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
18.	London Electricity (2nd)	P37_UMR_018
(See Summary Responses Attachment for attachment to 2nd LE Response)		

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] circum- stances. 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

(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, 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:

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

(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 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:

(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

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 the risks associated with making ECVNs. This is a commercial decision and should a party subsequently find that they are unable to manage

[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 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.

<u>General comments</u>

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.

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)

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.

Q17 Would 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.

P37_UMR_018

Mr Nicholas Durlacher
RB/MVB
Chairman, BSC Panel
c/o Elexon Ltd
Third Floor
1 Triton Square
9 October 2001
London NW1 3BX

Dear Mr Durlacher

MODIFICATION PROPOSAL P37: LEGAL ADVICE

I refer to your letter dated 3 October 2001 on behalf of the BSC Panel to the Gas and Electricity Markets Authority (the 'Authority'). In that letter, pursuant to the provisions of paragraph F2.6 of the BSC, you have asked the Authority for its preliminary view on matters arising from the Modification Group's recent consideration of Urgent Modification Proposal P37.

In responding to your request, the Authority will have to form a provisional view on whether P37 (or an alternative modification, as compared with it) would better facilitate the achievement of the Applicable BSC Objectives than the BSC does in its present form. Accordingly, London Electricity plc ('London'), as the proposer of P37, now wishes to make further public representations in this regard – particularly in relation to the legal basis of the case for P37.

As you know, the direct predecessor of P37 was Modification Proposal P19, of which London was also the proposer. That proposal was rejected, earlier this year, by both the Panel and the Authority. A key element of London's case on behalf of P19 was that this modification should be favoured on the ground that it would bring the BSC more closely into line with the requirements of NGC's licence condition 7A.2, and would thus, by that fact alone, better facilitate achievement of the Applicable BSC Objectives.

That argument seems to have been discounted by BSC Panel members in their consideration of P19, apparently on the basis of advice supplied by Elexon's lawyers (see p 15 of Elexon's Urgent Modification Report dated 5 July). Nor was it addressed by the Authority in its P19 decision document dated 1 August. As you know, the same argument, in all material respects, is relied upon by London in support of P37.

London has now been advised on this matter by James Goudie QC, and a copy of his Opinion accompanies this letter. In essence, Counsel has concluded that Elexon and, consequently, the Panel have received, and the Authority may be acting upon, erroneous advice. This is because**:**

- Condition 7A.2, taken in conjunction with the provisions of paragraph P1.4 of the BSC, clearly requires that the settlement of imbalances should be effected by reference to ascertainable contracted trading positions which exist independently of notified amounts, and which will include positions arising from internal trades between a single party's production and consumption accounts.

- The notion that the present form of the BSC is to be regarded as compliant with NGC's licence just because the present BSC was designated by the Secretary of State for the purposes of NGC's licence condition 7A.1 is incorrect in law. The legal effect of condition 7A.1 of NGC's licence is merely that NGC will not be regarded as having infringed its obligation to adopt an appropriate BSC so long as NGC operates under a form of BSC designated by the Secretary of State. Condition 7A.1 does not mean that the present BSC fully meets the requirements of condition 7A.2.

The implications of Counsel's advice are, in our view, unavoidable. Once it is appreciated on a proper legal analysis that the present form of the BSC does not comply with the requirements of NGC's licence, and that this situation could be remedied or ameliorated by a BSC modification such as P37, then as a matter of law it becomes incumbent on the Panel to recommend, and on the Authority to accept, the adoption of that proposal (or a superior available alternative).

On behalf of London Electricity, I should be grateful if you were to arrange for this letter and Counsel's Opinion to be circulated and put into the public domain in the same way that modification proposals are dealt with under paragraph F2.1.10 of the BSC.

I have copied both this letter and the Opinion directly to Nicola Northway, the Authority's General Counsel.

Yours sincerely

Roger Barnard

Regulatory Lawyer
London Electricity Group