26 October 2001

# URGENT MODIFICATION DRAFT REPORT

**MODIFICATION PROPOSAL P37**

**To provide for the remedy of past errors in Energy Contract Notifications and in Metered Volume Reallocation Notifications**

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

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# I DOCUMENT CONTROL

## a Authorities

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|---|---|---|---|---|
| 2.0 | 26/09/01 | David Warner | | P37 Modification Group Chairman |
| 2.0 | 26/09/01 | Chris Rowell | | P37 Modification Group Chairman |
| | | | | |

| Version | Date | Authorisation | Signature | Responsibility |
|---|---|---|---|---|
| 2.0 | 26/09/01 | Brian Saunders | | ELEXON, Chief Executive |
| | | | | |

## b Distribution

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## c Intellectual Property Rights and Copyright

# II CONTENTS TABLE

# 1 SUMMARY

### *Purpose of the Report*

This is the Report on Modification Proposal P37 from the Modification Group to the Panel. This document is drafted in such a form that, following the inclusion of any amendments to reflect the Panel's views, it could form the Panel's Report to the Authority.

### *The Proposed Modification*

Modification proposal P37 was submitted by London Electricity on 11 September 2001. Subsequently the Modification Group agreed a number of clarifications, and also formulated an Alternative. The proposal provides for the remedy of past notification errors in Energy Contract Volume Notifications and in Metered Volume Reallocation Notifications. The proposal would apply retrospectively.

The definition of an erroneous notification would be where such a notification did not reflect a settled and (where appropriate) shared intent to notify. It would be at the Panel's discretion to determine whether such an error had occurred and, on the basis of certain criteria, whether to rectify such an error. Panel decisions on these matters would be subject to appeal to the Authority, on specified grounds.

A fee would be payable for any claim of erroneous notification raised and there would also be a fee for any appeal lodged in respect of any subsequent decision by the Panel. If the Panel were to decide that an error had occurred and that such error should be rectified, the change in energy imbalance liability associated with the relevant energy accounts arising from the rectification would be reimbursed, less 20%. This 20% retention is described as an Error Correction Payment and would be disbursed to all energy accounts, except those that benefit directly from the claim, on a pro-rata basis. In the original proposal, the Error Correction Payment was capped at £200,000. However, in the alternative proposal, no cap is placed on the Error Correction Payment.

### *Proposer's View on Extent to which the Proposed Modification Would Better Facilitate The Applicable BSC Objectives*

The proposer's view is included in the Modification Proposal and the accompanying letter (see Annex 1).

The Proposer has further described these views in a document referenced on the BSC website as "LE Advice" in the P37 area of the Modifications section, (www.ELEXON.co.uk). This includes a consideration of NGC's Licence Condition 7A.2 (b) (ii).

Subsequent to the publication of the further Consultation Document the Proposer asked that a further response be published. This may be found on the BSC website, referenced as "Further Correspondence (London)" in the P37 area of the Modifications Section.

A response to this from ELEXON may be found in the same area and is referenced as "Further Correspondence (ELEXON)"

A legal view on this matter obtained by ELEXON has also been made available on the BSC website referenced as panel paper 32/007 in the BSC Panel Section.

### *Statement of Urgency*

The Authority granted the modification urgent status for the purposes of Section F2.9 of the BSC on 13 September 2001.

### *Background and Timescales*

Two previous Modification Proposals (P9 and P19) were concerned with the correction of erroneous notifications. In its determination on P19, the Authority provided some views on the issues raised. The P37 Proposal refers to the P19 determination.

On 13 September 2001, the Authority approved a schedule and process which envisaged two Modification Group Meetings, and two consultations (the second relating to legal drafting). The Panel Report would be sent to the Authority on 12 October 2001.

On 9 October 2001 the Authority approved a revised schedule and process which included the provision by the Authority of provisional thinking, and the addition of a further meeting of the Modification Group. This revised schedule also explicitly recognised that an Alternative Proposal might be tabled, and that it would be appropriate for this to be included in the second consultation. This revised schedule calls for the Panel Report to be sent to the Authority on 5 November 2001. On 25 October 2001 the Authority authorised one further day for the issue of the Draft Report to the Panel (in accordance with F2.6 of the BSC), in order to accommodate the Panel's deliberations on 31 October 2001.

### *Initial Modification Group Discussions*

At its first meeting the Modification Group considered the proposal and identified matters to be raised in the first consultation.

### *First Consultation*

The first consultation (issued on 21 of September 2001) was structured around a series of questions which invited views both on the general concepts of the proposal and in respect of the detailed elements of the proposal. Furthermore, questions were also put to consultation inviting views in respect of the processes associated with the proposal and in respect of the impact of the proposal. The responses to these questions (see Annex 3) were subsequently presented to the Modification Group for its further consideration.

### *Further Modification Group Deliberations*

The Modification Group considered all the responses to the consultation at its meeting on 1 October 2001. At a subsequent meeting held on 19 October 2001 the Group considered preliminary views from the Authority. The Modification Group, additionally, gave some consideration to the implementation of the proposal, in the light of some preliminary views provided by ELEXON and discussed certain specific details regarding the legal drafting for the proposal. As a result of these further deliberations, a number of conclusions were drawn and reflected in the clarification of the original Proposal.

### *Conclusions on Detailed Elements of P37*

The Modification Group agreed that the following clarifications should be incorporated into proposal P37 to form P37 Clarified:

- **Test for erroneous notifications arising from causes directly attributable to BSC systems** The clause should be modified to exclude any aspects of central system functions where performance is covered by other clauses in the BSC (apart from the 7 day report).

- **Test for erroneous notifications arising from the loss incurred being disproportionate** Reference should be made to the loss being disproportionate to an incentive signal where such a signal relates to a sum that would have been reasonable as an incentive to make correct notifications.

- **Discretion of Panel in rectification** The Panel should be obliged to decline to rectify a claim if prudent systems and processes were not in place, or if prompt action were not taken following an error.

- **Burden of proof** The burden of proof should be explicitly placed on the claimant.

- **Discretion of Panel in rectification** The Panel should retain the discretion as to whether or not to rectify, in the event that an error was directly attributable to BSC Systems, unforeseeable, or disproportionate to an incentive signal.

- **Decision making** An appeals process should be incorporated whereby any Party can raise an appeal within five working days of a Panel determination, for a fee of £5,000, on grounds of a perceived defect in due process, or new evidence coming to light which could not reasonably have been adduced at the claim hearing. The Authority will be the appeals body.

- **Credit checking** No correction to indebtedness should be made in the event of a notification being corrected.

The Modification Group also concluded that an alternative proposal should be formulated that would be as per the original proposal, including all the above mentioned clarifications, but which would not incorporate a cap on the error correction payment.

In so far as implementation was concerned, the Modification Group concluded that the notice period of five business days would be appropriate, recognising that, once claims had been raised, some time would elapse before the necessary central infrastructure could process such claims.

### *General Conclusions on P37*

The Modification Group noted that the consultation respondents were divided between those who supported the Proposal and those that did not. The Group also noted that all those who did not support P37 were also against the principles behind the proposal (some considered that the retrospective element of the proposal was inappropriate, others were not supportive of ex-post adjustments). The Modification Group also noted that those that supported P37 also believed that they would not have acted differently had the ability to make ex-post adjustments been anticipated. Whereas, some of those who did not support the Proposal stated that they would have acted differently. One respondent suggested that they would have invested less in the testing of systems, another respondent suggested that their trading strategy would have differed. The Group acknowledged that there was a balance of views and arguments.

Subsequently, having agreed the form of P37 Clarified and the Alternative Proposal, the Modification Group moved on to consider its views on the two proposals and whether, in its view, they better facilitated achievement of the Applicable BSC Objectives.

As context for this discussion, it was noted that the proposer had raised a particular legal issue about the interpretation of Licence Condition 7A.2 of NGC's Transmission Licence. The proposer contended that the reference to 'contracted' in that Licence Condition must be read as meaning 'actually contracted' and the BSC should therefore be modified to contain rules or procedures which gave effect to that requirement. In support of this view, the proposer had provided a copy of its legal advice which has been published on the BSC website. ELEXON noted that ELEXON and the Panel had been advised that there were good arguments which oppose the proposer's conclusions and, in particular, in the context in which NETA operates, it is entirely consistent with that Licence Condition to undertake imbalance calculations by reference to notified volumes. The Modification Group was given a brief outline of those arguments.

Modification Group members had confirmed that they were aware that the legal opinion procured by the proposer had been published on the BSC website. It was agreed that the views of the Modification Group members regarding P37 should be ascertained, together with an indication of whether the LC7A.2 legal issue raised by the proposer influenced these views. Members were invited to say whether their view on the modification proposal would be different if their own assumption regarding LC7A.2 did not hold. Hence, Modification Group members were not asked or required to reach a final conclusion on the correctness or otherwise of any legal opinions regarding LC7A.2. They were merely asked to explain what assumptions they had made and what weight they attached to them in forming their assessment of the modification.

In the context of the above, the Modification Group's summary was framed by four particular questions in respect of which the Group returned to some of the principal arguments relating to the Proposal (more fully considered in Section 10):

a. Do you believe that P37 Clarified better facilitates achievement of the Applicable BSC Objectives?

   There were strong views put forward both for and against as to whether P37 Clarified would better meet the Applicable BSC Objectives. Some members argued that the latitude implied by the Proposal and the concerns over retrospection were such that P37 Clarified would not better achieve BSC Objectives. In particular, it was suggested that, in so far as retrospection was concerned, the argument that market instability could be introduced was felt to be of significance. Another argument cited against the Proposal was that participants have been made aware of the arrangements for notifications well in advance of the Code becoming effective. Those in favour of the proposal felt that the arguments relating to LC7A.2 were compelling. It was also suggested that the argument that market stability was enhanced because of the Proposal was important.

b. Do you believe that the Alternative Proposal better facilitates achievement of the Applicable BSC Objectives?

   Views were similar to those above.

c. Do you believe that the Alternative Proposal better facilitates achievement of Applicable BSC Objectives as compared with P37 Clarified?

There were differing views among the Modification Group members as to whether the Alternative would better facilitate achievement of the Applicable BSC Objectives, as compared with P37 Clarified. No agreement was reached amongst the Group on this issue, however, there were strong arguments both for and against. In respect to the key argument pertaining to the cap creating a form of discrimination between smaller and larger claims, a view was put that the absence of a cap could unduly impact smaller players faced with large claims and therefore there should be a cap on the Error Correction Payment. Those members favouring the Proposal preferred P37 Clarified over the Alternative. Those members that did not favour the Proposal saw the Alternative as preferable to P37 Clarified.

d. In arriving at the above views, were your views influenced by the LC7A.2 legal issue and would they have changed if your assumption on LC7A.2 were different?

Those who considered that P37 Clarified and Alternative better achieved the applicable BSC Objectives stated that they were influenced by the arguments pertaining to LC7A.2 and that these arguments were key to the Proposals. Amongst those that did not believe that either P37 Clarified or the Alternative would better facilitate the applicable BSC Objectives, one view was that LC7A.2 was not appropriate, another view was that it was unclear whether, or not LC7A.2 was an appropriate consideration (although one member who was of this latter view considered that, if it were an appropriate consideration, it could be argued that LC7A.3(a) might be better achieved to some small extent). However, in any event, the LC7A.2 related arguments were felt not ultimately to change the views of those who did not support the arguments that either P37 Clarified or the Alternative would better facilitate the applicable BSC Objectives

***Further Consultation***

The further consultation document was issued on 23 October 2001 and invited views on the clarifications by the Modification Group to P37, on the Alternative Proposal formulated by the Modification Group, and on the legal drafting.

The results of the further consultation have been circulated to the Modification Group. No Group Members have indicated that, as a consequence, they wish to change their views.

***Recommendations***

Although the Modification Group was unable to come to a consensus view, it recommends that the Panel:

1. NOTES that the Modification Group, in the light of the consultation responses, the P19 Determination, and the Authority's provisional thinking on P37, has formulated:

    a. An agreed set of clarifications to the original proposal, forming "P37 Clarified"
    b. An Alternative Proposal (which also incorporates the agreed clarifications)

2. NOTES that

    Respondents to the consultation have put well-argued and strongly held cases both for and against P37 (Clarified and the Alternative Proposal)

3. NOTES that

   a. The Modification Group could not reach a single view on whether P37 Clarified better facilitates achievement of the Applicable BSC Objectives, there being strong views for and against.
   b. The Modification Group could not reach a single view on whether the Alternative Proposal better facilitates achievement of the Applicable BSC Objectives, there being strong views for and against.
   c. The Modification Group could not reach a single view on whether the Alternative Proposal better facilitates achievement of the Applicable BSC Objectives, in comparison with P37 Clarified, there being strong views for and against.

4. NOTES

   That the Modification Group makes no recommendation to the Panel as to whether P37 Clarified or the P37 Alternative Proposal should be recommended to the Authority for adoption.

5. NOTES

   a. The role of the Panel as the decision making body as envisaged in both P37 Clarified and the Alternative.
   b. That, consequently, the Panel will need to make the preparations it sees fit to fulfil this role.
   c. That the proposal envisages an Implementation Date shortly after the Authority's determination, with a subsequent period for preparations to be made.

6. RECOMMENDS one of the following

   a. Adoption of P37 (Clarified).
   b. Adoption of the Alternative to P37 (Clarified).
   c. Rejection of both P37 (Clairified) and the Alternative to P37 Clarified.

7. RECOMMENDS to the Authority an Implementation Date 5 days after the Authority's determination, should the Authority wish to implement P37 (Clarified) or the Alternative to P37 Clarified.

# 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.

An electronic copy of this document can be found on the BSC website, at WWW.ELEXON.CO.UK.

If you have any queries about the issues raised in this Report, please contact either David Warner, or Neil Cohen, at ELEXON (tel. (0207)-380-4100).

# 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 modification procedures culminate in a modification report to the Authority, which normally contains the Panel's recommendation on whether or not a proposed modification should be approved and a proposed date for its implementation, together with a detailed assessment of the proposal in question. The report forms the basis upon which the Authority will decide whether to approve, direct or reject a modification proposal.

The Transmission Company or ELEXON may recommend that a Modification Proposal be treated as urgent, subject to approval by the Authority. The procedure for progressing an Urgent Modification Proposal is set out in Sections F2.9 and B4.6 of the Code. These urgent procedures allow the normal modification procedures to be circumvented as necessary to fit with the urgency of the matter. In such cases, the Authority will confirm the timetable and procedure that should apply. The timetable and procedure directed by the Authority must be adhered to, along with any other special instructions. A statement containing the reasons why the Panel (or Panel Chairman) considers the Proposal should be treated as urgent must be included in the Urgent Modification Report, together with a description of the extent to which the procedure followed deviated from the normal modification procedure. Depending on the urgency of the matter, it may not be possible to establish a Modification Group or undertake detailed assessment of the modification proposal. The level of detail and analysis presented in this Urgent Modification Report therefore represents the full extent of relevant information regarding the modification proposal that could be collated within the time available.

# 4 DESCRIPTION OF PROPOSED MODIFICATION

Modification Proposal P37 was submitted by London Electricity on 11 September 2001. Subsequently the Modification Group agreed a number of clarifications, and also formulated an Alternative. The proposal provides for the remedy of past notification errors in Energy Contract Volume Notifications and in Metered Volume Reallocation Notifications. The proposal would apply retrospectively.

The definition of an erroneous notification would be where such a notification did not reflect a settled and (where appropriate) shared intent to notify. It would be at the Panel's discretion to determine whether such an error had occurred and, on the basis of certain criteria, whether to rectify such an error. Panel decisions on these matters would be subject to appeal to the Authority, on specified grounds.

A fee would be payable for any claim of erroneous notification raised and there would also be a fee for any appeal lodged in respect of any subsequent decision by the Panel. If the Panel were to decide that an error had occurred and that such error should be rectified, the change in energy imbalance liability associated with the relevant energy accounts arising from the rectification would be reimbursed, less 20%. This 20% retention is described as an Error Correction Payment and would be disbursed to all energy accounts, except those that benefit directly from the claim, on a pro-rata basis. In the original proposal, the Error Correction Payment was capped at £200,000. However, in the alternative proposal, no cap is placed on the Error Correction Payment.

A copy of the Modification Proposal, is available on the BSC website (www.ELEXON.co.uk), and is appended in Annex 1. Further details relating to the Proposal have been provided by London Electricity and these are also provided on the BSC website.

# 5 PROPOSER'S VIEW ON EXTENT TO WHICH THE PROPOSED MODIFICATION WOULD BETTER FACILITATE THE APPLICABLE BSC OBJECTIVES

The proposer's view is included in the Modification Proposal and the accompanying letter (see Annex 1).

The Proposer has further described these views in a document referenced on the BSC website as "LE Advice" in the P37 area of the Modifications section, (www.ELEXON.co.uk). This includes a consideration of NGC's Licence Condition 7A.2 (b) (ii).

Subsequent to the publication of the further Consultation Document the Proposer asked that a further response be published. This may be found on the BSC website, referenced as "Further Correspondence (London)" in the P37 area of the Modifications Section.

A response to this from ELEXON may be found in the same area and is referenced as "Further Correspondence (ELEXON)"

A legal view on this matter obtained by ELEXON has also been made available on the BSC website referenced as panel paper 32/007 in the BSC Panel Section.

# 6 STATEMENT OF URGENCY

Section F2.9 of the Balancing and Settlement Code makes provision for proposals to be treated as Urgent Modification Proposals upon the recommendation of the Transmission Company and BSCCo (ELEXON). Following representations from London Electricity ELEXON recommended to the Panel Chairman that Modification Proposal P37 be treated as an Urgent Modification Proposal.

The BSC Panel Chairman sought the views of Panel Members, the majority of whom supported the recommendation that the Modification Proposal be treated as urgent. The Authority granted the Proposal urgent status for the purposes of Section F2.9 of the BSC on 13 September 2001.

# 7 BACKGROUND AND TIMESCALES

Modification proposal P37 was submitted by London Electricity, on 11 September 2001. The proposal provides for the remedy of past notification errors in Energy Contract Volume Notifications and in Metered Volume Reallocation Notifications. The proposal seeks to enable this facility on a retrospective basis and hence the facility would be available for a fixed period, after which no further remedy for notification errors would be provided.

Two previous Modification proposals (Modification Proposal P9 and Modification Proposal P19) were concerned with a similar perceived defect, although both were rejected by the Authority. However, in its determination rejecting Modification Proposal P19, the Authority provided some views as to certain features associated with the general concept of remedying errors in Energy Contract Volume Notifications and Meter Volume Reallocation Notifications. The P37 Proposal refers to the P19 determination.

On 13 September 2001, The Authority agreed that this Modification proposal should be progressed as an Urgent Modification and the following timescales were also agreed:

- Initial meeting of the P37 Modification Group; 18/9/01
- Issue Consultation; 21/9/01
- Closing date for responses to consultation; 27/9/01
- Second meeting of the P37 Modification Group; 1/10/01
- Further Consultation 2/10/01
- Issue Urgent Modification Report to the Panel; 5/10/01
- Consideration of draft Report by the Panel; 9/10/01
- Issue final Urgent Modification Report to the Authority; 12/10/01

Relevant impact assessments have also been undertaken.

On 9 October 2001 the Authority approved a revised schedule and process due to a decision taken following the second Modification Group meeting to request preliminary thinking from the Authority (which was received on 12 October 2001) and also to accommodate a third Modification Group meeting which was held on 19 October 2001. The revised timetable is as follows:

- Further consultation 23/10/01
- Issue Urgent Modification Report to the Panel; 29/10/01
- Consideration of draft Report by the Panel; 31/10/01
- Issue final Urgent Modification Report to the Authority; 05/11/01

On 25th October 2001 the Authority authorised one further day for the issue of the Draft Report to the Panel (in accordance with F2.6 of the BSC).

The Modification Group identified a number of clarifications to the original proposal and also formulated an alternative proposal. Section 10 of this document describes the conclusions of the Modification Group in these regards.

Legal drafting for both P37 Clarified and the alternative proposal has been produced and is included in Annex 7 of this document.

# 8 INITIAL MODIFICATION GROUP DISCUSSIONS

The Modification Group met on 18 September 2001 in order to consider the proposed Modification. The approach taken and the consideration of specific aspects of the proposal were discussed and formed the basis of the consultation exercise (undertaken over the period 21 September 2001 to 27 September 2001). An extract from the consultation document which detailed the deliberations of the Modification Group is given in Annex 2.

# 9 CONSULTATION

## 9.1 The Consultation Process

The matters raised by the Proposal were discussed at the first meeting of the Modification Group and included in a document for consultation (see Annex 2). A draft of this document was then sent to Modification Group members for comment. The Consultation document invited views on any matter relating to P37. It also included a number of individual questions seeking views on particular topics. These questions are reproduced in a Table of Consultation Responses to Questions on P37 (in Section 9.3). They comprise two general questions on key features, and a further fifteen questions on more detailed issues.

The Consultation document itself can be found on the BSC website (P37_UMR_CON).

The Consultation document was published on 21 September 2001, to all interested Parties. Responses were requested by close of play on 27 September 2001. By this time, ELEXON had received 17 responses; these respondents stated that they were replying on behalf of 53 Parties.

As had been identified in the Consultation document, legal drafting for the proposal had not been included. However this drafting has now been circulated to interested Parties and responses will be considered and included in the final Report to the BSC Panel to be sent out on 29 October 2001.

## 9.2 Views of Respondents

Responses were received from 17 companies, representing 53 BSC Parties. Irrespective of whether they supported the Proposal, many respondents provided views on the specific questions and some also made further points. A summary of these responses is given below and the full set of responses, along with an analysis of responses is given in Annex 3.

## 9.3 Table of Consultation Responses to Questions on P37

**GENERAL**

| BSC PARTY | Q.1: PROPOSAL | Q.2: PRINCIPLE |
|---|---|---|
| **Scottish Power** (On behalf of 3 Parties) | Yes | Yes |
| **Entergy-Koch Trading** | Yes | Yes |
| **SEEBOARD** | No | No |
| **Scottish & Southern** (On behalf of 4 Parties) | No | No |
| **London Electricity** (On behalf of 5 Parties) | Yes | Yes |
| **TXU** (On behalf of 14 Parties) | No | No |
| **Edison Mission Energy** (On behalf of 4 Parties) | No | No |
| **Powergen** (On behalf of 4 Parties) | No | No |
| **APX** | Yes | Yes |
| **EDF** | Yes | Yes |
| **British Energy** (On behalf of 3 Parties) | No | No |
| **BGT** (On behalf of 2 Parties) | No | No |
| **TotalFinaElf** (On behalf of 2 Parties) | Yes | Yes |
| **InterGen (UK)** (On behalf of 5 Parties) | No | No |
| **Innogy** | Yes | Yes |
| **Derwent Cogeneration Company** | Yes – "Some suggestions for alteration in certain areas" | Yes |
| **Enron Europe** | Yes | Yes |
| **TOTAL** | 9 Yes (On behalf of 16 Parties), 8 No (On behalf of 37 Parties). | 9 Yes (On behalf of 16 Parties), 8 No (On behalf of 37 Parties). |

**DETAIL (Part 1)**

| BSC PARTY | Q.3: DEFINITION OF ERROR | Q.4: TIME LIMIT | Q.5: FEE | Q.6: ASSURANCE | Q.7: EVIDENCE |
|---|---|---|---|---|---|
| **Scottish Power** (On behalf of 3 Parties) | Yes | Yes | No | Yes | Yes |
| **Entergy-Koch Trading** | Yes | Yes | Not below £2,500 not above £5,000 | Yes | Yes |
| **SEEBOARD** | No | Yes | Yes | No – Joint Claims | Yes |
| **Scottish & Southern** (On behalf of 4 Parties) | Yes | No, see note 2 | Yes | Yes | Yes |
| **London Electricity** (On behalf of 5 Parties) | Yes | Yes | See note 5. | Yes | Yes, however onus should be on the Party to prove justification to the Panel. |
| **TXU** (On behalf of 14 Parties) | See note 8: | Yes | Yes | See note 9 | Yes |
| **Edison Mission Energy** (On behalf of 4 Parties) | No, see note 12. | Minimum of 10 working days. | Yes, if it reflects cost of administering the claim. | See note 13. | Yes |
| **Powergen** (On behalf of 4 Parties) | See note 15. | Yes | Yes | See note 16. | Yes |
| **APX** | Yes | see note17. | Needs to Reflects cost of administering the claim. | Yes | Yes |
| **EDF** | Yes | At least 10 working days | Yes | Yes | Yes |
| **British Energy** (On behalf of 3 Parties) | No comment. | No comment. | No comment | No comment | No comment |
| **BGT** (On behalf of 2 Parties) | No comment. | No comment | No comment | No comment | No comment |
| **TotalFinaElf** (On behalf of 2 Parties) | Yes, see note 19. | Yes. | Yes | Yes | Yes, but guidelines would be useful. |
| **InterGen (UK)** (On behalf of 5 Parties) | No comment. | No comment | No comment | No comment | No comment |
| **Innogy** | Yes, broadly. See note 21. | Yes | Needs to Reflects cost of administering the claim. | Yes | No, predefined principles must be met. |
| **Derwent Cogeneration Company** | See note 26. | Yes | Yes | No – Joint Claims | Yes. |
| **Enron Europe** | No comment. | No comment | No comment | No comment | No comment |

**DETAIL (PART 2)**

| BSC PARTY | Q.8: DISCRETION | Q.9: LIMIT ON DISCRETION | Q.11: CREDIT COVER | Q.12: DECISION MAKING BODY |
|---|---|---|---|---|
| **Scottish Power** (On behalf of 3 Parties) | Yes | Yes | Yes | Panel |
| **Entergy-Koch Trading** | Yes | Yes | Yes | Panel |
| **SEEBOARD** | No – Further clarification needed, "Have in place" should be tightened up. | Inappropriate to prescribe, each case should be judged on its merits | Yes | Authority, taking in to account Panel views. |
| **Scottish & Southern** (On behalf of 4 Parties) | See note 3. | Yes | Yes | Panel, but also an appeal process to the Authority, and then under General Law. |
| **London Electricity** (On behalf of 5 Parties) | See note 6 | Yes | Yes | Panel |
| **TXU** (On behalf of 14 Parties) | Yes, Panel should be able to exercise discretion in all cases. | See note 10 | Yes | Panel |
| **Edison Mission Energy** (On behalf of 4 Parties) | Yes | See note 14. | Yes | Authority, taking in to account Panel views. |
| **Powergen** (On behalf of 4 Parties) | No – Further clarification needed, scope and definition need to be tightened up. Refer to answer. | Yes, but must prove to the Panel. | Yes | Panel |
| **APX** | Yes | Yes | Yes | Panel |
| **EDF** | Yes | Yes | Yes | Panel |
| **British Energy** (On behalf of 3 Parties) | No comment | No comment | No comment | No comment |
| **BGT** (On behalf of 2 Parties) | No comment | No comment | No comment | No comment |
| **TotalFinaElf** (On behalf of 2 Parties) | See note 20. | Yes | Yes, but should be fast resolutions of claims, to stop parties being in incorrect credit default. | Panel, but there should be methods for arbitration. |
| **InterGen (UK)** (On behalf of 5 Parties) | No comment | No comment | No comment | No comment |
| **Innogy** | No, see note 22. | See note 23. | Yes | Panel |
| **Derwent Cogeneration Company** | Yes | Yes, but must prove to the Panel. | Yes | Authority, due to size of claims. |
| **Enron Europe** | No comment | No comment | No comment | No comment |

**DETAIL (PART 3)**

| BSC PARTY | Q.10.(A) & (B): % ECP | Q.10.(C) & (D): CAP ON ECP | Q.10.(E): FORM OF ECP |
|---|---|---|---|
| **Scottish Power** (On behalf of 3 Parties) | Yes | Yes | N/A |
| **Entergy-Koch Trading** | Yes | Yes | N/A |
| **SEEBOARD** | Yes | Yes | N/A |
| **Scottish & Southern** (On behalf of 4 Parties) | Yes | Yes | N/A |
| **London Electricity** (On behalf of 5 Parties) | See note 7 | Yes | N/A |
| **TXU** (On behalf of 14 Parties) | Yes | No cap, disproportionate on smaller claims. | N/A |
| **Edison Mission Energy** (On behalf of 4 Parties) | Yes | No cap, disproportionate on smaller claims. | N/A |
| **Powergen** (On behalf of 4 Parties) | Yes | No cap, disproportionate on smaller claims. | N/A |
| **APX** | No | N/A | See note 18. |
| **EDF** | Yes, 5% | No conclusive view. | N/A |
| **British Energy** (On behalf of 3 Parties) | No comment | No comment | No comment |
| **BGT** (On behalf of 2 Parties) | No comment | No comment | No comment |
| **TotalFinaElf** (On behalf of 2 Parties) | Yes, 10% | Yes, £100,000 | N/A |
| **InterGen (UK)** (On behalf of 5 Parties) | No comment | No comment | No comment |
| **Innogy** | No, Full reimbursement less associated costs. | Cap not appropriate. | See note 24 |
| **Derwent Cogeneration Company** | See note 27 | See note 27 | N/A |
| **Enron Europe** | No comment | No comment | No comment |

**PROCESS**

| BSC PARTY | Q.13: SEPARATE ECP | Q.14: ECP BASED ON EIC | Q.15: ECP TO PARTIES |
|---|---|---|---|
| **Scottish Power** (On behalf of 3 Parties) | Yes | Yes | Yes |
| **Entergy-Koch Trading** | Yes | Yes | Yes |
| **SEEBOARD** | Yes | Yes | Yes see note 1 |
| **Scottish & Southern** (On behalf of 4 Parties) | Yes | Yes | Yes |
| **London Electricity** (On behalf of 5 Parties) | Yes | Yes | Yes |
| **TXU** (On behalf of 14 Parties) | Yes | Yes | Yes |
| **Edison Mission Energy** (On behalf of 4 Parties) | Yes | Yes | Yes |
| **Powergen** (On behalf of 4 Parties) | Yes | Yes | Yes |
| **APX** | Yes | Yes | No, should be redistributed on basis of "Gross Contract MWh" |
| **EDF** | Yes | Yes | Yes |
| **British Energy** (On behalf of 3 Parties) | No comment | No comment | No comment |
| **BGT** (On behalf of 2 Parties) | No comment | No comment | No comment |
| **TotalFinaElf** (On behalf of 2 Parties) | Yes | Yes | No, unnecessary complexity would be added. |
| **InterGen (UK)** (On behalf of 5 Parties) | No comment | No comment | No comment |
| **Innogy** | Errors should be corrected, but settlement should take account of reimbursements through RCRC & GTMA. | No, needs to encompass RCRC, GTMA and costs of error correction. | See note 25. |
| **Derwent Cogeneration Company** | Yes | Yes, alternatively base on net position of the two accounts. | Yes |
| **Enron Europe** | No comment | No comment | No comment |

**IMPACT**

| BSC PARTY | Q.16: NOTICE | Q.17: BEHAVIOUR |
|---|---|---|
| **Scottish Power** (On behalf of 3 Parties) | Five working days | No |
| **Entergy-Koch Trading** | Five working days | No |
| **SEEBOARD** | No notice | No |
| **Scottish & Southern** (On behalf of 4 Parties) | See note 4. | Commented on usefulness of responses to question. |
| **London Electricity** (On behalf of 5 Parties) | No need for significant delay between adopting this proposal and implementing it. | No. |
| **TXU** (On behalf of 14 Parties) | 1 month, if implemented. | See note 11. |
| **Edison Mission Energy** (On behalf of 4 Parties) | Depends of decision on Q4, if claims must be made within 5 working days, then 5 day notice should be given. | No, |
| **Powergen** (On behalf of 4 Parties) | Ten days. | Yes |
| **APX** | Undergoing process of Code is sufficient notice. | No |
| **EDF** | Ten days. | No |
| **British Energy** (On behalf of 3 Parties) | No comment | No comment |
| **BGT** (On behalf of 2 Parties) | No comment | Yes |
| **TotalFinaElf** (On behalf of 2 Parties) | None | Nop |
| **InterGen (UK) ltd** (On behalf of 5 Parties) | No comment | No comment |
| **Innogy** | 1 Month | No |
| **Derwert Cogeneration Company** | See Q4 | No |
| **Enron Europe** | No comment | No comment |

**NOTES**

Note 1: provided that added complexity and/or costs of a process to exclude those parties making an error do not outweigh the benefits.

Note 2: Participants may choose whether or not to submit claims for past errors depending on how many claims are made by others. 5 days is not adequate to prepare enough details. A period of 6 months should be given to allow participants to assess their total liability based on other claims.

Note 3: The danger with this is that it is starting to prescribe. The circumstances cited should certainly not be rejected or be ineligible for consideration purely on their merits alone.

Note 4: Depends on the time scales under Q4. If Q4 is a 6 month period as suggested by SSE then only a short notice needs to be given for the period to start. If it is 5 days, parties ought to be given 3 months to get evidence together – but see our response to Q4.

Note 5: The fee should be broadly related to the average cost of administering a claim of notification error. If Elexon has grounds for believing that this figure will be significantly more or less than £5,000, that would provide *prima facie* grounds for changing the level of the administration fee. Under P37, the Authority will have the power to veto changes to the fee (for example, if it believes that a different amount would prejudice smaller market players).

Note 6: The specified circumstances derive from paragraph 25 of the Authority's decision letter in respect of P19. London is content for the Panel to have the discretion to decline to direct that a notification error be rectified in cases where the claim falls within the scope of such circumstances. This is on the pragmatic basis that parties themselves are best placed to provide information on their contract position, and it is therefore appropriate that they are incentivised to provide accurate information. (This is also, in our view, the correct way to approach Q10A.)

Note 7: The concept of an error correction payment (or, more accurately, an error correction penalty – see below) is derived from paragraph 25 of the Authority's decision letter in respect of P19. Although there is no need in principle to levy an error correction payment, one can be justified (within limits and subject to a cap on the maximum payment) on the pragmatic basis mentioned under Q8 – ie, that parties themselves are best placed to provide information on their contract position, and it is therefore appropriate that they are incentivised to provide accurate information.

Section 4 of the consultation paper refers to the Modification Group's view that the term 'error correction payment' should, for the time being, be used instead of 'error correction penalty'. While Elexon's paper does not seek views on this, we should like to take this opportunity to explain our preference for a final decision in favour of 'error correction penalty'. That 'penalty' is the appropriate term is supported by the Authority's own decision letter in respect of P19, which justifies a fixed percentage limit on recovery of claims on the basis that this is an incentive for parties to submit accurate notifications. The term 'penalty' seems the most apt expression to describe a sanction for failing to submit an accurate notification.

Note 8: TXU believes that the definition should only apply to volume notification agents and not to contract trading parties, as a notification is always made by an ECVNA. Further, we believe that where an error has been made, the contract trading party should seek redress from the ECVNA. Where the trading party and the ECVNA is the same party, then that party has obviously decided to internalise the risks associated with making ECVNs. This is a commercial decision and should a party subsequently find that they are unable to manage the risk, then

they should not seek to make changes to the Balancing and Settlement Code to mitigate that risk.

Note 9: Should this proposal be implemented, then it is vital that any claim is supported by the counterparty as claims may already have been made under the terms of the GTMA and it would be inappropriate for a Party to double-recover any imbalance charges. Although we do not believe that the proposal should apply to claims between energy accounts (as opposed to between BSC Parties), it is clear that in such cases some other level of assurance would be required.

Note 10: TXU does not believe that the first bullet point should be included as there are already provisions within the BSC to allow Parties to re-submit contract notifications following a failure of the ECVAA systems.

Regarding the second bullet point, this should be at the discretion of the Panel, and it may be appropriate for the Panel to seek representations from BSC Parties who have not made such errors as to whether or not such circumstances could have been forseen.

The final bullet point is more difficult as a loss may have been "disproportionate" due to high system prices for the relevant settlement periods, or due to a high volume being notified incorrectly, further, "disproportionate" is a subjective term and what may be seen as disproportionate in one instance may not be in another. Therefore we think it appropriate that this is excluded and left to the discretion of the Panel.

Note 11: The risk assessment that was undertaken by TXU, and indeed all the IT solutions and processes adopted, were on the basis of the rules of the Balancing and Settlement Code applying at the time and therefore it is difficult to say whether our behaviour would have been different. It is true to say that during the early stages of NETA, TXU like many other companies, submitted ECVNs many hours ahead of gate closure and scrutinised reports and feedbacks from the central systems to ensure that accurate ECVNs had been sent and received. Had there been provisions in place which would have enabled us to subsequently rectify notifications where errors had been made, it is more likely that we would have submitted notifications closer to gate closure, and there may have been more liquidity in the prompt market.

In addition to this, much of our time during Unified Pre-Production was spent ensuring that we were able to make accurate ECVNs and receive feedback flows and reports and that our systems were able to validate those reports. Had there been provisions to rectify ECVN errors in place at go-live we may have been able to spend the limited time available in UPP running more commercial scenarios. As we were aware of the potentially huge financial consequences of making erroneous notifications, this was one of our priority areas during UPP.

Note 12: What constitutes a past notification error has not been defined and is open to interpretation For example, if a party fails to invest in adequate systems to notify contracts, or to train operators to use those systems competently or have systems and staff in place to interpret settlement reports that highlight errors, should they be able to claim that there has been an error? Allowing the correction of any errors will not incentivise participants to develop and test robust systems for contract notification. Instead, it will allow participants to use inadequate systems safe in the knowledge that failures in notification can be corrected after the event.

Additional features that should be included are a precise definition of an allowable error. For example, the 7 day report details all notification submitted up to 18:00 day ahead. This

provides the opportunity to detect errors in contract notifications and rectify them prior to Gate Closure. If the 7 day report was expected but not received or if it contained incorrect information then a retrospective amendment might be appropriate. If the notification error was due to a failure to interpret the report correctly then a retrospective amendment is inappropriate.

Note 13: Only if the Counterparty is not part of the same parent company. An independent view should be given regardless of the relationship of the counterparties and is essential if they are part of the same parent company.

Note 14: **Where the past notification error was directly attributable to BSC systems**

Agree, this should be extended to BSC processes and procedures.

**Where the past notification error and/or the magnitude of the loss suffered arose from a combination of circumstances that could not have been reasonably foreseen**

What does reasonably foreseen mean? After the event it is rather subjective and reasons for errors can be tailored to support arguments in a claim. The requires tightening up.

**Where the magnitude of the loss suffered as a result of the past notification error was wholly disproportionate to the fault or error committed by that Party.**

The magnitude of the loss is irrelevant, all claims should be treated equitably regardless of the amount lost as a result of past notification errors. There should be no special treatment just because a party has suffered a large loss.

Note 15: Failure to submit a Volume Notification should not be considered as a Past Notification Error (6.1.1(b) (ii)). In our view it would be extremely difficult to demonstrate intent to notify. It is one thing to enter data incorrectly and another to omit to submit data altogether.

Note 16: This provides a high degree of assurance for most inter company transactions. Clearly support by a counterparty is not relevant in the context of intra-company transactions. However, without corroboration by another organisation, how can any decision to allow an intra-company claim ever be safe? It would seem that there is greater potential scope to make spurious claims in the case of intra company errors where a single party is involved compared to inter company claims where two parties can provide supporting evidence. Also it may be clear an error has been made, but difficult to ascertain the 'correct' notification value. Conveniently, the value claimed might include a party's forecasting error, which he is now in a position to determine.

We are very sceptical that evidence provided by a single trading party with respect to internal intra company notifications, could be verified even by an external party. In our view it isn't feasible to obtain cast iron assurances as to the legitimacy of such claims. We therefore believe if accepted P37 should be amended to limit claims to inter company transactions.

Note 17: The modification states that a further modification will be raised to cover future notification errors. The implementation date of this proposal (P37) should be set such that were the other modification to be approved, then there should not be a gap between being able to claim for retrospective errors and future errors. To the extent that parties would have notice of the pending implementation of this modification, a five day time limit is appropriate.

Note 18: The P19 Ofgem decision document talks about "incentives to achieve accurate notifications". This modification is purely looking at retrospective notifications, hence it is inappropriate to

talk about incentives in this context and any "error correction payment" would simply be an arbitrary punishment. Any modification that was concerned with future errors could legitimately include "incentive" arrangements.

Note 19: Yes, although a more explicit recognition that Volume Notifications refers both to Contract and Metered Volume Notifications may be preferable.

Note 20: Strict application of the provisions listed above would appear to prevent any claim being accepted by the Panel. It is certainly much easier with the benefit of hindsight to identify the deficiencies within pre-existing systems. TFE G&P would prefer that stronger weighting is applied by the Panel to the issue of disproportionate loss within Question 9.

We would also urge the Panel in their decision making to bear in mind the uncertainty and unfamiliarity associated with the detailed NETA trading rules, upon initial implementation. These undoubtedly contributed to errors in contract notification, and retrospective application of this modification, far from creating uncertainties within the trading rules, should correct for these initial market uncertainties and distortions.

Note 21: Whilst we think the definition is broadly correct it needs to make clear that it an error in the Volume Notification and not necessarily in the submission of that volume. We assume it would be incumbent on the claimant to demonstrate that the volume notified was erroneous.

Note 22: The difficulty with this approach is that it assumes the Panel is competent to judge whether a party's systems and processes are prudent and adequate. Since these are not accredited it would appear that to follow this approach would give the Panel and any prospective claimant an impossible task. Our view is that the grounds for correcting past errors should be related to the consequence of the error rather than the reasons for it arising.

Note 23: We agree with the first bullet point.

We are unclear as to the circumstances Ofgem has in mind in the second bullet. The magnitude of any loss from an erroneous notification can never be foreseen because it is dependent upon the value ascribed to the cash-out prices.

In the third bullet we think the test should not be linked to the proportionality of the consequence of the loss for the party, but whether the error imposed additional costs on the system. The general principle should be that the cost of an error to the party should be reimbursed after accounting for any additional costs imposed on either the balancing mechanism or the settlement system.

Note 24: In general the payment to the party should be derived from the reimbursement of the imbalance payment, a correction to the RCRC payments, any consequent payments under the GTMA, and the administration costs.

Note 25: The error correction process should be to reimburse the party that has submitted an erroneous notification, but also to correct the subsequent impact on RCRC and any GTMA related payments, although it is appreciated that the GTMA effects cannot be dealt with through the BSC. If the cost of the imbalance reimbursement is charged back to the RCRC for the settlement period in which the error occurred then the RCRC will be appropriately adjusted for all parties including the claimant.

Note 26: Clearly the definition of a past notification error is central to this proposal, and within this we see the key elements as being (i) a requirement for documentary evidence of the intended contractual position between the parties (or accounts), and (ii) the error to be of a type which has had no effect on overall system energy balance.

One concern with the drafting of clause 6.1.1 is in (c) (i) where the phrase “demonstrably settled and…. shared commitment to notify” is used. It is possible that the word “settled” could be misleading here and could be replaced by the word “contracted”.

Note 27: Our understanding is that the proposed limit on the recovery of a claim arises out of Paragraph 25 of Ofgem’s decision letter on Modification Proposal P19 where the limit is suggested as a means of providing an incentive to accurate notification. In the case of retrospective remedy it is difficult to see how the payment works as an incentive since the relevant actions are in the past. It is clear that any payment levied on a retrospective claim is in fact a penalty.

If such a penalty is deemed appropriate we would have concerns over its magnitude, as set out below.

The fundamental reason for raising this Modification Proposal is that errors have arisen which have caused costs wholly disproportionate to the normal day to day operational costs of running the business. It is generally recognised that costs of errors can not only be very large but are also somewhat arbitrary in magnitude, being driven by system prices at the time of the error.

It would seem more sensible therefore if the penalty payment (if it is deemed appropriate to include one at all) should be decoupled from the cost effect of the error, i.e. not based on a percentage at all. However,we note that, taken in conjunction with the cap, the penalty on the Proposer’s claim is effectively 2.7% (£200,000/£7.5m).

In terms of percentage spend against revenue smaller players are extremely heavily penalised in setting up systems as we obtain no economy of scale, and this proposal leaves such players similarly exposed with regard to penalty payments on errors. DCL believes that it would be more appropriate to set any payment by formula related to, say, RCRC proportion with the £200,000 suggested by the Proposer used as a benchmark.

# 10 FURTHER MODIFICATION GROUP DELIBERATIONS

## 10.1 Introduction

The P37 Modification Group reviewed the consultation responses on both the detailed and general elements of P37. For the detailed elements of the proposal, the Group considered the strength of argument supporting consultation responses and assessed whether to:

- Build in a clarification to P37,
- Generate an element of a potential alternative to P37, or
- Leave P37 unchanged.

The basis for making a clarification to the original was that, where changes were supported by arguments that were judged by the Group as a whole to have some merit (in respect of better achieving BSC objectives) and were within the spirit of the proposal, the clarification was accepted. If arguments were judged to be of merit but the suggested variant reflected a material change, or change of principle, then the variant was considered to form part of a potential alternative proposal. Where supporting arguments were considered not to be compelling, no further action was taken.

So far as concerns the overall view as to the merits of the proposal and any alternative arising as a result of the above deliberations, the Modification Group considered arguments presented in response to consultation in the context of the following:

- Do you believe that P37 Clarified better facilitates achievement of the Applicable BSC Objectives?
- Do you believe that the Alternative Proposal better facilitates achievement of the Applicable BSC Objectives?
- Do you believe that the Alternative Proposal better facilitates achievement of Applicable BSC Objectives as compared with P37 Clarified? In arriving at the above views, were your views influenced by the LC7A.2 legal issue and would they have changed if your assumption on LC7A.2 were different?

These deliberations were undertaken over two meetings, one held on the 1st October 2001 and the other held on the 19th October 2001. In addition to consultation responses, the first of these meetings also involved some consideration of the Authority's determination of P19, to the extent applicable to proposal P37. At the second meeting, consideration was given to some preliminary views provided by the Authority, in response to a request for such views from the Panel, in accordance with clause 2.6 of section F of the BSC.

A full set of responses can be found in Annex 3.2. The initial views provided by the Authority can be found on the BSC website (WWW.ELEXON.CO.UK).

