



16 September 2009

Jon Dixon
Head of Industry Codes & Licensing
Ofgem
9 Millbank, London, SW1P 3GE

(By Email)

Dear Jon,

ELEXON RESPONSE TO OFGEM'S INITIAL PROPOSALS ON THE ROLE OF CODE ADMINISTRATORS AND SMALL PARTICIPANT/CONSUMER INITIATIVES (ISSUED JULY 2009)

We welcome the opportunity to comment on your initial proposals in this area and remain committed to making a positive contribution to the Code Governance Review. In this response we've confined our comments to just those elements that impact ELEXON and the BSC arrangements. These are:

- Embedding a 'critical friend' approach for code administrators
- Obligations to assist small participants and consumer groups
- 'Call in' and 'send back' powers
- Panels to provide reasons for decisions
- Performance evaluation measures
- Service Contracts
- Code of practice for code administrators

We have not commented on the proposals for consumer representation and independent chairmanship, as these are already existing practice under the BSC.

As you will see from our answers below, we are committed to delivering continuous improvement, greater value and accountability for all aspects of our role and services. We have already taken many proactive steps to improve accessibility, transparency and support for all our customers (including smaller parties and consumers) to help them engage effectively with the BSC. We welcome any proposals arising from the Governance Review that will further enable us to do so.

Embedding a 'critical friend' approach for code administrators

You are seeking views on which activities should be considered within scope of the 'critical friend' approach and the appropriate mechanism for its introduction.

As detailed in our response to your previous consultation, we believe that we already undertake most of the activities assigned to the 'critical friend' role. We strongly support the idea (and believe we have demonstrated) that, by acting beyond a purely secretarial role, code administrators can make a very valuable contribution to the efficiency and quality of the

total customer experience, from market entry, through operations and engagement in change, through to exit. In relation to the change process specifically, this includes facilitating debate, and providing advice and analysis.

However, we also firmly believe that, in doing so, code administrators should remain independent and not be seen as champions of any particular party, sector or cause. Whatever the scope of activities that you ultimately determine should fall under any formally defined 'critical friend' role, we will also endeavour to discharge these in a collaborative manner rather than acting as an overt challenger.

Your document proposes some minimum 'primary activities' and possible 'secondary activities' that code administrators might be expected to undertake as a 'critical friend'. We are more comfortable with some of these elements than others, as you will see from our comments below.

Primary Activity 1: 'Judge if Ofgem is likely to reject a modification due to a lack of analytical support and seek to prevent this occurring'

While we already seek to be conversant with the needs and views of the Authority through regular working level dialogue with Ofgem staff, we remain of the view that the active and direct involvement of the Authority's representatives in the Modification process is by far the most reliable and effective model to achieve the objective of this proposal.

Primary Activity 2: 'Ensure that unsubstantiated assumptions or assertions do not go unchallenged, all arguments for and against a modification are adequately discussed at workgroup and panel level and reflected in the modification documents'

We are comfortable in this role and already always seek to ensure the quality of all the inputs and outputs of the change process. We do this through: proposing terms of reference to the BSC Panel (via our Initial Written Assessment); acting as advisor on changes to the Panel and Modification Groups; assisting participants in the drafting and development of changes prior to their formal launch through the change processes; working with the Modification Groups to deliver the required analysis and to document all views; taking a lead and accountability for the quality of assessment; commissioning external assessments where the necessary skills and expertise are not available in-house; analysing the views and reasoning of consultation respondents; providing legal advice and drafting; and helping the Panel to document its views and record its recommendations.

Primary Activity 3: 'Assess modification proposals to determine whether they are likely to have a significant impact on smaller participants and/or consumers and, if so, alert suitable representative organisations of this fact'

We already make every effort to better understand all our customers' businesses (for example, through our OSM services described in previous consultation responses) and to proactively flag up any matters that might impact them. Where an impact is known we will contact organisations or trade bodies to highlight the change and invite them to engage in the change process. Our Modification documents now signpost where particular classes of user will be impacted. However, the only reliable solution in this area is regular direct engagement with organisations representing smaller participants and consumers.

