

## Stage 03: Attachment A: Detailed Assessment for P250

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

What stage is this document in the process?

01 Initial Written Assessment

02 Definition Procedure

▶ 03 Assessment Procedure

04 Report Phase

## Contents

1	Terms of Reference	2
2	Modification Group’s Discussions	3
3	Assessment Consultation Responses	14
4	Group’s final Conclusions	18
5	Timetable and Responsibilities	21

## About this document:

This is Attachment A to the Assessment Report. This attachment provides additional detail, including details of the Modification Group’s discussions.

## 1 Terms of Reference

The P250 Modification Group consists of members of the Governance Standing Modification Group.

The table below summarises the areas which the Group has considered as part of its P250 Terms of Reference, as set by the Panel.

**Table 1 – Terms of Reference**

P250 Terms of Reference	
Ref	Area
1	Consider if a defect as described in the Modification Proposal exists in the Code.
2	<p>Determine the best wording for the obligation on the BSC Panel to construct Modification Proposal Implementation Dates in such a way that they do not cause the Authority to be timed out from making a decision. As part of determining the wording the Group should also consider:</p> <ul style="list-style-type: none"><li>• past Modifications that impacted Implementation Dates/'decision by dates';</li><li>• the P198/P200/P203/P204 Judicial Review decision;</li><li>• the impact on implementation costs for ELEXON, BSC Agents, Parties, Party Agents and the Transmission Company;</li><li>• potential ways of wording an Implementation Date that cannot time out; and</li><li>• whether the Panel can already construct Implementation Dates that cannot time out.</li></ul>
3	Consider whether the new obligation would supersede the existing 'Conditional Implementation Date' provisions for Approved/Rejected Modification Proposals in BSC F2.11 (or whether P250 should be kept separate and only apply to Pending Modification Proposals).
4	<p>Consider the process and determine the BSC wording for the Panel to write to the Authority to:</p> <ul style="list-style-type: none"><li>• ask the Authority for a likely decision date on a Modification Proposal; and</li><li>• advise the Authority if the analysis contained in the Final Modification Report has become (or will shortly become) out of date.</li></ul> <p>This includes considering:</p> <ul style="list-style-type: none"><li>• whether these new processes should be additionally reported in the Monthly Progress Report to the Authority (BSC F1.4); and</li><li>• The current wording in other industry codes regarding out-of-date analysis.</li></ul>
5	Consider the effect of P250 on Applicable BSC Objective (d) and any other relevant BSC Objective(s).
6	Consider whether an Alternative Modification is required.
7	Identify the most effective implementation approach for P250.

Sections 2 and 4 details the Group's discussion.



### Any questions?

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166/06

P250  
Detailed Assessment

5 March 2010

Version 1.0

Page 2 of 21

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## 2 Modification Group's Discussions

The Group split its discussion on P250 into the two distinct parts of the P250 solution:

- Placing an obligation on the Panel so Implementation Dates could not time out; and
- Providing a formal process for the Panel to communicate with the Authority on time-sensitive matters relating to Implementation Dates.

### Placing an obligation on the Panel so Implementation Dates cannot time out

#### Is there a defect?

The Panel had requested that the Group consider whether the defect as stated in the P250 Modification Proposal actually existed. The Group noted that this was not necessarily a clear cut question.

The P198/P200/P203/P204 Judgement had concluded that the Authority could not make a decision on Modification Proposals where the final 'decision by' date in the Modification Report had passed. The Proposer's representative noted that they wanted to find a solution to this problem through a change to the BSC, rather than a change to the Transmission License. They commented that, as set out in the Modification Proposal form:

"The result of 'timing out' is to cause uncertainty among the industry as to the future of a Modification Proposal, as well as the timescales surrounding that proposal. It also has the potential to waste resources in terms of the costs incurred by industry participants in raising and considering a Modification Proposal which may then 'time out'."

A Group member challenged this view. In their view the uncertainty which may be caused by timing out was minor compared to the ongoing uncertainty that would be caused by having Implementation Dates that cannot 'time out' (i.e. 'open-ended' dates). With such dates the industry would have no certainty as to when an Approved Modification would be implemented. This would not be an improvement to the current arrangements. This view was widely held in the Group.

Another Group member noted that the Panel already has flexibility when constructing Implementation Dates. In their view the Panel can already construct Implementation Dates that cannot 'time out'. Indeed, at their meeting on 11 September 2008 when discussing *Implementation Dates for Modification Proposals* (144/08), the Panel:

"agreed to adopt the practice of considering the application of an additional Implementation Date structure to any Modification Proposal upon receipt of the Assessment Report"

This would allow the Panel to construct Implementation Dates that cannot 'time out' where the Panel believes this was necessary. The Group also noted that the Panel already uses an 'open-ended' Implementation Date construct for many Modification Proposals of 'X Working Days after an Authority decision'. While many of these have been for minor document changes, the Panel has also used this construct for Urgent Modification Proposals with greater materiality where a quick implementation was desirable. Was a Modification Proposal required where the Panel already had the ability to construct Implementation Dates that cannot 'time out'?

