

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

Prepared by: Balancing and Settlement Code Panel

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This document has been distributed in accordance with Section F2.1.10¹ 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)

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¹ The current version of the Balancing and Settlement Code (the 'Code') can be found at www.elexon.co.uk/ta/bscresl_docs/bsc_code.html

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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"/>
Party Agents		
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"/>	Core Industry Documents
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"/>
BSC Agents		
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"/>	BSCCo
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"/>	Other Documents
MIDP <input type="checkbox"/>		Transmission Licence <input checked="" type="checkbox"/>
TFLA <input type="checkbox"/>		
Other Agents		
SMRA <input type="checkbox"/>		
Data Transmission Provider <input type="checkbox"/>		

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

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

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. Estimates of timescales and costs of any changes are also given where this information is available:

- a) 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*.
- b) 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*.
- c) 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*.
- d) 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*.
- e) There may be additional work required to publish the guideline for, and results of, the Challenge process – *10 ELEXON man days*.
- f) New internal processes for submitting Modification Reports to the Panel for decision, and of notifying Parties of decisions would need to be implemented (a).
- g) The Modifications Register, Status Report and Change Report would need to be amended to reflect new decision-making processes (b).
- h) 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*.
- i) Local Working Instructions for the Assurance department and Key Performance Indicators (KPIs) would need to be revised – *5 ELEXON man days*.
- j) 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.
- k) The Modification area of the BSC Website may need to be amended to reflect the new Governance arrangements – *3 ELEXON man days*.

- l) The obligations register, used by the Assurance Department, may need to be updated – *1 ELEXON man day*.
- m) 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*.
- n) 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

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. 12 responses (33 Parties and 0 non-Parties) were received and are attached as annex 3 of this draft Modification 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 <u>should not</u> be made?	
Yes	10 Responses (18 Parties)
No	1 Response (14 Parties)
No opinion expressed	1 Response (1 Party)

The majority of respondents did not believe that the Proposed Modification P129 should be made.

One respondent believed that it would complicate the governance arrangements in that as the Authority would still, the respondent believed, be passed Modification Proposals, as well as Modification Proposals that have been granted Urgent Status, the process would not be more efficient. The same respondent believed that the appeal process proposed would further delay determinations. Another respondent believed that P129 would introduce two-tier decision-making.

Several respondents expressed concerns about the Panel determination process, as well as the appeals process, in that they would increase the uncertainty in the electricity market.

Another respondent was concerned that P129 would create conflicts with the Transmission Licence and several other respondents were concerned that the Applicable BSC Objectives were not wide enough to be used as criteria for determining whether or not Modification Proposals should be made. Another respondent noted that he did not believe it appropriate for the Panel to have its criteria for considering Modification Proposals widened, whilst another was concerned that the Authority may not be able to delegate its authority to the Panel in respect of determination on Modification Proposals as the Panel, unlike the Authority, is not subject to primary legislation. One respondent was concerned that if the Applicable BSC Objectives were used as criteria for making determinations on Modification Proposals then the LDSO Licence obligations may not be taken into account.

One respondent believed that the independence of the Authority was useful to promote effective competition in the generation, supply, sale and purchase of electricity, whilst another was concerned that the removal of the Authority, an independent regulator, was against the principles set out in the European electricity directive.

Several Parties noted that the revised Panel election procedures proposed in P129 are not conducive with an impartial Panel. Several Parties noted that Panel Members voted for by constituencies could no longer be viewed as impartial.

The respondent who did not support the Panel's provisional recommendation that P129 should not be made, noted that he believed that P129 would lead to an increased involvement of stakeholders in the Modification Procedures, and "lighter touch" regulation of the balancing and settlement arrangements.

This respondent (the Proposer) believed that P129 would make the decision-making process shorter and more efficient and provided figures he believed supported his point that over time the Panel's recommendations have become increasingly aligned with the Authority's determinations in respect of Modification Proposals. (The figures provided by the Proposer can be found in annex 3 of this report, under the response titled P129_DR_006). The Proposer asserted that ELEXON declined to undertake an analysis of all previous decisions with respect to Modification Proposals.

