

Stage 03: Assessment Consultation

What stage is this document in the process?

01 Initial Written Assessment

02 Definition Procedure

03 Assessment Procedure

04 Report Phase

P250: Prevention of “Timing Out” of Authority decisions on Modification Proposals

P250 Proposed Modification would oblige the BSC Panel to construct Implementation Dates in such a way that they cannot cause the Authority to be ‘timed out’ from making a decision. It would also formalise the ability for the BSC Panel to write to the Authority.

P250 Alternative Modification would introduce a process whereby, in the event the Authority was unable to make a decision before the last ‘decision by’ date, the Authority could instruct the BSC Panel to provide additional Implementation Dates.



Modification Group initially recommends
Rejection of both the Proposed Modification and Alternative Modification



Medium Impact:
BSC Panel, the Authority, Modification Groups and ELEXON



Low Impact:
All participants affected by Modification Proposal Implementation Dates

P250
Assessment Consultation

5 February 2010

Version 1.0

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About this document:

The purpose of this Assessment Consultation is to obtain views or further evidence from BSC Parties and other interested parties on matters discussed in this document. The P250 Modification Group will then discuss the consultation responses before making its recommendations to the Panel on 11 March 2010.

There are 7 documents for this Assessment Consultation:

- This is the **main document**. It outlines the solution, impacts, costs, benefits and implementation approach for the change. It includes the Group's initial recommendation on whether the change should be approved.
- **Attachment A** provides further supporting details of how the Group's discussions have led it to its initial views.
- **Attachment B** contains the Group's legal text for the P250 Proposed Modification.
- **Attachment C** contains the Group's legal text for the P250 Alternative Modification.
- **Attachment D** contains the Assessment Consultation questions and response form.
- **Attachment E** contains the Authority decision for Rejected Modification P93.
- **Attachment F** contains the P198/P200/P203/P204 Judicial Review Judgement.



Any questions?

Contact:

Andrew Wright



**andrew.wright@elexon
.co.uk**



020 7380 4217

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Why Change?

The current working practice for constructing Modification Proposal Implementation Dates can potentially cause the Authority to be 'timed out' from making a decision. This occurs when the Authority has not made a decision by the final 'decision by' date provided in the Final Modification Report.

P250 proposes to introduce measures so that 'timing out' of Authority decisions would not occur.

Proposed Modification

P250 Proposed Modification would introduce an obligation on the BSC Panel to propose Implementation Dates in such a way that it is not possible for an Authority decision to 'time out' because of the way that the dates are constructed.

It would also introduce a formal mechanism for the Panel to:

- ask the Authority for a likely decision date on a Modification Proposal; and
- advise the Authority if the analysis contained in the Final Modification Report has become (or may shortly become) out of date.

Alternative Modification

P250 Alternative Modification would introduce a new process into the BSC so that if the Authority is unable to make a decision before the final 'decision by' date in the Final Modification Report they could instruct the Panel to provide additional Implementation Dates.

If instructed by the Authority, the Panel would consult with the industry in order to create appropriate additional Implementation Dates. During this consultation the Panel would also ask the industry if there are any 'time-sensitive' issues (for example, out of date analysis or a change to implementation lead times), as provided in the Final Modification Report, was out of date.

If the Authority were unable to meet the 'decision by' dates in these additional Implementation Dates then they could again request the Panel provide further additional Implementation Dates.

Under both the Proposed Modification and the Alternative Modification, the Panel would not have the ability to revise the analysis or its original recommendation as to whether the Modification Proposal should be made.

Likely Impacts & Costs

P250 is likely to impact the BSC Panel, the Authority, Modification Groups, ELEXON, BSC Agent and all Parties and Party Agents impacted by Modification Proposal Implementation Dates. The P250 Modification Group would welcome any views you have on the costs and impacts of the P250 Proposed Modification and the P250 Alternative Modification.

Implementation

The Group recommends an Implementation Date (for either the Proposed Modification or the Alternative Modification) of:

- 10 Working Days after an Authority decision.

The Group also agreed, if approved, P250 rules would only apply to Modification Proposals raised on or after the P250 Implementation Date. Modification Proposals raised prior to the Implementation Date would be progressed in line with the current rules for Implementation Dates.