This allows our knowledge and understanding of current BSC issues to combine with their specialist sectoral expertise and perspective and it is this mix that gives the best chance for all possible impacts to be brought to light. It is very difficult for a code administrator to make a judgement on all external impacts in isolation and it would be unfair to hold us accountable for missing any possible impacts through lack of specialist expertise. We could, alternatively, recruit or otherwise 'buy in' that kind of expertise and knowledge, but this would be potentially costly and a risk would remain of that expertise becoming out of touch over time.

Primary Activity 4: 'Alert other code administrators when a proposed modification is likely to have consequential effects for other codes (either directly or indirectly)'

We have pragmatic collaborative arrangements and regular dialogue in place with other codes for this purpose and believe this is a valid function for code administrators. However, as with Activity 3 above, it would be unreasonable to hold a code administrator fully accountable in this area as each code requires a high level of familiarity and specialist knowledge in order to be able to identify all impacts. The success of these arrangements is also dependent on the willingness of all parties to engage.

Secondary Activity 1: 'provide assistance to smaller participants/consumer representatives with the drafting of modification proposals (particularly with regard to legal text), and provide small participants/consumer representatives with clarifications as to the operation of part of the relevant code'

We are very proactive in this regard and always provide our expert input and support to any customer that requests it, including in relation to the drafting of modification proposals. We also draft all legal text for modification proposals. As well as supporting parties through the change process, we also provide a range of tailored training options, open seminars, and published guidance documents. We also attend external events (e.g. small supplier forums) as well as visiting individual companies to provide information and teaching on specific aspects of the BSC. We would therefore have no issue with these activities being codified.

Secondary Activity 2: 'ensure that the views of smaller market participants and consumers are both heard and effectively debated at work-group and panel meetings'

We would be uncomfortable with any suggestion that we should somehow act as a formal proxy for direct participation of smaller parties and consumers at these meetings or otherwise in the process, as we do not have the expertise nor the mandate to do so. This would also conflict with our overriding objective to act independently and without discrimination. However, in chairing Panel and Modification Group meetings we always seek to ensure that all group members have a fair opportunity to express their views (notwithstanding that they must act independently when in that capacity). In acting as an independent body we always seek to marshal the submitted views of participants rather than represent the views of any one particular sector of the industry. We also actively seek out the views of affected industry participants, such as the smaller market participants. All of our reports set out the views of the minority and all consultation responses are attached to ensure that all views are visible to the Modification Groups, the Panel and the Authority. We also try to ensure that the membership of all groups is reflective of all sectors of the industry, although we rely on industry participants of all sizes to volunteer sufficient resources to make this feasible. We

make teleconference and videoconference facilities available to allow for active participation, without the need to travel.

Mechanism for introduction

In terms of how best to formalise these 'critical friend' activities to some greater extent than at present, we suggest that these could relatively easily be included as principles in the proposed voluntary Code of Practice to apply to code administrators. ELEXON, National Grid and the Joint Office have set these out in the initial draft prepared for the industry.

Costs and Impacts

As described above, we believe that we are already fulfilling significant elements of the critical friend role and therefore any formalisation of these should not lead to any significant increase in our costs or resources. If, however, we are expected, over and above this, to develop a permanent in-house capability to directly represent the interests of all smaller parties and consumers, and to retain full and up-to-date knowledge of all issues and impacts across these sectors (which are themselves diverse) then we believe that your estimate of £37-50k for each code is unrealistically low.

Obligations to assist small participants and consumer groups

You are seeking views on whether a specific obligation should be placed upon code administrators to assist smaller participants and consumer representatives and how best to define who should benefit from this support.

You propose a new duty upon code administrators to actively engage with small participants and consumer groups, facilitating their participation in the codes processes. You also outline a number of practical ways in which this duty could be discharged. As noted above and in our previous responses, we have already put in place a number of services and initiatives to assist all interested parties to cope with the inherent complexity of the BSC arrangements and rules including: offering a wide range of training, guidance and advice; providing dedicated operational support staff; using technology such as online forums¹ and website personalisation to improve access to information; making our documents easier to read and understand; supplying remote video and telephone conference facilities for key meetings and aligning meetings with those taking place under other industry codes.