One member noted that the Authority already has many opportunities, via the Ofgem representative, to assist the Panel and the Modification Group in crafting Implementation Dates. Under the current arrangements the Authority should be able to ensure that it had appropriate 'decision by' dates.

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166/06

P250  
Detailed Assessment

---

5 March 2010

Version 1.0

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Page 3 of 21

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Another member noted that a potential problem with the current arrangements was that, although the Panel has flexibility to construct Implementation Dates which cannot 'time out', they (and the Authority at the point that the dates are originally formulated) might not be able to foresee when such an Implementation Date construction was necessary. For example, with P198/P200/P203/P204 the Panel and the Authority could not necessarily have foreseen the issues that occurred following the submission of the Final Modification Report. For this reason there was a defect that should be considered by the Group (i.e. in extraordinary circumstances the original 'decision by' dates agreed by the Panel would become unachievable or inappropriate due to circumstances beyond the foresight of the Panel and the Authority).

The Group, on balance, considered that P250 needed to be assessed in the same way as any other Modification Proposal.

## What can be done using the current Implementation Date arrangements?

As noted above, the Panel already has flexibility in constructing Implementation Dates. The BSC does not specify a specific Implementation Date construction. This allows the Modification Group (and ultimately the Panel) to develop the most appropriate Implementation Dates for each Modification Proposal. There are two forms of Implementation Date constructions that Modification Groups and the Panel regularly develop:

### 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]**.

### 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.

Example 2 would provide an Implementation Date that would not 'time out'.

The Group concluded that there was nothing stopping the Panel setting Implementation Dates that cannot 'time out' under the current arrangements.

The Group noted that the Panel currently has flexibility to construct Implementation Dates that cannot 'time out'. Ofgem also can indicate to the Modification Group and the Panel if there are any circumstances that require an Implementation Date that cannot 'time out'. The Group commented that it was key that Ofgem engaged in the process for all Modification Proposals.

## What are the benefits of Implementation Dates that cannot time out?

### Benefits as set out by the Proposer

As set out above the Proposer's representative noted that the result of 'timing out' is to cause uncertainty among the industry as to the future of a Modification Proposal, as well as the timescales surrounding that proposal. It also has the potential to waste resources in

terms of the costs incurred by industry participants in raising and considering a Modification Proposal which may then 'time out'.

This view was not held by any other Modification Group member.

### **Ofgem representative's view of the benefits**

Ofgem's representative explained the benefits of P250 as he saw them. Ofgem was concerned that it would be inefficient to 'time out' decisions where the industry had completed considerable work, but Ofgem had insufficient time to make a robust decision. This occurred for P198/P200/P203/P204. Ofgem did not see the P250 solution as something that would be used routinely, only for complex issues where extraordinary circumstances occurred, such as those that occurred following the issuing of the P198/P200/P203/P204 Final Modification Reports. If P250 was implemented then Ofgem would continue to aim to make decisions within 25 Working Days (unless a Regulatory Impact Assessment was required) and only use the new provisions where this was not possible.

## **What are the drawbacks of Implementation Dates that cannot time out?**

### **P250 can already be achieved under the current arrangements**

As stated above the Group noted the Panel can already construct Implementation Dates that cannot 'time out'. The majority of the Group considered that introducing a mandatory requirement to propose Implementation Dates for all Modification Proposals that cannot 'time out', when this only rarely occurs in practice, is therefore excessive and creates a disproportionate level of uncertainty for the industry. The Group acknowledged that 'timing out' could occur in rare circumstances. However, the Proposed Modification solution was using a sledgehammer to crack a nut.

### **P250 will introduce greater uncertainty**

The majority of the Group did not agree with the suggestion that preventing Modification Proposals 'timing out' would increase certainty. On the contrary, it would increase uncertainty for the industry, Modification Groups, the Panel and ELEXON as:

- it would make it harder for the industry:
  - to plan and prepare for when change would be implemented (a particular issue for changes to IT systems which need to be co-ordinated with other planned work to those systems);
  - to provide accurate impact assessments as circumstances may change if Ofgem requires a significant time period to make a decision;
  - it may have a larger impact on smaller Parties and new entrants who may be more materially impacted by uncertain Implementation Dates. In that regard the Proposed Modification would be a barrier to entry;
- it would make it harder for Modification Groups as they:
  - would have less certainty as to the benefits of a change if they were unable to understand the likely Implementation Date. This would also impact the validity of the analysis contained in the Final Modification Report if there was an element that was time related.

