

## Draft MODIFICATION REPORT for Modification Proposal P129 Changes to Panel Determination Process and Panel Election Procedures

**Date of issue:** 20 August 2003      **Document reference:** P129R01  
**Reason for issue:** Internal Review      **Issue/Version number:** Draft/0.1

This document has been distributed in accordance with Section F2.1.10<sup>1</sup> of the Balancing and Settlement Code.

### RECOMMENDATIONS

The Balancing and Settlement Code Panel recommends that:

- **The Proposed Modification P129 should not be made; and**
- **In the event the Proposed Modification P129 is made, that it should have an Implementation Date of:**
  - **1 May 2004 if an Authority determination is received before 19 April 2004; or**
  - **1 May 2006 if an Authority determination is received on or after 19 April 2004;**

**(Note: With the Agreement of the Authority no legal text has been provided)**

**Intellectual Property Rights and Copyright** - This document contains materials the copyright and other intellectual property rights in which are vested in ELEXON Limited or which appear with the consent of the copyright owner. These materials are made available for you to review and to copy for the purposes of the establishment, operation or participation in electricity trading arrangements in England and Wales under the BSC. All other commercial use is prohibited. Unless you are a person having an interest in electricity trading in England and Wales under the BSC you are not permitted to view, download, modify, copy, distribute, transmit, store, reproduce or otherwise use, publish, licence, transfer, sell or create derivative works (in whatever format) from this document or any information obtained from this document otherwise than for personal academic or other non-commercial purposes. All copyright and other proprietary notices contained in the original material must be retained on any copy that you make. All other rights of the copyright owner not expressly dealt with above are reserved.

**Disclaimer** - No representation, warranty or guarantee is made that the information provided is accurate, current or complete. Whilst care is taken in the collection and provision of this information, ELEXON Limited will not be liable for any errors, omissions, misstatements or mistakes in any information or damages resulting from the use of this information or any decision made or action taken in reliance on this information.

<sup>1</sup> The current version of the Balancing and Settlement Code (the 'Code') can be found at [www.elexon.co.uk/ta/bscres\\_docs/bsc\\_code.html](http://www.elexon.co.uk/ta/bscres_docs/bsc_code.html)

**CONTENTS TABLE**

<b>Summary of impacted parties and documents .....</b>	<b>3</b>
<b>1 Description of Proposed Modification and assessment against the Applicable BSC Objectives .....</b>	<b>4</b>
1.1 Modification Proposal .....	4
1.2 Proposed Modification .....	4
1.3 Issues raised by the Proposed Modification .....	6
1.4 Assessment of how the Proposed Modification will better facilitate the Applicable BSC Objectives.....	10
1.5 Modification Group’s cost benefit analysis of Proposed Modification.....	11
1.6 Governance and regulatory framework assessment .....	11
<b>2 Rationale for Panel’s recommendations .....</b>	<b>11</b>
<b>3 Impact on BSC Systems and Parties .....</b>	<b>12</b>
3.1 BSCCo .....	12
3.2 BSC Systems.....	13
3.3 Party Agents .....	13
<b>4 IMPACT ON CODE AND DOCUMENTATION .....</b>	<b>13</b>
4.1 Balancing and Settlement Code .....	13
4.2 Code Subsidiary Documents .....	13
4.3 BSCCo Memorandum and Articles of Association .....	13
4.4 Impact on Core Industry Documents and supporting arrangements .....	13
<b>5 Summary of consultations .....</b>	<b>13</b>
5.1 Panel’s summary of the consultation responses.....	13
5.2 Panel’s comments and views of the Panel.....	23
<b>6 Summary of Transmission Company analysis.....</b>	<b>23</b>
6.1 Analysis .....	23
6.2 Comments and views of the Panel .....	24
<b>7 Summary of external advice .....</b>	<b>24</b>
<b>8 Implementation approach .....</b>	<b>24</b>
<b>9 Document control .....</b>	<b>24</b>
9.1 Authorities .....	24
<b>Annex 1 Draft legal text.....</b>	<b>25</b>
<b>Annex 2 Modification Group details.....</b>	<b>25</b>
<b>Annex 3 Consultation responses.....</b>	<b>25</b>
<b>Annex 4 Transmission Company analysis .....</b>	<b>25</b>
<b>Annex 5 BSC Agent impact assessments .....</b>	<b>Error! Bookmark not defined.</b>
<b>Annex 6 Party impact assessments .....</b>	<b>Error! Bookmark not defined.</b>
<b>Annex 7 Cost benefit analysis .....</b>	<b>Error! Bookmark not defined.</b>
<b>Annex 8 Core Industry Document Owner impact assessments.....</b>	<b>Error! Bookmark not defined.</b>
<b>Annex 9 Proposed text to modify BSCCo Memorandum and Articles of Association .....</b>	<b>Error! Bookmark not defined.</b>
<b>Annex 10 Terms of reference and report/analysis of external consultants/advisors.....</b>	<b>Error! Bookmark not defined.</b>

### SUMMARY OF IMPACTED PARTIES AND DOCUMENTS

The following parties/documents have been identified as being potentially impacted by Modification Proposal P129.

Parties	Sections of the BSC	Code Subsidiary Documents
Suppliers <input checked="" type="checkbox"/>	A <input type="checkbox"/>	BSC Procedures <input checked="" type="checkbox"/>
Generators <input checked="" type="checkbox"/>	B <input checked="" type="checkbox"/>	Codes of Practice <input type="checkbox"/>
Licence Exemptable Generators <input checked="" type="checkbox"/>	C <input type="checkbox"/>	BSC Service Descriptions <input type="checkbox"/>
Transmission Company <input checked="" type="checkbox"/>	D <input type="checkbox"/>	Service Lines <input type="checkbox"/>
Interconnector <input checked="" type="checkbox"/>	E <input type="checkbox"/>	Data Catalogues <input type="checkbox"/>
Distribution System Operators <input checked="" type="checkbox"/>	F <input checked="" type="checkbox"/>	Communication Requirements Documents <input type="checkbox"/>
<b>Party Agents</b>		
Data Aggregators <input type="checkbox"/>	G <input type="checkbox"/>	Reporting Catalogue <input type="checkbox"/>
Data Collectors <input type="checkbox"/>	H <input type="checkbox"/>	MIDS <input type="checkbox"/>
Meter Operator Agents <input type="checkbox"/>	J <input type="checkbox"/>	<b>Core Industry Documents</b>
ECVNA <input type="checkbox"/>	K <input type="checkbox"/>	Grid Code <input type="checkbox"/>
MVRNA <input type="checkbox"/>	L <input type="checkbox"/>	Supplemental Agreements <input type="checkbox"/>
<b>BSC Agents</b>		
SAA <input type="checkbox"/>	M <input type="checkbox"/>	Ancillary Services Agreements <input type="checkbox"/>
FAA <input type="checkbox"/>	N <input type="checkbox"/>	Master Registration Agreement <input type="checkbox"/>
BMRA <input type="checkbox"/>	O <input type="checkbox"/>	Data Transfer Services Agreement <input type="checkbox"/>
ECVAA <input type="checkbox"/>	P <input type="checkbox"/>	British Grid Systems Agreement <input type="checkbox"/>
CDCA <input type="checkbox"/>	Q <input type="checkbox"/>	Use of Interconnector Agreement <input type="checkbox"/>
TAA <input type="checkbox"/>	R <input type="checkbox"/>	Settlement Agreement for Scotland <input type="checkbox"/>
CRA <input type="checkbox"/>	S <input type="checkbox"/>	Distribution Codes <input type="checkbox"/>
Teleswitch Agent <input type="checkbox"/>	T <input type="checkbox"/>	Distribution Use of System Agreements <input type="checkbox"/>
SVAA <input type="checkbox"/>	U <input type="checkbox"/>	Distribution Connection Agreements <input type="checkbox"/>
BSC Auditor <input type="checkbox"/>	V <input type="checkbox"/>	<b>BSCCo</b>
Profile Administrator <input type="checkbox"/>	W <input type="checkbox"/>	Internal Working Procedures <input checked="" type="checkbox"/>
Certification Agent <input type="checkbox"/>	X <input checked="" type="checkbox"/>	<b>Other Documents</b>
MIDP <input type="checkbox"/>		Transmission Licence <input checked="" type="checkbox"/>
TFLA <input type="checkbox"/>		
<b>Other Agents</b>		
SMRA <input type="checkbox"/>		
Data Transmission Provider <input type="checkbox"/>		

X = Identified in Report for last Procedure  
 N = Newly identified in this Report

<b>Cost of implementing Proposed Modification:</b>	
Change specific	£0
Operational/maintenance	£0
<b>Total:</b>	<b>£ 0 + 124 ELEXON man days</b>

# 1 DESCRIPTION OF PROPOSED MODIFICATION AND ASSESSMENT AGAINST THE APPLICABLE BSC OBJECTIVES

## 1.1 Modification Proposal

Modification Proposal P129 "Changes to Panel Determination Process and Panel Election Procedures" ("P129") was raised on 7 May 2003 by Powergen UK plc.