The Case for Change

The majority of the P250 Modification Group believes that **neither** the Proposed or the Alternative Modification would better facilitate the Applicable BSC Objectives as they:

- Increase regulatory risk and uncertainty for material Modification Proposals; and
- Are unnecessary Modifications as current processes allow for flexible Implementation Dates and the Panel is mindful to provide ample opportunity for the Authority to make a decision.

A minority of the Group believes that both the Proposed and the Alternative Modifications would better facilitate the Applicable BSC Objectives as they:

- Remove the potential for Authority decisions on Modification Proposals to 'time out', thereby preventing a potential waste of industry resource and associated costs.

The Group unanimously believe the Alternative Modification is better than the Proposed because it enables greater use of industry expertise in deciding appropriate additional dates, and therefore gives greater flexibility regarding date construction.

Recommendations

The Group's provisional majority recommendation is that both P250 Proposed and Alternative Modifications should be rejected.

The Group invites you to comment on this view as part of the consultation.

How do we currently construct BSC Modification Implementation Dates?

The BSC requires ELEXON (in consultation with any Modification Group) to provide “the proposed steps, timetable and programme plan for such implementation consistent with the proposed Implementation Date”.

The BSC itself does not set out a specific construction for Implementation Dates, but just refers to a ‘proposed Implementation Date’. It obliges:

- Modification Groups to provide a ‘proposed Implementation Date’ to the Panel in its Assessment Report;
- The Panel to provisionally recommend a ‘proposed Implementation Date’, and consult Parties on that recommendation as part of its Draft Modification Report; and
- The Panel to provide its final ‘proposed Implementation Date’ to the Authority in the Final Modification Report.

Each Modification requires a lead time to implement, i.e. the time to make the necessary system, process and/or document changes. This lead time can range from days to months, depending on the implementation activities involved. As such, each proposed Implementation Date comes with a ‘decision by date’. This is the date by which the Authority needs to make a decision in order to implement the Modification Proposal on the relevant Implementation Date.

The Modification Group and ELEXON initially create the Implementation Dates and ‘decision by’ dates taking account of the implementation lead times provided as part of the impact assessments from Parties, Party Agents, ELEXON, BSC Agents and any other affected participants. In developing these dates, we also estimate (using any advice provided by the Authority during the Modification Proposal’s progression) how long the Authority is likely to require to make its decision. This includes considering whether the Authority may need to undertake a Regulatory Impact Assessment (RIA).

Implementation Dates usually (though not always) take the form of one of the following two constructions:

Example 1 – Two set decision dates with linked Implementation Dates

“The recommended Implementation Date for PXXX is:

- **[Implementation Date A]** if an Authority decision is received on or before **[‘decision by’ date 1]**; or
- **[Implementation Date B]** if an Authority decision is received after **[‘decision by’ date 1]** but on or before **[‘decision by’ date 2]**.

We use this Implementation Date construction when there is significant work required by either the industry or ELEXON. This provides ELEXON and the industry with certainty for planning implementation activities and associated resources. These types of Implementation Dates are often aligned with the dates of standard BSC Releases (usually for system changes). However, there may be other reasons for aligning implementation with a fixed date – for example, annual contract rounds, implementation of primary legislation, a change to another industry code, or the start of a BSC/financial year.

Where this date construction is used, it is current working practice to provide the Authority with two Implementation Dates where the second date is a ‘fall-back’ to be used if the Authority cannot meet the first ‘decision by’ date.

Example 2 – Set number of Working Days after an Authority decision

The recommended Implementation Date for PXXX is:

- **[X] Working Days** following an Authority decision.

We use this Implementation Date construction where there are documentation only changes that do not need to be tied to a particular fixed date, or, potentially, if it is an Urgent Modification where a quick Implementation Date is required.

Other constructions may occasionally be used (e.g. in exceptional circumstances some changes may have a retrospective Implementation Date).

The implementation approach that is put forward in the Final Modification Report depends on what the industry, Modification Groups and the Panel believe to be the most appropriate and efficient at that time.

What's 'timing out' of Authority decisions and why is it a problem?