ELEXON noted it was still possible to propose Implementation Dates that would not time out while maintaining some certainty regarding the potential implementation point. This could be done by using the following construction:

- **[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]**.

ELEXON also noted that it possible to propose Implementation Dates that would not time out, but that still aligned system changes with ELEXON's standard Releases. This could be done using the following construction:

- An Implementation Date of the next BSC Release to occur not less than [X] months after the Authority's decision.

The Group agreed this was better than no certainty at all, but was still more uncertain than under the current working practice.

### **P250 goes against the previous Authority decision on P93 (Attachment D)**

The Group noted that the Authority had previously rejected Modification Proposal P93 'Introduction of a Process for Amendment of Proposed Modification Implementation Dates' on 21 November 2002. P93 proposed to introduce a process in which the Panel could apply to the Authority to amend the proposed Implementation Date (only where the Authority had not yet made a decision). In rejecting P93 the Authority noted:

"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 Implementation Dates would introduce unnecessary regulatory uncertainty to the market with no corresponding gains in efficiency. This would not better facilitate achievement of the Applicable Objectives..."

The majority of the Group believed this rationale was still relevant. ELEXON commented that P93 was a slightly different solution to P250. ELEXON also noted that it was apparent that Ofgem had since changed its view, because it had subsequently approved P180 (which provides a mechanism to revise Implementation Dates for approved/rejected modifications which are subject to judicial review or appeal) and had recently consulted on introducing Transmission Licence requirements to prevent Implementation Dates 'timing out'. The Ofgem representative noted that the Authority considered each Modification Proposal on its own merits.

### **P250 goes against Judge's comments in the P198/P200/P203/P204 Judgement (Attachment E)**

The Group noted that the P198/P200/P203/P204 Judgement was highly relevant when considering P250. One member noted that the Judge had commented (Attachment E paragraph 83):

"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."

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166/06

P250  
Detailed Assessment

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5 March 2010

Version 1.0

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Page 6 of 21

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One of the key points of the Modification Process is that the Modification Group, the Panel, the industry and the Authority make recommendations and decisions against the same solution under the same environment (taking into account that the Authority has wider statutory duties to consider). As the Judge noted, if the Authority took a significant time to come to a decision then it may be deciding on almost 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.

Another member noted the same paragraph continues to say:

"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."

This suggested that the Judge believed an ability for the Authority to 'send back' a Modification Proposal to the Panel, which is outside the scope of P250, would be a better option than providing the Authority with infinite time to make a decision. It might better preserve the balance between the Authority and the Panel. The Proposer commented that they had aimed to address this concern in P250 by giving the Panel the ability to notify Ofgem of potentially out-dated analysis. Ofgem is also separately consulting on 'send back' ability under the Governance Review. Under P250 it would be up to Ofgem what to do with any information about changes in circumstances (for example, whether it wished to do extra analysis in a RIA or use the 'send back' process if introduced).

### **One member viewed the Proposed Modification as potentially illegal (ELEXON's legal view is the Proposed Modification is not illegal)**

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.

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."

Although (with the exception of the Proposer) the Group did not support the Proposed Modification, no other members believed that the Proposed Modification was illegal.

## Potential solutions that would prevent Implementation Dates timing out

The Group noted that although the majority of members consider P250 not to be better than the current arrangements, they needed to develop a solution that could be sent to the Authority for decision. That included considering possible ways of constructing Implementation Dates that cannot 'time out'. The Group noted there were two constructions of Implementation Dates that had been considered by a sub-group of Panel members in 2008 (144/08). These were:

### a) Open ended fall back date targeting a BSC Systems Release:

"The recommended Implementation Date for PXXX is the next BSC Release subsequent to the [X] month after an Authority decision is received"

### b) Open ended fall back date which did not target a BSC Systems Release:

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166/06

P250

Detailed Assessment

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5 March 2010

Version 1.0

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Page 8 of 21

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“The recommended Implementation Date for PXXX is [X] Working Days following an Authority decision”

The Group noted that these Implementation Date constructions could be mixed with a specific Implementation Date in order to provide some certainty. For example:

The recommended Implementation Date for PXXX is:

- [Implementation Date A] if an Authority decision is received on or before [‘decision by’ date 1]; or
- [X] Working Days following an Authority decision, if an Authority decision is received after [‘decision by’ date 1].

The Group noted that this construction was better than having no certainty. The Group agreed that P250 should not hard-wire a specific type of Implementation Date construction in to the BSC, just the obligation that the construction used should not cause the Authority to ‘time out’. It was better for the Panel to formulate appropriate Implementation Dates on a case by case basis.

## Expanding the P180 solution as an Alternative Modification

The Group investigated whether developing a similar solution to P180 would be better than using Implementation Dates for all Modification Proposals that could not ‘time out’.