P129 seeks to revise the election procedures for those Panel Members elected by Trading Parties (Industry Panel Members), pursuant to Section B2.2 of the Balancing and Settlement Code (the 'Code'), and to introduce new powers to allow the Balancing and Settlement Code Panel (the 'Panel') to make determinations on Modification Proposals, where there is agreement by a "substantial majority" of voting Panel Members.

## 1.2 Proposed Modification

### 1.2.1 Panel composition

The changes that P129 seeks to introduce are changes to the way in which Industry Panel Members are elected, pursuant to Section B2.2 of the Code. Specifically, P129 seeks to replace the current system of biennial elections using a preference voting system with a constituency-based annual election process that employs a "first past the post" approach.

The Proposer suggests that each trading party group (Annex B-2, paragraph 3.1.5 of the Code) would be permitted to cast one vote in each of its two designated constituencies. The proposed criteria by which trading party groups are categorised as belonging to constituencies are as follows:

#### Small Supplier constituency

One vote would be allocated if the annual metered energy offtake by a trading party group is "greater than zero TWh and less than 25 TWh", except where the trading party group is allocated a vote in the Trading Constituency since its annual energy metered offtake is less than or equal to 50% of the annual metered energy delivered by that trading party group.

#### Small generator constituency

One vote would be allocated if annual metered energy delivered by a trading party group is "greater than zero TWh and less than 10 TWh", except where the trading party group is allocated a vote in the Trading Constituency since its annual metered energy delivered is less than or equal to 50% of the annual metered energy offtake by that trading party group.

#### Large Supplier constituency

One vote would be allocated if annual metered energy offtake by a trading party group is "more than 25 TWh" , except where the trading party group is allocated a vote in the Trading Constituency since its annual metered energy offtake is less than or equal to 50% of the annual metered energy delivered by that trading party group.

#### Large generator constituency

One vote would be allocated if annual metered energy delivered by a trading party group is "more than 10 TWh" except where the trading party group is allocated a vote in the Trading Constituency since its annual metered energy delivered is less than or equal to 50% of the annual metered energy offtake by that trading party group.

Trading constituency (Representing 'pure' traders (two votes) and net purchasers or sellers of electricity (one vote))

- One vote allocated if a trading party group's annual metered energy offtake is less than or equal to 50% of the annual metered energy delivered by that trading party group (the 'Electricity Seller Vote').
- One vote allocated if a trading party group's annual metered energy delivered is less than or equal to 50% of the annual metered energy offtake by that trading party group (the 'Electricity Buyer vote').

P129 proposes to introduce 5 constituency classes (one for each elected Industry Panel Member) with each trading party group having 2 votes; one vote in each of two constituencies within which that trading party group belongs. In the case of pure Trading Parties, 2 votes would be allocated in a single constituency. The Proposer believes that the proposed revised process for electing industry Panel Members would, together with the proposal to make the Panel elections annual, rather than biennial, make the Panel more representative of the industry.

### **1.2.2 Panel power to make determinations on Modification Proposals**

Presently, the Panel makes recommendations on each Modification Proposal in a Modification Report, which is sent to the Authority for determination. P129 proposes that, where there is a "substantial majority" of Panel Members in agreement, the Panel could make determinations in respect of such Modification Proposals. Where there is no "substantial majority" agreement, the Modification Report would be passed to the Authority for determination.

The Proposer quantifies a "substantial majority" as 7 votes out of 9 from voting Panel Members (or 7 votes out of 10, if the Panel Chairman has appointed a sixth Industry Panel Member, pursuant to Section B2.6.1 of the Code).

P129 recognises that the Panel has no jurisdiction over other industry documents, such as the Grid Code for example, and that some Code Modifications may require consequential amendments to such documents. P129 proposes that in such cases, the Panel could "conditionally approve" a Modification Proposal.

The Proposer believes that Panel recommendations and Authority decisions do not always reflect the views of a cross section of the industry, and that they should do so. If the Panel were to make determinations instead of recommendations, as proposed in P129, then the constitution of the Panel is of primary concern to the Proposer. The Proposer believes that if P129 were to be made, the Authority would be able to refocus its resources on more complicated or controversial Modification Proposals that would be passed to it due to a lack of a majority decision by the Panel.

P129 does not seek to:

- alter the requirement of impartiality on Panel Members, pursuant to Section B2.8.1(a) of the Code; or
- change the process whereby the Panel apply to the Authority to change the Implementation Date of Approved Modification Proposals, pursuant to Section F2.11.9 of the Code.

### **1.2.3 Timetable**

The P129 Initial Written Assessment (IWA) was presented to the Panel at its meeting on 12 June 2003. The Panel recommended that P129 should be submitted to a 3 month Assessment Procedure, to be undertaken by the GSMG. The Panel requested that an interim report be presented at its meeting on 14 August 2003. At this meeting the Panel agreed with the GSMG's recommendation that assessment of P129 be terminated, in accordance with Section F2.2.11 of the Code. The Panel requested that the draft Modification Report be submitted at its meeting on 11 September 2003.

### 1.2.4 Implementation Date

In the event that the Authority determines that P129 should be made then it should have an Implementation Date of:

- 1 May 2004 if an Authority Determination is received before 19 April 2004; or
- 1 May 2006 if an Authority Determination is received on or after 19 April 2004.

The provisional Implementation Dates have been determined as a result of the dates of the next two scheduled Panel elections. P129 consists of changes to two different processes (revisions to Panel election procedure and the Modification Proposal determination process) but the changes are included in the Modification Proposal as a package. Therefore, the first Implementation Date would allow changes to BSCCo systems and processes to be in place for the July 2004 Panel election, and the second Implementation Date for the July 2006 Panel election (depending on the date of the Authority's decision). Only once a new Panel is in place, formed using the revised election procedures for Industry Panel Members, could the Panel make determinations on Modification Proposals.

## 1.3 Issues raised by the Proposed Modification

During its three meetings, on 18 June, 9 July and 5 August 2003, the GSMG discussed the issues raised in P129. Although the GSMG recognised the need to consider the Modification Proposal as a "single package", the group initially considered the implications of the revised Panel election procedures, followed by the issues related to the proposed remit for the Panel to make determinations when there is "substantial majority" agreement.

### 1.3.1 Revised Panel election procedures

The following sections outline the GSMG's views on the issues concerning the proposed process for electing Industry Panel Members.

- **Comparison of the preference voting system with the first past the post system**

The GSMG agreed that replacing the current preference voting system with a first past the post system could mean that the voting procedure would be clearer to participants. The GSMG observed that the revised election procedures proposed in P129 may increase Parties' perception of their ability to influence Panel Member selection, as they would be fully aware of which Panel Members' election they directly participated in.

The first past the post voting system forms part of the Proposed Modification. The GSMG consulted the industry on this matter during the Assessment Procedure (see section 5.2 of this report).

- **Optimum number of constituencies to achieve the desired balance within the Panel**

P129 proposes that trading party groups would declare which constituencies they believed they belonged to, but this would be open to challenge by other Parties. BSCCo would investigate any challenge, and if necessary refer to annual metered energy offtake or delivery to establish constituency class. The 5 constituency classes proposed in P129 will result in the election of 5 Industry Trading Members, which is no change from the current number.

The GSMG discussed the balance of the Industry Panel Members to non voting Panel Members and agreed that there should be no refinement to the balance as described in the Modification Proposal for the Proposed Modification. The GSMG consulted the industry on this matter during the Assessment Procedure (see section 5.2 of this report).

- **Criteria for constituency classes**

The GSMG discussed the thresholds (defined in TWh) by which a trading party group would declare its constituency class.

Two votes would be allocated to each trading party group, as described in section 1.2.1 above. Whilst non-physical traders would have two votes, these votes would be within one constituency and therefore non-physical traders would only be involved in electing one Panel Member. They would, however, have greater influence over the election of the Panel Member for that constituency.