In 2007/08 the Authority was unable to make a decision on Modification Proposals P198, P200, P203 and P204 by the final 'decision by' date provided in the Final Modification Report. A subsequent Judicial Review ruled that if the Authority did not make a decision by the final date in the report then it lost its ability to make a decision on the Modification Proposals (such that they were effectively 'timed out'). The Judgement is provided for information as Attachment F.

'Timing out' of a Modification Proposal may cause additional work for the Panel, the industry and ELEXON. If a Party wants to progress a 'timed out' Modification (i.e. it is still seen as a good idea) then a new Modification Proposal must be raised. This requires ELEXON and the industry to assess the new Modification Proposal on its own merits which may cause some duplication in process and assessment. Note that a Party can also raise a Modification Proposal similar to a Modification rejected by the Authority after a short stand down period (2 months following an Authority decision to reject). This would result in similar duplication.

'Timing out' can only occur where an Implementation Date includes a 'decision by' date as in Example 1. Other constructions such as that in Example 2 are 'open-ended' dates in the sense that these dates cannot 'time out'.

Can 'timing out' only affect changes on which the Authority has not yet made a decision?

Yes. In 2005, Approved Modification P180 'Revision to BSC Modification Implementation dates, where an Authority determination is referred to appeal or judicial review' introduced BSC provisions to deal with circumstances where an Approved Modification or Rejected Modification Proposal could be 'timed out' as a consequence of a legal challenge (a Judicial Review to the High Court, or an appeal to the Competition Commission).

This occurred in 2004 for Modification Proposal P82. P82 had been approved by the Authority, but subsequently became the subject of a Judicial Review which resulted in the modification being remitted to the Authority for it to re-make its decision (effectively quashing the Authority's earlier approval). Because the original 'decision by' dates had gone past, P82 was 'timed out' and the implementation work which the industry had already completed was lost (with an associated cost).

The P180 BSC provisions oblige the Panel, where an Approved Modification or Rejected Modification Proposal is subject to a legal challenge, to propose 'extra' Implementation Dates ('Conditional Implementation Dates') to the Authority if needed to stop the possibility of 'timing out'. The Panel proposes these dates after consultation with the industry, and they effectively overwrite either the approved Implementation Date (for an Approved Modification) or the proposed dates in the Final Modification Report (for a Rejected Modification Proposal).

The trigger for these provisions is a legal challenge being brought against a modification on which the Authority has already made a decision. The P180 provisions therefore cannot be used for Modification Proposals on which the Authority has not made a decision. This is the case even if the Modification Proposal is subject to a legal challenge through a Judicial Review (as was the case for P198, P200, P203 and P204).¹ If the Authority is unable to make its decision on a Modification Proposal by the last 'decision by' date in the Final Modification Report, then, under the ruling of the High Court in 2008, the Modification Proposal would be 'timed out'.

Previous industry discussion

The industry has previously discussed the possibility of adopting a different date construction which cannot 'time out'. These discussions have either considered changes using a working practice change, a BSC Modification Proposal, or a new Transmission Licence requirement².

Details of these discussions can be found in:

- P93 'Introduction of a Process for Amendment of Proposed Modification Implementation Dates' Authority decision letter – Attachment E
- Panel paper 80/004 (August 2004);³
- The Standing [Issue 10](#) Group's report to the Panel (October 2004);
- Panel paper 144/08 (September 2008);
- The BSC Panel's and ELEXON's [responses](#) to Ofgem's November 2008 open letter (January 2009); and
- The BSC Panel's and ELEXON's [responses](#) to Ofgem's May 2009 consultation.

Ofgem has previously consulted on draft Transmission Licence changes designed to remove the possibility of 'timing out' under the BSC, Connection and Use of System Code and Uniform Network Code (see the November 2008 open letter and the May 2009 consultation referred to above). However, the Proposer of P250 considers that it is preferable if any obligations are developed and introduced through the industry code change processes.

¹ A Party can only appeal Approved Modifications or Rejected Modification Proposals to the Competition Commission, because the criteria for an appeal are that the Authority's decision was contrary to the Panel's recommendation. However, the ability to bring a Judicial Review is not limited in this way.