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 happened with P82 ‘Introduction of Zonal Transmission Losses on an Average Basis’ in 2004.

The P180 BSC provisions oblige the Panel, where an Approved or Rejected modification 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 Group proposed a similar solution for the P250 Alternative Modification:

- In situations where the Authority would be unable to make a decision before the final ‘decision by’ date in the Final Modification Report it can direct the Panel to request additional Implementation Dates. As part of this the Authority could:
  - instruct 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;
- The Panel would consult with industry in order to create appropriate additional Implementation Dates;
- During the consultation the Panel would also ask industry if there are any ‘time-sensitive’ issues (for example, out of date analysis or a change to implementation lead times/costs) relating to the Final Modification Report, which should be highlighted to the Authority;
- The Panel would provide the Authority with additional Implementation Dates; and

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

This process must be completed before the last 'decision by' date in the Final Modification Report in order to prevent the Modification Proposal 'timing out'.

The Group unanimously considered this to be a more appropriate solution to providing Implementation Dates that could not 'time out'. The benefits are:

- It would provide industry with clear Implementation Dates to plan their implementation activities around (for example, under this process, the Panel could propose additional 'fixed' Implementation Dates with fixed 'decision by' dates rather than having to propose 'open-ended' dates for all Modification Proposals under the Proposed Modification). It would therefore create much less uncertainty and risk than the Proposed Modification;
- It would allow Panel to consult with industry participants as to whether the lead times that the original proposed Implementation Dates were based on are still appropriate, and to propose additional dates based on revised lead times if not. The Proposed Modification would not take account of the fact that impacts and lead times can change over time, because it would oblige the Panel to provide 'open-ended' dates up front based on the original impact assessment lead times;
- Placing the trigger for the process with the Authority is more appropriate, as only the Authority can know (in the absence of any previous advice to the Panel before the submission of the Modification Report) whether it is able to make a particular decision date;
- Additional Implementation Dates would therefore only be put forward where needed; and
- It provides the Panel the opportunity to consult with industry as to whether the analysis in the Final Modification Report is still relevant, and whether there are any other 'time-sensitive' issues which the Authority should be aware of.

In short, the Alternative Modification would better deliver the intent of P250 than the Proposed Modification.

The Group expanded upon these benefits:

### **More certainty**

One of the failings of open-ended Implementation Dates (i.e. "[X] working days after an Authority decision") is that the industry cannot plan their implementation activities. The Alternative Modification solution would provide the industry with the certainty of fixed (although revised) Implementation Dates.

### **Allows industry consultation on Implementation Dates and analysis**

The Group noted that the required implementation timescale of a particular modification may change over time. It would depend on what other activities were also going on within the industry. For example, when the roll out of smart meters occurs, it is possible that some Parties will require more time to implement a Modification (not related to smart meters), as they may have to devote resource to the smart meter roll out. This would not be considered under the Proposed solution, but would be considered under the Alternative solution.

The Group noted that lead times and costs can vary significantly for system changes depending on the Implementation Date, because of the interaction they may have with other work.

The Alternative Modification also better handles the issue of out of date analysis (see below for further discussion on this issue). The Group assumed that any analysis contained in the Final Modification Report would not be out of date at the time the Panel was proposing Implementation Dates in the Final Modification Report. Therefore, it was better to consult with industry on the validity of the analysis once a change was with Ofgem and after Ofgem had indicated that it could not make the original Implementation Dates.

### **Why is this solution not the Proposed Modification?**

The Group considered whether it was possible to include the above solution as the Proposed Modification. Unfortunately, the wording of the Modification Proposal form appears to prevent this. The Modification Proposal states that the Proposed solution would:

“place an obligation on the Panel to ensure that...“timing out” cannot occur.”

One member noted that the Alternative solution only prevented ‘timing out’ occurring if the Authority requested additional Implementation Dates from the Panel. Therefore only the Authority, and not the Panel, could ensure that ‘timing out’ did not occur. On that basis, the Group developed the above solution as the Alternative Modification. A Group member made a broader comment that regardless what provisions are put in the BSC, the ultimate responsibility for preventing ‘timing out’ rests with the Authority. They can do this by either making timely decisions or rejecting a Modification Proposal.

### **Other potential alternative solutions**

The group also investigated other potential alternative solutions:

#### **Introduce a mechanism similar to the Authority approval process in the Charging Methodologies**

One member, following the meeting, suggested that one possible alternative solution is to introduce a similar decision process for BSC Modification Proposals as exists for changes to Charging Methodologies under the CUSC. Under this suggestion the Panel would make a decision to approve or reject a change, and this decision would become binding unless the Authority vetoed it within a certain number of days. Under the Charging Methodology arrangements, Implementation Dates therefore cannot ‘time out’, because there are time-restrictions on the Authority’s ability to veto and any implementation will therefore always take place on the original proposed date. It should be noted that this alternative would require a change to the Transmission Licence and would be a significant change to BSC governance. Ofgem are also currently consulting on changing the governance of the Charging Methodologies so that they have a Panel recommendation and Ofgem decision in the same way as code modifications.

