

Issue 26

Issues arising from Elexon/PAB interpretation concerning the application of Supplier Charges to Replacement Suppliers

1. Summary

PAB has made a determination on the application of Supplier Charges to Suppliers of Last Resort, which appears to be inconsistent with clauses in the Code and Code Subsidiary Documents defining the allocation of responsibilities, the formula for the calculation of the charges in Annex S-1 and the functionality of the PARMS process.

Npower Limited has discussed this further with Elexon, which has acknowledged the issues, and both agree that it would be appropriate for a Standing Modification Group to consider the issues arising and advise whether a Modification is required to clarify the Code or remove the apparent inconsistencies.

2. Background

The BSC Failing Supplier process was developed, under the auspices of the “G3” Group, following the failure of Independent Energy in the period leading up to NETA Go-Live in March 2001. The key features of this process (as stated in the Ofgem consultation paper of February 2001) were to be:

“(5.2) The BSC Failing Supplier Process will be in two stages:

- initially financial transfer via reallocation of total metered volumes;
- and
- subsequently registration transfer via correctly registering each meter.

“(5.3) Under the BSC Failing Supplier Process, any SoLR appointed by Ofgem will:

- for the settlement day from appointment onwards (as deemed contracts are not retrospective), assume the financial responsibility for future energy purchases⁷ under the BSC, relating to metering systems of the failing Supplier, implemented via transfer of energy to new BM Units; and
- complete the transfer of metering system registrations, in the relevant registration services, from the failing Supplier to themselves in a timely manner.

“In other words, the Replacement Supplier would be treated for the purposes of the BSC as if it were the Registrant of the relevant Metering Systems from the date of transfer of financial responsibility. The Replacement Supplier would be required to effect the transfer of the relevant metering systems from the failing Supplier to itself as soon as possible. For the avoidance of doubt, these arrangements should ensure a smooth cross over with no gap where neither the Replacement Supplier nor the failing Supplier is responsible for particular customers.”

⁷ For the avoidance of doubt, this does not relate to settlement or reconciliation runs or disputes for previous settlements days.”

It was acknowledged that there were issues associated with maintenance of the failing Supplier's processes and that it would be appropriate "to suspend certain Supplier obligations during the financial transfer stage ... in order to allow the Replacement Supplier to operate with existing Agents for which it has not made the appropriate appointments".

At the end of the Pool (in March 2001) it was agreed to waive all outstanding LDs (Supplier Charges). Supplier Charges then became applicable from the first Settlement Day under NETA (Ref. Panel Paper 66/014, August 2003). However, it was soon recognised that the PARMS system could not support the stopping and starting of the process in this manner, and the processing of Supplier Charges had to be suspended until January 2003, although the liabilities continued to accrue.

Following the failure of ENRON at the end of 2001, it was recognised that there was a need for robust rules under the BSC to govern the apportionment of liabilities between a failed Party and the Party acquiring its customers and/or processes. It was also recognised that there are other situations where a Supplier might wish to take over the processes under the Supplier ID of another Supplier or to segregate its business by establishing an additional Supplier ID of its own. To address these issues, Modification P106 was raised by British Gas Trading in October 2002. This was subsequently approved on 22 April 2003, with an implementation date of 24 June 2003. However, again it was found that there were difficulties with implementing the agreed changes (which included applying the PARMS Serials in Annex S-1 on a Party rather than Supplier ID basis) in the PARMS system, and a further Modification, P141, was raised on 28 August 2003 to change Annex S-1 to a Supplier ID basis. Ofgem approved the latter on 23 December 2003, to be effective (unusually) retrospectively from the P106 implementation date.