² A Transmission Licence change would be required to implement one of the potential alternative solutions proposed by a Modification Group member. Under this solution a similar implementation process for changes to Charging Methodologies would be adopted for BSC Modification Proposals, where a Panel decision becomes binding unless vetoed by the Authority. This change cannot be an Alternative Modification. For further details see Attachment A, Other potential alternative solutions.

³ Historic Panel papers have been archived from the BSC Website, but you can request a copy of these through the Lead Analyst or the BSC Helpdesk.

Industry concerns about removing time constraints on Authority decisions

During the previous industry discussion, concerns were raised about removing time constraints on the Authority's decision-making ability. Participants in favour of retaining 'decision by' dates noted that:

- they provide certainty regarding potential Implementation Dates; and
- that the original analysis in the Final Modification Report could become out of date if a long period of time elapses between the submission of the report and the Authority's decision.

How does the Panel currently communicate with the Authority?

The Panel can write to the Authority (or publicly question the Authority at a Panel meeting) for any purpose under the current arrangements.

The Proposer is proposing to introduce a more formal process for the Panel to write to the Authority in order to allay industry concerns that providing 'open-ended' Implementation Dates would reduce the pressure on the Authority to make a decision within a reasonable period of time.

3 Proposed Solution

Proposed solution

The P250 Proposed Modification would introduce a BSC obligation on the Panel to propose Implementation Dates in such a way that 'timing out' can be avoided in future. In practice this would mean that the Panel must always include an 'open ended' Implementation Date as part of the Final Modification Report.

For example:

- **[Implementation Date A]** if an Authority decision is received on or before **['decision by' date 1]**;
- **[Implementation Date B]** if an Authority decision is received after **['decision by' date 1]** but on or before **['decision by' date 2]**; or
- **[X] Working Days** following an Authority decision if an Authority decision is received after **['decision by' date 2]**.

The Proposed Modification would also introduce a formal mechanism for the Panel to:

- ask the Authority for a likely decision date on a Modification Proposal; and
- advise the Authority if the analysis contained in the Final Modification Report has become (or may shortly become) out of date.

Assessment Consultation question

Would P250 Proposed Modification help to achieve the Applicable BSC Objectives compared to the current arrangements? (see [Section 7](#) for the Group's views against Applicable BSC Objectives)

The Group invites you to give your views using the response form in Attachment D.

4 Alternative Solution

Alternative solution

Rather than obliging the Panel to set 'open ended' Implementation Dates for all Modification Proposals, the P250 Alternative Modification would require the Panel to provide additional implementation dates when requested by the Authority.

A new process would be introduced into the BSC whereby:

- The Authority, unable to make a decision before the final 'decision by' date, instructs the Panel to set additional Implementation Dates. As part of this the Authority could:
 - specify that the revised proposed Implementation Date shall not be prior to a specified date;
 - specify a reasonable period within which the Panel shall be obliged to make its recommendation;
 - provide reasons as it deems appropriate for why it needs new Implementation Dates;
- Once instructed the Panel consults with the industry in order to create appropriate additional Implementation Dates;
- During the consultation the Panel also ask the industry if there are any 'time-sensitive' issues (for example, out of date analysis or a change to implementation lead times), as provided in the Final Modification Report, which should be highlighted to the Authority; and
- Finally, the Panel provide the Authority with the consulted upon additional Implementation Dates and indicate when the analysis in the Final Modification Report should be considered out of date potentially indicating a rate of expected decay.

If the Authority were unable to meet the 'decision by' dates in these additional Implementation Dates then they could start the process again by requesting the Panel provide further additional Implementation Dates.

Assessment Consultation question

Would P250 Alternative Modification help to achieve the Applicable BSC Objectives compared to the current arrangements? (see [Section 7](#) for the Group's views against Applicable BSC Objectives)

The Group invites you to give your views using the response form in Attachment D.

5 Likely Impacts

Impacts

The Group is undertaking the impact assessment with this consultation, in order to establish the exact impact and any associated costs. The Group would welcome any views you have on the costs and impacts of the P250 Proposed Modification and the P250 Alternative Modification.