A GSMG member indicated that the cut-off threshold for constituency classes would have an influence on their size. The GSMG consulted with the industry to determine whether or not the threshold levels for constituency class, as defined in the Modification Proposal, should be reviewed and changed and who should be responsible for this process. The GSMG considered the fact that, if the threshold levels for constituency class were written into the Code, a Modification Proposal would be required to amend them. If the Panel was the body making the determination on the Modification Proposal, it would effectively be involved in setting the parameters for its own re-election. An alternative approach would be for the Authority to authorise the thresholds.

The Proposed Modification does not include a change to the number of candidates allowed within the industry Panel Member election process (which remains at 5). A candidate will only be able to stand for election within a single constituency.

The GSMG assessed whether a further constituency class needed to be included as a refinement in the Proposed Modification, but decided against introducing more constituency classes. The GSMG included a question on this matter in the Assessment Procedure consultation with the industry, the responses to which are shown in section 5.2 of this report.

- **Panel Chairman's right to appoint an additional industry Panel Member**

The Modification Proposal is silent on the matter of whether or not the Panel Chairman should retain the right to appoint a further Panel Member, pursuant to Section B2.6 of the Code. The Panel Chairman would appoint an additional Industry Panel Member if he believed that there was an industry sector whose interests were not reflected in the composition of the Panel. The GSMG decided that the Panel Chairman's ability to appoint an additional Industry Panel Member should be retained in the Proposed Modification.

- **Changes to the current non-voting appointments on the Panel**

The GSMG decided that changing the non-voting status of some Panel Members was not necessary to address the defect documented in P129 and would, therefore, not be considered further.

- **Distribution System Operators and the Transmission Company**

P129 is silent on the appointment of a representative for Distribution System Operators and the Transmission Company Panel Member.

The GSMG decided that the Proposed Modification did not propose to change the status quo for the Panel Members appointed by the Transmission Company and Distribution System Operators.

At its meeting on 14 August 2003, the Panel Member representing the Distribution System Operators commented that the current Panel arrangements discriminate against the Distribution System Operators and he noted that he didn't believe that P129 would improve the situation.

- **Publication of number of votes for each candidate in the Panel Election**

The Modification Proposal was raised with the intention that only the number of votes for each candidate be published, as opposed to who voted for which candidate. This differs from the existing election rules, under which no voting information is made available. The GSMG agreed that the publication of the number of votes for each candidate would make the process more transparent without compromising the Panel's independence.

- **Annual elections**

The GSMG discussed the impact of elections being annual, rather than biennial, as they currently are. The group noted the importance of preserving Panel Member continuity and that this might be compromised by annual elections. The group discussed the possibility that the Industry Panel Members should be elected for two years, but that the voting for different constituencies' Panel Members be staggered. This suggestion was, however, discounted by the GSMG as overly complex and impractical.

The GSMG discussed whether the entire Panel should be reappointed on an annual basis or just the elected industry members. The group observed that the Proposed Modification implied that only the elected members would be appointed annually; however, the GSMG favoured biennial elections. The GSMG consulted the industry during the Assessment Procedure on this matter (see section 5.2 of this report).

- **Constitution of the Panel and impact on Panel Committees**

The GSMG agreed that since the processes for choosing Panel Members and Panel Committee Members are different, a change to the Industry Panel Member election procedure would have no immediate impact on the Panel Committee appointment processes. Moreover, the GSMG concluded that it would not be practical to introduce any such changes, as Panel Committees are based largely on industry experts appointed by the Panel, as opposed to being elected by Parties.

### **1.3.2 Principle of Panel making determinations on Modification Proposals rather than recommendations to the Authority**

At its meetings on 18 June, 9 July and 5 August 2003, the GSMG discussed the principle that the Panel could, where there is "substantial majority" agreement between Panel Members, make determinations on Modification Proposals.

- **Efficiency**

A view was put forward that allowing the Panel to make decisions on Modification Proposals could result in a more efficient decision-making process regarding whether or not Modification Proposals are made, as the time taken for the Authority to make a decision would be eliminated in many instances.

However, it was also observed that it would be the more controversial Modification Proposals that would be referred to the Authority and these are the Modification Proposals that take time for the Authority to decide upon. The majority of the GSMG members did not believe that the proposal to allow the Panel decision making powers for Modification Proposals would significantly cut down the time it takes for determinations to be made. The principle that the Panel could, where there is "substantial majority" agreement between Panel Members, make determinations on Modification Proposals is part of the Proposed Modification. The GSMG consulted the industry during the Assessment Procedure on this matter (see section 5.2 of this report).

- **Wider statutory obligations**

Currently, the Authority is able to consider the implications of Modification Proposals in the context of the regulatory and statutory frameworks, within which it operates. If the responsibility for determining whether or not Modification Proposals are made were to fall to the Panel, it would not, as compared with the Authority, be able to fully consider the wider context of its determinations (for example, environmental issues or consumer protection objectives), since the Panel is currently confined to considering whether a Modification Proposal would better facilitate the achievement of the Applicable BSC Objectives (which can be found in Condition C3 of the Transmission Licence).

One member of the GSMG pointed out that the Authority had never cited as a reason for rejecting a Modification Proposal that the proposal would be contrary to a wider statutory obligation. However, the Authority representative observed that the Authority always takes its wider statutory obligations into account when making determinations on whether Modification Proposals should be made or not. The

GSMG consulted parties during the Report Phase and the Assessment Procedure on this issue (see section 5.1 and 5.2 of this report).

- **Conditional approval**

The GSMG discussed the issue of approval of Modification Proposals which are conditional on the modification of industry documents not under the vires of the Panel. The group felt that if a deadline for the non-BSC documentation to be changed were to be included in the conditional determination, then configuration of the Code could be successfully managed. The GSMG consulted the industry during the Assessment Procedure on this matter (see section 5.2 of this report).

- **Panel's ability to raise and make determinations on Modification Proposals**

The GSMG considered whether it would still be appropriate for the Panel to raise Modification Proposals as, additionally, it would hold powers to make determinations on Modification Proposals. The GSMG agreed that, as the Panel is only able to raise Modification Proposals in limited circumstances, e.g. for housekeeping or efficiency, the GSMG did not believe this would be an issue.

- **Code Sections not determinable by "substantial majority"**

The GSMG noted that, currently, there are certain matters enshrined within the Code that require Authority approval to make any change. These matters range from parameters set within the Code to the timetable set for Modification Proposals etc. The GSMG also noted that under the current proposal, were a Modification Proposal to be raised, and a "substantial majority" of the Panel so minded, the Authority's role in such decisions could be eliminated from the process. Certain members of the GSMG believed that it may be apt for certain paragraphs of the Code to be reserved, such that Authority approval would be required to vary those provisions. The majority of the GSMG decided that limiting the sections of the Code that the Panel could make determinations on could be included as part of an option to form an Alternative Modification (see section 1.5 of the Assessment Report).

- **Competing Modification Proposals**

The Panel is obliged to consider each Modification Proposal, with which it is presented, in terms of whether it better facilitates the Applicable BSC Objectives. The GSMG considered what would happen in the event that two Modification Proposals, which addressed the same defect but proposed different solutions, were presented to the Panel for determination at the same Panel meeting. P129 proposes that the Panel should consider which Modification Proposal best facilitated the Applicable BSC Objectives.

A question was asked about what would happen where competing Modification Proposals both achieve a "substantial majority" in relation to whether they better facilitate the Applicable BSC Objectives. In the event that a "substantial majority" could not be reached on which best facilitates the Applicable BSC Objectives overall, the GSMG agreed that both the Modification Proposals should be sent to the Authority for a decision.

- **Appeals mechanism**

The only route currently by which an Approved Modification can be appealed is by judicial review. The GSMG considered whether or not Parties should be able to appeal a decision regarding a Modification Proposal, when the decision has been made by the Panel, as opposed to the Authority.

The GSMG requested legal advice from BSCCo on whether to adopt an appeals process in relation to the revised Modification Procedures proposed under P129. The legal advice stated that establishment of an appeals process may render any revised Modification Procedures better able to withstand any potential challenge than perhaps if the Panel decision was final. For this reason the GSMG included an appeals mechanism in the Proposed Modification.

The GSMG discussed what the grounds for appeal of a decision by the Panel should be. The GSMG was mindful of the fact that the grounds needed to be stringently defined, such that Parties did not routinely appeal Modification Proposal decisions that they disagreed with.

The GSMG believed that the grounds for appeal should be that:

- new evidence could be presented that the appealing Party felt had not been sufficiently explored during the Modification Procedures;
- the Code Modification will, or is likely to, unfairly prejudice the interests of the appealing Party; or
- the Code Modification will cause that appealing Party to be in breach of the Code or its licence.

The GSMG reached the conclusion that anyone who can raise a Modification Proposal should be able to appeal a Panel determination on Modification Proposals.