In August 2003 PAB agreed a set of principles for a "workaround" to apportion Supplier charges between parties where a Supplier ID was transferred between them. These are documented in SVG paper 33/449, which included a copy of the PAB paper 29/335. The latter paper described how Supplier Charges would be calculated "for the Supplier ID without regard to the transfer between Suppliers" and that "the charges associated with the Supplier ID would be attributed to the old and new Suppliers based on when the failed obligations that sourced the charges occurred and who the Supplier responsible for these obligations was at the time" (This is discussed in more detail in section 4 below). The paper stated that the process "would also support a Supplier of Last Resort process where a Supplier ID was transferred to up to one Supplier per GSP Group" (As discussed in 4.1 and 4.4 below, there are reasons to question this). In the case of Serial 1 (corresponding to the current serial SP08a), the Appendices clarified that the compliance measure was "provided by the SVAA for each Settlement Day and GSP Group" with the SVA Run as an "obligation point", and that for Serial 1 the Apportioning Method was "N/A" (not applicable) – Presumably on the basis that the liability for the performance in any particular SVA Run was clearly attributable to either one Supplier or the other. Elexon developed a solution based on their interpretation of these principles.

Following appointment as SoLR for Eledor in December 2005, Npower Limited (npower) was extremely surprised to be informed by Elexon that it was to be invoiced for Supplier Charges (albeit small) under Serial SP08a for the ELED Supplier ID, relating to performance for Settlement Dates prior to its appointment as SoLR, i.e. consumption for which npower was not the Supplier and potentially including some metering systems for which npower had never been the Supplier (and had therefore never had a contractual relationship with either the customer or the Supplier Agents, in order to be able to influence the performance).

npower pointed out to Elexon that the definition of Serial SP08a in Annex S-1 of the Code refers to “the percentage of energy attributable to a Supplier”, which it had always understood to refer to energy for which the Supplier was responsible in Settlement. This argument is corroborated by the construction of the formula in paragraph 2.2.2 of Annex S-1, which is based on an aggregate of volumes by BM Unit (implicitly those for which the relevant Supplier is responsible), and the process for setting up new Replacement Supplier BM Units with effect from the Replacement Supplier appointment date, and the consequences of this, described in paragraphs 7.3-7.4 of Section K of the Code.

Elexon’s counter-argument to this was based on a particular legal interpretation of certain clauses in the Code, together with an interpretation of a set of principles agreed in a PAB paper in 2003. The consequence of these was that Supplier Charges would be calculated for a Supplier ID without regard to the transfer between different Parties and then apportioned to the Party considered to be “responsible for the Supplier ID” at a particular point in time. (This is discussed in more detail below.)

Since npower considered the matter to have much wider potential implications for the responsibilities and liabilities of Suppliers of Last Resort, and npower and Elexon were unable to reach a consensus, npower referred the matter to PAB for resolution. In support of its case it presented extensive evidence, including references to:

- Section K of the Code, paragraphs 7.1.3, 7.3, 7.4 (and section K7 generally)
- Section S, paragraphs 1.3.3 and 1.4-1.8
- Annex S-1 paragraphs 2.2.1 and 2.2.2
- Annex X-2 (for definitions)
- The relevant Party Service Lines (PSLs 120 and 140).

3. The PAB determination

The PAB report to the Panel on 12th October stated that:

(para 6.1.2) “... ELEXON confirmed that this clause [BSC Section S1.3.3] actually allowed for a single Supplier to hold multiple Supplier IDs and that its purpose was to ensure that the provisions of the Code applied separately to each ID. Any liabilities associated with that ID would be transferred to the new Supplier.”

(para 6.1.3) “ELEXON explained why the original PAB decision regarding the apportionment principles was correct and worked effectively ...

“... It was acknowledged that a new Supplier would have limited opportunity to obtain Meter readings if the SVA Run took place close to the date of the transfer, however there was the ability for a Supplier to perform some ‘due diligence’ prior to its appointment as SoLR ...

(para 6.1.4) “ELEXON confirmed that the apportionment principles were compliant with the Code, however some refinement may be required to deal with MPANs lost by the Failing Supplier prior to the transfer to the Replacement Supplier as it should not be liable for obligations in respect of these ...

(para 6.1.5) “The PAB considered the points made by the Party and considered which interpretation was compliant with the Code. It was noted that a Supplier did have time to take Meter readings between its appointment and the relevant SVA Run and therefore was in a position to influence the impact of any SP08 charges. The PAB concluded that some

clarification was required on how to deal with MPANs from customers that had switched prior to the transfer and asked ELEXON to provide guidance on its website ...