At this stage the Group considers the likely impacts to be as follows:

Impact on BSC Systems and process		
BSC System/Process	Proposed Modification	Alternative Modification
BSC Systems	None	None

Impact on BSC Agent/service provider contractual arrangements		
BSC Agent/service provider contract	Proposed Modification	Alternative Modification
BSC Agent/service providers	The Group considers that having Implementation Dates that cannot 'time out' would impact BSC Agent impact assessments, as the BSC Agents would not necessarily know when a Modification would be implemented. The Group would welcome the views of the BSC Agents on the impact of P250.	The BSC Agents would need to consider any additional Implementation Dates.

Impact on BSC Parties and Party Agents	
Proposed Modification	Alternative Modification
All Parties and Party Agents would be impacted to the extent that they are affected by Implementation Dates. The Group considers that having Implementation Dates that cannot 'time out' would affect Parties impact assessment response, as Parties would not necessarily know when a Modification would be implemented. The Group welcome the views of Parties on the impact of P250.	All Parties and Party Agents would be impacted to the extent that they are affected by Implementation Dates. When the Authority instructed the Panel to provide additional Implementation Dates, Parties and Party Agents would be consulted on the timing of additional Implementation Dates, and to establish whether the analysis contained in a Final Modification Report is out of date. The Group welcome the views of Parties on the impact of P250.

Impact on Transmission Company	
Proposed Modification	Alternative Modification
The Transmission Company would be impacted to the extent that it is affected by Implementation Dates. The Group considers that having Implementation Dates that cannot 'time out' would impact the Transmission Company's impact assessment responses, as it would not necessarily know when a Modification would be implemented. The Group would welcome the views of the Transmission Company on the impact of P250.	The Transmission Company would be impacted to the extent that it is affected by Implementation Dates. When the Authority instructed the Panel to provide additional Implementation Dates, the Transmission Company would be consulted on the timing of additional Implementation Dates, and to establish whether the analysis contained in a Final Modification Report is out of date.

Impact on ELEXON		
Area of ELEXON's business	Proposed Modification	Alternative Modification
Change Delivery (including the Modification Secretary)	<p>ELEXON would be required to assist Modification Groups and the Panel in formulating Implementation Dates in a way that prevents Modification Proposals being timed out as a result of the construction of those dates.</p> <p>The Modification Secretary would be required to write to the Authority if instructed by the Panel in order to:</p> <ul style="list-style-type: none"> ask the Authority for a likely decision date on a Modification Proposal; or advise the Authority if the analysis contained in the Final Modification Report has become (or will shortly become) out of date. 	ELEXON would be required to assist the Panel in formulating additional Implementation Dates. This would include issuing consultations, collating the responses, presenting to the Panel and issuing the report to the Authority.

Impact on Code		
Code section	Proposed Modification	Alternative Modification
Section F	Additional obligations would need to be inserted into Section F.	Additional obligations would need to be inserted into Section F.

Impact on Core Industry Documents and other documents		
Document	Proposed Modification	Alternative Modification
Connection and Use of System Code (CUSC) / Uniform Network Code (UNC)	National Grid has raised similar proposals to amend the CUSC/UNC to prevent 'timing out' occurring under their change processes.	National Grid has raised similar proposals to amend the CUSC/UNC to prevent 'timing out' occurring under their change processes.

Other Impacts		
Item impacted	Proposed Modification	Alternative Modification
BSC Panel	<p>The Panel would have a new obligation to propose Implementation Dates in a way that prevents Modification Proposals being timed out as a result of the construction of these dates.</p> <p>The Panel would also have a formal mechanism to:</p> <ul style="list-style-type: none"> ask the Authority for a likely decision date on a Modification Proposal advise the Authority if the analysis contained in the Final Modification Report has become (or will shortly become) out of date. 	<p>The Panel would have a new obligation to provide additional Implementation Dates when instructed to by the Authority. To do this the Panel would consult on the Implementation Date with industry. At the same time the Panel would also consult on whether there are any 'time-sensitive' issues (such as out of date analysis) contained in a Final Modification Report that the Authority should be aware of.</p>
Authority	<p>The Authority's decision making process would be impacted as:</p> <ul style="list-style-type: none"> Implementation Dates would be constructed such that they cannot cause the Authority to 'time out'; and The Panel could write to the Authority to ask the Authority for a likely decision date on a Modification Proposal, or advise the Authority if the analysis contained in the Final Modification Report has become (or will shortly become) out of date. <p>The BSC could not oblige the Authority to take any action as a result of this letter. However, the Proposer notes that the Authority may wish to</p>	<p>The Authority's processes would be impacted as it could instruct the Panel to provide additional Implementation Dates. This would be a new process as the Authority cannot currently instruct the Panel to construct additional Implementation Dates on Modification Proposals where it has not made a decision.</p>

