

Neutral Citation Number: [2008] EWHC 1415 (Admin)

IN THE HIGH COURT OF JUSTICE

Case No: CO/11010/2007

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 25 June 2008

Before:

Kenneth Parker QC, sitting as a Deputy Judge of the High Court

Between:

THE QUEEN (on the application of (1) TEESIDE  
POWER LIMITED (2) IMMINGHAM CHP LLP  
(3) DRAX POWER LIMITED (4) BRITISH  
ENERGY GROUP PLC)

Claimants

- and -

THE GAS AND ELECTRICITY MARKETS  
AUTHORITY

Defendant

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Mr Michael Fordham QC and Mr Javan Herberg (instructed by Denton Wilde  
Sapte) for the Claimants  
Ms Dinah Rose QC and Tristan Jones (instructed by Ofgem) for the Defendant

Hearing date: 19 May 2008

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**JUDGMENT**

**Kenneth Parker QC:**

## **Introduction**

1. In this application the Claimants challenge the legality of the decision of the Gas and Electricity Markets Authority ("the Authority"), contained in a letter to the Claimants and other affected parties dated 14 September 2007, concluding that (1) the Authority had the power to approve a Proposed Modification to the Balancing and Settlement Code ("the BSC") other than in accordance with the implementation timetable set by the BSC Panel in the relevant Final Modification Report; and (2) accordingly the Authority would continue to consider and (if appropriate) approve any of the six modifications to the BSC ("the challenged decision"). The Defendant in these proceedings is the Authority.
2. The proposed modifications are important: they concern the treatment of electricity transmission losses on the national grid; they would affect all consumers of electricity in Great Britain. However, it is not the substance, but the timing for implementation, of any such proposed modification that is in issue in these proceedings.
3. I shall first set out the legislative background, then describe the procedures under the BSC, outlining the events leading to the challenged decision, before identifying the issue before the Court and summarising the submissions of the parties, and finally analysing the reasons why, in my judgment, the claim succeeds.

## **The Authority**

4. The Authority is an independent regulator with statutory responsibility for issuing electricity supply licences, electricity generator licences, electricity interconnector licences, electricity distribution licences, and electricity transmission licences (see section 4(1) and section 6(1) of the Electricity Act 1989). Section 137 of the Energy Act 2004 confers power on the Secretary of State to determine standard conditions for transmission licences. The standard conditions relevant to the present application were first determined by the Secretary of State under section 33(1) of the Utilities Act 2000, prior to the amendment of that section under the Energy Act 2004.
5. The Authority consists of non-executive and executive members and a non-executive chair. Non-executive members bring expertise from a range of areas including industry, social policy, environmental work and finance.
6. The Office of Gas and Electricity Markets ("Ofgem") supports the Authority in its work. Ofgem is divided into three policy divisions, namely, corporate affairs, networks and markets.

## **The Electricity Market**

7. The electricity supply chain typically consists of four distinct components: generation; transmission; distribution and supply. In general, generators produce electricity and sell it to suppliers which in turn sell the electricity to consumers. Electricity is transported to consumers from generators through a

high voltage transmission system (the national grid) and lower voltage distribution systems. The transmission system in England and Wales is owned by National Grid Electricity Transmission plc ("NGET"). Ownership of the transmission system in Scotland is split between Scottish Hydro-Electric Transmission Limited in the north of Scotland and SP Transmission Limited in the south.

8. Following privatisation and related reforms, the wholesale market for electricity now operates in a manner similar to any other trading market. Generators and suppliers can trade electricity through individual commercial contracts and through power exchanges. Generators now determine the level at which power stations operate, in accordance with concluded contracts. However, although most electricity is now bought and sold freely, the transmission system still has to be physically balanced, matching generation and consumption of electricity, to maintain security and quality of supplies.

### **The Balancing and Settlement Code**

9. It is NGET, as operator of the national grid, which has responsibility for ensuring that the system is physically balanced. The mechanisms for balancing the system are set out in the BSC. Under Standard Licence Condition C3 of its transmission licence, NGET is required to have in force the BSC. In essence the BSC provides for the calculation of payments due for electricity flows outside bilateral contracts between users of the system. Such flows include both inadvertent flows caused by unpredictable generation and consumption, and flows required by NGET to balance supply and demand on the system.

Among other things, the BSC provides for the allocation of costs resulting from the excess flow of electricity across the transmission system.

10. Under Standard Licence Condition C3(3) the objectives of the BSC are:

(1) The efficient discharge by NGET of the obligations imposed upon it by its licence;

(2) The efficient, economic and co-ordinated operation of the GB transmission system;

(3) Promoting effective competition in the generation and supply of electricity, and (so far as consistent therewith) promoting such competition in the sale and purchase of electricity;

(4) Promoting efficiency in the implementation and administration of the balancing and settlement arrangements.