(para 6.1.7) "The PAB unanimously agreed that its original decision on apportionment principles for Supplier Charges was correct and agreed that the apportionment method should be refined to reflect the fact that the Replacement Supplier has no obligations in respect of Metering Systems lost by the Failing Supplier between the Settlement Date and the date of transfer to the SoLR."

A number of points need to be noted in relation to this:

- The last sentence of paragraph 6.1.2 in the report is a very broad statement that could potentially be interpreted to relate to Trading Charges and other charges as well as Supplier Charges (See also 4.3 below);
- The second statement quoted above from paragraph 6.1.3 of the report is incorrect at least in relation to npower's appointment as SoLR for Eledor;
- The statement, in paragraph 6.1.5 of the report, that the Supplier did have time to take meter readings between its appointment and the relevant SVA Run is clearly incorrect and/or misleading in respect of certain SVA Runs taking place in the first few days (see section 4.5 below).

4. Issues arising

The PAB determination gives rise to a number of questions and issues. These have been discussed further with Elexon, as a result of which Elexon have now acknowledged the merits of the npower view on key aspects.

The first overall question is whether the principles and approach set out in paper PAB/29/335 and Elexon's original interpretation of this are consistent with a reasonable interpretation of the Code, particularly in respect of Suppliers of Last Resort.

In determining this, the key question is: What does "energy attributable to a Supplier" mean in paragraphs 2.2.1-2.2.2 of Annex S-1? i.e. How is the definition of the Serial to be interpreted in conjunction with paragraphs 7.1.3, 7.3 and 7.4 of Section K?

This depends on an understanding of how paragraph 7.1.3 of Section K is to be interpreted – particularly, whether this is to be on a Calendar or Settlement Day basis – both in respect of Annex S-1 and in a wider context, and what impacts different interpretations would have.

It is also important to understand what "on a Supplier ID basis" means, i.e. how paragraph 1.3.3 of Section S of the Code is to be interpreted and applied, in the case where a Supplier ID is transferred between parties or in the context of the Failing Supplier Process (Section K7 of the Code).

The interpretation is also considered against the available evidence of what those who developed the BSC Failing Supplier Process intended with regard to the division of liabilities between failing and Replacement Suppliers.

The significance of Elexon re-assigning Affected BM Units rather than setting up the Replacement Supplier BM Units as distinct entities, the apparent inconsistency of this with the wording of paragraphs 7.3-7.4 of Section K, and the practical reasons for and consequences of this also need to be examined.

With regard to the PAB determination a further question is whether there is any reasonable method of excluding MPANs lost by the failing Supplier between the relevant Settlement Day and the Replacement Supplier Transfer Date, that is consistent with Annex S-1 paragraph 2.2.2, other than excluding all volumes associated with the failing Supplier's Affected BM Units from the Serial SP08a calculation.

Finally, there is an issue concerning the wording of Section K paragraph 7.4.5, and particularly whether the words at the end of Section K paragraph 7.4.5 (which were apparently introduced following the final pre-NETA consultation in the BSC Failing Supplier Process, which included the draft legal text) are consistent with the principle of Supplier Charges as 'liquidated damages'..

4.1 Are the principles and approach set out in paper PAB/29/335 and Elexon's interpretation of this consistent with a reasonable interpretation of the Code, particularly in respect of Suppliers of Last Resort?

This divides into two parts:

- a) Are the principles and approach as stated in the paper consistent with a reasonable interpretation of the Code?
- b) Have they been interpreted and implemented in a way that is consistent with a reasonable interpretation of the Code?

The principles and approach set out in PAB/29/335 were recognised to be a "workaround", taking account of the fact that the PARMS system was designed to work on the assumption of a one-to-one relationship between a Supplier and a Supplier ID, and that it could not easily be modified to conform exactly with the provisions in the Code, although it was expected that the resulting charges would be "reasonably accurate and without skew" (paragraph 4.1). Close examination of the Serials in Annex S-1 and the details of the workaround in paper PAB/29/335 indicates that they will indeed result in different charges to failing and Replacement Suppliers. This potentially affects other Serials as well as SP08a.