At present we offer these services to all our customers on an equal basis and, even if a more formal obligation is placed on us to assist smaller parties and consumer representatives, we would continue to offer our full range of support to all our customers. However, such an explicit obligation might be useful if we are to justify expenditure on providing support to organisations that are not parties to the BSC, particularly when our costs are being socialised across only BSC Parties.

Reasonable Endeavours

¹ It should be noted that our experience to date of using online forums as a discussion tool has not been a great success, as participants have had reservations about comments being attributable and do not appear keen to engage with each other in this way.

We agree that any such obligation should be on a 'reasonable endeavours' basis for the reasons outlined in your document.

Definition of small participant

We do not have any views on the proposed definition of 'small participant'. As explained above, we will always endeavour to make the full range of our support services available to all our customers regardless of size.

'Call in' and 'send back' Powers

You are seeking views on whether it is necessary to include the powers within the relevant licences to enable Ofgem to 'call in' modification proposals which are not being effectively developed or assessed at a speed relative to their importance, and powers to 'send back' proposals where analysis is deficient. Our position on these proposals remains exactly the same as in our previous response, which is repeated below for convenience.

In principle we would have no issue with the introduction of more general "call in" and "send back" powers. The BSC already contains powers for the Authority to instruct a revised timetable where the length of the procedure exceeds certain prescribed durations. These have not been exercised to date as, when concerns have been raised, discussion has enabled positions to be explained and appropriate solutions reached.

The BSC does not explicitly contemplate a "call in" process on the grounds of inadequate or deficient analysis². If one were included, we would seek to ensure it was never exercised. We believe that dialogue with the Authority through more direct involvement in the Modification process is a more appropriate way to ensure issues are adequately addressed. There is also the possibility that transferring ownership of the procedures may introduce a delay as the activity is re-planned and previously gathered information has to be reassessed.

Similarly, the BSC does not envisage a "send back" process. Whilst again we would seek to ensure it was never exercised, we can see more obvious benefits in this proposal. Nobody wishes that a Modification Proposal be rejected on grounds of insufficient analysis, particularly where this can be practically remedied. Closer alignment of Panel and Ofgem objectives might minimise the likelihood of this occurrence. Beyond this we would again assert the primacy of good dialogue with the Authority representatives involved in the procedures.

Panels to provide reasons for decisions

You note that the extent to which panels provide reasons for their recommendations differs considerably across codes and are seeking views on whether a licence modification requiring more explicit provision of reasons for recommendations is appropriate.

We would have no objection to such an obligation for the reasons we have set out previously. Again these are repeated below for convenience.

² Although, arguably, BSC Section F1.7.1 to 1.7.4 could be used for these purposes

We believe that any body or organisation making a recommendation should publish its reasoning. It is difficult for the basis of the recommendation to be assessed without the publication of the rationale behind the recommendation. We believe the publication of reasoning to be essential to good governance. It would also be necessary for reasons of natural justice should the Panel be given any decision making powers in relation to modifications. We note that the BSC Panel always publishes its reasons.

Performance evaluation measures

You are seeking views on whether a regular scorecard evaluation of the code administrators' conducted by Ofgem would be of value and whether code administrators' should be required to obtain and maintain ISO9001 accreditation for their processes.

Scorecard

As noted in our previous response, we believe that a scorecard is, in principle, the right way to evaluate performance but needs to include a balanced set of appropriate measures. We would be happy to discuss this further, including under the Code of Practice workstream. We already recognise the importance of measuring our organisational performance and we employ a number of key performance indicators and stakeholder perception measures to support this. In particular we already track:

- performance against budget
- compliance with our obligations under the BSC (including implementation of change)
- the performance of our key suppliers (including the BSC Agents)
- customer satisfaction against a wide range of service indicators

These areas effectively form our balanced scorecard. We are comfortable with sharing and comparing this information. Indeed we already publish much of this via our Business Plan, quarterly and annual reports (including KPIs related to contracted services) and other reports such as those outlining our customer satisfaction results and our actions in response. We provide detailed information about the costs of assessing and implementing Modifications in our monthly Change Report published on our website. Transparency of this information is central to our aim of being customer focused and accountable and we believe that similar transparency across all codes would create further opportunities to share best practice and identify efficiencies.