The GSMG decided that there should be a time limit on when an appeal against a Panel decision could be made. The GSMG decided that this timeframe should be 10 working days after the Panel meeting at which the decision was made. The GSMG consulted industry participants during the Assessment Procedure on this matter (see section 5.2 of this report).

- **Increased indemnification for the Panel**

The GSMG requested that BSCCo provide legal advice on whether or not the revision of the Modification Procedures (such that the Panel can decide to approve or reject Modification Proposals) requires a strengthening of the terms of the indemnity granted to Panel Members by BSCCo.

The legal view is that Section B2.9.1 of the Code, together with the current terms of the indemnity, will be sufficient to protect Panel Members in the event that the Code is amended to require the Panel to make determinations on Modification Proposals, as outlined in P129.

The GSMG believed that the Panel would be appropriately indemnified to cover any new powers of determination for Modification Proposals.

- **Urgent Modification Proposals**

The GSMG discussed whether or not the Panel should be able to make determinations on Modification Proposals that had been granted urgent status. The GSMG noted that P129 is silent on Urgent Modification Proposals. The GSMG decided that the Proposed Modification should not include any change to the process for progressing Urgent Modification Proposals, and that the Authority should continue to determine whether Modification Proposals should be granted urgent status and determine on those Modification Proposals.

## **1.4 Assessment of how the Proposed Modification will better facilitate the Applicable BSC Objectives**

The Panel noted that it wished to limit its discussion of P129, and place a heavier than usual reliance on the Modification Group's assessment of P129, since the Modification Proposal directly concerned the Panel's election and powers.

By the end of the Assessment Procedure the majority of the GSMG agreed that the Proposed Modification would not better facilitate the achievement of any of the Applicable BSC Objectives.

Several GSMG members did not believe that the Proposed Modification would improve efficiency of the implementation and administration of the balancing and settlement arrangements, and the majority were of the opinion that any suggested time saving, as a result of the processes proposed in the Proposed Modification, was not proven. The majority of the GSMG were also in agreement that the Proposed Modification would lead to an increase in the risk and uncertainty in the market because:

- the Modification Proposals where there is the greatest elapsed time in the decision making process, are the ones that would still be referred to the Authority and would take the same amount of time;
- the process by which Parties could appeal to the Authority against a determination made by the Panel would result in an increase in the time for Modification Proposals to be implemented. In addition, work undertaken by BSCCo to implement Code Modifications would have to be delayed until the deadline for an appeal to be lodged had passed;
- independent regulation by the Authority was a more appropriate model;
- it was appropriate that decisions should be guided by the wider statutory obligations of the Authority. The Panel's remit in this regard was too narrow; and
- revised Panel election rules could lead to an undue increase in the influence of larger players and was therefore anti-competitive.

The minority view of the GSMG (who supported the implementation of the Proposed Modification) was that it would allow the industry a greater degree of self regulation and would, in the majority of cases, cut down the time taken for determinations to be made on Modification Proposals. These members believed that this would increase the efficiency of the implementation and administration of the balancing and settlement arrangements and better facilitate the achievement of Applicable BSC Objective (d).

The Panel considered and accepted the majority view of the consultation responses and the GSMG, that the Proposed Modification would not better facilitate any of the Applicable BSC Objectives.

### **1.5 Modification Group's views on likely cost of Proposed Modification**

The cost of implementing P129 would be quantified as 124 ELEXON man days effort, but did not see any benefit to implementing the Proposed Modification for the reasons outlined in section 1.4 of this report.

### **1.6 Governance and regulatory framework assessment**

As discussed in section 1.3 of this report, P129 has implications for the Governance of other industry documents.

a) The Panel, unlike the Authority, does not have the ability to approve changes to other industry documents, in order to eradicate conflicts between them arising from changes to individual industry codes. The ability of the Panel to make "conditional" determinations on Modification Proposals is the method by which the Modification Proposal attempts to overcome this issue.

b) The Authority is bound to take into account wider statutory obligations, as well as the achievement of the Applicable BSC Objectives, when deciding whether a modification should be made to the Code. Among these wider obligations is the obligation to ensure that there are no conflicts between the Code and the various Licences held by the industry (including the Transmission Licence, Supply Licences, Generation Licences and Distribution Licences). The Panel would only be able to take into account the Applicable BSC Objectives.

## **2 RATIONALE FOR PANEL'S RECOMMENDATIONS**

The Assessment Report was presented to the Panel at its meeting on 14 August 2003. The Panel noted that since its powers and responsibilities were the subject of the Modification Proposal, it believed that its comments and any debate on the subject should be kept to a minimum. The Panel noted that this resulted in a heavier than usual reliance on the Modification Group's provisional recommendations.

The GSMG agreed that the Proposed Modification P129 should not be made. The Panel unanimously concurred with the GSMG's provisional recommendations to the Panel.

The Panel noted that several options had been discussed with which to form an Alternative Modification during the assessment of P129. The Panel further noted that the GSMG did not agree on an Alternative Modification, as it did not believe that any of the options better facilitated the achievement of the Applicable BSC Objectives. Full details of the options that the GSMG discussed and rejected can be found in the P129 Assessment Report.

### **3 IMPACT ON BSC SYSTEMS AND PARTIES**

An assessment has been undertaken in respect of BSC Systems and Parties and the following have been identified as potentially being impacted by the Proposed Modification.

#### **3.1 BSCCo**

Potential impacts that have been identified to date in the Assessment Procedure are shown below. Timescales and costs of any changes are also given where this information is available:

- I. The Guidelines for the Panel Election Process and the Guidelines for the Panel Process, the local working instructions (LWIs) for the Voting Database will be impacted – *10 ELEXON man days*.
- II. Probable impact on the election voting database, which is currently configured to reflect 2 votes per Trading Party/trading party group and will have to be amended/replaced to reflect the sub-divisions of voting constituencies and revised vote allocations – *20 ELEXON man days*.
- III. There may be an impact on the Service Delivery department, in that it may be used as a source of information for the consumption or production data that BSCCo would use if a Party challenged the "Constituency" status of another. To obtain the relevant data for all Parties – *1 ELEXON man day*.
- IV. Annual Panel elections, new Panel election processes and different processes to challenge appointment of Parties to constituencies will require significantly more administrative work for BSCCo – *40 ELEXON man days*.
- V. There may be additional work required to publish the guideline for, and results of, the Challenge process – *10 ELEXON man days*.
- VI. New internal processes for submitting Modification Reports to the Panel for decision, and of notifying Parties of decisions would need to be implemented (a).
- VII. The Modifications Register, Status Report and Change Report would need to be amended to reflect new decision-making processes (b).
- VIII. The current process for notifying Parties of Authority decisions would need to be amended to reflect the new decision-making process. The new process would need to be communicated to industry, and BSCCo may have to respond to a high number of enquiries (c) – *(a, b and c) = 20 ELEXON man days in total*.
- IX. Local Working Instructions for the Assurance department and Key Performance Indicators (KPIs) would need to be revised – *5 ELEXON man days*.
- X. It is anticipated that new responsibilities on the Panel with regard to the Modification Process may prolong discussions and increase the requirement for BSCCo Panel support resources.
- XI. The Modification area of the BSC Website may need to be amended to reflect the new Governance arrangements – *3 ELEXON man days*.

- XII. The obligations register, used by the Assurance Department, may need to be updated – *1 ELEXON man day*.
- XIII. The ASSYST database, used by the Change Delivery to reflect action types for Panel, rather than Authority, determinations may need to be updated – *2 ELEXON man days*.
- XIV. There may be an impact on the ELEXON Business Process Model, depending on the solution chosen by the Modification Group – *2 ELEXON man days*.

### **3.2 BSC Systems**

No impact has been identified to any BSC Systems and processes.

### **3.3 Party Agents**

Three Party Agent responses were received to the request for an impact assessment of P129. From these no impacts were identified on Party Agents.

## **4 IMPACT ON CODE AND DOCUMENTATION**

### **4.1 Balancing and Settlement Code**

Legal text has not been commissioned, at this stage. It is believed, however, that the impact would be on Annex B-2 of the Code, which would need to be revised. In addition, a new annex, Annex B-3, would be included in the Code to describe and define the constituency categories outlined in the Modification Proposal. Section F and Annex X-1 of the Code would also require amendment. It is estimated that the work required by this will take a total of 5 ELEXON man days.

After its meeting on the 14 August 2003, the Panel consulted with the Authority to determine whether legal text would be required for the P129 Report Phase. The Authority determined that no legal text was required and so no draft legal text has been prepared to be included with this report.