There is no problem in principle with measuring the performance of two Suppliers separately, even if they have used the same Supplier ID at different times, provided that all individual actions that are the subject of the performance measurement can be clearly attributed to either one Supplier or the other. Even if a Supplier ID is transferred part way through a month, this does not prevent there being a monthly performance measure for each of the Suppliers for that month, any more than it is impossible to measure the performance of a new Supplier starting up part way through that month. The problem is simply that the PARMS system does not have the ability to segregate data on a Party (rather than Supplier ID) basis, and could not easily be made to do so. It was the somewhat belated realisation of this that led to the raising of Modification P141. It is in part the latter, or rather the unforeseen consequences of this, that has given rise to the current problem.

This may not have mattered where interests under Supplier IDs were being transferred between viable parties on an agreed basis following due diligence. However, in the situation where one of the parties is financially unstable, any uncertainty in the allocation of liabilities between them and an acquiring party, or dependence on assets of the failed/failing party, can be a very serious matter. The assertion in PAB/29/335 that the same approach "would also support a Supplier of Last Resort process" may be valid from a pure process point of view but is highly questionable when insolvency/administration considerations are taken into account.

Notwithstanding what is said in paper PAB/29/335 about the “legal position”, the “workaround” proposed is clearly inconsistent with the Code to the extent that it does not allocate performance and charges correctly to each of the two Suppliers in strict accordance with the Code.

Npower believes that this issue has been further compounded by an incorrect legal interpretation of the principles and approach set out in paper PAB/29/335, particularly:

“who the Supplier responsible for the obligations was at the time”.

This is discussed further in the following sections, along with other aspects.

It is also a matter of concern that, despite the reference in paragraph 3.2 of paper PAB/29/335 to information in Appendix I “outlining an initial review of the mechanisms that may be employed to identify the obligation points ...”, the recommendation for PAB to “Note that any need to diverge from these principles and approach – because of issues of detail being detected when developing and testing the workaround – will be brought to their attention so that refined principles and/or approach can be approved” and the fact that the implementation in respect of Serial 1 (SP08a) does not seem to have resulted in the initial allocation of liabilities indicated in section 8 (i.e. without the need for “apportionment”), it does not seem to have been perceived that there was any need for referral back to PAB until npower raised their challenge.

4.2 The definition of Serial SP08a

The standard relates to “the percentage of total energy attributable to a Supplier” (Ref. Annex S-1, paragraph 2.2.1).

The calculation described in paragraph 2.2.2 of Annex S-1 of the Code is based on energy volumes aggregated by BM Unit (subscript i). This can only reasonably be taken to mean BM Units for which the Replacement Supplier is responsible, i.e. the Replacement Supplier BM Units supposed to be set up in accordance with Section K paragraph 7.3, the effects of which are described in Section K paragraph 7.4, and not the failing Supplier’s Affected BM Units.

Note that paragraph 7.4.1 of Section K states that:

“The establishment of a Replacement Supplier BM Unit pursuant to paragraph 7.3 shall be treated, for the purposes of the Code, as if:

- (a) that new BM Unit had been registered (comprising the same Metering Systems as those comprised in the corresponding BM Unit of the failing Supplier) by the Replacement Supplier with effect from the Replacement Supplier Transfer Date; and
- (b) the registration of the corresponding BM Unit of the failing Supplier had been cancelled by the failing Supplier with effect from such date.”

There is no reference to the Replacement Supplier being treated as having registered an Affected BM Unit.

The BM Unit Metered Volumes are only supposed be allocated to the Replacement Supplier BM Units with effect from the Replacement Supplier Transfer Date (Ref K 7.4.2 – Although this appears to be specific to Section T). This is corroborated by paragraph 7.1.3 of Section K, which states that:

“(a) such Replacement Supplier shall be treated for the purposes of the Code (notwithstanding any other provision of this Section K but subject to the further

provisions of this paragraph 7) as becoming:

- (i) responsible for Exports and Imports of the Plant and Apparatus comprised in that BM Unit;
- (ii) the Registrant in respect of all Metering Systems associated with that BM Unit (and, for the purposes only of the Code, as having appointed and registered the Party Agents of the failing Supplier in respect of such Metering Systems, and otherwise as having complied with any conditions to the appointment or registration thereof, in accordance with the provisions of the Code); and
- (iii) subject to the obligations and liabilities and entitled to the rights and benefits (including in respect of Trading Charges and BSCCo Charges) related to or connected with those Metering Systems and Exports and Imports of that Plant and Apparatus; and