At the initial meeting of the GSMG to discuss P129, the Proposer requested that the GSMG commission some analysis from BSCCo, as to whether any Panel decisions reached by a "substantial majority" of the Panel, in respect of Modification Proposals, had resulted in a different decision by the Authority.

At the same meeting, the GSMG noted the difficulties in both providing this information and rejected the suggestion that this analysis would be of use to the group in its deliberations, given that the

decisions taken by the Authority were made on the basis of the Authority's wider statutory obligations, as well as the Applicable BSC Objectives.

The GSMG noted that the baseline of the Code could have changed between each Panel recommendation and the respective Authority determination. If the recommendation and determination differed, it would be impossible to tell whether this was because the Authority and Panel were not aligned in their understanding of whether the Modification Proposal was a good thing for the industry (based on their different criteria for assessing this), or whether it was the altered baseline that resulted in the Authority's decision being different from that of the Panel.

Following the initial meeting, the GSMG met on a further two occasions to assess P129 and the Proposer did not indicate its intention to provide such analysis at a subsequent meeting of the Modification Group.

Whilst BSCCo has not carried out an exhaustive analysis of the figures provided by the Proposer in the Report Phase consultation response P129_DR_006, BSCCo notes that there are some inaccuracies in the analysis provided. The number of Authority decisions up to 21 August 2003 was 106 (not 102). The Authority and the Panel agreed on 83% of these decisions (not 86%).

In addition, the respondent states that the Panel and the Authority decisions have all been aligned since P101. This is incorrect, as the Authority's decisions in respect of P82, P98 and P102 (determined by the Authority after P101) were not aligned with those of the Panel.

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

Yes	6 Responses (11 Parties)
No	2 Responses (16 Parties)
No opinion expressed	4 Responses (6 Parties)

The majority of respondents agreed with the Implementation Date proposed for P129.

One argument put forward to support this implementation date was that the respondent felt it was appropriate to link the Implementation Date for P129 to the scheduled Panel Election dates.

Of the respondents who disagreed with the implementation date, one did so with no comment, but had agreed that Proposed Modification P129 should not be made. The other respondent noted that he did not believe that the benefits of P129 should be delayed simply to allow the Panel elected under the "old rules" their full 2 year tenure. This respondent stated that the Implementation Date should be changed to 1 May 2005.

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

Yes	1 Response (14 Parties)
No	8 Responses (13 Parties)
No opinion expressed	3 Responses (5 Parties)

One respondent noted that there were further comments he wished to make. This respondent noted that some of the respondents, who he believed to be supportive of the P129, had changed their positions, as they believed P129 would compromise the case for an appeals process for the Authority's

Modification Proposal decisions. This respondent believed that these parties' position on P129 could change again, if the DTI were to introduce an appeals process for Modification Proposals.

This respondent noted that there appeared to be support from different parties for the two parts of P129 (introducing decision-making powers to the Panel and revising the Panel election procedures), but noted that he believed it was necessary to have the Panel Election procedures revised if the Panel were to make determinations on Modification Proposals as proposed by P129.

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.

Q.2. Do you believe there are any alternative solutions that the Modification Group has not identified and that should be considered?

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.

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?

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.

Q.4. Do you believe that the criteria for defining constituency class should be open to review? If so, who do you think should be responsible for this process?

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.

Q.5. Do you believe that Interconnector Users should have their own constituency class?	
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.

Q.6. Do you believe that annual, rather than biennial, Panel elections would better facilitate the Applicable BSC Objectives?	
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.

Q.7. Do you believe that the Panel should make determinations on Modification Proposals where there is "substantial majority" agreement?	
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.

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?

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.

Q.9. Do you believe it is appropriate for the Panel to make conditional determinations?

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.

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?

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 after P129 Panel discussion on 11 September 2003].

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 after P129 Panel discussion on 11 September 2003].

7 SUMMARY OF EXTERNAL ADVICE

None commissioned.

8 DOCUMENT CONTROL

8.1 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
0.3	1 September 2003	Change Delivery	Gareth Forrester	Technical Review
0.4	2 September 2003	Change Delivery	Richard Clarke	Technical Review

0.5	3 September 2003	Change Delivery	Justin Andrews	Technical Review
0.5	5 September 2003	Change Delivery	Helen Spindler	Quality Review
0.6	5 September 2003	Change Delivery	BSC Panel	Decision

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 P129.