Other Impacts

Item impacted	Proposed Modification	Alternative Modification
	update the analysis itself under its existing RIA process, or (if its proposed 'send back' process is introduced separately under the Governance Review) send the Modification Proposal back to the Panel for further analysis and a revised recommendation.	

Assessment Consultation question

What are the impacts and costs of the Proposed Modification on your organisation?

Please let us know:

- whether the Proposed Modification would impact your ability to provide accurate impact assessments to future Modification Proposals?

The Group invites you to give your views using the response form in Attachment D.

Assessment Consultation question

What are the impacts and costs of the Alternative Modification on your organisation?

Please let us know:

- whether the Alternative Modification would impact your ability to provide accurate impact assessments to future Modification Proposals?

The Group invites you to give your views using the response form in Attachment D.

How would P250 be implemented?

The Group recommends an implementation approach (for both the Proposed and the Alternative Modification) of:

- **10 Working Days after an Authority decision.**

The Group also agreed that the new P250 Implementation Date rules would only apply to Modification Proposals that were raised on or after the P250 Implementation Date. Modification Proposals raised prior to the P250 would be progressed in line with the current rules for Implementation Dates.

The Group believed it was important for a Modification Proposal to be progressed using the same set of BSC arrangements that were in existence when it was raised. A change to the arrangements during the progression of a Modification Proposal could cause uncertainty and require considerable additional work. For example, a change to the Implementation Date rules would require the Modification Groups to reassess the Implementation Dates and any other aspects of their work which were time-sensitive (for example, cost-benefit analysis conducted assuming that a Modification Proposal would be implemented by a certain date).

The majority of the Group also noted that they were not against constructing Implementation Dates that cannot time out where it is appropriate (such as for P250). But the majority did not believe that such a construction methodology should be mandated in the BSC. Instead it should be a question for the Panel to consider for each Modification Proposal.

Assessment Consultation question

Do you support the implementation option preferred by the Modification Group?
Please let us know:

- whether you support the Group's view that P250 Proposed Modification or Alternative Modification should only apply to Modification Proposals raised on or after the P250 Implementation Date?; and
- whether you agree with proposed implementation timescales?

The Group invites you to give your views using the response form in Attachment D.

This section summarises Groups view and key arguments, detail of debate and all arguments in Attachment A.

Proposed Modification vs. the current arrangements

Majority - worse than the current arrangements

The majority of the Group believed the Proposed Modification would not be better than the current arrangements. The Group cited arguments against Applicable BSC Objectives (a), (c) and (d).

In summary the Group noted that the Proposed Modification solution could be achieved under the current arrangements. The Panel currently has the ability to construct Implementation Dates in such a way that they cannot 'time out'. It would do this by using an Implementation Date construction in the form of:

The recommended Implementation Date for PXXX is:

- **[X] Working Days** following an Authority decision.

The Group also noted that mandating that Implementation Dates cannot 'time out' would increase uncertainty in the industry in relation to material Modification Proposals. This would be a particular problem for smaller Parties and new entrants who may be less able to deal with uncertain Implementation Dates. This would present a barrier to entry.

The reasons under each Applicable BSC Objective were as follows:

Applicable BSC Objective (a):

- One Group member viewed P250 Proposed Modification as being potentially illegal and therefore not better facilitating the efficient discharge by the Transmission Company of the obligations imposed upon it by the Transmission Licence. Their opinion was:

"The Judge noted [in the P198/P200/P203/P204 Judgement paragraphs 62 and 66]] that the Authority "have a reasonable period in which to take a decision". However, what is being proposed, with P250 Proposed Modification, is that the Authority would have, as noted at the P250 Modification Group meeting, till "infinity" (neither the Proposer or the Ofgem representative disputed this) to make a decision. Only in this way can we be assured that the Panel will never 'time out' the Authority.