#### **Introducing additional obligations on the Panel to ensure it consults with the Authority when constructing Implementation Dates**

One member suggested that a more palatable way forward would be to introduce additional obligations on the Panel to ensure it consults with the Authority when constructing Implementation Dates. This would prevent the Panel always having to construct Implementation Dates that cannot time out (which increased uncertainty) while ensuring the Authority has been suitably consulted about Implementation Dates.

The Group noted that it was already working practice by Modification Groups and the Panel to consult the Ofgem representative on Implementation Dates (and their respective ‘decision by’ dates). So an additional obligation would not achieve anything more than was already done. The Group also commented that the defect as stated in the Modification

Proposal was to construct Implementation Dates that could not 'time out'. Even with discussion and consultation between the Panel/Modification Group and Ofgem there was no guarantee that the Implementation Dates would not time out. The Ofgem representative reiterated that there could be unexpected issues which arise after it receives a Final Modification Report (as with P198/P200/P203/P204), and which it and the Panel could not have reasonably anticipated at the time the Implementation Dates were constructed. Therefore this potential alternative solution did not meet the P250 defect.

## **A formal process for Panel to write to the Authority**

### **What can be done using the current Implementation Date arrangements?**

The Group noted that the Panel can already write to the Authority (or publicly question the Authority at a Panel meeting) for any purpose in the current arrangements. Some members questioned whether the introduction of a more formal process to do this was necessary.

The Proposer's representative commented that under the UNC there was a formal process for the Panel to write to the Authority. This could occur if no decision had been received for a certain number of months, or if the analysis contained in the Final Modification Report was considered out of date. The Group noted that this formal process was required under the UNC as it was not UNC working practice to provide Implementation Dates or 'decision by' dates in their Final Modification Reports. Under the BSC, if the Authority did not make a decision by the final 'decision by' date then the Modification would be 'timed out'.

The Proposer noted that they were proposing to introduce a formal process in order to recognise 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. The majority of the Group viewed this as a poor alternative to current working practice, where the Authority often has 'decision by' dates.

### **How would the Panel know if the analysis was out of date?**

The Group were concerned that the Panel would not always be best placed to know if analysis contained in the Final Modification Report was out of date. The Modification Group conducts the analysis, and they would be best placed to consider whether the analysis is now out of date. However, the Proposed Modification does not propose to consult the Modification Group as to whether analysis is out of date.

A suggested way forward would be for the Modification Group to develop working practices so that they stated the shelf life of analysis in the Final Modification Report. The Group were cautious as to whether this would be a workable solution. In certain situations it would work, but the Modification Group would not be able to account for external factors (such as changes in government policy) in their shelf life recommendation. It could also be arbitrary to set a fixed 'best before' date on analysis – e.g. if you set this as being 31 March, is it really true to say that the analysis then becomes 'out of date' the next day on 1 April?

The Group considered that a better solution is contained in the Alternative Modification. It is more appropriate than the Proposed Modification as it:

- involves industry consultation on whether circumstances have materially changed since the Final Modification Report was submitted;
- allows the Panel to highlight any material change in circumstances to the Authority;

- allows this to happen at the point where the Authority instructs the Panel to provide additional Implementation Dates; and
- therefore does not involve the Modification Group assigning a shelf life to analysis early on in the process, which may change due to events outside of the Group's foresight.

#### Is the Proposed Modification better than the current baseline?

The strong opinion of the respondents is the Proposed Modification is **not better** than the current arrangements (7 out of 8). Respondents cited Applicable BSC Objectives (c) and (d). One respondent believed the Proposed Modification was better than the current arrangements and cited Applicable BSC Objectives (c) and (d).

#### Arguments against the Proposed Modification

Applicable BSC Objective (c):

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

Applicable BSC Objective (d):

- Would reduce the efficient operation of the BSC as the:
  - solution it would introduce can already be achieved under the current BSC arrangements;
  - Modification Group would be required to prepare cost benefit analysis that would be relevant for an indefinite period – potentially impossible work; and
- P250 goes against the findings of the P198/ P200/P203/P204 Judgement (paragraph 83):
  - if the Authority took a significant time to come to a decision then it may be deciding on a different Modification Proposal.

#### Arguments for the Proposed Modification

Applicable BSC Objective (d):

- 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
- Would ensure that the validity of underlying analysis which supports a Panel recommendation can be questioned should circumstances surrounding the Modification Proposal change after a period of time has elapsed.