## 10.2 Detailed Elements of P37

### Definition

Responses to consultation contained five specific variants to the definition of what constitutes an erroneous notification:

- Definition should exclude errors in submission
- Definition should exclude references to Contract Trading Parties
- Exclude failure to submit
- Replace the term 'settled' with 'contracted'
- Exclude intra-company trades

The argument to exclude errors in submission was that such errors would be technical matters and Parties should pursue their notification agents for recompense. The counter-view was that only agents actually make submissions, therefore, remove references to the Contract Trading Parties. The Group considered that errors should cover all aspects of making a submission (including input to the notification agent), but should exclude the commercial strategy of Parties. Hence, the general term of 'submission' and reference to Contract Trading Parties, as well as to notification agents would best achieve the intent.

The argument to exclude failures to make a notification was that this is a significantly different circumstance to making an error in submission and is less likely to be found to be prudent. The Group felt that this was more a matter of presenting appropriate evidence than of definition and would, therefore, best be left as a decision of the Panel, dependant on the validity of any such claim.

So far as concerns replacing the term 'settled' with 'contracted', the Group rejected this due to there being no contract (in the strict legal sense of the word) for intra-company trades. If such trades were to be excluded from the definition of errors, this could be regarded as being unduly restrictive, since it would exclude a whole category of claim that would otherwise qualify.

Other arguments explicitly called for the exclusion of intra-company trades. Two distinct arguments were put forward. The first suggested that NGC Licence Condition 7A.2 implied such an exclusion since it referred to contracted quantities. The other argument presented was that such internal trades could not be adequately demonstrated as a basis against which any erroneous notification might be confirmed. Some members of the Group did not accept that NGC Licence Condition 7A.2 was an appropriate consideration. Others in the Group suggested that the adequacy of such trades was a matter best left for the Panel in its consideration of any claim and that it would be unduly restrictive to exclude such errors.

### Time limit and Notice

Consultation responses had suggested a range of possible alternative timescales following implementation, both for the notice required and the window for making claims. In its initial consideration of this matter, the Modification Group felt that there were no compelling arguments for any change to the proposal as it stands. At its third meeting, the Modification Group were presented with further information on implementation, provided by ELEXON. The ELEXON analysis suggested that central system changes would require some 8 weeks to implement (although subsequent discussion had suggested that this timescale might be capable of being reduced to some six weeks). ELEXON also suggested that administrative arrangements might require between one and three months to establish, depending on what approach might be favoured by the decision making body. A particular option in this respect was the possibility that non-industry specialists might need to be procured to participate in the decision making process itself. The Modification Group acknowledged that some time beyond the five days notice required for the industry at large might be needed for the central arrangements to be ready. However, the Group considered that an early implementation would be preferable and that, once implementation had occurred, it would be reasonable for some time to elapse whilst central arrangements were put in place. The Group also noted that, given that one element of the central arrangements might be a set of guidelines as to how determinations might be made, it should be assumed that after implementation, only a claim need be lodged within five days and that supporting evidence could follow, once any such guidelines were produced. Therefore the group suggest that the Implementation Date, were the Modification Proposal approved, should be 5 days after approval by the Authority.

**Fee**

Although some different views were put forward by respondents, the Group noted that the proposal allowed the Panel to recommend a change of value to the Authority. The Group agreed that there was no compelling reason to change the fee as set down in the Proposal.

**Assurance, Evidence & Panel Discretion**

The Group considered the responses to these elements of the proposal under four key headings:

- Tests for erroneous notifications
- Discretion of Panel in making rectifications
- Burden of proof
- Standard of proof

***Tests for Erroneous Notifications***

The Group discussed comments made by respondents to consultation in respect of the tests within the proposal for erroneous notifications. An argument was made that there

should be a tightening of the proposal regarding having in place prudent systems and processes. It was suggested that this should include not only the presence of these systems, but also that these systems should be operated in a reasonable and prudent manner. Members of the Group considered that this was implicit, however, not all agreed and suggested that if these systems were being operated prudently then, it could be argued, no error would ever occur. The clause would then become self-defeating. On balance, the Group agreed that the text should stand, as tightening it could be unduly restrictive.

There were arguments to remove the test relating to errors being directly attributable to BSC central systems, as ECVAA system failure provisions are already catered for (BSC clause 5, section P). The Group noted that certain circumstances are covered by this clause and that other circumstances, such as those where reliance cannot be placed on reports (section V), also cut across this general test. The Group agreed that the test should remain, but that circumstances covered by other parts of the Code should be explicitly excluded (apart from the 7 Day Report). An argument was put forward that, in the legal drafting (where a loss arising from an error was wholly disproportionate), it was unclear as to what the magnitude of the loss would be disproportionate to. The Authority noted their remarks regarding their determination on proposal P19, that imbalance charges may sometimes be disproportionate, relative to the incentive to avoid making errors. The Group agreed that, given that this proposal constitutes a retrospective change, then it could not refer to incentives, and should refer to an 'incentive factor'. This was accepted as a clarification.

### *Discretion of Panel in Making Rectifications*

The alternative wording for the basis of Panel decisions suggested by one respondent was considered by the Group. A key theme that emerged was that there should be clearer scope for the Panel in making its determination. In response, the Group agreed that the term 'may' should be replaced with 'shall' for the obligation on the Panel to decline to rectify a claimed error in circumstances relating to systems and subsequent action (6.4.6(a) of the legal drafting).

However, recognising the intent to allow the Panel to exercise discretion in terms of circumstances other than those relating to BSC central systems, foresight, and the scale of the loss arising, the term 'may' should be retained for these clauses (6.4.6(b) of the legal drafting). This was accepted as a clarification to the original proposal. On a more general point, the Group clarified the intent of this aspect of the proposal that if it were proven that an error arose which was consistent with one or more of these criteria (directly attributable to BSC Systems, unforeseeable, or disproportionate to an incentive factor), then the Panel would rectify such an error. Although some members of the Group argued that, in such circumstances it was difficult to imagine what might override a decision to rectify, others were of the view that the Panel should retain the discretion of whether or not to rectify. This latter view was also accepted as a clarification to the proposal.

The Modification Group also discussed the view that there was a need to set down guidelines and principles for the Panel to follow. However, the Group decided that what was already included in the proposal was adequate and that anything more might be unduly restrictive. However, it was acknowledged that the Panel may itself wish to set

down some informal guidelines which would assist both themselves and participants. A further point raised by respondents was that there should be an obligation to receive representations from third parties in respect of particular claims. However, the Group felt that this too might unduly restrict the Panel in its deliberations and that it would be preferable to leave this possibility entirely at the discretion of the Panel.

### *Burden of proof*

The alternative wording described above also implied a stronger emphasis on the claimant proving their case. The Group accepted this view that, in effect, the burden of proof should be placed clearly on the claimant and that a clarification should be made to the Proposal to reflect this sentiment.

### *Standard of proof*

The Group then discussed the standard of proof required for the consideration of individual cases. There was some debate on this subject with reference to the distinction between criminal and civil judgements in law. There was a view that any standard of proof thought appropriate could be drafted into the Code: the Group were not limited to the Code being silent on this matter, and a court applying a strict civil test of balance of probabilities at some possible later stage. Some members of the Group thought that the consideration of which standard of proof was required was irrelevant with regard to the BSC, and it was noted that no question on this topic had been put to consultation. Therefore, it was decided that no specific standard of proof should be drafted into the Code.

### Decision Making

Some responses had suggested that the Authority should be the decision-making body, rather than the Panel. The initial view from the Authority was that they had some sympathy with the arguments suggesting that they should be the decision making body; asserting that the Authority could reflect a broader perspective, for instance in respect of ensuring market stability. The other view put forward was that such decisions being taken by the Panel better matched current governance (whereby the Panel is an operational body, whilst the Authority acts purely on regulatory matters). It was also noted that one respondent had suggested that the Panel could make the decision, but that there could be an appeal route to the Authority. Yet a further variation suggested was that there could be an arbitration arrangement allowed for. In the light of preliminary views provided by the Authority, the Group confirmed that the proposal should retain the Panel as the decision making body. The Group recognised that the BSC gave the Panel the authority to set up specialist sub-committees: the Panel could chose such a route in this case, if it wished. Further, the Group agreed that the Authority would be an appropriate appellate body. The Modification Group gave some consideration to the circumstances that were required for an appeals process. The Group concluded that any BSC Party could raise an appeal on the grounds of due process not being followed (including the grounds that the Panel could not reasonably have come to the decision it did based on the evidence before it) or on the grounds of new evidence, which was not available, or could not reasonably have been available at the time of the claim (this would be an appeal by the claimant). Any such claim would attract a fee of £5000 and should be lodged within five working

days of a Panel determination. The Group also recognised that, in order to the enable process and the reasonableness of the Panel decision to be judged, the process and the reasoning of the Panel needed to be published as part of the process of hearing a claim, albeit so as to protect any confidentiality of particular Parties. These arrangements were accepted as clarifications to the proposal.

**Payments**

Comments arose from consultation in four areas relating to payments:

- Partial payment of claims
- Net payment of claims
- Form of error correction payment
- Level of error correction payment and cap

It was clarified that a claim relates to individual settlement periods. Hence any calculations would relate only to settlement periods that were successfully rectified, constituting a partial payment, where applicable.

The suggestion that the Error Correction Payment should relate to the net position of the Party and Counterparty energy accounts was based on it being a simpler solution. The Group noted that this solution would result in a different outcome (since it implied, typically, a smaller error correction payment). The Group saw no compelling reasons to consider this suggestion further.

The Modification Group discussed two options that had been proposed by respondents for the calculation of the error correction payment:

- The error correction payment to be based upon the total amount of an initial claim, irrespective of the extent to which the Panel might decide to rectify errors. The argument was put that this would strengthen the incentive to get notifications right the first time and would disincentivise spurious claims.
- Removal of the cap on the percentage error correction payment. The view put forward was that this removal of the cap would remove discrimination against smaller players. However, it was recognised that this suggestion actually removed discrimination against smaller claims (as there is not necessarily a link between size of Parties and size of claims).

Responses included a number of variations on both the level of the error correction payment and of the cap on such payments. In so far as the cap was concerned, the Authority's preliminary views suggested that there should be no cap on the error correction payment at all. In addition to the arguments put in response to the consultation (largely concerning the potential between larger and smaller claims; possibly relating to participants of commensurate size), it was suggested that the Error Correction Payment related to investment which itself is related to the risks involved in the cash-out price

volatility. Hence, there should be no cap. Counter arguments suggested that the Error Correction Payment was arbitrary, was not linked to cost and hence should be capped. It was also suggested that investment costs were similar for participants, large and small. Others disagreed with this view. On the balance of arguments the Group concluded that the setting of an Error Correction Payment, without a cap could form the basis of an Alternative Proposal.

However in the absence of a cap, the Group considered what level of Error Correction Payment might be appropriate. Although the Authority, in its preliminary view, had suggested that a 20% Error Correction Payment might be too low, counter arguments were that there appeared to be no compelling reasons for there to be any Error Correction Payment at all. It was also noted that one response had suggested that the Error Correction Payment should reduce for associated claims where the underlying reason was the same as for an original claim. It was also suggested that the Group should seek to agree the lowest Error Correction Payment that was amenable to all members. It was also suggested that there was no strictly definable value for Error Correction Payment, the payment constituted an incentive signal, as perceived by participants. As such, any value of Error Correction Payment could only be a judgement. In view of all the arguments and preferences put, there appeared to be no basis on which to deviate from the 20% originally proposed. This value was, therefore accepted by the Group.

**Process**

No variations to the proposal arose in response to consultation.

**Credit Cover**

No variations arose in responses to consultation. However, ELEXON suggested that the requirement to correct indebtedness calculations for credit checking for periods after an error had been rectified would, in most circumstances, not be relevant. The reasoning was that for a given credit check, the relevant period of historic indebtedness is the previous 29 days (including the day in which the check is being done). However, an erroneous notification (relating to some previous Settlement Periods) would only be claimed up to 5 days after implementation and would then need to be considered by the Panel. Subsequently, if the Panel were to agree to rectify the claim, the next run of settlement would be the vehicle for making the rectification. Given the likely timescales for such a process, it was not clear that an error would ever be less than 29 days old at the time of correction. It was also noted that, if there were material doubt as to a credit check calculation, ELEXON could suspend the credit processes for that Party. On this basis, the Group accepted as a clarification the simplification that no correction to the indebtedness calculation need be made in the event of an erroneous notification being rectified.

## 10.3 Conclusions on Detailed Elements of P37

The Modification Group agreed that the following clarifications should be incorporated into proposal P37 to form P37 Clarified:

- **Test for erroneous notifications arising from causes directly attributable to BSC systems** The clause should be modified to exclude any aspects of central

system functions where performance is covered by other clauses in the BSC (apart from the 7 day report).

- **Test for erroneous notifications arising from the loss incurred being disproportionate** Reference should be made to the loss being disproportionate to an incentive signal where such a signal relates to a sum that would have been reasonable as an incentive to make correct notifications.

- **Discretion of Panel in rectification** The Panel should be obliged to decline to rectify a claim if prudent systems and processes were not in place, or if prompt action were not taken following an error.

- **Burden of proof** The burden of proof should be explicitly placed on the claimant.

- **Discretion of Panel in rectification** The Panel should retain the discretion as to whether or not to rectify, in the event that an error was directly attributable to BSC Systems, unforeseeable, or disproportionate to an incentive signal.

- **Decision making** An appeals process should be incorporated whereby any Party can raise an appeal within five working days of a Panel determination, for a fee of £5,000, on grounds of a perceived defect in due process, or new evidence coming to light which could not reasonably have been adduced at the claim hearing. The Authority will be the appeals body.

- **Credit checking** No correction to indebtedness should be made in the event of a notification being corrected.

A further point was not included in Modification Group discussions but emerged during legal drafting:

- **Discretion of Panel in rectification** To make explicit that the Panel should decline to rectify in the event that prompt action to mitigate an error was not taken, when such action ought reasonably to have been taken.

The Modification Group also concluded that an alternative proposal should be formulated that would be as per the original proposal, including all the above mentioned clarifications, but which would not incorporate a cap on the error correction payment.

In so far as implementation was concerned, the Modification Group concluded that the notice period of five business days would be appropriate, recognising that, once claims had been raised, some time would elapse before the necessary central infrastructure could process such claims.

## 10.4 General Conclusions on P37

The Modification Group noted that the consultation respondents were divided between those who supported the Proposal and those that did not. The Group also noted that all those who did not support P37 were also against the principles behind the proposal (some considered that the retrospective element of the proposal was inappropriate, others were not supportive of ex-post adjustments). The Modification Group also noted that those that

supported P37 also believed that they would not have acted differently had the ability to make ex-post adjustments been anticipated. Whereas, some of those who did not support the Proposal stated that they would have acted differently. One respondent suggested that they would have invested less in the testing of systems, another respondent suggested that their trading strategy would have differed. The Group acknowledged that there was a balance of views and arguments.

Subsequently, having agreed the form of P37 Clarified and the Alternative Proposal, the Modification Group moved on to consider its views on the two proposals and whether, in its view, they better facilitated achievement of the Applicable BSC Objectives.

As context for this discussion, it was noted that the proposer had raised a particular legal issue about the interpretation of Licence Condition 7A.2 of NGC's Transmission Licence. The proposer contended that the reference to 'contracted' in that Licence Condition must be read as meaning 'actually contracted' and the BSC should therefore be modified to contain rules or procedures which gave effect to that requirement. In support of this view, the proposer had provided a copy of its legal advice which has been published on the BSC website. ELEXON noted that ELEXON and the Panel had been advised that there were good arguments which oppose the proposer's conclusions and, in particular, in the context in which NETA operates, it is entirely consistent with that Licence Condition to undertake imbalance calculations by reference to notified volumes. The Modification Group was given a brief outline of those arguments.

Modification Group members had confirmed that they were aware that the legal opinion procured by the proposer had been published on the BSC website. It was agreed that the views of the Modification Group members regarding P37 should be ascertained, together with an indication of whether the LC7A.2 legal issue raised by the proposer influenced these views. Members were invited to say whether their view on the modification proposal would be different if their own assumption regarding LC7A.2 did not hold. Hence, Modification Group members were not asked or required to reach a final conclusion on the correctness or otherwise of any legal opinions regarding LC7A.2. They were merely asked to explain what assumptions they had made and what weight they attached to them in forming their assessment of the modification.

In the context of the above, the Modification Group's summary was framed by four particular questions in respect of which the Group returned to some of the principal arguments relating to the Proposal (more fully considered in Section 10):

a. Do you believe that P37 Clarified better facilitates achievement of the Applicable BSC Objectives?

There were strong views put forward both for and against as to whether P37 Clarified would better meet the Applicable BSC Objectives. Some members argued that the latitude implied by the Proposal and the concerns over retrospection were such that P37 Clarified would not better achieve BSC Objectives. In particular, it was suggested that, in so far as retrospection was concerned, the argument that market instability could be introduced was felt to be of significance. Another argument cited against the Proposal was that participants have been made aware of the arrangements for notifications well in advance of the Code becoming effective. Those in favour of the proposal felt that the arguments relating to LC7A.2 were compelling. It was also suggested that the argument that market stability was enhanced because of the Proposal was important.

b. Do you believe that the Alternative Proposal better facilitates achievement of the Applicable BSC Objectives?

Views were similar to those above.

c. Do you believe that the Alternative Proposal better facilitates achievement of Applicable BSC Objectives as compared with P37 Clarified?

There were differing views among the Modification Group members as to whether the Alternative would better facilitate achievement of the Applicable BSC Objectives, as compared with P37 Clarified. No agreement was reached amongst the Group on this issue, however, there were strong arguments both for and against. In respect to the key argument pertaining to the cap creating a form of discrimination between smaller and larger claims, a view was put that the absence of a cap could unduly impact smaller players faced with large claims and therefore there should be a cap on the Error Correction Payment. Those members favouring the Proposal preferred P37 Clarified over the Alternative. Those members that did not favour the Proposal saw the Alternative as preferable to P37 Clarified.

d. In arriving at the above views, were your views influenced by the LC7A.2 legal issue and would they have changed if your assumption on LC7A.2 were different?

Those who considered that P37 Clarified and Alternative better achieved the applicable BSC Objectives stated that they were influenced by the arguments pertaining to LC7A.2 and that these arguments were key to the Proposals. Amongst those that did not believe that either P37 Clarified or the Alternative would better facilitate the applicable BSC Objectives, one view was that LC7A.2 was not appropriate, another view was that it was unclear whether, or not LC7A.2 was an appropriate consideration (although one member who was of this latter view considered that, if it were an appropriate consideration, it could be argued that LC7A.3(a) might be better achieved to some small extent). However, in any event, the LC7A.2 related arguments were felt not ultimately to change the views of those who did not support the arguments that either P37 Clarified or the Alternative would better facilitate the applicable BSC Objectives

# 11 FURTHER CONSULTATION

The Further Consultation invited views on the clarifications made to the original P37, on the Alternative Proposal, and on the legal drafting of both P37 Clarified and the Alternative Proposal.

### *Responses*

The Further Consultation brought 14 responses on behalf of 39 Parties. These are reproduced in Annex 4.

Of these 14 responses, 13 were from Parties who had previously responded to the initial consultation.

It was notable that a number of respondents took the opportunity to, in essence, reiterate the views they had expressed in the first consultation. Some respondents in favour of the Proposal (or the Alternative) and some against opted to do this, graphically demonstrating the strength of views on this matter, and the division of opinions amongst interested Parties.

It appears that no fundamentally new arguments have been raised in response to the Further Consultation as to whether the BSC Objectives are better facilitated by P37 Clarified, or the Alternative Proposal.

It appears that of the respondents who replied to both the initial and the further consultation, none have changed their views in principle as a result of the clarifications introduced by the Modifications Group: those originally in favour remain so; those originally against have maintained their position.

Once again, those respondents who favour the proposal largely tend to prefer the "clarified" variant over the Alternative. It appears that the Alternative proposal has not attracted the support of those generally against the proposal, although those of this viewpoint do tend to believe the Alternative Proposal is preferable to P37 Clarified.

A number of respondents commented on relevance or otherwise in their view of LC7A.2.

On more detailed issues, one respondent commented unfavourably on the £5,000 administration fee for lodging an appeal (and also on the similar fee for making a claim), the argument being that a fee of such size would be disadvantageous to small Parties. The argument of the Modification Group was that this fee should be related to administrative costs, rather than the size of claim or the claiming Party.

### *Legal Drafting*

A number of respondents gave detailed comments on the proposed legal drafting. These have been taken into consideration in the legal drafting included in this report.

# 12 RECOMMENDATIONS

Although the Modification Group was unable to come to a consensus view, it recommends that the Panel:

1. That the Panel NOTES that the Modification Group, in the light of the consultation responses, the P19 Determination, and the Authority's provisional thinking on P37, has formulated:

    a. An agreed set of clarifications to the original proposal, forming "P37 Clarified"
    b. An Alternative Proposal (which also incorporates the agreed clarifications)

2. That the Panel NOTES that

    Respondents to the consultation have put well-argued and strongly held cases both for and against P37 (Clarified and the Alternative Proposal)

3. That the Panel NOTES that

    a. The Modification Group could not reach a single view on whether P37 Clarified better facilitates achievement of the Applicable BSC Objectives, there being strong views for and against.
    b. The Modification Group could not reach a single view on whether the Alternative Proposal better facilitates achievement of the Applicable BSC Objectives, there being strong views for and against.
    c. The Modification Group could not reach a single view on whether the Alternative Proposal better facilitates achievement of the Applicable BSC Objectives, in comparison with P37 Clarified, there being strong views for and against.

4. That the Panel NOTES

    That the Modification Group makes no recommendation to the Panel as to whether P37 Clarified or the P37 Alternative Proposal should be recommended to the Authority for adoption.

5. That the Panel NOTES

    a. The role of the Panel as the decision making body as envisaged in both P37 Clarified and the Alternative.
    b. That, consequently, the Panel will need to make the preparations it sees fit to fulfil this role.
    c. That the proposal envisages an Implementation Date shortly after the Authority's determination, with a subsequent period for preparations to be made.

6. That the Panel RECOMMENDS one of the following

    a. Adoption of P37 (Clarified).
    b. Adoption of the Alternative to P37 (Clarified).
    c. Rejection of both P37 (Clairified) and the Alternative to P37 Clarified.

7. That the Panel RECOMMENDS to the Authority an Implementation Date 5 days after the Authority's determination, should the Authority wish to implement P37 (Clarified) or the Alternative to P37 Clarified.

# ANNEX 1 MODIFICATION P37

**Attached Letter**

Mr Nicholas Durlacher
Chairman, BSC Panel
c/o Elexon Ltd
Third Floor, 1 Triton Square
London NW1 3BX

RB/MVB

11 September 2001

Dear Mr Durlacher

## RETROSPECTIVE REMEDY OF NOTIFICATION ERRORS

When London Electricity ('London') put forward the BSC modification proposal known as P19 earlier this year, we covered our submission with a public letter, addressed to you and other members of the BSC Panel. In that letter, we revealed that, after making notification errors in relation to its contract position for the day of 3 April, London's net financial liability for that particular day was increased by £7.5 million above the level corresponding to its true contract position.

As the Panel was well aware of the magnitude of the losses we had suffered, by virtue of the way in which settlement liabilities are currently calculated under the BSC, its members will not be surprised to know that we were disappointed both by their decision not to recommend P19 to Ofgem and, of course, even more by Ofgem's subsequent decision to reject P19.

However, in considering our options in the light of that determination, we have found Ofgem's P19 decision document to be very helpful. This is particularly the case where it articulates ideas or principles which point towards a form of BSC modification which Ofgem would be content to adopt, and which could be applied retrospectively in such a way as to allow us to recover some, if not substantially all, of the sums which we have lost.

Paragraphs 25, 36, and 37 of the decision document are especially pertinent in these respects, since in combination they point to features which Ofgem has indicated should form part of any acceptable BSC modification designed to deal with the correction of notification errors. Following a meeting with Ofgem to clarify its approach to such modifications in the light of that document, London is now submitting a specific proposal (herewith) in respect of past notification errors. We request that this be dealt with on an urgent basis, in advance of a separate proposal designed to address future errors.

In formulating our proposal, we have used what finally came to be known as P19 Optimised as the basis, with necessary adaptations, for the legal drafting of this modification. To the extent possible in relation to retrospective claims, we have tried our best to reflect, and we hope satisfy, Ofgem's concerns at a number of points in its decision document that parties should have sufficient incentives to submit accurate notifications.

We also argue that the circumstances giving rise to our proposal clearly warrant a retrospective rule change, having regard to paragraph 36 of the Ofgem decision document and, also, to retrospective modifications approved by Ofgem in relation to the early Gas Network Code. As for the requirement for a 'more stringent cap' on retrospective recovery (see Ofgem's paragraph 37), we believe that this would be properly satisfied by allowing only 80 per cent of the value of correction claims up to the £1 million level to be recoverable (that is, the maximum unrecovered, or penalty, amount would be £200,000). Above £1 million, having first incurred that penalty, full recovery would then, in principle, be permitted.

This letter seeks to add background to the modification now proposed, which we have submitted separately in the prescribed manner, and should be treated by the Panel as an integral part of the modification proposal. As with the original P19 proposal, the ultimate justification for this new

modification is that, under present arrangements, the requirements set out in Condition 7A.2 of the NGC licence are not achieved. Remedying this defect would, therefore, facilitate the better achievement of the applicable BSC objectives.

For the avoidance of doubt, I confirm that we will wish to make a retrospective claim to rectify the consequences of London's notification error in respect of its contract position for the day of 3 April, if this modification is adopted.

We are ready to assist the Panel and its advisers as much as we can to process this proposal in an efficient and timely manner.

Yours sincerely

**Roger Barnard**

Regulatory Lawyer

London Electricity Group

| Modification Proposal – F76/01 | MP Number: |
|---|---|

**Title of Modification Proposal**

To provide for the remedy of past errors in Energy Contract Volume Notifications and in Metered Volume Reallocation Notifications.

**Submission Date**

**11 September 2001**

**Date Logged**

[ ]

**Description of Proposed Modification**

London Electricity ('London') proposes a modification which would amend the BSC to enable past (but not, under this proposal, future) errors in Energy Contract Volume Notifications and Metered Volume Reallocation Notifications to be remedied on an ex-post basis.

This proposal follows Modification Proposal P19, which addressed both past and future notification errors but which was rejected by the Gas and Electricity Markets Authority (the 'Authority') in its decision document dated 1 August 2001. Following a meeting with the Authority to clarify its approach to notification error modifications, London is submitting this proposal in respect of past notification errors in advance of a separate proposal that will address future notification errors. This approach will enable past notification errors to be dealt with on an urgent basis (if that is thought appropriate) and considered separately from the issue of future notification errors.

This Modification Proposal is based upon 'P19 Optimised', that being the version of P19 that was preferred by the BSC Panel in its consideration of that proposal. It additionally incorporates the features which the Authority indicated in its decision on P19 should form part of an acceptable notification error correction modification. In particular, it includes features that Ofgem has said would be applicable to modifications that have retrospective effect.

Under this proposal, where a notification made prior to the adoption of this modification failed to reflect the true trading positions of one or more parties, the party/parties concerned would be entitled to submit a claim for the notification error to be rectified. Parties would have five business days from the adoption of this proposal in which to make such claims.

It would be for the parties to prove to the satisfaction of the Panel that they had a demonstrably settled and (where appropriate) shared commitment to notify accurately the true trading position, and that there had been a mistake in giving effect to that commitment.

The Panel would have discretion to decline to rectify a notification error if it considered that the party or parties concerned did not at the relevant time have prudent systems and processes in place for checking notifications and/or had failed to take appropriate steps to improve such systems and processes once the error had been discovered. Moreover, the Panel could refuse to rectify a notification error in circumstances other than where**:**

- the notification error was directly attributable to BSC Systems;
- the notification error or loss suffered as a result of the error arose from a combination of circumstances that could not have been reasonably foreseen; or
- the magnitude of the loss suffered was wholly disproportionate to the fault or error committed.

Where the Panel decided that a notification error should be rectified, it would be required to determine that appropriate adjustments be made to the erroneous notification. These adjustments would bring the notification into line with the true trading position, but would also subject the parties to a financial penalty equivalent to 20 per cent of the value to the parties of having the notification error rectified (the maximum penalty for each claim being capped at £200,000). The adjusted notification would then be used for the purposes of calculating settlement liabilities.

A non-refundable administration fee (initially set at £5,000 but subject to revision by the Panel, with the approval of the Authority) would be payable to BSCCo in respect of each claim.

**Description of Issue or Defect that the Modification Proposal Seeks to Address**

The defect in the Code that this Modification Proposal seeks to address is the same as that which P19 sought to address, although the proposal relates only to notification errors made prior to its adoption**:** future notification errors will be the subject of a separate modification proposal.

Condition 7A.1 of the NGC transmission licence requires NGC to have in force a document (the Balancing and Settlement Code) setting out the terms of the balancing and settlement arrangements. Those arrangements are defined in condition 7A.2(b)(ii) to include arrangements for the settlement of obligations between the BSC Parties**:**

> '*arising by reference to the [physical quantities of electricity allocated to BSC Parties], including the imbalances **...** between such quantities and the quantities of electricity <u>contracted</u>* [our emphasis] *for sale and purchase between BSC Parties'.*

The Modification Proposal (together with the separate proposal now envisaged in respect of future notification errors) is designed to ensure that the BSC does, in fact, fulfil the requirements of condition 7A.2(b)(ii) of NGC's licence, by providing for each Party's imbalance position to be settled by reference to its true contract position, rather than by reference to a notified position which turns out to have been erroneous.

The BSC places on the contracting Parties the onus of notifying to the Energy Contract Volume Aggregation Agent details of their contractual position in respect of each Settlement Period. Once Gate Closure has been reached for any given Settlement Period, there is no facility for Parties to correct any errors in their contract notifications. This means that, in cases where an erroneous notification has been made, and has not been corrected before Gate Closure, the settlement of imbalances will be effected by reference to the difference between the Party's physical production (or consumption) and the notified amount, rather than by reference to the difference between the Party's physical production (or consumption) and the contract amount. The actual requirements described in Condition 7A.2 are therefore not, in fact, achieved, and the affected Party may consequently suffer substantially higher imbalance charges than would apply if the correct contract volumes had been used to calculate settlement liabilities.

In order to achieve full and final settlement, the BSC must provide an effective mechanism for the Settlement Administration Agent to collate information as to each Party's contract position for each Settlement Period, and to calculate settlement liabilities accordingly. In practice, the contracting Parties are best placed to provide information as to their contract position, and it is appropriate that they should be required and incentivised to provide accurate information.

However, there is no good reason why Parties should be denied the opportunity to correct erroneous

notifications, including those which have occurred already, provided that**:**

(a) the Parties do so sufficiently soon to avoid any delay in final settlement;

(b) the opportunity for Parties to rectify erroneous notifications does not unduly diminish incentives to provide accurate notifications in the first place; and

(c) the opportunity to rectify erroneous notifications is used for its proper purpose – namely, to rectify erroneous notifications of Parties' true trading positions, and not to effect and notify changes in a Party's contract position which occur after Gate Closure.

The Proposed Modification is designed to introduce into the BSC a provision enabling Parties to rectify notification errors within these limits, in this case with retrospective effect. In particular, the proposal incorporates, to the extent relevant, those features which the Authority has indicated (at paragraph 25 of its decision in respect of P19) should form part of any notification error correction modification. Taking the elements of paragraph 25 in turn**:**

(a) **Authority's paragraph 25(i): an appropriate and material charge for any party seeking to correct a notification error**

This would initially be set at £5,000, being an estimate of the average administrative cost that the BSCCo would incur in investigating a claim of notification error (it is also the fee charged for investigating claims of manifest error under Section Q of the Code). The Panel would have the discretion to vary this charge, following consultation with the parties and with the approval of the Authority. The need to obtain the Authority's approval would guard against the charge being set at a level that could be prohibitive to smaller players.

(b) **Authority's paragraph 25(ii): a fixed percentage limit on recovery of a claim**

This is given effect by imposing a 20 per cent financial penalty on parties that make a successful claim of notification error. The maximum size of the financial penalty is capped at £200,000. This is because, notwithstanding that a notification error can result in losses running into many millions of pounds, whether such an error results in a large or a small loss is largely a consequence of chance and bears little, if any, relationship to the scale or nature of the error committed by the party concerned. It would be arbitrary to impose very widely varying financial penalties on such a basis, for example by setting a fixed discount on the total value of the claim at any level. We believe that a cap of £200,000 on the penalty to be incurred addresses these considerations, while providing BSC Parties with sufficient incentive to submit accurate notifications.

(c) **Authority's paragraph 25(iii): a short claim period**

This element of the Authority's decision is directed more at claims for future notification errors, rather than at claims for notification errors falling within the scope of this Modification Proposal. However, parties will have only five days from the date that this proposal comes into effect in which to make their claims of past notification error.

(d) **First part of Authority's paragraph 25(iv): the responsibility for establishing the nature of the error must rest on the claimant**

It is for the party claiming a notification error to demonstrate to the Panel that it had a settled and (where appropriate) shared commitment to accurately notify the true trading position, and that there had been a mistake in giving effect to that commitment;

(e) **Second part of Authority's paragraph 25(iv): the claimant must show that it had acted prudently in checking its notifications**

The Panel would have discretion to refuse to rectify a notification error if it considered that the party at fault did not, at the time that the error occurred, have in place prudent systems and processes for the checking of notifications. The effect of the drafting is that the Panel would have to judge whether such systems and processes were prudent in the light of the circumstances prevailing at the time, rather than with the benefit of hindsight.

(f) **Third part of Authority's paragraph 25(iv): the claimant must promptly put in place**

**steps to avoid repetition of the error**

The Panel would have discretion to refuse to rectify a notification error if it considered that the party at fault had not, following discovery of the error, promptly taken all appropriate steps to avoid repetition of the error.

In addition, because this Modification Proposal is directed to the rectification of past notification errors, it also incorporates those features which the Authority has indicated are appropriate to modifications which have retrospective effect.

At paragraph 36 of its decision in respect of P19, the Authority outlined a non-exhaustive list of categories of 'particular circumstances' which could give rise to the need for a retrospective rule change. The Modification Proposal incorporates these categories of particular circumstances into the notification error correcting mechanism so that the Panel is bound to have regard to them in deciding whether to allow rectification of a notification error. If a notification error falls outside the specified categories of circumstances, the Panel may decline to rectify that error. Those particular circumstances are**:**

- where the notification error was directly attributable to BSC Systems;
- where the notification error and/or the magnitude of the loss suffered by the party or parties concerned arose from a combination of circumstances that could not have been reasonably foreseen; or
- where the magnitude of the loss suffered by the party or parties concerned was wholly disproportionate to the fault or error committed by that party.

It can be seen that, where necessary, appropriate changes have been made to the categories of particular circumstances described in paragraph 36 of the P19 decision to reflect the fact that the Modification Proposal is concerned with retrospective notification errors rather than with a more general type of retrospective change. For example, the category comprising the third bullet point under Ofgem's paragraph 36 ('where the possibility of a retrospective action had been clearly flagged to the participants in advance, allowing the detail and process of the change to be finalised with retrospective effect') has not been included, since those particular circumstances are not applicable to notification errors under the BSC.

Moreover, the Modification Proposal includes a category of circumstances (our third bullet point above) that did not appear in paragraph 36 of the Authority's decision. In its broader context, this additional category can best be defined as**:**

> 'where the magnitude of the loss suffered by a party is wholly disproportionate to the fault or error committed by that party, provided that the fault or error had no detrimental effect on the efficient operation of the balancing and/or settlement systems'

In the context of notification errors, the reference to 'no detrimental effect on the efficient operation of the balancing and/or settlement systems' can be omitted since notification errors by their nature are incapable of having any such detrimental effect.

In common with the three categories of circumstance identified by the Authority in paragraph 36 of its P19 decision, this 'fourth' category is derived from modifications approved by the regulator in respect of the Gas Network Code, including, in particular, modification reference number 0064.

In that specific case, the Authority's predecessor, the Director General of Gas Supply, approved a retrospective modification which had the effect of redistributing millions of pounds of imbalance charges that had been incurred by certain (but by no means all) shippers of gas. The shippers concerned had incurred significant imbalance charges as a direct result of their failure to provide zero nominations to Transco, the system operator. It was accepted that zero nominations (which were in relation to gas deliveries to sub-terminals) were of no importance or value to Transco in its operation of the system. Nevertheless, those who failed to provide the zero nominations incurred significant imbalance charges, whereas those who provided zero nominations did not (and, indeed, benefited from a redistribution of the imbalance charges incurred by others). Despite opposition from the system operator, the Director General of Gas Supply directed that the Network Code be modified with retrospective effect to reverse the imbalance charges incurred by those of the gas shippers who had omitted to provide zero nominations.

London submits that this precedent from the Gas Network Code justifies the incorporation of a 'fourth' category of particular circumstances into the Proposed Modification.

At paragraph 37 of its decision in respect of P19, the Authority stated that a more stringent cap should apply to the retrospective recovery of monies lost through notification errors. The size of the financial penalty under this Modification Proposal (20 per cent, up to a maximum of £200,000) already incorporates this more stringent cap. A lesser financial penalty would be appropriate in relation to future notification errors (which will the be the subject of a separate proposal).

The proposed modification also embodies a similar modification to deal with the correction of past erroneous notifications of Metered Volume Reallocation Notifications.

**Impact on Code**

*The following text shall be inserted in Section P.*

**6. PAST NOTIFICATION ERRORS**

**6.1 Meaning of Past Notification Error**

6.1.1 For the purposes of this Section P**:**

(a) a **'Past Notification Error'** has occurred in relation to the notification of Energy Contract Volume Data or Metered Volume Reallocation Data for a Settlement Period where and only where there was an error in the submission of a Volume Notification on the part of the Volume Notification Agent and/or the relevant Contract Trading Parties which was not rectified prior to Gate Closure for the relevant Settlement Period and where Gate Closure for such Settlement Period has occurred prior to the date on which this paragraph 6 comes into effect;

(b) references in this paragraph 6 to the submission of a Volume Notification**:**

(i) mean the submission of a particular Volume Notification, and

(ii) include a failure to submit a Volume Notification,

and the provisions of this paragraph 6 shall be construed accordingly;

(c) for the purposes of paragraph (a), an error in the submission of a Volume Notification will be considered to have occurred only where**:**

(i) the relevant Contract Trading Parties had, at the time of such submission, a demonstrably settled and (save in the case of paragraph 1.4.1) shared commitment to notify particular ascertained Volume Data for the Settlement Period in question, and

(ii) it is clear that a mistake occurred in giving effect to that commitment;

(d) in relation to a claim of Past Notification Error**:**

(i) the **'relevant'** Volume Notification is the Volume Notification in respect of which the Past Notification Error has occurred,

(ii) the **'relevant'** Volume Notification Agent is the Volume Notification Agent which submitted or failed to submit (as the case may be) the relevant Volume Notification,

(iii) the **'relevant**' Settlement Period is the Settlement Period in respect of which the Past Notification Error has occurred,

(iv) a **'relevant**' Contract Trading Party is a Contract Trading Party in relation to which the Past Notification Error has occurred, and

(v) the **'rectified Volume Notification**' is the Volume Notification which would have been made had the Past Notification Error not occurred;

(e) in relation to a relevant Contract Trading Party, references to a Past Notification Error are to the Error which has (or is alleged to have) occurred in respect of such Party;

(f) **'Volume Data**' means Energy Contract Volume Data or Metered Volume Reallocation Data,

as the case may be.

**6.2 Claiming Past Notification Errors**

6.2.1 Where a relevant Contract Trading Party considers that there has been a Past Notification Error, such Party may make a claim to that effect by giving notice of such claim to BSCCo, identifying the Past Notification Error(s) and the relevant Settlement Period(s), provided that no claim of Past Notification Error may be made after the expiry of five days after the date on which this paragraph 6 comes into effect.

6.2.2 Where a relevant Contract Trading Party makes a claim of Past Notification Error, such Party shall pay a fee to BSCCo for each such claim (provided that, for the purposes of this paragraph 6.2.2, and subject to paragraph 6.2.4, a claim may relate to more than one Past Notification Error in respect of the same Volume Notification), the amount of which shall be £5,000, or such other amount as the Panel may from time to time, after consultation with Parties and with the approval of the Authority, determine upon not less than 30 days' notice to Parties, and which shall not be reimbursed in any circumstances.

6.2.3 Where a relevant Contract Trading Party makes a claim of Past Notification Error (other than one to which paragraph 1.4.1 applies), the claim shall be accompanied by a statement in writing from the other relevant Contract Trading Party (addressed to BSCCo for the benefit of all Contract Trading Parties) confirming that it considers that the Past Notification Error has occurred.

6.2.4 A claim of Past Notification Error may not be made in relation to a Volume Notification in respect of which a previous claim has been made (and, accordingly, if a relevant Contract Trading Party wishes to claim Past Notification Errors in relation to more than one Settlement Period, a single claim must be made for all such errors).

6.2.5 A claim of Past Notification Error may be made in relation to a Volume Notification, notwithstanding that the Volume Notification was treated as rejected (in relation to the relevant Settlement Period) or refused, in accordance with paragraph 2.4 or 3.4, where the rectified Volume Notification (if submitted as described in paragraph 6.4.5) would not have been so treated, but without prejudice to paragraph 6.6.2.

**6.3 Flagging Past Notification Errors**

6.3.1 Where a Party gives notice of a claim of Past Notification Error under paragraph 6.2.1, BSCCo shall within one Business Day after receiving such notice notify the claim to the Energy Contract Volume Aggregation Agent, all Contract Trading Parties, and the relevant Volume Notification Agent.

**6.4 Determination of Past Notification Errors**

6.4.1 The Panel shall consider claims of Past Notification Error in accordance with this paragraph 6.4.

6.4.2 For the avoidance of doubt, the Panel may establish or appoint a Panel Committee to discharge its functions under this paragraph 6, and (notwithstanding Section W2.2) the Panel may appoint the Trading Disputes Committee, and (if so appointed) that Committee shall have the ability and competence, to do so.

6.4.3 Where a claim of Past Notification Error is made**:**

(a) the Panel Secretary shall arrange for the claim to be placed on the agenda of a meeting of the Panel (consistently with paragraph (c)), and shall request**:**

(i) the Party claiming the Past Notification Error to provide evidence and information supporting its claim,

(ii) the other relevant Contract Trading Party (if any) to provide evidence and

information supporting the claim, and

(iii) the relevant Volume Notification Agent and the ECVAA to provide comments in relation to the claim;

(b) the Panel shall determine in its opinion whether there was a Past Notification Error and, if so, what it was;

(c) the relevant Contract Trading Parties and the relevant Volume Notification Agent shall**:**

(i) provide the Panel with such further information as it may reasonably request to assist it in making its determination, and

(ii) confirm to the Panel that the evidence and information provided to the Panel are complete and not misleading;

(d) the Panel Secretary shall notify the Panel's determinations to all Contract Trading Parties and the relevant Volume Notification Agent;

(e) BSCCo shall give such instructions to the ECVAA, SAA, and FAA as are necessary to give effect to any such rectification;

(f) the fee under paragraph 6.2.2 shall be invoiced as and included in determining BSCCo Charges for the relevant Party for the next month for which BSCCo Charges are invoiced following the notification of the Panel's determination under paragraph (d), and shall be paid accordingly.

6.4.4 The determination of the Panel (or any Panel Committee established or appointed under paragraph 6.4.2) as to whether there was a Notification Error and, if so, what it was shall be final and binding on all Parties.

6.4.5 Rectification of a Past Notification Error shall not be made if the rectified Volume Notification would have been invalid (pursuant to paragraph 2.3.4 or 3.3.4) or treated as rejected (in relation to the relevant Settlement Period) or refused (pursuant to paragraph 2.4 or 3.4) if such rectified Volume Notification had been submitted**:**

(a) at the time at which the relevant Volume Notification was submitted; or

(b) where the Past Notification Error is a failure to submit, immediately prior to Gate Closure for the relevant Settlement Period.

6.4.6 The Panel may decline to rectify a Past Notification Error**:**

(a) where it considers that the Contract Trading Party and/or Energy Contract Volume Notification Agent that made the error in the submission of the relevant Volume Notification did not**:**

(i) at the time that the Past Notification Error occurred, have in place prudent systems and processes for the checking of Volume Notifications (the question of whether such systems and processes were prudent to be judged in the light of the circumstances then prevailing), or

(ii) following discovery of the error, promptly take all appropriate steps in relation to such systems and processes to avoid a repetition of the said error; and

(b) in circumstances other than where**:**

(i) the said Past Notification Error was directly attributable to BSC Systems,

(ii) the said Past Notification Error and/or the magnitude of the loss suffered by the relevant Contract Trading Parties as a result arose from a combination of circumstances that could not have been reasonably foreseen, or

(iii) the magnitude of the loss suffered by one or more of the relevant Contract Trading Parties as a result of the said Past Notification Error was wholly disproportionate to the fault or error committed by that party.

**6.5 Rectification of Past Notification Errors**

6.5.1 Where the Panel determines that a Past Notification Error has occurred**:**

(a) the Panel shall determine what adjustments are required to the relevant Account Bilateral Contract Volumes, Metered Volume Fixed Reallocations, and/or Metered Volume Percentage Reallocations (as the case may be) to achieve the following effects**:**

(i) to put the relevant Contract Trading Parties into the position that they would have been in had the Past Notification Error not occurred (subject to paragraph (ii) below), and

(ii) to impose on each of the relevant Contract Trading Parties in respect of each claim an Error Correction Penalty determined in accordance with paragraph 6.5.2; and

(b) such adjustments shall be made as soon as is practicable, and shall be taken into account in the next Settlement Run for the relevant Settlement Period.

6.5.2 In relation to a claim of Past Notification Error (provided that, for the purposes of this paragraph 6.5, and subject to paragraph 6.2.4, a claim may relate to more than one Past Notification Error in respect of a single Volume Notification covering more than one Settlement Period), an Error Correction Penalty is the lesser of**:**

(a) a sum equal to 20 per cent of the cash equivalent of the value (if any) to the relevant Contract Trading Party of being put into the position that it would have been in had the Past Notification Error(s) to which the claim relates not occurred; and

(b) £200,000.

For the avoidance of doubt, the maximum Error Correction Penalty applicable in respect of any claim shall be the amount provided for in this paragraph 6.5.2, regardless of the number of Past Notification Errors to which any particular claim relates.

