

Reference:



7 September 2009

Andy MacFaul  
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Ofgem  
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London  
SW1P 3GE

Dear Andy

**Code Governance Review: BSC Panel Response to Initial Proposals on Major Policy Reviews and Self-Governance**

The BSC Panel welcomes the opportunity to make additional comments on some of Ofgem's initial proposals for the Major Policy Review (MPR) and Self-Governance processes. As stated previously, in principle the Panel supports the introduction of a holistic consideration of the wider policy issues prior to implementing any solutions in the industry codes. We also agree with the introduction of a self-governance path as of a means of avoiding the full modification process for self-evident changes, and with maintaining the 'status quo' option. However, we set out below some of our thoughts around the detail of Ofgem's proposals.

**Major Policy Reviews (MPRs)**

***Ofgem as Proposer***

The Panel notes the backstop power that Ofgem will have under the MPR process to draft a modification itself should it deem this necessary, thus effectively putting itself in the position of the change proposer. This role carries with it responsibilities under the BSC which will be expanded should Ofgem introduce proposer ownership of change as has been suggested elsewhere under the Governance Review. Engagement by Ofgem in the Modification Procedures will be essential under this model, and would always be desirable in any event. We would note also the consequences for the Modification Group if it were only be able to directly influence change through the development and assessment of an alternative solution. We ask that Ofgem takes this into account when establishing the length of time it grants for its proposed 'time window' of opportunity for alternative solutions to be raised. Ofgem suggests that it may change its mind should new information be received and allowing the industry sufficient time to assess its preferred solution would provide parties with a chance to prove their case.

We would add that, irrespective of the Panel Members' mixed views on the merits of introducing the concept of the proposer owning a modification, this change would now become necessary, at least where Ofgem is the proposer. Otherwise the modification group would be put in an invidious position under the present BSC rules if it kept the ownership but had no power develop the modification in the direction it believed better facilitated the BSC Objectives.

We note the need for companies to plan and set budgets in the context of as much regulatory certainty as can be provided and request that the timescales for further assessment accompanying a change of opinion take this into account.

### ***Drafting Changes***

The Panel notes that the usual route for MPR changes will be for Ofgem to instruct the 'relevant licence holder' to draft a modification. This could be National Grid, Suppliers or Generators. We remain of the view that the most knowledgeable people to understand changes to codes for some subject matters (e.g. where they impact central systems) are the administrators of the codes themselves. They are closer to the detail in the codes and more aware of the impacts. We are mindful of the industry's view that code administrators should not be able to propose change but are also aware of the level of support ELEXON presently provides to the industry in this area. It appears to us to be inefficient not to acknowledge this and ensure that proposers takes advantage of the drafting expertise of code administrators.

### ***Criteria for MPRs***

Ofgem proposes that only it will decide whether a MPR is necessary but will listen to representations. As well as creating uncertainty, major policy shifts may have unforeseen consequences for the industry and we would suggest that engagement with the industry occurs prior to the commencement of a MPR.

The Panel would expect to take responsibility for flagging to Ofgem any likely candidates for a MPR if they become apparent under the non-MPR routes.

### ***Assessment of MPRs***

We would comment that discussions on any change are likely to touch on areas not directly connected with the MPR subject matter but which may benefit from further consideration. We ask that such debates are not stifled without an alternative forum for them to take place so that any consequential changes can be managed in an orderly and efficient way.

### ***MPR Appeals***

Ofgem proposes that the ability to appeal MPR decisions to the Competition Commission and through Judicial Review will remain. However, we would note that because the new arrangements will introduce a complex process, it will be a long time before the industry has the ability to appeal the principles being introduced. In addition, our experience of appeals illustrates that appeal decisions are made to the outcome when the solution is set in stone rather than the input when options are being developed. Whilst we acknowledge it is the general nature of appeals to challenge the process, we would like to understand what the checks and balances will be during the input stage to provide the industry with the opportunity to question more than just the process followed.

### **Self-Governance**

#### ***Self-Governance Appeals***

Whilst the Panel continues to welcome the introduction of a more efficient and practical means of progressing simple code changes, we note that Ofgem's proposals for appealing these decisions include the introduction of a third stage and an industry body, staffed by industry representatives, between the Panel and Ofgem's final determination. This will result in a complex appeals process for what are intended to be self-evident changes and, should it be required, would undermine any savings on time and resource that the new procedures introduce. We would note that the BSC Panel membership reflects all sections of the industry, with the exception of the DSO Representative who is permitted only to provide an opinion, and there is an ability to make further appointments should it at any time be not so reflective.

We would suggest that any such appeal is an indication that the modification was incorrectly allocated to the self-governance route initially and an alternative process would be a mechanism that allowed parties to challenge the allocation and appeal to either the panels or Ofgem that the modification be transferred to the status quo path.

### ***Filtering Criteria***

We note the suggestion that Ofgem may put a requirement on panels to flag when a self-governance modification should actually be processed under the status quo route. The Panel would consider it had a duty to allocate a Modification to the appropriate path with or without such an obligation.

We would expect ELEXON's Initial Written Assessment to include an initial assessment of the change against Ofgem's filtering criteria. It would also seem sensible for the proposal form to contain a section that participants must complete on the suggested route to be followed, with accompanying rationale or analysis, much as the request for urgent treatment does now.

### ***Impact on Consumers***

Ofgem considers that it's possible for code panels to 'provide an opinion on consumer impacts, seeking input and advice as necessary from Consumer Focus'. The Panel would agree that this is possible, and having always been fortunate in having two consumer Panel Members as part of the BSC Panel, has been keen for some time to be able to better take advantage of their expertise. We will assume from this statement that the Panel is now able to reference consumers in its discussions. We would also comment that as a principle, irrespective of whether arguments can be tailored to the BSC Objectives, any efficiency savings resulting in a reduction of costs will be of benefit to somebody whether it is to energy consumers and/or to shareholders.

### ***Panel Structure***

Ofgem proposes to leave it up to the industry to decide whether panels should be representative or independent and whether the voting should be weighted. The Panel would like to reiterate its strong belief that the current status of non-representative BSC Panel Members with expertise from all areas of the electricity industry, balanced with members with experience of consumer issues and of other industries, has served it and the electricity industry well to date. We would also comment that it is contradictory to have members who are independent experts but then introduce weighted voting.

Finally, we would like to express a more general concern that Ofgem's proposals, although they broadly have our support, may be introduced in a way that would lead to a dilution of the roles of ELEXON and the BSC Panel. It would be regrettable if these bodies – and the committees which support their work - became less attractive and less able to attract the calibre of person needed to understand the complexities of the industry.

This response is written on behalf of the BSC Panel but does not preclude individual Panel Members from responding on their own, or on their organisation's behalf. Should you wish to discuss any of the comments further, please contact in the first instance the Panel Secretary, Laone Roscorla (0207 3804120) or me, Nick Durlacher (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**