



16 June 2009

Mark Feather

Director, Industry Codes and Licensing
Ofgem
9 Millbank
London
SW1P 3GE

Dear Mark

The “timing out” of Code modification proposals

Thank you for the opportunity to comment on Ofgem’s revised proposals to prevent Authority decisions on code modifications being ‘timed out’.

In keeping with our response to the previous consultation we do not provide a view on the merits of the solution, instead we set out below matters for consideration if the proposed arrangements are to be applied in practice.

Timetable for provision of revised dates/updated analysis

Any request for revised ‘decide by dates’ must be made sufficiently in advance of the last ‘decide by date’ to ensure the appropriate time is available to consider revised dates and to consult with industry. We would expect that the Panel would provide the Authority with revised decide by dates and the suggested implementation approaches associated with those dates.¹

We note that updating analysis may take some time. For example, if ELEXON were required to have provided updated analysis for the last losses Modifications, ELEXON would have to; re-procure the services of the Cost Benefit Analysis providers; agree costs with the Panel and ELEXON Board; invite comment from the Authority; and agree with the Panel (or Modification Group) the scope for revised analysis (assuming the Authority has not determined the scope of analysis in its direction to the Panel). Once the analysis was completed and assessed, an appropriate consultation period would be required prior to submission to the Authority.

It would be helpful to understand whether the Authority anticipates that updated analysis and new decide by dates are required to be provided at the same time. It is likely that new decide by dates could be provided in advance of the updated analysis, however consultation responses may indicate that a different lead time is required for implementation.

Updating analysis

¹ We noted in ELEXON’s first consultation response that the BSC Panel uses a number of different implementation approaches based on the type of Modification (e.g. urgent, major system changes, housekeeping). When a ‘decide by date’ is provided it is normally based on the lead time for system changes required by industry or ELEXON to deliver those system changes. Typically a Modification will be delivered within one of the three scheduled dates in the year (in February, June and November).

We agree that the provision of updated analysis is likely to be required if there has been a significant period between the submission of a proposed change to the Authority and any request for revised dates. However we note that it is possible that the conclusions of the Panel and industry regarding whether the change better facilitates the Applicable Objectives may differ as a result of updated analysis. In this circumstance it is anticipated that the Panel would submit its revised views alongside the updated analysis and consultation responses. However it is not clear that this is expected from the draft licence changes. We are mindful that the Panel recommendation and subsequent Authority determination has a bearing on whether an appeal can be made to the Competition Commission.

Comments on the drafting of the suggested licence changes

We consider that there may be inadvertent references to the licensee in the new Condition C3 paragraphs 4A and 4B.

Our understanding is that the original vision at the time of NETA was that the transmission licence would require the licensee to have in place a "BSC" which would set out the terms of the balancing and settlement arrangements and would include procedures for its own modification. The licence drafting avoided statements which would place specific detailed obligations on the licensee in respect of the modification procedures. Any specific obligations on the licensee in relation to the modifications process (and there are very few) are set out in the BSC itself and not in the licence. This permitted the BSC to be drafted so as to place most of the obligations relating to the modification process directly upon the Panel, Modification Groups and BSCCo (i.e. ELEXON) rather than on the licensee. The licensee therefore does not play an active role in performing the detailed obligations relating to the modification process.

Thus paragraph 4 currently does not specify who is to perform certain actions – e.g. it merely states that the BSC shall contain procedures for modification proposals to be made, for evaluating modifications, for the preparation of a modification report and for setting out a timetable for the implementation of a modification.

As currently drafted, paragraphs 4A and 4B do not follow this practice. For example, paragraph 4A envisages that the Authority will serve a notice on the licensee indicating that it considers that Implementation Related Dates should be changed and including instructions to the licensee concerning the updating of analysis.

It should be noted, however, that the licensee does not have any role under the BSC in relation to the proposing of implementation dates, nor in relation to the provision of the original analysis. Strictly speaking the analysis is provided to the Panel by the Modification Group – see Section F2.6.4 of the BSC. The Modification Group may also request BSCCo to commission analysis from BSC Agents or third party consultants – see Section F2.6.5 and 2.6.6. It may also be the case that the Panel requires the Modification Group to commission BSCCo to obtain analysis.

It should also be mentioned that in obtaining the analysis BSCCo does so under its existing contracts with its BSC Agents, or enters into a new contract with a specialist consultant for the provision of the analysis (e.g. as has occurred in relation to the P229 (transmission losses)). The licensee has no role in this and is not party to such contracts.

If the obligations set out in paragraphs 4A and 4B remain on the licensee it will be necessary for the modification brought under (new) paragraph 4C to require the BSC to be changed so as to impose those obligations directly on the licensee. It is possible, of course, that to overcome the difficulty created by this, the BSC might also be modified to state that the licensee shall perform those obligations through BSCCo or, alternatively, to state that BSCCo shall be obliged to perform those obligations on behalf of the licensee. However, it is considered that both constructs are not entirely desirable. Instead, it is suggested that the proposed changes to the transmission licence be "tweaked" as shown in Appendix A.

Next steps

We would seek to work with our fellow code administrators to ensure that the implementation and new processes for any changes arising from the transmission licence are consistent across the codes.

Yours sincerely

A handwritten signature in black ink that reads "Stuart". The signature is written in a cursive style with a long horizontal flourish underneath the name.

Stuart Senior
Chief Executive

List of Enclosures

Appendix A – suggested changes to paragraphs 4A and 4B.

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The following is one suggestion as to how the Transmission Licence could be modified to address the issues raised in ELEXON's covering letter. It is not intended to be definitive and utilises the current structure of paragraphs 4A and 4B in order to minimise drafting changes.

Draft legal text – changes to paragraphs 4A, 4B and 4C (the tracked changes have been made to Ofgem's proposed new text)

- 4A. If at any time after a report has been submitted to the Authority in accordance with the procedures described in paragraph 4(b)(vi) above the Authority considers that any or all of the Implementation Related Dates set out in such report should be extended, the Authority may issue a notice, to that effect. A notice served by the Authority in accordance with this paragraph:
- (a) shall specify which of the Implementation Related Dates the Authority considers should be extended;
 - (b) shall set out the Authority's reasons for considering that those Implementation Related Dates should be extended;
 - (c) may include instructions concerning:
 - (i) the required extension including instructions as to the period or the minimum period by which any or all of the Implementation Related Dates should be extended; and
 - (ii) the updating of any analysis that was submitted with the report and the undertaking of appropriate consultation concerning such updated analysis.
- 4B. The licensee shall ensure that the BSC contains procedures for:
- (a) compliance, with any notice which the Authority serves in accordance with paragraph 4A, including any instructions set out therein; and
 - (b) the submission to the Authority as soon as reasonably practicable, of any analysis which has been updated in accordance with a notice served under paragraph 4A, together with (where appropriate) details of the proposed revised Implementation Related Dates which are to apply. [NB note that the words "where appropriate" are suggested as the Authority may already have specified new Implementation Related Dates or the notice may not include instructions requiring that new proposed Implementation Related Dates be submitted]
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