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

Responses from P129 Draft Report Consultation - issued 22 August 2003

No	Company	File Number	No. BSC Parties Represented	No. Non-Parties Represented
1.	British Energy	P129_DR_001	3	0
2.	Barclays Capital	P129_DR_002	1	0
3.	Edison Mission	P129_DR_003	1	0
4.	YEDL & NEDL	P129_DR_004	2	0
5.	NGT	P129_DR_005	1	0
6.	Powergen	P129_DR_006	14	0
7.	Aquila Networks	P129_DR_007	1	0
8.	Western Power Distribution	P129_DR_008	2	0
9.	Entergy-Koch Trading Europe Ltd	P129_DR_009	1	0
10.	British Gas Trading	P129_DR_010	1	0
11.	BP	P129_DR_011	2	0
12.	Scottish and Southern (late response)	P129_DR_012	4	0

P129_DR_001 – British Energy

Respondent:	<i>Rachel Lockley</i>
No. of BSC Parties Represented	3
BSC Parties Represented	British Energy Power and Energy Trading, Eggborough Power Ltd, British Energy Generation Ltd
No. of Non BSC Parties Represented	0
Non BSC Parties represented	<i>Please list all non BSC Parties responding on behalf of (including the respondent company if relevant).</i>
Role of Respondent	<i>Generator</i>

Q	Question	Response	Rationale
1.	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 not be made? Please give rationale.	Yes	We believe that the proposal if implemented will complicate the governance arrangements and increase market uncertainty. While the panel would be able to make determinations where a 'substantial majority' of its members are in agreement the right of appeal would mean that the Authority would continue to have the final say in many cases. In all other cases, including for urgent cases, the Authority would continue as now to make the determinations. This modification will potentially therefore result in greater delays, uncertainty and reduce efficiency. Consequently, we consider it would not better facilitate Applicable Objective (d) as compared with the current baseline.
2.	Do you agree with the Panel's provisional recommendation concerning the Implementation Date for P129? Please give rationale.	Yes / No	N/A
3.	Are there any further comments on P129 that you wish to make?	Yes / No	N/A

P129_DR_002 – Barclays Capital

Respondent:	Barclays Capital
No. of BSC Parties Represented	1
BSC Parties Represented	Barclays Capital
No. of Non BSC Parties Represented	None
Non BSC Parties represented	None
Role of Respondent	Trader

Q	Question	Response	Rationale
1.	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 not be made? Please give rationale.	Yes	The proposal has not demonstrated any benefit in facilitating the achievement of the applicable BSC objectives. It has fundamental problems in respect of the current licence conditions placed on NGC and is internally inconsistent in trying to have representative constituencies while maintaining the

Q	Question	Response	Rationale
			independence of Panel members.
2.	Do you agree with the Panel's provisional recommendation concerning the Implementation Date for P129? Please give rationale.	Yes	It seems appropriate to link the proposal to existing scheduled dates for Panel Elections.
3.	Are there any further comments on P129 that you wish to make?	No	

P129_DR_003 – Edison Mission

Respondent:	<i>Edison Mission Energy</i>
No. of BSC Parties Represented	One
BSC Parties Represented	<i>First Hydro Company</i>
No. of Non BSC Parties Represented	None
Non BSC Parties represented	
Role of Respondent	<i>Generator</i>

Q	Question	Response	Rationale
1.	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 not be made? Please give rationale.	Yes	Agree with the majority view of the GSMG listed on page 11 of mod report – the mod increases the risk and uncertainty in the market.
2.	Do you agree with the Panel's provisional recommendation concerning the Implementation Date for P129 ? Please give rationale.	Yes	
3.	Are there any further comments on P129 that you wish to make?	No	

P129_DR_004 – YEDL & NEDL

Respondent:	<i>Ann Penford</i>
No. of BSC Parties Represented	2
BSC Parties Represented	YEDL and NEDL
No. of Non BSC Parties Represented	
Non BSC Parties represented	<i>Please list all non BSC Parties responding on behalf of (including the respondent company if relevant).</i>
Role of Respondent	<i>Party Agent</i>

Q	Question	Response	Rationale
1.	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 not be made? Please give rationale.	Yes	BSC objectives are narrower in scope than those of the Authority This means that by moving the decision making, away from the Authority the Panel will not be able to take account of LDSO Licence obligations. This would unduly discriminate against LDSO's who are obligated through their licence to be a party to the BSC. We believe this new regime would open up the scope for an abuse of power.