11. Under the terms of their licences, electricity supply, distribution, interconnector and generation licensees must be signatories to the BSC. There is also a "BSC Framework Agreement" dated 14 August 2000, under which the BSC is made binding upon licensed persons and under which licensed persons undertake with each other to comply with and perform their obligations in accordance with the BSC.

12. The BSC also sets out the role and powers of Elexon Limited ("Elexon"). Elexon is referred to in the BSC as the "Balancing and Settlement Code Company (BSCCo) for Great Britain". Elexon's principal role is to provide and procure facilities, resources and services required for the proper, effective and efficient implementation of the BSC.

### **Modifications to the BSC**

13. Under Standard Licence Condition C3(1)(c), the BSC must include the modification procedures required by Standard Licence Condition C3(4), which states:

"The BSC shall include procedures for its own modification (including procedures for the modification of the modification procedures themselves), which procedures shall provide.....

(a) for proposals for the modification of the BSC to be made by the licensee, BSC parties and such other persons or bodies as the BSC may provide;

(b) where such proposal is made...

(v) for the preparation of a report

-setting out the proposed modification and any alternative,

-evaluating the proposed modification and any alternative

-assessing the extent to which the proposed modification or any alternative would better facilitate achieving the applicable BSC objectives,

-assessing the impact of the modification on the core industry documents and the changes expected to be required to such documents as a consequence of such modification

*-setting out a timetable for implementation of the modification and any alternative, including the date with effect from which such modification (if made) is to take effect; and*

(vi) for the submission of the report to the Authority as soon after the proposal is made as is appropriate (taking into account the complexity, importance and urgency of the modification) for the proper execution and completion of the steps in sub-paragraphs (i) to (v)

*(c) for the timetable (referred to in sub-paragraph (b) (v)) for implementation of any modification to be such as will enable the modification to be made, account being taken of the complexity, importance and urgency of the modification, and for that timetable to be extended or shortened with the consent of or as directed by the Authority after those persons likely to be affected by the revision of the timetable have been consulted"* (my emphasis)

14. The procedures for modification of the BSC are set out in BSC Section F. Under F 1.1.1, the BSC may only be modified pursuant to the transmission licence. Under F 1.2.1, the BSC Panel is responsible for the operation of the Modification Procedures in accordance with the provisions of the BSC. The Panel is an expert body, comprising a chairperson appointed by the Authority, not more than five persons appointed by Trading Parties, not more than two persons appointed by energywatch, a person appointed by the Transmission Company, not more than two independent persons appointed by the chairperson, and a further industry member appointed at the discretion of the chairperson.
15. F 2.1.1 sets out those bodies which can make a "Modification Proposal", that is, "a proposal to modify the Code which has been submitted (and not refused) pursuant to and in accordance with Section F 1.1.1".
16. Under F 2.2.3, the Panel has certain choices relating to the process to be followed in respect of a particular Modification Proposal. The process relevant to this claim is the Panel's power to submit the Modification Proposal to an Assessment Procedure pursuant to F 2.6. Under F 2.6.2:

"The purpose of the Assessment Procedure is to evaluate whether the Proposed Modification identified in a Modification Proposal better facilitates achievement of the Applicable BSC Objective(s) and whether any alternative modification would, as compared with the Proposed Modification, better facilitate achievement of the Applicable BSC



Objective(s) in relation to the issue or defect identified in the Modification Proposal”.

17. Where a Modification Proposal is submitted to an Assessment Procedure, the Panel must establish or designate a Modification Group under F 2.6.3. Under F 2.6.4:

“The Modification Group shall:

(a) evaluate the Modification Proposal for the purpose set out in paragraph 2.6.2;

(b) where appropriate, develop an alternative proposed modification (“the Alternative Modification”) which, as compared with the Proposed Modification, would better facilitate achievement of the Applicable BSC Objective(s) and

(c) prepare a report for the Panel...which shall set out, in relation to the Proposed Modification and any Alternative Modification, the matters referred to in Annex F-1, to the extent applicable to the proposal in question.”

18. The matters which the Modification Group’s report shall include are set out in Annex F-1 of the BSC. Annex F-1 provides for the report to include an analysis of the Proposed Modification or any Alternative Modification against the applicable BSC objective(s). It includes various matters relevant to the

timetable of implementation of any Proposed Modification. In particular, it shall include:

“the Modification Group’s proposed Implementation Date(s) for the implementation (subject to the consent of the Authority) of the Proposed Modification and any Alternative Modification (F-1 paragraph 1(q))”.

19. Upon completion of the report, it is placed on the agenda of the next Panel meeting under F 2.6.11. The Panel must then determine whether to proceed to the Report Phase, and if so, it must determine the proposed Implementation Date to be included in the draft Modification Report (F 2.6.13 (b)). The Implementation Date is defined in the general glossary in Annex X-1 as “in relation to an Approved Modification, the date with effect from which the Code is to be given effect as modified by that modification, as such date may be extended pursuant to Section F 2.11.7”.

