

Electricity Governance Reform
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Future System Operation
Ofgem
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21 February 2024

Dear Teams

The Future Ownership of Elexon: new electricity supply and generation licence conditions and Balancing and Settlement Code (BSC) changes: Government and Ofgem Statutory Consultation

We welcome the opportunity to respond to this consultation on proposed changes to supply and generation licence conditions and to the BSC. Our main comments are provided below. We have provided more detailed comments on the licences, BSC codes and Articles of Association in Annexes 1 to 4 attached.

1. We acknowledge that the policy approach, involving the inclusion of a condition in the Electricity supply and gas generation licence to direct parties to hold a share and to adjust the BSC (Balancing and Settlement Code) documents accordingly, accomplishes the intended outcome of transferring ownership of Elexon to the proposed 13 licensed BSC funding parties.
2. We understand that, in the event of a conflict between the Articles of Association and Annex C-3 BSCO Governance (the “Annex”) the provisions of the Annex are to prevail. However, we would also be grateful for clarity as to what document would prevail in the event of a conflict between the Annex and the recently published Elexon Transfer Scheme document,
3. Currently, BSC Section 5.1.1 (b) offers reasonable guarantee that any financial consequences of any claim against the BSC Company would be borne by the trading parties. However, this assurance (and indeed other assurances in the code) are contingent on Ofgem / DESNZ (Department of Energy Security and Net Zero) maintaining this stance in the future. What, if any, assurances/guarantees will be provided to the proposed shareholders to ensure that they will not be liable for any future liabilities resulting from post-transfer amendments to the BSC?
4. The question of pension liability requires further clarification and continues to be a primary concern. We have included in Annex 5 a list of questions to which we are still awaiting a response. The consultation documents refer to past requests for a

guarantee or cap on this within the licence conditions to safeguard the thirteen parties from any associated liabilities. The frequently asked questions section indicates that the amounts will be disclosed at the appropriate time: please could this be confirmed?

Yours sincerely,

A handwritten signature in blue ink that reads "Richard Sweet". The signature is written in a cursive style with a large 'R' and a long, sweeping underline.

Richard Sweet
Director of Regulatory Policy

**NEW ELECTRICITY SUPPLY AND GENERATION LICENCE CONDITIONS –
SCOTTISHPOWER COMMENTS**

1. Substantive comments and requested amendments

Provision	Comment	Requested amendment
Condition xx: Elexon ownership, paragraph 4	The requirement to inform the Secretary of State and Ofgem about a 'change in corporate relationship' is vague and appears to be duplicative of the provisions in paragraph 3(a)-(c).	This requirement should be removed: 4. Once directed under paragraph 1, the licensee must inform the Secretary of State and Authority about a change in the corporate relationship between the licensee and any affiliate of the licensee specified in the direction.

2. Minor amendments and typos

Provision	Comment	Suggested response / drafting
Definition of "Elexon"	The definition of Elexon is incomplete – Elexon should be fully defined.	Adopt the following definition (as used in the draft Transfer Scheme): <i>"Elexon means Elexon Limited, company registered in England and Wales under registered number 03782949 whose registered office is at 4th Floor, 350 Euston Road, London, NW1 3AW"</i>
Condition xx, paragraph 3(c)	Typo	Insert the underlined as follows: <i>"if the party to whom responsibility is delegated ceases to <u>be</u> a wholly owned affiliate of the licensee."</i>