#### Is the Alternative Modification better than the current baseline?

The majority view of the respondents is the Alternative Modification is **not better** than the current arrangements (5 out of 8). Respondents cited Applicable BSC Objectives (c) and (d). The three respondent that believed the Alternative Modification was better than the current arrangements cited Applicable BSC Objectives (c) and (d). They believed that the Alternative Modification was a pragmatic solution to the issue of timing out.

#### Arguments against the Alternative Modification

Applicable BSC Objective (c):

- Detrimental to competition as Implementation Dates are still open-ended – therefore greater uncertainty to the market.

Applicable BSC Objective (d):

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

### **Arguments for the Alternative Modification**

Applicable BSC Objective (c)

- 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:
  - 1 respondent suggested the Alternative Modification should be confined to non-system changes.

Applicable BSC Objective (d):

- 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;
- Would allow industry to inform the Authority if the analysis which support a Panel recommendation is out of date; and
- Would better preserve the regulatory balance between the Authority and the Panel when compared to the Proposed Modification.

### **Is the Alternative Modification better than the Proposed Modification?**

The strong majority view of the respondents is the Alternative Modification is better than the Proposed Modification (6 out of 8). Arguments are similar to the Group's arguments:

#### **Alternative Modification better than Proposed Modification**

Applicable BSC Objective (c)

- Industry consultation on additional dates – more appropriate Implementation Dates
- Industry consultation on time based issues such as analysis
- Gives greater certainty to industry as can still use fixed Implementation Dates
- Introduces a process built on the current P180 process, which is already understood by industry.

Applicable BSC Objective (d):

- Alternative Modification goes some way towards better (although not fully) preserving the regulatory balance between the Authority and the Panel when compared to the Proposed Modification.

#### **Alternative Modification worse than Proposed Modification**

Applicable BSC Objective (d):

- Proposed provides greater certainty for decision timetable

### **Do you support the implementation option preferred by the Modification Group?**

7 of the 8 respondents supported Groups proposed Implementation Date and approach. One respondent would prefer that P250 applied to all open Modification Proposals, rather than those raised following the implementation of P250. The respondent commented that

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166/06

P250

Detailed Assessment

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5 March 2010

Version 1.0

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Page 15 of 21

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they believed the Implementation Dates do not have bearing on the Modification Proposal's development and therefore it would be more efficient to apply P250 to all open Modification Proposals.

See page 14 of the Assessment Report for the Group's view.

## Are you impacted by the Proposed Modification/Alternative Modification?

5 out of 8 respondents reported that the Proposed Modification/Alternative Modification would:

- Make it harder for Parties to plan their implementation activities
- Make it harder for Parties to understand the impact of a Modification on their business
- Reduce certainty and increase costs for investors/Parties

## Are there any other alternative solutions?

### Assessment consultation responses

1. Drax suggested that there should only be an ability for a single extension to the Implementation Date, rather than the ability for the Authority to request additional Implementation Dates multiple times.
2. Drax also suggested it should be clear that a request to revise the Modification timetable must be made prior to the final 'decision by' date.
3. EDF suggested the Group consider, as part of the proposed 'additional Implementation Date' process, that the Panel also has the ability to revise its analysis and recommendation
4. National Grid suggested a process where industry parties could notify ELEXON if they identified a concern with any supporting analysis for an existing Modification Proposal which had been sent to the Authority for a decision.

### Group's discussion on the other alternative solutions

The Group considered suggestion (1). One member commented that they understood the reasoning for the potential alternative, as it would add more certainty to the process and more incentive for the Authority to make a decision in a reasonable period of time. Another member noted that, while they were sympathetic, it would not necessarily prevent a Modification Proposal 'timing out' if the Authority would only be able to request one extension. It was possible that circumstances may change over time meaning a second (or more) request is required for additional Implementation Dates. On that basis suggestion (1) would not satisfy the defect as set out in the Modification Proposal form. The Group therefore did not amend the Alternative solution in line with suggestion (1).

For suggestion (2) the ELEXON noted that the High Court's judgement on P198/P200/P203/P20 does mean that an Authority direction to revise the Modification timetable must be completed prior to the final 'decision by' date to avoid 'timing out'. The Group requested that this fact should be clear in the Assessment Report (see page 10 of the main Assessment Report document).

The Group noted that in order to take forward suggestion (3) a Transmission Licence change would be required. The Transmission Licence does not provide for re-submission of an updated report (containing new analysis, a new recommendation or otherwise). Without a Transmission Licence change the Authority could not legitimately consider such a report. Suggestion (3) would also go beyond the identified defect. Hence it was not a

valid Alternative. On that basis the Group decided not to add suggestion (3) into the P250 Alternative solution.