### **4.2 Code Subsidiary Documents**

An initial assessment has been undertaken in respect of all Code Subsidiary Documents and it has been determined that BSCP76 "Submission of Modification Proposals" may need to be amended. It is estimated that the work required by the Change Process will take a total of 5 ELEXON man days.

### **4.3 BSCCo Memorandum and Articles of Association**

No impact has been identified.

### **4.4 Impact on Core Industry Documents and supporting arrangements**

No impacts have been identified on any Core Industry Documents or supporting arrangements.

## **5 SUMMARY OF CONSULTATIONS**

### **5.1 Summary of the Report Phase consultation responses**

A consultation document and questionnaire was issued during the Report Phase to the industry on 22 August 2003, with 29 August 2003 as the deadline for responses. XX responses (XX Parties and XX non-Parties) were received and are attached as annex 3 of this report.

The following questions were asked of the respondents and the arguments are summarised below each question.

**Do you agree with the Panel’s views on P129 and the provisional recommendation to the Authority contained in the draft Modification Report that P129 should be made?**

<b>Yes</b>			
<b>No</b>			
<b>No opinion expressed</b>			

[Further comments to be added post-consultation].

**Do you agree with the Panel’s provisional recommendation concerning the Implementation Date for P129?**

<b>Yes</b>			
<b>No</b>			
<b>No opinion expressed</b>			

[Further comments to be added post-consultation].

**Do you believe that there are any impacts that have not been highlighted?**

<b>Yes</b>	
<b>No</b>	
<b>No opinion expressed</b>	

[Further comments to be added post-consultation].

**5.2 Summary of the Assessment Procedure consultation responses**

A consultation document and questionnaire was issued to the industry during the Assessment Procedure on 11 July 2003, with 31 July 2003 as the deadline for responses. 15 responses (50 Parties and 1 non-Party) were received and are attached as annex 3 of the Assessment Report.

The following questions were asked of the respondents and the arguments are summarised below each question.

**Q.1. Do you believe Proposed Modification P129 better facilitates the achievement of the Applicable BSC Objectives?**

Yes	2 (23 Parties)
No	13 (27 Parties and 1 non Party)
No Comment	-

The majority of respondents did not believe that the Proposed Modification better facilitated the Applicable BSC Objectives.

An argument from one of the minority who did believe that the Applicable BSC Objectives would be better facilitated by the Proposed Modification was that reducing the level of involvement of the Authority in Modification Proposal decision making would speed up the process. This respondent felt that a Panel which was elected by the new process would be able to make better decisions regarding Modification Proposals, and would increase the efficiency of the implementation and administration of the balancing and settlement arrangements and therefore better facilitate Applicable BSC Objective (d). Another respondent felt that the Proposed Modification could lead to a reduction of bureaucracy and, hence, better facilitate the same Applicable BSC Objective.

A counter argument put forward by one respondent was that as the Panel would be making determinations on Modification Proposals and the Authority determinations on others, the BSC governance arrangements would be complicated and there would be an increase in market uncertainty. Another respondent stated that any time savings are doubtful, as the Authority would be likely to be passed the more contentious Modification Proposals and the respondent believed that it is these Modification Proposals that are the ones that take the most time for the Authority to decide upon.

***The GSMG had mixed opinions as to whether or not the Proposed Modification would speed up the decision making process and hence increase efficiency. The majority of members noted that this point had not been proven. The majority of the GSMG members agreed that the Proposed Modification would lead to an increase in risk and uncertainty in the market.***

***The GSMG also noted that the timetable for progressing Modification proposals through the Modification Procedures would not be shortened by P129.***

Another respondent noted that if the Panel were to make determinations on Modification Proposals then there could be inconsistencies between the BSC and other industry codes and licences which would decrease the efficiency of the implementation and administration of the balancing and settlement arrangements.

Arguments from 3 respondents who did not think that the Proposed Modification better facilitated the Applicable BSC Objectives, stated that the Distribution System Operators (DSOs) would be disadvantaged by the Proposed Modification. The Authority has an obligation to take into account the DSOs licence obligations when making its decisions. The Applicable BSC Objectives are the yardstick by which the Panel must judge Modification Proposals, but do not explicitly take DSO licence obligations into account.

***The GSMG were concerned that the Panel would have to make determinations based only on the Applicable BSC Objectives and were not satisfied that the wider statutory obligations would be taken into account in a Panel determination process.***

One respondent stated that they believed that larger generators and Suppliers would have their market power increased by the Proposed Modification and that smaller Suppliers and generators would be under-represented.

An argument put forward by another respondent was that effective competition can only be maintained if amendments to the Code are made by a independent regulatory body. The respondent believed that Applicable BSC Objective (c) is therefore not better facilitated by the Proposed Modification.

One respondent noted that there are already provisions in the Code for accelerating Modification Proposals that require rapid determinations. While another respondent noted that the Modification Proposal was a retrograde step back towards the Pool constituencies and governance.

***The GSMG believed that the weight of argument was on the side of the respondents who did not believe that the Applicable BSC Objectives would be better facilitated by the Proposed Modification. The Majority of the GSMG stated that they believed that the Proposed Modification did not better facilitate the Applicable BSC Objectives.***

<b>Q.2. Do you believe there are any alternative solutions that the Modification Group has not identified and that should be considered?</b>	
Yes	2 (15 Parties)
No	13 (35 Parties and 1 non Party)
No Comment	-

One respondent suggested that the Panel should only be able to reject Modification Proposals (where there is "substantial majority" agreement between Panel Members). In all other cases the Modification Proposal would be forwarded to the Authority for determination.

***This alternative solution was the basis for option 1, the GSMG's views of which have been discussed in section 1.5 of this report.***

One respondent asserted that the Panel should not be given the power to make determinations on Modification Proposals, but where the Authority makes a determination that is different from the recommendation by the Panel, the Authority must provide more detail than it currently does about its rationale. Along a similar vein, one respondent noted that they too were concerned with the lack of transparency of the Authority decision making. They suggested that a process could be developed whereby Authority determinations could be appealed to a body outside the governance of the industry Codes such as, for example, the Competition Commission.

***The GSMG noted that these issues were outside the vires of the Code.***

<b>Q.3. Do you believe that 5 constituency classes are the optimum number and that the balance is correct for non-voting to voting Panel Members?</b>	
Yes	4 (30 Parties)
No	8 (10 Parties and 1 non Party)
No Comment	3 (10 Parties)

The majority of respondents did not believe that 5 was the optimum number of constituency classes and that the balance of the non-voting to voting Panel Members is correct. As described below this was mainly because they didn't support the constituency based Panel election model.

Four respondents believed that 5 constituency classes allowed the industry to be adequately represented by the Panel, and that the balance of voting to non-voting Panel Members is correct. However, one of these respondents was concerned with the proposal that parties fall into "large" or "small" player constituencies and that this may distort the good representation that the constituency classes could introduce.

Two respondents noted that they believed that having Panel Members elected by constituencies could not be reconciled with the Panel's requirement for impartiality. One stated that the need for

constituencies is not clear since the current voting procedures already allow market participants to form “informal” constituencies in voting for individual candidates.

Three respondents were concerned about the lack of a DSO constituency class and felt that this left DSOs un-represented.

One respondent asserted that there was no evidence to suggest that the Panel does not already adequately represent the industry, while another respondent stated that they believed that the proposed constituency classes would not accurately represent the industry. One respondent noted that the Panel could never really be representative of the industry due primarily to the large number of BSC Signatories. The same respondent was concerned that there has not been provision made for a “Renewables” constituency.

Two further respondents stated that they also did not believe in the constituency voting procedures and therefore could not comment on the optimum number of them.

***The GSMG had considered the fact that there was not a “Renewables” constituency class, but came to the conclusion that the additional industry Panel Member that the Panel Chairman is at liberty to appoint could allow this industry sector to be represented.***

<b>Q.4. Do you believe that the criteria for defining constituency class should be open to review?</b>	
<b>If so, who do you think should be responsible for this process?</b>	
Yes	6 (20 Parties)
No	5 (18 Parties and 1 non Party)
No Comment	4 (12 Parties)

There was no majority agreement between respondents as to whether or not the criteria for defining constituency class should be open to review.

One respondent, who believed that the criteria for defining constituency class should be open to review, noted that the current market structure compared with that at the time of Go-Live is very different. Therefore, the respondent felt that the criteria for defining constituency class should be open to review to contend with the changing industry landscape. Another respondent felt that the criteria should be reviewed automatically every 5 years, while another believed that the trigger for the review should be a Modification Proposal.