20. There follows a process of consultation, following which the Panel finalises the Modification Report. Under F 2.7.7:

“The matters to be included in a Modification Report shall be the following (in respect of the Modification Proposal):

(a) the recommendation of the Panel as to whether or not the Proposed Modification or any Alternative Modification should be made;

*(b) the proposed Implementation Date for implementation of any  
Proposed Modification or Alternative Modification*

(c) the other items referred to in Annex F-1, based on the report prepared by the Modification Group (where the proposal was submitted to a Modification Group prior to the Report Phase) except to the extent that the Panel has formed a different view as to any matters contained in such report,

together with a copy of the representations made by Parties and interested third parties during the consultation undertaken in respect of the Proposed Modification and any Alternative Modification” (my emphasis).

21. The Modification Report is then furnished to the Authority under F 2.7.8. The Authority’s power to approve a Proposed Modification is not referred to or derived from the BSC: its power is set out in Standard Licence Condition C3(5)(a) of the transmission licence, which provides as follows:

“If a report has been submitted to the Authority pursuant to the procedures described in paragraph (4)(b)(vi), and the Authority is of the opinion that a modification set out in such report would, as compared with the then existing provisions of the BSC and any other modifications set out in such report, better facilitate achieving the applicable BSC objective(s), the Authority may direct the licensee to make that modification”.

22. The Authority may, therefore, only accept or reject the modification. It cannot amend a proposed modification and purport to approve the modification as amended.
23. If the Authority does approve a Proposed Modification, it becomes an Approved Modification, defined in the general glossary in Annex X-1 as “a modification to the Code which has been made pursuant to Section F 1.1.1 but which has not yet been implemented”.
24. Section F 2.11 deals with “implementation”. Under F 1.9.1, “for the purposes of this Section F, in relation to an Approved Modification, “implement” (and derivative terms) shall mean, “bring into operational effect”.
25. There are two general provisions under the BSC for the amendment of an Implementation Date. Under F 2.11.7:
- “without prejudice to the obligations of the Panel and BSCCo under this section F, the Implementation Date may be extended or brought forward with the prior approval of, or at the direction of, the Authority”.
26. The Authority may also under F 2.11.10 substitute a “Conditional Implementation Date” where there is a Relevant Challenge”. I shall describe these provisions at greater length later in this judgment.

**The events leading to the challenged decision**

27. The Modification Proposals relevant to this claim were originally made on 16 December 2005 (P198), 21 April 2006 (P200), 26 June 2006 (P203) and 3 July 2006 (P204). Modification Groups were established in respect of each of the proposals and held their first meetings between January and July 2006.
28. As part of the Assessment Procedure, Elexon commissioned analysis from Oxera Consulting Limited ("Oxera"), an economic consultancy firm. This analysis ("the Oxera Analysis"), or parts of it, was taken into account by the Modification Groups in writing the Assessment Reports and by the Panel in writing Modification Reports.
29. The Authority received Modification Reports for P198 (and the P198 Alternative), P200 (and the P200 Alternative) and P203 on 22 September 2006, and for P204 on 16 November 2006.
30. In their Modification Report for P198 and the P198 Alternative, the Panel stated:

"Having considered and taken into due account the contents of the P198 draft Modification Report, the BSC Panel recommends.....

an Implementation Date for both the Proposed Modification and Alternative Modification of 1 April 2008 if an Authority decision is received on or before 22 March 2007, or 1 October 2008 if the Authority

decision is received after 22 March 2007 but on or before 20 September 2007”.

31. The Panel used the same language in respect of the other Proposals. The Panel gave reasons why a “lead-time” of 12 months between the assumed date of a decision by the Authority and the date of implementation was appropriate. Furthermore, the impact of the relevant Proposed Modification would be likely to vary, and the balance of costs and benefits would be likely to change, depending on the precise implementation date: see paragraphs 5-7 of the second witness statement of Keith Miller on behalf of the Claimants and paragraphs 5-7 of the second witness statement of Sarah Harrison on behalf of the Authority.
32. Following receipt of the Modification Reports, the Authority conducted an impact assessment and consultation on the Proposals. On 24 May 2007 it indicated that it was “minded to” approve Modification Proposal P203 and to reject the other proposals. The Authority then issued a further consultation on that decision.
33. In the course of the Authority’s consultations, questions were raised over the validity of an analysis conducted during the Assessment Procedure by Oxera and the reliance which had been placed on that analysis. During the further consultation following the announcement of the Authority’s minded-to position, Oxera itself stated that the Authority had placed “more weight than appropriate” on its analysis.