Q	Question	Response	Rationale
2.	Do you agree with the Panel's provisional recommendation concerning the Implementation Date for P129? Please give rationale.	No	
3.	Are there any further comments on P129 that you wish to make?	No	

P129_DR_005 – NGT

Respondent:	Name Clare Talbot
No. of BSC Parties Represented	One
BSC Parties Represented	Please list all BSC Parties responding on behalf of (including the respondent company if relevant).National Grid
No. of Non BSC Parties Represented	None
Non BSC Parties represented	Please list all non BSC Parties responding on behalf of (including the respondent company if relevant).None
Role of Respondent	(Supplier/Generator/ Trader / Consolidator / Exemptable Generator / BSC Agent / Party Agent / other – please state) BSC Party

Q	Question	Response	Rationale
1.	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 not be made? Please give rationale.	Yes	We agree with the Panel's views on P129 and the provisional recommendation that the modification should not be made. As outlined in our previous consultation response, we do not believe that the proposal better facilitates applicable objective d) for a timely more efficient decision-making process when compared to the existing governance arrangements.
2.	Do you agree with the Panel's provisional recommendation concerning the Implementation Date for P129? Please give rationale.	Yes	In the event that the Authority determines that P129 should be made, we agree with the proposed implementation timetable to allow for the necessary arrangements to be put in place for the revised process on the basis of the existing timetable for biannual elections.
3.	Are there any further comments on P129 that you wish to make?	No	

P129_DR_006 – Powergen

Respondent:	Powergen UK plc
No. of BSC Parties Represented	14
BSC Parties Represented	Powergen UK plc, Powergen Retail Limited, Cottam Development Centre Limited, TXU Europe Drakelow Limited, TXU Europe Ironbridge Limited, TXU Europe High Marnham Limited, Midlands Gas Limited, Western

	Gas Limited, TXU Europe (AHG) Limited, TXU Europe (AH Online) Limited, Citigen (London) Limited, Severn Trent Energy Limited (known as TXU Europe (AHST) Limited), TXU Europe (AHGD) Limited and Ownlabel Energy
No. of Non BSC Parties Represented	0
Non BSC Parties represented	
Role of Respondent	Supplier, Generator, Trader and Exemptable Generator

Q	Question	Response	Rationale
1.	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 not be made? Please give rationale.	No	<p>In our view P129 represents a viable model not only for the future Governance of the E&W BSC and ultimately the GB BSC. Its purpose is to facilitate 'lighter-touch' regulation and greater involvement of all key stakeholders in the modification decision making process. We remain convinced that it perfectly feasible for a Panel that represents a diversity of stakeholder views to make the majority of decisions to approve or reject modification proposals. At the P129 modification group meeting on 9th July we asked Elexon to determine how many of the past Panel recommendations were made on a 'substantial majority' basis. Elexon declined to carry out this work because of they anticipated difficulty in collating data on notification recommendations and decisions. We therefore decided to carry out this work instead. It was our intention to present this at a later modification group, but unfortunately this was cancelled following the Modification Group's decision to curtail further work on P129.</p>
			<p>We established that as of 21 August 2003 of the 102 determinations made by Ofgem since Go-live, <u>at least</u> 59% (60 of 102) had been subject to a 'substantial majority' Panel recommendation. This rose to close to 95% (16 of 17) if one considers determinations from P101 onwards. Where it was not possible to deduce from the Panel minutes that a 'substantial majority' recommendation had been made, this was recorded as a 'smaller majority' recommendation – thus our figures are likely to understate the number of actual 'substantial majority' recommendations made.</p> <p>Since Go-live some 86% of <u>all</u> Panel recommendations have been upheld by Ofgem, with a similar proportion of 'substantial majority' recommendations upheld. Over time however Panel recommendations and Ofgem decisions seem to have become increasingly aligned. Post P101 there is 100% agreement. A full breakdown of our analysis is attached.</p> <p>Although this analysis relates to the current regime and Panel determination behaviour may well change if P129 were to be implemented, the most recent data</p>

