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Mark Cox
Ofgem
9 Millbank
London
SW1P 3GE

Dear Mark

ELEXON response to the Code Governance Review Final Proposed Licence Drafting and Code Administrator Code of Practice Consultations

ELEXON welcomes the opportunity to respond to the amended licence conditions for the Code Governance Review final proposals. Whilst Ofgem asks some specific questions on the proposed licence drafting and Code Administrators Code of Practice (CoP), we have answered by subject matter in order to avoid overly repeating comments under each of the questions. As part of our response we have provided views against both the proposed licence drafting and CoP outlined in the sections below.

Licence Drafting

We broadly agree and support Ofgem's proposed licence changes. We believe the introduction of Significant Code Reviews, Self Governance and the principles enshrined in the Code Administrators Code of Practice provides an opportunity to improve the code governance arrangements across the energy industry. We look forward to assisting Ofgem in the operation of the new processes.

We have based our response on the updated Licence drafting issued on 6 May 2010. This licence drafting addresses many of our initial concerns and we appreciate the changes. There remain three outstanding concerns which we recommend you address.

- 1 Clarity that codes take precedence over the CoP
- 2 It is unclear whether the BSC should be consistent with the CoP
- 3 Who has the power to modify the BSC under the Self Governance route?

1 Clarity that codes take precedence over the CoP

The proposed changes to licence condition C3 paragraph 1(e)(iii) states:

"1. The licensee shall at all times have in force a BSC, being a document

e. establishing a secretarial or administrative person or body, [as specified in the BSC], (the "code administrator") and setting out the code administrator's powers, duties and functions, which shall:...

... *(iii) have regard to and, in particular, be consistent with the principles contained in, the Code of Practice;*

Why does this cause concern?

It is our understanding that the intent of the Code Governance Review is to create streamlined, flexible and pragmatic processes that are supported by a consistent approach across the main codes. We fully support this intent. Our concern is that the proposed licence drafting does not enable or reflect this intent.

It is currently not clear that the individual codes, such as the BSC, take precedence over the CoP in the event of conflict. Although the CoP itself states that the individual codes take precedence, there is an implication in the proposed licence drafting that the CoP takes precedence over the codes.

In our view, there is a risk of regulatory uncertainty if the issue of precedence is not dealt with, and we strongly believe that the licence drafting should **explicitly** state that where any conflict exists, the codes take precedence over the CoP.

It is also unclear that whilst Code Administrators need to follow the 12 CoP principles, they do not need to explicitly follow the guidance that is provided below the 12 CoP principles. It is our understanding from discussions with Ofgem that the details provided below each principle are intended as guidance. If a code should differ from the detailed guidance for good reason then this is acceptable to Ofgem. However, this is not reflected in the proposed licence drafting which would obligate ELEXON to be consistent with both the CoP's high level principles and its lower level detailed guidance.

These issues cause the following concerns:

1. Introducing inconsistencies and inefficiencies

To amend the BSC to be fully consistent with the CoP would introduce a number of inefficiencies. This would extend and complicate the existing change process and undermine the efforts made by ELEXON and the Code Administrators Working Group (CAWG) to streamline processes. For example, the need to for all consultations to last for 15 Working Days would, for Modification Proposals passing through a Working Group, extend the overall Modification process by 2 months due to the time taken to produce the necessary reports and the timing of BSC Panel meetings. Under the current BSC, we can flex the length of the consultation to fit the significance of the subject matter, and more often operate with a 10 Working Day period.

The CoP is also inconsistent with current Pending Modifications raised to help implement the recommendations of the CAWG and the Code Governance Review. P247 'Proposer Ownership of Modification proposals' seeks to introduce Proposer ownership and has been developed by a Working Group to create a sensible and pragmatic solution. P247 supports the principles within the CoP yet would be inconsistent with the CoP as the detail of when the Proposer can withdraw its Modification is different – P247 being up to the production of the Assessment Report, whereas the CoP is right through to the final Report being submitted to the Authority.

2. Parties may look to change the CoP in order to change the codes

The lack of a formal change process for the CoP, coupled with the CoP's possible precedence over the codes, may lead to BSC Parties suggesting amendments to the CoP rather than the BSC. Any approved amendments to the CoP would then need to be drafted into the BSC to maintain consistency. Such changes to the CoP may not have undergone the same rigorous industry assessment and consultation as would a BSC Modification Proposal. It would potentially subject Code Administrators to lobbying and would favour those Parties who have time and resource to press their case.

3. CoP as a legal document

The CoP was originally drafted for the CAWG as a guidance document. It outlines the principles that Code Administrators should aspire to and provides examples of how this could be achieved. Because the CoP was drafted as guidance, its wording and phraseology do not reflect normal legal drafting conventions. This could cause issues when ensuring Code Administrators comply with the CoP. In addition, we would be concerned that, unless it is clear that the codes take precedence over the CoP and that the lower level detail is provided as guidance, there is a risk of legal challenges where differences exist between the BSC and CoP.

