

*Reference:*



12 June 2009

Mark Feather  
Director, Industry Codes & Licensing  
Ofgem  
9 Millbank  
London  
SW1P 3GE

Dear Mark

### **The 'timing-out' of code modification proposals**

The BSC Panel responded with its preferred option of the two solutions to address the timing out of modifications proposed in the Ofgem open letter of 18 November 2008. The views of the Panel Members have not changed. Ofgem has now issued a revised proposal – 'Option C' – setting out its intended process and seeking industry views on the detail of this new approach. This response is the BSC Panel's comments on that detail.

Option C grants the Authority a licence power to require code panels to provide a revised implementation timetable as well as updated analysis where there is a risk that the information in the modification report is out of date. The Panel agrees that much of the analysis on the impact of change is based on assumptions which apply at the point of assessment, and it is therefore likely to be of value for a limited time only. The Panel notes, however, that the provision of new information may have the effect of changing panels' original views as to the merits of a change and the Panel would expect the opportunity to provide a revised recommendation. As any panel recommendation has a potential impact upon the ability of parties to challenge an Authority decision through the Competition Commission, there may otherwise be a risk that the equability of the process itself would be open to challenge by participants seeking to overturn the final decision. These requests for extended timescales and updated analysis are most likely to occur in the context of more contentious changes.

The scenario may also arise whereby only a revised implementation date is required by the Authority but, in considering and consulting on the timetable, the Panel itself concludes that the analysis should be revisited. The Panel would anticipate that this would be communicated to Ofgem along with the new timetable.

The Panel supports the principle that it is helpful to the industry and aids market certainty if the decision-making timetable is as fast as allowed by the need for a robust process and solution. We would note that seeking additional analysis may be problematic in terms of the time and cost of re-negotiating terms with previously commissioned agents, some of whom may no longer be available, and would urge Ofgem to communicate potential problems to panels at the earliest opportunity. Early warning would enable the Panel and ELEXON to have time to explore the most cost-effective and practical options before, where it becomes necessary, notice of the formal licence requirement is received.

Finally, the Panel is aware that ELEXON is submitting comments on the content of the legal drafting and does not intend to reproduce them in this response.

It may have been Ofgem's intention to address these points of detail in the context of any subsequent modifications to the industry codes. I hope that this response has been helpful. However, should you wish to discuss any of the points raised, please contact in the first instance Laone Roscorla, BSC Panel Secretary on 0207 3804120 or myself, Nick Durlacher on 0207 3804251.

Yours sincerely

A handwritten signature in black ink that reads "Nick Durlacher". The signature is written in a cursive, slightly slanted style.

Nick Durlacher  
**BSC Panel Chairman**  
**(on behalf of the BSC Panel)**