**6.6 Credit arrangements**

6.6.1 Where a Past Notification Error is rectified, the rectification shall be taken into account for the purposes of the determination of the relevant Contract Trading Parties' Credit Cover Percentages in relation to Settlement Periods for which Gate Closure occurs after, but not earlier than, the time of the rectification.

6.6.2 In accordance with paragraph 6.6.1**:**

(a) where, in accordance with Section M, a relevant Contract Trading Party was treated before the time of the rectification as being in Credit Default and would not have been so treated had the rectified Volume Notification been submitted**:**

(i) Section M3.5 shall not apply, and such Party shall not be entitled to any

right or remedy in respect of being so treated, and

(ii) to the extent that, as a result of such Party being so treated, any other Volume Notification was treated as rejected (in relation to any Settlement Period) or refused in accordance with paragraph 2.4 or 3.4, such refusal or rejection shall not be affected or prejudiced by the rectification of the Past Notification Error and Section M4 shall not apply in relation thereto;

(b) where, in accordance with Section M, a relevant Contract Trading Party would have been treated before the time of the rectification as being in Level 2 Credit Default had the rectified Volume Notification been submitted, and was not so treated, the rectification of the Past Notification Error shall not affect or prejudice any other Volume Notification which was not treated as refused before, or rejected as to Settlement Periods for which Gate Closure was before, the time of the rectification.

6.6.3 For the purposes of this paragraph 6.6, the time of the rectification of a Past Notification Error is the time with effect from which the ECVAA enters into its BSC Agent System the adjustments determined under paragraph 6.5.1.

**Section D**

*The following text shall be inserted in Section D4.1(a)(v):*

'(v) any amounts paid to BSCCo by way of fee pursuant to Section P6.2.2 or Section Q7.2.3;'

**Section G**

*The following text shall be inserted as a new Section G1.1.2(b) and the existing Section G1.1.2(b) and remaining paragraphs of Section G1.1.2 shall be renumbered accordingly:*

'(b) Section P6, which addresses the possibility of notification errors in the submission of Volume Notifications;'

**Section M**

*The following text shall be inserted as a new Section M3.5.2 and the title of Section M3.5 shall be amended to read 'Result of Trading Dispute, etc':*

'3.5.2 This paragraph 3 and paragraph 4 are subject to the provisions of Section P6.'

**Annex X–1**

*The following new definitions shall be inserted in Annex X–1:*

| | |
|---|---|
| **'Past Notification Error'** | has the meaning given to that term in Section P6.1.1(a); |
| **'Volume Data'** | has the meaning given to that term in Section P6.1.1(f); |
| **'Error Correction Penalty'** | has the meaning given to that term in Section P6.5.2 |

**Impact on Core Industry Documents**
None

**Impact on BSC Systems and other Relevant Systems and Processes used by Parties**
None

**Justification for Proposed Modification with Reference to Applicable BSC Objectives**

The Proposed Modification is justified on the following principal grounds**:**

**1.** It would ensure that, as regards the period prior to the adoption of the Modification Proposal, settlement of imbalance obligations will be conducted by reference to Parties' true contract positions, as required by Condition 7A.2(b)(ii) of NGC's transmission licence, rather than by reference to erroneously notified positions. When taken together with a separate modification in respect of future notification errors, the Proposed Modification would therefore promote the attainment of the objective specified in Condition 7A.3(a) of that licence (the efficient discharge by NGC of its licence obligations).

**2.** The Proposed Modification is intended to allow Parties who have already made notification errors in respect of past Settlement Periods to submit claims for correction of those errors.

At paragraph 36 of its decision in respect of P19, the Authority outlined a non-exhaustive list of categories of 'particular circumstances' that could give rise to the need for rule changes having a retrospective effect. These categories (with appropriate amendments) have been incorporated into the notification error correction mechanism so that the Panel is bound to have regard to them in deciding whether to allow rectification of a notification error. If a notification error falls outside the specified circumstances, the Panel may decline to rectify that error.

Such an approach to retrospection is consistent with general principles of law as to when retrospection may be justified. Generally, retrospective changes are presumed to be unfair because**:**

(a)the retrospective application of new rules may be unfair to parties who would have acted differently, if they had known that the new rules would apply;

(b)the retrospective application of new rules on one occasion may create a perception among present and future participants that there will be other occasions where new rules are adopted and applied retrospectively to the detriment of parties, thereby causing them to regard participation in the arrangements as carrying additional risk, which will feed through into higher prices; or

(c) the retrospective application of rules may re-open settled financial transactions.

Taking these three issues in turn**:**

The first of these issues does not arise in this case**:** there is no evidence that any Party would (and no Party has claimed that it would) have conducted itself differently in the balancing market if it had known that erroneous contract notifications could be rectified, since balancing trades are based on notifications of physical positions, and not of contract positions. (This also means that, where some BSC Parties have benefited from errors in others' notifications, that benefit has been a windfall.)

The second issue is of a more general nature, and is based on a common concern that *all* retrospective application of new rules creates increased risk. This is a misconception. It may equally be argued that a refusal to implement retrospective changes to address unfairnesses is a risk factor which participants must factor into their decision-making. Indeed, London submits that, in this case, the BSC has caused unnecessary unfairness by exposing Parties to substantial imbalance settlement liabilities which were not, and could not reasonably have been, foreseen at the time when the BSC was concluded.

If the BSC is now amended to provide for retrospective correction of such unfairnesses, that would send a signal to participants that Parties are protected from unforeseen unfairnesses in the operation of the BSC. Parties can therefore be expected to regard a retrospective application of the Proposed Modification as in fact decreasing, rather than increasing, the risks associated with participation in the BSC.

The third of these issues need not be of concern in the present case because**:**

(a) the retrospective application of the Proposed Modification will not interfere with transactions which have been finally settled, since final settlement in respect of any given Settlement Period is not completed until 14 months after its close;

(b)there is no absolute rule of law prohibiting the re-opening of transactions which have be fully settled**:** see, for example, *Kleinwort Benson Ltd v Lincoln City Council* [1998] 4 All ER 5 (HL);

(c) the retrospective application of the Proposed Modification should therefore be permitted if the benefits of retrospective application (as outlined above) are likely to outweigh any detriments.

London submits that, in this case, retrospective effect of the Proposed Modification will be bene overall. Any detriments can be avoided by ensuring that the rationale for the retrospective applicati the Proposed Modification is fully and clearly explained in any report or decision document, so as to concerns that new rules might be applied retrospectively in other, materially different, cases.

The retrospective effect of the Proposed Modification can therefore, on this analysis, be expected to:

(a) promote effective competition in the generation and supply of electricity, by allowing the BSC Parties, and new entrants in particular, to place reliance on the effectiveness of the BSC in addressing unfairnesses (Condition 7A.3(c)). To the extent that new entrants to the market may be more likely to make Notification Errors, then the Proposed Modification may further serve to promote competition from new entrants, by protecting them from the disproportionate consequences of such Errors; and

(b) promote efficiency in the implementation of balancing and settlement arrangements (Condition 7A.3(d)), by reducing the risk to Parties of participating in the BSC, and thereby reducing the risk-related costs of balancing and settlement activity.

**3.** It may be argued (as it was in the context of Modification Proposal P9) that the balance of fairness lies in favour of making no Code modification with retrospective effect because Parties had an opportunity to address these considerations before the BSC was signed. London submits that such an argument would be incorrect because:

(a) discussions of the proposed terms of the BSC prior to its signature expressly contemplated that the question of notifications post Gate Closure would be reconsidered in the light of the operation of the BSC, and also that Parties would be free to make a modification proposal post Go-Live to address errors in Energy Contract Volumes or in Metered Volume Reallocation (see, respectively, page 48 of the Ofgem/DTI 'conclusions document'on NETA dated October 1999, and pages 2 and 3 of the joint NETA Programme/Elexon working group paper dated October 2000 on Manifest Errors in Balancing Mechanism Transactions);

(b) discussions before signature of the BSC focused on whether Parties should be allowed to notify trades conducted after Gate Closure, whereas the Proposed Modification relates only to the notification after Gate Closure of trades effected (but not correctly notified) before Gate Closure;

(c) experience of the operation of the BSC shows that, in the weeks immediately after the commencement of the BSC, it was more difficult than might previously have been expected for Parties to validate contract notification data, because of the large numbers of unrelated errors in the data put to them for validation, so that any conclusion on these issues reached through discussions conducted prior to the start date of the BSC may properly be re-opened in the light of experience; and

(d) discussions as to the terms on which the BSC should be adopted focused on the adoption of terms which would be appropriate to cater for the normal functioning of the market, and were not addressed to the exceptional circumstances which would apply in the period immediately following the introduction of NETA. There should therefore be no objection to adopting a modification with retrospective effect to cater for the exceptional difficulties arising from the exceptional circumstances of the period immediately following Go-Live.

**Details of Proposer**


| | | | |
|---|---|---|---|
| Name: | | Roger | Barnard |
| Organisation: | London | Electricity | plc |
| Telephone: | 0207 | 331 | 3398 |
| e-mail address: | roger_barnard@londonelec.co.uk (note: the link is an underscore) | | |


**Attachments**

For completeness, London details in its letter covering this application a recent instance of contract

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|---|
| notification error in respect of which it will wish to make a retrospective claim for rectification, if the Proposed Modification is adopted.<br>London asks that that letter be treated as an integral part of this Modification Proposal. |
| |

# ANNEX 2 EXTRACT FROM CONSULTATION DOCUMENT DESCRIBING MODIFICATION GROUP CONSIDERATION OF P37

Note: The original document from which this is extracted referred to the Authority view. Below we have clarified this by showing [representative] where this was the contribution of a representative rather than the formal view of the Authority.

In view of the fact that the proposal builds on remarks made in the Authority's determination on P19, a number of those remarks, alluded to in the P37 proposal, were discussed by the Modification Group. The Authority representatives noted three points which were pertinent to the P37 proposal, relating to the following areas: the cap on reimbursement, the impact of imbalance charges arising from an erroneous notification and the treatment of retrospective corrections on a case-by-case basis.

The Authority [representative] noted that they had suggested a cap on the amount that might be reimbursed, as a proportion of the value of a correction of an erroneous notification. However, it was noted that whilst the proposal does contain such a cap, by virtue of the error correction payment of 20%, the proposal contained an additional feature that limited the imposition of this cap to the first £1m of the value of a correction. The proposer suggested that the logic of this approach was that the worth of an error was more properly reflected in a capped payment than by an unlimited scaling of the reimbursement, since this would produce arbitrary effects.

The Authority [representative] also repeated their statement in the determination of P19 relating to the imbalance charges that might arise in respect of an erroneous notification. The Authority [representative] stated that the Authority had stated that imbalance charges may sometimes be disproportionate, relative to the incentive to correctly notify relevant quantities into the settlement systems rather than being disproportionate to the error, as suggested by the proposer.

Finally, the Authority [representative] noted that, although the Authority had intimated that retrospective correction of erroneous notifications may need to be treated on a case-by-case basis, no method for this approach had been prescribed. Hence, it would be possible to contemplate a number of options in this respect. Three possibilities were considered:

- A separate modification for each claim, each therefore requiring an Authority determination;
- As in P37, the Panel considering and deciding each claim;
- As in P37, except that the Panel would make a recommendation to Authority for its determination.

The Modification Group supported this particular aspect of P37 as currently defined (i.e. the Panel considering and deciding on each claim).

The Modification Group also considered the use of the term 'error correction penalty' used in the Proposal itself. It was recognised that clarification would be needed as to whether, or not, the use of the term 'penalty' was appropriate. In the meantime, it was agreed that the term 'error correction payment' would be used.

Finally, the Modification Group considered a number of detailed elements of the process by which the proposal could operate. Firstly, the Modification Group accepted that effecting both the correction of the notification and the payment for the error correction

via changes to the notification volume itself would be extremely complex. The reason for this was that, whilst a notified volume would be common to the Party and the counterparty, the error correction payment would differ, by virtue of the dual cash-out arrangements. Hence, the Modification Group concluded that it would be easier if the correction to notifications were made purely to reflect the correct notification volume. Appropriate reimbursements would then flow in the normal course of events, as subsequent runs of settlement picked up the revised notification data. The error correction payment could then be made as an explicit, separate payment.

The Modification Group then considered the basis on which the error correction payment could be calculated. Firstly, it was acknowledged that, being a payment, the error correction payment should be equal to or greater than zero. In other words, the error correction payment should not result in money being paid out to a claimant. Furthermore, it was recognised that some notifications relate to one Party (where trades are taking place between energy accounts), whilst others involve two Parties. If the error correction payment were to be based on a percentage of the value of a correction for a Party, this would imply a net value for a trade involving a single Party, but a gross value for a trade involving two Parties. The Modification Group took the view that the error correction payment should, therefore be levied in respect of any energy account associated with a claim for which some reimbursement is remitted.

Another issue that was considered was that of which run of settlement should be used to establish the error correction payment. The Modification Group were of the view that early settlement of the error correction payment was of greater importance than a precise calculation (which would require a final reconciliation run of settlement involving both the erroneous and the corrected notification volumes and could only be undertaken 14 months after the relevant day). The preference of the Modification Group was that as soon as practical, after a claim is approved, appropriate settlement runs for the settlement days to which a claim relates should be used to establish the value of the correction, from which the error correction payment could be calculated. No further reconciliations would be undertaken in respect of this error correction payment.

There was also some discussion concerning what the value of a correction should be and the basis on which the error correction payment should be calculated. This error correction value could relate purely to energy imbalance charges, or could include secondary cash-flows in settlement such as Residual Cashflow Reallocation Cashflow (RCRC) and BSCCo charges. In order to enable a simple and robust approach to be adopted, the Modification Group considered that the value of an error correction (for the purposes of calculating the error correction payment) should derive solely from energy imbalance charges.

The Modification Group also considered what should be done with the collected error correction payments. The Group concluded that the error correction payments should be disbursed to all Parties, in accordance with their RCRC accruals for the settlement day in question. One refinement to this approach that the Modification Group accepted was that the errant Parties should not receive any of the disbursement of error correction payment (which they themselves will have paid in the first place). Hence, the allocation of error correction payment would be adjusted accordingly.

# ANNEX 3 CONSULTATION RESPONSES

## Annex 3.1. Analysis of Consultation Responses

Responses were received from 17 respondents representing over 53 companies. In addition to responding to the specific questions asked in the Consultation Report circulated on 21 September 2001 (and which are reproduced below) some respondents made additional points and where possible the key issues raised have been incorporated into this summary. Most of those respondents who did not support P37 nevertheless chose to comment on the questions asked, some reminding the reader that they objected to the Proposal whilst others, who also objected to the Proposal did not respond to all the questions. This summary is intended to reflect the range of views in relation to each issue and references to respondents are references to the number of written responses rather than the number of companies on whose behalf that response was submitted. Copies of the individual responses from each company can be found in Annex 3.2 of this Report.

**Q1: Do you support Modification Proposal P37? Please support your answer by explaining why P37 better achieves the applicable BSC Objectives, or not, as the case may be?**

Nine respondents (including the Proposer) supported the Proposal. The Proposer reaffirms its views (contained in P37 which it submitted on 11 September) and says that P37 better facilitates achievement of the applicable BSC objectives and that, as the merit of this contention turns on questions of law, it should be noted that it intends to publish a legal opinion in support of its view about the significance, in this context, of Condition 7A.2(b)(ii) of NGC's transmission licence.

One respondent said that the principle of imbalance settlement is that the Party's allocated energy should be compared with its contracted position when determining the volume of imbalance energy which is to be cashed out. For example, The Ofgem/DTI Balancing and Settlement Code Conclusions Document (August 2000) refers to "...a Settlement Process for charging participants whose contracted positions do not match their metered volumes of electricity...". Accepting that this requires the SAA to be notified of the Party's true contract position and that there should be an incentive for the Party to notify correctly, it nevertheless believes that the imposition of imbalance charges on imbalances which are merely the result of erroneous notifications and which do not relate to any corresponding physical imbalance on the system is wholly inappropriate. The levying of such excessive imbalance charges and the distribution of these funds to other parties through the residual cashflow reallocation cashflow exposes participants to arbitrary penalties and windfall gains. These penalties and windfalls distort the fair competition required by EU and UK legislation. Implementation of the modification proposal would allow, should certain conditions be met, the charges which have been incurred to be reduced to levels which might be considered to provide an adequate incentive for accurate volume notification. Such a reduction, together with the complementary recovery of the redistributed windfall gains, would remove most of the distortion which has occurred since the introduction of the BSC and would therefore better

achieve the BSC objectives, in particular that of promoting effective competition in the generation and supply of electricity.

Two other respondents agreed with one of the two saying that in order to promote effective competition, the BSC must be seen to place appropriate costs on parties for the actions, or omissions, that they undertake. It said that the application of the current rules, in certain circumstances, can result in disproportionate costs being levied. If parties see injustices in the BSC not being rectified, this may well dissuade parties from participating in the trading arrangements and thus limiting competition. Another respondent agreed with this view adding that it is wrong to suppose that errors have occurred simply because systems and processes have had insufficient money or resources thrown at them. Considerable expenditure has been undertaken, and it adds that in terms of percentage spend against revenue smaller players are extremely heavily penalised in this area as no economy of scale is obtained. To further exacerbate this by loading unreasonable levels of risk would lead to only the very largest of players in the energy market being able to overcome the entry hurdles, which could be viewed as anti-competitive.

This respondent said that it is relevant to note the fact that the BSC as currently adopted sets an information imbalance price of zero, recognising that there will be teething troubles and bugs in the system and processes yet participants are required to accept penalties on “actual errors” at a level which could cause the financial failure of smaller players and further trigger cross default on a broad range of other contracts. It is in the Industry’s own best interest to create a trading framework that is both robust and error free, but has a measure of sensibility about it regarding errors which do not in any way threaten the actual market or consumers. The magnitude of the losses that currently exist suggest that if the Industry itself does not sort out the issue then other (more expensive) means will be pursued for its resolution. Given the acknowledged tight timescale for the implementation of NETA and also the increased possibility of errors being made in the early months of operation of any new system, a retrospective modification such as this is entirely appropriate at the present time and can be made without prejudice to any subsequent forward-looking arrangements. In particular, where the failure or incorrect notification has occurred due to a failure of central systems or processes then post event notifications or corrections should be allowed.

A further respondent said that it believed the intent of the BSC is, inter alia, to provide for sufficient financial incentives for BSC parties to contract such that energy accounts are balanced/optimised prior to gate-closure. The post-gate closure settlement rules presently consider only those notifications that were accurately notified ex-ante. It said that it recognises the present rules contain little flexibility for technical errors or events that may sometimes result in the inability of a party to strictly follow BSC processes despite these parties having contracted ex-ante to avoid imbalance price exposure. Failure to recognise these particular circumstances, within the BSC, results in parties being cashed out in an manner that does not recognise their true contract position and leads to inappropriate residual cashflow reallocation smears across the industry. This would seem perverse since the objective of the imbalance settlement process is to identify those participants whose energy accounts were imbalanced and levy imbalance prices upon those parties whose imbalance volumes caused physical imbalances upon the system. Given that incorrect notifications do not result in any change to the physical balance upon

the system, applying imbalance price exposure to those parties who failed to notify correctly for technical reasons, does appear to be unduly onerous and penal i.e. disproportionate to the consequence of their error. It said that permitting post gate-closure correction of notifications would be both pragmatic and does better facilitates the objectives of the BSC, particularly Condition 7A.3 (c) of NGC's licence. It agreed that Condition 7A.3 (d) is better facilitated, since failure to implement this modification, leads to a greater perceived notification risk associated with trading close to delivery and that this has a continuing and detrimental impact upon liquidity within the secondary markets and prices to end customers.

A further respondent agreed with the above comments and said that there is little risk that retrospective application of P37 will render the BSC inherently uncertain. Firstly, P37 is designed to address specific flaws in the BSC, not make arbitrary and widespread changes. Secondly, P37 has minimal impact on third parties. Participants, other than the participant applying to the Panel to correct an erroneous notification, would only be impacted by the correction of a notification in as much as the correction affects the size of RCRC. Thirdly, London has carefully designed P37 to ensure it would not have incentivised participants to act differently had they known the proposed rules would apply from Go-Live. This is because the application fee and significant residual penalty Parties face if their application for a notification error were accepted means that they would have been extremely unlikely to adopt less robust contract tracking and notification systems had they known P37 would take effect from Go-Live. Any argument that retrospective application of P37 would have resulted in a change of behaviour is therefore largely spurious.

Finally, Ofgem can further reduce the risk that retrospective application of P37 might make the BSC inherently uncertain by carefully considering and documenting its reasons for making P37 retrospective. Ofgem can legitimately apply modifications retrospectively in those cases where the advantages clearly outweigh the disadvantages of such action. Indeed Ofgem has set the precedent by approving a retrospective modification to the Gas Network Code.

Eight respondents did not support the proposal,

One said that although it was not opposed to a means of correction of future errors it was the retrospective application that it did not support. By accepting such a proposal this would open up the prospect to other retrospective changes. This will increase risks and uncertainties to both existing and potential new BSC signatories. This could have a number of impacts and they would tend to lead to inefficiencies and potential administration problems. It could be possible that changes are made in a more cavalier fashion as the industry could always back them out by a retrospective change. However, such a method of operation would likely to increase costs of operation potentially have a knock on effect to consumers and lead to an inefficient market.

Another respondent agreed with this point of view saying that there is a very real risk that the proposal will threaten the integrity of the new trading arrangements. In its view the proposal could potentially open the floodgates for all sorts of spurious claims, and routine ex post adjustments to notifications would undermine the robustness of notification and

settlement data which will increase industry costs.

It said that London assert that the objects described in NGC's Licence Condition 7A.2 are not achieved; it disagreed with this view; Condition 7A.2 needs to be seen in the broader context of the objectives set out in Condition 7A.3. In particular, sub paragraph 3(d) requires "efficiency in the implementation and administration of the balancing and settlement arrangements". It said that furthermore London Electricity's interpretation of NGC's Condition 7A Licence obligations does not seem applicable to internal intra company notifications. Paragraph 2(b)(ii) provides for the settlement of obligations between BSC Parties arising by reference to the quantities referred to in sub paragraph 2(b)(i), including "the quantities of electricity contracted for sale and purchase between BSC Parties". However, London's proposal includes quantities that are not contracted between BSC Parties but are transfers between the energy accounts of just one party. In summary it said it strongly opposed the modification

The same respondent said that effectively extending the scope of BSC manifest error provision beyond the central systems could seriously undermine the integrity of the new trading arrangements, reducing incentives to notify accurately, creating uncertainty in the settlement processes and a stream of claims the management of which will place a substantial cost burden on the industry. Furthermore it also believes the proposal fails to address the specific concerns (paragraph 25) and guidance on retrospectivity (paragraphs 28, 31, 33, 36 and 37) outlined in Ofgem's P19 decision letter dated 1 August 2001

Another respondent said that in its opinion allowing retrospective changes to the rules sets a precedent for changes in other as yet undefined areas of the BSC. Most participants have taken the rough with the smooth, and managed a basket of risks in trading under NETA. To upset that balance of risks is unfair on participants.

A further respondent agreed with this view saying that retrospective changes to the BSC would undermine confidence in the trading arrangements and increase investment risk for all parties. This would act against the BSC objectives of promoting efficiency and competition. All parties were aware of the NETA design principles and most invested substantial amounts in the design, testing and operation of their systems and processes. If such a significant rule change had been envisaged this would clearly have affected these investment decisions, and it would be unfair to allow parties with less robust processes to change the rules after the event.

These views were also supported by a further respondent who said that while it sympathised with the limited amount of time allowed to thoroughly test systems prior to go-live, all parties were equally aware of the timescales involved for testing of their systems. The trading arrangements include strong incentives to ensure accurate notification at all times. It saw no circumstance where the minority should be allowed to retrospectively address an error when the majority have managed the risk involved. Should the Panel implement this proposal, a precedent would be set where retrospective action would have to be considered in all cases, undermining confidence in the BSC.

A further respondent said that it did not believe that the modification should be applied to notifications between energy accounts. The proposal references condition 7A.2(b)(ii) of

the NGC transmission licence, however, this condition relates to "quantities of electricity contracted for sale and purchase between BSC Parties". It is unclear therefore whether this condition should be applied to an internal notification between the energy accounts of one BSC Party as this may not satisfy the definition of a contract and furthermore there is no sale and purchase between BSC Parties involved in this type of notification. It said that the relevant Contract Trading Party should seek redress from the relevant ECVNA in the event of a failure to make a correct notification. Where the relevant Contract Trading Party and the relevant ECVNA are the same person then it is clear that the company has chosen to internalise the risks associated with making contract notifications. All Parties have the opportunity to employ a third party notification agent and should they decide not to, then they must face the consequences should they not be able to perform the function adequately. Other Parties have assessed the risks of making contract notifications and have decided, on the basis of the rules as they stand and the potentially high financial consequences, whether to use a third party agent or to invest in systems and processes themselves. It says that these are commercial investment decisions that companies have taken on the basis of rules existing in the BSC. It would be inappropriate to make subsequent retrospective changes to those rules, thus changing the fundamentals on which investment took was made.

It says that it does not believe that this modification proposal better facilitates the applicable BSC Objectives. Implementation of this proposal, to which it is strongly opposed will not aid NGC in efficiently discharging it's obligations under the licence as it has noted above in relation to the condition relied on by London Electricity, nor will it assist the efficient, economic and co-ordinated operation of the Transmission System. It does not believe that to implement a retrospective modification will promote competition in either the generation or supply of electricity, in fact to implement a retrospective modification of this magnitude which undermines the basis on which investment was made in NETA systems and processes, may deter potential entrants to the market, or increase risks to current participants and have a detrimental effect on competition. Neither can it see how the proposal better promotes efficiency in the implementation and administration of the balancing and settlement arrangements.

A further respondent also states that retrospection would not promote effective competition as it allows parties to modify their contract positions after the event providing an unfair advantage to vertically integrated companies who would be able (subject to Panel approval) to balance post event. The only circumstances where post event notifications or corrections should be acceptable is where the failure or incorrect notification is due to a failure of central systems or processes. Widening the scope for allowable errors will lead to subjectivity and inconsistencies.

This respondent also argues that allowing post event notification does not promote efficiency in the implementation of the balancing and settlement arrangements (objective d). Post event notification was not envisaged when NETA was designed. Allowing it will reduce efficiency as time will have to be spent on an individual assessment of each claim. It said that objectives a and b are irrelevant to this modification, notification errors do not affect the operation of the transmission system.

One respondent says that while it does not support this modification it can sympathise with the circumstances that have caused it to be raised. It is true that the combination of

high imbalance prices and energy contract volume notification errors can mean the consequences of the notification error are out of proportion with the error but we do not believe the results can be fully unwound without significant impact on the industry.

Introducing retrospection will increase market uncertainty and regulatory risk. It says that Ofgem have not been prepared to agree with retrospection for pricing issues (e.g. Mod 18); volumes should not be treated any differently. It adds that the modification is sufficiently wide in scope that it could potentially allow almost every error that has resulted since Go-Live to be claimed as erroneous. It anticipates that there would be a very large number of claims coming forward should this proposal be implemented. The proposal does not provide any framework to determine what constitutes prudent systems and processes and as such as soon as one Party claimed an error and had it upheld this would set a precedent for future claims. This could be construed as a barrier to entry for new participants should the standards be seen unduly rigorous. It is also possible that such a move would unfairly increase the burden on small players who do not have the resource to meet the requirements for what are deemed to be prudent systems and processes. Implementation of the modification would introduce a significant potential for gaming in the market going forward and would undoubtedly give rise to many more "error" claims for the period since go-live. The net position of each party also needs to be considered taking account of all the residual cashflow reallocation payments since NETA started. It says that it was its strong belief that parties' behaviour during this period was influenced by their perception of the rules and risks of failure; had they known that errors could be retrospectively corrected then they would almost certainly have taken different actions.

**Q2: Do you believe that the ability to make retrospective adjustments of notifications (within a fixed period, following some effective date) would better achieve applicable BSC Objectives?**

Nine respondents agreed that the ability to make retrospective adjustments of notifications would better achieve the Applicable Objectives with two saying that such adjustments should be made in accordance with defined principles and another saying that it believes it is important to periodically allow BSC participants certainty in their settled positions. Currently the industry acknowledges their settlement positions are subject to variation for up to fourteen months after the settlement period. It said it accepts, however, these variations within the suite of imbalance charges may not be as large as those which may result from acceptance of this modification. To achieve a pragmatic balance between the desire for post-gate closure correction and the market participants desire for certainty we would prefer this modification to be implemented alongside a similar modification that included a prospective element which prevents earlier settlement periods being "re-opened". One of the seven said that certain BSC participants having made single errors, are faced with losses of several million pounds. Losses of this magnitude would be sufficient to take certain other participants out of the market, and awareness of such a situation must surely act as strong deterrent to future market entry.

One of the nine said that the imbalance price spread penalises participants for imbalances between notified contract volumes and allocated metered volumes. Therefore, erroneous contract volume and meter volume notifications are penalised to the extent they cause an imbalance. The very wide imbalance price spread, characteristic of NETA, means the

financial consequences of an erroneous notification are very large – far in excess of any additional costs that an erroneous notification places on the system.

At Go-Live, participants did not anticipate the problems of central systems feeding inaccurate notification to participants for validation. As a result, and through no fault of their own, participants found it very difficult to know whether their notifications were in error. Nor did participants anticipate the very large spread between imbalance prices. This large spread means that the penalty for erroneous notifications is higher than anticipated at Go-Live. Retrospective application of P37 addresses both these unanticipated flaws in NETA.

To the extent that a Party acted prudently and made a past notification error as the result of a fault in central systems, that Party should be compensated for the financial consequences of the notification error. Retrospective mitigation of notification errors in these specific circumstances provides the precedent that participants will be protected from the consequences of unanticipated flaws in the BSC. This reduces the regulatory risk of participating in the BSC thereby reducing participants' costs and better meeting the Applicable BSC Objective to promote efficient implementation and administration of the BSC.

One respondent said that to achieve a pragmatic balance between the desire for post-gate closure correction and the market participants' desire for certainty it would prefer this modification to be implemented alongside a similar modification that included a prospective element which prevents earlier settlement periods being "re-opened".

Five disagreed that the ability to make retrospective adjustments would better facilitate the BSC Applicable Objectives with one of them stating that if a principle of retrospection is established it increases uncertainty within the market. This would also make it difficult to set clear and unambiguous rules as to what defines an error.

One respondent said that the word "retrospective" is ambiguous. If this is a general question about future errors being capable of being amended retrospectively, the answer is "yes". If "retrospective" means "past notification errors" as per the modification, then "No". Assuming the former, then it supports the principle of ex-post notification where a genuine error has been made, or can be proved to have had no effect on balancing changes. It supports this but opposes P37 purely on the grounds of managing risk going forwards, where a participant is in control of their own destiny. Correction of "past errors" has an effect on participants outside their control, and generally favouring participants who have not succeeded in managing their own risk, and now seek to retrace their steps. Those who were prepared to "take their medicine" should not be at risk of being penalised by retrospective correction by those who were not.

One respondent said that there may be circumstances where retrospective changes are appropriate e.g. those set out in Ofgem's letter on P19 (para 36); fault directly attributable to central arrangements; combinations of circumstances that could not have been reasonably forseen; where possible retrospective action has already been clearly flagged. However, none of these seem to be applicable to P37. The proposer argues that the proposal would better meet the efficient discharge by the Transmission company of

the obligations imposed under the Transmission Licence as settlement imbalance obligations would be conducted by reference to Parties' true contract conditions rather than erroneously notified positions. This only refers to the period before the modification proposal is adopted, the proposer suggests a further modification to account for subsequent periods will be necessary before the changes would fully realise the efficient discharge of the Transmission company's licence obligations. This proposal has yet to be raised so it is inappropriate to assess this modification against one that has yet to be raised, let alone approved. It adds that the implication here is that calculations based on contract notifications made to date are incorrect. As the proposer states 'The Proposed Modification is intended to allow Parties who have already made notification errors in respect of Settlement Periods to submit claims for correction of those errors'. As no criteria is given to determine the validity of such claims the modification would potentially open the way for all parties to claim that all notifications made, or indeed had not made but intended to, since the Go-Live are incorrect.

**Q3: Do you agree with the way in which an erroneous notification is defined and circumscribed (as described, generally within Modification proposal P37, but more specifically given in clause 6.1.1 of the legal drafting within the above proposal)? If your answer is no, please**

**a. Identify any features of the definition which you regard as inappropriate or inadequate, and why.**
**b. Identify any additional features you believe should be included, and why.**

Five respondents (including the Proposer) agreed with the way in which an erroneous notification was defined and circumscribed in both the Proposal and the legal drafting with the Proposer saying that the definition of 'Past Notification Error' in paragraph 6.1.1 of the modification proposal is identical in all material respects to the definition proposed by Elexon's legal advisers in 'P19 Optimised' (the version of modification proposal P19 which was preferred by the Panel).

One respondent suggested that a more explicit recognition that Volume Notifications refers to both Contract and Metered Volume Notifications may be preferable and another said that in general it agrees but there may also be circumstances when the Notification Agent will be able to provide additional evidence and this should be drawn upon as appropriate. A further respondent said that whilst it thinks the definition is broadly correct it needs to make clear that it an error in the Volume Notification and not necessarily in the submission of that volume. It assumes it would be incumbent on the claimant to demonstrate that the volume notified was erroneous.

One respondent said that clearly the definition of a past notification error is central to this proposal, and within this it sees the key elements as being (i) a requirement for documentary evidence of the intended contractual position between the parties (or accounts), and (ii) the error to be of a type which has had no effect on overall system energy balance. One concern with the drafting of clause 6.1.1 is in (c) (i) where the phrase "demonstrably settled and …. shared commitment to notify" is used. It is possible that the word "settled" could be misleading here and could be replaced by the word "contracted".

One respondent believes that the definition should only apply to volume notification agents and not to contract trading parties, as a notification is always made by an ECVNA. Further, it believes that where an error has been made, the contract trading party should seek redress from the ECVNA. Where the trading party and the ECVNA is the same party, then that party has obviously decided to internalise the risks associated with making ECVNs. This is a commercial decision and should a party subsequently find that they are unable to manage the risk, then they should not seek to make changes to the Balancing and Settlement Code to mitigate that risk.

One respondent disagrees. It says that the definition does not specify any criteria that determine limits to number of Settlement periods that can be included in a single claim. It would be inappropriate to include any periods that had not closed at the date and time that an error was discovered. The "point of discovery" should be defined and established with evidence in the process of making a claim.

Another respondent says that what constitutes a past notification error has not been defined and is open to interpretation. For example, if a party fails to invest in adequate systems to notify contracts, or to train operators to use those systems competently or have systems and staff in place to interpret settlement reports that highlight errors, should they be able to claim that there has been an error? Allowing the correction of any errors will not incentivise participants to develop and test robust systems for contract notification. Instead, it will allow participants to use inadequate systems safe in the knowledge that failures in notification can be corrected after the event.

Additional features that should be included are a precise definition of an allowable error. For example, the 7 day report details all notification submitted up to 18:00 day ahead. This provides the opportunity to detect errors in contract notifications and rectify them prior to Gate Closure. If the 7 day report was expected but not received or if it contained incorrect information then a retrospective amendment might be appropriate. If the notification error was due to a failure to interpret the report correctly then a retrospective amendment is inappropriate.

One respondent says that failure to submit a Volume Notification should not be considered as a Past Notification Error (6.1.1(b) (ii)). In its view it would be extremely difficult to demonstrate intent to notify. It is one thing to enter data incorrectly and another to omit to submit data altogether.

**Q4: Do you agree that the time limit for making claims, following implementation, should be 5 working days? If not, what should the time limit be, and why?**

Five say that they believe that 5 days following the date of implementation of the modification is a sufficient period for the submission of claims. A further two say that whilst they do not support the proposal five working days seemed appropriate. One whilst agreeing that five days was appropriate says that a shorter period would be equally acceptable provided that adequate notice is given of the implementation date.

One respondent says that it is quite possible, or indeed likely, that the subject of a particular claim would initially raised under the Trading Query/Trading Dispute Procedures of BSCP11. This being the case, the 5 working day limit on claims should only apply if claims could be made without prejudice to the continuing Trading Dispute. Thus, 5 working days is not an unreasonable time within which to register a claim, but the detail of the claim outstanding following the disputes process may not be fully known until a later date.

A further respondent says that the modification states that a further modification will be raised to cover future notification errors. The implementation date of this proposal (P37) should be set such that were the other modification to be approved, then there should not be a gap between being able to claim for retrospective errors and future errors. To the extent that parties would have notice of the pending implementation of this modification, a five day time limit is appropriate.

One respondent disagrees with the five day limit. It says that participants may choose whether or not to submit claims for past errors depending on how many claims are made by others. 5 days is not adequate to prepare enough details. A period of 6 months should be given to allow participants to assess their total liability based on other claims. A further respondent agrees that five days is not appropriate. It says that a longer period is needed for those parties that do not support the modification but would make a claim were it to be approved. They will require additional time to pull together all the information to support their claim. This applies especially to smaller companies who might not have the resources to collate the information quickly. It suggests a minimum of 10 working days. This view was supported by another respondent.

**Q5: Do you agree that the administration fee for making a claim should be £5,000? If not, what should it be and why?**

Six respondents agree that the administration fee for making a claim should be £5,000 (although one qualifies this by saying that it does not support implementation of the proposal; one says that it may be appropriate to have a minimum charge in order to dissuade frivolous claims and two respondents say that if this represents the cost of administering the claim, then it is appropriate). One respondent says that if this modification were progressed it would agree to a fee of £5,000, provided this covers all costs accrued by Elexon and others in processing such a claim. No other BSC Party should pick up any costs of such claims. Two other respondents generally supported this view saying that the fee should be broadly related to the average cost of administering a claim of notification error. If Elexon has grounds for believing that this figure will be significantly more or less than £5,000, that would provide prima facie grounds for changing the level of the administration fee. Under P37, the Authority will have the power to veto changes to the fee (for example, if it believes that a different amount would prejudice smaller market players).

One respondent supports an administration fee for making claim of not less than £2,500 and not exceeding £5,000.

A further respondent supports the £5,000 fee provided the error correction fee is set at 20% of any claim, and the £5,000 is in addition to the error correction fee. It says that the £5,000 fee is consistent with the fee that applies with respect to claims for Manifest Error. A further respondent agrees that the charges should be consistent with those for Manifest Errors.

One respondent disagrees with a £5,000 administration fee. It says that the fee for processing a claim of erroneous notification should be cost reflective and that £5000 may reflect the cost of processing a single notification error claim or each of a series of unrelated claims. However, where a series of similarly erroneous notifications have been submitted due to, for example, the same undiscovered system or process failure, we believe that the costs of investigating the claims will be much lower. In such circumstances it believes that a more appropriate fee structure would be £5000 in relation to the first notification and £500 for each subsequent notification in the series of similar errors caused by an undiscovered system or process failure.

**Q6: Do you agree that a sufficient level of assurance is afforded by a claim being supported in writing by the counterparty? If not, what other assurance would be required?**

Eight respondents say that they believe that a sufficient level of assurance is offered by a claim being supported in writing by the counterparty. One expands this by saying that where the claim relates to an intra-company trade, sufficient assurance would be afforded by the endorsement of the claim by a director of the claimant party. Another of the eight says that a statement by the other party to the trade confirming that it considers that the notification error has occurred (see paragraph 6.2.3 of the modification proposal) will preclude the possibility of the notification error correction process being used as a forum to settle inter-party disputes. It will ensure that the Panel's role in determining claims of notification error will be restricted, as it should be, to cases where the facts are agreed between the parties concerned. Another of the eight respondents above adds that there will be cases where only the two parties involved in the trade will know any details of the claim, therefore the only evidence available will be provided by the two parties. Claims for incorrect notifications between energy accounts of the same company should also be considered, in this case evidence will only be available from one trading party. Whilst one suggests that there should be a joint claim by the two counterparties.

One respondent says that the claim should certainly include written evidence, however, it would expect the onus to be upon the counterparty to provide sufficient information to satisfy the reasonable concerns of the Panel. Without attempting to produce an exhaustive list, it considers this may include, for example, voice records, email/fax transmissions and signed contracts

One respondent (who opposed implementation of P37) suggests that should this proposal be implemented, then it is vital that any claim is supported by the counterparty as claims

may already have been made under the terms of the GTMA and it would be inappropriate for a Party to double-recover any imbalance charges. Although it does not believe that the proposal should apply to claims between energy accounts (as opposed to between BSC Parties), it is clear that in such cases some other level of assurance would be required.

Another respondent says that it thought a sufficient level assurance was afforded by a claim being supported in writing by a counterparty was acceptable only if the counterparty is not part of the same parent company. An independent view should be given regardless of the relationship of the counterparties and is essential if they are part of the same parent company.

One respondent said that this provides a high degree of assurance for most inter company transactions. Clearly support by a counterparty is not relevant in the context of intra-company transactions. However, without corroboration by another organisation, how can any decision to allow an intra-company claim ever be safe? It would seem that there is greater potential scope to make spurious claims in the case of intra company errors where a single party is involved compared to inter company claims where two parties can provide supporting evidence. Also it may be clear an error has been made, but difficult to ascertain the 'correct' notification value. Conveniently, the value claimed might include a party's forecasting error, which he is now in a position to determine.

It said that it is very sceptical that evidence provided by a single trading party with respect to internal intra company notifications, could be verified even by an external party. In its view it isn't feasible to obtain cast iron assurances as to the legitimacy of such claims. It therefore believes if accepted P37 should be amended to limit claims to inter company transactions.

In response to both question 6 and question 7 one respondent says that counterparties should submit a single joint claim. Nominated representatives of each organisation, if two are involved, should sign this off. BSC Panel /Authority should use its judgement and call for specific evidence appropriate to each claim.

**Q7: Do you agree that the evidence to support a claim should be at the discretion of the Panel? If your answer is no, what specific evidence should be provided?**

Ten respondents say they agree that the evidence required to support the claim should be at the discretion of the Panel and one added that since it believes that the circumstances of any claims can be sufficiently different that it would be difficult to prescribe in advance the evidence which would be required. One of the ten states that there needs to be a safeguard that the Panel cannot use its discretion to discount any evidence a claimant thinks is relevant without judgement and a second says that it believes the claimant should satisfy the tests outlined in its response to Q8 below and evidence on good industry practice provided by other BSC participants. One suggested that sufficient time must be allowed to meet the claim requirements.

The Proposer thinks that the question is misconceived. It says it is not a question of the Panel determining the evidence it requires to support a claim. Rather, the onus is on the party claiming notification error to prove to the Panel that its claim is made out. It said that in any event it would be wrong to prescribe the evidence needed to satisfy the Panel as to the validity of the claim. Each claim should be considered on a case by case basis. Evidence that is persuasive in one case, given a particular set of circumstances, may not be persuasive in another in which the circumstances are very different.

One respondent says it believes the Panel should adjudicate within a framework that provides transparency not only to the claimant but other BSC Parties. Guidelines regarding how the decision making process is achieved would certainly be useful. In principle we would prefer this process to be similar to the Trading Disputes process, where independent third-parties may be agreed to arbitrate.

Another respondent disagreed that the Panel should have discretion and said that the Panel, or a sub group of it, in considering a claim should do so in accordance with pre-defined principles and guidelines as is the case for Trade Disputes. These principles and guidelines should be included within the BSC.

**Q8: Do you agree with the scope and definition of the following circumstances where the Panel may exercise discretion in declining to rectify a claimed notification error? If your answer is no for any of these circumstances, please give views as to what the deficiencies are:**

- **Where the relevant Contract Trading Party (or its Agent) did not, at the time that the past notification error occurred, have in place prudent systems and processes for the checking of volume notifications (the question of whether such systems and processes were prudent to be judged in the light of circumstances then prevailing).**
- **Where the relevant Contract Trading Party (or its Agent) did not, following discovery of the error, promptly take all appropriate steps in relation to relevant systems and processes to avoid a repetition of the said error.**

Four respondents agreed with the scope and definition outlined above with one of them saying that it believes that the circumstances detailed in Question 8 in which the Panel may decline to rectify a claimed notification error represent the standard which a reasonable and prudent operator would be expected to achieve.

One respondent says that the Panel should be entitled to exercise discretion in all cases.

One respondent agrees that where the relevant Contract Trading party did not at the time that the past notification error occurred, have in place prudent systems and process for the checking of volume notifications. However, where the relevant Contract Trading party did not, following discovery of the error, promptly take all appropriate steps in relation to relevant systems and process to avoid repetition of the said error it would depend on the duration of the error before it is discovered. Contract Trading parties should have systems and processes in place to spot an error via the 7 day report. If the Contract Trading party failed to spot an error the day after its occurrence and the duration of an error was more than a day, a claim should only be allowed for the first day of the error.

Another respondent says that it should be sufficient for the claimant to demonstrate that it used due diligence to have in place a prudent system and checking processes at the time the past notification error occurred. For example, where the claimant has invested in a recognised contract notification system and processes and obtained a statement from the software vendors on their systems meeting NETA requirements this should be sufficient grounds to demonstrate that prudent steps had been taken. It agrees that a Contract Trading Party (or its Agent) requires to demonstrate that all appropriate steps in relation to systems and processes to avoid a repetition of the said error. For example, where a party has made system enhancements to the checking of the 7 Day Contract Notification Forward report, after a past notification error has occurred, this should be sufficient evidence to meet such a requirement. Also where a party demonstrates investing in a 'back-up' contract notification system should be seen as taking corrective measures to minimise future losses.

One respondent says that strict application of the provisions listed above would appear to prevent any claim being accepted by the Panel. It is certainly much easier with the benefit of hindsight to identify the deficiencies within pre-existing systems. It said it would prefer that stronger weighting is applied by the Panel to the issue of disproportionate loss within Question 9. It also says that it would urge the Panel in their decision making to bear in mind the uncertainty and unfamiliarity associated with the detailed NETA trading rules, upon initial implementation. These undoubtedly contributed to errors in contract notification, and retrospective application of this modification, far from creating uncertainties within the trading rules, should correct for these initial market uncertainties and distortions.

One respondent said that the danger with this is that it is starting to prescribe. The circumstances cited should certainly not be rejected or be ineligible for consideration purely on their merits alone.