We believe that we already strive to meet the principles in the CoP, indeed many are based upon current ELEXON practices which we will do our best to improve. However, we would be placed in a dilemma if we had to comply with the exact wording and detail contained within the CoP. We have a duty of care to our customers to provide a robust, transparent and efficient change process. The inefficiencies and lack of clarity that would be introduced by slavishly following all aspects of the guidance could undermine that responsibility and the very principles the CoP is trying to uphold. As importantly, it could also inhibit Code Administrators' ability to innovate and stifle a culture of continual process improvement.

Our proposed solution

We believe that the issues we have detailed above can be resolved without diluting the Code Administrators' obligation to ensure consistency with the CoP. This could be done by **explicitly** stating that the BSC takes precedent over the CoP in the licence.

In addition, you could state in the CoP that:

- Codes Administrators shall be consistent with the CoP's twelve principles (in the yellow boxed areas); and
- The details beneath each principle are suggested guidance on how to meet the principles, but are not mandatory.

2 It is unclear whether the BSC should be consistent with the CoP

The licence condition as currently drafted at paragraph 1(e) places an obligation on the licensee to in effect:

- i establish a Code Administrator i.e BSCCo; and
- ii ensure that the Code Administrator's powers, duties and functions have regard to, and are consistent with, the principles contained in the CoP.

Why does this cause concern?

The proposed licence drafting does not place an obligation on the BSC itself to be consistent with the CoP. Its focus is narrower. Namely, to ensure that BSCCo/BSCCo's powers, duties and functions are consistent with the CoP. However the scope of this licence obligation is inconsistent with the CoP which states that the BSC must be consistent with the CoP.

This confusion is reflected in some of the CoP's principles which relate to BSC processes and not BSCCo's powers, duties and functions. For example, principle 6 of the CoP states that a proposer of a Modification will retain ownership of the detail of their solution. This ownership issue is essentially a matter of BSC procedure and not within the scope of BSCCo's powers, duties and functions.

Our proposed solution

You may want redraft paragraph 1(e)(iii) to clarify that Code Administrators should only be consistent to the relevant CoP principles. This could be achieved by expressing the obligation in paragraph 1(e)(iii) as:

"have regard to and, in particular (to the extent relevant) be consistent with the principles contained in the Code of Practice;"

However, we believe that your intention is that the CoP should relate to Code Administrators and code processes. We recommend that you consider redrafting paragraph 1(e) of the licence in order to clarify that Code Administrators and code processes shall be consistent with the CoP principles.

3 Who has the power to modify the BSC under the Self Governance route?

We have a significant concern regarding the drafting of the Self Governance provisions. The proposed licence drafting is unclear as to who has the power to modify the BSC following an approved Self Governance Modification.

Paragraph 5(a) states that:

"Without prejudice to paragraph 13A" if a report is submitted to the Authority pursuant toparagraph 4(b) (vi)the Authority may direct the Licensee to make the modification.

Paragraph 5(e) states:

"[Without prejudice to paragraph 4A] only the licensee shall have the power to modify the BSC".

Why does this cause concern?

This appears to create three issues:

- 1 The intent of the words ["Without prejudice to paragraph 13A"] in paragraph 5(a) is unclear. Paragraph 13A states in effect that, subject to the relevant conditions being satisfied, the Panel may determine that a Modification should be implemented. The proposed licence condition drafting is otherwise silent as to how the BSC would be modified under the Self Governance change process. The Panel's ability to make a decision to implement a Modification is not the same as the Panel having the power to modify the BSC, unless the licence explicitly provides for this.
- 2 Under the Self Governance route, the Panel's report would not be submitted to the Authority in accordance with paragraph 4(b)(vi). Thus, on the face of it, paragraph 5(a) is not intended to deal with Self Governance Modifications.
- 3 The relevance of the reference to paragraph 4A in paragraph 5(e) is not clear as paragraph 4A deals with the raising of Modification Proposals within the scope of a Significant Code Review. Therefore on the basis of paragraph 5(e), only National Grid has the power to modify the BSC (following a direction from the Authority).

We have also noted two other areas of drafting that we suggest need to be clarified:

- 1 Paragraph 4(b) - the scope of this paragraph potentially includes Self Governance Modifications (see the square bracketed reference to proposals made in accordance with paragraph 4(ab) at the beginning of paragraph 4(b)). However the requirements of paragraph 4(b)(vi) - i.e submission of the Panel report to the Authority and the "send back" mechanism under paragraph 4(b)(vii) - would not appear to be relevant to a Self Governance Modification.
- 2 Paragraph 13A(b) – the reference to the Panel's "final determination" is unclear. We believe that there is potential confusion as to whether the licence condition refers to:
 - the Panel's determination whether to implement a Self Governance Modification; or
 - the Panel's determination as to whether a Modification meets the self governance criteria.