Two respondents felt that ELEXON should be the body responsible for reviewing the criteria, two other respondents thought that the responsibility should lie with the Authority and another was undecided as to with whom the responsibility should lie (however, they were particularly against the review being conducted by the Panel or the Authority undertaking the task). This view was also held by another respondent who was particularly concerned that the Panel should not be involved in reviewing criteria that could be a factor in whether or not they are re-elected.

One respondent replied with an opinion of what the criteria should be. The respondent’s view differed from the Modification Proposal in that the respondent believed that the size of the constituencies should be the deciding factor rather than the annual metered offtake and delivery of electricity. The respondent believed that the split of the number of trading party groups in the “large” and “small” constituency classes should be 50/50.

***The majority of the GSMG were of the view that a 50/50 split of trading party groups between "large" and "small" constituencies would not result in trading party groups being grouped according to their specific requirements, which depend on their actual size rather than their relative size to other trading party groups.***

<b>Q.5. Do you believe that Interconnector Users should have their own constituency class?</b>	
Yes	1 (1 Party)
No	8 (34 Parties and 1 non Party)
No Comment	6 (15 Parties)

The majority of respondents believed that Interconnector Users should not have their own constituency class.

The argument put forward by one respondent in favour of introducing a constituency class was that they are an un-represented group whose specific views might be swamped by some other classification.

The arguments against introducing a constituency class for Interconnector Users mainly were based on the fact that the Interconnector users would be included, just not in an Interconnector user specific constituency class. One respondent believed that Interconnector users should fall into the Trading constituency, another the supplier or generator constituency depending on which direction the net electricity was flowing. One respondent pointed out that the percentage of Parties that are Interconnector users is significantly less than 20% and therefore having their own constituency class is not justified. Another respondent believed that since membership of each constituency is for the whole trading party group, and most Interconnector users are affiliated with Suppliers and/or generators, it is likely that Interconnector users would fall into one of these groups anyway.

***The GSMG believed that Interconnector users would be a small part of a large trading party group that would fall into one of the proposed constituency classes and therefore an Interconnector constituency class is unnecessary for all trading party groups to be adequately represented.***

<b>Q.6. Do you believe that annual, rather than biennial, Panel elections would better facilitate the Applicable BSC Objectives?</b>	
Yes	4 (19 Parties)
No	10 (29 Parties and 1 non Party)
No Comment	1 (2 Parties)

The majority of respondents were in favour of Panel elections remaining biennial, rather than annual.

One of the respondents in favour of annual elections noted that the Proposed Modification would bring BSC governance into line with other industry codes, such as the Network Code. Another respondent was in favour of annual elections as the industry has undergone rapid and significant changes and is likely to continue to do so. Annual elections, this respondent believed, would enable the Panel to remain representative of the market place. Another respondent stated that annual elections would not necessarily impact continuity of the Panel as the same Panel Members could be elected every year.

Arguments against introducing an annual Panel election process fell into three categories; the 4 respondents that believed that an annual election would be inefficient; the 4 respondents who believed that there would be a loss of continuity in the Panel makeup (and that continuity is beneficial); and the 3 respondents that simply stated that the Applicable BSC Objectives would not be better facilitated by having annual, rather than biennial, Panel elections.

***The GSMG were unanimous in its view that the existing provision in the code for biennial rather than annual (as proposed in P129) was the better solution as it better ensures efficiency and continuity of the Panel.***

<b>Q.7. Do you believe that the Panel should make determinations on Modification Proposals where there is "substantial majority" agreement?</b>	
Yes	2 (23 Parties)
No	13 (27 Parties and 1 non Party)
No Comment	-

The majority of respondents believed that the Panel should not have the ability to make determinations on Modification Proposals (where there was a substantial majority agreement).

Of those respondents in support of the Panel making determinations (where there is a substantial majority agreement) the basis of their argument was that the Panel, as it is currently formulated, understands, and therefore well represents, the views of the industry.

There were a significant number of reasons from those respondents who did not support the Panel making determinations (where there was a substantial majority agreement). In summary, these respondents did not believe that the Panel should have the ability to determine on Modification Proposals, as the Panel cannot provide an independent role. Another concern was that the Authority was better placed to co-ordinate changes across the range of industry documents than the Panel which is restricted to considering Modification Proposals against the Applicable BSC Objectives. Respondents indicated that the role of decision-making should continue to lie solely with the Authority on the basis that they have independence and also have wider statutory obligations that the Panel cannot take into account in when making their determinations.

***While the majority of the GSMG recognised that the electricity market suffers from fractured governance arrangements, the majority agreed that the best way to address this was for the Authority to have decision making powers across the various industry documents. They also believed that the Panel could not consider any of the Authority's wider statutory obligations when making determinations on Modification Proposals and that it was appropriate that decisions should take these into account.***

<b>Q.8. Do you believe that it would be inappropriate for the Panel to make determinations on Modification Proposals only against the Applicable BSC Objectives, whilst determinations made by the Authority would be made against its wider statutory obligations, as well as the Applicable BSC Objectives?</b>	
Yes	10 (25 Parties)
No	4 (24 Parties and 1 non Party)
No Comment	1 (1 Party)

The responses to this question were nearly evenly split, the reasons for which are explored further below.

Respondents in support of the Panel making determinations on Modification Proposals only against the Applicable BSC Objectives, whilst determinations made by the Authority would be made against its wider statutory obligations in addition to the Applicable BSC Objectives, believed that since the role, expertise and respective governances of the Panel and the Authority are different it was not

appropriate for the Panel to consider wider statutory obligations when making determinations on Modification Proposals.

Respondents not in favour of the Panel making determinations on Modification Proposals only against the Applicable BSC Objectives, whilst determinations made by the Authority would be made against its wider statutory obligations, as well as the Applicable BSC Objectives, believed that it would not be appropriate for the Panel to make determinations without an understanding of the statutory requirements.

<b>Q.9. Do you believe it is appropriate for the Panel to make conditional determinations?</b>	
Yes	3 (27 Parties)
No	12 (23 Parties and 1 non Party)
No Comment	-

The majority of respondents believed that conditional determinations were not appropriate.

Respondents in favour of conditional approval noted that it would be a pragmatic solution for situations where, to ensure consistency, changes would be required to other industry documents. Another respondent stated that each conditional determination should be reviewed 6 months after it was made. However, this same respondent offered an alternative solution to solving the problem of aligning all industry documents. The solution proposed is that the Panel only be allowed to reject Modification Proposals.

***The GSMG based option 1 on this suggested solution. Option 1 has been discussed in section 1.5 of this report.***

Two main arguments were put forward by respondents who believed that conditional determinations by the Panel are not appropriate: that conditional determinations in themselves were disadvantageous; and that the Panel itself is not suitable to make determinations.

The reasons given against conditional determinations were that they would be inefficient, could result in development work in delivering the agreed solution being undone, that there would be extra costs incurred subsequent to an Authority decision and that conditional approval would result in increased market uncertainty and risk for all BSC Parties.

<b>Q.10. Do you believe it is appropriate for certain parts of the Code to only have changes made to their provisions with Authority approval?</b>	
Yes	12 (39 Parties)
No	2 (3 Parties and 1 non Party)
No Comment	1 (8 Parties)

The majority of candidates believed that it is appropriate that certain parts of the Code can only be changed with Authority approval.

However, the main argument that respondents gave that certain parts of the Code should not be reserved for an Authority decision, was that this would increase complexity and that all parts of the Code should be changed with Authority approval.

One respondent felt that it was important that the Panel (made up of trading party group elected members) should only be allowed to decide upon Modification Proposals that impact Trading Parties.

Two respondents stated that the Authority should make determinations for certain Modification Proposals, one of whom specifically named Modification Proposals that relate to the election of the Panel and the Panel's decision making powers.

One respondent believed that the likelihood of the Panel reaching a "substantial majority" agreement on Modification Proposals is unlikely, and therefore it is more pragmatic that the Authority retain the power to make all determinations on Modification Proposals and two further respondents stated that they believed that the Authority should retain the responsibility for making determinations on all areas of the Code.

**Q.11. Do you believe that a process should be put in place to allow Parties to appeal a decision by the Panel on whether a Modification Proposal is approved or not? If so, what should the process be?**

Yes	8 (34 Parties)
No	5 (12 Parties and 1 non Party)
No Comment	2 (4 Parties)

The majority of respondents believed that parties should be able to appeal determinations made by the Panel on a Modification Proposals.

One respondent, who did not support the Proposed Modification, stated that they were opposed to the introduction of an appeals mechanism within the current baseline. However, if the Panel were given decision making powers then all Parties should be able to appeal the decision, as is the process for the Past Notification Errors.