We already seek to benchmark ourselves against other organisations offering comparable 'code administrator' services in the energy industry. Our customer survey asks for views on our levels of service in comparison with organisations including Electralink, Gemserv, Xoserve, and National Grid.

ISO 9001

We already have quality management approaches in place and have embraced the European Foundation for Quality Management (EFQM) Business Excellence Model as a means to benchmark our overall performance with other high performing organisations. We recognise

that organisations with a business excellence approach obtain significant benefits including improvement in financial performance, enhanced innovation and idea generation, customer satisfaction, organisational growth, employee satisfaction and involvement, efficiency, effectiveness and reliability. We are beginning to see these benefits working through and have been awarded the EFQM's Committed to Excellence status. We have also focused on improving our customer service and some of our staff have been awarded professional qualifications by the Institute of Customer Service. We'd welcome the opportunity to explore further with you whether ISO 9001 would deliver any additional benefits over and above our existing quality approaches. It may not be necessary or efficient to impose a single, specific quality framework on all code administrators.

We note that your estimate for ISO 9001 is based solely on the external certification fee and does not take into account any internal preparation costs to demonstrate conformity.

Service Contracts

We note that you believe there may be merit in the industry giving further consideration to the introduction of service contracts for all code administrators. We repeat our previous views on this.

Although we do not currently have an explicit service contract in place with our customers (other than the BSC itself), we ensure that we clearly establish their requirements through consultation and interaction. We also seek to clearly communicate our available services to our customers. In this way we have been able to provide some services over and above those enshrined explicitly in the Code, as we have received confirmation that these services are required and valued (examples include our operational support or "OSM" service and provision of training and education to Parties). Parties have said that they value the central provision of training and advice on two counts, savings in direct costs to themselves and the benefit of receiving accurate and impartial advice.

There may be some complexities in moving to a service contract. For example, there are a number of 'demand-led' events and activities that can impact our costs, but over which we have little or no control and it is not always possible to predict the exact number or nature of these. These include BSC Modifications, trading disputes, new entrants (who must become qualified and subject to audit) and a number of parties who may default. It would therefore be difficult to price the contract accurately and it would be necessary to introduce arrangements such as re-opening clauses, caps and collars in order to manage such risks.

It would be unacceptable for any company performing a central industry role such as that of BSCCo to be allowed to become insolvent because of the impact that would have on the orderly operation of the market. We also provide analysis, support and education to Ofgem, DECC and other regulatory bodies and it is not clear how this would be justified and funded under a services agreement.

It should also be noted that ELEXON does not have any share capital, and therefore, if the service were to be put out to tender, we would be at a significant disadvantage or may not even be able to do so at all.

We do not believe that the service contract model would have any advantage over the present BSC model and in particular we do not believe it would provide a greater degree of control and accountability over the actions of ELEXON as code administrator than the current model, nor create any sharper incentives to reduce our operating and contracted costs (which we always actively seek to do already).

Code of practice for code administrators

We are currently actively engaged with the other code administrators in the development of the 'straw man' Code of Practice. However, we still have some reservations about whether a single code of practice for all code administrators is necessary or appropriate or can take into account the significant differences between the scope and functions of the different codes and administrators. We are also wary of the risk that codifying approaches could actually stifle innovation in code administration. Whether or not it is decided to implement such a code of practice and notwithstanding the final form of any such document, we will remain committed to the continuous improvement of our customer facing services and processes and will always seek to adopt best practices from within our industry and beyond.

In conclusion, we welcome the opportunity to respond to this consultation. We are supportive of your review, and will continue to actively engage in the process. We think that the BSC arrangements which Ofgem put in place some eight years ago continue to serve BSC participants and those with a wider interest in the industry well and that our administration of those arrangements is consistent with the principles of your proposals. We will continue to look for opportunities to improve the service we provide in a manner consistent with the aspirations of your review.

We would of course be happy to discuss any of the points we have made above with you in more detail if you would find that helpful.

Yours sincerely

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

Stuart Senior
ELEXON Chief Executive