34. At meetings on 30 August 2007 and 6 September 2007, the Authority decided that before reaching its final decisions it would undertake a further review of Oxera's analysis, and the reliance placed upon it, and would then consult upon the findings of that further review. The Authority therefore decided that it would delay taking its final decisions concerning the Proposals until after 20 September 2007.
35. As it recorded in its open letter of 14 September 2007, the Authority also decided that "[should] the Authority decide to approve any of the proposals, it would consult with affected parties before directing an alternative implementation date".
36. The review of Oxera's analysis has been conducted in parallel to this litigation and is now complete. The Authority intends, if legally at liberty to do so, to consult on, among other things, the results of this review and expects to reach a final decision on the Proposals in the second half of 2008.

#### **The Issue in this claim**

37. It is common ground that the relevant Proposed Modification cannot now be implemented in accordance with the timetable set by the Panel. The Authority, for the reasons explained above, was not able to make a decision by the proposed deadline of 20 September 2007. The Proposed Modification could take effect on 1 October 2008, the proposed Implementation Date, only if the "lead-time" between the date of a putative decision and 1 October 2008 were substantially reduced from the lead-time of 12 months set by the Panel.

However, the Panel gave good reasons, which are not questioned by any party in these proceedings, why the lead-time between the date of any decision approving the relevant Proposed Modification and the proposed Implementation Date should not be less than 12 months.

38. The issue, therefore, is simply this. May the Authority take a decision approving the relevant Proposed Modification **after** the deadline of 20 September 2007, with the inevitable result that either (a) the Proposed Modification takes effect on the proposed Implementation Date, but the lead-time set by the Panel is reduced; or (b) the Proposed Modification takes effect after the proposed Implementation Date of 1 October 2008, with a lead-time of 12 months or such other period as the Authority deems appropriate?

39. As the formulation of the issue shows, no decision taken by the Authority after 20 September 2007 can be fully consistent with the timetable set by the Panel under the BSC procedures.

#### **The Claimants' case**

40. In short, Mr Fordham QC, who appears on behalf of the Claimants, submits that the timetable for implementation of any Proposed Modification set by the Panel is binding on the Authority. If the Authority took no decision approving the Proposed Modification by 20 September 2007, the timetable set by the Panel could not be met: either the proposed lead time would have to be reduced, or the Proposed Modification would have to take effect after the proposed Implementation Date of 1 October 2008. In either event the



timetable set by the Panel would inevitably be varied by the putative decision of the Authority. The Authority having no power to vary the timetable set by the Panel, any decision purporting to approve the Proposed Modification after 20 September 2007 would be invalid and of no effect.

41. Mr Fordham advances six reasons in support of this submission, which I shall seek to summarise.
42. First, in the present context the Authority is in a special position. Under Condition C3 (5)(a), the Authority must either approve or reject a Proposed Modification: it has no power on its own initiative to amend a Proposed Modification, and to approve a Proposed Modification as so amended. That would be the case, even if the Authority was entirely satisfied that a Proposed Modification as so amended would better advance the objectives of the BSC. Although this position may seem unusual, on inspection it is not surprising: the Panel and the relevant Modification Group are expert bodies with appropriate industry expertise; they are tasked with the technical job of specifying the Proposed Modification with precision; the function of the Authority is to approve or reject the Proposed Modification, not to tinker with it.
43. Secondly, Condition C3 (5)(a) says nothing about timetable or implementation dates. It is Condition C3 (4) (c) which deals with timetable, and that Condition expressly provides that it is for the BSC to regulate the timetable, including the amendment of any timetable. It is, therefore, necessary to examine carefully what the BSC says about timetable. The BSC makes no provision for

the Authority to amend the timetable set by the Panel **before** the Authority has taken a decision approving a Proposed Modification. The alternative hypothesis – that the Authority was at liberty to vary the timetable at the earlier stage – would imply that the Authority had power to make a decision long after a Modification Report had been presented to it, or to make a decision in which it radically accelerated or postponed the Implementation Date set by the Panel.

44. Thirdly, the BSC is not silent on timetable. On the contrary, the BSC (at F 2.11.7) confers an express power on the Authority to consent to or direct the extension or bringing forward of the Implementation Date. However, the power is limited to the case where a Proposed Modification has already been approved and an Implementation Date determined. Similarly, the power of the Authority (under F 2.11.10 and 2.11.15) to substitute a Conditional Implementation Date for a current Implementation Date or a Proposed Implementation Date in the event of a Relevant Challenge is limited to the case where a decision on a Proposed Modification has already been taken (F 2.11.15. (a)).

45. Fourthly, under the BSC, the Panel sets the timetable, and **recommends** (or not) the Proposed Modification. In other words, whether or not the Panel recommends a Proposed Modification, it must set a timetable, including a proposed Implementation Date. The Authority is free to approve or reject a Proposed Modification, whatever the Panel's recommendation. It has no power to amend the timetable.