(b) the relevant failing Supplier shall be treated for the purposes of the Code (notwithstanding any other provision of this Section K but subject to the further provisions of this paragraph 7) as ceasing to be:

- (i) responsible for Exports and Imports of the Plant and Apparatus comprised in that BM Unit;
- (ii) the Registrant in respect of all Metering Systems comprised in that BM Unit; and
- (iii) subject to the obligations and liabilities and entitled to the rights and benefits (including in respect of Trading Charges and BSCCo Charges) related to or connected with those Metering Systems and Exports and Imports of that Plant and Apparatus,

in each case, with effect from the time and date when the transfer of responsibility resulting from such appointment is deemed to take effect in accordance with paragraph 7.1.4 and in respect of each Settlement Period on and after such time, and the provisions of the Code shall be construed accordingly.”.

Therefore, irrespective of Elexon's or PAB's views on the extent to which the Replacement Supplier's actions may influence the performance for earlier Settlement Days, it is hard to see how there can be any volumes “attributable” to the Replacement Supplier in respect of earlier Settlement Days. This would appear to be an inconsistency between Elexon/PAB's interpretation and what the Code actually says.

4.3 How is paragraph 7.1.3 of Section K to be interpreted, both in respect of Annex S-1 and in a wider context, and what impacts would this have?

Much significance has been attached in PAB/29/335 and elsewhere by Elexon to the concept of an “obligation point”. However, when considering the periods in respect of which a failing Supplier or a Replacement Supplier should be treated as responsible for the quality of data in Settlement or other performance, and whether this should be on a Calendar or Settlement Day basis, we believe more attention needs to be given to the actual Supplier (or Supplier Agent) obligations that contribute to the performance, and whether the “obligation point” is in reality a “measurement point”.

npower's (and we believe the conventional) interpretation of section K paragraph 7.1.3 is that it treats the Replacement Supplier as having registered and appointed Agents, and thereby become responsible for certain obligations, in respect of metering systems in relation to Settlement Days from the date of its appointment. For the Supplier, in relation to Registration actions and Settlement, it seems obvious that everything is in relation to the Settlement Days for which it is registered. For the DC and DA Agents, this is consistent with the Period of Responsibility as defined in

the relevant Party Service Lines, which is in relation to Settlement Days. For Meter Operators, the situation is slightly less clear. The most sensible allocation of responsibility would appear to be on a "Site visit day" basis, since it does not seem sensible to have more than one MOA acting on a Metering System at the same time (possibly with conflicting actions) or to expect a different MOA to carry out the post-visit obligations (e.g. updating records and sending data flows) from that which carried out the actions on site. However, in the terms with which we are familiar, this approximates fairly closely to a Settlement Day basis.

How does the principle of Settlement Day responsibility apply in the context of a new meter reading taken, which results (or does not) in an Annualised Advance for a range of Settlement Days since a previous meter reading, which may span the periods of responsibility of both a failing Supplier and a Replacement Supplier? Paragraph 7.1.3 of section K (quoted above) should mean that both the failing Supplier and the Replacement Supplier should be in the same position as if there had been a Change of Supplier for the metering system (with re-appointment of the same Agents) on the Replacement Supplier Transfer Date. In this case, the failing Supplier would clearly be responsible for the performance in respect of Settlement Days up to the transfer date and the Replacement Supplier would be responsible for the performance from the transfer date, irrespective of who took (or deemed?) the Change of Supplier meter reading.

Being slightly more realistic about whether there might actually be a COS meter reading, interpretation on a strict Settlement Day basis would lead to the conclusion that the Agents would be responsible to the failing Supplier for the first part of the Meter Advance and the performance in relation to the associated Settlement Days, and to the Replacement Supplier for the latter part of the Meter Advance and its associated performance, with the two Suppliers being ultimately responsible for the performance in their respective periods on a Settlement Day basis.

By contrast, the Elexon/PAB interpretation of paragraph K 7.1.3 is effectively on a Calendar day basis.