Our proposed solution

We recommend that you clarify:

- who has the power to modify the BSC following the Panel's approval decision on a Self Governance Modification;

- whether the 'send back' mechanism has any relevance to Self Governance Modifications; and
- whether Paragraph 13A(b) refers to the Panel's "final determination" to implement a Modification, or to whether a Modification meets the self governance criteria.

Code of Practice

We fully support the intention of the Code of Practice. As stated above, in relation to our response on Licence Conditions, we can, and will, meet the principles within the CoP and look forward to developing processes to build upon these core areas. We do however have five main concerns, three of which are mentioned in greater detail in our licence drafting comments above.

1 Codes should take precedence over the Code Administrator Code of Practice

We have explained previously our main concern is that that the proposed licence drafting currently suggests that the CoP takes precedence over the codes. We do not repeat our reasons here but it is a fundamental issue that must be resolved. We believe the codes should take precedence over the CoP. Once this concern is resolved then the majority of concerns outlined in our response are removed.

2 CoP should be clarified to indicate which parts are obligations and which parts are guidance

We have also explained our concern that the CoP currently does not explicitly state that:

- Codes Administrators shall be consistent with the twelve principles (in the yellow boxed areas); and
- The details beneath each principle are suggested guidance on how to meet the principles, but are not mandatory.

Making this difference clear would ensure that Code Administrators are consistent with the CoP, without introducing unnecessary inconsistencies with current processes, hindering best practice, adding complexity and stifling innovation.

3 Not all CoP principles are directly under ELEXON's control

We have identified that adherence to some CoP principles may not be entirely within our control. For example, principle 2 states "Documentation published by Code Administrators will be in clear English". Unfortunately, due to the complexity of the balancing and settlement arrangements it may not always be possible to publish all documents in clear English. For example, the BSC itself, and some BSC Systems documentation may not be written in what

all users would consider clear English. We also are not in direct control of all documents we publish. For example, Modification legal text is signed off by the Modification Group.

In order to reflect this concern, principle 2 could be redrafted to state: "As far as possible documentation published by Code Administrators shall be in clear English".

4 Templates

In CoP Appendix B there is a reference to the document templates to be used as part of the Modification process. We are glad to see that templates originally developed by ELEXON following substantial work in our *Write For The Reader* programme were subsequently adopted by the CAWG.

The CoP currently directs users to a Joint Office webpage. We note that some of the templates on this webpage are not being used as designed. For example, the IWA template is being used as a proposal form.

As ELEXON developed the templates, we believe to avoid confusion and provide information the CoP should also link to the ELEXON Modification Template webpage. This shows examples of the templates, how they should be used and where they relate to in the change process. It also includes information on the journey we undertook in developing these templates. Users may find this information useful when trying to understand the templates, offer ideas on further improvement, or if they wish to undertake a similar project themselves. We will provide Ofgem with the hyperlink in order to update the CoP.

5 KPIs

We agree that KPIs are a useful tool to see what works well and where there is room for improvement. If chosen correctly, they would allow Ofgem and customers to identify how Code Administrators are performing well against the CoP principles. We already report our change-related KPIs at the BSC Panel and will continue to publish them on our website.

However, we are unsure as to what Ofgem are looking to measure with the suggested KPIs. We would like clarification as to whether the KPIs would measure Code Administrators, code processes or code panels.

We believe that the most useful measure of Code Administrators and code processes can be achieved from direct customers feedback. We would therefore suggest that Ofgem remove the reference to KPIs in the CoP and amend principle 12 to read 'Code Administrators shall undertake annual joint customer surveys in order to compare how they are meeting the CoP principles'. Joint customer surveys would give clear feedback on Code Administrator performance. It would also allow code signatories to provide qualitative comments on Code Administrators and code processes.

If Ofgem is wedded to the principle of KPIs we are happy to discuss which KPIs would best provide the measures Ofgem are looking for. Alternatively, KPIs could be turned into CoP principles. For example, the KPI on "Percentage of 'bounced' or unsuccessful emails" could be

replaced with a principle that states Code Administrators will maintain up to date circulation lists.

We look forward to discussing how to best measure Code Administrator and code process performance with Ofgem and the other Code Administrators.

Summary

In summary, we welcome Ofgem's proposed improvements to the code governance processes and will endeavour to implement these improvements into the BSC. However, in order to ensure the industry and Ofgem achieve maximum benefit we recommend that the apparent licence and Code of Practice discrepancies as outlined in our response are addressed.

If you have any questions regarding our response please contact Adam Lattimore on 020 7380 4363 who would be happy to help.

Yours sincerely

Chris Rowell

Head of Change Delivery