46. Fifthly, Modification P93, submitted in 2002, proposed the introduction of an analogous power into the BSC, to be exercisable by the Panel. In its determination of 21 November 2002 the Authority explained:

“Modification Proposal P93 seeks to modify the BSC so as to allow the Panel to amend the proposed Implementation Date in a Modification Report submitted to the Authority for a determination, but on which a decision has not yet been made. The amendment would take place after the Panel had consulted with interested parties and prior to an Authority decision”.

47. The Authority rejected P93 for the following reasons:

“Ofgem considers, having regard to its statutory duties, that Modification Proposal P93 does not better facilitate achievement of the Applicable BSC Objectives, in that it does not promote efficiency in the implementation and administration of the balancing and settlement arrangements.

Currently, Section F of the BSC provides that if a modification Proposal or its Alternative is approved, the Approved Modification’s Implementation Date may be extended or brought forward as appropriate [a reference to F 2.11.7].

Further, prior to the Modification Report being issued to the Authority, Ofgem has the ability at various points in the process to direct the alteration of proposed Implementation Dates [a reference to F 1.4.3 (d)].

Consequently, under normal circumstances, the proposed Implementation Dates for Proposed Modifications that have a dependency on external factors (such as system updates) should be set so that the Authority will be in a position to make a determination in time for Parties to effect appropriate changes to their systems.

The rationale behind submitting an Implementation Date is to provide certainty to Parties as to when a change to the Code will take effect. *Ofgem considers that the addition of yet another mechanism to alter the Implementation Dates would introduce regulatory uncertainty to the market with no corresponding gains in efficiency. This would not better facilitate achievement of the Applicable BSC Objectives in that it would not promote efficiency in the implementation and administration of the balancing and settlement arrangements"* (my emphasis).

48. Sixthly, in many cases practical problems are avoidable where the Panel sets a timetable that links the proposed Implementation Date directly to the date of the Authority decision. If, for example, the Implementation Date is set for 15 days after the Authority has taken a decision of approval, the Authority is likely to have considerable flexibility on timing.

49. Finally, Mr Fordham buttresses his submissions by noting that the Authority had previously accepted that it did not have the power it now claims. In the context of an earlier judicial review, the Authority explained its position by saying:

“.....Although Section F 2.11.7 BSC gives a power to amend an Implementation Report after a modification has been approved, the BSC does not permit the Authority to vary a timetable for implementation of the Modification Proposal prior to approval (it should be noted that Standard Licence Condition C3.4(c) appears to envisage that the Authority should have a power, but that the BSC does not currently provide for it)”.

### **The Defendant's Case**

50. Ms Rose QC, who appeared on behalf of the Authority, submitted, first, that the Claimants' case rested on a flawed premise, namely, that the Panel had power to impose a “Decide-by Date”. None of the phrases used by the Claimants to describe this concept appear in the Licence or in the BSC or anywhere in the regulatory framework. The Panel could not be granted such a wide-reaching power to constrain the Authority without express words to that effect.
51. Secondly, she submitted that even if (contrary to the first submission) the Panel had the power to impose a Decide-by Date, the Panel has not in any event done so. All that the Panel has done is to recommend that the modifications should be implemented on a certain date if the approval decision is taken on or before 20 September 2007.
52. Ms Rose contended that the Authority's powers to determine its timetable for taking decisions were to be found in the Licence, and exclusively in the

Licence. The BSC was silent in relation to those powers. There was nothing in the Licence to preclude the Authority from changing the Panel's timetable for implementation, particularly in order to give itself a longer period for taking a decision, if that were required in all the circumstances.

53. Furthermore, the provisions in the BSC relied on by the Claimants were either consistent with the power claimed by the Authority or had found their way into the BSC on a misunderstanding of the Authority's powers under the Licence.

#### **Decision**

54. With respect to Ms Rose's first two submissions, I do not accept that the Claimants' case rests on an unsupported assertion that the Panel may impose a "Decide-by Date" on the Authority. Mr Fordham relies upon the express provisions of the Licence and the BSC to show that the Panel may set a comprehensive *timetable* for implementation, including a proposed implementation date. The Panel may quite validly include within the timetable an assumption, or assumptions, about when the Authority may take a decision, and set the proposed implementation date by reference to such assumptions. The Panel did so in this case. At the time the Panel's assumptions were reasonable, allowing the Authority an adequate time to take a decision. The lead-time of 12 months between any decision of the Authority and the proposed implementation dates was also fully justified. No party in these proceedings challenges the manner in which the Panel set the timetable, or the validity of the actual timetable set by the Panel, or even the appropriateness of

that timetable at the time that it was set. Nor do I see any grounds upon which such a challenge could be properly based. The issue in this case, as I have already set out, is simply whether the Authority had power to change the timetable validly and appropriately set by the Panel.