Another respondent stated that Parties should be able to appeal to the Authority and further suggested that there should be a totally independent appeals process for all decisions made by the Authority. Another respondent supported this view, and added the suggestion that the Authority should invite Parties to comment on the appeal and consider the previous responses made and the previous views of the Panel. Another respondent suggested that the appeals process should involve a public hearing.

With regard to whom has the right to lodge an appeal, one Party suggested that it should be open to those capable of submitting Modification Proposals.

One respondent stated that it was not necessary for the Modification Group to introduce a process for appealing a "substantial majority" decision of the Panel. This respondent did not agree with the proposal to allow the Panel to make implementation decisions. However, a respondent who did not support the Proposed Modification stated that an appeals process was an inevitable consequence of this proposal, and another respondent stated that an appeals process must be introduced to reduce the potential for those Parties disenfranchised by any Modification Proposal to make legal challenges.

**Q.12. Do you believe that the grounds for appeal suggested in the consultation document are appropriate?**

Yes	2 (13 Parties)
No	7 (10 Parties)
No Comment	6 (27 Parties and 1 non Party)

The majority of respondents who made a comment with respect to the grounds for appeal, stated that they believed the grounds for appeal suggested by the GSMG required some amendment.

One respondent suggested that the grounds for appeal should be wide enough to allow any party to appeal to ensure that the eventual decision is the best policy outcome, not necessarily the most popular one. They further stated that administrative and procedural grounds should also be included as grounds for appeal.

Another respondent stated that the grounds for appeal should include: where a decision unfairly discriminates against a party or class of parties; where a decision is made without a clearly proven cost/benefit analysis; and where a decision is made without due consideration being given to the views of dissenting Parties.

One respondent stated that the grounds for appeal should also cover the possibility of the Panel's decisions being inconsistent with the Applicable BSC Objectives. That is, participants should have the right to appeal if they can demonstrate material flaws in the Panel's reasoning. Another respondent suggested that the grounds for appeal should mirror those utilised by the Judicial Review process. They further suggested that any appeals process should consider the grounds highlighted in the consultation document with an additional reference to due process not having been complied with. And, finally, one respondent suggested that one reason why an appeal might be allowed is that of unreasonable costs being incurred.

***The GSMG was concerned to make the hurdle for lodging any appeal against a Panel decision quite high as this would discourage frivolous or vexatious appeals being lodged. The group was also concerned that the grounds for appeal should not allow decisions to be appealed just because the appellant did not agree with the result of the determination.***

***After considering the consultation responses the GSMG was satisfied that the grounds for appeal outlined in this report were adequate and sufficient to achieve the objectives stated above.***

**Q.13. Do you believe that the time limit by which an appeal against Panel determinations on Modification Proposals must be lodged, should be 10 days after the Panel meeting at which the determination were made?**

Yes	4 (17 Parties)
No	8 (21 Parties and 1 non Party)
No Comment	3 (12 Parties)

The majority of respondents were against the deadline for an appeal to be initiated against a Panel decision being 10 days after the Panel meeting at which the decision was taken.

Of the respondents who did not agree with the proposed timescale, all of them believed that a longer timescale was necessary. One respondent stated that since the examination of new evidence was one reason for an appeal to be raised, more than 10 days was necessary for the Party to raise an appeal based on this evidence. Three other respondents believed that the timescale should not be 10 days from the Panel meeting, but from the publication of the meeting minutes. One respondent pointed out that the minutes were not approved until the following Panel meeting, and so the appeal should be lodged by 10 days after the meeting following that at which the determination was made.

One respondent, who was in favour of the 10 day time limit for the submission of an appeal against a Panel decision, believed that this was sufficient time for Parties to prepare and submit the initial appeal papers. Another respondent in favour of this timescale believed that a 10 day period would reduce the risk and uncertainty that would be inherent in a longer time period during which Parties could raise an appeal against a Panel determined Modification Proposal.

***While considering the consultation responses the GSMG believed that it was important to distinguish between the point by which a party must advise the relevant body that an appeal will be made, and the point at which evidence supporting the appeal (including reasons for appealing the Panel's decision) must be submitted. The majority of the GSMG believed that an appeals process should be included in the Proposed Modification and that the appeal (and relevant supporting papers) should be submitted 20 working days after the publication of the minutes for the Panel Meeting at which the Modification Proposal determination was made.***

**Additional respondent comments:**

Respondents included several other comments unrelated to specific questions in their consultation responses.

One respondent noted that they were not convinced that the Authority had the power to delegate its legislated authority to the Panel. The respondent was also concerned that the implementation of constituency voting for Panel Members may result in cartel-type behaviour in regard to the Modification Proposal decision making.

One respondent believed that in a fully competitive market "intrusive" regulation is inappropriate and that the Proposed Modification would allow "lighter touch" regulation.

Whilst they believed that non-voting members on the Panel should not be provided with a vote, one respondent believed that they were involved in the decision making process by being able to suggest the referral of particular Modification Proposals to the Authority for decision.

One respondent suggested that perhaps the time taken for the Authority to make a decision could be cut down if it was provided with sufficient information. The respondent felt that to solve the defect identified by the Proposer in P129 the industry needs to better understand the root causes for the Authority's delays in providing a determination on Modification Proposals.

One party, responding to the request for an impact assessment, noted that 5 constituency classes seemed appropriate, although recognised that all Parties should have the opportunity to be represented. This respondent also stated a preference for biennial Panel elections and that were the Panel to make decisions by substantial majority then it would be necessary to introduce a timely appeals process.

### **5.3 Panel's comments and views of the Panel**

[Further comments to be added post-consultation].

## **6 SUMMARY OF TRANSMISSION COMPANY ANALYSIS**

### **6.1 Analysis**

The Transmission Company identified a potential conflict that could arise as a result of any decision with respect to a Modification Proposal being made by the Panel as opposed to the Authority. As the Panel has to assess each Modification Proposal with regard to whether it better facilitates the achievement of the Applicable BSC Objectives, whilst the Authority has wider statutory obligations to consider, a decision reached by the Panel without reference to wider statutory obligations could create a conflict between the Code and the Transmission Licence.

The Transmission Company identified several areas within the Transmission Licence that would require a change as a result of any decision to approve P129 and observed that any such changes would require a statutory consultation under Section 11 of the Electricity Act 1989 and would be subject to the consent of the licensee. Specifically, changes would be required: to define the Balancing and

Settlement Code Panel under Condition C1; to allow Modification Proposals to be referred to the Panel for determination (paragraph 4 of Condition C3); and to allow the Balancing and Settlement Code Panel to direct a Code Modification (Paragraph 5 of Condition C3).

In undertaking an impact assessment for P129, the Transmission Company observed that the P129 Proposer had identified P129 as better facilitating Applicable BSC Objective (d) by providing for a more timely and effective decision making process. The Transmission Company observed that there were means within the existing governance arrangements to facilitate a more efficient and timely decision in respect of Modification Proposals. Specifically, the Transmission Company highlighted the Urgent Modification Procedures and the regular housekeeping Modification Proposals raised by the Panel.

A copy of the Transmission Company analysis in full can be found in annex 3.

## 6.2 Comments and views of the Panel

[Comments to added post-consultation].

## 7 SUMMARY OF EXTERNAL ADVICE

None commissioned.

## 8 IMPLEMENTATION APPROACH

A Project Brief has been prepared which sets out in high level terms a proposed Project for implementation of the changes required to implement the necessary changes to the Code Subsidiary Documents and other configurable items required to implement the Proposed Modification.

There would no costs associated with amending systems or processes for BSC Agents.

Monthly Operation and maintenance costs would be £0.

The implementation of the Proposed Modification will require an estimated 124 man-days effort from ELEXON for some or all of project management, solution design, testing and/or implementation.

ELEXON will be responsible for managing implementation of the Proposed Modification.

## 9 DOCUMENT CONTROL

### 9.1 Authorities

Version	Date	Author	Reviewer	Change Reference
0.1	17 August 2003	Change Delivery	Gareth Forrester	Peer review
0.2	22 August 2003	Change Delivery	-	Consultation

## ANNEX 1 DRAFT LEGAL TEXT

The Panel consulted with the Authority to determine whether legal text would be required for the P129 Report Phase. The Authority determined that no legal text was required and so no draft legal text has been prepared to be included with this report.

## ANNEX 2 MODIFICATION GROUP DETAILS

Three GSMG meetings took place on 18 June, 9 July and 5 August 2003. The following have been involved in the GSMG assessment of Modification Proposal P127.