Q	Question	Response	Rationale
			<p>does in our view offer us a good indication that perhaps over 90% of modification decisions could be made by a Panel. Contrary to the assertions of some respondents, we believe this will speed up the decision making process and will enhance the efficiency in the administration of the balancing and settlement arrangements. We would urge the Panel to reconsider its initial recommendation in the light of this additional information and would request that Annex 1 (attached) is incorporated into the Final Modification Report.</p>
2.	<p>Do you agree with the Panel's provisional recommendation concerning the Implementation Date for P129? Please give rationale.</p>	No	<p>We see no reason why the benefits of this proposal should be delayed simply to give elected Panel members under the 'old rules' a two year tenure. We suggest that 1 May 2006 is changed to 1 May 2005.</p>
3.	<p>Are there any further comments on P129 that you wish to make?</p>	Yes	<p>We offer a number of further observations which may assist the Panel and Ofgem in their deliberations:</p> <p>P129 was syndicated amongst a large number of industry stakeholders before it was submitted. However it was a mistake on our part to not include DNOs in these discussions. Nevertheless we hope the subsequent inclusion of an appeals process for Panel decisions should address their concerns, and we trust the DNO Panel Member is now in a position to offer his support for this refined version of P129.</p> <p>P129 was proposed as a package and although many respondents supported aspects of the proposal they were unwilling to support the complete package. It would have been interesting to see what respondents views would have been if the two elements "Change to Panel Determination Process" and "Change to Panel Election Procedures" had been proposed separately. Powergen would not wish to change the former element without a simultaneous reform of the later. Why you may ask?</p> <p>Unlike other important industry codes such as the Network Code, CUSC and the Grid Code, where employees from <u>some</u> of the larger organisations (such as Centrica, SP, SSE, LE Innogy and Powergen) are amongst those that get elected to each Panel, such persons are conspicuous by their absence from the BSC Panel. This outcome is not surprising given the current 'two votes per trading party group concept' used for BSC Panel elections gives smaller players disproportionate voting power. Over time however, election outcomes could change if further</p>

Q	Question	Response	Rationale
			consolidation in the market reduces the number of votes available to be cast. The constituency model advocated under P129 would of course offer <u>all</u> industry stakeholders whether large or small the opportunity to have their views reflected by a newly constituted Panel.
4.	Are there any further comments on P129 that you wish to make? (continued)		<p>Without a proposal (such as P129) to give the Panel real decision making powers, Panel recommendations may be increasingly viewed as superfluous and it might ultimately be better to simply limit the Panel's powers to the management of the modification process (in a similar way to the gas Network Code). There may however, be other ways in which the status of Panel decisions could be enhanced. One option, (which we suggested to the DTI in its recent consultation on the transparency and accountability of the industry code modification process), would be to allow an appeal of an Ofgem decision only where such a decision was contrary to a 'substantial majority' recommendation of the Panel.</p> <p>Some parties, who were previously supportive of P129 appeared to change their position because they thought it may compromise the case for an appeals mechanism for Ofgem modification decisions. Although we believe P129 provides a more robust decision process that encourages greater consensus and hence will more frequently 'get decisions right first time', we do not see it as a substitute for appeals to Ofgem decisions. It is a complementary proposal. If the DTI were to introduce an appeals process we would envisage Panel/Ofgem decisions, would be sent direct to the Appeals body and there would no longer be a need for Panel decisions to be first appealed to Ofgem. One might expect this change to be incorporated into any modification designed to facilitate the introduction of a (DTI) modification appeals mechanism.</p> <p>Overall respondents were opposed to P129. This should not in any way be viewed as an endorsement or vindication of the current BSC governance arrangements. In our view the modification process remains cumbersome, costly and unnecessarily bureaucratic and we trust that, whatever decision the Authority makes they will reflect this sentiment in their decision letter.</p> <p>As a major contributor to Elexon's coffers we shall continue to seek improvements in efficiency and effectiveness of the code modification process.</p>

Annex 1

Analysis of Panel Recommendations to Support Assessment of Modification Proposal P129 (as at 21 August 2003)

Scope:

The aim of this brief study was to determine the number of Panel recommendations made on a 'substantial majority' basis and the proportion of such decisions that are ultimately upheld by the Authority. Changes in the number of substantial majority recommendations reached and decisions upheld by the Authority over time have also been investigated. 102 modification determinations have so far been examined and the results can be found below.