This would have the consequence of making the Replacement Supplier responsible not only for the Annex S-1 obligations but also potentially the Trading Charges (and other liabilities) on a Calendar Day basis, in conflict with paragraph K 7.4.2 and the way Trading Charges have been allocated and paid since 2001. This re-interpretation could act as a severe deterrent to any Supplier contemplating becoming a Replacement Supplier for a failing party, either through the Supplier of Last Resort process or via a Trade Sale.

It would also have the highly undesirable effect of absolving failing Suppliers from certain accrued or accruing responsibilities, contrary to what npower believes to be the intent of paragraph K 7.1.5. This could result in the waiving of certain liabilities of the failing Supplier (potentially including Trading Charges relating to Reconciliation Runs) which, while they might not be recoverable in practice on a stand-alone basis, would then not be offset against other payments due to the failing Supplier, to the cost of Trading Parties generally.

We do not believe paragraph K7.1.3 can be interpreted in one way (i.e. effectively on a Calendar Day basis) for one part of the Code and another way (i.e. effectively on a Settlement Day basis) for another part of the Code. If this had been the intention, then surely wording would have been included to say so and so avoid ambiguity?

4.4 What does "on a Supplier ID basis" mean, i.e. how is paragraph 1.3.3 of Section S of the Code to be interpreted and applied, in the case where a Supplier ID is transferred between parties or in the context of the Failing Supplier Process (Section K7)?

There are two key points to be made here:

- Firstly, this paragraph relates to “holding” of a Supplier ID. Transfer of a Supplier ID or setting up of new ones is covered in Section S paras 1.4-1.8; there is no reference to a transfer of Supplier ID in section K7. Therefore there is clearly a question as to whether the Replacement Supplier “holds” the Supplier ID, and hence whether it should be responsible for any Supplier Charges under it.
- Secondly, a key part of the reason for the wording of paragraph 1.3.3 is that obligations cannot be placed on a Supplier ID (which is not a person in the legal sense) but only on a Party. An obligation has to be identified with a Party (probably via a relationship with a Metering System and/or a Supplier ID and a Settlement Date); and then, in the context of Annex S-1, performance will be assessed “separately in respect of the Supplier in the capacity of each of its Supplier IDs”.

It is npower’s view that, if paragraph S 1.3.3 is applicable to the failing Supplier process under Section K7, then it must mean what it says, and not that provisions should apply in relation to Supplier ID irrespective of different Suppliers being associated with it for different Settlement (or Calendar) dates. In this respect, the Elexon/PAB interpretation seems to be at odds with what the Code actually says.

4.5 Was it the intent of the BSC failing Supplier process that the Replacement Supplier should pick up liability for Supplier Charges relating to Settlement Days prior to the effective date of its appointment as such?

This seems clearly contrary to the principles set out in section 5 of the Ofgem consultation document of February 2001 (See “Background” section above), although npower understands that the G3 Group did not explicitly consider the arrangements concerning Supplier Charges.

The Elexon/PAB interpretation is based on the argument that some activities apparently the responsibility of the Replacement Supplier will affect performance in respect of Volume Allocation Runs for Settlement Dates prior to its appointment. However it is also the case that:

- Failures by the failing Supplier may affect this performance (e.g. previous failure to obtain meter readings or failure to complete a previous registration/update or get Agents to provide accurate standing data or consumption history may prevent an Annualised Advance being established) – Indeed, this is probably the most likely cause of a failure to establish an AA following the re-registration of a Metering System by the Replacement Supplier;
- Because of timing (particularly where the SoLR is appointed with retrospective effect, as with Eledor) and the SVA timetable, there are a number of days for which the SoLR could not possibly influence the performance;
- It may take a significant time to verify the accuracy of the customer information provided (as npower was advised to do by Ofgem) prior to re-registration, obtain the details of existing Agent appointments and establish working processes when the SoLR does not have any rights of access to or use of the failed Suppliers industry-facing systems and processes using its Supplier ID.

This being the case, is it genuinely accurate to state that the application of Supplier Charges to the Replacement Supplier in respect of a failure to meet the required standard in respect of these actions “is reasonable in all the circumstances” (Ref Annex S-1 paragraph 1.3.1)? This would appear to be another inconsistency in the Code arising from the Elexon/PAB interpretation.