The Proposer says that the specified circumstances derive from paragraph 25 of the Authority's decision letter in respect of P19. It is content for the Panel to have the discretion to decline to direct that a notification error be rectified in cases where the claim falls within the scope of such circumstances. This is on the pragmatic basis that parties themselves are best placed to provide information on their contract position, and it is therefore appropriate that they are incentivised to provide accurate information. (This is also, in its view, the correct way to approach Q10A.)

One respondent says that the difficulty with the approach described in the question is that it assumes the Panel is competent to judge whether a party's systems and processes are prudent and adequate. Since these are not accredited it would appear that to follow this approach would give the Panel and any prospective claimant an impossible task. Its view is that the grounds for correcting past errors should be related to the consequence of the error rather than the reasons for it arising.

One respondent disagrees with the scope and definition. It says it feels further clarification is required. With respect to first bullet point, definition should make meaning of "have in place" absolutely clear. A participant might well have a system and

documented procedure but if the system was not operating or this procedure was not followed then a claim should be declined. With respect to second bullet point, definition of "promptly take all appropriate steps" likewise requires clarity. It feels that this should mean the immediate implementation of an emergency procedure to bolster a procedure that must have failed.

One respondent says the scope and definition in this section of the proposal needs to be tightened up and offered the following suggestions:

**"A Reasonable and Prudent Operator (RPO) test**

We believe that the burden of making a claim should fall upon the claimant and that if the proposal proceeds then the draft wording should reflect that burden of proof. Furthermore the draft wording should reflect paragraph 25 of Ofgem's previous P19 decision. Accordingly we consider that paragraph 6.4.6 should be replaced with the following text:

"6.4.6 The Panel shall reject a Party's claim for a Past Notification Error unless such Party can prove:

(a) the nature of the error and that such Party took all reasonable steps to prevent the error occurring, and
(b) that such Party had acted prudently in checking its notification

In regard to the above, such Party shall be required to demonstrate beyond reasonable doubt that he had taken all reasonable steps (to the standard of a reasonable and prudent operator) to prevent notification errors happening in the first place and taken all such steps to minimise the impact of errors should they actually occur. The actions taken should be commensurate with the risks and costs that a RPO could have reasonably anticipated, given circumstances prevailing at the time."

The scope of any claim

A claim may relate to a number of consecutive trading periods in which a similar error has been made (e.g. buy rather than sell). For example a failure of the central systems to deliver the 7 day report may have prevented the checking of notifications for particular periods ahead of gate closure. It might only be reasonable to allow rectification of errors for those periods in which it was not possible to check notifications. Thus the Panel should have the authority to determine whether they allow claims in full or part.

In determining the extent to which a claim may be allowed and whether the above RPO conditions have been met the BSC Panel should be required to hear evidence and comment on and determine good practice from other BSC parties and relevant industry experts to inform their decision. In our view, without evidence from the rest of the industry, the Panel Committee or Elexon are unlikely to have the knowledge of participant systems and procedures to judge the RPO test or scope of any claim.

It is however difficult to set strict and comprehensive guidelines for the Panel on these issues ahead of time. It would therefore seem reasonable to both allow a BSC party to make their case for a notification error and other BSC parties (who will suffer loss in terms

of a reduction in earning from residual cash flow) to make the case against the claimant. In opposing a claim BSC parties would need to know the circumstances behind any claim - evidence could be made available in writing in advance of any hearing so that they can (if they wish) take the opportunity to dispute the basis of any claim.

It will be necessary for Elexon to promptly publish details of the magnitude of any claim for error, the impact on residual cash flow (to enable parties to make provision for potential losses) and how in the view of the claimant the error occurred. Once a judgement has been made all submissions would need to be published to that "case law" could be built up as to the expected future conduct of an RPO."

**Q9: So long as the circumstances described in Q8 have been satisfied, then the Panel may not decline to rectify a notification error under the following further circumstances:**

- **Where the past notification error was directly attributable to BSC Systems.**
- **Where the past notification error and/or the magnitude of the loss suffered by the relevant Contract Trading Parties as a result arose from a combination of circumstances that could not have been reasonably foreseen.**
- **Where the magnitude of the loss suffered by one or more of the relevant Contract Trading Parties as a result of the said past notification error was wholly disproportionate to the fault or error committed by that Party.**

**Do you agree with the scope and definition of the above circumstances? If your answer is no for any particular circumstance, please give views as to what the deficiencies are.**

Six respondents agree with the scope and definition of the above circumstances but one of them qualified its response as follows. It believes that the first two conditions detailed in Question 9 (where errors were directly attributable to central systems and where errors or the magnitude of the loss were due to a combination of circumstances which could not reasonably have been foreseen) are such as to require the Panel to rectify the notification error. However, the third condition compares the magnitude of the loss to the magnitude of the error and ignores the desirability of retaining the incentive to submit accurate notifications. This third restriction on the Panel's discretion to rectify an error should relate to this required incentive for accurate volume notification and should compare the magnitude of the loss to the magnitude of the incentive necessary to achieve accurate notifications. A seventh agrees but says that the burden of proof should rest firmly with the claimant. If they are unable to demonstrate one of the above to the reasonable satisfaction of the Panel the claim should be rejected. In relation to the "magnitude of the loss….was wholly disproportionate to the fault to the fault or error committed", it refers the back to bullet point 5 in its covering letter that suggests such circumstances should be rare and perhaps unlikely to apply in the London Electricity case. An eighth respondent also agrees, but caveated its agreement as being subject to its response to question 8.

One respondent agrees with the first bullet point but says it is unclear as to the circumstances Ofgem has in mind in the second bullet. The magnitude of any loss from

an erroneous notification can never be foreseen because it is dependent upon the value ascribed to the cash-out prices. In the third bullet it thinks the test should not be linked to the proportionality of the consequence of the loss for the party, but whether the error imposed additional costs on the system. The general principle should be that the cost of an error to the party should be reimbursed after accounting for any additional costs imposed on either the balancing mechanism or the settlement system.

Two respondents suggest that in bullet point one this should be extended to BSC processes and procedures but one of the two asks what "reasonably foreseen" means in the context of bullet point two. It says that after the event it is rather subjective and reasons for errors can be tailored to support arguments in a claim. The definition requires tightening up. In relation to the third bullet point it argues that the magnitude of the loss is irrelevant, all claims should be treated equitably regardless of the amount lost as a result of past notification errors. There should be no special treatment just because a party has suffered a large loss. The second respondent said that the test in relation to bullet point two the test must be carried out without the benefit of hindsight and is necessarily subjective. The onus should be on the claimant to make the case. It agrees with the third bullet point with the proviso that Q8 had been satisfied this protection would be helpful in addressing the concerns set out in our introductory remarks at Q1.

One respondent said that it does not agree to this definition as it considers it inappropriate to prescribe circumstances where BSC Panel / Authority must rectify a claim. The BSC Panel / Authority should be allowed to judge each case on its merits.

Another respondent says that it does not believe that the first bullet point should be included as there are already provisions within the BSC to allow Parties to re-submit contract notifications following a failure of the ECVAA systems. Regarding the second bullet point, this should be at the discretion of the Panel, and it may be appropriate for the Panel to seek representations from BSC Parties who have not made such errors as to whether or not such circumstances could have been forseen. The final bullet point is more difficult as a loss may have been "disproportionate" due to high system prices for the relevant settlement periods, or due to a high volume being notified incorrectly, further, "disproportionate" is a subjective term and what may be seen as disproportionate in one instance may not be in another. Therefore it thinks it appropriate that this is excluded and left to the discretion of the Panel.

**Q10 (A): Do you agree that an error correction payment, in the form of a percentage of the value of the rectification, should be levied?**

**Q10 (B): If your answer to Q10(A) was yes, do you agree with the level of error correction payment being 20%. If your answer was no, what level do you believe would be appropriate**

**Q10(C): If your answer to Q10(A) was yes, do you agree that that the payment should be capped?**

**Q10 (D): If your answer to Q10(C) was yes, do you agree that the payment should be capped at £200,000. If your answer was no, what level do you believe would be appropriate.**

**Q10 (E): If your answer to Q10 (A) was no, what other form, if any, should the error correction payment take?**

Three respondents agree with this set of questions but one of them says that it supports a cap on error correction payments of not less than £50,000 and not more than £200,000.

Two respondents agree with 10A and 10B but say that they do not believe that a further cap should be applied to the 20%. This discriminates against smaller parties whose errors are less likely to be in excess of £1million and who will therefore feel the full effect of the further cap.

A further respondent agrees with 10A and 10B (but suggests that to limit the scope of particular claims made, the error correction payment applies to the whole of any claim irrespective as to whether only part of the claim is allowed is allowed by the Panel. This would help dissuade speculative claims. It doe not agree that the payment should be capped. It says that it understands that London Electricity in proposing Modification Proposal P37 have sought to address the concerns raised in Ofgem's decision letter for P19. However, it finds London's interpretation of paragraph 25 of Ofgem's letter to be rather too creative. The nature of scope of any error is likely to be related to the size of transactions normally undertaken by a BSC participant. However, a large company's errors may not proportionately be more than those made by a smaller player. A straight error percentage payment without a cap is by definition proportionate. It asks whether bigger players really need greater protection from their errors?

Another respondent agrees with 10A on the basis that this should prevent spurious claims being raised and pursued but disagrees with the level of error correction payment being 20%. It says that although it is subject to the size of the entity making the claim, it considers 20% may in practical terms restrict smaller suppliers from raising a valid claim. On balance it considers 10% to be more appropriate. It agrees that the correction payment should be capped but that £100,000 is a more appropriate level.

One respondent qualifies its agreement to this set of questions by saying that in its answer to Q5 above it drew a distinction between a claim for a single erroneous notification error and a set of claims relating to a series of similarly erroneous notifications caused by, for instance, a system or process failure. It believes that this distinction is equally important in relation to the level of error correction payments. It agrees that the error correction payment should relate to the magnitude of the incentive necessary to achieve accurate notifications. To levy the payment at the rate of 20% of the value of the rectification is an appropriate starting point for this and capping the payment at £200,000 should maintain the incentive to notify accurately whilst avoiding punitive charges. However, it believes that this cap should operate in relation to the total of all claims which are consequent on a single incident of undiscovered system or process failure, rather than on each individual claim for each individual notification in the erroneous series.

Another respondent says that in relation to 10A the error correction payment should reflect the cost of the error to the party less any costs imposed on the balancing mechanism and settlement system, and the costs of resolving the error. It does not believe that the error correction payment should be linked to a proportion of the cost of

the error, but to a full reimbursement less any associated costs or adjustments to other payments nor does it believe that capping is an appropriate concept in this respect. It says that in general the payment to the party should be derived from the reimbursement of the imbalance payment, a correction to the RCRC payments, any consequent payments under the GTMA, and the administration costs.

One respondent, in response to Q10A says that its understanding is that the proposed limit on the recovery of a claim arises out of Paragraph 25 of Ofgem's decision letter on Modification Proposal P19 where the limit is suggested as a means of providing an incentive to accurate notification. In the case of retrospective remedy it is difficult to see how the payment works as an incentive since the relevant actions are in the past. It is clear that any payment levied on a retrospective claim is in fact a penalty. If such a penalty is deemed appropriate it would have concerns over its magnitude. In response to Q10B it said that the fundamental reason for raising this Modification Proposal is that errors have arisen which have caused costs wholly disproportionate to the normal day to day operational costs of running the business. It is generally recognised that costs of errors can not only be very large but are also somewhat arbitrary in magnitude, being driven by system prices at the time of the error. It would seem more sensible therefore if the penalty payment (if it is deemed appropriate to include one at all) should be decoupled from the cost effect of the error, i.e. not based on a percentage at all. However, it notes that, taken in conjunction with the cap, the penalty on the Proposer's claim is effectively 2.7% (£200k/£7.5m). In relation to 10C it says that in terms of percentage spend against revenue smaller players are extremely heavily penalised in setting up systems as we obtain no economy of scale, and this proposal leaves such players similarly exposed with regard to penalty payments on errors. It believes that it would be more appropriate to set any payment by formula related to, say, RCRC proportion with the £200k suggested by the Proposer used as a benchmark.

One respondent also disagrees with question 10A and in relation to 10E says that the P19 Ofgem decision document talks about "incentives to achieve accurate notifications". This modification is purely looking at retrospective notifications, hence it is inappropriate to talk about incentives in this context and any "error correction payment" would simply be an arbitrary punishment. Any modification that was concerned with future errors could legitimately include "incentive" arrangements.

A further respondent agrees with 10A but says that in relation to 10B the error correction payment is too high and that the percentage should be lowered to 5%.

The Proposer set out its detailed response to these questions as follows:

- Do you agree that an error correction payment, in the form of a percentage of the value of the rectification, should be levied?

The concept of an error correction payment (or, more accurately, an error correction *penalty* – see below) is derived from paragraph 25 of the Authority's decision letter in respect of P19. Although there is no need in principle to levy an error correction payment, one can be justified (within limits and subject to a cap on the maximum payment) on the pragmatic basis mentioned under Q8 – i.e., that parties themselves are

best placed to provide information on their contract position, and it is therefore appropriate that they are incentivised to provide accurate information.

Section 4 of the consultation paper refers to the Modification Group's view that the term 'error correction payment' should, for the time being, be used instead of 'error correction penalty'. While Elexon's paper does not seek views on this, we should like to take this opportunity to explain our preference for a final decision in favour of 'error correction penalty'. That 'penalty' is the appropriate term is supported by the Authority's own decision letter in respect of P19, which justifies a fixed percentage limit on recovery of claims on the basis that this is an incentive for parties to submit accurate notifications. The term 'penalty' seems the most apt expression to describe a sanction for failing to submit an accurate notification.

- Do you agree with the level of error correction payment being 20%?

See our answer to Q10A above. On the basis argued there, which we believe is the correct approach, it would in our view be difficult to justify an error correction payment in excess of 20%.

- Do you agree that the payment should be capped?

Yes. Notwithstanding that a notification error can result in losses running into many millions of pounds, whether such an error results in a large or small loss is largely a consequence of chance and bears little, if any, relationship to the scale or nature of the error committed by the party concerned. It would be arbitrary to impose very widely varying error correction payments on such a basis. London believes that a cap on such payments addresses these considerations, while providing parties with sufficient incentive to submit accurate notifications.

- Do you agree that the payment should be capped at £200,000?

See our answer to Q10C above. On the basis argued there, which we believe is the correct approach, it would in our view be difficult to justify an error correction payment in excess of £200,000.

**Q11: Do you agree with the approach to credit cover taken within the proposal? If your answer is no, please give reasons.**

Twelve respondents accept the approach taken to credit cover within the proposal. One respondent says that the approach is simplistic and pragmatic, however, there should also be a reciprocal measure of swift resolution for past notification error claims. This would avoid doubly penalising a party, with poor cashflow, who is 'incorrectly' in credit default.

**Q12: What body do you believe should decide on whether a claim should be allowed?**

- **The Panel, as described in the proposal**
- **The Authority, taking into account the views of the Panel**
- **Some other body (please specify)**

The Proposer says that it is difficult to conceive of a reason why a body other than the Panel (or a body appointed by it for this purpose under paragraph 6.4.2) should decide claims of notification errors. In this regard, it is relevant that the Panel is regarded as the appropriate body to decide claims of manifest error under Section Q of the BSC. Seven further respondents believe that the Panel is the appropriate body to decide whether a claim should be allowed. One of these respondents says that the proposal is designed to set out a process for consideration of notification claims in general. It assumes that if the proposer had wished his notification error to be dealt with as an individual special case (with the final decision residing with the Authority) the proposal would have been drafted accordingly. Another said that the counterparty should have the ability to employ similar mechanisms within the Trading Disputes process for arbitration. It also says that if the BSC Panel became the appeals body for notification error claims (whether such responsibilities were delegated or otherwise) they would be faced with making judgements, which could easily be open to legal challenge especially if different rulings on ostensibly similar cases were made. The scope for such challenge is potentially huge compared to the limited scope of the current BSC manifest error provisions. This places members of the BSC Panel in a very difficult position.

One respondent agrees that the Panel is the appropriate body but that there must be an appeal process to the Authority, initially and under General Law thereafter. This view was supported by a second respondent who says that provided that the BSC incorporates appropriate principles and guidelines for the resolution of errors, then it would be appropriate for the Panel to decide the resolution of an error subject to a right of appeal by the claimant to the Authority.

One said that it would be happy with a TDC/Panel led process but in view of the size of current claims outstanding it may be appropriate for the Authority to make the decision so that “justice is seen to be done”.

One says that to ensure impartiality, the Authority should be the body which decides on whether a claim should be allowed, taking into account the views of the BSC Panel. This view was supported by a second respondent.

**Q13: Do you agree that, if an error correction is allowed, there should be a full correction of the notified volumes and that the error correction payment should be separately dealt with? If your answer is no, please give reasons.**

Twelve respondents said that they believe that the full correction of notified volumes followed by a separate calculation and settlement of the error payment is a satisfactory method of implementing the rectification of an error.

One respondent said that the notified volumes should be fully corrected, but the subsequent settlement of the error should take account of reimbursements made through the RCRC and the provisions of the GTMA.

**Q14: Do you agree that the error correction payment should be based on energy imbalance charges and levied in respect of any energy account where a reimbursement arises? If your answer is no, please give reasons.**

Ten respondents agree that the error payment should be levied on the value of the reimbursement to each energy account. An eleventh agrees on the basis that this means the imbalance changes relating to the respective settlement periods that are corrected. A twelfth respondent agrees but says that an alternative approach to charging (if it is to be linked to the magnitude of the error) would be to base it on the net position of the two affected accounts, whether they belong to one counterparty or two. In the case of two affected parties it envisages a joint claim (with one party nominated as "Lead") for rectification of the error volume. The magnitude of the claim would be determined as the aggregate (net) difference between the Corrected and the Non-Corrected Account Energy Imbalance Cashflows, of the parties taken together. The penalty payment (if deemed appropriate) could be levied on the Lead Party, who would make their own arrangements for recovery from any other party.

One respondent says that the error correction payment needs to extend further than the imbalance payments to encompass the RCRC, GTMA consequences and the costs of correcting the error.

**Q15: Do you agree that error correction payments should be disbursed to all Parties, pro-rata on credited energy, adjusted to exclude those Parties making the error correction payments themselves? If your answer is no, please give reasons.**

Eight respondents believe that the error correction payments should be disbursed to all parties, pro-rata on credited energy, adjusted such that a party does not receive a share of its own error correction payment.

One respondent said it agreed with the above respondents provided that added complexity and/or costs of a process to exclude those parties making an error do not outweigh the benefits.

One respondent says that error correction payments will almost always be levied from all Parties rather than disbursed, unless a party is daft enough to want to make a correction resulting in his paying out!

Two respondents disagree. One of the two said that as the error correction payment is recovered as a result of incorrect notifications, it should be redistributed to parties who have invested in systems and process that allow them to correctly notify. Therefore the payment should be redistributed on the basis of "Gross Contract MWh" as calculated in paragraph 3.2 in Annex D-3 of the Code. It is not appropriate to recover payments levied in respect of "incorrect" contract notifications on the basis of metered volumes. The

second says that excluding the parties from the error correction smear would appear to add unnecessary layers of complexity to the process.

One respondent says that the error correction process should be to reimburse the party that has submitted an erroneous notification, but also to correct the subsequent impact on RCRC and any GTMA related payments, although it is appreciated that the GTMA effects cannot be dealt with through the BSC. If the cost of the imbalance reimbursement is charged back to the RCRC for the settlement period in which the error occurred then the RCRC will be appropriately adjusted for all parties including the claimant.

**Q16: What period of notice, if any, would be required before the proposal should take effect?**

One respondent says that it believes that five working days notice prior to implementation of the modification would be appropriate.

One says that its response depends on the decision on Q4. If claims must be made within 5 working days of implementation of the modification, there should be a period of notice before the proposal takes effect to allow parties to prepare claims of a further 5 working days.

One respondent says it does not oppose any minimum notice period before implementing MP37, but suspects a notice period of 5 working days would be fair to those companies not operating a 24 x 7 trading floor. Another respondent intimates that five working days would be appropriate under certain circumstances.

Two respondents say that if accepted they do not require any notice before this proposal could come into effect. Another says that there should be no need for a significant delay between adopting this proposal and implementing and another respondent say that the modification undergoing the due process of the Code is sufficient notice.

Two respondents say that ten days would seem reasonable. One of the two says that a substantial backlog of claims is possible and the industry requires time to collate the details of claims going back to Go-Live. It is essential that estimates as to the potential size of claims under this proposal are made quickly so that appropriate provisions can be reflected in company accounts it.

One respondent says that it does not believe that this proposal should be implemented, but if it were approved, then 1 month's notice would be appropriate. A further respondent agrees that one month is appropriate.

One respondent says that it depends on the time scales under Q4. If Q4 is a 6 month period as suggested by SSE then only a short notice needs to be given for the period to start. If it is 5 days, parties ought to be given 3 months to get evidence together.

**Q17: Would your actions and behaviour have been different, had the proposal been anticipated at or before Go-Live? If yes, please identify which of the following would have been carried out differently and why:**

**a) Development and testing of systems and processes**
**b) Operation of systems and processes**
**c) Trading and notification strategies**
**d) Other**

Nine respondents say that their actions and behaviour would not have been different. One of them says it invested heavily in manpower, processes and systems in preparation for the introduction of the BSC. It does not believe that the availability or otherwise of a notification error correction mechanism was a factor in determining the level of investment which took place, the way in which the processes and systems were operated, or the trading and notification strategies which have been pursued. A second says that prior to go-live it publicly predicted that a serious loss due to some form of Contract Notification error was likely. This risk was examined in detail and it made every attempt to ensure it could mitigate such an error. In preparation for this area it specifically included the following:

persistently lobbied for what became the "7 day report".
robust systems for notification and automated reconciliation of reports.
extensive system and volume testing.
full participation in pre-production, including notification of its entire contract portfolio.
robust business processes designed and implemented.
full use of its automated reconciliation of reports during "cut-over" period leading in to NETA go-live.

Since go-live its systems and processes have operated without fault, thereby demonstrating that is was both possible and prudent to pay a high level of attention to this issue. With the level of error correction payment proposed it would almost certainly have adopted the same approach. A third respondent in this group says that it should be noted here that the Proposal requires claims to satisfy the test of prudent systems and processes being in place, and all appropriate steps being taken to avoid a repetition of a particular error. Thus the Proposal makes no relaxation of the basic requirement to implement and maintain robust systems and processes, leaving this incentive firmly on BSC Parties.

One respondent suggests that the answer to this question depends on whether you support P37 or not. Those who support P37 will all say that there wasn't enough time to test systems or get operational procedures in place, those who are against P37 will claim they put lots of effort into these activities to mitigate the risk.

One respondent says that given the uncertainty of success and the subjectivity in agreeing whether or not a notification was erroneous, it would be unwise to adopt a strategy of developing inadequate systems in the hope that retrospective notifications would be allowed. No ambiguity should be allowed.

One respondent says that **t**he risk assessment that it undertook, and indeed all the IT solutions and processes adopted, were on the basis of the rules of the Balancing and Settlement Code applying at the time and therefore it is difficult to say whether our behaviour would have been different. It is true to say that during the early stages of NETA, it like many other companies, submitted ECVNs many hours ahead of gate closure and scrutinised reports and feedbacks from the central systems to ensure that accurate ECVNs had been sent and received. Had there been provisions in place which would have enabled it to subsequently rectify notifications where errors had been made, it is more likely that it would have submitted notifications closer to gate closure, and there may have been more liquidity in the prompt market.

It says that, in addition to this, much of its time during Unified Pre-Production was spent ensuring that it was able to make accurate ECVNs and receive feedback flows and reports and that its systems were able to validate those reports. Had there been provisions to rectify ECVN errors in place at go-live it may have been able to spend the limited time available in UPP running more commercial scenarios. As it was aware of the potentially huge financial consequences of making erroneous notifications, this was one of its priority areas during UPP.

One respondent says that undoubtedly, had there been a lower perceived risk because of the potential for a retrospective correction mechanism to be available, then it would have acted differently. It says that it was clearly understood by all parties that at NETA Go-Live there would be would be no manifest error provisions for the notification of energy contract volumes or metered volume reallocations. Whilst Ofgem's decision letter on P19 notes that a modification could be proposed to change this, the implication is that changes would be prospective. There is no suggestion that such a modification could be applied retrospectively. Therefore, the basis on which it prepared for NETA was one where it took active and clear responsibility for the accurate notification of energy contract quantities and took great care in its notifying arrangements and systems to avoid such errors and the consequences of those errors.

Specifically,

- IT systems were specified, designed, configured with great care over a long period and at significant cost. These systems were tested extensively (details can be provided if necessary) both internally and to the maximum extent available with NETA central systems.
- Staff numbers, rotas and experience were also carefully planned and new staff carefully selected and trained with full 'operating' procedures prepared.

Because of the risks of incorrect notification, it took a very risk-averse approach to 'over-the-counter' trading close to gate closure and relied more heavily on power exchange trading where notification risks were avoided.

Another respondent says that it is likely that it would have been less rigorous in managing these activities. As with many other companies it estimates that it has invested hundreds of thousands of pounds in additional manpower, systems and procedures just to minimise these risks associated with potential notification errors. In particular it identified at an early stage the high risk associated with internal intra company notifications. In its response this respondent sets out what it considers to be indicative actions of a reasonable and prudent operator with respect to MVRNs and ECVNs.

**General points**

Some respondents made a number of general points. Some of these are set out below.

One respondent says that it acknowledges that a prospective mechanism to allow correction of future notification errors might better facilitate BSC objectives. It also acknowledges that this proposal contains ideas some of which may be able to be developed into a robust mechanism. However, it does not believe that such a change should be made hastily without proper consideration in a sensible timescale in which all parties are able to participate. A correction mechanism needs to ensure that strong incentives for accurate and timely notification remain and that there is no opportunity to exploit the mechanism to notify post-gate closure contracts.

It has a number of minor detailed comments on the proposed correction process, but says it has had insufficient time to provide detailed comments at this time:

- There are two sides to every notification - how would the costs and "penalties" apply to the two sides?
- Either the ECVNA or one or both of the parties to the contract could be at fault - how will this distinction be handled?
- Percentage "penalty" based on what volume and price, and applicable to who? Imbalance costs of the two parties are a moving target as imbalance prices and costs change with each run of settlement. To go back to individual contract prices would be extremely difficult, and outside the BSC.
- The fees and penalties to be applied, and the route by which they are "recycled" to achieve the BSC objectives, need to be more carefully considered.

Another respondent says that the importance of accurate notifications and the potential financial risk of making errors were well understood by BSC signatories prior to Go-live. As a result many companies have invested hundreds of thousands of pounds in additional manpower, systems and procedures just to minimise these risks. If a more relaxed NETA regime had been planned prior to Go-live (as is effectively advocated by this proposal) significantly less investment would have been made.

In particular the significant potential risks associated with intra company notification errors (i.e. large transactions where the notification risk can not be shared in a contract with an external counterparty) should have been clear to all BSC participants. Prudent players will have concentrated their efforts on making such risks as residual as possible. In this context it does not believe it is fair to say “loss is largely a consequence of chance and bears little, if any, relationship to the scale or nature of the error committed by the party concerned”.

Although it is not aware of the full circumstances behind London Electricity’s notification error it would suggest that it is difficult to conclude that “the number of circulars and bulletins relating to central system problems made validation unusually difficult” (Ofgem letter paragraph 33). In London’s submission under P19 they refer to 14 Elexon circulars (largely dealing with SSP/SBP data) which may have added to some confusion, but none of these circulars describe conditions that could affect a BSC Party’s ability to submit and

validate ex ante notification data. On the relevant date (3 April) we were not aware that there were any problems with either the operation of the central systems or provision of data through the E0221 ECVAA 7 day report that could have lead to inaccuracies in notified data or the ability of parties to validate notifications submitted.

In circumstances where parties have not acted prudently to minimise the probability of error relative to the risks involved, we would contend that losses of the size suffered by London Electricity are wholly proportionate to the "incentives necessary to achieve accurate notifications" (Ofgem letter paragraph 25). In Appendix B we have attempted to identify examples of prudent behaviour designed to both reduce the risk of errors the first place and minimise the consequences of any error should such errors actually occur.

It also believes it is important to ensure, as far as is reasonably practical, consistency of treatment of manifest errors across the gas and electricity markets. Nevertheless the example of retrospective action cited by London Electricity in respect of Network Code Modification 64 in its view is not directly relevant to this proposal. That proposal simply sought to rectify a rule, which essentially existed because the Transco central systems didn't initially have full functionality to insert zero nominations automatically. The process by which shippers were required to insert zero nomination was clearly a superfluous activity which bore no relationship to actual transactions between shippers. Although the possibility of retrospective action was not directly signalled at the time (Ofgem letter paragraph 36) the expectation within the industry was that retrospective application of a modification was probable and indeed reasonable.

Should the Panel believe there is some merit in this proposal (despite the above comments), it believes it is important that recommendations are made to restrict claims to very limited and exceptional circumstances. It believes that any claimant should be required to demonstrate beyond reasonable doubt that he had taken all reasonable steps (to the standard of a reasonable and prudent operator (RPO)) to prevent notification errors happening in the first place and minimise the impact of errors should they actually occur. The actions taken should be commensurate with the risks and costs that a RPO could have reasonably anticipated, given circumstances prevailing at the time. In addition the Panel should have the power to limit the scope of any claim (which may be made up of a series of similar errors across consecutive periods) to periods during which the claimant has acted as an RPO. In Appendix B to its response it give some examples of possible circumstances where a claim might be entertained under these criteria.

## Annex 3.2 Consultation Responses

### Responses from P37 Urgent Modification Report Consultation

Representations were received from the following parties:

| No | Company | File Number |
|---|---|---|
| **1.** | Scottish Power UK plc | P37_UMR_001 |
| **2.** | Entergy-Koch Trading, Ltd | P37_UMR_002 |
| **3.** | SEEBOARD | P37_UMR_003 |
| **4.** | Scottish & Southern | P37_UMR_004 |
| **5.** | London Electricity plc | P37_UMR_005 |
| **6.** | TXU Europe Energy Trading Ltd | P37_UMR_006 |
| **7.** | Edison Mission Energy | P37_UMR_007 |
| **8.** | Powergen UK plc | P37_UMR_008 |
| **9.** | APX | P37_UMR_009 |
| **10.** | EDF Trading Limited | P37_UMR_010 |
| **11.** | British Energy plc | P37_UMR_011 |
| **12.** | BGT | P37_UMR_012 |
| **13.** | TotalFinaElf Gas and Power Ltd | P37_UMR_013 |
| **14.** | InterGen (UK) Ltd | P37_UMR_014 |
| **15.** | Innogy | P37_UMR_015 |
| **16.** | Derwent Cogeneration Ltd | P37_UMR_016 |
| **17.** | Enron Europe Limited | P37_UMR_017 |

**P37_UMR_001 – Scottish Power UK plc**

This response is submitted on behalf of Scottish Power UK plc, Manweb plc and Emerald Power Generation Ltd.

ScottishPower fully supports Modification Proposal P37 *To provide for the remedy of past errors in Energy Contract Volume Notifications and in Metered Volume Reallocation Notifications* and believes that its acceptance will allow better achievement of the objectives of the BSC set out in the NGC Transmission Licence without reducing the efficiency of the implementation and administration of the balancing and settlement arrangements. Our views on the matters arising from the proposed modification and our answers to the specific questions posed in the consultation paper are set out below.

**Q1 – Yes**

The principle of imbalance settlement is that the Party's allocated energy should be compared with its contracted position when determining the volume of imbalance energy which is to be cashed out. For example, The Ofgem/DTI Balancing and Settlement Code Conclusions Document (August 2000) refers to "...a Settlement Process for charging participants whose contracted positions do not match their metered volumes of electricity...". Accepting that this requires the SAA to be notified of the Party's true contract position and that there should be an incentive for the Party to notify correctly, we nevertheless believe that the imposition of imbalance charges on imbalances which are merely the result of erroneous notifications and which do not relate to any corresponding physical imbalance on the system is wholly inappropriate. The levying of such excessive imbalance charges and the distribution of these funds to other parties through the residual cashflow reallocation cashflow exposes participants to arbitrary penalties and windfall gains. These penalties and windfalls distort the fair competition required by EU and UK legislation. Implementation of the modification proposal would allow, should certain conditions be met, the charges which have been incurred to be reduced to levels which might be considered to provide an adequate incentive for accurate volume notification. Such a reduction, together with the complementary recovery of the redistributed windfall gains, would remove most of the distortion which has occurred since the introduction of the BSC and would therefore better achieve the BSC objectives, in particular that of promoting effective competition in the generation and supply of electricity.

**Q2 – Yes**

**Q3 – Yes**

ScottishPower agrees with the way in which an erroneous notification is defined and circumscribed in clause 6.1.1 of the legal drafting within P37.

**Q4 – Yes**

We believe that 5 days following the date of implementation of the modification is a sufficient period for the submission of claims.

**Q5 – No**

ScottishPower believes that the fee for processing a claim of erroneous notification should be cost reflective and that £5000 may reflect the cost of processing a single notification error claim or each of a series of unrelated claims. However, where a series of similarly erroneous notifications have been submitted due to, for example, the same undiscovered system or process failure, we believe that the costs of investigating the claims will be much lower. In such circumstances we believe that a more appropriate fee structure would be £5000 in relation to the first notification and £500 for each subsequent notification in the series of similar errors caused by an undiscovered system or process failure.

**Q6 – Yes**

We believe that a sufficient level of assurance is offered by a claim being supported in writing by the counterparty. Where the claim relates to an intra-company trade, sufficient assurance would be afforded by the endorsement of the claim by a director of the claimant party.

**Q7 – Yes**

We believe that the circumstances of any claims can be sufficiently different that it would be difficult to prescribe in advance the evidence which would be required. We agree that the evidence required to support the claim should be at the discretion of the Panel.

**Q8 – Yes**

ScottishPower believes that the circumstances detailed in Question 8 in which the Panel may decline to rectify a claimed notification error represent the standard which a reasonable and prudent operator would be expected to achieve.

**Q9 – Yes, as qualified below**

ScottishPower believes that the first two conditions detailed in Question 9 (where errors were directly attributable to central systems and where errors or the magnitude of the loss were due to a combination of circumstances which could not reasonably have been foreseen) are such as to require the Panel to rectify the notification error. However, the third condition compares the magnitude of the loss to the magnitude of the error and ignores the desirability of retaining the incentive to submit accurate notifications. This third restriction on the Panel's discretion to rectify an error should relate to this required incentive for accurate volume notification and should compare the magnitude of the loss to the magnitude of the incentive necessary to achieve accurate notifications.

**Q10 (A), Q10 (B), Q10 (C), Q10 (D) – Yes, as qualified below**

In our answer to Q5 above we drew a distinction between a claim for a single erroneous notification error and a set of claims relating to a series of similarly erroneous notifications caused by, for instance, a system or process failure. We believe that this distinction is equally important in relation to the level of error correction payments. ScottishPower agrees that the error correction payment should relate to the magnitude of the incentive necessary to achieve accurate notifications. To levy the payment at the rate of 20% of the value of the rectification is an appropriate starting point for this and capping the payment at £200,000 should maintain the incentive to notify accurately whilst avoiding punitive charges. However, we believe that this cap should operate in relation to the total of all claims which are consequent on a single incident of undiscovered system or process failure, rather than on each individual claim for each individual notification in the erroneous series.

**Q11 – Yes**

ScottishPower accepts the approach taken to credit cover within the proposal.

**Q12 – The Panel**

We believe that the Panel is the appropriate body to decide whether a claim should be allowed.

**Q13 – Yes**

We believe that the full correction of notified volumes followed by a separate calculation and settlement of the error payment is a satisfactory method of implementing the rectification of an error.

**Q14 – Yes**

We agree that the error payment should be levied on the value of the reimbursement to each energy account.

**Q15 – Yes**

We believe that the error correction payments should be disbursed to all parties, pro-rata on credited energy, adjusted such that a party does not receive a share of its own error correction payment.

**Q16 – Five working days**

We believe that five working days notice prior to implementation of the modification would be appropriate.

**Q17 – No**

ScottishPower invested heavily in manpower, processes and systems in preparation for the introduction of the BSC. We do not believe that the availability or otherwise of a notification error correction mechanism was a factor in determining the level of investment which took place, the way in which the processes and systems were operated, or the trading and notification strategies which have been pursued.

In conclusion, ScottishPower believes that the implementation of this modification proposal will, in respect of the period since trading under the BSC commenced, better achieve the objectives of the BSC, comply with EU and UK legislation, and reduce the distortions in competition which have occurred.

Yours faithfully

**Mike Harrison**
Commercial Manager, Trading UK
Scottish Power UK plc

**P37_UMR_002 – Entergy-Koch Trading, Ltd**

Entergy-Koch Trading, Ltd. ("EKT"), the European marketing and trading arm of Entergy-Koch, LP, offers the following comments respecting the questions set forth in consultation document to Modification Proposal P37 ('MP37"). Given the considerable wisdom, time and effort devoted to MP37 and its philosophical ancestors, EKT chiefly advocates brevity, endorsing generally the positions of London Electricity.

**General Questions**

Q1: Do you support Modification Proposal P37? Please support your answer by explaining why P37 better achieves the applicable BSC Objectives, or not, as the case may be?

*Yes, for the reasons set forth in London Electricity's Justification for MP37.*

Q2: Do you believe that the ability to make retrospective adjustments of notifications (within a fixed period, following some effective date) would better achieve applicable BSC Objectives? If your answer is yes, but your answer to Q.1 was no, please give reasons.

*Yes.*

**Detailed Questions**

Q3: Do you agree with the way in which an erroneous notification is defined and circumscribed (as described, generally within Modification proposal P37, but more specifically given in clause 6.1.1 of the legal drafting within the above proposal)? If your answer is no, please

a. Identify any features of the definition which you regard as inappropriate or inadequate, and why.

b. Identify any additional features you believe should be included, and why.

*Yes.*

Q4: Do you agree that the time limit for making claims, following implementation, should be 5 working days? If not, what should the time limit be, and why?

*Yes.*

Q5: Do you agree that the administration fee for making a claim should be £5,000? If not, what should it be and why?

*EKT supports an administration fee for making claim of not less than £2,500 and not exceeding £5,000.*

Q6: Do you agree that a sufficient level of assurance is afforded by a claim being supported in writing by the counterparty? If not, what other assurance would be required?

*Yes.*

Q7: Do you agree that the evidence to support a claim should be at the discretion of the panel? If your answer is no, what specific evidence should be provided?

*Yes.*

Q8: Do you agree with the scope and definition of the following circumstances where the Panel may exercise discretion in declining to rectify a claimed notification error? If your answer is no for any of these circumstances, please give views as to what the deficiencies are:

- Where the relevant Contract Trading Party (or its Agent) did not, at the time that the past notification error occurred, have in place prudent systems and processes for the checking of volume notifications (the question of whether such systems and processes were prudent to be judged in the light of circumstances then prevailing).
- Where the relevant Contract Trading Party (or its Agent) did not, following discovery of the error, promptly take all appropriate steps in relation to relevant systems and processes to avoid a repetition of the said error.

*Yes.*

Q9: So long as the circumstances described in Q8 have been satisfied, then the Panel may not decline to rectify a notification error under the following further circumstances:

- Where the past notification error was directly attributable to BSC Systems.
- Where the past notification error and/or the magnitude of the loss suffered by the relevant Contract Trading Parties as a result arose from a combination of circumstances that could not have been reasonably foreseen.
- Where the magnitude of the loss suffered by one or more of the relevant Contract Trading Parties as a result of the said past notification error was wholly disproportionate to the fault or error committed by that Party.

Do you agree with the scope and definition of the above circumstances? If your answer is no for any particular circumstance, please give views as to what the deficiencies are.

*Yes.*

Q10 (A): Do you agree that an error correction payment, in the form of a percentage of the value of the rectification, should be levied?

*Yes.*

Q10 (B): If your answer to Q10 (A) was yes, do you agree with the level of error correction payment being 20%? If your answer was no, what level do you believe would be appropriate.

*Yes.*

Q10(C): If your answer to Q10 (A) was yes, do you agree that that the payment should be capped?

*Yes.*

Q10 (D): If your answer to Q10(C) was yes, do you agree that the payment should be capped at £200,000? If your answer was no, what level do you believe would be appropriate.

*EKT supports a cap on error correction payments of not less than £50,000 and not more than £200,000.*

Q10 (E): If your answer to Q10 (A) was no, what other form, if any, should the error correction payment take?

Q11: Do you agree with the approach to credit cover taken within the proposal? If your answer is no, please give reasons.

*Yes.*

Q12: What body do you believe should decide on whether a claim should be allowed? The Panel, as described in the proposal; the Authority, taking into account the views of the Panel; or some other body (please specify)

*The Panel.*

**Process**

Q13: Do you agree that, if an error correction is allowed, there should be a full correction of the notified volumes and that the error correction payment should be separately dealt with? If your answer is no, please give reasons.

*Yes.*

Q14: Do you agree that the error correction payment should be based on energy imbalance charges and levied in respect of any energy account where a reimbursement arises? If your answer is no, please give reasons.

*Yes.*

Q15: Do you agree that error correction payments should be disbursed to all Parties, pro- rata on credited energy, adjusted to exclude those Parties making the error correction payments themselves? If your answer is no, please give reasons.

*Yes.*

**Impact**

Q16: What period of notice, if any, would be required before the proposal should take effect?

*EKT does not oppose any minimum notice period before implementing MP37, but suspects a notice period of 5 working days would be fair to those companies not operating a 24 x 7 trading floor.*

Q17: Would your actions and behaviour have been different, had the proposal been anticipated at or before Go-Live? If yes, please identify which of the following would have been carried out differently and why:

a. Development and testing of systems and processes
b. Operation of systems and processes
c. Trading and notification strategies
d. Other
*No.*

EKT thanks you for the opportunity to submit our views, and looks forward to a speedy decision.

Sincerely,
William C. Pitcher
Director, Legal & Regulatory Affairs

**P37_UMR_003 – SEEBOARD**

**Response to P37 Consultation**

With respect to modification proposal P37, SEEBOARD are strongly opposed to this modification. Responses to questions within urgent modification draft consultation paper are detailed below.

Q1: We do not support this modification, although are not opposed to a means of correction of future errors. It is the retrospective application that we do not support. By accepting such a proposal this would open up the prospect to other retrospective changes. This will increase risks and uncertainties to both existing and potential new BSC signatories. This could have a number of impacts and they would tend to lead to inefficiencies and potential administration problems. It could be possible that changes are made in a more cavalier fashion as the industry could always back them out by a retrospective change. However, such a method of operation would likely to increase costs of operation potentially have a knock on effect to consumers and lead to an inefficient market.

Q2: No.

Q3: No –definition does not specify any criteria that determine limits to number of Settlement periods that can be included in a single claim. It would be inappropriate to include any periods that had not closed at the date and time that an error was discovered. The "point of discovery" should be defined and established with evidence in the process of making a claim.

Q4: If this modification were progressed we would agree to a period of 5 days.

Q5: If this modification were progressed we would agree to a fee of £5,000, provided this covers all costs accrued by Elexon and others in processing such a claim. No other BSC Party should pick up any costs of such claims.

Q6 & Q7: Counterparties should submit a single joint claim. Nominated representatives of each organisation, if two are involved, should sign this off. BSC Panel /Authority should use its judgement and call for specific evidence appropriate to each claim.

Q8: No – we feel further clarification is required. With respect to first bullet point, definition should make meaning of "have in place" absolutely clear. A participant might well have a system and documented procedure but if the system was not operating or this procedure was not followed then a claim should be declined.

With respect to second bullet point, definition of "promptly take all appropriate steps" likewise requires clarity. We feel that this should mean the immediate implementation of an emergency procedure to bolster a procedure that must have failed.

Q9: We do not agree to this definition as we consider it inappropriate to prescribe circumstances where BSC Panel / Authority must rectify a claim. BSC Panel / Authority should be allowed to judge each case on its merits.

Q10(A): Yes.

Q10(B): Yes.

Q10(C): Yes.

Q10(D): Yes.

Q10(E): Not applicable.

Q11: Yes.

Q12: We feel that this should be the Authority, taking into account views of BSC Panel.

Q13: Yes.

Q14: Yes.

Q15: Yes, provided that added complexity and/or costs of a process to exclude those parties making an error do not outweigh the benefits.

Q16: If accepted we do not require any notice before this proposal could come into effect.

Q17: No, prior to go-live we publicly predicted that a serious loss due to some form of Contract Notification error was likely. This risk was examined in detail and we made every attempt to ensure we could mitigate such an error. In preparation for this area we specifically included the following:

– persistently lobbied for what became the "7 day report".
– robust systems for notification and automated reconciliation of reports.
– extensive system and volume testing.
– full participation in pre-production, including notification of our entire contract portfolio.
– robust business processes designed and implemented.
– full use of our automated reconciliation of reports during "cut-over" period leading in to NETA go-live.

Since go-live systems and processes have operated without fault, thereby demonstrating that is was both possible and prudent to pay a high level of attention to this issue. With the level of error correction payment proposed we would almost certainly have adopted the same approach.

Dave Morton
SEEBOARD
0190 328 3465

**P37_UMR_004 – Scottish & Southern**

The following is the response to the consultation dated 21 September 2001 on behalf of: SSE, Keadby, SSE Energy Supply and Southern Electric

Q1 No, SSE does not support P37. SSE is of the opinion that allowing retrospective changes to the rules sets a precedent for changes in other as yet undefined areas of the BSC. Most participants have taken the rough with the smooth, and managed a basket of risks in trading under NETA. To upset that balance of risks is unfair on participants.

Q2 The word "retrospective" is ambiguous. If this is a general question about future errors being capable of being amended retrospectively, the answer is "yes". If "retrospective" means "past notification errors" as per the modification, then "No".

Assuming the former, then SSE supports the principle of ex-post notification where a genuine error has been made, or can be proved to have had no effect on balancing changes. SSE support this but opposes P37 purely on the grounds of managing risk going forwards, where a participant is in control of their own destiny. Correction of "past errors" has an effect on participants outside their control, and generally favouring participants who have not succeeded in managing their own risk, and now seek to retrace their steps. Those who were prepared to "take their medicine" should not be at risk of being penalised by retrospective correction by those who were not.

