

Change Proposal – BSCP40/02	CP No: 1240 Version No: 1.0 (mandatory by BSCCo)
Title (mandatory by originator) Reinforcement of the legal status of the Qualification Service Provider under the BSCP537 Qualification Letter	
Description of Problem/Issue (mandatory by originator) Alternative Modification P197 ‘SVA Qualification Processes Review’ was approved by the Authority on 10 August 2006 with an Implementation Date of 23 August 2007. P197 introduced a new Qualification Process for Supplier Volume Allocation (SVA) Parties, SVA Party Agents and Central Volume Allocation (CVA) Meter Operation Agents (MOAs). The new process replaced the Accreditation, Certification and Entry Processes. On 11 January 2007 the Panel approved the establishment of a new BSC Procedure, BSCP537 ‘Qualification Process for SVA Parties, SVA Party Agents and CVA MOAs’ (122/07). Authority for approval of subsequent changes to BSCP537 was delegated jointly to the ISG and SVG. In accordance with the Qualification Process under the Balancing and Settlement Code (BSC) a Party Agent Applicant’s application to Qualify shall not be accepted or considered until the Applicant has agreed to be bound by the BSC and has executed a letter agreement in the form and content satisfactory to the Performance Assurance Board (PAB) (BSC Section J3.3.6). The approved letter agreement is the Qualification Letter in Appendix 3.7 of BSCP537. The Qualification Letter, in addition to binding the Applicant to the BSC, defines the extent of the liability of the PAB to the Applicant. These provisions are the same as those in the BSC; as such, the PAB’s liability to a Party and an Applicant are the same. The Qualification Letter also contains a provision (paragraph 2 (g)) which states that: to the extent permitted by law, any agent or service provider of BSCCo who may perform any of the Qualification services shall have no liability to the Applicant on any basis, whether in contract, tort (including negligence) or otherwise, arising from or in connection with its Application including (without limitation) any advice or interpretation relating thereto given to it by any agent or service provider (whether orally or in writing). Such exclusion of liability shall not apply in the event of any acts or omission which are in any case criminal, dishonest or fraudulent on the part of the agent or service provider; A further provision (paragraph 2 (h)) of the Qualification Letter confirms that; the exclusion of liability under paragraph 2 (g) and any relevant paragraphs of the BSC (if applicable) are reasonable because of (amongst other matters) the agent or service provider will be relying on information provided by the Applicant and will not be acting in a decision making capacity in relation to the Application. The only amendment to these two provisions as a result of P197 was to include reference to a service provider. This is a new concept; previously any similar market entry services were carried out by a BSC Agent (the Certification Agent), and therefore this BSC Agent was afforded the protections contained within the BSC. Including the service provider in the letter agreement provisions affords the service provider protections similar to those of a BSC Agent. In general, service providers are understandably extremely reluctant to be exposed to the possibility of a multiplicity of actions by many different interested parties. ELEXON has appointed a Qualification Service Provider (QSP) to provide certain elements of the	

Qualification Process. During the QSP appointment negotiations, the QSP requested that additional wording be added to the Qualification Letter to emphasise the already stated legal position, i.e. that the QSP shall have no liability to the Applicant.

Proposed Solution *(mandatory by originator)*

It is proposed that additional wording, as proposed by the QSP, is included in BSCP537. This additional wording would be added to the end of Appendix 3.7, paragraph 2 (g) of BSCP537. The proposed additional wording is as follows:

In addition, we also agree not to take any action against an agent or service provider of BSCCo who may perform any of the Qualification services; and further that such agents or service providers shall have a right (subject to the discretion of the Court) to a stay in proceedings should we bring such a claim in breach of this paragraph 2 (g)

Justification for Change *(mandatory by originator)*

As stated above, during the appointment negotiations with the QSP, the QSP requested additional wording be added to the Qualification Letter. ELEXON explained that it was unable to agree to amend the Qualification Letter because as an Appendix to BSCP537, any proposed change must be subject to industry consultation and approval by the relevant Panel committee. Therefore, though ELEXON could agree to endeavour to arrange for industry to consider the requested amendment, implementation of the amendment could not be guaranteed.

ELEXON is of the opinion that the proposed additional wording essentially only reinforces the existing legal position. ELEXON therefore agreed to use its best endeavours to progress the amendment proposed by the QSP. The QSP accepted this was the most that ELEXON could agree.

In considering this matter, ELEXON also took that the Qualification Process contains checks and balances in respect of any issues which concern the Applicant, such as permitting appeals to the Panel and so forth. The intention is that an Applicant that is concerned about the Qualification Process and any decisions made should pursue resolution under the avenues available under the Code, rather than seek to utilise the Courts.

As stated, the current wording of the Qualification Letter already confirms that the QSP shall not be liable to Applicants (paragraph 2 (g)). Therefore the proposed amendment, which means that the Applicant agrees not to take any action against the QSP and that the QSP has the right to a stay¹ of any such action if brought, is essentially only a reinforcement of the existing form of words. As other provisions mean the Applicant has agreed that the QSP is not liable, it is difficult to envisage a situation in which it could be appropriate for the Applicant to bring an action against the QSP.

It should also be noted that the opportunity is being taken to correct a manifest error as part of CP1240 by adding a missing bracket into paragraph 2(a) of the Qualification Letter.

To which section of the Code does the CP relate, and does the CP facilitate the current provisions of the Code? *(mandatory by originator)*

CP1240 relates to section J of the Code. CP1240 does facilitate the current provisions of the Code.

¹ A stay of proceedings is a ruling by the Court which “stops” proceedings (i.e. does not permit them to proceed further while the stay is in place). While either party to proceedings may apply for a stay, the ruling can only be granted by the Court and is at the discretion of the Court. The Court will take into account any agreements between the parties (e.g. as in the Qualification Letter) and context in considering exercising its discretion.

Estimated Implementation Costs *(mandatory by BSCCo)*

The estimated ELEXON Implementation cost is 2.75 man days, which equates to £605.

Configurable Items Affected by Proposed Solution(s) *(mandatory by originator)*

BSCP537 'Qualification Process for SVA Parties, SVA Party Agents and CVA MOAs'. A redlined excerpt of BSCP537 showing the changes proposed by CP1240 is attached (Attachment A).

Impact on Core Industry Documents or System Operator-Transmission Owner Code *(mandatory by originator)*

No impact identified.

Related Changes and/or Projects *(mandatory by BSCCo)*

None identified.

Requested Implementation Date *(mandatory by originator)*

November 2008 Release.

Reason:

The proposed change should be implemented in the next available Release following the P207 Release (see above), which is November 2008. It should be noted that implementation of CP1240 in the November 2008 Release along with CP1244 would avoid any additional project management costs, because CP1244 also impacts BSCP537.

Version History *(mandatory by BSCCo)*

Version 1.0 for industry impact assessment.

Originator's Details:

BCA Name.....*Dean Riddell*

Organisation.....*ELEXON*

Email Address.....*dean.riddell@elexon.co.uk*

Telephone Number.....*0207 380 4366*

Date.....*29 February 2008*

Attachments: Yes

CP1240 Attachment A – BSCP537 v3.0 redlined v0.2.doc (3 pages)