4.6 What is the significance of Elexon re-assigning Affected BM units rather than setting up the Replacement Supplier BM Units as distinct entities?

It should be noted that Elexon has acknowledged that the process it actually used to implement Section K paragraph 7.3 involved a re-assignment of the Affected BM Units rather than the setting up of the Replacement Supplier BM Units as distinct entities. It needs to be clarified whether this is an acceptable interpretation of Section K paragraph 7.3, taking account of any adverse consequences it may have.

It would appear that the SVAA process has the ability to output data segmented by BM Unit, at least in relation to Additional BM Units. However, neither the SVAA system nor the PARMS system appears able to distinguish between the Base BM Units of the failing Supplier and the Replacement Supplier on the same Supplier ID in the same GSP Group. This is understood to be because the relationship between a Supplier ID and the related Base BM Units is effectively ‘hard wired’ in both these systems.

It would appear that the mapping of energy to either the failing Supplier or the Replacement Supplier is carried out satisfactorily based on Settlement Day for the purposes of Section T, on the basis of a relationship between BM Unit and Party which is a function of Settlement Day.

The working principle, for the purposes of PARMS and Supplier Charges, that “Replacement Supplier BM Unit = Affected BM Unit” could have the consequence that all energy on that Supplier ID and GSP Group across Settlement Periods either side of the transfer of responsibility would be attributed to either the failing Supplier or the Replacement Supplier or both. The Standing Modification Group should be asked to assess the extent to which this working principle and the consequent failure to segregate the data attributable to failing and Replacement Suppliers under distinct BM Unit entities may have contributed to the problem experienced, and what remedies and/or workarounds may be appropriate to prevent a repeat of problems.

4.7 Is there a reasonable method of excluding MPANs lost by the failing Supplier between the relevant Settlement Day and the Replacement Supplier Transfer Date, that is consistent with Annex S-1 paragraph 2.2.2, other than excluding all volumes associated with the failing Supplier’s Affected BM Units from the Serial SP08a calculation?

The PAB determination appears to suggest that a Supplier of Last Resort [a Replacement Supplier] should be responsible for the performance relating to part of the energy volumes attributable to the Supplier ID, but not that part relating to MPANs (i.e. Metering Systems) which have been “lost” by the failing Supplier between the relevant Settlement Date and the Replacement Supplier Transfer Date. The first problem with this is that the volumes associated with these excluded Metering Systems are inherently included in the aggregate BM Unit level volumes in the formula in paragraph 2.2.2 of Annex S-1, which are based on the outputs from

the SVAA system. In order to exclude these volumes (only), it would presumably be necessary to change the functionality of the SVAA system and the associated calculation rules, which would appear to require a Modification to the Code. In addition, it would be necessary to provide a mechanism to identify the “lost” Metering Systems and the associated volumes, which would involve information on the registration history of each of these from the Settlement Date of each relevant Volume Allocation Run up to the Replacement Supplier Transfer Date. This is a far from trivial exercise, and would be likely to require a Modification in relation to the Data Aggregator processing obligations in Annex S-2. There is also a question as to how Erroneous Transfers should be treated.

By contrast, a much simpler solution, which could also be argued to be consistent with both the PAB determination and the existing wording of Annex S-1 paragraph 2.2.2, would be to exclude all volumes for Settlement Days prior to the Replacement Supplier Transfer Date from the calculation of the Replacement Supplier’s Serial SP08a performance. This would be consistent with including only the volumes attributed to the Replacement Supplier BM Units and not the volumes attributed to the Affected BM Units of the failing Supplier.

4.8 Are the words at the end of Section K paragraph 7.4.5 (which were apparently introduced following the final pre-NETA consultation in the BSC Failing Supplier Process, which included the draft legal text) consistent with the principle of Supplier Charges as ‘liquidated damages’?