**MODIFICATIONS TO BSC SECTION C: BSCCO AND ITS SUBSIDIARIES
– SCOTTISHPOWER COMMENTS**

1. Substantive comments and requested amendments

Provision	Comment	Requested amendment
Paragraph 5.2.2	<p>“Paragraph 5.2.1 shall not apply in respect of a breach by BSCCo:</p> <p>(a) of any of its obligations as, or provision of the Code relating to, the Performance Assurance Administrator; or</p> <p>(b) of any provision of Section M; or</p> <p>(c) of paragraph 2.6; or</p> <p>(d) of any provision of Section F.”</p>	<p>The reference to paragraph 2.6 in point (c) should be deleted as paragraph 2.6 has been deleted.</p>
Paragraph 5.2.5	<p><i>“The aggregate cumulative amount payable by BSCCo to all Parties in respect of actionable breaches under this paragraph 5.2 for which payments (of damages or otherwise) fall to be made by BSCCo in any BSC Year shall not exceed £3,000,000”</i></p>	<p>Please provide further clarity on the definition of “parties” for the purposes of this clause and throughout. We note that Section A paragraph 1.2.2 makes reference to NETSO being a Party.</p>
Annex C-3: BSCCO Governance		
Paras 1.3.4, 1.5.3 and 1.8.1	<p>Per paragraphs 1.3.4 and 1.5.3, shareholders are to be required to exercise their voting rights to give effect to the Code or as directed by the Panel consistent with the provisions of the Code on certain relevant governance matters.</p> <p>Per paragraph 1.8, if any steps taken by Elexon (or its subsidiaries) and the ownership of a share in Elexon by a shareholder might result in that shareholder (or its affiliate) being in breach of or incurring a liability under a Legal Requirement (being any legislation, regulations, licence conditions etc.), subject to receiving notice from the shareholder, Elexon cannot take such step without the consent of the shareholder</p>	<p>Please include a new provision that, notwithstanding anything else in the Code, if a shareholder is directed to act or exercise its voting rights in a way which will result in it being in breach or incurring a liability under a Legal Requirement then BSCCo shall be required to notify and consult with such shareholder and the shareholder will only be required to take such action if BSCCo determines, following such consultation, that the action is necessary for the purpose of BSCCo discharging its functions or responsibilities under the Code.</p> <p>Any provisions where the shareholders are required to act or vote in a certain way (including paragraphs 1.3.4 and 1.5.3) should be subject to such new provision.</p>

Provision	Comment	Requested amendment
	<p>unless it is required to do so for the purpose of discharging its functions or responsibilities under the Code.</p> <p>It should be expressly provided that, where the shareholders are required to vote in a way that may result in a similar breach or liability, similar protections are in place.</p>	Please also amend the drafting to expressly provide that, if a shareholder becomes aware of an intended action which may breach a Legal Requirement that has not been previously notified to BSCCo, the shareholder must notify BSCCo on becoming so aware.
Para 1.2.2	This section states <i>“the Shareholders have agreed that their respective rights as Shareholders shall be regulated by the provisions of this Annex”</i>	We would recommend this is removed. We don't think it is appropriate to state that the shareholders have agreed.
Para 1.9.1	We request that wording is included to make clear that the new shareholders of Elexon do not take on any tax liability generated in the BSCCo group because any or all of the companies have left a tax group as a result of the transfer of ownership to the shareholders or otherwise.	Please could you amend wording as suggested
Para 1.9.2	We don't believe this clause is necessary	Please delete
Annex C-2: Voting Procedures for Binding Resolutions, Non-Binding Resolutions and Appointment Resolutions		
Para 3.2.1(c)	“if the entire Board is the subject of a Binding Resolution, the NETSO attendee will chair the meeting.”	As we understand it there will be no NETSO attendee so we think this subparagraph needs to be amended.

2. Minor amendments and typos

Provision	Comment	Suggested drafting change
General	Various references to NETSO throughout document.	Review and update references to NETSO as appropriate
Annex C-3 para 1.2.2	Minor amendment required for clarification.	<p>Insert the underlined as follows:</p> <p><i>“The Shareholders have agreed that their respective rights <u>and obligations</u> as Shareholders shall be regulated by the provisions of this Annex. No other provision of this Code shall apply to the regulation of the rights and obligations of Shareholders in their capacity as Shareholders.”</i></p>

Provision	Comment	Suggested drafting change
Annex C-3 para 1.3.4	BSCCo to notify shareholders of requirement to create new shares where necessary pursuant to para 1.3.2.	Insert the underlined as follows: <i>“where no Shares are otherwise available for issue, they will, <u>promptly on written request by BSCCo</u>, exercise the voting rights...”</i>
Annex C-3 para 1.3.5	Minor amendment required for clarification.	The word "nominal" to be removed from this clause, as the price is the price, irrespective of whether it is also the nominal value.
Annex C-3 para 1.5.1(b)	Minor amendment required for clarification.	Insert the underlined as follows: <i>“other than permitted <u>or required</u> by this Annex...”</i>
Annex C-3 para 1.5.5(a)	Minor amendment required for clarification.	There is no concept of an "extraordinary general meeting". Replace "extraordinary" with "other".

**MODIFICATIONS TO BSC SECTION X-1
-SCOTTISHPOWER COMMENTS****1. Substantive comments and requested amendments**

We have no substantive comments on the proposed modifications to BSC Section X-1.