Name	Organisation
Gareth Forrester (Chairman)	ELEXON
Rachel Lindstrom-Thomas (Lead Analyst)	ELEXON
Richard Clarke (Analyst Support)	ELEXON
Peter Bolitho	Powergen
Clare Talbot	National Grid
John Sykes	Scottish and Southern
Mark Manley	British Gas Trading
Terry Ballard	Innogy
Rachel Lockley	British Energy
Lisa Waters	Waters Wye
Phil Russell	TXU
Paul Mott	EDF Energy
Man Kwong Liu	Scottish Power
Katharine Morrison	Energywatch

## ANNEX 3 CONSULTATION RESPONSES

[Comments to added post-consultation].

## ANNEX 4 TRANSMISSION COMPANY ANALYSIS

The following analysis was received from the Transmission Company during the Assessment Procedure.

Q	Question	Response
1	Please outline any impact of the Proposed Modification (and, if applicable, any Alternative Modification) on the ability of the Transmission Company to discharge its obligations efficiently under the Transmission Licence and on its ability to operate an efficient, economical and co-ordinated transmission system.	In order to deliver the proposed modification, changes would have to be made to the National Grid Transmission Licence (as outlined below). Currently the Authority reaches decisions on the basis of its wider obligations in addition to the BSC applicable objectives encompassing relevant licences and other industry codes. The Panel does not have the ability to consider the wider context in its decision making and therefore we would have concerns about the impact on our Licence. A decision reached by the Panel without reference to these wider objectives creates a risk of a potential conflict with our licence obligations.
2	Please outline the views and rationale of the Transmission Company as to whether the Proposed Modification (and, if applicable, any Alternative Modification) would better facilitate achievement of the Applicable BSC	The proposer has suggested that the proposal meets applicable objective d) and provides for a timely more efficient decision-making process. However, within the existing structure in the instance of urgent and house-keeping

	Objectives.	modifications there is already provision for the governance process to be accelerated. The existing process incorporates the consideration of all other relevant governances under the Authority via its wider statutory duties. With the Panel's remit being focused on the consideration against the applicable objectives of the BSC only we believe that this change could result in inconsistencies with other codes and licences.
3	Please outline the impact of the Proposed Modification (and, if applicable, any Alternative Modification) on the computer systems and processes of the Transmission Company, including details of any changes to such systems and processes that would be required as a result of the implementation of the Proposed Modification (and, if applicable, any Alternative Modification)	None identified.
4	Please provide an estimate of the development, capital and operating costs (broken down in reasonable detail) which the Transmission Company anticipates that it would incur in, and as a result of, implementing the Proposed Modification (and, if applicable, any Alternative Modification).	None identified.
5	Please provide details of any consequential changes to Core Industry Documents that would be required as a result of the implementation of the Proposed Modification (and, if applicable, any Alternative Modification).	None identified.
6	Any other comments on the Proposed Modification (and Alternative Modification if applicable).	None.

### Transmission Licence Implications

Additionally we were asked by Elexon to outline as part of our response any impact of P129 upon the Transmission Licence and any implications of such impact. These comments are provided without prejudice to the fact that we do not believe that this modification meets the Applicable BSC objectives. Our comments are as follows:

Paragraph 4 of Condition C3 (Balancing and Settlement Code) of the National Grid Transmission Licence specifies the modification procedures that are to be reflected in the BSC. This paragraph would need to be amended to provide for modifications to be referred to the Panel for decision. Where no majority decision had been reached by the Panel, the route for modification reports to be referred to the Authority for decision would need to be maintained.

Under paragraph 5 of Condition C3 the Authority currently directs the licensee (Transmission Company) to make a modification to the Code. The licensee responds by modifying the BSC in accordance with the direction of the Authority. This paragraph would also need to be amended in order to grant the Panel in addition to the Authority the ability to direct the licensee to give effect to a modification.

A definition of "BSC Panel" would also need to be referred to in the definitions under Condition C1 (Interpretation of Section C).

All/Any changes to the Transmission Licence would require a statutory consultation under section 11 of the Electricity Act 1989 and would be subject to the consent of National Grid as licensee.

## ANNEX 4 BSC AGENT IMPACT ASSESSMENTS

No response received at the request, made during the Assessment Procedure, for an impact assessment from BSC Agents.

## ANNEX 5 PARTY IMPACT ASSESSMENTS

The following impact assessments were submitted to BSCCo during the Assessment Procedure.

Organisation	Comments
<b>Ros Parsons</b> Npower Ltd, Npower Direct Ltd, Npower Yorkshire Ltd, Npower Yorkshire Supply Ltd	<b>No impact</b>
<b>Alistair Trower</b> Barking Power Ltd	<p>What impact, if any, will the Proposed Modification have on your organisation?</p> <p><b>Low operational impact, however this modification favours expedience for future modification proposals, which would bring forward the implementation of modifications that best meet the BSC objectives.</b></p> <p>What implementation timescale, if applicable, would your organisation require to implement the changes associated with the Proposed Modification?</p> <p><b>As soon as practicable.</b></p> <p>Any other comments:</p> <p><b>The initial view that the voting process proposed for the 5 constituency classes seems satisfactory, however it may be beneficial for an example to be issued to all parties with the proposed classification method and equivalent votes for all parties to ensure that the methodology does not inadvertently weight some classes.</b></p> <p><b>The constituency class threshold once set using the previous years data should not be reviewed for simplicity and cost reasons.</b></p> <p><b>The view as to whether Interconnector Users should have their own class is that all BSC party must have representation, however a methodology of what constitutes a class and to which categories other minority BSC parties belong is possible the key for a resolution for this issue.</b></p> <p><b>It is preferred that Panel elections should remain biennially to facilitate continuity, reduced administration and costs.</b></p> <p><b>The views on the principle that the Panel could make determinations on Modification Proposals where there is "substantial majority" agreement are fundamental as the BSC Panel represent all BSC Parties to facilitate the achievement of the applicable BSC objectives.</b></p> <p><b>A timely, concise appeal process for decisions by the Panel on whether a Modification Proposal is approved or not would be beneficial to ensure the Modification Proposal was meeting the BSC objectives for all parties.</b></p>
<b>Dave Morton</b> EDF Energy – Supply	<b>No impact</b>
<b>Rachael Gardener</b> Aquila Networks (late response)	<p>What impact, if any, will the Proposed Modification have on your organisation?</p> <p><b>Indeterminate, because of the nature of proposed change is difficult to</b></p>

	<p><b>assess future potential implications.</b></p> <p>What implementation timescale, if applicable, would your organisation require to implement the changes associated with the Proposed Modification?</p> <p><b>On face value, probably none.</b></p> <p>If this Modification Proposal is not applicable to your organisation, please indicate why (e.g. proposed changes do not apply to Party Agents).</p> <p><b>Most likely not applicable to ourselves as the provider of Party Agency services, but see comments above.</b></p>
--	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

## ANNEX 6 MODIFICATION GROUP TERMS OF REFERENCE

The GSMG should:

- Consider whether 5 is the optimum number of constituencies to achieve the desired balance within the Panel.
- Assess the criteria for each constituency class and determine whether any adjustments to the criteria should be made.
- Consider whether the provision for the Panel Chairman to appoint an additional industry Panel Member (potentially with the purpose of reflecting the interests of non-signatories) should be retained.
- Consider whether there should be any changes to the current non-voting appointments on the Panel.
- Consider what effect the proposed revised Panel election rules will have on Parties' ability to influence the outcome.
- Assess the appropriateness of annual (as opposed to biennial) elections.
- Understand whether any changes to the constitution of the Panel would impact the manner in which Panel Committees are constituted.
- Assess whether the proposed governance model will impact the Panel's ability to discharge its functions in as timely, efficient and non-discriminatory a manner as possible.
- Consider whether the protection afforded to the interests of Distribution System Operators and the Transmission Company would be diminished, given that the Panel is not obliged to take their Licence (and other statutory) obligations into account when taking decisions (whereas the Authority must currently do so).
- Undertake an assessment of how many instances the Authority disagreed with the Panel recommendations for Modification Proposals.
- Understand the risk of inconsistent treatment of related issues across industry documents if decisions on modifications are being made by different bodies (e.g. Panel for BSC, Authority for CUSC).
- Consider the appropriate appeals mechanism for Panel decisions on modifications.
- Consider whether Panel Members will require increased indemnification if the Panel is to make determinations on modifications.
- Produce an interim report for the August Panel meeting (or earlier if appropriate), on the basis of which the Panel may consider seeking provisional thinking from the Authority.

---

END OF DOCUMENT