However, such a time-frame (of infinity) clearly goes beyond a reasonable period and would also, in my view, fall foul of the Judge's comments with respect to the Authority not having the power "to sit upon a Modification Report for years and then seek to restart the exercise by a purported variation of the timetable set in the Report."

In essence whilst we are free to change the legal text in the Code, we are always 'confined' to the requirements to comply with the law, both in terms of the relevant energy related laws (such as from the Electricity Act 1989 to the Energy Act 2008) as well as general law (such as the 'reasonableness' 'test' noted by the Judge in P198)."

- ELEXON legal advice is that P250 Proposed Modification is **not illegal**:
"The suggestion has been made that the Proposed Modification is unlawful as it would, in effect, enable the Authority to make a decision in respect of a Modification within an unreasonable period.



Recommendation

The majority of the Modification Group recommends rejection of both the Proposed Modification and the Alternative Modification.

The Proposed Modification seeks to prevent the ‘timing out’ of the Authority’s decision in respect of a Modification Proposal by providing that the proposed Implementation Date shall not prevent the Authority making a decision in relation to a relevant Modification by reason of the proposed Implementation Date having passed.

Reference is made to the court’s judgment in respect of the judicial review application brought by various claimants challenging the legality of the Authority’s decision letter of 14 September 2007 (“the judgment”).

At paragraph 66 of the judgment, the judge notes that the Authority is obliged to take a decision in respect of a Modification Report within a reasonable time in light of the prevailing circumstances following receipt of the relevant report. In our view, the Proposed Modification is not in conflict with such obligation on the Authority nor does it fetter the ability of the Authority to take a decision within a reasonable period or otherwise.

The Proposed Modification simply prevents a proposed Implementation Date being set which might impose a deadline by which the Authority must make a decision in respect of a Modification. The timing of the decision following receipt of the Modification Report is entirely within the gift of the Authority as the decision maker. It is therefore a matter for the Authority to determine what is a reasonable period in light of the relevant circumstances then existing.

Indeed, the judgment acknowledges implicitly that the absence of a deadline for an Authority decision in the timetable set out in a Modification Report is not, in itself, objectionable when it states at paragraph 63 that, “If the Panel sets a timetable in a Modification Report that simply proposes that implementation should follow the Authority’s decision, there is no tension between the Panel’s timetable for implementation and the Authority’s timetable for decision making”.

For the above reasons, we do not consider that the Proposed Modification is unlawful.”

Applicable BSC Objective (c):

- P250 Proposed Modification does not benefit competition as it would introduce Implementation Date rules which would substantially increase uncertainty and regulatory risk particularly in relation to material Modification Proposals. It would make it harder for the industry:
 - to plan and prepare for when change would be implemented; and
 - to provide accurate impact assessments as circumstances may change if Ofgem requires a significant time period to make a decision.

Applicable BSC Objective (d):

- P250 Proposed Modification would reduce the efficient operation of the BSC as:
 - the solution it would introduce can already be achieved under the current BSC arrangements. Implementation Dates can be constructed to allow reasonable time for an Authority decision, in some cases not including a decision by date. Additionally, the Panel already has the ability to write to the Authority. Making this process formal in itself provides no benefit as the Authority cannot be obliged to act on any correspondence;
 - the Modification Group would be required to prepare cost benefit analysis that would be relevant for an indefinite period – this would require additional work and would potentially undermine the cost benefit analysis; and

- P250 goes against the findings of the P198/P200/P203/P204 Judgement (paragraph 83) as if the Authority took a significant time to come to a decision then it may be deciding on a different Modification Proposal from the one the Panel gave their recommendations against. This would potentially cause issues if a Party wanted to appeal the Authority decision to the Competition Commission.

Minority – better than the current arrangements

A minority of the Group believed the Proposed Modification would be better than the current arrangements. The minority of the Group cited arguments against Applicable BSC Objective (d).

Applicable BSC Objective (d):

- P250 Proposed Modification would remove the potential for Authority decisions on Modification Proposals to 'time out', thereby preventing a potential waste of industry resource and the associated costs incurred; and
- P250 Proposed Modification would ensure that the validity of underlying analysis which support a Panel recommendation can be questioned should circumstances surrounding the Modification Proposal change after a period of time has elapsed.