Methodology:

The Panel recommendations were obtained from the final modification reports on the Elexon website. The Ofgem decisions were also obtained from the Authority decision letters. These decisions were then checked against the modification progress charts held within Elexon's progress reports web page to ensure accuracy. Due to the manual process of collating data slight errors may have been introduced.

In order to compile a representative chart it has been necessary to show only those modifications which have received a determination from the Authority. Those modifications which have not yet received a determination, or have been withdrawn, are not shown on the chart. The modifications have been placed in groups of ten, with the actual numbers of decisions shown. This should give the most accurate reflection of decision making and also provide a general historical perspective.

It is important to note that where it was not possible to deduce from Panel minutes that a 'substantial majority recommendation had been reached, this was recorded as a 'smaller' majority recommendation – thus figures are likely to understate the number of actual 'substantial majority' recommendations made. This is particularly the case for earlier modification proposals where the actual number of votes cast was not recorded.

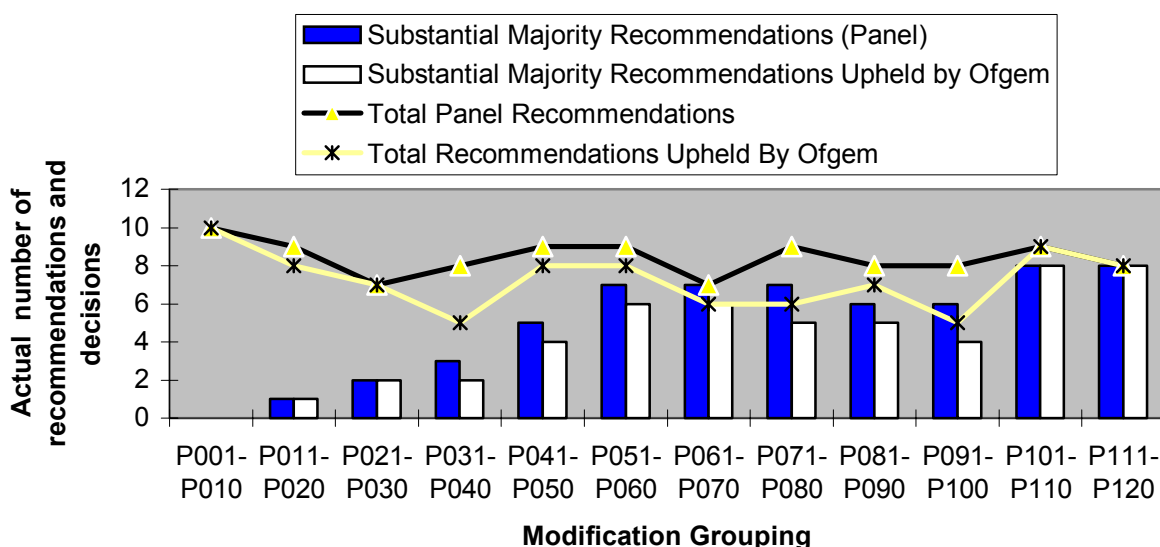
Results:

Out of the 102 modification decisions, 86% of the Panel's recommendations have been upheld by Ofgem. The Panel were able to make 60 recommendations that could be classed as substantial majority/unanimous decisions and of these 85% were upheld.

The chart below reveals what appear to be the two key trends from the available data.

- 1) The number of 'substantial majority' recommendations made by the Panel are increasing, whilst the number of 'smaller majority' recommendations made by the Panel are decreasing. Close to 95% of post P101 modification decisions were made on a 'substantial majority' basis.
- 2) Recently, the Authority has increasingly upheld the Panel's recommendation. This fact is highlighted with the 100% alignment in Panel and Authority determinations since P101.

Panel recommendations compared to Ofgem final decisions



P129_DR_007 – Aquila Networks

Aquila Networks PLC would like to return a response of 'No Comment' to P129 Consultation on draft Modification Report.