Paragraph 7.4.5 of Section K (to quote in full) states:

“Without prejudice to the obligations of the Replacement Supplier in paragraph 7.6, a Replacement Supplier shall not be considered to be in breach of any provision of the Code relating to Metering Systems (and/or Party Agents deemed to be appointed and registered by it pursuant to paragraph 7.1.3(a)(ii)) to the extent that, during the period between the Replacement Supplier Transfer Date and the relevant Replacement Supplier Registration Date, the Replacement Supplier is unable to comply or take steps to comply with such provision by reason (only) of the fact that it is not formally registered in CMRS or SMRS (as the case may be) as the Registrant of Metering System(s) for which it is deemed to be the Registrant by virtue of paragraph 7.1.3(a)(ii), including the provisions of:

- (a) Section J5; and
- (b) Section O3.2

provided that this paragraph 7.4.5 shall not relieve the Replacement Supplier of liability under Section S3.2 and Annex S-1 in relation to such Metering Systems.”

It is to be noted that this wording is virtually identical with that of the draft paragraph (K7.4.4) in the February 2001 consultation, except for a couple of references to “Trading Party” changed to “Replacement Supplier” (to make them more specific) and the addition of the last two lines. It should be noted also that the reference to Section J5 and Section O3.2 is not exclusive.

The significance of this paragraph (up to the last two lines) is that:

- i) it recognises (at least implicitly) that Replacement Suppliers are unable to do certain things (broadly relating to Metering Systems) by normal industry processes because they are not in effective control of processes using that Supplier ID;
- ii) it overcomes the fact that the Replacement Supplier may not have approved operating relationships with Agents which it is treated under section K7 as having appointed;

- iii) it states that the Replacement Supplier shall not be treated as being in breach of the Code in the circumstances described.

The inclusion of this paragraph does raise a number of questions:

- If volumes associated with certain Metering Systems are to be excluded from the performance calculation, how is this to be identified to the PARMS system?
- Would it be feasible to do this 'automatically' (it is potentially quite a complex matter, depending on the obligations involved) or would a judgement be needed in each individual case as to whether the relevant criteria had been met? (e.g. it might be that 'Trade Sale' cases where a Replacement Supplier had been able to reach an agreement to take over the failing Supplier's processes should be treated differently – possibly as a 'Transfer of Supplier ID' under Section S1.4, which would take them outside the scope of Section K7.)
- Would a Replacement Supplier (particularly a Supplier of Last Resort) in practice have sufficient access to data to enable it to make a quantified claim (if this was the process)?
- Would the process for such a claim be the same as for Supplier Force Majeure or different?

Presumably, the reason why paragraph K 7.4.5 was included was because it was not considered appropriate for the Failing Supplier Process to put a Replacement Supplier in a position where they would automatically be in breach and would therefore need to claim Supplier Force Majeure.

It is not entirely clear what the "(only)" (in line 7) is intended to add. It has been suggested that this means that, if there were any other reasons in addition, then the Replacement Supplier would be considered to be in breach. However, a more reasonable interpretation is probably that this should be sufficient reason on its own. This would suggest the use of different criteria to those applicable in the case of Supplier Force Majeure.

The reason for the addition of the last two lines of K7.4.5 seems more of a mystery. Certainly, npower raised questions in the consultation process about what obligations it was intended to relieve the Replacement Supplier of, bearing in mind particular experience with dealing with Administrators and obtaining data related to failing Suppliers. However, if the addition of this wording was a response to such questions, it appears to have been something of a "knee-jerk" response. Bearing in mind that Supplier Charges are supposed to be 'liquidated damages' (LDs) from a legal perspective, and that LDs are only supposed to be a genuine pre-estimate of loss and applicable to a breach of a contract/agreement, it is hard to see why anyone should think they should still be payable in circumstances where the Replacement Supplier was not "considered to be in breach" (This would apply whether the Replacement Supplier was simply not formally the Registrant or whether it was not even deemed to be the Registrant in relation to the relevant periods, and hence not responsible for the relevant obligations). This could potentially undermine the principle of the Supplier Charges in general. It would be useful to know whether the G3 Group endorsed this amendment.

Npower suggests that the Standing Modification Group should be asked to consider whether a Modification to the Code is desirable to address the issues highlighted in the foregoing two paragraphs, as well as whether other changes are desirable to clarify the Code in the other areas identified in the earlier sections.