Alternative Modification vs. the current arrangements

Majority - worse than the current arrangements

The majority of the Group believed the Alternative Modification would not be better than the current arrangements. The Group cited arguments against Applicable BSC Objective (d).

The reasons were as follows:

Applicable BSC Objective (d):

- P250 Alternative Modification would reduce the efficient operation of the BSC as it would introduce greater uncertainty as to when Modification Proposals would be implemented.

Minority - better than the current arrangements

A minority of the Group believed the Alternative Modification would be better than the current arrangements. The minority of the Group cited arguments against Applicable BSC Objectives (c) and (d).

Applicable BSC Objective (c):

- P250 Alternative Modification better facilitates competition as it would introduce a process that would allow industry to be consulted on additional Implementation Dates and whether the analysis contained in the Final Modification Report was out of date.

Applicable BSC Objective (d):

- P250 Alternative Modification would reduce the potential for Authority decisions on Modification Proposals to 'time out', thereby preventing a potential waste of industry resource and the associated costs incurred;
- P250 Alternative Modification would allow industry to inform the Authority if the analysis which support a Panel recommendation is out of date; and
- P250 Alternative Modification better preserves the regulatory balance between the Authority and the Panel when compared to the Proposed. As stated by the Judge in the P198/P200/P203/P204 Judgement:

“In such circumstances a power to remit the matter to the Panel for complete reconsideration, rather than a power in the Authority to change the timetable for implementation of what had in substance become by lapse of time a different modification, might better preserve the institutional balance between the Panel and the Authority and better serve the objectives of the BSC.”

Alternative Modification vs. the Proposed Modification

Unanimous – Alternative Modification better than Proposed Modification

The Group unanimously believes that the Alternative Modification would be better than the Proposed Modification. The Group noted the following reasons:

Applicable BSC Objective (a):

- None of the Group members view the Alternative Modification as potentially illegal, one Group member viewed the Proposed Modification as potentially illegal. ELEXON’s legal advice is that the Proposed Modification is **not illegal**.

Applicable BSC Objective (c):

- The Alternative Modification introduces a process which gives industry expertise the opportunity to assist (during the consultation) on the construction of additional Implementation Dates. This is likely to make for more appropriate Implementation Dates than would be achieved under the Proposed Modification as the Alternative Modification allows the Panel to take account of any changes in lead time/implementation approach that might be appropriate. It also allows revised 'fixed' dates to be put forward, whereas the Proposed requires 'open-ended' dates;
- The Alternative Modification introduces a process which gives industry expertise the opportunity to assist (during the consultation) the Panel as to whether the analysis contained in the Final Modification Report is out of date. This is a more efficient process than under the Proposed; and
- The Alternative Modification would introduce a process based in part on an existing process (the Conditional Implementation Date process introduced by P180). This makes for a clearer and more easily understood process for industry.

Applicable BSC Objective (d):

- P250 Alternative Modification better preserves the regulatory balance between the Authority and the Panel when compared to the Proposed. As stated by the Judge in the P198/P200/P203/P204 Judgement:

“In such circumstances a power to remit the matter to the Panel for complete reconsideration, rather than a power in the Authority to change the timetable for implementation of what had in substance become by lapse of time a different modification, might better preserve the institutional balance between the Panel and the Authority and better serve the objectives of the BSC.”

Assessment Consultation question

Would the Alternative Modification P250 help to achieve of the Applicable BSC Objectives when compared to the Proposed Modification?

The Group invites you to give your views using the response form in Attachment D.

P250
Assessment Consultation

5 February 2010

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8 Further Information

More information is available in

Attachment **A**: Detailed Assessment.

This information includes:

- Terms of Reference;
- Full Modification Group discussions;
- Modification Group Membership; and
- Assessment process and timetable followed for P250.

Attachment **B**: Legal Text for P250 Proposed Modification

Attachment **C**: Legal Text for P250 Alternative Modification

Attachment **D**: Assessment Consultation questions

Attachment **E**: Reject Modification P93 Authority decision

Attachment **F**: P198/P200/P203/P204 Judicial Review Judgement