Regards,

Deborah Hayward
 Distribution Support Office &
 Deregulation Control Group
 Aquila Networks plc

P129_DR_008 – Western Power Distribution

Respondent:	Graham Smith
No. of BSC Parties Represented	2
BSC Parties Represented	Western Power Distribution (South Wales) and Western Power Distribution (south West)
No. of Non BSC Parties Represented	
Non BSC Parties represented	<i>Please list all non BSC Parties responding on behalf of (including the respondent company if relevant).</i>
Role of Respondent	<i>(Supplier/Generator/ Trader / Consolidator / Exemptable Generator / BSC Agent / Party Agent / other – please state)</i>

Q	Question	Response	Rationale
1.	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 not be made? Please give rationale.	Yes	We strongly support the Panel's view, as we do not consider this modification is of any benefit.
2.	Do you agree with the Panel’s provisional recommendation concerning the Implementation Date for P129?	Yes	

Q	Question	Response	Rationale
	Please give rationale.		
3.	Are there any further comments on P129 that you wish to make?	No	

P129_DR_009 - Entergy-Koch Trading Europe Ltd

Respondent:	<i>Name</i>
No. of BSC Parties Represented	
BSC Parties Represented	<i>Please list all BSC Parties responding on behalf of (including the respondent company if relevant).</i>
No. of Non BSC Parties Represented	
Non BSC Parties represented	<i>Please list all non BSC Parties responding on behalf of (including the respondent company if relevant).</i>
Role of Respondent	<i>Trader)</i>

Q	Question	Response	Rationale
1.	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 not be made? Please give rationale.	Yes	<p>We consider that the Panel's views and the provisional recommendation are correct with respect to P129.</p> <p>The effective removal of independent regulatory decision making for many modification proposals is a retrograde step that would be detrimental to promoting effective competition in the generation, sale, purchase and supply of electricity. Further, implementing P129 would hinder continued industry reform in the England and Wales market and is counter to the principles of having an independent regulator as envisaged in the European electricity directive</p> <p>There is no optimal number of constituency classes as modification proposals ought to be assessed on the relevant arguments, rather than by votes from constituent blocks. We consider that it is not possible to reconcile constituent structures with a requirement for impartiality. Further, it is far easier to ensure impartiality in panel considerations when an independent regulator is responsible for decisions.</p> <p>It is difficult to see how the panel could make decisions without considering Ofgem's wider objectives, given that these wider objectives are statutory requirements. However, it would make no sense trying to adjust the BSC objectives to align with Ofgem's wider objectives, as BSC parties do not have the expertise or the relevant public policy experience to consider the broader Government framework.</p> <p>The development of a workable appeals mechanism is also problematic. An open approach</p>

			would provide more confidence in the policy outcomes at the cost of certainty and speed for the specific policy under consideration, and possibly other live modifications. Finally, it is not clear whether Ofgem has the ability to delegate its legislated authority to the panel. During the MALC considerations, it was clear that Ofgem's authority could not be delegated even from an appeals perspective, so it would be difficult to see how legislated decision making processes could be offered out to a party not subject to the primary legislation.
2.	Do you agree with the Panel's provisional recommendation concerning the Implementation Date for P129? Please give rationale.		No comment
3.	Are there any further comments on P129 that you wish to make?		No, see response to question 1.

P129_DR_010 – British Gas Trading

Re: Modification Proposal P129 – Changes to Panel Determination Process and Panel Election Procedures

Thank you for the opportunity of responding to this draft modification report considering Modification Proposal P129. British Gas Trading (BGT) do not believe this Modification Proposal will better facilitate Applicable BSC Objective (d). The proposal will not shorten the decision making process on the more contentious modification proposals and will introduce a two tier decision making process. BGT concur with the Panel's provisional recommendation rejecting this modification proposal.