Q3 Yes

Q4 No. Participants may choose whether or not to submit claims for past errors depending on how many claims are made by others. 5 days is not adequate to prepare enough details. A period of 6 months should be given to allow participants to assess their total liability based on other claims.

Q5 Yes

Q6 Yes

Q7 Yes. Prescribing the evidence is inappropriate as by their nature, most claims will be different by nature and circumstances. However, there needs to be a safeguard that the Panel cannot use its discretion to discount any evidence a claimant thinks is relevant without judgement.

Q8 The danger with this is that it is starting to prescribe. The circumstances cited should certainly not be rejected or be ineligible for consideration purely on their merits alone.

Q9 Yes

Q10A Yes

Q10B Yes

Q10C Yes

Q10D Yes

Q10E N/A

Q11 Yes

Q12 The Panel, but there must be an appeal process to the Authority, initially and under General Law thereafter.

Q13 Yes

Q14 Yes, presumably this means the imbalance changes relating to the respective settlement periods that are corrected.

Q15 Error correction payments will almost always be levied from all Parties rather than disbursed, unless a party is daft enough to want to make a correction resulting in his paying out!

Q16 Depends on the time scales under Q4. If Q4 is a 6 month period as suggested by SSE then only a short notice needs to be given for the period to start. If it is 5 days, parties ought to be given 3 months to get evidence together – but see our response to Q4.

Q17 What answer would you like - the answer depends on whether you support P37 or not. Those who support P37 will all say that there wasn't enough time to test systems or get operational procedures in place, those who are against P37 will claim they put lots of effort into these activities to mitigate the risk. Believe what you like!

John Sykes

**P37_UMR_005 – London Electricity plc**

London Electricity plc ('London') welcomes the opportunity to comment on the Urgent Modification Consultation (the 'consultation') in respect of modification proposal P37. London provides this response on behalf of itself and the following BSC parties**:** Jade Power Generation, London Energy Company, South Western Electricity, and Sutton Bridge Power.

Before dealing with Elexon's questions, we should like the Modification Group to be aware that we have identified a technical deficiency in our legal drafting of P37. It should be amended to clarify that the Panel is to order the rectification of a notification error only if all relevant tests are satisfied. We attach as an Annex to this letter a mark-up of the legal drafting that would achieve this effect.

Turning to Elexon's paper, London wishes to reaffirm the views contained in modification proposal P37, which it submitted on 11 September. Those views are not restated here. For the sake of completeness, however, London sets out below its answers to each of the specific questions raised in the consultation.

**Q1. Do you support Modification Proposal P37?**

London supports P37 because, for the reasons set out in the modification proposal itself, it better facilitates achievement of the applicable BSC objectives. As the merit of this contention turns on questions of law, it should be noted that London intends to publish a legal opinion in support of its view about the significance, in this context, of Condition 7A.2(b)(ii) of NGC's transmission licence.

Q2. Do you believe that the ability to make retrospective adjustments of notifications would better achieve the applicable BSC objectives?

Yes. See the answer to Q1 above. Moreover, the sheer scale of settlement imbalance charges which parties have incurred through making notification errors (London alone has incurred a net loss of some £7.5 million from a single error) clearly confirms that any risk of introducing uncertainty into the trading rules as a result of the modification is substantially outweighed by the certainty of a continuing unfair treatment of some BSC parties should no such modification be made.

Q3. Do you agree with the way in which an erroneous notification is defined and circumscribed?

Yes. The definition of 'Past Notification Error' in paragraph 6.1.1 of the modification proposal is identical in all material respects to the definition proposed by Elexon's legal advisers in 'P19 Optimised' (the version of modification proposal P19 which was preferred by the Panel).

Q4. Do you agree that the time limit for making claims, following implementation, should be five working days?

Yes, although a shorter period would be equally acceptable provided that adequate notice is given of the implementation date.

**Q5. Do you agree that the administration fee for making a claim should be £5,000?**

The fee should be broadly related to the average cost of administering a claim of notification error. If Elexon has grounds for believing that this figure will be significantly more or less than £5,000, that would provide *prima facie* grounds for changing the level of the administration fee. Under P37, the Authority will have the power to veto changes to the fee (for example, if it believes that a different amount would prejudice smaller market players).

Q6. Do you agree that a sufficient level of assurance is afforded by a claim being supported in writing by the counterparty?

Yes. A statement by the other party to the trade confirming that it considers that the notification error has occurred (see paragraph 6.2.3 of the modification proposal) will preclude the possibility of the notification error correction process being used as a forum to settle inter-party disputes. It will ensure that the Panel's role in determining claims of notification error will be restricted, as it should be, to cases where the facts are agreed between the parties concerned.

Q7. Do you agree that the evidence to support a claim should be at the discretion of the Panel?

This question is misconceived. It is not a question of the Panel determining the evidence it requires to support a claim. Rather, the onus is on the party claiming notification error to prove to the Panel that its claim is made out.

In any event, it would be wrong to prescribe the evidence needed to satisfy the Panel as to the validity of the claim. Each claim should be considered on a case by case basis. Evidence that is persuasive in one case, given a particular set of circumstances, may not be persuasive in another in which the circumstances are very different.

Q8. Do you agree with the scope and definition of the circumstances where the Panel may exercise discretion in declining to rectify a claimed notification error?

The specified circumstances derive from paragraph 25 of the Authority's decision letter in respect of P19. London is content for the Panel to have the discretion to decline to direct that a notification error be rectified in cases where the claim falls within the scope of such circumstances. This is on the pragmatic basis that parties themselves are best placed to provide information on their contract position, and it is therefore appropriate that they are incentivised to provide accurate information. (This is also, in our view, the correct way to approach Q10A.)

**Q9. So long as the circumstances described in Q8 have been satisfied, then the Panel may not decline to rectify a notification error under further [specified] circumstances. Do you agree with the scope and definition of these circumstances?**

Yes, for the reasons set out in the modification proposal itself (reproduced on page 18 of the consultation).

**Q10A. Do you agree that an error correction payment, in the form of a percentage of the value of the rectification, should be levied?**

The concept of an error correction payment (or, more accurately, an error correction *penalty* – see below) is derived from paragraph 25 of the Authority's decision letter in respect of P19. Although there is no need in principle to levy an error correction payment, one can be justified (within limits and subject to a cap on the maximum payment) on the pragmatic basis mentioned under Q8 – ie, that parties themselves are best placed to provide information on their contract position, and it is therefore appropriate that they are incentivised to provide accurate information.

Section 4 of the consultation paper refers to the Modification Group's view that the term 'error correction payment' should, for the time being, be used instead of 'error correction penalty'. While Elexon's paper does not seek views on this, we should like to take this opportunity to explain our preference for a final decision in favour of 'error correction penalty'. That 'penalty' is the appropriate term is supported by the Authority's own decision letter in respect of P19, which

justifies a fixed percentage limit on recovery of claims on the basis that this is an incentive for parties to submit accurate notifications. The term 'penalty' seems the most apt expression to describe a sanction for failing to submit an accurate notification.

**Q10B. Do you agree with the level of error correction payment being 20%?**

See our answer to Q10A above. On the basis argued there, which we believe is the correct approach, it would in our view be difficult to justify an error correction payment in excess of 20%.

**Q10C. Do you agree that the payment should be capped?**

Yes. Notwithstanding that a notification error can result in losses running into many millions of pounds, whether such an error results in a large or small loss is largely a consequence of chance and bears little, if any, relationship to the scale or nature of the

error committed by the party concerned. It would be arbitrary to impose very widely varying error correction payments on such a basis. London believes that a cap on such payments addresses these considerations, while providing parties with sufficient incentive to submit accurate notifications.

**Q10D. Do you agree that the payment should be capped at £200,000?**

See our answer to Q10C above. On the basis argued there, which we believe is the correct approach, it would in our view be difficult to justify an error correction payment in excess of £200,000.

**Q11. Do you agree with the approach to credit cover taken within the proposal?**

Yes. It is identical to that proposed by Elexon in 'P19 Optimised'.

**Q12. What body do you believe should decide on whether a claim should be allowed?**

It is difficult to conceive of a reason why a body other than the Panel (or a body appointed by it for this purpose under paragraph 6.4.2) should decide claims of notifi- cation errors. In this regard, it is relevant that the Panel is regarded as the appropriate body to decide claims of manifest error under Section Q of the BSC.

**Q13. Do you agree that, if an error correction is allowed, there should be a full correction of the notified volumes and that the error correction payment should be separately dealt with?**

Yes, if that is the most straightforward approach. The advice we have seen from Elexon clearly suggests that it is.

**Q14. Do you agree that the error correction payment should be based on energy imbalance charges and levied in respect of any energy account where a reimbursement arises?**

Yes (following discussion within the Modification Group) .

**Q15. Do you agree that error correction payments should be disbursed to all parties, pro-rata on credited energy, adjusted to exclude those parties making the error correction payments themselves?**

Yes (following discussion within the Modification Group) .

**Q16. What period of notice, if any, would be required before the proposal should take effect?**

There should be no need for a significant delay between adopting this proposal and implementing it.

**Q17. Would your actions and behaviour [in the specified respects] have been different, had the proposal been anticipated at or before go-live?**

No.

We hope that these comments will assist the Panel.

Yours faithfully

**Roger Barnard**

Regulatory Lawyer, London

Electricity Group

**ANNEX**

Impact on Code

*The following text shall be inserted in Section P.*

**6. PAST NOTIFICATION ERRORS**

**6.1 Meaning of Past Notification Error**

6.1.1 For the purposes of this Section P**:**

(a) a **'Past Notification Error'** has occurred in relation to the notification of Energy Contract Volume Data or Metered Volume Reallocation Data for a Settlement Period where and only where there was an error in the submission of a Volume Notification on the part of the Volume Notification Agent and/or the relevant Contract Trading Parties which was not rectified prior to Gate Closure for the relevant Settlement Period and where Gate Closure for such Settlement Period has occurred prior to the date on which this paragraph 6 comes into effect;

(b) references in this paragraph 6 to the submission of a Volume Notification**:**

(i) mean the submission of a particular Volume Notification, and

(ii) include a failure to submit a Volume Notification,

and the provisions of this paragraph 6 shall be construed accordingly;

(c) for the purposes of paragraph (a), an error in the submission of a Volume Notification will be considered to have occurred only where**:**

(i) the relevant Contract Trading Parties had, at the time of such sub- mission, a demonstrably settled and (save in the case of paragraph 1.4.1) shared commitment to notify particular ascertained Volume Data for the Settlement Period in question, and

(iii) it is clear that a mistake occurred in giving effect to that commitment;

(d) in relation to a claim of Past Notification Error**:**

(i) the **'relevant'** Volume Notification is the Volume Notification in respect of which the Past Notification Error has occurred,

(ii) the **'relevant'** Volume Notification Agent is the Volume Notification Agent which submitted or failed to submit (as the case may be) the relevant Volume Notification,

(iii) the **'relevant**' Settlement Period is the Settlement Period in respect of which the Past Notification Error has occurred,

(iv) a **'relevant**' Contract Trading Party is a Contract Trading Party in relation to which the Past Notification Error has occurred, and

(v) the **'rectified Volume Notification**' is the Volume Notification which would have been made had the Past Notification Error not occurred;

(e) in relation to a relevant Contract Trading Party, references to a Past Notification Error are to the Error which has (or is alleged to have) occurred in respect of such Party;

(f) **'Volume Data**' means Energy Contract Volume Data or Metered Volume Reallocation Data, as the case may be.

### 6.2 Claiming Past Notification Errors

6.2.2 Where a relevant Contract Trading Party considers that there has been a Past Notification Error, such Party may make a claim to that effect by giving notice of such claim to BSCCo, identifying the Past Notification Error(s) and the relevant Settlement Period(s), provided that no claim of Past Notification Error may be made after the expiry of five days after the date on which this paragraph 6 comes into effect.

6.2.2 Where a relevant Contract Trading Party makes a claim of Past Notification Error, such Party shall pay a fee to BSCCo for each such claim (provided that, for the purposes of this paragraph 6.2.2, and subject to paragraph 6.2.4, a claim may relate to more than one Past Notification Error in respect of the same Volume Notification), the amount of which shall be £5,000, or such other amount as the Panel may from time to time, after consultation with Parties and with the approval of the Authority, determine upon not less than 30 days' notice to Parties, and which shall not be reimbursed in any circumstances.

6.2.3 Where a relevant Contract Trading Party makes a claim of Past Notification Error (other than one to which paragraph 1.4.1 applies), the claim shall be accompanied by a statement in writing from the other relevant Contract Trading Party (addressed to BSCCo for the benefit of all Contract Trading Parties) confirming that it considers that the Past Notification Error has occurred.

6.2.4 A claim of Past Notification Error may not be made in relation to a Volume Notification in respect of which a previous claim has been made (and, accordingly, if a relevant Contract Trading Party wishes to claim Past Notification Errors in relation to more than one Settlement Period, a single claim must be made for all such errors).

6.2.5 A claim of Past Notification Error may be made in relation to a Volume Notification, notwithstanding that the Volume Notification was treated as rejected (in relation to the relevant Settlement Period) or refused, in accordance with paragraph 2.4 or 3.4, where the rectified Volume Notification (if submitted as described in paragraph 6.4.5) would not have been so treated, but without prejudice to paragraph 6.6.2.

### 6.3 Flagging Past Notification Errors

6.3.1 Where a Party gives notice of a claim of Past Notification Error under paragraph 6.2.1, BSCCo shall within one Business Day after receiving such notice notify the claim to the Energy Contract Volume Aggregation Agent, all Contract Trading Parties, and the relevant Volume Notification Agent.

### 6.4 Determination of Past Notification Errors

6.4.1 The Panel shall consider claims of Past Notification Error in accordance with this paragraph 6.4.

6.4.2 For the avoidance of doubt, the Panel may establish or appoint a Panel Committee to discharge its functions under this paragraph 6, and (notwithstanding Section W2.2) the Panel may appoint the Trading Disputes Committee, and (if so appointed) that Committee shall have the ability and competence, to do so.

6.4.3 Where a claim of Past Notification Error is made**:**

(a) the Panel Secretary shall arrange for the claim to be placed on the agenda of a meeting of the Panel, and shall request**:**

(i) the Party claiming the Past Notification Error to provide evidence and information supporting its claim,

(ii) the other relevant Contract Trading Party (if any) to provide evidence and information supporting the claim, and

(iii) the relevant Volume Notification Agent and the ECVAA to provide comments in relation to the claim;

(b) the Panel shall determine in its opinion whether there was a Past Notification Error and, if so**:**

(i) what it was, and

(ii) whether, under paragraphs 6.4.6 and/or 6.4.7, the Panel should decline to direct that the said error be rectified.

(c) the relevant Contract Trading Parties and the relevant Volume Notification Agent shall**:**

(iii) provide the Panel with such further information as it may reasonably request to assist it in making its determinations, and

(iv) confirm to the Panel that the evidence and information provided to the Panel are complete and not misleading;

(d) the Panel Secretary shall notify the Panel's determinations to all Contract Trading Parties and the relevant Volume Notification Agent;

(e) the fee under paragraph 6.2.2 shall be invoiced as and included in determining BSCCo Charges for the relevant Party for the next month for which BSCCo Charges are invoiced following the notification of the Panel's determinations under paragraph (d), and shall be paid accordingly.

6.4.4 Where the Panel has determined that there was a Past Notification Error, and unless it has determined that it should decline to direct that the said error be rectified**:**

(a) it shall direct that the said error be rectified in accordance with paragraph 6.5, and

(b) the BSCCo shall give such instructions to the ECVAA, SAA, and FAA as are necessary to give effect to such rectification.

6.4.5 The determinations of the Panel (or any Panel Committee established or appointed under paragraph 6.4.2) as to whether there was a Notification Error and, if so**:**

(a) what it was, and

(b) whether, under paragraphs 6.4.6 and/or 6.4.7, the Panel should decline to direct that the said error be rectified

shall be final and binding on all Parties.

6.4.6 Rectification of a Past Notification Error shall not be made if the rectified Volume Notification would have been invalid (pursuant to paragraph 2.3.4 or 3.3.4) or treated as rejected (in relation to the relevant Settlement Period) or refused (pursuant to paragraph 2.4 or 3.4) if such rectified Volume Notification had been submitted**:**

(a) at the time at which the relevant Volume Notification was submitted; or

(b) where the Past Notification Error is a failure to submit, immediately prior to Gate Closure for the relevant Settlement Period.

6.4.7 The Panel may decline to direct that a Past Notification Error be rectified**:**

(a) where it considers that the Contract Trading Party and/or Energy Contract Volume Notification Agent that made the error in the submission of the relevant Volume Notification did not**:**

(i) at the time that the Past Notification Error occurred, have in place prudent systems and processes for the checking of Volume Notifications (the question of whether such systems and processes were prudent to be judged in the light of the circumstances then prevailing), or

(ii) following discovery of the error, promptly take all appropriate steps in relation to such systems and processes to avoid a repetition of the said error; and

(b) in circumstances other than where:

(iv) the said Past Notification Error was directly attributable to BSC Systems,

(v) the said Past Notification Error and/or the magnitude of the loss suffered by the relevant Contract Trading Parties as a result arose from a combination of circumstances that could not have been reasonably foreseen, or

(vi) the magnitude of the loss suffered by one or more of the relevant Contract Trading Parties as a result of the said Past Notification Error was wholly disproportionate to the fault or error committed by that party.

**6.5 Rectification of Past Notification Errors**

6.5.1 Where the Panel has directed that a Past Notification Error should be rectified:

(a) the Panel shall determine what adjustments are required to the relevant Account Bilateral Contract Volumes, Metered Volume Fixed Reallocations, and/or Metered Volume Percentage Reallocations (as the case may be) to achieve the following effects:

(iii) to put the relevant Contract Trading Parties into the position that they would have been in had the Past Notification Error not occurred (subject to paragraph (ii) below), and

(iv) to impose on each of the relevant Contract Trading Parties in respect of each claim an Error Correction Penalty determined in accordance with paragraph 6.5.2; and

(b) such adjustments shall be made as soon as is practicable, and shall be taken into account in the next Settlement Run for the relevant Settlement Period.

6.5.2 In relation to a claim of Past Notification Error (provided that, for the purposes of this paragraph 6.5, and subject to paragraph 6.2.4, a claim may relate to more than one Past Notification Error in respect of a single Volume Notification covering more than one Settlement Period), an Error Correction Penalty is the lesser of:

(c) a sum equal to 20 per cent of the cash equivalent of the value (if any) to the relevant Contract Trading Party of being put into the position that it would have been in had the Past Notification Error(s) to which the claim relates not occurred; and

(d) £200,000.

For the avoidance of doubt, the maximum Error Correction Penalty applicable in respect of any claim shall be the amount provided for in this paragraph 6.5.2, regardless of the number of Past Notification Errors to which any particular claim relates.

**6.6 Credit arrangements**

6.6.1 Where a Past Notification Error is rectified, the rectification shall be taken into account for the purposes of the determination of the relevant Contract Trading Parties' Credit Cover Percentages in relation to Settlement Periods for which Gate Closure occurs after, but not earlier than, the time of the rectification.

6.6.2 In accordance with paragraph 6.6.1:

(a) where, in accordance with Section M, a relevant Contract Trading Party was treated before the time of the rectification as being in Credit Default and would not have been so treated had the rectified Volume Notification been submitted:

(i) Section M3.5 shall not apply, and such Party shall not be entitled to any right or remedy in respect of being so treated, and

(ii) to the extent that, as a result of such Party being so treated, any other Volume Notification was treated as rejected (in relation to any Settlement Period) or refused in accordance with paragraph 2.4 or 3.4, such refusal or rejection shall not be affected or prejudiced by the rectification of the Past Notification Error and Section M4 shall not apply in relation thereto;

(b) where, in accordance with Section M, a relevant Contract Trading Party would have been treated before the time of the rectification as being in Level 2 Credit Default had the rectified Volume Notification been submitted, and was not so treated, the rectification of the Past Notification Error shall not affect or prejudice any other Volume Notification which was not treated as refused before, or rejected as to Settlement Periods for which Gate Closure was before, the time of the rectification.

6.6.3 For the purposes of this paragraph 6.6, the time of the rectification of a Past Notification Error is the time with effect from which the ECVAA enters into its BSC Agent System the adjustments determined under paragraph 6.5.1.

**Section D**

*The following text shall be inserted in Section D4.1(a)(v):*

'(v) any amounts paid to BSCCo by way of fee pursuant to Section P6.2.2 or Section Q7.2.3;'

**Section G**

*The following text shall be inserted as a new Section G1.1.2(b) and the existing Section G1.1.2(b) and remaining paragraphs of Section G1.1.2 shall be renumbered accordingly:*

'(b) Section P6, which addresses the possibility of notification errors in the submission of Volume Notifications;'

**Section M**

*The following text shall be inserted as a new Section M3.5.2 and the title of Section M3.5 shall be amended to read 'Result of Trading Dispute, etc':*

'3.5.2 This paragraph 3 and paragraph 4 are subject to the provisions of Section P6.'

**Annex X–1**

*The following new definitions shall be inserted in Annex X–1:*

**'Past Notification Error'** has the meaning given to that term in Section P6.1.1(a);

**'Volume Data'** has the meaning given to that term in Section P6.1.1(f);

**'Error Correction Penalty'** has the meaning given to that term in Section P6.5.2

**P37_UMR_006 – TXU Europe Energy Trading Ltd**

Thank you for the opportunity to comment on the above urgent modification proposal. TXU Europe Energy Trading Ltd would like to make the following comments on behalf of all TXU Europe companies.[1] This response is set out as answers to the questions in the consultation, with further general comments at the end.

> Q1: Do you support Modification Proposal P37? Please support your answer by explaining why P37 better facilitates the applicable BSC objectives, or not, as the case may be?

TXU does not support this modification proposal. We do not believe that it is appropriate to make a retrospective modification to the Balancing and Settlement Code in this case. Particularly, we do not believe that the modification should be applied to notifications between energy accounts. The proposal references condition 7A.2(b)(ii) of the NGC transmission licence, however, this condition relates to "quantities of electricity contracted for sale and purchase between BSC Parties". It is unclear therefore whether this condition should be applied to an internal notification between the energy accounts of one BSC Party as this may not satisfy the definition of a contract and furthermore there is no sale and purchase between BSC Parties involved in this type of notification.

We do not believe that this modification proposal better facilitates the applicable BSC Objectives. Implementation of this proposal will not aid NGC in efficiently discharging it's obligations under the licence as we have noted above in relation to the condition relied on by London Electricity, nor will it assist the efficient, economic and co-ordinated operation of the Transmission System. TXU does not believe that to implement a retrospective modification will promote competition in either the generation or supply of electricity, in fact to implement a retrospective modification of this magnitude which undermines the basis on which investment was made in NETA systems and processes, may deter potential entrants to the market, or increase risks to current participants and have a detrimental effect on competition. Neither can we see how the proposal better promotes efficiency in the implementation and administration of the balancing and settlement arrangements.

> Q2: Do you believe that the ability to make retrospective adjustments of notifications (within a fixed period, following some effective date) would better achieve applicable BSC Objectives?

No, for the reasons given above.

> Q3: Do you agree with the way in which an erroneous notification is defined and circumscribed (as described, generally within Modification proposal P37, but more specifically given in Clause 6.1.1 of the legal drafting within the above proposal)? If your answer is no, please
>
> a. *Identify any features of the definition which you regard as inappropriate or inadequate, and why.*
> b. *Identify any additional features you believe should be included, and why.*

TXU believes that the definition should only apply to volume notification agents and not to contract trading parties, as a notification is always made by an ECVNA. Further, we believe that where an error has been made, the contract trading party should seek redress from the ECVNA. Where the trading party and the ECVNA is the same party, then that party has obviously decided to internalise

[1] TXU Europe Energy Trading Ltd; TXU Europe Energy Trading BV; TXU Europe Merchant Generation Ltd; TXU Europe Drakelow Ltd; TXU Europe High Marnham Ltd; TXU Europe Ironbridge Ltd; TXU Europe West Burton Ltd; Anglian Power Generators Ltd; Peterborough Power Ltd; Eastern Energy Ltd; TXU Energi Ltd (formerly Eastern Electricity Ltd); Norweb Energi; Citigen; Shotton CHP Ltd.

the risks associated with making ECVNs. This is a commercial decision and should a party subsequently find that they are unable to manage the risk, then they should not seek to make changes to the Balancing and Settlement Code to mitigate that risk.

Q4: Do you agree that the time limit for making claims, following implementation, should be 5 working days? If not, what should the time limit be, and why?

TXU do not support this modification, but should it be implemented then 5 working days would seem to be appropriate.

Q5: Do you agree that the administration fee for making a claim should be £5,000? If no, what should it be and why?

TXU do not support implementation, but should the proposal be approved then £5,000 seems reasonable.

Q6: Do you agree that a sufficient level of assurance is afforded by a claim being supported in writing by the counterparty? If not, what other assurance would be required?

Should this proposal be implemented, then it is vital that any claim is supported by the counterparty as claims may already have been made under the terms of the GTMA and it would be inappropriate for a Party to double-recover any imbalance charges. Although we do not believe that the proposal should apply to claims between energy accounts (as opposed to between BSC Parties), it is clear that in such cases some other level of assurance would be required.

Q7: Do you agree that the evidence to support a claim should be at the discretion of the Panel? If your answer is no, what specific evidence should be provided?

TXU does not support the proposal, but should it be implemented, then we agree that evidence should be at the discretion of the Panel.

Q8: Do you agree with the scope and definition of the following circumstances where the Panel may exercise discretion in declining to rectify a claimed notification error? If your answer is no for any of these circumstances, please give views as to what the deficiencies are:

- *Where the relevant Contract Trading Party (or its Agent) did not, at the time that the past notification error occurred, have in place prudent systems and processes for the checking of volume notifications (the question of whether such systems were prudent to be judged in the light of circumstances then prevailing).*

- *Where the relevant Contract Trading Party (or its Agent) did not, following discovery of the error, promptly take all appropriate steps in relation to relevant systems and processes to avoid a repetition of the said error.*

TXU believe that the Panel should be entitled to exercise discretion in all cases.

*Q9: So long as the circumstances described in Q8 have been satisfied, then the Panel may not decline to rectify a notification error under the following further circumstances:*

- *Where the past notification error was directly attributable to BSC Systems.*
- *Where the past notification error and/or the magnitude of the loss suffered by the relevant Contract Trading Parties as a result arose from a combination of circumstances that could not have been reasonably forseen.*
- *Where the magnitude of the loss suffered by one or more of the relevant Contract Trading Parties as a result of the said past notification error was wholly disproportionate to the fault of error committed by that Party.*

*Do you agree with the scope and definition of the above circumstances? If your answer is no for any particular circumstance, please give views as to what the deficiencies are.*

TXU does not believe that the first bullet point should be included as there are already provisions within the BSC to allow Parties to re-submit contract notifications following a failure of the ECVAA systems.

Regarding the second bullet point, this should be at the discretion of the Panel, and it may be appropriate for the Panel to seek representations from BSC Parties who have not made such errors as to whether or not such circumstances could have been forseen.

The final bullet point is more difficult as a loss may have been “disproportionate” due to high system prices for the relevant settlement periods, or due to a high volume being notified incorrectly, further, “disproportionate” is a subjective term and what may be seen as disproportionate in one instance may

not be in another. Therefore we think it appropriate that this is excluded and left to the discretion of the Panel.

*Q10 (A): Do you agree that an error correction payment, in the form of a percentage of the value of the rectification, should be levied?*

Yes.

*Q10 (B): If your answer to Q10 (A) was yes, do you agree with the level of error correction payment being 20%?*

Yes.

*Q10 (C): If your answer to Q10 (A) was yes, do you agree that the payment should be capped?*

No, TXU does not believe that a further cap should be applied to the 20%. This discriminates against smaller parties whose errors are less likely to be in excess of £1million and who will therefore feel the full effect of the further cap.

*Q10 (D): If your answer to Q10 (C) was yes, do you agree that the payment should be capped at £200,000. If your answer was no, what level do you believe would be appropriate.*

TXU do not believe that a further cap on top of the 20% is appropriate.

*Q10 (E): If your answer to Q10 (A) was no, what other form, if any, should the error correction payment take?*

N/A

*Q11: Do you agree with the approach taken to credit cover within the proposal? If your answer is no, please give reasons.*

Yes.

*Q12: What body do you believe should decide on whether a claim should be allowed?*

- *The Panel, as described in the proposal*
- *The Authority, taking into account the views of the Panel*
- *Some other body (please specify)*

The Panel.

*Q13: Do you agree that, if an error correction is allowed, there should be a full correction of the notified volumes and that the error correction payment should be separately dealt with? If your answer is no, please give reasons.*

Yes.

*Q14: Do you agree that the error correction payment should be based on energy imbalance charges and levied in respect of any energy account where a reimbursement arises? If your answer is no, please give reasons.*

Yes.

*Q15: Do you agree that error correction payments should be disbursed to all Parties, pro-rata on credited energy, adjusted to exclude those parties making the error correction payments themselves? If your answer is no, please give your reasons.*

Yes.

*Q16: What period of notice, if any, would be required before the proposal should take effect?*

TXU does not believe that this proposal should be implemented, but if it were approved, then 1 month's notice would be appropriate.

*Q17: Would your actions and behaviour have been different, had the proposal been anticipated at or before Go-Live? If yes, please identify which of the following would have been carried out differently and why:*

*a) Development and testing of systems and processes*

*b) Operation of systems and processes*

*c) Trading and notification strategies*

*d) Other*

The risk assessment that was undertaken by TXU, and indeed all the IT solutions and processes adopted, were on the basis of the rules of the Balancing and Settlement Code applying at the time and therefore it is difficult to say whether our behaviour would have been different. It is true to say that during the early stages of NETA, TXU like many other companies, submitted ECVNs many hours ahead of gate closure and scrutinised reports and feedbacks from the central systems to ensure that accurate ECVNs had been sent and received. Had there been provisions in place which would have enabled us to subsequently rectify notifications where errors had been made, it is more likely that we would have submitted notifications closer to gate closure, and there may have been more liquidity in the prompt market.

In addition to this, much of our time during Unified Pre-Production was spent ensuring that we were able to make accurate ECVNs and receive feedback flows and reports and that our systems were able to validate those reports. Had there been provisions to rectify ECVN errors in place at go-live we may have been able to spend the limited time available in UPP running more commercial scenarios. As we

were aware of the potentially huge financial consequences of making erroneous notifications, this was one of our priority areas during UPP.

General comments

The relevant Contract Trading Party should seek redress from the relevant ECVNA in the event of a failure to make a correct notification. Where the relevant Contract Trading Party and the relevant ECVNA are the same person then it is clear that the company has chosen to internalise the risks associated with making contract notifications. All Parties have the opportunity to employ a third party notification agent and should they decide not to, then they must face the consequences should they not be able to perform the function adequately. Other Parties have assessed the risks of making contract notifications and have decided, on the basis of the rules as they stand and the potentially high financial consequences, whether to use a third party agent or to invest in systems and processes themselves.

These are commercial investment decisions that companies have taken on the basis of rules existing in the BSC. It would be inappropriate to make subsequent retrospective changes to those rules, thus changing the fundamentals on which investment took was made.

Therefore TXU is strongly opposed to this modification proposal. We hope you have found our comments useful and should you wish to discuss any aspect of this response further, please contact me on the above number.

Yours sincerely

Nicola Lea
Market Development Analyst

**P37_UMR_007 – Edison Mission Energy**

Consultation on Modification Proposal P37

**Comments by Edison Mission Energy**

on behalf of
First Hydro Company, Edison First Power and Lakeland Power

**Q1 Do you support Modification Proposal P37?**

No. Retrospection does not fulfil objective c (promoting effective competition) as it allows parties to modify their contract positions after the event providing an unfair advantage to vertically integrated companies who would be able (subject to Panel approval) to balance post event. The only circumstances where post event notifications or corrections should be acceptable is where the failure or incorrect notification is due to a failure of central systems or processes. Widening the scope for allowable errors will lead to subjectivity and inconsistencies.

Allowing post event notification does not promote efficiency in the implementation of the balancing and settlement arrangements (objective d). Post event notification was not envisaged when NETA was designed. Allowing it will reduce efficiency as time will have to be spent on an individual assessment of each claim.

Objectives a and b are irrelevant to this modification, notification errors do not affect the operation of the transmission system.

Q2 See Q1

**Q3 Do you agree with the way in which an erroneous notification is defined and circumscribed?**

What constitutes a past notification error has not been defined and is open to interpretation For example, if a party fails to invest in adequate systems to notify contracts, or to train operators to use those systems competently or have systems and staff in place to interpret settlement reports that highlight errors, should they be able to claim that there has been an error? Allowing the correction of any errors will not incentivise participants to develop and test robust systems for contract notification. Instead, it will allow participants to use inadequate systems safe in the knowledge that failures in notification can be corrected after the event.

Additional features that should be included are a precise definition of an allowable error. For example, the 7 day report details all notification submitted up to 18:00 day ahead. This provides the opportunity to detect errors in contract notifications and rectify them prior to Gate Closure. If the 7 day report was expected but not received or if it contained incorrect information then a retrospective amendment might be appropriate. If the notification error was due to a failure to interpret the report correctly then a retrospective amendment is inappropriate.

Q4 **Do you agree that the time limit for making claims, following implementation, should be 5 working days**

A longer period is needed for those parties that do not support the modification but would make a claim were it to be approved. They will require additional time to pull together all the information to support their claim. This applies especially to smaller companies who might not have the resources to collate the information quickly. We suggest a minimum of 10 working days.

**Q5 Do you agree that the administration fee for making a claim should be £5000.**

If this represents the cost of administering the claim, then it is appropriate.

Q6 Do you agree that a sufficient level of assurance is afforded by a claim being supported in writing by a counterparty.

Only if the counterparty is not part of the same parent company. An independent view should be given regardless of the relationship of the counterparties and is essential if they are part of the same parent company.

Q7 Do you agree that the evidence to support a claim should be at the discretion of the Panel. If no, what specific evidence should be provided.

Since claims are to be treated on a case by case basis, this is appropriate.

**Q8. Do you agree with the scope and definition of the following circumstances where the Panel may exercise discretion in declining to rectify a claimed notification error.**

Where the relevant Contract Trading party did not at the time that the past notification error occurred, have in place prudent systems and process for the checking of volume notifications.

Agree.

Where the relevant Contract Trading party did not, following discovery of the error, promptly take all appropriate steps in relation to relevant systems and process to avoid repetition of the said error.

This depends on the duration of the error before it is discovered. Contract Trading parties should have systems and processes in place to spot an error via the 7 day report. If the Contract Trading party failed to spot an error the day after its occurrence and the duration of an error was more than a day, a claim should only be allowed for the first day of the error.

Q9 So long as the circumstances in Q8 have been satisfied, then the Panel may not decline to rectify a notification error under the following circumstances

**Where the past notification error was directly attributable to BSC systems**

Agree, this should be extended to BSC processes and procedures.

Where the past notification error and/or the magnitude of the loss suffered arose from a combination of circumstances that could not have been reasonably foreseen

**What does reasonably foreseen mean? After the event it is rather subjective and reasons for errors can be tailored to support arguments in a claim. The requires tightening up.**

Where the magnitude of the loss suffered as a result of the past notification error was wholly disproportionate to the fault or error committed by that Party.

**The magnitude of the loss is irrelevant, all claims should be treated equitably regardless of the amount lost as a result of past notification errors. There should be no special treatment just because a party has suffered a large loss.**

Q10A Do you agree that an error correction payment in the form of a percentage of the value of the rectification should be levied?

**Yes**

Q10B Do you agree that the level of the error correction payments should be 20%

**Yes**

Q10C/D Do you agree that the payment should be capped at £200k

**No. Parties making claims for smaller losses of less than £1m would be disproportionately fined. It should be a flat rate of 20% regardless of the value of the rectification.**

Q11 Do you agree with the approach to credit cover taken within the proposal?

**Agree, there is no point in reopening the credit cover calculations since these are essentially forward looking.**

Q12 What body should decide on whether a claim should be allowed?

**To ensure impartiality, the Authority should make the decision, taking into account the views of the Panel.**

Q13 Do you agree that, if an error correction is allowed, there should be a full correction of the notified volumes and that the error correction payment should be separately dealt with.

**Yes**

Q14 Do you agree that the error correction payment should be based on energy imbalance charges and levied in respect of any energy account where a reimbursement arises

**Yes**

Q15 Do you agree that the error correction payments should be disbursed to all parties, pro rata on credited energy, adjusted to exclude those parties making the error correction payments themselves?

**Yes**

Q16 What period of notice would be required before the proposal takes effect.

**This depends on, the decision on Q4. If claims must be made within 5 working days of implementation of the modification, there should be a period of notice before the proposal takes effect to allow parties to prepare claims of a further 5 working days.**

Q17 Would you actions and behaviours have been different, had the proposal been anticipated before Go-Live?

**Given the uncertainty of success and the subjectivity in agreeing whether or not a notification was erroneous, it would be unwise to adopt a strategy**

**of developing inadequate systems in the hope that retrospective notifications would be allowed. No ambiguity should be allowed.**

Libby Glazebrook
Edison Mission Energy
27 September 2001

## P37_UMR_008 – Powergen UK plc

Thank you for giving us the opportunity to comment on this proposal. Powergen UK plc ('Powergen') provides this response on behalf of itself and the following BSC Parties: Powergen Energy plc, Diamond Power Generation Limited and Cottam Development Centre Limited.

Powergen does not support this proposal. In our view effectively extending the scope of BSC manifest error provision beyond the central systems could seriously undermine the integrity of the new trading arrangements, reducing incentives to notify accurately, creating uncertainty in the settlement processes and a stream of claims the management of which will place a substantial cost burden on the industry. Furthermore we also believe the proposal fails to address the specific concerns (paragraph 25) and guidance on retrospectivity (paragraphs 28, 31, 33, 36 and 37) outlined in Ofgem's P19 decision letter dated 1 August 2001

In considering its recommendations we would like to bring the BSC Panel's attention to the following

points (responses to specific consultation questions are addressed in Appendix A):

- The importance of accurate notifications and the potential financial risk of making errors were well understood by BSC signatories prior to Go-live. As a result many companies have invested hundreds of thousands of pounds in additional manpower, systems and procedures just to minimise these risks. If a more relaxed NETA regime had been planned prior to Go-live (as is effectively advocated by this proposal) significantly less investment would have been made.

- In particular the significant potential risks associated with intra company notification errors (i.e. large transactions where the notification risk can not be shared in a contract with an external counterparty) should have been clear to all BSC participants. Prudent players will have concentrated their efforts on making such risks as residual as possible. In this context we do not believe it is fair to say "loss is largely a consequence of chance and bears little, if any, relationship to the scale or nature of the error committed by the party concerned".

- Although we are not aware of the full circumstances behind London Electricity's notification error we would suggest that it is difficult to conclude that "the number of circulars and bulletins relating to central system problems made validation unusually difficult" (Ofgem letter paragraph 33). In London's submission under P19 they refer to 14 Elexon circulars (largely dealing with SSP/SBP data) which may have added to some confusion, but none of these circulars describe conditions that could affect a BSC Party's ability to submit and validate ex ante notification data. **On the relevant date (3 April) we were not aware that there were any problems with either the operation of the central systems or provision of data through the E0221 ECVAA 7 day report** that could have lead to inaccuracies in notified data or the ability of parties to validate notifications submitted.

- In circumstances where parties have not acted prudently to minimise the probability of error relative to the risks involved, we would contend that losses of the size suffered by London Electricity are wholly proportionate to the "incentives necessary to achieve accurate notifications" (Ofgem letter paragraph 25). In Appendix B we have attempted to identify examples of prudent behaviour designed to both reduce the risk of errors the first place and minimise the consequences of any error should such errors actually occur.

- If the BSC Panel became the appeals body for notification error claims (whether such responsibilities were delegated or otherwise) they would be faced with making judgements, which could easily be open to legal challenge especially if different rulings on ostensibly similar cases were made. The scope for such challenge is potentially huge compared to the limited scope of the current BSC manifest error provisions. This places members of the BSC Panel in a very difficult position.

- We also believe it is important to ensure, as far as is reasonably practical, consistency of treatment of manifest errors across the gas and electricity markets. Nevertheless the example of retrospective action cited by London Electricity in respect of Network Code Modification 64 in our view is not directly relevant to this proposal. That proposal simply sought to rectify a rule, which essentially existed because the Transco central systems didn't initially have full functionality to insert zero nominations automatically. The process by which shippers were required to insert zero nomination was clearly a superfluous activity which bore no relationship to actual transactions between shippers. Although the possibility of retrospective action was not directly signalled at the time (Ofgem letter paragraph 36) the expectation within the industry was that retrospective application of a modification was probable and indeed reasonable.

- Should the Panel believe there is some merit in this proposal (despite the above comments), we believe it is important that recommendations are made to restrict claims to very limited and exceptional circumstances. We believe that any claimant should be required to demonstrate beyond reasonable doubt that he had taken all reasonable steps (to the standard of a reasonable and prudent operator (RPO)) to prevent notification errors happening in the first place and minimise the impact of errors should they actually occur. The actions taken should be commensurate with the risks and costs that a RPO could have reasonably anticipated, given circumstances prevailing at the time. In addition the Panel should have the power to limit the scope of any claim (which may be made up of a series of similar errors across consecutive periods) to periods during which the claimant has acted as an RPO. In Appendix B we have given some examples of possible circumstances where a claim might be entertained under these criteria.

In general we consider that London Electricity's proposal would reduce the efficiency in the implementation and administration of the balancing and settlement arrangements. The expense of dealing with numerous claims could prove prohibitive for the industry and the proposal will significantly weaken the disciplines in the regime to avoid errors in the first place. It also important to note that the efficiency of the market or indeed prices paid by electricity consumers does not seem to have been affected by notification errors made in the first few weeks of NETA. We therefore do not believe this proposal better meets the Applicable BSC Objectives.

In the light of the above comments we would urge the Panel to recommend this proposal be rejected outright.

Yours sincerely

Peter Bolitho
Trading Arrangements Manager
Powergen UK plc

## Appendix A - Specific Consultation Questions

Please note answering these questions does not imply support by Powergen for the proposal. Nevertheless, should the BSC Panel and the Authority conclude there is merit in this proposal, we believe appropriate mechanisms should be put in place to restrict claims to very defined and exceptional circumstances.

*Q1 Do you support Modification Proposal P37? Please support your answer by explaining why P37 better achieves the applicable BSC objectives, or not, as the case may be?*

No. There is a very real risk that the proposal will threaten the integrity of the new trading arrangements. In our view the proposal could potentially open the floodgates for all sorts of spurious claims, and routine ex post adjustments to notifications would undermine the robustness of notification and settlement data which will increase industry costs.

London assert that the objects described in NGC's Licence Condition 7A.2 are not achieved; a view with which we disagree. However Condition 7A.2 needs to be seen in the broader context of the

objectives set out in Condition 7A.3. In particular, sub paragraph 3(d) requires "efficiency in the implementation and administration of the balancing and settlement arrangements".

Furthermore London Electricity's interpretation of NGC's Condition 7A Licence obligations does not seem applicable to internal intra company notifications. Paragaph 2(b)(ii) provides for the settlement of obligations between BSC Parties arising by reference to the quantities referred to in sub paragraph 2(b)(i), including "the quantities of electricity contracted for sale and purchase between BSC Parties". However, London's proposal includes quantities that are not contracted between BSC Parties but are transfers between the energy accounts of just one party.

*Q2 Do you believe that the ability to make retrospective adjustments of notifications (within a fixed period, following some effective date) would better achieve applicable BSC objectives? If your answer is yes, but your answer to Q1 was no, please give reasons.*

No

*Q3 Do you agree with the way in which an erroneous notification is defined and circumscribed (as described, generally within Modification proposal P37, but more specifically given in clause 6.1.1 of the legal drafting within the above proposal)? If your answer is no please a) identify any features of the definition which you regard as inappropriate or inadequate, and why.*
*b) identify any additional features you believe should be included , and why.*

Failure to submit a Volume Notification should not be considered as a Past Notification Error (6.1.1(b) (ii)). In our view it would be extremely difficult to demonstrate intent to notify. It is one thing to enter data incorrectly and another to omit to submit data altogether.

*Q4 Do you agree that the time limit for making claims, following implementation, should be 5 working days? If not, what should the time limit be, and why?*

Yes

*Q5 Do you agree that the administration fee for making a claim should be £5,000? If not what should it be any why?*

Yes provided the error correction fee is set at 20% of any claim, and the £5,000 is in addition to the error correction fee. The £5,000 fee is consistent with the fee that applies with respect to claims for Manifest Error.

*Q6 Do you agree that a sufficient level of assurance is afforded by a claim being supported in writing by the counterparty? If not, what other assurance would be required.*

This provides a high degree of assurance for most inter company transactions. Clearly support by a counterparty is not relevant in the context of intra-company transactions. However, without corroboration by another organisation, how can any decision to allow an intra-company claim ever be safe? It would seem that there is greater potential scope to make spurious claims in the case of intra company errors where a single party is involved compared to inter company claims where two parties can provide supporting evidence. Also it may be clear an error has been made, but difficult to ascertain the 'correct' notification value. Conveniently, the value claimed might include a party's forecasting error, which he is now in a position to determine.

We are very sceptical that evidence provided by a single trading party with respect to internal intra company notifications, could be verified even by an external party. In our view it isn't feasible to obtain cast iron assurances as to the legitimacy of such claims. We therefore believe if accepted P37 should be amended to limit claims to inter company transactions.

*Q7 Do you agree that the evidence to support a claim should be at the discretion of the Panel? If you answer is no, what specific evidence should be provided?*

Yes – it is always difficult to be prescriptive as to what evidence will be required to support a claim. Given that the burden of proof should be on the claimant to make the case we don't believe this should cause the Panel too many difficulties. Nevertheless, we believe the claimant should satisfy the tests outlined in our response to Q8 below and evidence on good industry practice provided by other BSC participants.