With suggestion (4) the Group acknowledged that if a Party identified a concern with any supporting analysis then it would be useful to contact ELEXON. However, Parties could already do this under the current arrangements. Indeed, Parties could also contact the Authority directly. On that basis the Group decided not to add suggestion (4) into the Alternative solution.

## Do you have any further comments on P250?

### Assessment consultation responses

The following additional comments were made by respondents:

- P250 is contrary to the P93 decision;
- P250 is contrary to the P198/P200/P204/P204 judgment;
- The key issue is that the Authority needs to make decisions in a reasonable time:
  - If analysis in the Final Modification Report is not sufficient then Authority should have engaged more in the process;
  - If this feedback process is not working adequately then it would lead to a waste of industry resource; and
  - Where Ofgem encounter an unforeseen problem then maybe there should be a process to send back to the Panel/Mod Group;
- We have concerns about the Authority's ability to conduct additional analysis as part of the Regulatory Impact Assessment because:
  - It might be considered to be a different Modification Proposal;
  - The additional analysis would not seen by the Modification Group/Panel when making their recommendations; and
  - It might therefore invalidate a successful appeal to the Competition Commission; and
- Another way of ensuring that a change does not 'time out' is to use a similar process to Charging Methodologies, as detailed on page 11.

### Group's discussion on the consultation further comments

The Group noted their previous discussions had explored most of the additional comments.

The Ofgem representative explained that the Authority could undertake further analysis for a Regulatory Impact Assessment and that there was an obligation set out in statute for when a Regulatory Impact Assessment ought to be conducted. This would not mean they were deciding on a different Modification Proposal. One member disagreed and noted the reasons given above. ELEXON noted that considering whether the Authority has the ability to conduct analysis as part of a Regulatory Impact Assessment was outside the scope of the Modification Proposal and the BSC.

## Transmission Company analysis

The Transmission Company:

- supported both the Proposed and the Alternative Modification
- believed the Alternative Modification was better than the Proposed Modification
- noted no impacts on them.

### Proposed Modification

The Group reviewed the consultation responses and noted strong concerns with the Proposed Modification.

The Ofgem representative commented that the Proposed Modification seemed to be a simple solution. Implementation Dates were set in such a way as they would not 'time out' and the Panel could write to the Authority if it needed to know when a decision was likely. The Authority also published a spreadsheet containing the likely 'decision by' dates for code Modifications. They wanted to fully understand why the industry was concerned with the change, particularly as some Modification Proposals already have Implementation Dates that cannot 'time out' and have been comfortable with open-ended Implementation Dates?

The Modification Group members explained that the Proposed Modification would:

- increase uncertainty and regulatory risk in the industry;
- increase industry costs - as without fixed Implementation Dates the industry would need to incur additional costs in order to be prepared to implement a Modification with an open Implementation Date;
- not allow the industry to amend implementation timescales. This would occur if there was a change to the regulatory environment in such a way that additional time is required to implement a Modification with the Authority for decision. This becomes a problem if the Authority takes considerable time to make a decision. It is much less of a problem under the current arrangements. The Group do not consider that the formal process for the Panel to write to the Authority goes any way to alleviating the issue of open-ended Implementation dates. The Proposed Modification does not allow for an adjustment of implementation timescales.
- 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;
- apply to all Modification Proposals (unlike the Alternative Modification) when only a tiny number of Modification Proposals will ever be likely to put the Authority in a decision where it might 'time out'; and
- be unnecessary as the Panel can already construct Implementation Dates that cannot time-out.

The Group noted that, currently, where a Modification has an Implementation Date that cannot 'time out' it would be for a minor, documentation only change with no systems impacts. Or there is an industry desire for the earliest possible Implementation Date. But the Proposed Modification would require Implementation Dates that cannot 'time out' for all Modifications, including those that require system changes, where greater certainty is required. The Group also noted that 'timing out' only occurs in rare circumstances. Applying open-ended Implementation Dates to all Modification Proposals was using a sledgehammer to crack a nut.

The Ofgem representative suggested that if the industry was concerned about open ended Implementation Dates then the Panel could still set 'open-ended' Implementation Dates that aligned with future BSC Systems Releases (e.g. the next Release to occur no less than X months after an Authority decision). A member commented that their view of what an 'open-ended Implementation Date' meant was one where there was no fixed date in time. Aligning to a future Release would be an open Implementation Date. This would cause uncertainty as to when Implementation would occur. That uncertainty would increase costs on the industry.

One member noted that under the Proposed Modification a situation could arise where the Authority has not made a decision on a Modification for quite some time, and the regulatory environment has changed. In that case the implementation timescale as set out in the Final Modification Report may have become inappropriate (i.e. a Modification Proposal may take longer to implement than originally thought). Under the Proposed Modification there is no facility to change the implementation timescale until after the Authority had approved a Modification. The Ofgem representative questioned whether the ability for the Panel to write to the Authority to note any time-sensitive issues would help. Another member commented that this would not help matters if the Implementation Date cannot be varied. The Group were unsure as to whether the Panel were best placed to know about time-sensitive issues. And the Group further noted that the Panel can write to the Authority under the current arrangements.