55. Nor do I accept that the Panel's timetable can be brushed aside as no more than a "recommendation", which as such the Authority could simply approve or reject at its discretion. Under the Licence and the BSC, the Panel was required to set a timetable. The question is again whether the Authority had power to change the timetable that the Panel had in this case set under the BSC.
56. I do, however, agree with Ms Rose that the starting point for analysis is Condition C3 (5)(a). That Condition says nothing about timetable or implementation date. It simply empowers the Authority to approve or reject the Proposed Modification, that is, the substantive proposal that is before the Authority. Standing alone, Condition C3 (5)(a) in itself would not appear to preclude the Authority from approving a Proposed Modification, but on the basis of a timetable, including implementation date, different from that set by the Panel.
57. However, Condition C3 (5)(a) does not stand alone. I agree with Mr Fordham that the Licence and the BSC established pursuant thereto are made under statute, are akin to a legislative code and must be interpreted as a coherent and consistent scheme. It seems to me that his case comes to this. If the scheme is interpreted coherently, and according to well recognised principles of statutory

interpretation, Condition C3 (5)(a) must be read as if at the end of the Condition were the words “in accordance with, and only in accordance with, the timetable for implementation (including the Implementation Date) set out in the relevant Modification Report”.

58. It is, therefore, necessary to examine Mr Fordham’s arguments with care.
59. As to his first point, it is correct that the Authority may only approve or reject a Proposed Modification, and may not amend any such Modification. However, in my view, that gives little guidance on whether the Authority is precluded from amending a timetable at the time that the Authority takes a decision approving a Proposed Modification. Condition C3 (4)(c) indicates that the Authority may be empowered (and the Authority is specifically empowered by the BSC under F 2.11.7) to change the timetable **after** an approval decision. In principle, therefore, the Authority controls the timetable, and is implicitly recognised by the Licence as having the requisite expertise to do so. That recognition reflects the reality of the regulatory regime: the Authority is the statutory regulator, and it has its own independent experts, or can engage such experts, to evaluate both the merits of any Proposed Modification and the appropriateness of any timetable set out in a Modification Report.
60. It seems to me that the crux of the case lies in Mr Fordham’s second and third arguments, which are closely interconnected. Under Condition C3 (4)(v), the modification procedures must provide for a report setting out a timetable for implementation of the modification, including the implementation date. The



timetable referred to can be only that set out in a Modification Report. It appears to me that C 3 (4)(c) is then stating in unambiguous terms that all timetabling matters are in principle to be regulated by the provisions of the BSC, especially any matter that relates to the extending or shortening of the timetable set in a Modification Report. The BSC **has** dealt with timetabling, but has conferred no power on the Authority to change the timetable set by the Panel in the relevant Modification Report **before** approval of the Proposed Modification.

61. The key question, therefore, is whether Condition C3 (4)(c) leaves any scope for the Authority to amend the timetable set in a Modification Report otherwise than by the procedures specifically stipulated in the BSC. I turn to consider that question.
62. It seems to me implicit in Condition C3 (5)(a) that the Authority should be able to control, within reasonable limits, its own timetable for decision making. Condition C3 (5)(a) says nothing about the timescale in which the Authority should take a decision approving or rejecting a Proposed Modification, but it appears to be implicit that the Authority should have a reasonable period in which to take a decision. What is reasonable will depend upon all the circumstances, including, for example, the complexity and importance of the Proposed Modification, the quality of the Panel's Modification Report, and the resources available to the Authority.
63. 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. However, if, as in the present case, the Panel makes implementation dependent upon the Authority making a decision by a certain deadline, there is plainly potential for serious tension. In these circumstances there is a considerable temptation to conclude that, as a necessary adjunct to the right of the Authority to control its own decision making timetable, and to have a reasonable time in which to decide, the Authority has the implied power to vary the Panel's timetable set in the Modification Report. The test of necessity in this context follows *Ward v Metropolitan Police Commissioner* [2006] 1 AC 23, at paragraph 23, by Baroness Hale.

64. Furthermore, such a conclusion would not seem to lack pragmatic underpinning. In the present case, if the Authority had no power to give itself the additional time necessary to evaluate the Proposed Modification in the circumstances that have unforeseeably arisen, the whole exercise – including the work done by the Panel and the Authority – would be frustrated, with the probable attendant waste of time and resources, and also with the potential lost opportunity of securing a Modification that might well bring substantial benefits to licensed persons, and users and consumers of electricity. I accept that the exercise could be re-run with a new timetable, but this would appear to be an inefficient and wasteful duplication of procedures without any obvious countervailing benefits.

65. I also note that the tension to which I have referred is quite likely to be entirely fortuitous. It is reasonably clear in this present case that the principal (but not

necessarily exclusive: see paragraph 31 above) concern of the Panel was to ensure that there was a 12-month lead-time between the decision of the Authority and implementation of the Proposed Modification. It was not, as far as I can see, the intention of the Panel to put a pistol to the head of the Authority to ensure, come what may, a decision by 20 September 2007. If the Panel had expressed itself differently, the tension might not have materialised. But it has, and it is again tempting to seek to extricate the Authority from the Morton's fork upon which it has become impaled, by enabling it to vary the Panel's timetable.