*Q8 Do you agree with the scope and definition of the following circumstances where the Panel may exercise discretion in declining to rectify a claimed notification error? If your answer is no to any of these circumstances, please give views as to what the deficiencies are:*

*Where the relevant Contract Trading Party (or its Agent) did not, at the time that the past notification error occurred, have in place prudent systems and processes for the checking of volume notifications (the question of whether such systems and processes were prudent to be judged in the light of circumstances then prevailing).*

*Where the relevant Contract Trading Party (or its Agent) did not, following discovery of the error, promptly take all appropriate steps in relation to relevant systems and processes to avoid a repetition of the said error.*

No – the scope and definition in this section of the proposal needs to be tightened up. We offer the following suggestions:

**A Reasonable and Prudent Operator (RPO) test**

We believe that the burden of making a claim should fall upon the claimant and that if the proposal proceeds then the draft wording should reflect that burden of proof. Furthermore the draft wording should reflect paragraph 25 of Ofgem's previous P19 decision. Accordingly we consider that paragraph 6.4.6 should be replaced with the following text:

"6.4.6 The Panel shall reject a Party's claim for a Past Notification Error unless such Party can prove:

(a) the nature of the error and that such Party took all reasonable steps to prevent the error occurring, and
(b) that such Party had acted prudently in checking its notification

In regard to the above, such Party shall be required to demonstrate beyond reasonable doubt that he had taken all reasonable steps (to the standard of a reasonable and prudent operator) to prevent notification errors happening in the first place and taken all such steps to minimise the impact of errors should they actually occur. The actions taken should be commensurate with the risks and costs that a RPO could have reasonably anticipated, given circumstances prevailing at the time."

**The scope of any claim**

A claim may relate to a number of consecutive trading periods in which a similar error has been made (e.g. buy rather than sell). For example a failure of the central systems to deliver the 7 day report may have prevented the checking of notifications for particular periods ahead of gate closure. It might only be reasonable to allow rectification of errors for those periods in which it was not possible to check notifications. Thus the Panel should have the authority to determine whether they allow claims in full or part.

In determining the extent to which a claim may be allowed and whether the above RPO conditions have been met the BSC Panel should be required to hear evidence and comment on and determine good practice from other BSC parties and relevant industry experts to

inform their decision. In our view, without evidence from the rest of the industry, the Panel Committee or Elexon are unlikely to have the knowledge of participant systems and procedures to judge the RPO test or scope of any claim.

It is however difficult to set strict and comprehensive guidelines for the Panel on these issues ahead of time. It would therefore seem reasonable to both allow a BSC party to make their case for a notification error and other BSC parties (who will suffer loss in terms of a reduction in earning from residual cash flow) to make the case against the claimant. In opposing a claim BSC parties would need to know the circumstances behind any claim - evidence could be made available in writing in advance of any hearing so that they can (if they wish) take the opportunity to dispute the basis of any claim.

It will be necessary for Elexon to promptly publish details of the magnitude of any claim for error, the impact on residual cash flow (to enable parties to make provision for potential losses) and how in the view of the claimant the error occurred. Once a judgement has been made all submissions would need to be published to that "case law" could be built up as to the expected future conduct of an RPO.

*Q9 So long as the circumstances described in Q8 have been satisfied, then the Panel may not decline to rectify a notification error under the following further circumstances:*

*Where the past notification error was directly attributable to BSC Systems.*

*Where the past notification error and/or the magnitude of loss suffered by the relevant Contract Trading Parties as a result arose from a combination of circumstances that could not have been reasonably been foreseen.*

*Where the magnitude of the loss suffered by one or more of the Contract Trading Parties as of the said past notification error was wholly disproportionate to the fault or error committed by that Party.*

*Do you agree with the scope and definition of the above circumstances? If your answer is no for any particular circumstances, please give views as to what the deficiencies are.*

Agreed. Nevertheless, the burden of proof should rest firmly with the claimant. If they are unable to demonstrate one of the above to the reasonable satisfaction of the Panel the claim should be rejected. In relation to the "magnitude of the loss....was wholly disproportionate to the fault to the fault or error committed", we would refer you back to bullet point 5 in our covering letter that suggests such circumstances should be rare and perhaps unlikely to apply in the London Electricity case.

*Q10A Do you agree that an error correction payment, in the form of a percentage of the value of the rectification, should be levied?*

Yes . Incentives are required to encourage BSC participants to submit correct notifications in the first place.

*Q10B If your answer to Q10A was yes, do you agree with the level of error correction payment being 20%. If your answer was no, what level do you believe would be appropriate.*

Yes. To limit the scope of particular claims made, we would suggest the error correction payment applies to the whole of any claim irrespective as to whether only part of the claim is allowed (see also comments on scope of claim under Q8) is allowed by the Panel. This would help dissuade speculative claims.

*Q10 C If your answer to Q10A was yes, do you agree that the payment should be capped.*

No. We understand that London Electricity in proposing Modification Proposal P37 have sought to address the concerns raised in Ofgem's decision letter for P19. However, we find London's interpretation of paragraph 25 of Ofgem's letter to be rather too creative. The nature of scope of any error is likely to be related to the size of transactions normally undertaken by a BSC participant. However, a large company's errors may not proportionately be more than those made by a smaller player. A straight error percentage payment without a cap is by definition proportionate. Do bigger players really need greater protection from their errors?

*Q10D If your answer to Q10C was yes, do you agree that the payment should be capped at £200,000. If your answer was no, what level do you believe would be appropriate.*

Not applicable - see Q10C above.

*Q10E If your answer to Q10 (A) was no, what other form, if any, should the error correction payment take?*

Not applicable – see Q10A.

*Q11Do you agree with the approach to credit cover taken within the proposal? If your answer is no, please give reasons.*

Yes.

*Q12 What body do you believe should decide on whether a claim should be allowed?*
*The Panel as described in the proposal.*
*The Authority, taking into account the views of the Panel*
*Some other body (please specify)*

The Panel. The proposal is designed to set out a process for consideration of notification claims in general. We assume that if the proposer had wished his notification error to be dealt with as an individual special case (with the final decision residing with the Authority) the proposal would have been drafted accordingly. Please also refer to our response to Q8 which deals with how, in our view, the decision making body should assess whether a claim should be allowed.

*Q13 Do you agree that, if an error correction is allowed, there should be full correction of the notified volume and that the error correction payment should separately dealt with. If your answer is no, please give reasons.*

Yes.

*Q14 Do you agree that error correction payments should be based on energy imbalance charges and levied in respect of any energy account where a reimbursement arises? If your answer is no, please give reasons.*

Yes

*Q15 Do you agree that error correction payments should be disbursed to all Parties, pro-rata on credited energy, adjusted to exclude those Parties making the error correction payments themselves? If your answer is no, please give reasons.*

Yes

*Q16 What period of notice, if any, would be required before the proposal should take effect?*

Ten days would seem reasonable. A substantial backlog of claims is possible and the industry requires time to collate the details of claims going back to Go-Live. It is essential that estimates as to the potential size of claims under this proposal are made quickly so that appropriate provisions can be reflected in company accounts.

*Q17Would your actions and behaviour been different, had the proposal been anticipated at or before Go-Live? If yes, please identify which of the following would have been carried out differently and why:*

*a) Development and testing of systems and processes*
*b) Operation of systems and processes*
*c) Trading and notification strategies*
*d) Other*

It is likely that we would have been less rigorous in managing these activities. As with many other companies we estimate that we have invested hundreds of thousands of pounds in additional manpower, systems and procedures just to minimise these risks associated with potential notification errors. In particular we identified at an early stage the high risk associated with internal intra company notifications.

## Appendix B - Examples of actions of a reasonable and prudent operator (RPO) with respect to MVRNs and ECVNs

The examples below are intended to be indicative and should not been seen as an exhaustive list

### Bad Practice

Leaving notifications to the last minute even though a contract has been agreed with a counterparty well in advance of gate closure. This in itself increases the probability of errors and the likely impact of any errors should say the 7 day report fail to be delivered.

### Good Practice

All systems and processes should demonstrably have been subjected to an appropriate testing regime.

Under the current ECVAA User Requirements Specification

100 % MVRNs are a convenient and low-risk method of consolidating physical volume and should be used in preference to individual notifications

For a claim to succeed the claimant should demonstrate:-

- for bilateral trades entered into:-
    - before 18:00 of the day before the claim day adherence to GTMA Schedule 3a or b, or a similar bilateral agreement;
    - on the day before the claim day that a reasonable attempt was made to resolve a difference identified by the Schedule 3 type processes;
    - after 18:00 of the day before the claim day that robust processes were in place at both itself and its counterparty to minimise the risk of an incorrect notification.
- for physical volume being transferred within an affiliated group, either by MVRNs or ECVNs :-
- that a best view of the volume (e.g. IPN quantities) had been notified in time to be reflected on the ECVAA Forward Contract Report (aka 7 Day Report), giving assurance of the notifier's process and a backstop notification in case of subsequent ECVNA system failure;
- that robust procedures were in place to cover non-working days
- that robust procedures were in place to monitor within-day adjustments to the physical transfer. These procedures could include:-
    - Manual review of files being sent to the ECVAA to validate the sign and sensible magnitude of a notification;
    - Daily checklists to enable confirmation that expected adjustments of the position have been made;
- that the validation processes based on the 7 Day Report make full use of the reports features e.g. its removal of the ‘from and to’ signing associated with the ECVNAA id;
- that robust procedures were in place surrounding the setting up and amendment of ECVNAA data to ensure that the correct data was in place and that the transfer direction was understood

It can be seen from the above that the sort of claims that might reasonably be allowed would be those where the notifier has:-

- not been sent a 7 Day Report, despite reasonable attempts to resolve any issues preventing delivery;
- despite having acted as an RPO in the design and installation of its systems, has experienced a systems or process failure which has led to incorrect data being submitted on or just before the claim day, either as new data or overwriting existing verified data.

## P37_UMR_009 – APX

APX response to P37 Consultation

Q1 - Yes - APX does support this modification and believes that the BSC Objectives would be better achieved if this modification were to be implemented. In order to promote effective competition, the BSC must be seen to place appropriate costs on parties for the actions, or omissions, that they undertake. As has been seen, the application of the current rules, in certain circumstances, can result in disproportionate costs being levied. If parties see injustices in the BSC not being rectified, this may well dissuade parties from participating in the trading arrangements and thus limiting competition.

Q2 - Yes.

Q3 - In general we agree but there may also be circumstances when the
Notification Agent will be able to provide additional evidence and this should be drawn upon as appropriate.

Q4 - The modification states that a further modification will be raised to cover future notification errors. The implementation date of this proposal (P37) should be set such that were the other modification to be approved, then there should not be a gap between being able to claim for retrospective errors and future errors. To the extent that parties would have notice of the pending implementation of this modification, a five day time limit is appropriate.

Q5 - The administration fee should reflect the Elexon costs in processing any claim. Views should be sought from Elexon on the likely cost.

Q6 - Yes - there will be cases where only the two parties involved in the trade will know any details of the claim, therefore the only evidence available will be provided by the two parties. Claims for incorrect notifications between energy accounts of the same company should also be considered, in this case evidence will only be available from one trading party.

Q7 - Yes - The Panel should have absolute discretion in the evidence they require.

Q8 - Yes.

Q9 - Yes.

Q10(a) - No.

Q10(e) - The P19 Ofgem decision document talks about "incentives to achieve accurate notifications". This modification is purely looking at retrospective notifications, hence it is inappropriate to talk about incentives in this context and any "error correction payment" would simply be an arbitrary punishment. Any modification that was concerned with future errors could legitimately include "incentive" arrangements.

Q11 - Yes.

Q12 - The Panel should decide.

Q13 - Agree.

Q14 - Yes.

Q15 - No - As the error correction payment is recovered as a result of incorrect notifications, it should be redistributed to parties who have invested in systems and process that allow them to correctly notify. Therefore the payment should be redistributed on the basis of "Gross Contract MWh" as calculated in paragraph 3.2 in Annex D-3 of the Code. It is not appropriate to recover payments levied in respect of "incorrect" contract notifications on the basis of metered volumes.

Q16 - The modification undergoing the due process of the Code is sufficient notice.

Q17 - No.

Ian Moss
Automated Power Exchange
27th September 2001

## P37_UMR_010 – EDF Trading Limited

In response to the urgent consultation and impact analysis of Modification Proposal P37, EDF Trading Limited have formulated the following response to the questions raised in Section 5 of the consultation document.

*Q1: Do you support Modification Proposal P37? Please support your answer by explaining why P37 better achieves the applicable BSC Objectives, or not, as the case may be?*

Response: EDF Trading Limited fully support Modification P37 to provide a retrospective remedy of past notification errors. We believe that P37 better serves the BSC Objectives so that settlement of imbalance obligations will be conducted by reference to a BSC parties true contracted position, as required by condition 7A of the NGC Transmission Licence, rather than by reference to erroneously notified positions.

*Q2: Do you believe that the ability to make retrospective adjustments of notifications (within a fixed period, following some effective date) would better achieve applicable BSC Objectives?. If your answer is yes, but your answer to Q.1 was no, please give reasons.*

Response: We believe retrospective adjustments of notifications would better achieve the BSC Objectives particularly in promoting efficiency in the implementation and administration of the balancing and settlement arrangements.

*Q3: Do you agree with the way in which an erroneous notification is defined and circumscribed (as described, generally within Modification Proposal P37, but more specifically given in clause 6.1.1 of the legal drafting within the above proposal)? If your answer is no please*

*a. Identify any features of the definition which you regard as inappropriate or inadequate, and why.*

*b. Identify any additional features you believe should be included, and why.*

Response: We agree with the definition of 'Past Notification Error' as stated in clause 6.1.1.

*Q4: Do you agree that the time limit for making claims, following implementation, should be 5 working days? If not, what should the time limit be, and why?*

Response: We believe the timeframe for making claims, following implementation, should be extended to at least 10 working days. This is to allow sufficient time to gather information to meet the requirements of claiming past notification errors as defined in clause 6.2 of the legal drafting of modification proposal 37.

*Q5: Do you agree that the administration fee for making a claim should be £5,000? If not, what should it be and why?*

Response: We recognise that the BSCCo will incur administrative costs for processing each claim. We believe the claim administrative fee of £5,000 has been defined at the correct level to avoid submissions of small claims.

*Q6: Do you agree that a sufficient level of assurance is afforded by a claim being supported in writing by the counterparty? If not, what other assurance would be required.*

Response: We believe that a claim supported in writing by the counterpart and also by the notification agent in confirming that they consider that a 'Past Notification Error' has occurred should provide a sufficient level of assurance to the claim.

*Q7: Do you agree that the evidence to support the claim should be at the discretion of the Panel? If your answer is no, what specific evidence should be provided?*

Response: We agree that the evidence to support the claim to be at the reasonable discretion of the Panel. As stated in the response to question 4 sufficient time must be allowed to gather the evidence to meet the claim requirements.

*Q8: Do you agree with the scope and definition of the following circumstances where the Panel may exercise discretion in declining to rectify a claimed notification error? If your answer is no for any of these circumstances, please give views as to what the deficiencies are:*

- *Where the relevant Contract Trading Party (or its Agent) did not, at the time that the past notification error occurred, have in place prudent systems and processes for the checking of volume notifications (the question of whether such systems and processes were prudent to be judged in the light of circumstances then prevailing).*

Response: We believe that it should be sufficient for the claimant to demonstrate that it used due diligence to have in place a prudent system and checking processes at the time the past notification error occurred. For example, where the claimant has invested in a recognised contract notification system and processes and obtained a statement from the software vendors on their systems meeting NETA requirements this should be sufficient grounds to demonstrate that prudent steps had been taken.

- *Where the relevant Contract Trading Party (or its Agent) did not, following discovery of the error, promptly take all appropriate steps in relation to relevant systems and processes to avoid a repetition of the said error.*

Response: We agree that a Contract Trading Party (or its Agent) requires to demonstrate that all appropriate steps in relation to systems and processes to avoid a repetition of the said error. For example, where a party has made system enhancements to the checking of the 7 Day Contract Notification Forward report, after a past notification error has occurred, this should be sufficient

evidence to meet such a requirement. Also where a party demonstrates investing in a 'back-up' contract notification system should be seen as taking corrective measures to minimise future losses.

*Q9: So long as the circumstances described in Q8 have been satisfied, then the Panel may not decline to rectify a notification error under the following further circumstances:*

- *Where the past notification error was directly attributable to BSC Systems.*
- *Where the past notification error and/or the magnitude of the loss suffered by the relevant Contract Trading Parties as a result arose from a combination of circumstances that could not have been reasonably foreseen.*
- *Where the magnitude of the loss suffered by one or more of the relevant Contract Trading Parties as a result of the said past notification error was wholly disproportionate to the fault or error committed by that Party.*

*Do you agree with the scope and definition of the above circumstances? If your answer is no for any particular circumstance, please give views as to what the deficiencies are.*

Response: We agree with the scope and definition of the above circumstances.

*Q10 (A) Do you agree that an error correction payment, in the form of a percentage of the value of the rectification, should be levied?*

Response: We believe a percentage of the value of the rectification would be most appropriate to calculate the error correction payment.

*Q10 (B) If your answer to Q10(A) was yes, do you agree with the level of error correction payment being 20%. If your answer was no, what level do you believe would be appropriate.*

Response: We believe the correction payment is too high we feel that the percentage should be lowered to 5%.

*Q10 (C) If your answer to Q10(A) was yes, do you agree that the payment should be capped.*

Response: We express no conclusive view as to whether the payment should be capped, but if appropriate the cap should be referable to the size of the claim.

*Q10 (D) If your answer to Q10(C) was yes, do you agree that the payment should be capped at £200,000. If your answer was no, what level would do you believe would be appropriate.*

Response: Refer to response to Q10(C).

*Q10 (E) If your answer to Q10(A) was no, what other form, if any, should the correction payment take?*

Response: Refer to response to Q10(C).

*Q11: Do you agree with the approach to credit cover taken within the proposal? If your answer is no, please give reasons.*

Response: We agree with clause 6.6.1.in the legal drafting of modification proposal 37.

*Q12: What body do you believe should decide on whether a claim should be allowed?*

Response: We believe the BSC Panel would be the most suitable body to deal with the claim.

*Q13: Do you agree that, if an error correction is allowed, there should be a full correction of the notified volumes and that the error correction payment should be separately dealt with? If your answer is no, please give reasons.*

Response: We agree.

*Q14: Do you agree that the error correction payment should be based on energy imbalance charges and levied in respect of any energy account where a reimbursement arises? If your answer is no, please give reasons.*

Response: We agree.

*Q15: Do you agree that the error correction payments should be disbursed to all Parties, pro-rata on credited energy, adjusted to exclude those Parties making an error correction payments themselves? If your answer is no, please give reasons.*

Response: We agree.

*Q16: What period of notice, if any, would be required before the proposal takes effect.*

Response: We believe 10 working days provides sufficient notice.

*Q17: Would your actions and behaviour have been different, had the proposal been anticipated at or before Go-Live? If yes, please identify which of the following would have been carried out differently and why:*

*a. Development and testing of systems and processes*

*b. Operation of systems and processes*

*c. Trading and notification strategies*

Response: (a) The development and testing of system and processes would have been unaffected by modification proposal 37. EDF Trading Limited took an active participation in testing particularly of contract notifications with Logica central systems before Go-Live.

(b) The operations of NETA systems and processes at EdF Trading would have had no impact as a result of this proposal.

(c) Trading and other notification strategies by EDF Trading would have been unaffected by this proposal.

**P37_UMR_011 – British Energy plc**

BSC Modification Proposal P37 - To provide for the remedy of past errors in Energy Contract Notifications and in Metered Volume Reallocation Notifications

British Energy does not support this proposal.

Retrospective changes to the BSC would undermine confidence in the trading arrangements and increase investment risk for all parties. This would act against the BSC objectives of promoting efficiency and competition. All parties were aware of the NETA design principles and most invested substantial amounts in the design, testing and operation of their systems and processes. If such a significant rule change had been envisaged this would clearly have affected these investment decisions, and it would be unfair to allow parties with less robust processes to change the rules after the event.

British Energy acknowledges that a prospective mechanism to allow correction of future notification errors might better facilitate BSC objectives. We also acknowledge that this proposal contains ideas some of which may be able to be developed into a robust mechanism. However, we do not believe that such a change should be made hastily without proper consideration in a sensible timescale in which all parties are able to participate. A correction mechanism needs to ensure that strong incentives for accurate and timely notification remain and that there is no opportunity to exploit the mechanism to notify post-gate closure contracts.

We have a number of minor detailed comments on the proposed correction process, but have had insufficient time to provide detailed comments at this time:

- There are two sides to every notification - how would the costs and "penalties" apply to the two sides?
- Either the ECVNA or one or both of the parties to the contract could be at fault - how will this distinction be handled?
- Percentage "penalty" based on what volume and price, and applicable to who? Imbalance costs of the two parties are a moving target as imbalance prices and costs change with each run of settlement. To go back to individual contract prices would be extremely difficult, and outside the BSC.
- The fees and penalties to be applied, and the route by which they are "recycled" to achieve the BSC objectives, need to be more carefully considered.

Martin Mate
For British Energy Power & Energy Trading Ltd
British Energy Generation Ltd, Eggborough Power Ltd

**P37_UMR_012 – BGT**

Urgent Modification 37: To provide for the remedy of past errors in Energy Contract Notification and in Metered Volume Reallocation Notifications

Thank you for the opportunity to respond to this modification proposal. This response is on behalf of British Gas Trading and Accord. As requested we have answered the specific questions raised by the consultation below. However as we are opposed to this modification we have not answered Questions 3 to 16 as we do not consider these relevant to our response.

The main points from BGT's response are:

- We do not support this modification although we can sympathise with the circumstances that have caused it to be raised. It is true that the combination of high imbalance prices and energy contract volume notification errors can mean the consequences of the notification error are out of proportion with the error but we do not believe the results can be fully unwound without significant impact on the industry.
- Introducing retrospection will increase market uncertainty. Ofgem have not been prepared to agree with retrospection for pricing issues (e.g. Mod 18); volumes should not be treated any differently.
- The modification is sufficiently wide in scope that it could potentially allow almost every error that has resulted since Go-Live to be claimed as erroneous. We would anticipate that there would be a very large number of claims coming forward should this proposal be implemented. The proposal does not provide any framework to determine what constitutes prudent systems and processes and as such as soon as one Party claimed an error and had it upheld this would set a precedent for future claims. This could be construed as a barrier to entry for new participants should the standards be seen unduly rigorous. It is also possible that such a move would unfairly increase the burden on small players who do not have the resource to meet the requirements for what are deemed to be prudent systems and processes.
- Implementation of the modification would introduce a significant potential for gaming in the market going forward and would undoubtedly give rise to many more "error" claims for the period since go-live.
- The net position of each party also needs to be considered taking account of all the residual cashflow reallocation payments since NETA started.
- It our strong belief that parties behaviour during this period was influenced by their perception of the rules and risks of failure; had they known that errors could be retrospectively corrected then they would almost certainly have taken different actions.

Yours faithfully

Danielle Lane
Transportation Analyst

## General Questions

Q1: Do you support Modification Proposal P37? Please support your answer by explaining why P37

better achieves the applicable BSC Objectives, or not, as the case may be?

No, we do not support the Modification Proposal 37. We believe the cost and disruption of the change would outweigh the benefits to all parties.

The key issue is whether retrospective amendments to contract notifications should be allowed. Whilst we are not against retrospective changes in principle, we agree with Ofgem (P19 decision letter, paragraph 31) that the starting point should be that 'retrospective changes to the BSC will damage market confidence in, and the efficient operation of the new trading arrangements.'. We agree that, in general, parties would prefer the assurance of rules that are unlikely to be changed retrospectively to a situation where rules can be changed after the event as this would make it very difficult to rely on the BSC and increase market and regulatory risk. As such, Mod P37 does not better meet the applicable BSC objectives.

There may be circumstances where retrospective changes are appropriate e.g. those set out in Ofgem's letter on P19 (para 36); fault directly attributable to central arrangements; combinations of circumstances that could not have been reasonably forseen; where possible retrospective action has already been clearly flagged. However, none of these seem to be applicable to Mod 37.

The proposer argues that the proposal would better meet the efficient discharge by the Transmission company of the obligations imposed under the Transmission Licence as settlement imbalance obligations would be conducted by reference to Parties' true contract conditions rather than erroneously notified positions. This only refers to the period before the modification proposal is adopted, the proposer suggests a further modification to account for subsequent periods will be necessary before the changes would fully realise the efficient discharge of the Transmission company's licence obligations. This proposal has yet to be raised so it is inappropriate to assess this modification against one that has yet to be raised, let alone approved.

Also the implication here is that calculations based on contract notifications made to date are incorrect. As the proposer states 'The Proposed Modification is intended to allow Parties who have already made notification errors in respect of Settlement Periods to submit claims for correction of those errors'. As no criteria is given to determine the validity of such claims the modification would potentially open the way for all parties to claim that all notifications made, or indeed had not made but intended to, since the Go-Live are incorrect.

Q2: Do you believe that the ability to make retrospective adjustments of notifications (within a fixed

period, following some effective date) would better achieve applicable BSC Objectives? If your answer

is yes, but your answer to Q.1 was no, please give reasons.

No, we do not believe that the ability to make retrospective adjustments of notifications (within a fixed period, following some effective dates) would better achieve the BSC Objectives. As stated previously, if a principle of retrospection is established it increases uncertainty within the market. This would also make it difficult to set clear and unambiguous rules as to what defines an error.

Q17: Would your actions and behaviour have been different, had the proposal been anticipated at or before Go-Live? If yes, please identify which of the following would have been carried out differently and why:
a. Development and testing of systems and processes
b. Operation of systems and processes
c. Trading and notification strategies
d. Other

It was clearly understood by all parties that at NETA Go-Live there would be would be no manifest error provisions for the notification of energy contract volumes or metered volume reallocations (ref

Ofgem decision letter on Mod P19 para. 19). Whilst Ofgem's decision letter notes that a modification could be proposed to change this, the implication is that changes would be prospective. There is no suggestion that such a modification could be applied retrospectively.

Therefore, the basis on which BGT prepared for NETA was one where BGT took active and clear responsibility for the accurate notification of energy contract quantities and took great care in our notifying arrangements and systems to avoid such errors and the consequences of those errors.

Specifically,

- IT systems were specified, designed, configured with great care over a long period and at significant cost. These systems were tested extensively (details can be provided if necessary) both internally and to the maximum extent available with NETA central systems.
- Staff numbers, rotas and experience were also carefully planned and new staff carefully selected and trained with full 'operating' procedures prepared.
- Because of the risks of incorrect notification, BGT took a very risk-averse approach to 'over-the-counter' trading close to gate closure and relied more heavily on power exchange trading where notification risks were avoided

Undoubtedly, had there been a lower perceived risk because of the potential for a retrospective correction mechanism to be available, then BGT would have acted differently.

**P37_UMR_013 – TotalFinaElf Gas and Power Ltd**

TotalFinaElf Response to Modification Proposal P37: Remedy for Errors in Energy Contract Volume Notifications and in Metered Volume Reallocation Notifications

TotalFinaElf Gas and Power (TFE) welcome the opportunity to respond to this modification. Please note our responses below to the specific questions within the consultation. We would appreciate if these comments were to be included within the panel modification report for P37.

**Q1 Do you support Modification Proposal P37? Please support your answer by explaining why P37 better achieves the applicable BSC Objectives, or not, as the case may be?**

A1 TFE G&P support Modification Proposal P37. As indicated within our response to P19, we believe the intent of the BSC is, inter alia, to provide for sufficient financial incentives for BSC parties to contract such that energy accounts are balanced/optimised prior to gate-closure. The post-gate closure settlement rules presently consider only those notifications that were accurately notified ex-ante. We recognise the present rules, contain little flexibility for technical errors or events that may, sometimes result in the inability of a party to strictly follow BSC processes, despite these parties having contracted ex-ante to avoid imbalance price exposure.

TFE consider that failure to recognise these particular circumstances, within the BSC, results in parties being cashed out in an manner that does not recognise their true contract position and leads to inappropriate residual cashflow reallocation smears across the industry. This would seem perverse since the objective of the imbalance settlement process is to identify those participants whose energy accounts were imbalanced and levy imbalance prices upon those parties whose imbalance volumes caused physical imbalances upon the system. Given that incorrect notifications do not result in any change to the physical balance upon the system, applying imbalance price exposure to those parties who failed to notify correctly for technical reasons, does appear to be unduly onerous and penal i.e. disproportionate to the consequence of their error.

TFE therefore recommend inclusion within the BSC of post gate-closure correction of notifications. We consider this would be both pragmatic and does better facilitates the objectives of the BSC, particularly Condition 7A.3 (c) of NGC's licence. Furthermore, we agree that Condition 7A.3 (d) is better facilitated, since failure to implement this modification, leads to a greater perceived notification risk associated with trading close to delivery. This we consider has a continuing and detrimental impact upon liquidity within the secondary markets and prices to end customers.

**Q2 Do you believe that the ability to make retrospective adjustments of notifications (within a fixed period, following some effective date) would better achieve applicable BSC Objectives? If you answer is yes, but your answer to Q.1 was no, please give reasons**

A2 TFE G&P believe it is important to periodically allow BSC participants certainty in their settled positions. Currently the industry acknowledges their settlement positions are subject to variation for up to fourteen months after the settlement period. We accept, however, these variations within the suite of imbalance charges may not be as large as those which may result from acceptance of this modification. To achieve a pragmatic balance between the desire for post-gate closure correction and the market participants desire for certainty we

would prefer this modification to be implemented alongside a similar modification that included a prospective element which prevents earlier settlement periods being "re-opened".

**Q3 Do you agree with the way in which an erroneous notification is defined and circumscribed (as described generally within Modification proposal P37, but more specifically given in clause 6.1.1 of the legal drafting within the above proposal)? If your answer is no, please**

**a) Identify any features of the definition which you regard as inappropriate or inadequate, and why.**
**b) Identify any additional features you believe should be included, and why.**

A3 Yes, although a more explicit recognition that Volume Notifications refers both to Contract and Metered Volume Notifications may be preferable.

**Q4 Do you agree that the time limit for making claims, following implementation, should be 5 working days? If not, what should the time limit be, and why?**

A4 Yes, subject to our comments for question two.

**Q5 Do you agree that the administration fee for making a claim should be £5,000? If not, what should it be and why?**

A5 The principles underlying this modification proposal and those for Manifest Error provisions do appear to be similar. Hence we would expect the charges to be consistent.

**Q6 Do you agree that a sufficient level of assurance is afforded by a claim being supported in writing by the counterparty? If not, what other assurances would be required?**

A6 The claim should certainly include written evidence, however, we would expect the onus to be upon the counterparty to provide sufficient information to satisfy the reasonable concerns of the Panel. Without attempting to produce an exhaustive list, we consider this may include, for example, voice records, email/fax transmissions and signed contracts

**Q7 Do you agree that the evidence to support a claim should be at the discretion of the Panel? If your answer is no, what specific evidence should be provided?**

A7 We believe the Panel should adjudicate within a framework that provides transparency not only to the claimant but other BSC Parties. Guidelines regarding how the decision making process is achieved would certainly be useful. In principle we would prefer this process to be similar to the Trading Disputes process, where independent third-parties may be agreed to arbitrate.

**Q8 Do you agree with the scope and definition of the following circumstances where the Panel may exercise discretion in declining to rectify a claimed notification error? If your answer is no for any of these circumstances, please give views as to what the deficiencies are:**

- **Where the relevant Contract Trading Party (or its Agent) did not, at the time that the past notification error occurred, have in place prudent systems and processes for the checking of volume notifications (the question of whether such systems and processes were prudent to be judged in the light of circumstances then prevailing).**

- **Where the relevant Contract Trading Party (or its Agent) did not, following discovery of the error, promptly take all**

**appropriate steps in relation to relevant systems and processes to avoid a repetition of the said error.**

A8 Strict application of the provisions listed above would appear to prevent any claim being accepted by the Panel. It is certainly much easier with the benefit of hindsight to identify the deficiencies within pre-existing systems. TFE G&P would prefer that stronger weighting is applied by the Panel to the issue of disproportionate loss within Question 9.

We would also urge the Panel in their deision making to bear in mind the uncertainty and unfamiliarity associated with the detailed NETA trading rules, upon initial implementation. These undoubtedly contributed to errors in contract notification, and retrospective application of this modification, far from creating uncertainties within the trading rules, should correct for these initial market uncertainties and distortions.

**Q9 So long as the circumstances described in Q8 have been satisfied, then the Panel may not decline to rectify a notification error under the following further circumstances:**

- **Where the past notification error was directly attributable to BSC Systems.**
- **Where the past notification error and/or the magnitude of the loss suffered by the relevant Contract Trading parties as a result arose from a combination of circumstances that could not have been reasonably foreseen.**
- **Where the magnitude of the loss suffered by one or more of the relevant Contract Trading Parties as a result of the said past notification error was wholly disproportionate to the fault or error committed by that Party.**

**Do you agree with the scope and definition of the above circumstances? If your answer is no for any particular circumstances, please give views as to what the deficiencies are.**

A9 Subject to our answer for question 8, we agree with the scope and definition set out in the question.

**Q10 (a) Do you agree that an error correction payment, in the form of a percentage of the value of the rectification, should be levied?**

A10(a) Yes. This should prevent spurious or immaterial claims being raised and pursued.

**Q10 (B) If your answer to Q10 (A) was yes, do you agree with the level of error correction payment being 20%. If your answer was no, what level do you believe would be appropriate.**

A10(b) No. Although it is subject to the size of the entity making the claim, we consider 20% may in practical terms restrict smaller suppliers from raising a valid claim. On balance we consider 10% to be more appropriate.

**Q10 (c) If you answer to Q10 (A) was yes, do you agree that the payment should be capped?**

A10(c) Yes.

**Q10 (d) If your answer to Q10 (C) was yes, do you agree that the payment should be capped at £200,000? If your answer was no, what level do you believe would be appropriate.**

A10(d) For similar reasons to A10(b), we consider £100,000 to be more appropriate.

**Q10 (e) If your answer to Q10 (A) was no, what other form, if any, should the error correction payment take?**

A10(e) N/A

**Q11 Do you agree with the approach to credit cover taken within the proposal. If your answer is no, please give reasons.**

A11 The approach is simplistic and pragmatic, however, there should also be a reciprocal measure of swift resolution for past notification error claims. This would avoid doubly penalising a party, with poor cashflow, who is 'incorrectly' in credit default.

**Q12 What body do you believe should decide on whether a claim should be allows?**

- **The Panel, as described in the proposal**
- **The Authority, taking in account the views of the Panel**
- **Some other body (please specify).**

A12 The Panel, however, the counterparty should have the ability to employ similar mechanisms within the Trading Disputes process for arbitration.

**Q13 Do you agree that, if an error correction is allowed, there should be a full correction of the notified volumes and that the error correction payment should be separately dealt with? If your answer is no, please give reasons.**

A13 Yes

**Q14 Do you agree that the error correction payment should be based on energy Imbalance charges and levied in respect of any energy account where a reimbursement arises? If your answer is no, please give reasons.**

A14 Yes

**Q15 Do you agree that error correction payments should be disbursed to all Parties, pro-rata on credited energy, adjusted to exclude those Parties making the error correction payments themselves? If your answer is no, please give reasons**

A15 No. Excluding the parties from the error correction smear would appear to add uneccessary layers of complexity to the process.

**Q16 What period of notice, if any, would be required before the proposal should take effect?**

A16 None

**Q17 Would your actions and behaviour have been different, had the proposal been anticipated at or before Go-Live. If yes, please identify which of the following would have been carried out differently and why:**

**a) Development and testing of systems and processes**
**b) Operation of systems and processes**
**c) Trading and notification strategies**
**d) Other**

A17 No.

Yours sincerely,

Sharif Islam
Energy Regulation Manager
**TotalFinaElf Gas and Power Ltd**
**For and on behalf of Humber Power Limited**

**P37_UMR_014 – InterGen (UK) Ltd**

P37 - The Remedy of Past Errors in ECVN's and MVRN's

Thank you for the opportunity to comment on this proposal. InterGen (UK) Ltd do not support modification P37 for the following reasons:

While we sympathise with the limited amount of time allowed to thoroughly test systems prior to go-live, all parties were equally aware of the timescales involved for testing of their systems.

The trading arrangements include strong incentives to ensure accurate notification at all times. We see no circumstance where the minority should be allowed to retrospectively address an error when the majority have managed the risk involved.

Should the Panel implement this proposal, a precedent would be set where retrospective action would have to be considered in all cases, undermining confidence in the BSC.

Clara Anderson
Commercial Operator
InterGen (UK) Ltd

On behalf of:
Rocksavage Power Company Limited
Coryton Energy Company Limited
Spalding Energy Company Limited
InterGen Trading and Shipping Limited

**P37_UMR_015 – Innogy**

**Submission in response to Consultation on Modification Proposal P37**

**The remedy of past errors in Energy Contract Notifications and in Metered Volume Reallocation Notification**

***Generally***

Innogy supports the overall purpose of the P37 proposal. Visiting substantial penalties on parties as a consequence of contract notification errors that have little or no cost associated with them would appear contrary to both the objectives of the BSC and the Conditions of NGC's Licences. Furthermore, the notion that individual companies can suffer substantial losses or profit from windfall gains as a consequence of errors that have little or no impact on the operation of the electricity system is likely to put the design of NETA into disrepute with those who are looking for appropriate market designs to further the liberalising of European markets.

In approaching the issue raised by P37 we would suggest that clear principles should be defined in deciding when error correction would be appropriate. These principles should be enshrined in the BSC and start from the position that the purpose of BM settlement is to visit the costs of imbalance on those parties responsible for the imbalance. If it can be shown that no cost has arisen as a consequence of an erroneous notification then there should be grounds for full reimbursement subject only to deductions for the administrative and any associated costs of investigating and correcting the error. This reasoning suggests that arbitrary caps on the amount reimbursed would be inappropriate, although we would support a minimum administrative charge to deter frivolous claims.

We believe an appropriate approach would be for a standing group with relevant expertise to be constituted under the BSC Panel to conduct inquiries into any errors. This group should be under the direction of the Panel but work within guidelines incorporated either within or as an adjunct to the BSC. However, where a party believes that a decision of the Panel does not accord with the Principles or Guidelines then there should be a right of appeal to the Authority.

Turning to the specific questions raised by the Consultation we would comment as follows:

## *Consultation Questions - General*

### Q1: Do you support Modification Proposal P37? Please support your answer by explaining why P37 better achieves the applicable BSC Objectives, or not, as the case may be?

Innogy supports Modification P37 since we believe that it further promotes the following BSC

Objectives.

- Promoting effective competition in the generation and supply of electricity because it removes the risk of charges being imposed that bear no relationship to costs incurred;
- Promoting efficiency in the implementation and administration of the balancing and settlement arrangements by improving the accuracy of the contract notification.

The object of the BM is to ensure that participants are given an incentive to balance their position prior to Gate Closure, not to penalise them for erroneous contract notifications where these were submitted in good faith. In this respect it should be noted that contract notification is a distinct and separate process to the lodging of PNs as required by the Grid Code.

**Q2: Do you believe that the ability to make retrospective adjustments of notifications (within a fixed period, following some effective date) would better achieve applicable BSC Objectives? If your answer is yes, but your answer to Q.1 was no, please give reasons.**

Whilst the BSC is based on the principle that the contract position should be notified at Gate Closure, retrospective adjustments made in accordance with defined principles and guidelines to correct errors would appear to better achieve the BSC Objectives.

**Consultation Questions - Specific**

Q3: Do you agree with the way in which an erroneous notification is defined and circumscribed (as described, generally within Modification proposal P37, but more specifically given in clause 6.1.1 of the legal drafting within the above proposal)? If your answer is no, please

a. Identify any features of the definition which you regard as inappropriate or inadequate, and why.

**b. Identify any additional features you believe should be included, and why**.

Whilst we think the definition is broadly correct it needs to make clear that it an error in the Volume Notification and not necessarily in the submission of that volume. We assume it would be incumbent on the claimant to demonstrate that the volume notified was erroneous.

**Q4: Do you agree that the time limit for making claims, following implementation, should be 5 working days? If not, what should the time limit be, and why?**

The time limit should be relatively short in order that there is some certainty in the settlement process. 5 working days would seem to be an appropriate period.

**Q5: Do you agree that the administration fee for making a claim should be £5,000? If not, what should it be and why?**

***The administrative fee should be set at a level that covers the cost of investigating and correcting the consequences of a notification error. It may be appropriate to have a minimum charge in order to dissuade frivolous claims.***

**Q6: Do you agree that a sufficient level of assurance is afforded by a claim being supported in writing by the counterparty? If not, what other assurance would be required?**

**Yes**

**Q7: Do you agree that the evidence to support a claim should be at the discretion of the Panel? If your answer is no, what specific evidence should be provided?**

**No. The Panel, or a sub group of it, in considering a claim should do so in accordance with pre-defined principles and guidelines as is the case for Trade Disputes. These principles and guidelines should be included within the BSC.**

**Q8: Do you agree with the scope and definition of the following circumstances where the Panel may exercise discretion in declining to rectify a claimed notification error? If your answer is no for any of these circumstances, please give views as to what the deficiencies are:**

- Where the relevant Contract Trading Party (or its Agent) did not, at the time that the past notification error occurred, have in place prudent systems and processes for the checking of volume notifications (the question of whether such systems and processes were prudent to be judged in the light of circumstances then prevailing).

- Where the relevant Contract Trading Party (or its Agent) did not, following discovery of the error, promptly take all appropriate steps in relation to relevant systems and processes to avoid a repetition of the said error.

The difficulty with this approach is that it assumes the Panel is competent to judge whether a party's systems and processes are prudent and adequate.

Since these are not accredited it would appear that to follow this approach would give the Panel and any prospective claimant an impossible task. Our view is that the grounds for correcting past errors should be related to the consequence of the error rather than the reasons for it arising.

**Q9: So long as the circumstances described in Q8 have been satisfied, then the Panel may not decline to rectify a notification error under the following further circumstances:**

- Where the past notification error was directly attributable to BSC Systems.

- Where the past notification error and/or the magnitude of the loss suffered by the relevant Contract Trading Parties as a result arose from a combination of circumstances that could not have been reasonably foreseen.

- Where the magnitude of the loss suffered by one or more of the relevant Contract Trading Parties as a result of the said past notification error was wholly disproportionate to the fault or error committed by that Party.

**Do you agree with the scope and definition of the above circumstances? If your answer is no for any particular circumstance, please give views as to what the deficiencies are.**

We agree with the first bullet point.

We are unclear as to the circumstances Ofgem has in mind in the second bullet. The magnitude of any loss from an erroneous notification can never be foreseen because it is dependent upon the value ascribed to the cash-out prices.

In the third bullet we think the test should not be linked to the proportionality of the consequence of the loss for the party, but whether the error imposed additional costs on the system. The general principle should be that the cost of an error to the party should be reimbursed after accounting for any additional costs imposed on either the balancing mechanism or the settlement system.

**Q10 (A): Do you agree that an error correction payment, in the form of a percentage of the value of the rectification, should be levied?**

The error correction payment should reflect the cost of the error to the party less any costs imposed on the balancing mechanism and settlement system, and the costs of resolving the error.

**Q10 (B): If your answer to Q10 (A) was yes, do you agree with the level of error correction payment being 20%. If your answer was no, what level do you believe would be appropriate**

We do not believe that the error correction payment should be linked to a proportion of the cost of the error, but to a full reimbursement less any associated costs or adjustments to other payments. See answer to Q10 (E).

**Q10(C): If your answer to Q10 (A) was yes, do you agree that that the payment should be capped?**

We do not believe capping to be an appropriate concept in this respect.

**Q10 (D): If your answer to Q10(C) was yes, do you agree that the payment should be capped at £200,000. If your answer was no, what level do you believe would be appropriate.**

N/A

**Q10 (E): If your answer to Q10 (A) was no, what other form, if any, should the error correction payment take?**

In general the payment to the party should be derived from the reimbursement of the imbalance payment, a correction to the RCRC payments, any consequent payments under the GTMA, and the administration costs.

**Q11: Do you agree with the approach to credit cover taken within the proposal? If your answer is no, please give reasons.**

Yes.

**Q12: What body do you believe should decide on whether a claim should be allowed?**

- The Panel, as described in the proposal
- The Authority, taking into account the views of the Panel
- Some other body (please specify)

Provided that the BSC incorporates appropriate principles and guidelines for the resolution of errors, then it would be appropriate for the Panel to decide the resolution of an error subject to a right of appeal by the claimant to the Authority.

**Q13: Do you agree that, if an error correction is allowed, there should be a full correction of the notified volumes and that the error correction payment should be separately dealt with? If your answer is no, please give reasons.**

The notified volumes should be fully corrected, but the subsequent settlement of the error should take account of reimbursements made through the RCRC and the provisions of the GTMA.

**Q14: Do you agree that the error correction payment should be based on energy imbalance charges and levied in respect of any energy account where a reimbursement arises? If your answer is no, please give reasons.**

The error correction payment needs to extend further than the imbalance payments to encompass the RCRC, GTMA consequences and the costs of correcting the error.

**Q15: Do you agree that error correction payments should be disbursed to all Parties, pro-rata on credited energy, adjusted to exclude those Parties making the error correction payments themselves? If your answer is no, please give reasons.**

The error correction process should be to reimburse the party that has submitted an erroneous notification, but also to correct the subsequent impact on RCRC and any GTMA related payments, although it is appreciated that the GTMA effects cannot be dealt with through the BSC. If the cost of the imbalance reimbursement is charged back to the RCRC for the settlement period in which the error occurred then the RCRC will be appropriately adjusted for all parties including the claimant.

**Q16: What period of notice, if any, would be required before the proposal should take effect?**

1 Month would seem an appropriate period.

**Q17: Would your actions and behaviour have been different, had the proposal been anticipated at or before Go-Live? If yes, please identify which of the following would have been carried out differently and why:**

a. Development and testing of systems and processes

b. Operation of systems and processes

b. Trading and notification strategies

d. Other

Innogy has always endeavoured to ensure that it's systems and procedures were robust regardless of whether this proposal could have been anticipated irrespective of this proposal. Thus we do not believe our actions or behaviour would have been different had this proposal been anticipated at or prior to NETA Go Live.

