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The Future Ownership of Elexon: Licence and Code Changes

EDF is the UK's largest producer of low carbon electricity. EDF operates low carbon nuclear power stations and is building the first of a new generation of nuclear plants. EDF also has a large and growing portfolio of renewables, including onshore and offshore wind and solar generation, as well as energy storage. With over five and a half million electricity and gas customer accounts, including residential and business users, EDF aims to help Britain achieve net zero by building a smarter energy future that will support delivery of net zero carbon emissions, including through digital innovations and new customer offerings that encourage the transition to low carbon electric transport and heating.

We welcome the opportunity to respond to this consultation on the new licence conditions and code changes to implement the new ownership arrangements for Elexon. We continue to support the establishment of the National Energy System Operator (NESO) and acknowledge that moving Elexon to Industry Ownership is designed to support the creation of this new entity.

Shareholder liabilities and costs

In its response to industry concerns over shareholder liabilities and costs, Government sets out that "if any future changes were proposed by industry, Ofgem, or the Government, they would be subject to the appropriate consultation processes and assessments." This does not provide reassurance that where Government has recommended a number of changes to Energy Codes, including the licensing of code bodies; potential changes from this reform could impact the liabilities of Elexon shareholders. We believe that this reassurance is necessary to provide protection to industry against liabilities that otherwise could arise from this separate reform.

Pensions

We have raised to Government and Ofgem on a number of occasions that the shareholders still do not know what the pensions arrangements will be following the changes to Elexon ownership. We note that Ofgem is currently considering a proposal¹ to allocate the costs of the pension scheme between National Grid and the NESO in a way that seeks to preserve neutrality for consumers and

¹ <https://www.ofgem.gov.uk/publications/pension-scheme-arrangements-national-grid-employees-transferring-future-system-operator-national-energy-system-operator-or-neso>

National Grid. The ongoing lack of transparency on what the pension arrangements will be following the transfer of ownership is sub optimal.

We continue to believe that it would not be necessarily practical, efficient, and proportionate for Elexon to be required to create and maintain pensions schemes following the separation of Elexon from NESO. We believe that the least cost option for end consumers is for NESO to retain management of the pension schemes of Elexon employees. Unlike other direct business costs that Elexon is well placed to manage which will be passed through to BSC funding parties, pensions costs and historical pension liabilities are complex and a disproportionate issue for Elexon as a standalone entity to manage.

Policy Consultation

We note the policy proposal that sets out when ‘topping up’ of shareholders would occur if the number of mandated shareholders drops to 7. However, there is no reference to this proposal in the draft BSC Annex C-3; we believe that this should be in place.

We note that there is a policy proposal to introduce a new obligation for shareholders to “co-operate in the maintenance of BSCCo as necessary”; however, it is not clear what this may mean in practice and where this is reflected in the BSC.

BSC Annex C-3

We believe that the draft BSC Annex C-3 legal text largely delivers the intent of the Elexon ownership policy decision and sets out the roles and responsibilities for shareholders and Elexon. However, the BSC is amendable and therefore it is possible that BSC modification proposals are raised that may amend the shareholders’ rights and obligations; this is a risk that should be mitigated as much as possible. We also believe that there is a need to refine a few aspects including:

Paragraph 1.3.1: This states that the mandated parties need to apply to become a shareholder to then be allocated by the BSCCo. This does not completely align the wording under clause 2.1 and 2.2 of the transfer scheme as no mention of an application is made and instead it is read as the transfer being automatically transferred by way of the legal right under the Schedule 9 paragraph 3 of the Energy Act 2003. It is not clear when the transfer is to take effect and what prospective shareholders are required to do.

Paragraph 1.3.2: There are a number policy proposals put forward in relation to the management of share transfers (including facilitating compliance; relinquishing shares and trading). It is proposed that Elexon would have discretion to refuse any request or revoke any arrangement by which shares were held voluntary as well as take back any shares when requested to do so by the shareholder. BSC Annex C-3, paragraph 1.3.2 sets out that the BSCCo retain a right to reject an eligible parties’ registration as shareholder even in the event that it has agreed to register the transfer of a Share, or approved the allotment of a Share. In what circumstances could this occur?

We believe that there is a typographical error - paragraph 1.6 “No obligation to finance”.

Guidance, instructions and proformas

In advance of transfer of ownership there is a need to agree and publish the clear guidance, instructions and proformas to be used by BSCCo directors and future Elexon shareholders in fulfil the roles and responsibilities as set out in BSC Annex C-3 BSCCO Governance ‘1.3 New Shareholders’ and ‘1.4 Transfers, revocations and returns of Shares’.

Articles of Association (AoA)

Share capital / rights: We believe that if detailed in the BSC Annex C-3, there needs to be corresponding confirmation in the AoA. Shareholder rights are limited to that which is under paragraph 1.5.4 of the BSC Annex C-3; this should reduce the need to amend the AoA as and when the BSC changes.

Transfer, revocation and return of shares: We believe that it would be appropriate for the AoA to include a clause that sets out that BSC Annex C-3 (principally paragraph 1.4) governs the transfer, revocation and return of shares held by shareholders.

Chair: There is an amendment to clause 14.2 to include reference to a ‘chair’ but there is no clause in the AoA to reflect the ability to have a chair, who the chair may be and what their rights are i.e., do they have a casting vote? Whilst clause 37.11 describes the role of the chair and voting rights, this is specific to the issues details under 37.11 A, B and C only.

Resolution in writing: Clause 35 provides Directors with the ability to vote by written resolution; there is no corresponding option for shareholders. Clause 15 has been deleted which would have enabled this. We believe that this should be reinstated in the AoA; there is no reason as to why this should not be permitted.

Disapplication of statutory pre-emption provisions: We would welcome the additional wording “subject to BSC Annex C-3” to Clause 6.

Should you wish to discuss any of the issues raised in our response or have any queries, please contact me or Natasha Ranatunga on 07875 112 981.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'AM Cox'.

Mark Cox
Head of Nuclear & Wholesale Policy and Regulation