66. I would also observe that the adjunctive power needed for the purpose would not be a wide ranging one, so as to enable the Authority to vary the Panel's timetable set in the Modification Report for any reason that seemed appropriate to the Authority. It would be a limited power to vary, solely so that the Authority could take a decision within a reasonable time in the light of the circumstances that had arisen following receipt of the Modification Report. It would not be a power that would enable the Authority to set, for policy reasons, a different implementation date, or 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.
67. However, tempting though this course might be, I am unable to take it, for three reasons.
68. First, I have to interpret the Licence and the BSC as a coherent and consistent whole: see, for example, Bennion, *Statutory Interpretation*, 4<sup>th</sup> edition, Section

268, pp 690 – 693. For that purpose, F 2.11.10 – 2.11.15 of the BSC (“the relevant provisions”), to which I have referred at paragraph 26 above, are critical. The relevant provisions were made by modification to the BSC, having been recommended by the Panel and approved by the Authority. They now form an integral part of the BSC for interpretative purposes. Before the BSC was amended by the relevant provisions, the Authority had express power to direct a change in the timetable set by the Panel, but only **after** the Authority had approved a Proposed Modification (F 2.11.7).

69. The issue that the relevant provisions were intended to address was as follows. After the Authority had taken a decision in respect of a Proposed Modification, a person having sufficient interest or standing might challenge the decision by appeal or judicial review. There were then two contingencies. First, the appeal or judicial review might fail. If so, the decision of the Authority was *ex hypothesi* lawful. However, in the course of the proceedings the Authority, if it had taken a decision approving the Proposed Modification, might have exercised its power under F 2.11.7 to postpone the Implementation Date or Proposed Implementation Date until the appeal or judicial review had been determined. The Authority might have exercised such power, either in compliance with an interim injunctive order of the Court, or by way of undertaking, or simply on its own initiative, having regard to the uncertain status of the decision and to the possible dislocation in the industry if an actual, but premature, implementation had to be unwound following the outcome of the legal challenge.

70. The first contingency posed no problem. The Authority had the power under the BSC to change the Implementation Date or Proposed Implementation Date. No modification to the BSC was, therefore, needed to meet the first contingency.
71. The second contingency was that the legal challenge succeeded, or that the Authority, as a result of, and in the course of, the legal proceedings, withdrew the challenged decision. The Authority might, however, wish to revisit the decision and to take a fresh decision that would avoid the flaw, or possible flaw, in the challenged decision. Because of the delay caused by the proceedings, the Implementation Date or Proposed Implementation Date set by the Panel might well have passed or at least not be practicably achievable. However, there being in these circumstances no valid or extant decision approving the Proposed Modification in question, the Authority had no power under F 2.11.7 to change the Implementation Date or Proposed Implementation Date.
72. In this second contingency, therefore, the Authority needed power to change the timetable set by the Panel in a Modification Report **before** the Authority took any fresh decision – that is, of course, the very power claimed by the Authority in this application. The relevant provisions conferred that power, *and the whole rationale for the relevant provisions was that, in their absence, the Authority lacked that power.* I should not assume that the relevant provisions were simply otiose, under the well-recognised principle of interpretation that amendments of this kind should not be made without good

cause (see, for example, Bennion, *Statutory Interpretation*, cited above, at Section 269, pp 693 – 697).

73. This rationale was recognised at the time. In its letter dated 31 March 2005 to National Grid Company, BSC Signatories and Other Interested parties, explaining how and why the relevant provisions had been made, the Authority said, by way of background:

“Legal challenge can potentially result in the Authority having to revisit its previous decisions on a proposed modification. Depending on timescales, a consequence of this may be *that the Authority is not capable of re-considering a Proposed Modification because the Implementation Dated contained in the original Modification Report has expired. The practical effect of such a situation could be that the Modification Proposal would “time out” and be incapable of implementation*” (page 2 of the letter, second paragraph under “Background”, my emphasis).

74. In explaining its reasons for approving the relevant provisions, the Authority said:

“Ofgem considers that *if P180 [that is, the relevant provisions] were not approved the only way in which issues could be reconsidered in the event that an Implementation Date for a Modification Proposal passes due to an Authority direction being legally challenged would be for a new Modification Proposal to be raised and for this to pass through the Modification Procedures of the BSC.* Ofgem does not consider this

desirable and is of the view that the changes proposed by P180 [the relevant provisions] will provide a more efficient process than those provided by the current baseline, thus better facilitating the achievement of Applicable BSC Objective (d)” (page 5 of the letter, my emphasis)