**P37_UMR_016 – Derwent Cogeneration Ltd**

## General Questions

### Q1&2 Do you support Modification Proposal P37?

DCL supports the intention and general thrust of this modification proposal, while having some suggestions for alteration in specific areas. We broadly support the proposer's analysis of the applicable BSC Objectives, and in particular the views expressed concerning the promotion of effective competition in generation and supply. The situation that exists now is that certain BSC participants, having made single errors, are faced with losses of several million pounds. Losses of this magnitude would be sufficient to take certain other participants (such as DCL) out of the market, and awareness of such a situation must surely act as strong deterrent to future market entry.

It is wrong to suppose that errors have occurred simply because systems and processes have had insufficient money or resources thrown at them. Considerable expenditure has been undertaken, and we would add that in terms of percentage spend against revenue smaller players are extremely heavily penalised in this area as we obtain no economy of scale. To further exacerbate this by loading unreasonable levels of risk would lead to only the very largest of players in the energy market being able to overcome the entry hurdles, which could be viewed as anti-competitive.

It is relevant to note the fact that the BSC as currently adopted sets an information imbalance price of zero, recognising that there will be teething troubles and bugs in the system and processes yet we are required to accept penalties on "actual errors" at a level which could cause the financial failure of smaller players and further trigger cross default on a broad range of other contracts.

It is in the Industry's own best interest to create a trading framework that is both robust and error free, but has a measure of sensibility about it regarding errors which do not in any way threaten the actual market or consumers. The magnitude of the losses that currently exist suggest that if the Industry itself does not sort out the issue then other (more expensive) means will be pursued for its resolution.

Given the acknowledged tight timescale for the implementation of NETA and also the increased possibility of errors being made in the early months of operation of any new system, a retrospective modification such as this is entirely appropriate at the present time and can be made without prejudice to any subsequent forward-looking arrangements.

In particular, where the failure or incorrect notification has occurred due to a failure of central systems or processes then post event notifications or corrections should be allowed.

## Detailed Questions

### Q3 Do you agree with the way in which an erroneous notification is defined and circumscribed?

Clearly the definition of a past notification error is central to this proposal, and within this we see the key elements as being (i) a requirement for documentary evidence of the intended contractual position between the parties (or accounts), and (ii) the error to be of a type which has had no effect on overall system energy balance.

One concern with the drafting of clause 6.1.1 is in (c) (i) where the phrase "demonstrably settled and .... shared commitment to notify" is used. It is possible that the word "settled" could be misleading here and could be replaced by the word "contracted".

**Q4 Do you agree that the time limit for making claims, following implementation, should be 5 working days?**

It is quite possible, or indeed likely, that the subject of a particular claim would initially raised under the Trading Query/Trading Dispute Procedures of BSCP11. This being the case, the 5 working day limit on claims should only apply if claims could be made without prejudice to the continuing Trading Dispute. Thus, 5 working days is not an unreasonable time within which to register a claim, but the detail of the claim outstanding following the disputes process may not be fully known until a later date.

**Q5 Do you agree that the administration fee for making a claim should be £5000?**

A fee of £5000 with the protections suggested within the proposal does not seem unreasonable if it is a true reflection of the cost of administering the claim.

**Q6 Do you agree that a sufficient level of assurance is afforded by a claim being supported in writing by a counterparty?**

DCL suggest that there should effectively be a joint claim by the two counterparties (see also response to Question 14).

**Q7 Do you agree that the evidence to support a claim should be at the discretion of the Panel?**

Part of the thrust of this proposal is that retrospective modifications should be dealt with on a case by case basis, and as such the Panel would need to be able to call evidence at their discretion.

**Q8 Do you agree with the scope and definition of the following circumstances where the Panel may exercise discretion in declining to rectify a claimed notification error:**

**Where the relevant Contract Trading party did not at the time that the past notification error occurred, have in place prudent systems and process for the checking of volume notifications.**

Agreed

**Where the relevant Contract Trading party did not, following discovery of the error, promptly take all appropriate steps in relation to relevant systems and process to avoid repetition of the said error.**

Agreed

**Q9 So long as the circumstances in Q8 have been satisfied, then the Panel may not decline to rectify a notification error under the following circumstances**

**Where the past notification error was directly attributable to BSC systems**

Agreed, with extension to cover BSC processes and procedures.

**Where the past notification error and/or the magnitude of the loss suffered arose from a combination of circumstances that could not have been reasonably foreseen**

This test must be carried out without the benefit of hindsight and is necessarily subjective. The onus should be on the claimant to make the case.

**Where the magnitude of the loss suffered as a result of the past notification error was wholly disproportionate to the fault or error committed by that Party.**

With the proviso that Q8 had been satisfied this protection would be helpful in addressing the concerns set out in our introductory remarks at Q1.

**Q10A Do you agree that an error correction payment in the form of a percentage of the value of the rectification should be levied?**

Our understanding is that the proposed limit on the recovery of a claim arises out of Paragraph 25 of Ofgem's decision letter on Modification Proposal P19 where the limit is suggested as a means of providing an incentive to accurate notification. In the case of retrospective remedy it is difficult to see how the payment works as an incentive since the relevant actions are in the past. It is clear that any payment levied on a retrospective claim is in fact a penalty.

If such a penalty is deemed appropriate we would have concerns over its magnitude, as set out below.

**Q10B Do you agree that the level of the error correction payments should be 20%**

The fundamental reason for raising this Modification Proposal is that errors have arisen which have caused costs wholly disproportionate to the normal day to day operational costs of running the business. It is generally recognised that costs of errors can not only be very large but are also somewhat arbitrary in magnitude, being driven by system prices at the time of the error.

It would seem more sensible therefore if the penalty payment (if it is deemed appropriate to include one at all) should be decoupled from the cost effect of the error, i.e. not based on a percentage at all. However,we note that, taken in conjunction with the cap, the penalty on the Proposer's claim is effectively 2.7% (£200k/£7.5m).

**Q10C/D Do you agree that the payment should be capped at £200k**

In terms of percentage spend against revenue smaller players are extremely heavily penalised in setting up systems as we obtain no economy of scale, and this proposal leaves such players similarly exposed with regard to penalty payments on errors. DCL believes that it would be more appropriate to set any payment by formula related to, say, RCRC proportion with the £200k suggested by the Proposer used as a benchmark.

**Q11 Do you agree with the approach to credit cover taken within the proposal?**

Agreed – there is no point in revisiting credit cover calculations which are essentially forward looking.

**Q12 What body should decide on whether a claim should be allowed?**

We would be happy with a TDC/Panel led process but in view of the size of current claims outstanding it may be appropriate for the Authority to make the decision so that "justice is seen to be done".

**Process**

**Q13 Do you agree that, if an error correction is allowed, there should be a full correction of the notified volumes and that the error correction payment should be separately dealt with?**

Agreed – this seems to be a pragmatic solution.

**Q14 Do you agree that the error correction payment should be based on energy imbalance charges and levied in respect of any energy account where a reimbursement arises?**

Agreed that the payment should be based on imbalance charges only. However, an alternative approach to charging (if it is to be linked to the magnitude of the error) would be to base it on the net position of the two affected accounts, whether they belong to one counterparty or two. In the case of two affected parties we envisage a joint claim (with one party nominated as "Lead") for rectification of the error volume. The magnitude of the claim would be determined as the aggregate (net) difference between the Corrected and the Non-Corrected Account Energy Imbalance Cashflows, of the parties taken together. The penalty payment (if deemed appropriate) could be levied on the Lead Party, who would make their own arrangements for recovery from any other party.

**Q15 Do you agree that the error correction payments should be disbursed to all parties, pro rata on credited energy, adjusted to exclude those parties making the error correction payments themselves?**

Agreed.

**Impact**

**Q16 What period of notice would be required before the proposal takes effect?**

See answer to Q4

**Q17 Would your actions and behaviours have been different, had the proposal been anticipated before Go-Live?**

We do not believe that anticipation of this proposal would have made any difference to DCL's approach to trading and notification strategies, systems and processes either before or after Go-Live. Robust systems and procedures are part and parcel of power station operation and we have sought to implement such within the constraints imposed by the NETA implementation timetable.

It should be noted here that the Proposal requires claims to satisfy the test of prudent systems and processes being in place, and all appropriate steps being taken to avoid a repetition of a particular error. Thus the Proposal makes no relaxation of the basic requirement to implement and maintain robust systems and processes, leaving this incentive firmly on BSC Parties.

## P37_UMR_017 – Enron Europe Limited

### Enron's Recommended Solution

Enron Europe Limited (EEL) supports modification proposal P37.

### Rational for Enron's Recommendation

The imbalance price spread penalises participants for imbalances between notified contract volumes and allocated metered volumes. Therefore, erroneous contract volume and meter volume notifications are penalised to the extent they cause an imbalance. The very wide imbalance price spread, characteristic of NETA, means the financial consequences of an erroneous notification are very large – far in excess of any additional costs that an erroneous notification places on the system.

At Go-Live, participants did not anticipate the problems of central systems feeding inaccurate notification to participants for validation. As a result, and through no fault of their own, participants found it very difficult to know whether their notifications were in error. Nor did participants anticipate the very large spread between imbalance prices. This large spread means that the penalty for erroneous notifications is higher than anticipated at Go-Live. Retrospective application of P37 addresses both these unanticipated flaws in NETA.

To the extent that a Party acted prudently and made a past notification error as the result of a fault in central systems, that Party should be compensated for the financial consequences of the notification error. Retrospective mitigation of notification errors in these specific circumstances provides the precedent that participants will be protected from the consequences of unanticipated flaws in the BSC. This reduces the regulatory risk of participating in the BSC thereby reducing participants' costs and better meeting the Applicable BSC Objective to promote efficient implementation and administration of the BSC.

There is little risk that retrospective application of P37 will render the BSC inherently uncertain. Firstly, P37 is designed to address specific flaws in the BSC, not make arbitrary and widespread changes. Secondly, P37 has minimal impact on third parties. Participants, other than the participant applying to the Panel to correct an erroneous notification, would only be impacted by the correction of a notification in as much as the correction affects the size of RCRC. Thirdly, London has carefully designed P37 to ensure it would not have incentivised participants to act differently had they known the proposed rules would apply from Go-Live. This is because the application fee and significant residual penalty Parties face if their application for a notification error were accepted means that they would have been extremely unlikely to adopt less robust contract tracking and notification systems had they known P37 would take effect from Go-Live. Any argument that retrospective application of P37 would have resulted in a change of behaviour is therefore largely spurious.

Finally, Ofgem can further reduce the risk that retrospective application of P37 might make the BSC inherently uncertain by carefully considering and documenting its reasons for making P37 retrospective. Ofgem can legitimately apply modifications retrospectively in those cases where the advantages clearly outweigh the disadvantages of such action. Indeed Ofgem has set the precedent by approving a retrospective modification to the Gas Network Code.

# ANNEX 4 FURTHER CONSULTATION RESPONSES

**Responses from P37 Urgent Modification Report Consultation No. 2**

Representations were received from the following parties:

| No | Company | File Number |
|---|---|---|
| **18.** | INEOS Chlor Ltd | P37_UMR2_001 |
| **19.** | Powergen UK plc | P37_UMR2_002 |
| **20.** | London Electricity plc | P37_UMR2_003 |
| **21.** | TXU Europe Energy Trading | P37_UMR2_004 |
| **22.** | ScottishPower Energy Trading Limited | P37_UMR2_005 |
| **23.** | Derwent Cogeneration Ltd. | P37_UMR2_006 |
| **24.** | SEEBOARD | P37_UMR2_007 |
| **25.** | EDF Trading Limited | P37_UMR2_008 |
| **26.** | Enron Europe | P37_UMR2_009 |
| **27.** | Innogy | P37_UMR2_010 |
| **28.** | British Gas Trading Ltd | P37_UMR2_012 |
| **29.** | TotalFinaElf | P37_UMR2_013 |
| **30.** | British Energy | P37_UMR2_014 |
| **31.** | Entergy-Koch Trading, Ltd | P37_UMR2_015 |

**P37_UMR2_001 – INEOS Chlor Ltd**

P37_UMR_CON - INEOS Chlor Ltd & INEOS Chlor Energy Ltd

Modification proposal P37 - To provide for the remedy of past errors in Energy Contract Notifications & in Metered Volume Reallocation Notifications.

The proposed non reimbursable fee of £5,000 to be levied on a party for each and every claim regarding a "post notification error" is highly discriminatory against existing small players whilst serving to deter direct involvement of potential new entrants. The situation is compounded by the proposal an additional non reimbursable £5,000 be paid prior to acceptance of an appeal.

NETA has failed miserably to encourage participation of the demand side & such rules will add unnecessary economic hurdles, thereby further discouraging competition from this market sector.

Regards
K.J.Green

**INEOS Chlor Ltd** 2nd response.

**Submission in response to Consultation on Modification Proposal P37**

**The remedy of past errors in Energy Contract Notifications and in Metered Volume Reallocation Notification**

**Generally**

Ineos Chlor supports the overall purpose of the P37 proposal. Visiting substantial penalties on parties as a consequence of contract notification errors that have little or no cost associated with them would appear contrary to both the objectives of the BSC and the Conditions of NGC's Licences. Furthermore, the notion that individual companies can suffer substantial losses or profit from windfall gains as a consequence of errors that have little or no impact on the operation of the electricity system is likely to put the design of NETA into disrepute with those who are looking for appropriate market designs to further the liberalising of European markets.

In approaching the issue raised by P37 we would suggest that clear principles should be defined in deciding when error correction would be appropriate. These principles should be enshrined in the BSC and start from the position that the purpose of BM settlement is to visit the costs of imbalance on those parties responsible for the imbalance. If it can be shown that no cost has arisen as a consequence of an erroneous notification then there should be grounds for full reimbursement subject only to deductions for the administrative and any associated costs of investigating and correcting the error. This reasoning suggests that arbitrary caps on the amount reimbursed would be inappropriate, although we would support a minimum administrative charge to deter frivolous claims.

Turning to the specific questions raised by the Consultation we would comment as follows:

**Consultation Questions - Specific**

Q3: Do you agree with the way in which an erroneous notification is defined and circumscribed (as described, generally within Modification proposal P37, but more specifically given in clause 6.1.1 of the legal drafting within the above proposal)? If your answer is no, please

a. Identify any features of the definition which you regard as inappropriate or inadequate, and why.

b. Identify any additional features you believe should be included, and why.

Whilst we think the definition is broadly correct it needs to make clear that it is an error in the Volume Notification and not necessarily in the submission of that volume. We assume it would be incumbent on the claimant to demonstrate that the volume notified was erroneous.

Additionally, we believe that the definition of erroneous notifications should be expanded to include Authorisation errors. The proposal seeks to allow participants to rectify errors that are manifestly erroneous, and to replicate the original intentions of those Trading Parties affected. We feel that rejections resulting from Authorisation errors should be included in the definition of erroneous notifications, provided that the Parties concerned can prove beyond reasonable doubt that there was an intention to trade, through the procedures detailed within paragraph 6.4. An example of this proof would be an Authorisation application in progress. To this end, we advocate the removal from paragraph 6.4.6 of the references to paragraphs 2.3.4 and 3.3.4.

**P37_UMR2_002 – Powergen UK plc**

**Modification Proposal P37 – To provide for the remedy of past errors in Energy Contract Volume Notifications and in Metered Volume Reallocation Notifications**
**- Further Consultation**

Thank you for giving us the opportunity to comment on this proposal. Powergen UK plc ('Powergen') provides this response on behalf of itself and the following BSC Parties: Powergen Energy plc, Diamond Power Generation Limited and Cottam Development Centre Limited. These comments should be read in conjunction with earlier detailed comments submitted on 27 September 2001.

Powergen does not support this proposal in either its clarified or alternative form. In our view the proposal does not properly address the concerns outlined in Ofgem's decision letter on P19 particularly in respect to the need for claimant to demonstrate they had acted prudently. It also seems both impractical and inequitable to consider implementation of P37 without consideration of the mechanism for correction of future notification errors. There is the danger of creating a time period where the 'window' for making retrospective claims has closed but the prospective mechanism has not yet come into force.

To help address these concerns Powergen put forward modification proposal **P44 "Correction of Notification Errors where Parties are able to satisfy a Reasonable and Prudent Operator test**". This recognises that the ECVAA systems have since go-live exposed market participants to "unmanageable" risks when submitting notifications after they have received the last E0221 Forward Contract Report for the day in question. Ex post amendment of such close to gate closure notifications would be permitted provided that:-

- the claimant can demonstrate that it had acted as a reasonable and prudent operator and
- the claim is supported by appropriate evidence.

This requires claims to be judged against good industry practice - P44 lists examples of good practice, **which we believe reasonable and prudent operators will have followed since go-live**.

In considering its recommendation we would urge the Panel to take account of the issues raised under P44 particularly in the context how P37 fits with any prospective notification error correction mechanism

Yours sincerely,

Peter Bolitho
Trading Arrangements Manager

**P37_UMR2_003 – London Electricity plc**

***Response to the Further P37 Consultation***

The following comments on Elexon's Further Consultation on Modification Proposal P37 are submitted by London Electricity plc ('London') on behalf of itself, Sweb Ltd, Sutton Bridge Power, and Jade Power Generation.

Since the issue of the consultation report earlier this week, London has formally complained to Elexon that the report treats the legal issues arising in this case, and the published advice of James Goudie QC on those issues, in an unclear and unfair manner. That letter, at London's request, has been placed on Elexon's website, alongside Elexon's reply. There is nothing in that reply that causes London to modify its view, as amplified in its letter, that the treatment of the legal issues at page 9 of the consultation report is misleading and does not adequately present the core of London's case.

On the question of which of P37 Clarified and the alternative proposal should be preferred on its merits, London sees no reason to change the view it has expressed to the Modification Group that, on the basis of Mr Goudie's advice, either of these proposals would bring the BSC more closely into line with the true requirements of Condition 7A(2) of NGC's licence than at present. We would argue, however, that P37 Clarified is, in principle, preferable because it makes the BSC compliant with the requirements of that condition to a greater extent than the alternative does. This is because the alternative proposal allows for settlement to be effected by reference to numbers that could depart substantially from contracted volumes, whereas, under P37 Clarified, settlement would be effected by reference to numbers which are closer to the true trading positions of parties, because the error correction 'penalty' will be smaller.

The argument that P37 Clarified should be preferred by the Panel, and ultimately Ofgem, is in fact strengthened if it is permissible to depart from strict compliance with the requirements of Condition 7A(2) in order to accommodate the BSC objectives set out at Condition 7A(3). On any possible range of meanings of the word 'efficient', the achievement of the applicable BSC objectives (a) and (d) is better facilitated, by reference to our argument above. BSC objective (b) appears not to be relevant (though it is worth noting that none of the errors that is sought to be rectified under either of these modification

proposals has had any impact on the efficient, economic, and co-ordinated operation of the transmission system).

As for objective (c), in our opinion the 'signalling' effect of adopting the alternative proposal would be inconsistent with this, since the underlying message would be that the Panel and/or Ofgem believe it is necessary to expose claimants to a larger (potentially unlimited) penalty for error, even though the 'incentivising' properties of such payments must be vanishingly weak in the context of the correction of past errors. To that extent, therefore, London would argue that P37 Clarified also facilitates objective (c) better than the alternative does.

Our detailed comments on the legal drafting circulated with the consultation document are set out in the annex accompanying this letter.

**Roger Barnard**

**London Electricity Group**

# ANNEX

**LONDON ELECTRICITY**
**RESPONSE TO CONSULTATION**
**LEGAL DRAFTING**

London Electricity plc ('London') welcomes the opportunity to comment on the legal drafting contained in the Further Consultation on P37 issued on 23 October 2001.

By way of a general observation, it will be clear from some of our detailed comments that we consider that some elements of the legal drafting in its present form go beyond the intent both of London in its capacity as proposer of P37 and also of the Modification Group. London considers it an essential element of the modification process that the legal drafting is properly reflective of the original modification proposal, subject only to any amendments agreed (and accepted by the proposer) at the meetings of the Modification Group.

Without prejudice to the status of all the comments below, we have highlighted in bold face those which, on the basis of the preceding paragraph, should be accepted without demur.

**Paragraph 6.2.1**

It would seem sensible if the reference to 'five days' was changed to 'five Business Days' to conform with the similar time period allowed for lodging appeals under paragraph 6.7. Moreover, it would seem wrong to be able to reduce the effective period that Parties have for making a claim of notification error by the simple expedient of bringing the modification into effect on a Friday (especially a Friday preceding a Bank Holiday).

**Paragraph 6.2.2**

The legal drafting no longer provides for the modification by the Panel of the £5,000 fee for making a claim of notification error. While London recognises the practical difficulties involved in modifying the fee within the five-day window in which claims of notification error may be made under P37, nevertheless we are keen to provide the Panel with opportunity to modify the fee if it believes that £5,000 will be inadequate to cover the average cost of processing a claim. Since P37 may well form the basis for a modification dealing with future (rather than past) notification errors, the inclusion of this power has some relevance looking forward. Moreover, London is keen to ensure that P37 conforms as closely as possible with Ofgem's decision letter in respect of P19.

One possibility in respect of P37 would be to retain the power of the Panel to modify the fee subject only to the Authority's approval (ie, remove the requirement to consult with the BSC Parties). In this way, any change to the fee could be implemented at the same time that the modification became effective. The duty to consult with BSC Parties could (and should) be reinstated in any forward-looking modification.

**Paragraph 6.4.1**

Add the words 'and determine' after the words 'shall consider'.

**Paragraph 6.4.3**

Add the words 'and determined' after the words 'will be considered'.

Qualify paragraph 6.4.3 so that claims must be considered and determined prior to the Final Settlement Run for the relevant Settlement Period. Without this, the provisions in paragraph 6.5 dealing with the rectification of Past Notification Errors will not be effective, since they rely upon there being a 'next Settlement Run' (see paragraph 6.5.1(b)).

**Paragraph 6.4.4**

Sub-paragraphs (c) and (d) should be transposed so that they appear in chronological order.

**Paragraph 6.4.4(c)(i)**

London would like to see the words in square brackets retained, since these words are consistent with and reflective of the Modification Group's view that the burden of proof must lie squarely on the claimant.

**Paragraph 6.4.4(c)(iii)**

Presumably the references should be to paragraphs 6.4.7 and 6.4.8.

In the final words of paragraph 6.4.4(c), arguably the word 'determination' should be in the plural. This same point arises for paragraph 6.4.4(d)(i).

**Paragraph 6.4.4(g)**

The reference to 'paragraph (d)' should be to 'paragraph (e)'.

**Paragraph 6.4.6**

The opening words, 'Rectification of a Past Notification Error shall not be made **...**', should be replaced with the following to ensure that the focus is on the Panel's determination**:** 'The Panel shall determine that a Past Notification Error should not be rectified **...**'

**Paragraph 6.4.7**

The commencing paragraph should be replaced with the following simpler formulation**:**

> 'The Panel shall determine that the Past Notification Error should not be rectified where it considers that the relevant Contract Trading Party has failed to demonstrate that it and/or the relevant Volume Notification Agent did**:**'

**Paragraph 6.4.7(a)**

The words '[and take all reasonable care to operate]' must be deleted. At all stages during the Modification Group's discussions, it has been accepted that the appropriate test is whether the party claiming notification error had in place prudent systems and processes. That is very different from a test that requires the claimant to demonstrate that at all times he acted prudently and/or with all reasonable care. The words in question add an unjustifiable gloss to the test that was discussed and agreed by the Modification Group, and should be removed.

In the same way, the words '(including in connection with the submitting and checking of such Notifications)', which were not in the original proposal, must also be deleted. These, too, add an unjustifiable gloss to the test that was discussed and agreed by the Modification Group. It should be for the Panel to determine the scope and require-ments of the test of 'prudent system and processes', and the Panel is to do so in the light of circumstances prevailing at the relevant time. In particular, it must not be assumed that this test would at all times require that notifications be checked – not least because of the deficiencies in the reports against which notifications could have been checked, particularly in the period immediately following Go-Live.

The words 'having regard to the circumstances then prevailing' do not achieve the same effect as the words contained in London's original proposal. They should be replaced with the words, 'the question of whether such systems and processes were prudent to be judged in the light of the circumstances then prevailing', which make far clearer the test that the Panel is to apply in this context.

**Paragraph 6.5**

The words 'and should be rectified' should be added after the words 'Past Notification Error occurred' in the first line.

**Paragraph 6.5.2**

It is not clear why the words 'reduced debit or increased credit' in the fourth line have been put in square brackets, since they seem to make good sense.

**Paragraph 6.7.2**

In paragraph (b), the words 'or both' should be added after the words 'on one'.

In paragraph (c), it would be both more accurate and more straightforward if the words 'the determination should be overturned or remitted' were replaced by a direct reference to the Panel's powers under paragraph 6.7.4.

**Paragraph 6.7.4**

At the end of the commencing paragraph, replace the word 'may' with 'shall'.

Add the words 'the provisions of' before the reference to the Arbitration Act (to conform with the approach in Paragraph H7.1.3).

**London Electricity**
**October 2001**

**P37_UMR2_004 – TXU Europe Energy Trading**

**P37 Urgent Report Consultation**

Thank you for the opportunity to comment on the above consultation report. TXU Europe Energy Trading would like to make the following comments on behalf of all TXU Europe companies[2].

> QF1. Considering P37 Clarified, are your views different from those expressed regarding the original P37? If so, how?

AF1. No, TXU does not believe that P37 Clarified better facilitates the relevant BSC Objectives for the reasons given in our earlier response.

> QF2. Considering the Alternative Proposal P37, are your views different from those expressed regarding the original P37? If so, how?

AF2. No, although we welcome the removal of the cap on ECP, we still believe that the proposal fails to better facilitate the relevant BSC Objectives.

> QF3 and QF4. No comment.

Regarding the issues surrounding Licence Condition 7.A.2 the TXU opinion is that regardless of which is the correct legal view we still believe that the proposal fails to better facilitate the relevant BSC Objectives, the standards by which all modification proposals should be judged.

TXU belives that the application of Licence Condition 7.A.2 is a matter for Ofgem and should not be the subject of this consultation. Furthermore we have found the proliferation of correspondence from London Electricity on this matter to be most inappropriate, we do not believe that attempts to influence the views of respondents in this manner should be permitted as they undermine the consultation process. We welcome the comments made by Brian Saunders in his letter to London Electricity of 24th October and agree that the publication of views in this manner should be discouraged as they detract from the pre-eminence of the consultation process.

We hope you have found our comments useful and should you wish to discuss any aspect of this response please contact me on the above number.

Yours sincerely

Nicola Lea
Market Development Analyst

[2] TXU Europe Energy Trading Ltd; TXU Europe Energy Trading BV; TXU Energi Ltd (formerly Eastern Electricity Ltd); Eastern Energy; Norweb Energi; TXU Europe Merchant Generation Ltd; TXU Europe Drakelow Ltd; TXU Europe High Marnham Ltd; TXU Europe West Burton Ltd; Citigen, Shotton CHP Ltd

**P37_UMR2_005 – ScottishPower Energy Trading Limited**

**Urgent Modification Proposal P37 – Response to Further Consultation**

This response is submitted on behalf of Scottish Power UK plc, ScottishPower Generation Limited, ScottishPower Energy Trading Limited, ScottishPower Energy Retail Limited and Emerald Power Generation Ltd.

ScottishPower expressed its full support for the original Modification Proposal P37 To provide for the remedy of past errors in Energy Contract Volume Notifications and in Metered Volume Reallocation Notifications in response to the initial consultation. Our views on P37 Clarified and the Alternative Proposal P37 are set out below in response to the questions in the further consultation. Finally, we address the issues surrounding Licence Condition 7A.2.

**QF1 and QF2**

ScottishPower supports the principle which underlies the proposed modification, that there should be provision within the BSC for the correction of erroneous volume notifications. As we stated in our earlier response, we believe that the imposition of imbalance charges on imbalances which are merely the result of erroneous notifications and which do not relate to any corresponding physical imbalance on the system is wholly inappropriate and a mechanism is required which allows such errors to be corrected. We accept that the efficiency of settlement depends on the accuracy of notifications and that there should be an incentive on Parties to act reasonably in the provision of systems and processes to minimise the risk of notification errors. Nevertheless, errors may occur from time to time. As originally drafted, P37 gave the Panel the discretion to decline to rectify a claim of notification error if the Panel believed that the Party (or its Agent) did not have in place prudent systems and processes. P37 Clarified has removed this discretion such that the Panel must now decline to rectify the error if the Party fails the 'prudent systems' test. ScottishPower believes that this change unnecessarily restricts the discretion of the Panel. We believe that the Panel should have wide discretion to deal with notification errors in order to ensure that the BSC objectives are achieved in the wide variety of circumstances in which notification errors can arise. We do not support this aspect of the clarification of P37.

Accepting that the efficiency of settlement depends on the accurate notification of volumes we agree that some incentive to accurate notifications is required and that an error correction payment related to the magnitude of the incentive necessary to achieve accurate notifications is an appropriate way forward. To levy the payment at the rate of 20% of the value of the rectification is a reasonable starting point for this and capping the payment at £200,000 will maintain the incentive to notify accurately whilst avoiding punitive charges.

Subject to the above comments regarding the 'prudent systems' test we therefore support P37 Clarified and believe that it better facilitates the achievement of the BSC Objectives than does the existing Code. We believe that P37 Clarified provides a greater increment of improvement to the BSC than does Alternative Proposal P37.

**QF3 and QF4**

Subject to the following comments we believe that the legal drafting reflects the requirements and principles of the proposals.

P6.4.4(c)(i): The phrase in square brackets seems unnecessary.

P6.4.7, third word: See our response above regarding the use of "shall" rather than "may".

P6.4.7(a): The phrase "have in place" should be included. The phrase "and take all reasonable care to operate" is unnecessary and should not be included. In the context of an error provision the test of prudent systems is sufficient.

P6.4.7(a): The phrase "including in connection with the submitting and checking of such Notifications" is an unnecessary addition to the text which does not appear to be supported by the report of the Modifications Group discussions. It should be deleted.

P6.4.7(b)(i): The phrase in square brackets should not be included. There is no indication given of how or by what means the Party "ought reasonably to have become" aware of the error. Any such consideration, if indeed such consideration is appropriate, should be included in the Panel's consideration of P6.4.7(a).

P6.5.1(b): Despite the provisions of P6.4.3 regarding the timescale in which claims should be heard, it is possible that a claim will not be determined until after the Final Reconciliation Run. It would be prudent to add a sentence to the effect that, in such circumstances, the Panel shall instruct an ad-hoc run to be executed.

P6.5.2: We see no reason why the clause in square brackets is so treated.

P6.5.5(b)(iii): If it is the intention, as we understood that it was, that the errant party should not receive any of its own Error Correction Payment through the error correction reallocation process, then the phrase in square brackets should be included.

P6.6.3: The reference to the "adjustments determined under paragraph 6.5.1" limits the adjustments to those made by the Panel. Given that the decision may be made by the Authority under the appeal process it may be more appropriate for P6.6.3 to read "...BSC Agent System the adjustments determined by the Panel under paragraph 6.5.1 or, where applicable, by the Authority under paragraph 6.7.4."

P6.7.1: It is difficult to see why a Party other than the Relevant Contract Trading Parties and the Notification Agent of the Relevant Volume Notification should have the right to refer the Panel's determination to the Authority. We believe that the right of appeal should be restricted to these parties.

P6.7.3: The cross-reference should be to paragraph 6.7.2(b).

D4.1(a)(v): The reference should be to Section Q7.2.3, not A7.2.3.

**Legal Issues**

Counsel's Opinion obtained by ScottishPower aligns with that of James Goudie QC as regards the relationship between NGC's Licence Condition 7A.2 and the BSC, that is, that LC7A.2 requires that the imbalance settlement provisions of the BSC must refer back to the Parties' contracted quantities.

It has been suggested that the term "actually contracted" is so restrictive that, if the intent of this provision was that reference should be made to the actual trading position of the Party, it would preclude the ability of Parties to 'trade' between their production and consumption accounts. We do not believe that this is the case. The intent of NETA was clearly to allow such transfers to take place and the provisions of the BSC support these activities. The interpretation of "actually contracted" should not therefore be drawn so narrowly as to exclude intra-company trades.

Conversely, it has been argued that "actually contracted" must be interpreted so widely as to allow settlement to refer only to the volume notified by the Party and to preclude any reference to the actual trading position of the Party. This seems to us to be an equally extreme, and equally incorrect, interpretation. We believe that the correct interpretation of LC7A.2 is that settlement should refer to

the actual trading position of the Party. Under normal conditions the notified volume will be a reasonable proxy for that position. However, in the event that the notified position and the actual position diverge, the Code should provide a means by which the position may be corrected. This will ensure that the provisions of LC7A.2 are complied with.

It has also been suggested that the designation of the BSC by the Secretary of State indicates that the Code fully satisfies the requirements of the Transmission Licence. We do not support this interpretation. We interpret the designation as indicating that, having regard to the circumstances then prevailing, NGC would be considered not to be in breach of its licence at the start of trading if the designated version of the BSC was in use. Designation should not be interpreted as indicating that the Code fully implements the requirements of the licence.

In terms of the BSC Objectives, the Panel's decision to provide an error correction facility for volume notifications by recommending the acceptance of P37 would better facilitate the efficient discharge by the Transmission Company of the obligations imposed under the Transmission Licence. Subject to our comments in this response, ScottishPower urges the Panel to recommend acceptance of P37 Clarified.

Yours faithfully

**Mike Harrison**
Commercial Manager, Trading Arrangements
ScottishPower Energy Trading Limited

**P37_UMR2_006 – Derwent Cogeneration Ltd.**

# Further Comments by Derwent Cogeneration Ltd. ("DCL")

## Introduction

These comments are provided in response to the Elexon document "Urgent Modification Further Consultation – Modification Proposal P37" dated 23 October 2001.

As requested, these comments seek to indicate where our views differ from those originally submitted in respect of the original Proposal. The comments are set out as follows:

1 Further response to Consultation Questions 1 and 2
2 Further response to Consultation Questions 3 to 17 (except Q10)
3 Further response to Consultation Question 10
4 Comments on legal drafting
5 Licence Condition 7A.2

## General Questions

### Q1&2 Do you support Modification Proposal P37?

DCL supports the Modification Proposal "P37 Clarified". We continue to support the proposer's analysis of the applicable BSC Objectives, and in particular the views expressed concerning the promotion of effective competition.

The principal concern addressed by P37 is that despite considerable investment by all parties in systems and processes for NETA, the complexities of the trading arrangements make it almost inevitable that errors will occur, particularly during the first year of operation. Furthermore, the volatile nature of the market at this stage of its development has magnified the effects of such errors, single incidents causing losses of several million pounds, out of proportion with either a reasonable level of expenditure on systems or with the nature of the errors.

With regard to the magnitude of potential losses, a fundamental issue we identify is that there is no direct link back to the size of the player involved. The effect of price volatility can be an order of magnitude higher than the volume effect, and furthermore it would not be unusual for the whole output of a small power station to be covered by one contract notification and therefore at risk to a single error.

With regard to expenditure on systems and processes, smaller players in particular are extremely heavily penalised in terms of percentage spend against revenue. To further exacerbate this by loading unreasonable levels of risk would lead to only the very largest of players in the energy market being able to overcome the entry hurdles, which could be viewed as anti-competitive. Thus the BSC Objectives are best served by removing what could be seen as an unreasonable level of risk, particularly for the smaller player, from the market.

In contracts generally it is quite normal for such "manifest errors" (used in its general sense rather than its BSC definition) to be corrected after the event by bilateral agreement. Four particular features arise in NETA however:

- A notification error to a third party (i.e. BSCco) can cause a contract between two accounts to be effectively frustrated
- The consequence is that the two accounts appear out of balance and therefore suffer a net financial penalty, whilst having no effect on overall system energy balance
- The financial penalty is distributed as a windfall gain to parties generally, meaning that the affected parties have no direct counterparty with whom to negotiate an appropriate settlement
- The windfall is distributed to players in proportion to their size, to the clear detriment of smaller players

These last two points have influenced the whole development of P37, where it has been apparent that no consensus could ever be reached in a committee structure where every representative is either a potential winner or potential loser and there is no incentive on the current winners to find a solution. However it is in the Industry's own best interest to create a trading framework that is both robust and error free, but has a measure of sensibility about it regarding errors which do not in any way threaten the actual market or consumers. The magnitude of the losses that currently exist suggest that if the Industry itself does not sort out the issue then other means (probably involving more QC advice) will be pursued for its resolution.

Given the acknowledged tight timescale for the implementation of NETA and also the increased possibility of errors being made in the early months of operation of any new system, a retrospective modification such as this is entirely appropriate at the present time and can be made without prejudice to any subsequent forward-looking arrangements.

Our views on the distinction between the Clarified (capped) Proposal and the Alternative (uncapped) are set out in the response to Detailed Question 10, below.

## Detailed Questions 3 – 17 (except 10)

DCL believes that the issues raised in this series of questions in the original consultation have now been satisfactorily dealt with.

**Detailed Question 10**
**Form of error correction payment, percentage, capped or uncapped**

As stated in our previous response, we believe that the fundamental reason for raising this Modification Proposal is that errors have arisen which have caused costs wholly disproportionate to the normal day to day operational costs of running the business. It is generally recognised that costs of errors can not only be very large but are also somewhat arbitrary in magnitude, being driven by system prices at the time of the error.

DCL would have preferred the penalty payment to be decoupled from the cost effect of the error, i.e. not based on a percentage at all. However given the alternatives available, our view is that the Modification "P37 Clarified" (i.e. with the £200k cap included) should be approved as this presents the more stable view as to how this market regulates itself to the potential new entrant.

In terms of incentives, we do not believe that anticipation of this proposal would have made any difference to the approach of Parties to trading and notification strategies, systems and processes either before or after Go-Live. It should be noted that the Proposal makes no relaxation of the basic requirement to implement and maintain robust systems and processes, leaving this incentive firmly on BSC Parties.

**Legal Drafting**

Par. 6.4.7 (a)
[and take all reasonable care to operate] should be deleted. These words are inappropriate in the context of dealing with situations where it is openly acknowledged that operational errors have occurred.

Par. 6.4.7 (b)
[or ought reasonably to have become] should similarly be deleted.

**Licence Condition 7A.2**

The above comments are made in the light of the applicable BSC Objectives (Licence Condition 7A.3) notwithstanding the outcome of the debate on the legal interpretation of 7A.2.

If, however, London's views are upheld then clearly there is a much stronger case for P37 to be accepted, and furthermore good arguments for the level of error correction payments to be linked to a reasonable level of systems expenditure rather than to the quantum of the error.

**P37_UMR2_007 – SEEBOARD**

Subject: P37 Urgent Report Consultation - SEEBOARD Response

Having reviewed this further consultation report, SEEBOARD's position is unchanged. We are still strongly opposed to this modification in all its alternative forms.

We were asked to comment on 'P37 Clarified' and 'Alternative Proposal P37' and, of the two, the latter would have the least impact on SEEBOARD. Having said this, we must again reiterate that we oppose this proposal.

Sue Fraser
for Dave Morton
0190 328 3465

**P37_UMR2_008 – EDF Trading Limited**

**'Response to the P37 Further Consultation'**

***MODIFICATION PROPOSAL P37***

**Urgent Modification Draft Consultation (P37_UMR_CON)**
**To provide for the remedy of the past errors in Energy Contract Notifications and in Metered Volume Reallocations**

In response to the further consultation and impact analysis of urgent modification proposal 37, EDF Trading Limited have formulated the following response to the questions raised in Section 4 of the further consultation document.

QF1: Considering P37 Clarified, are your views different from those expressed regarding the original P37? If so, how?

Response: EDF Trading Limited maintains full support to modification P37 to provide a retrospective remedy of past notification errors. EDF Trading Limited maintains the same view for the P37 Clarified as it had with the original P37.

QF2: Considering the Alternative Proposal P37, are your views different from those expressed regarding the original P37? If so, how?

EDF Trading Limited considers both the Alternative Proposal P37 and the original P37 better serves the BSC Objectives. However we consider original P37 better facilitates the BSC objectives to the greatest extent. We believe the settlement of imbalance obligations will be conducted fairer by reference to a BSC parties true contracted position, as required by condition 7A of the NGC Transmission Licence, rather than by reference to erroneously notified positions.

EDF Trading Limited supports the legal opinion from James Goudie QC on Licence condition 7A.2.

EDF Trading would like to re-iterate our response from the initial consultation that the correction payment is too high and that the percentage should be lowered to say 5%. Again, we express no

conclusive view as to whether the payment should be capped, but if appropriate the cap should be referable to the size of the claim.

QF3: Does the legal drafting for P37 Clarified fully express the requirements and principles of that proposal?

We believe the legal drafting of P37 Clarified serves the requirements and principles of that proposal.

QF4: Does the legal drafting for the Alternative Proposal P37 fully express the requirements and principles of that proposal?

As outlined in the response to QF2, we believe that Alternative Proposal P37 should consider a reduction in the correction payment.

If you have any queries about the issues raised in this further consultation response paper, please contact Saeed Patel at EdF Trading Limited.

**P37_UMR2_009 – Enron Europe**

## Modification Proposal P37: To provide for the remedy of Past errors in Energy Contract Volume Notifications and in Metered Volume Reallocation Notifications

Response by Enron Europe
26 October 2001

### QF1. Considering P37 Clarified, are your views different from those expressed regarding the original P37? If so, how?

Enron Europe's support for P37 remains unchanged. We stand by our response dated September 27 to the previous consultation on P37. This retrospective modification better achieves the BSC Objectives and in particular it better meets the Applicable BSC objectives. The principal reason we gave as to why this modification better achieves the BSC objectives is because retrospective mitigation of notification errors in the specific circumstances allowed by P37 provides the precedent that participants will be protected from the consequences of unanticipated flaws in the BSC or its implementation.

Furthermore, reducing the risk of notification error is an important step towards improving liquidity in within day markets. Better liquidity would allow all Parties to better manage their imbalances. In particular it would improve the ability for small Parties to manage imbalances since they do not have the option of physical self-balancing available to portfolio generators. Therefore, P37 also better meets the Applicable BSC Objective of promoting effective competition in generation and supply.

We believe that retaining the £200,000 cap on penalties for successful claims strikes a reasonable balance between allowing Parties to recover most of the costs of a genuine notification error and the need to provide reasonable assurance that Parties would not have changed their behaviour had they known this rule change would have been in place from Go-Live. To lift the cap would be to create unnecessary notification risk with no obvious benefit.

On balance therefore we consider P37 Clarified better meets the Applicable BSC Objectives and that P37 Clarified better meets the Applicable BSC Objectives than does P37 Alternative.

### QF2. Considering the Alternative Proposal P37, are your views different from those expressed regarding the original P37? If so, how?

Alternative Proposal P37 also better meets the Applicable BSC Objectives. For the reasons given above, P37 Alternative better meets the objective of promoting competition in generation and supply and the objective of promoting efficiency in the implementation and administration of the BSC.

However, removing the £200,000 cap on penalties for successful claims creates unnecessary notification risk. This added risk would have a small but detrimental effect on short-term liquidity. Therefore, on balance P37 Clarified better meets the Applicable BSC Objective of promoting competition than does P37 Alternative.

### Comment on Licence Condition

Our argument as to why P37 better meets the Applicable BSC Objectives does not rest on the legal argument surrounding NGC Licence condition 7A.2. Therefore our assumption about this legal issue is irrelevant.

**QF3. Does the legal drafting for P37 Clarified fully express the requirements and principles of that proposal?**

Yes

**QF4. Does the legal drafting for the Alternative Proposal P37 fully express the requirements and principles of that proposal?**

Yes

**P37_UMR2_010 – Innogy**

**Submission in response to Consultation on Modification Proposal P37**

**The remedy of past errors in Energy Contract Notifications and in Metered Volume Reallocation Notification**

**Generally**

Innogy supports the overall purpose of the P37 proposal. Visiting substantial penalties on parties as a consequence of contract notification errors that have little or no cost associated with them would appear contrary to both the objectives of the BSC and the Conditions of NGC's Licences. Furthermore, the notion that individual companies can suffer substantial losses or profit from windfall gains as a consequence of errors that have little or no impact on the operation of the electricity system is likely to put the design of NETA into disrepute with those who are looking for appropriate market designs to further the liberalising of European markets.

In approaching the issue raised by P37 we would suggest that clear principles should be defined in deciding when error correction would be appropriate. These principles should be enshrined in the BSC and start from the position that the purpose of BM settlement is to visit the costs of imbalance on those parties responsible for the imbalance. If it can be shown that no cost has arisen as a consequence of an erroneous notification then there should be grounds for full reimbursement subject only to deductions for the administrative and any associated costs of investigating and correcting the error. This reasoning suggests that arbitrary caps on the amount reimbursed would be inappropriate, although we would support a minimum administrative charge to deter frivolous claims.

We believe an appropriate approach would be for a standing group with relevant expertise to be constituted under the BSC Panel to conduct inquiries into any errors. This group should be under the direction of the Panel but work within guidelines incorporated either within or as an adjunct to the BSC. However, where a party believes that the decision of the Panel does not accord with the Principles or Guidelines then there should be a right of appeal to the Authority.

Turning to the specific questions raised by the Consultation we would comment as follows:

***Consultation Questions - General***

**Q1: Do you support Modification Proposal P37? Please support your answer by explaining why P37 better achieves the applicable BSC Objectives, or not, as the case may be?**

Innogy supports Modification P37 since we believe that it further promotes the following BSC

Objectives.

- Promoting effective competition in the generation and supply of electricity because it removes the risk of charges being imposed that bear no relationship to costs incurred;
- Promoting efficiency in the implementation and administration of the balancing and settlement arrangements by improving the accuracy of the contract notification.

The object of the BM is to ensure that participants are given an incentive to balance their position prior to Gate Closure, not to penalise them for erroneous contract notifications where these were submitted in good faith. In this respect it should be noted that contract notification is a distinct and separate process to the lodging of PNs as required by the Grid Code.

**Q2: Do you believe that the ability to make retrospective adjustments of notifications (within a fixed period, following some effective date) would better achieve applicable BSC Objectives? If your answer is yes, but your answer to Q.1 was no, please give reasons.**

Whilst the BSC is based on the principle that the contract position should be notified at Gate Closure, retrospective adjustments made in accordance with defined principles and guidelines to correct errors would appear to better achieve the BSC Objectives.