The Ofgem representative noted that the Authority aims to make decisions within 25 Working Days of receiving a Final Modification Report. However, if there was a concern about when the Authority would make a decision then the Panel could write to the Authority to request a likely decision date. One member believed that this provision was a retrograde step as the industry currently has certainty as to when Authority decisions will occur. The Proposed Modification would increase uncertainty.

The Group also commented that they did not believe the current Authority's decision-by-date-spreadsheet adequately informs industry when Authority decisions would occur under the Proposed Modification. The Group noted that, for Codes where fixed Implementation Dates are not provided, the 'decision by' dates can be extended and are not always very precise (i.e. quarter 1, 2010). Even where 'open-ended' dates were tied to Releases, whether the decision was made early or late in a Quarter could make the difference as to which Release the change was implemented in.

The Group reiterated its majority view that the Proposed Modification is considerably worse than the current arrangements and should not be approved.

## Alternative Modification

The Group noted that the responses were in line with its views at the first Modification Group meeting. The Group's strong view was that the Alternative Modification was much better than the Proposed Modification as it better delivers the intent of P250 than the Proposed Modification. The Group also noted their majority view was that neither the Proposed nor the Alternative Modification was better than the current arrangements.

## Final views on 'timing out'

One member reiterated that only the Authority can prevent 'timing out' occurring. If it is unable to make a decision within the Final Modification Report timescales then they have the option of rejecting the Modification Proposal. If there is merit in the Modification Proposal then a Party can always re-raise it. The Ofgem representative commented that the Authority is charged with making robust decisions. Rejecting a Modification Proposal because the Authority ran out of time may not be a robust decision and may be open to legal challenge. The majority of the Group disagreed – in their view rejecting a Modification Proposal because you do not have time to make a decision was a robust decision.

The majority of the Group believed that the Proposed Modification is a solution which would have unintended detrimental impacts to a defect that does not exist. They noted that the Panel can already set open-ended Implementation Dates where it is appropriate

and can already write to the Authority for any reason. They also noted that 'timing out' occurs very rarely.

The Group considered that the Alternative Modification was a better solution than the Proposed Modification, but not a better solution than the current arrangements. Although the Alternative Modification offered a more appropriate solution it still increased the uncertainty in the industry.

## Final conclusions

The Group's strong opinion is that the Proposed Modification is considerably worse than the current arrangements. The Group also considers that the Alternative Modification is worse than the current arrangements. However, the Group unanimously believes that the Alternative Modification is better than the Proposed Modification.

## 5 Timetable and Responsibilities

**Table 2 – P250 Assessment Procedure timetable**

Date	Assessment activity
14/01/10	Present P250 IWA to Panel
19/01/10	P250 Modification Group meeting 1
5/02/10	Issue Assessment Consultation and Impact Assessment to industry, ELEXON, BSC Agents and the Transmission Company for 10 working days
22/02/10	Assessment Consultation and Impact Assessment responses returned
23/02/10	P250 Modification Group meeting 2
5/03/10	Issue Assessment Report to Panel
11/03/10	Present P250 Assessment Report to Panel

**Table 3 – Estimated P250 progression costs up to an Authority decision**

Estimated progression costs based on proposed timetable	
Meeting costs (including Modification Group member expenses)	£750 (assuming 3 meetings with the meeting costs shared between P247 and P250)
Non-ELEXON legal and expert costs	£0
Service Provider impact assessment costs	£0
ELEXON resource	37 man days, equating to £8,880

**Table 4 – P250 Modification Group attendance**

Member	Organisation	20/01/10	23/02/10
Adam Lattimore	ELEXON (Chairman)	Yes	Yes
Andrew Wright	ELEXON (Lead Analyst)	Yes	Yes
Alex Thomason	National Grid (Proposer's representative)	Yes	Yes
Esther Sutton	E.ON UK	Yes	No
Chris Stewart	Centrica	Yes	Yes
Martin McDonald	SAIC	Yes	Yes
Garth Graham	Scottish and Southern	Yes (teleconference)	Yes (teleconference)
Eric Graham	TMA	Yes	Yes (teleconference)
		20/01/10	23/02/10
Jill Ashby	Gemserv	Yes	No
David Ahmad	ELEXON (Lawyer)	Yes	Yes
Kathryn Coffin	ELEXON (Design Authority)	Yes	Yes
Abid Sheikh	Ofgem	Yes	Yes

166/06

P250  
Detailed Assessment

5 March 2010

Version 1.0

Page 21 of 21

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