75. “The current baseline” there referred to was, of course, the power in F 2.11.7 for the Authority to change the timetable set by the Panel, but only **after** a decision by the Authority approving a Proposed Modification.
76. The clear rationale, therefore, for the relevant provisions was, and remains, that, in their absence, the Authority would not have the power that it claims in these proceedings. If the Authority had the power that it now claims, the Modification giving rise to the relevant provisions was not needed, and is not needed now, and the relevant provisions would have been, and would remain, substantially redundant.
77. Consistently with the foregoing rationale, F 2.11.15 (b) defines, for the purposes of the relevant provisions, “Proposed Implementation Date” as a proposed implementation date *set out in a Modification Report in accordance with F-1 in relation to any Modification Proposal in respect of which a decision has been made (or purportedly made) by the Authority to approve or reject such Modification Proposal*. This definition leaves no room for any proposed implementation date other than the one set out in a Modification Report. In particular, the definition is inconsistent with an implied power in the Authority to vary an implementation date set out in such a Report and to set its own implementation date.

78. In my view, it is no answer to this analysis to say that the relevant provisions rested upon some misunderstanding of the powers that the Authority enjoyed under the Licence and the BSC. I must interpret the scheme as a coherent whole as it now stands, and seek to make intelligent sense of the scheme as it so stands. In any event this is not a case where an amendment could be said to have been made on a clear and obvious misunderstanding of the extant text. The need for the relevant provisions was not seriously in doubt, and at the time there seems to have been a consensus among all interested parties, including, but not limited to, the Panel and the Authority, that the Authority had power to change a timetable set by the Panel only after an approval decision. As far as I can see, that consensus also remained in place until about the time of the challenged decision.
79. In the present context Ms Rose relies on *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, for the proposition that a contract should not be interpreted by the subsequent “actings” of the parties. However, the Claimants do not rely upon any subsequent conduct of the Authority or of any other interested party. The Claimants rely upon the text of the Licence and of the BSC as they currently stand and fall for interpretation.
80. If I am to interpret the Licence and the BSC as a coherent and intelligible whole, I can only conclude that, first, there is no general power of the nature claimed by the Authority, namely, to change the timetable set by the Panel **before** the Authority has taken a decision approving a Proposed Modification; and, second, that the relevant provisions to which I have referred at some



length confer such a power only under the conditions prescribed by those provisions.

81. The second reason for not taking the course outlined earlier is this. It seems to me that on any view I am being asked to imply a power that is not expressly to be found in what on its face, and according to its terms, is intended to be a comprehensive code, on the ground that such a power is a necessary adjunct to the power of the Authority to control its own timetable for decision making. However, the question whether such a power is necessary or appropriate raises difficult and contentious considerations of industry policy, some of which compete with others. This aspect was recognised when the Panel and the Authority were considering whether the Panel should have a power to change its own timetable **before** the Authority made a decision on a Proposed Modification. At that time the Authority decided in unequivocal terms that, first, no such power was necessary for the efficient administration of the BSC and, secondly, that in the interests of regulatory certainty, the Panel should not have such a power: see paragraphs 46-47 above. It has not been suggested that there has been any material change in circumstances since the Authority rejected Proposed Modification P93.
82. It is correct that the relevant Proposed Modification then under consideration concerned a proposed power that the Panel, rather than the Authority, would enjoy, and that that power would be a general one, not limited in the way that I have put forward. Nonetheless it seems to me that the question whether the Authority itself should have what would be a somewhat more limited power raises in principle similar considerations of efficient administration and

industry policy. I am not well placed to weigh those considerations, and certainly I do not have sufficient grounds to conclude that the power claimed is necessary or would, on balance, advance the objectives of the BSC, particularly taking due account of the reasons for the Authority's strong rejection of a not dissimilar power in the Panel, and the absence of any material change in circumstances since that rejection.

83. Thirdly, and this point is connected to the second, I anticipate serious difficulties in this context if the Court were to embark upon what would be a legislative role in formulating the precise terms of the limited power to which I have referred. Such a power might need to be carefully crafted to cater for a number of contingencies that I am not in a position to foresee. One possible contingency has, however, already struck me on reading the evidence in this case. The justification for a Proposed Modification put forward by the Panel might be dependent upon a very time sensitive analysis of costs and benefits, and the Panel timetable for implementation might accordingly be tailored to that time sensitive analysis. If for any reason there were then a long delay before the Authority could take a final decision, a question might arise whether the Authority was in substance and reality considering the same modification as had been submitted by the Panel, or was considering an altogether different modification, putatively predicated on a cost benefit analysis that the Panel did not, and could not have, evaluated. 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. I offer this as no more than an example of the potential hazards of judicial legislation in what is undoubtedly a technical and sometimes contentious field.

### **Conclusion**

84. For these reasons I find that the Authority does not have the power that it claims in these proceedings and upon which the course set out in the challenged decision was based. The Claimants, therefore, succeed in this claim and are at least entitled to a declaration that will reflect the terms of this judgment.

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