**Consultation Questions - Specific**

**Q3: Do you agree with the way in which an erroneous notification is defined and circumscribed (as described, generally within Modification proposal P37, but more specifically given in clause 6.1.1 of the legal drafting within the above proposal)? If your answer is no, please**

a. Identify any features of the definition which you regard as inappropriate or inadequate, and why.

b. Identify any additional features you believe should be included, and why.

Whilst we think the definition is broadly correct it needs to make clear that it is an error in the Volume Notification and not necessarily in the submission of that volume. We assume it would be incumbent on the claimant to demonstrate that the volume notified was erroneous.

Additionally, we believe that the definition of erroneous notifications should be expanded to include Authorisation errors. The proposal seeks to allow participants to rectify errors that are manifestly erroneous, and to replicate the original intentions of those Trading Parties affected. We feel that rejections resulting from Authorisation errors should be included in the definition of erroneous notifications, provided that the Parties concerned can demonstrate that there was an intention to make notifications in respect of the Settlement Period in question, through the procedures detailed within paragraph 6.4. An example of this proof would be an Authorisation application in progress. To this end, we advocate the removal from paragraph 6.4.6 of the references to paragraphs 2.3.4 and 3.3.4.

**Q4: Do you agree that the time limit for making claims, following implementation, should be 5 working days? If not, what should the time limit be, and why?**

The time limit should be relatively short in order that there is some certainty in the settlement process. 5 working days would seem to be an appropriate period.

### Q5: Do you agree that the administration fee for making a claim should be £5,000? If not, what should it be and why?

The administrative fee should be set at a level that covers the cost of investigating and correcting the consequences of a notification error. It may be appropriate to have a minimum charge in order to dissuade frivolous claims.

**Q6: Do you agree that a sufficient level of assurance is afforded by a claim being supported in writing by the counterparty? If not, what other assurance would be required?**

**Yes**

**Q7: Do you agree that the evidence to support a claim should be at the discretion of the Panel? If your answer is no, what specific evidence should be provided?**

**No. The Panel, or a sub group of it, in considering a claim should do so in accordance with pre-defined principles and guidelines, as is the case for Trade Disputes. These principles and guidelines should be included within the BSC.**

**Q8: Do you agree with the scope and definition of the following circumstances where the Panel may exercise discretion in declining to rectify a claimed notification error? If your answer is no for any of these circumstances, please give views as to what the deficiencies are:**

- Where the relevant Contract Trading Party (or its Agent) did not, at the time that the past notification error occurred, have in place prudent systems and processes for the checking of volume notifications (the question of whether such systems and processes were prudent to be judged in the light of circumstances then prevailing).

- Where the relevant Contract Trading Party (or its Agent) did not, following discovery of the error, promptly take all appropriate steps in relation to relevant systems and processes to avoid a repetition of the said error.

**The difficulty with this approach is that it assumes the Panel is competent to judge whether a party's systems and processes are prudent and adequate.**

Since these are not accredited it would appear that to follow this approach would give the Panel and any prospective claimant an impossible task. Our view is that the grounds for correcting past errors should be related to the consequence of the error rather than the reasons for it arising.

### Q9: So long as the circumstances described in Q8 have been satisfied, then the Panel may not decline to rectify a notification error under the following further circumstances:

- Where the past notification error was directly attributable to BSC Systems.

- Where the past notification error and/or the magnitude of the loss suffered by the relevant Contract Trading Parties as a result arose from a combination of circumstances that could not have been reasonably foreseen.

- Where the magnitude of the loss suffered by one or more of the relevant Contract Trading Parties as a result of the said past notification error was wholly disproportionate to the fault or error committed by that Party.

**Do you agree with the scope and definition of the above circumstances? If your answer is no for any particular circumstance, please give views as to what the deficiencies are.**

We agree with the first bullet point.

We are unclear as to the circumstances Ofgem has in mind in the second bullet. The magnitude of any loss from an erroneous notification can never be foreseen because it is dependent upon the value ascribed to the cash-out prices.

In the third bullet we think the test should not be linked to the proportionality of the consequence of the loss for the party, but whether the error imposed additional costs on the system. The general principle should be that the cost of an error to the party should be reimbursed after accounting for any additional costs imposed on either the balancing mechanism or the settlement system.

**Q10 (A): Do you agree that an error correction payment, in the form of a percentage of the value of the rectification, should be levied?**

The error correction payment should reflect the cost of the error to the party less any costs imposed on the balancing mechanism and settlement system, and the costs of resolving the error.

**Q10 (B): If your answer to Q10 (A) was yes, do you agree with the level of error correction payment being 20%. If your answer was no, what level do you believe would be appropriate**

We do not believe that the error correction payment should be linked to a proportion of the cost of the error, but to a full reimbursement less any associated costs or adjustments to other payments. See answer to Q10 (E).

**Q10(C): If your answer to Q10 (A) was yes, do you agree that that the payment should be capped?**

We do not believe capping to be an appropriate concept in this respect.

**Q10 (D): If your answer to Q10(C) was yes, do you agree that the payment should be capped at £200,000. If your answer was no, what level do you believe would be appropriate.**

N/A

**Q10 (E): If your answer to Q10 (A) was no, what other form, if any, should the error correction payment take?**

In general the payment to the party should be derived from the reimbursement of the imbalance payment, a correction to the RCRC payments, any consequent payments under the GTMA, and the administration costs.

**Q11: Do you agree with the approach to credit cover taken within the proposal? If your answer is no, please give reasons.**

Yes.

**Q12: What body do you believe should decide on whether a claim should be allowed?**

- The Panel, as described in the proposal
- The Authority, taking into account the views of the Panel
- Some other body (please specify)

Provided that the BSC incorporates appropriate principles and guidelines for the resolution of errors, then it would be appropriate for the Panel to decide the resolution of an error subject to a right of appeal by the claimant to the Authority.

**Q13: Do you agree that, if an error correction is allowed, there should be a full correction of the notified volumes and that the error correction payment should be separately dealt with? If your answer is no, please give reasons.**

The notified volumes should be fully corrected, but the subsequent settlement of the error should take account of reimbursements made through the RCRC and the provisions of the GTMA.

**Q14: Do you agree that the error correction payment should be based on energy imbalance charges and levied in respect of any energy account where a reimbursement arises? If your answer is no, please give reasons.**

The error correction payment needs to extend further than the imbalance payments to encompass the RCRC and the costs of correcting the error. There is also as between the parties the additional issue of the consequence of incorrect notification under the GTMA.

**Q15: Do you agree that error correction payments should be disbursed to all Parties, pro-rata on credited energy, adjusted to exclude those Parties making the error correction payments themselves? If your answer is no, please give reasons.**

The error correction process should be to reimburse the party that has submitted an erroneous notification, but also to correct the subsequent impact on RCRC and any GTMA related payments, although it is appreciated that the GTMA effects cannot be dealt with through the BSC. If the cost of the imbalance reimbursement is charged back to the RCRC for the settlement period in which the error occurred then the RCRC will be appropriately adjusted for all parties including the claimant.

**Q16: What period of notice, if any, would be required before the proposal should take effect?**

1 Month would seem an appropriate period.

**Q17: Would your actions and behaviour have been different, had the proposal been anticipated at or before Go-Live? If yes, please identify which of the following would have been carried out differently and why:**

a. Development and testing of systems and processes

b. Operation of systems and processes

c. Trading and notification strategies

d. Other

Innogy has always endeavoured to ensure that it's systems and procedures were robust regardless of whether this proposal could have been anticipated irrespective of this proposal. Thus we do not believe our actions or behaviour would have been different had this proposal been anticipated at or prior to NETA Go Live.

**P37_UMR2_011 – British Gas Trading Ltd**

Thank you for the opportunity to respond to this further consultation on the clarifications to the original P37 modification proposal and the proposed alternative. This response is made on behalf of British Gas Trading Ltd. and Accord Energy Ltd..

It should be noted that this response is based on whether P37 (Clarified or Alternative versions) better facilitate the Applicable BSC Objectives. We have not taken legal advice on the relationship between Conditions 7A(2) and 7A(3) as documented in London Electricity's letters dated 9th and 24th October 2001 and Opinion provided by James Goudie QC. We agree with Elexon that this matter is for Ofgem to decide and as such is outside the formal consultation process.

Additionally, we concur with Elexon that London Electricity's circulated letters have made it more difficult for respondents to concentrate on and evaluate the salient issues.

We do not support the implementation of either the Clarified modification proposal or the Alternative modification proposal as better facilitating the Applicable BSC objectives.

We have detailed our reasons why we believe this modification does not better facilitate the Applicable BSC Objectives under each objective as set out in paragraph 3 of Condition 7A of the Licence:

**(a) The efficient discharge by the Transmission Company of the obligations imposed under the Transmission Licence.**

Unless this objective is affected by the legal issues as raised by London Electricity then we have no reason to believe that the modification better facilitates achievement of this objective.

**(b) The efficient, economic and co-ordinated operation by the Transmission Company of the Transmission System.**

We believe that the proposal will not better facilitate any change in this respect.

**(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.**

Rather, as a retrospective change, it is difficult to see how the modification can promote competition going forward as it relates solely to matters which have already happened, this proposal will promote regulatory uncertainty in the market going forward – Parties would face the real risk that BSC rules can be changed after the event. Therefore, we believe that in principle retrospective changes should be avoided. However, circumstances could arise where retrospective changes might be seen as promoting effective competition.

We believe this happened in the case of the Network Code Modification 64. In this particular case, there were three main reasons why the retrospective nature of this Modification were judged to be valid:

1) Unforeseen circumstances of the issue.
2) It effected a large number of parties in the same way.
3) Represented a clearly defined set of circumstances that would be corrected. There was no doubt or need for judgement on whether certain Parties had been effected.

In direct contrast to this, these circumstances are not present in BSC Modification 37. Indeed, the proposal is wide ranging, each case will be individual and require judgement and the source of the error was not unforeseen.

**(d) Promoting efficiency in the implementation and administration of the balancing and settlement arrangements.**

Again it is difficult to see how retrospective changes can promote efficiency going forward. Rather, we believe the proposal will create an increased inefficiency in terms of the implementation and administration of the balancing and settlement arrangements. Each time a Party makes a claim under this proposal, the claim will have to be processed and a decision made on whether the claim is valid. If valid, the settlement information would have to be corrected and the Settlement Periods re-opened to allow for settlement which would affect (through RCRC) all BSC Parties. This would then be repeated for each subsequent claim.

Yours faithfully,

Sarah Grimes
Commercial Manager

**P37_UMR2_012 – TotalFinaElf**

TotalFinaElf Gas and Power (TFE) welcome the opportunity to respond to this further consultation on modification P37. We continue to endorse the opinions expressed in our original response to this consultation and concur with the advice received by LE regarding NGC's licence obligations.

TFE consider the clarified version of P37 provides for better achievement of the objectives underlying P37 and NGC's licence objective. We are, however, concerned by the following point, raised during legal drafting,

- Discretion of Panel in rectification To make explicit that the Panel will decline to rectify in the event that prompt action to mitigate an error was not taken, when such action ought reasonably to have been taken.

We consider this to be an unnecessary clause, in view of the requirement, for "reasonable and prudent systems and processes to be in place", sufficiently encompassing the Panels discretionary powers in this area. TFE therefore recommend this clause be removed from the legal text.

We hope these comments prove to be constructive. For clarity we have attache our original response. If you require clarification upon any of the issues raised within this letter, please contact me on 020 7318 6880.

Yours sincerely,

Sharif Islam
Energy Regulation Manager
TotalFinaElf Gas and Power Ltd

**Dear Modifications Secretary**

TotalFinaElf Response to Modification Proposal P37: Remedy for Errors in Energy Contract Volume Notifications and in Metered Volume Reallocation Notifications

TotalFinaElf Gas and Power (TFE) welcome the opportunity to respond to this modification. Please note our responses below to the specific questions within the consultation. We would appreciate if these comments were to be included within the panel modification report for P37.

**Q1 Do you support Modification Proposal P37? Please support your answer by explaining why P37 better achieves the applicable BSC Objectives, or not, as the case may be?**

A1 TFE G&P support Modification Proposal P37. As indicated within our response to P19, we believe the intent of the BSC is, inter alia, to provide for sufficient financial incentives for BSC parties to contract such that energy accounts are balanced/optimised prior to gate-closure. The post-gate closure settlement rules presently consider only those notifications that were accurately notified ex-ante. We recognise the present rules, contain little flexibility for technical errors or events that may, sometimes result in the inability of a party to strictly follow BSC processes, despite these parties having contracted ex-ante to avoid imbalance price exposure.

TFE consider that failure to recognise these particular circumstances, within the BSC, results in parties being cashed out in an manner that does not recognise their true contract position and leads to inappropriate residual cashflow reallocation smears across the industry. This would seem perverse since the objective of the imbalance settlement process is to identify those participants whose energy accounts were imbalanced and levy imbalance prices upon those parties whose imbalance volumes caused physical imbalances upon the system. Given that incorrect notifications do not result in any change to the physical balance upon the system, applying imbalance price exposure to those parties who failed to notify correctly for technical reasons, does appear to be unduly onerous and penal i.e. disproportionate to the consequence of their error.

TFE therefore recommend inclusion within the BSC of post gate-closure correction of notifications. We consider this would be both pragmatic and does better facilitates the objectives of the BSC, particularly Condition 7A.3 (c) of NGC's licence. Furthermore, we agree that Condition 7A.3 (d) is better facilitated, since failure to implement this modification, leads to a greater perceived notification risk associated with trading close to delivery. This we consider has a continuing and detrimental impact upon liquidity within the secondary markets and prices to end customers.

**Q2 Do you believe that the ability to make retrospective adjustments of notifications (within a fixed period, following some effective date) would better achieve applicable BSC Objectives? If you answer is yes, but your answer to Q.1 was no, please give reasons**

A2 TFE G&P believe it is important to periodically allow BSC participants certainty in their settled positions. Currently the industry acknowledges their settlement positions are subject to variation for up to fourteen months after the settlement period. We accept, however, these variations within the suite of imbalance charges may not be as large as those which may result from acceptance of this modification. To achieve a pragmatic balance between the desire for post-gate closure correction and the market participants desire for certainty we would prefer this modification to be implemented alongside a similar modification that included a prospective element which prevents earlier settlement periods being "re-opened".

**Q3 Do you agree with the way in which an erroneous notification is defined and circumscribed (as described generally within Modification proposal P37, but more specifically given in clause 6.1.1 of the legal drafting within the above proposal)? If your answer is no, please**

**c) Identify any features of the definition which you regard as inappropriate or inadequate, and why.**

**d) Identify any additional features you believe should be included, and why.**

A3 Yes, although a more explicit recognition that Volume Notifications refers both to Contract and Metered Volume Notifications may be preferable.

**Q4 Do you agree that the time limit for making claims, following implementation, should be 5 working days? If not, what should the time limit be, and why?**

A4 Yes, subject to our comments for question two.

**Q5 Do you agree that the administration fee for making a claim should be £5,000? If not, what should it be and why?**

A5 The principles underlying this modification proposal and those for Manifest Error provisions do appear to be similar. Hence we would expect the charges to be consistent.

**Q6 Do you agree that a sufficient level of assurance is afforded by a claim being supported in writing by the counterparty? If not, what other assurances would be required?**

A6 The claim should certainly include written evidence, however, we would expect the onus to be upon the counterparty to provide sufficient information to satisfy the reasonable concerns of the Panel. Without attempting to produce an exhaustive list, we consider this may include, for example, voice records, email/fax transmissions and signed contracts

**Q7 Do you agree that the evidence to support a claim should be at the discretion of the Panel? If your answer is no, what specific evidence should be provided?**

A7 We believe the Panel should adjudicate within a framework that provides transparency not only to the claimant but other BSC Parties. Guidelines regarding how the decision making process is achieved would certainly be useful. In principle we would prefer this process to be similar to the Trading Disputes process, where independent third-parties may be agreed to arbitrate.

**Q8 Do you agree with the scope and definition of the following circumstances where the Panel may exercise discretion in declining to rectify a claimed notification error? If your answer is no for any of these circumstances, please give views as to what the deficiencies are:**

- **Where the relevant Contract Trading Party (or its Agent) did not, at the time that the past notification error occurred, have in place prudent systems and processes for the checking of volume notifications (the question of whether such systems and processes were prudent to be judged in the light of circumstances then prevailing).**

- **Where the relevant Contract Trading Party (or its Agent) did not, following discovery of the error, promptly take all appropriate steps in relation to relevant systems and processes to avoid a repetition of the said error.**

A8 Strict application of the provisions listed above would appear to prevent any claim being accepted by the Panel. It is certainly much easier with the benefit of hindsight to identify the deficiencies within pre-existing systems. TFE G&P would prefer that stronger weighting is applied by the Panel to the issue of disproportionate loss within Question 9.

We would also urge the Panel in their deision making to bear in mind the uncertainty and unfamiliarity associated with the detailed NETA trading rules, upon initial implementation. These undoubtedly contributed to errors in contract notification, and retrospective application of this modification, far from creating uncertainties within the trading rules, should correct for these initial market uncertainties and distortions.

**Q9 So long as the circumstances described in Q8 have been satisfied, then the Panel may not decline to rectify a notification error under the following further circumstances:**

- **Where the past notification error was directly attributable to BSC Systems.**

- **Where the past notification error and/or the magnitude of the loss suffered by the relevant Contract Trading parties as a result arose from a combination of circumstances that could not have been reasonably foreseen.**

- **Where the magnitude of the loss suffered by one or more of the relevant Contract Trading Parties as a result of the said past**

**notification error was wholly disproportionate to the fault or error committed by that Party.**

**Do you agree with the scope and definition of the above circumstances? If your answer is no for any particular circumstances, please give views as to what the deficiencies are.**

A9 Subject to our answer for question 8, we agree with the scope and definition set out in the question.

**Q10 (a) Do you agree that an error correction payment, in the form of a percentage of the value of the rectification, should be levied?**

A10(a) Yes. This should prevent spurious or immaterial claims being raised and pursued.

**Q10 (B) If your answer to Q10 (A) was yes, do you agree with the level of error correction payment being 20%. If your answer was no, what level do you believe would be appropriate.**

A10(b) No. Although it is subject to the size of the entity making the claim, we consider 20% may in practical terms restrict smaller suppliers from raising a valid claim. On balance we consider 10% to be more appropriate.

**Q10 (c) If you answer to Q10 (A) was yes, do you agree that the payment should be capped?**

A10(c) Yes.

**Q10 (d) If your answer to Q10 (C) was yes, do you agree that the payment should be capped at £200,000? If your answer was no, what level do you believe would be appropriate.**

A10(d) For similar reasons to A10(b), we consider £100,000 to be more appropriate.

**Q10 (e) If your answer to Q10 (A) was no, what other form, if any, should the error correction payment take?**

A10(e) N/A

**Q11 Do you agree with the approach to credit cover taken within the proposal. If your answer is no, please give reasons.**

A11 The approach is simplistic and pragmatic, however, there should also be a reciprocal measure of swift resolution for past notification error claims. This would avoid doubly penalising a party, with poor cashflow, who is 'incorrectly' in credit default.

**Q12 What body do you believe should decide on whether a claim should be allows?**

- **The Panel, as described in the proposal**
- **The Authority, taking in account the views of the Panel**
- **Some other body (please specify).**

A12 The Panel, however, the counterparty should have the ability to employ similar mechanisms within the Trading Disputes process for arbitration.

**Q13 Do you agree that, if an error correction is allowed, there should be a full correction of the notified volumes and that the error correction payment should be separately dealt with? If your answer is no, please give reasons.**

A13 Yes

**Q14 Do you agree that the error correction payment should be based on energy Imbalance charges and levied in respect of any energy account where a reimbursement arises? If your answer is no, please give reasons.**

A14 Yes

**Q15 Do you agree that error correction payments should be disbursed to all Parties, pro-rata on credited energy, adjusted to exclude those Parties making the error correction payments themselves? If your answer is no, please give reasons**

A15 No. Excluding the parties from the error correction smear would appear to add unnecessary layers of complexity to the process.

**Q16 What period of notice, if any, would be required before the proposal should take effect?**

A16 None

**Q17 Would your actions and behaviour have been different, had the proposal been anticipated at or before Go-Live. If yes, please identify which of the following would have been carried out differently and why:**

**e) Development and testing of systems and processes**
**f) Operation of systems and processes**
**g) Trading and notification strategies**
**h) Other**

A17 No.

We hope these comments prove to be constructive. If you would like further clarification with regard to this response, please contact me on 020 7317 6880.

Yours sincerely,

Sharif Islam
Energy Regulation Manager
**TotalFinaElf Gas and Power Ltd**
**For and on behalf of Humber Power Limited**

**P37_UMR2_013 – British Energy**

British Energy re-iterates its view that retrospective modifications increase risk and undermine confidence in the balancing process and should not be supported. Without firm rules known in advance, inefficient investment decisions will be made and electricity prices will reflect the resulting risk. We do not support this modification proposal in either its original, clarified or alternative forms.

We support the view that future errors made by participants should be capable of correction, but only through change to the BSC affecting prospective events, and only if appropriate checks and incentives are in place to ensure that the facility is not unreasonably exploited or abused.

We would support a proposal containing elements of this proposal (a combination of fixed and proportional "penalties" to incentivise accurate notifications) and related proposal 44 (rules to establish the reasonableness of a claim and the measures being taken to avoid future occurrences), but feel that further work is necessary to find the "right" solution for the future.

Rachel Ace
for
British Energy Power & Energy Trading Ltd
British Energy Generation Ltd
Eggborough Power Ltd

**P37_UMR2_014 – Entergy-Koch Trading, Ltd**

Entergy-Koch Trading, Ltd. ("EKT"), the European marketing and trading arm of Entergy-Koch, LP, offers the following comments respecting the questions set forth in further consultation document to Modification Proposal P37 ('MP37").

**General Questions**

QF1: Considering P37 Clarified, are your views different from those expressed regarding the original P37?

No.

QF2: Considering the Alternative Proposal P37, are your views different from those expressed regarding the original P37?

No.

EKT will address the issues presented by QF3 and QF4 in due course and after final action respecting Modification Proposal P37.

EKT thanks you for the opportunity to submit our views, and we continue to look forward to a speedy decision.

Sincerely,
William C. Pitcher
Director, Legal & Regulatory Affairs

# ANNEX 5 APPLICABLE BSC OBJECTIVES

The Applicable BSC Objectives are set out in paragraph 3 of Condition 7A of the NGC 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; and

(d) Promoting efficiency in the implementation and administration of the balancing and settlement arrangements.

## ANNEX 6 MODIFICATION GROUP MEMBERSHIP

| Name | Company | Status |
|---|---|---|
| Roger Barnard | London Electricity | Proposer |
| Paul Mott | London Electricity | Member |
| Mike Harrison | Scottish Power | Member |
| Dave Lenton | St Clements Services | Member |
| Tim Johnson | PowerGen uk Plc | Member |
| Roy Dinsmore | Innogy | Member |
| Lisa Waters | Dynergy | Member |
| Andrew Foster | UK Power Exchange | Member |
| Chris Teverson | European Power Source Company (UK) | Member |
| Mike Edgar | Transmission Company | Member |
| Andrew Paddon | Sempra Energy | Member |
| Nicola Lea | TXU Europe Energy | Member |
| Jon Bradley | Centrica | Member |
| Sharif Islam | TotalFinaElf | Attendee |
| Nick Simpson | OFGEM | Attendee |
| Mike Attree | Derwent Co-generation Company | Attendee |
| Peter Bolitho | PowerGen | Attendee |
| Martyn Hunter | St Clements Services | Attendee |
| Libby Glazebrook | Edison Mission Energy | Attendee |
| Tim Briggs | Herbert Smith | Attendee |
| Nicola Holt | Denton Wilde Sapte | Attendee |
| Chris Rowell | ELEXON | Chairman (First meeting) |
| David Warner | ELEXON | Chairman (Second & third meetings) |

# ANNEX 7 PROPOSED LEGAL DRAFTING

## Annex 7.1. P37 Clarified

*The following text shall be inserted in Section P:*

### 6. PAST NOTIFICATION ERRORS

### 6.1 Meaning of Past Notification Error

6.1.1 For the purposes of this Section P:

(a) a "**Past Notification Error**" occurred in relation to the notification of Energy Contract Volume Data or Metered Volume Reallocation Data for a Settlement Period where and only where there was an error in the submission of a Volume Notification on the part of the Volume Notification Agent and/or the relevant Contract Trading Parties which was not rectified prior to Gate Closure for the relevant Settlement Period and where Gate Closure for such Settlement Period occurred prior to the date on which this paragraph 6 comes into effect;

(b) references in this paragraph 6 to the submission of a Volume Notification:

(i) mean the submission of a particular Volume Notification; and

(ii) include a failure to submit a Volume Notification

and the provisions of this paragraph 6 shall be construed accordingly;

(c) for the purposes of paragraph (a), an error in the submission of a Volume Notification will be considered to have occurred only where:

(i) the relevant Contract Trading Parties had, at the time of such submission, a demonstrably settled and (save in the case of paragraph 1.4.1) shared commitment to notify particular ascertained Volume Data for the Settlement Period in question; and

(ii) it is clear that a mistake occurred in giving effect to that commitment;

(d) in relation to a claim of Past Notification Error:

(i) the "**relevant**" Volume Notification is the Volume Notification in respect of which the Past Notification Error occurred;

(ii) the "**relevant**" Volume Notification Agent is the Volume Notification Agent which submitted or failed to submit (as the case may be) the relevant Volume Notification;

(iii) the "**relevant**" Settlement Period is the Settlement Period in respect of which the Past Notification Error occurred;

(iv) a "**relevant**" Contract Trading Party is a Contract Trading Party in relation to which the Past Notification Error occurred; and

(v) the "**rectified Volume Notification**" is the Volume Notification which would have been made had the Past Notification Error not occurred;

(vi) the "**relevant**" Settlement Run, in relation to a claim or claims for Past Notification Error, is the next Settlement Run as referred to in paragraph 6.5.1(b);

(e) in relation to a relevant Contract Trading Party, references to a Past Notification Error are to the Past Notification Error which has (or is alleged to have) occurred in respect of such Party;

(f) "**Volume Data**" means Energy Contract Volume Data or Metered Volume Reallocation Data, as the case may be;

(g) "**Relevant Account Energy Imbalance Cashflow**" means the Account Energy Imbalance Cashflow of an Energy Account of a relevant Contract Trading Party in relation to a relevant Settlement Period or, if claims for more than one Past Notification Error in respect of the same Volume Notification are made, the net aggregate amount of such Account Energy Imbalance Cashflows for all relevant Settlement Periods.

## 6.2 Claiming Past Notification Errors

6.2.1 Where a relevant Contract Trading Party considers that there has been a Past Notification Error, such Party may make a claim to that effect by giving written notice of such claim to BSCCo, identifying the Past Notification Error and the relevant Settlement Period, provided that no claim of Past Notification Error may be made after the expiry of five Business Days after the date on which this paragraph 6 comes into effect.

6.2.2 Where a relevant Contract Trading Party makes a claim of Past Notification Error, such Party shall pay a fee to BSCCo for each such claim, the amount of which (for each such claim, provided that, for the purposes of this paragraph 6.2.2 and subject to paragraph 6.2.4, claims of Past Notification Error made by a Party in respect of the same Volume Notification shall be treated as a single claim) shall be £5,000, or such other amount as the Panel may from time to time after consultation with Parties and the approval of the Authority, determine upon not less than 30 days notice to Parties, and which shall not be reimbursed in any circumstances

6.2.3 Where a relevant Contract Trading Party makes a claim of Past Notification Error (other than one to which paragraph 1.4.1 applies), the claim shall be accompanied by a statement in writing from the other relevant Contract Trading Party and, where the relevant Volume Notification Agent is not one of the relevant Contract Trading Parties, from the relevant Volume Notification Agent (addressed, in each case, to BSCCo for the benefit of all Contract Trading Parties) confirming that it considers that the Past Notification Error has occurred.

6.2.4 A claim of Past Notification Error may not be made in relation to a Volume Notification in respect of which a previous claim has been made (and, accordingly, if a relevant Contract Trading party wishes to claim Past Notification Errors in relation to more than one Settlement Period, a single claim must be made for all such errors).

6.2.5 A claim of Past Notification Error may be made in relation to a Volume Notification, notwithstanding that the Volume Notification was treated as rejected (in relation to the relevant Settlement Period) or refused, in accordance with paragraph 2.4 or 3.4, where the rectified Volume Notification (if submitted as described in paragraph 6.4.5) would not have been so treated, but without prejudice to paragraph 6.6.2.

## 6.3 Flagging Past Notification Errors

6.3.1 Where a Party gives notice of a claim of Past Notification Error under paragraph 6.2.1, BSCCo shall within one Business Day after receiving such notice notify the claim to the Energy Contract Volume Aggregation Agent, all Contract Trading Parties, and the relevant Volume Notification Agent.

6.4 **Determination of Past Notification Errors**

6.4.1 The Panel shall consider and determine claims of Past Notification Error in accordance with this paragraph 6.4.

6.4.2 For the avoidance of doubt, the Panel may establish or appoint a Panel Committee to discharge its functions under this paragraph 6, and (notwithstanding Section W2.2) the Panel may appoint the Trading Disputes Committee, and (if so appointed) that Committee shall have the ability and competence, to do so.

6.4.3 Claims of Past Notification Error will be considered and determined in a timely fashion, but having regard (among other things) to the need first to establish appropriate central systems and processes to give effect to the requirements of this paragraph 6, the overall number of claims made and the time reasonably required to investigate each claim.

6.4.4 Where a claim of Past Notification Error is made:

(a) the Panel Secretary shall request:

(i) the Party claiming the Past Notification Error to provide evidence and information supporting its claim;

(ii) the other relevant Contract Trading Party (if any) to provide evidence and information supporting the claim; and

(iii) the relevant Volume Notification Agent and the ECVAA to provide comments in relation to the claim;

(b) BSCCo shall:

(i) investigate the matters referred to in paragraph 6.4.7 (and each Trading Party shall provide BSCCo with such information as BSCCo may reasonably request for these purposes); and

(ii) provide the Panel with a report of its findings, a copy of which shall be made available to the Party claiming the Past Notification Error;

(c) the relevant Contract Trading Parties and the relevant Volume Notification Agent shall:

(i) provide the Panel with such further information as it may reasonably request to assist it in making its determination; and

(ii) confirm to the Panel that the evidence and information provided to the Panel are complete and not misleading;

(d) the Panel shall determine in its opinion:

(i) whether the Party claiming the Past Notification Error has demonstrated that there was a Past Notification Error in relation to the relevant Settlement Period;

(ii) if so, what the Past Notification Error was; and

(iii) whether the Past Notification Error should in all the circumstances be rectified in relation to the relevant Settlement Period, subject to paragraphs 6.4.6 and 6.4.7,

and the Panel shall indicate its reasons for its determination;

(e) the Panel Secretary shall notify the Panel's determinations to all Contract Trading Parties and the relevant Volume Notification Agent, together with the reasons indicated by the Panel for its determinations and a brief description of the process followed by the Panel in making its determinations;

(f) BSCCo shall give such instructions to the ECVAA, SAA and FAA as are necessary to give effect to any such rectification;

(g) the fee under paragraph 6.2.2 shall be invoiced as and included in determining BSCCo Charges for the relevant Party for the next month for which BSCCo Charges are invoiced following the notification of the Panel's determination under paragraph (e), and shall be paid accordingly.

6.4.5 The determination of the Panel (or any Panel Committee established or appointed under paragraph 6.4.2) as to each of the matters referred to in paragraph 6.4.4(c) shall be final and binding on all Parties, subject to paragraph 6.7.

6.4.6 Rectification of a Past Notification Error shall not be made if the rectified Volume Notification would have been invalid (pursuant to paragraph 2.3.4 or 3.3.4) or treated as rejected (in relation to the relevant Settlement Period) or refused (pursuant to paragraph 2.4 or 3.4) if such rectified Volume Notification had been submitted:

(a) at the time at which the relevant Volume Notification was submitted; or

(b) where the Past Notification Error is a failure to submit, immediately prior to Gate Closure for the relevant Settlement Period.

6.4.7 The Panel shall decline to rectify a Past Notification Error where it considers that the relevant Contract Trading Party and/or the relevant Volume Notification Agent did not (or the relevant Contract Trading Party has failed to demonstrate that it and/or the relevant Volume Notification Agent did):

(a) at the time that the Past Notification Error occurred, have in place prudent systems and processes in connection with Volume Notifications, having regard to the circumstances then prevailing; and/or

(b) promptly take all appropriate steps:

(i) to rectify, reverse or otherwise mitigate the effect of the error (giving rise to one or more such Past Notification Errors) in respect of Settlement Periods for which Gate Closure occurred after it became aware of such error; and

(ii) to avoid a repetition of the said error, following discovery of the error.

6.4.8 For the purposes of paragraph 6.4.4(c), in determining whether or not, subject to paragraphs 6.4.6 and 6.4.7, a Past Notification Error should in all the circumstances be rectified, the Panel may have regard, among other things, to the following factors, where the Panel considers such factors to be relevant:

(a) the extent to which, in the Panel's view, the Past Notification Error was directly attributable to a failure of BSC Systems, subject to paragraph 6.4.9;

(b) the extent to which, in the Panel's view, the Past Notification Error was directly attributable to an inaccuracy in or the non-availability of the Forward Notification Summary as referred to in Table 3 of Annex V-1 but otherwise without prejudice to the provisions of Section V1.1.4;

(c) the extent to which, in the Panel's view, the Past Notification Error and/or the magnitude of the loss suffered by the relevant Contract Trading Parties in respect of Trading Charges as a result of the error was attributable to a combination of circumstances which could not reasonably have been foreseen; or

(d) the extent to which, in the Panel's view, the magnitude of the loss suffered by one or both of the relevant Contract Trading Parties in respect of Trading Charges as a result of the Past Notification Error was wholly disproportionate, due weight being given to the desirability of incentivising Contract Trading Parties to avoid mistakes in the submission of Volume Notifications.

6.4.9 For the avoidance of doubt, no claim may be made under this paragraph 6 in respect of a Volume Notification to which the provisions of paragraph 5 apply.

### 6.5 Rectification of Past Notification Errors

6.5.1 Where the Panel determines that a Past Notification Error occurred:

(a) the Panel shall determine what adjustments are required to the relevant Account Bilateral Contract Volumes, Metered Volume Fixed Reallocations and/or Metered Volume Percentage Reallocations (as the case may be) in order to rectify the Past Notification Error as determined by the Panel;

(b) such adjustments shall be made as soon as is practicable, and shall be taken into account in the next Settlement Run for the relevant Settlement Period after such adjustments have been made.

(c) if the Final Reconciliation Settlement Run for the relevant Settlement Period has already taken place before the Panel has made its determination under 6.5.1, such adjustments shall be made as soon as is practicable, and shall be taken into account in an Ad Hoc Settlement Run for the relevant Settlement Period after such adjustments have been made.

6.5.2 Where, in relation to a claim for Past Notification Error (or, if claims for more than one Past Notification Error in respect of the same Volume Notification are made, in relation to the sum of all such claims in aggregate), the adjustments to the data as determined pursuant to paragraph 6.5.1 result in a reduced debit or increased credit in the Relevant Account Energy Imbalance Cashflow of the relevant Contract Trading Parties (or either of them individually), such Party or Parties shall be liable to pay to the BSC Clearer the Error Correction Payment(s) applicable to its or their Energy Account(s) in accordance with the further provisions of this paragraph 6.5.

6.5.3 BSCCo shall calculate the Error Correction Payment ($ECP_a$) for those Energy Account(s) of the relevant Contract Trading Party(ies) for which adjustment of the data as determined pursuant to paragraph 6.5.1 results in a reduced debit or increased credit in the Relevant Account Energy Imbalance Cashflow as follows:

$ECP_a = \min\{0.2 * \max (\Sigma_j (NQAEI_{aj} - QAEI_{aj}), 0), MECP\}$

where:

(a) $\Sigma_j$ is the sum over all relevant Settlement Periods j relating to the relevant Volume Notification;

(b) $QAEI_{aj}$ is the Account Energy Imbalance Cashflow determined by the relevant Settlement Run for Energy Account a and relevant Settlement Period j;

(c) $NQAEI_{aj}$ (the non-corrected Account Energy Imbalance Cashflow) is the value which would have been the value of $QAEI_{aj}$ for Energy Account a and relevant Settlement Period j, had the Past Notification Error not been rectified; and

(d) MECP is £200,000.

6.5.4 In relation to Past Notification Errors, the amount of the Error Correction Payment(s) made by the relevant Contract Trading Parties shall be paid by the BSC Clearer to Trading Parties by way of Error Correction Payment Reallocation in accordance with this paragraph 6.5.

6.5.5 Where an Error Correction Payment is payable, BSCCo shall calculate the Error Correction Payment Reallocation ($ECPR_a$) for each Energy Account of each Trading Party as follows:

(a) if rectification of the relevant Past Notification Error(s) in respect of which the Error Correction Payment is payable results in a reduced debit or increased credit (or net reduced debit or increased credit) in the Account Energy Imbalance Cashflow for Energy Account a, then:

$ECPR_a = O$

(b) otherwise:

$ECPR_a = ECP_a * \Sigma_j \ RCRP_{aj} \ / \ \Sigma_j \ \Sigma_a \ RCRP_{aj}$

where:

(i) $\Sigma_j$ is the sum over all relevant Settlement Periods j relating to the relevant Volume Notification;

(iii) $\Sigma_a$ is the sum over all Energy Accounts a other than those referred to in paragraph (a).

6.5.6 The amounts of the entitlements and liabilities under paragraphs 6.5.3 and 6.5.5 shall be Ad Hoc Trading Charges for the purposes of Section N6.9.

## 6.6 Credit Arrangements

6.6.1 Where a Past Notification Error is rectified, the rectification shall be taken into account for the purposes of the determination of the relevant Contract Trading Parties' Credit Cover Percentages in relation to Settlement Periods for which Gate Closure occurs after, but not earlier than, the time of the rectification.

6.6.2 In accordance with paragraph 6.6.1:

(a) where, in accordance with Section M, a relevant Contract Trading Party was treated before the time of the rectification as being in Credit Default and would not have been so treated had the rectified Volume Notification been submitted:

(i) Section M3.5 shall not apply, and such Party shall not be entitled to any right or remedy in respect of being so treated; and

(ii) to the extent that, as a result of such Party being so treated, any other Volume Notification was treated as rejected (in relation to any Settlement Period) or refused in accordance with paragraph 2.4 or 3.4, such refusal or rejection shall not be affected or prejudiced by the rectification of the Past Notification Error and Section M4 shall not apply in relation thereto;

(b) where, in accordance with Section M, a relevant Contract Trading Party would have been treated before the time of the rectification as being in Level 2 Credit Default had the rectified Volume Notification been submitted, and was not so treated, the rectification of the Past Notification Error shall not affect or prejudice any other Volume Notification which was not treated as refused before, or rejected as to Settlement Periods for which Gate Closure was before, the time of the rectification.

6.6.3 For the purposes of this paragraph 6.6, the time of the rectification of a Past Notification Error is the time with effect from which the ECVAA enters into its BSC Agent System the adjustments determined under paragraph 6.5.1.

## 6.7 Appeal to Authority

6.7.1 Where the Panel (or Panel Committee) makes a determination pursuant to paragraph 6.4.4(c), any Party may refer such determination to the Authority subject to the further provisions of this paragraph 6.7.

6.7.2 A reference to the Authority pursuant to paragraph 6.7.1 shall be made:

(a) no later than five Business Days after the relevant determination is notified to all Contract Trading Parties under paragraph 6.4.4(e);

(b) solely on one or both of the grounds set out in paragraph 6.7.3;

(c) by notice in writing to the Authority, copied to the Panel Chairman, setting out the grounds upon which the reference is made and the reasons why the Party making such reference believes that the Authority should exercise its powers set out in paragraph 6.7.4 (as the case may be); and

(d) subject to payment by the Party making such reference of a fee of £5000 (in respect of each such reference or, where more than one reference is made at the same time in relation to the same Volume Notification, in respect of all such references together), such fee to be invoiced and paid in accordance with the provisions, mutatis mutandis, of paragraph 6.4.4(g).

6.7.3 The grounds referred to in paragraph 6.7.2(b) are either:

(a) the procedures set out in this paragraph 6 have not been following in relation to the claim of Past Notification Error(s) forming the subject of the relevant determination; or

(b) new information has emerged since the relevant determination was made, which is or is likely to be of relevance to the determination.

6.7.4 Where a determination of the Panel (or Panel Committee) is referred to the Authority pursuant to paragraph 6.7.1, and provided the Authority is satisfied that one of the grounds referred to in paragraph 6.7.3 applies, the Authority may:

(a) substitute for the Panel's (or Panel Committee's) determination its own determination of the matter(s) forming the subject of such determination; or

(b) remit the matter(s) back to the Panel (or Panel Committee) to be decided again in accordance with the procedures of this paragraph 6 or in the light of the new information which has emerged (as the case may be); or

(c) uphold the relevant determination.

6.7.5 The decision of the Authority shall be final and binding.

6.7.6 The Panel (or Panel Committee) and the Authority shall not act as an expert or an arbitrator in making any decisions pursuant to this paragraph 6 and the provisions of the Arbitration Act 1996 shall not apply in respect of any such decisions.

**Section D**

*The following text shall be inserted in Section D4.1(a)(v):*

(v) any amounts paid to BSCCO by way of fee pursuant to Section P6.2.2, Section P6.7.2 or Section Q7.2.3;

**Section G**

*The following text shall be inserted as a new Section G1.1.2(b) and the existing Section G1..1.2(b) and remaining paragraphs of Sections G1.1.2 shall be renumbered accordingly:*

(b) Section P6, which addresses the possibility of notification errors in the submission of Volume Notifications;

**Section M**

*The following text shall be inserted as a new Section M3.5.2 and the title Section M3.5 shall be amended to read "Result of Trading Dispute, etc":*

3.5.2 This paragraph 3 and paragraph 4 are subject to the provisions of Section P6.

**Annex X-1**

*The following new definitions shall be inserted in Annex X-1:*

"**Past Notification Error**" has the meaning given to that term in Section P6.1.1(a);

"**Volume Data**" has the meaning given to that term in Section P6.1.1(f);

**Annex X-2**

*The following new terms and acronyms shall be inserted in Table X-2 of Annex X-2:*

| Defined Term | Acronym | Units | Definition/Explanatory Text |
|---|---|---|---|
| Error Correction Payment | $ECP_a$ | | The payment amount calculated in accordance with Section P6.5.3. |
| Error Correction Payment Reallocation | $ECPR_a$ | | The payment reallocation amount calculated in accordance with Section P6.5.5. |

## Annex 7.2. Alternative Modification P37

As above, *subject* to the following:

*Section P6.5.3 shall instead read as follows:*

6.5.3 BSCCo shall calculate the Error Correction Payment ($ECP_a$) for those Energy Account(s) of the relevant Contract Trading Party(ies) for which adjustment of the data as determined pursuant to paragraph 6.5.1 results in a reduced debit or increased credit in the Relevant Account Energy Imbalance Cashflow as follows:

$ECP_a = 0.2 * \max (\Sigma_j (NQAEI_{aj} - QAEI_{aj}), 0)$
where:

(a) $\Sigma_j$ is the sum over all relevant Settlement Periods j relating to the relevant Volume Notification;

(b) $QAEI_{aj}$ is the Account Energy Imbalance Cashflow determined by the relevant Settlement Run for Energy Account a and relevant Settlement Period j;

(c) $NQAEI_{aj}$ (the non-corrected Account Energy Imbalance Cashflow) is the value which would have been the value of $QAEI_{aj}$ for Energy Account a and relevant Settlement Period j, had the Past Notification Error not been rectified; and

# ANNEX 8 SUMMARY OF FEATURES WHICH ADDRESS SPECIFIC AUTHORITY VIEWS.

The following table provides an outline of certain features that the Authority considered might be appropriate in relation to arrangements for dealing with the correction of erroneous notifications. These considerations formed a part of the Authority's determination in respect of proposal P19. Furthermore, the Authority's provisional thinking in respect of proposal P37 itself has also been summarised in this table. The table then provides a summary of the relevant aspects of P37 that relates to such features. It should be noted that the table provides a paraphrase of the relevant elements both of the Authority's views and of the relevant text in the proposal. Hence, should there be any conflict between the table and any of the source documents, the source documents take precedence. It should further be noted that the table has been constructed in response to a comment and has not been considered by the Modification Group.

| **Specific Features Identified by the Authority** | **Specific Features Contained in Proposal P37 (clarified) or P37 (alternate)** |
|---|---|
| An appropriate and material charge for any Party seeking to correct a notification error, but not prohibitive to small players. | A fee of £5,000 for a claim is described in both P37 (clarified) and P37 (alternative). |
| A fixed percentage recovery of a claim, in addition to the fee. | An Error Correction Payment of 20% is described (this implies 80% recovery of a successful claim). P37 (clarified) caps this limit at £200, 000, P37 (alternative) does not. |
| A short claim period; less than two business days would be appropriate. | P37 (clarified and alternative) are wholly retrospective. Participants have five days, following implementation, to raise claims of past notification errors. |
| The responsibility for establishing the nature of the error to be placed on the claimant. | The burden of proof is placed explicitly on the claimant (both variants of the proposal). |
| A retrospective rule change could arise if there were a situation where a loss was incurred due to a fault or error that was directly attributable to central arrangements | The Panel has the discretion to rectify, or not, in the light of the extent to which the error was directly attributable to a failure of BSC Systems, subject to certain exclusions (for clarified and alternative). |
| A retrospective rule change could arise if there were a combination of circumstances that could not have been reasonably foreseen | The Panel has the discretion to rectify, or not, if there were a combination of circumstances could not reasonably have been foreseen (clarified and alternative) |
| A retrospective rule change could arise if the possibility of retrospective action had been clearly flagged to participants in advance, allowing the detail and process of the change to be finalised with retrospective effect. | Not Applicable |
| The Panel to be the decision making body, with an appeal route to the Authority. | The Panel acts as the decision making body, with an appeals route to the Authority (clarified and alternative). |
| 80% recovery of a claim may be too high | See above. |