2. Minor amendments and typos

Provision	Comment	Suggested drafting change
Definition of Asset Metering Party Agent	Typo	Replace the “M” in “Means” with lower case as follows: <i>“<u>m</u>means a Party Agent that has...”</i>
Definition of Period BM Unit Non Chargeable Demand	Typo	The bold text which reads Period BM Unit Non Chargeable Demand should be put in quotation marks as follows: <i>““Period BM Unit Non Chargeable Demand”.”</i> In addition, the “M” in “Means” should be replaced with lower case as follows: <i>“<u>m</u>means the Demand volume...”</i>

**NEW ELEXON ARTICLES OF ASSOCIATION
-SCOTTISHPOWER COMMENTS**

1. Substantive comments and requested amendments

Provision	Comment	Requested amendment
Article 9	This article states that two persons entitled to vote shall be a quorum. We question the quorum of two here and recommend that the quorum is changed to all shareholders or at least a majority.	Change definition of a quorum to all shareholders or at least a majority.
Article 36.2	This Clause states “... <i>Such a meeting shall be deemed to take place where the largest group of those participating is assembled, or, if there is no such group, where the chairman of the meeting is</i> ”. It is unclear who the chairman will be or they way in which directors decide.	Please confirm who will be the chairman and the way in which directors will decide.
Articles 47 & 48	<p>The members are obliged to give effect to the Balancing and Settlement Code (the “Code”), in addition to the articles, and shareholders' rights will be subject to any restrictions in the Code.</p> <p>While para 1.10 of Annex C-3 of the Code provides that it shall prevail over the articles, as the Transferees are required to give effect to the Code, and not just the Annex, they should have clarity on what prevails in the event of a conflict. As members are required to exercise their voting rights and take steps to give effect to the Code, the provisions of the Code should prevail without ambiguity, and it should be clear that the shareholders will not breach the articles by adhering to the Code.</p>	Please expand Article 47 to expressly provide that, to the extent that the members are obliged by the Articles to give effect to a provision of the Code, the relevant provision shall prevail over the articles should there be any conflict in their respective terms and the shareholders shall not be required to comply with the articles to the extent there is such a conflict.

2. Minor amendments and typos

Provision	Comment	Suggested drafting change
Article 8	Amendment requires clarification.	<p>Replace:</p> <p><i>"The directors may, subject to the provisions of the Code with respect to the transfer of shares but otherwise in their absolute discretion and without giving any reason, decline to register any transfer of any share whether or not it is a fully paid share and the directors may not approve any transfer other than in accordance with the Code."</i></p> <p>with:</p> <p><i>"8.1 Subject to Article 8.2, the directors may in their absolute discretion and without giving any reason, decline to register any transfer of any share whether or not it is a fully paid share.</i></p> <p><i>8.2 Notwithstanding Article 8.1, the directors may not take any decision with respect to the transfer of shares, including the approval of any transfer of share, other than in accordance with the Code."</i></p>

QUESTIONS ABOUT PENSIONS ARRANGEMENTS

1. Please confirm whether the current obligations to fund Elexon under the BSC funding mechanism will remain the same and how this will be achieved.
2. Please confirm if Elexon has any employees? If so, how many are "Protected Persons" as defined under the Electricity (Protected Persons) England and Wales Pension Regulation 1990 and how many are in defined benefit pension arrangements? If it is envisaged that certain employees will TUPE transfer to Elexon on completion of the Transaction, the same questions apply in relation to those employees.
3. We understand that Elexon contributes to NGUKPS and ESPS in relation to a number of employees, however, it does not appear to be a participating employer in either scheme. Please explain if this is the case and why that is. Please confirm whether it is envisaged that there will be a TUPE transfer and/or a Section 75 debt triggered against Elexon as a result of this transaction?
4. Please confirm the planned pension arrangements for Elexon post completion of this Transaction.
5. If the intention is for Elexon to participate in EGPS and NGUKPS on completion of the Transaction, please confirm if any consideration has been given to the scope of liabilities to be transferred to any new Elexon section of ESPS and NGUKPS. For instance, will the transferred liabilities be limited to active members only? Or will the transfer also include accrued pension rights?
6. Please confirm if Elexon has any liability towards, or previously participated in, any historic defined benefit pension arrangements.

ScottishPower
February 2024