Yours faithfully

Mark Manley
Contract Manager

P129_DR_011 – BP

Respondent:	<i>Name</i>
No. of BSC Parties Represented	2
BSC Parties Represented	BP Gas Marketing Ltd, Great Yarmouth Power Ltd
No. of Non BSC Parties Represented	0
Non BSC Parties represented	-
Role of Respondent	<i>(Generator/ Trader)</i>

Q	Question	Response	Rationale
1.	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 not be made? Please give rationale.	Yes	Supportive of Panel's rationale
2.	Do you agree with the Panel's provisional recommendation concerning the	Yes	Supportive of Panel's rationale

Q	Question	Response	Rationale
	Implementation Date for P129? Please give rationale.		
3.	Are there any further comments on P129 that you wish to make?	No	N/A

P129_DR_012 – Scottish and Southern (late response)

This response is sent on behalf of Scottish and Southern Energy, Southern Electric, Keadby Generation Ltd. and SSE Energy Supply Ltd.

In relation to the three questions listed in the Consultation Paper, contained within your note of 22nd August 2003 concerning Modification Proposals P129, we have the following comments to make:-

Q1 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 not be made? Please give rationale.

Yes, we agree with the proposed BSC Panel recommendation to the Authority that this Modification Proposal P129 should not be made.

We believe that the current arrangements better meet the Applicable BSC Objectives than Modification Proposal P129.

We note the comments in Section 1.1 of the Initial Written Assessment, dated 6th June 2003, that "if the Panel were to make determinations instead of recommendations, as proposed by P129, then the constitution of the Panel is of primary concern. In light of this, the Proposer has proposed revisions to the Panel election procedure for Panel Members". We believe that the first 'question' posed by the Proposer is should the Panel make determinations, this then leads onto the second 'question' posed by the Proposer is that if the Panel does make determinations then the composition of the Panel needs to be changed. It is our contention that the answer to the first 'question' (of allowing the Panel to make determinations) is that this should not happen and it therefore follows that the second 'question' does not arise; i.e. if the Panel is not making determinations then there is no need to amend the Panel composition by virtue of the introduction of a constituency class arrangement, as outlined in Modification Proposal P129.

Furthermore, as noted in Section 2.2 of the Consultation Document dated 11th July, "the GSMG concluded that they were undecided as to whether or not the Proposal to allow the Panel decision making powers for Modification Proposals would in practice significantly cut down the time it takes for determinations to be made". In the light of this it is hard to agree that this change will improve on the status quo, and therefore better achieve the Applicable BSC Objectives.

Q2 Do you agree with the Panel's provisional recommendation concerning the Implementation Date for P129? Please give rationale.

If the Modification Proposal P129 is approved, we agree with the proposed BSC Panel recommendation on the timing for the Implementation Date, as outlined in the Modification Report.

Q3 Are there any further comments on P129 that you wish to make?

Nothing further at this time.

Regards

Garth Graham
Scottish & Southern Energy plc

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 Objectives.	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 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 5 BSC AGENT IMPACT ASSESSMENTS

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

ANNEX 6 PARTY IMPACT ASSESSMENTS

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

Organisation	Comments
<p>Ros Parsons Npower Ltd, Npower Direct Ltd, Npower Yorkshire Ltd, Npower Yorkshire Supply Ltd</p>	<p>No impact</p>
<p>Alistair Trower Barking Power Ltd</p>	<p>What impact, if any, will the Proposed Modification have on your organisation?</p> <p>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.</p> <p>What implementation timescale, if applicable, would your organisation require to implement the changes associated with the Proposed Modification?</p> <p>As soon as practicable.</p> <p>Any other comments:</p> <p>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.</p>

	<p>The constituency class threshold once set using the previous years data should not be reviewed for simplicity and cost reasons.</p> <p>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.</p> <p>It is preferred that Panel elections should remain biennially to facilitate continuity, reduced administration and costs.</p> <p>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.</p> <p>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.</p>
<p>Dave Morton EDF Energy – Supply</p>	<p>No impact</p>
<p>Rachael Gardener Aquila Networks (late response)</p>	<p>What impact, if any, will the Proposed Modification have on your organisation?</p> <p>Indeterminate, because of the nature of proposed change is difficult to assess future potential implications.</p> <p>What implementation timescale, if applicable, would your organisation require to implement the changes associated with the Proposed Modification?</p> <p>On face value, probably none.</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>Most likely not applicable to ourselves as the provider of Party Agency services, but see comments above.</p>

ANNEX 7 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.

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