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Modification proposal:	**Balancing and Settlement Code (BSC) 351: Align the BSC with the changes to the SCR requirements (P351)**		
Decision:	The Authority[1] directs that this modification be made[2]		
Target audience:	National Grid Transmission Plc (NGET), Parties to the BSC, the BSC Panel and other interested parties		
Date of publication:	1 March 2017	Implementation date:	1 April 2017

Background

Ofgem's Code Governance Review (CGR)[3] sought to update and improve the industry code governance arrangements to ensure that they could effectively meet the challenges facing the industry and aimed to reduce complexity to ensure transparency and accessibility for all industry participants. Our CGR final proposals introduced, among other things, the Significant Code Review (SCR) process[4]. A second phase of the CGR (CGR2) focused on extending the CGR conclusions to further industry codes.[5]

In May 2015 we published an open letter setting out our views on issues facing code governance arrangements and seeking responses from industry. This was followed in October 2015 by our Initial Proposals on the third phase of CGR (CGR3)[6]. Our CGR3 Final Proposals[7] built on arrangements introduced by CGR and CGR2. Licence modifications giving effect to our Final Proposals came into force on 10 August 2016, with the requirement that the consequential changes to industry codes would be in place by 31 March 2017. The changes required to the governance arrangements of the BSC[8] relate to the revised SCR process.

The modification proposal

National Grid Electricity Transmission plc (the Proposer) raised Balancing and Settlement Code (BSC) modification number P351: Align the BSC with the changes to the SCR requirements (P351) on 29 July 2016. P351 seeks to implement changes to the BSC modification process following an SCR. In particular, P351 will make changes to Section F of the BSC to now include three options under which an SCR Modification can progress. The three options are:

- Ofgem directs the licensee to raise SCR Modification Proposals and the modification(s) follows the usual industry process

[1] References to the "Authority", "Ofgem", "we" and "our" are used interchangeably in this document. The Authority refers to GEMA, the Gas and Electricity Markets Authority. The Office of Gas and Electricity Markets (Ofgem) supports GEMA in its day to day work. This decision is made by or on behalf of GEMA.
[2] This document is notice of the reasons for this decision as required by section 49A of the Electricity Act 1989.
[3] CGR final proposals are here: https://www.ofgem.gov.uk/publications-and-updates/code-governance-review-final-proposals-4310 The CGR focussed primarily on the BSC, CUSC and UNC. The second phase of CGR (CGR2) extended the arrangements implemented through the CGR to other industry codes.
[4] A process which provides a role for Ofgem to lead complex changes to the industry codes in a holistic manner.
[5] We published our CGR2 final proposals in March 2013: https://www.ofgem.gov.uk/sites/default/files/docs/2013/03/cgr-2---final-proposals_0.pdf
[6] https://www.ofgem.gov.uk/publications-and-updates/code-governance-review-phase-3-initial-proposals
[7] https://www.ofgem.gov.uk/system/files/docs/2016/03/code_governance_review_phase_3_final_proposals_2.pdf
[8] Balancing & Settlement Code: https://www.elexon.co.uk/bsc-related-documents/balancing-settlement-code/

- Ofgem raises SCR Modification Proposals itself and the modification(s) follows the usual industry process; and

- Ofgem leads an end-to-end process to develop the SCR Modification enabling the Authority to submit SCR Modification Proposals directly to the Panel (Authority-led SCR). The usual industry process would not apply.

P351 also seeks to amend the BSC to allow for movement between these three options. This would involve Ofgem issuing a back stop direction to cease progress of any modification proposal(s) resulting from an SCR that was following the usual industry process if, for example, the development of the modification proposal(s) was not meeting the expected policy direction or timescales for implementation. The issuing of this direction would cause the SCR phase to restart. Ofgem could also elect to end progression of an Authority-led SCR and direct a modification(s) to be raised or raise a modification(s) under the usual BSC process.

The Proposer considers that P351 will better facilitate BSC relevant objective[9] (a)[10] by enabling compliance with the CGR3 licence changes, and relevant objective (d)[11] promoting efficiency in the BSC. It is to be noted that BSC objective (c)[12] was also deemed relevant for consideration in subsequent workgroup discussions.

One of the Assessment Consultation respondents made reference to the Competition and Market Authority (CMA) proposed remedies for SCR processes following its recent Energy Market Investigation[13]. In particular, the CMA recommended that Ofgem should have the ability to intervene to take substantive and procedural control of an ongoing strategically important modification proposal only in exceptional circumstances. The respondent considered that without a clearly defined and documented process, the Authority-led SCR option went beyond the CMA recommendation. Taking account of this response, the work group elected to raise an Alternate Modification. The Alternate is identical to P351 except for one additional change. The BSC would define 'SCR Exceptional Circumstances Criteria' where any Authority-led SCR being progressed would have:

- significant impact on consumers; or
- significant impact on market structure; or
- significant impact on more than one industry code.

Ofgem would be expected to include evidence of meeting (at least) one of these criteria in its report to the Panel when submitting the modification proposal. If the Panel decided that at least one of these criteria were not met they would be bound to recommend rejection to the Authority of the modification proposal.

BSC Panel[14] recommendation

At the BSC Panel meeting on 19 January 2017, a majority of the BSC Panel considered overall that neither P351 nor its Alternate better facilitated the relevant BSC objectives

[9] The applicable BSC objectives are set out in standard condition C3(3) of NGET's Transmission Licence: https://epr.ofgem.gov.uk

[10] the efficient discharge of the licensee's obligations under this licence.

[11] promoting efficiency in the implementation and administration of the balancing and settlement arrangements

[12] promoting effective competition in the generation and supply of electricity, and (so far as consistent therewith) promoting such competition in the sale and purchase of electricity

[13] https://www.gov.uk/cma-cases/energy-market-investigation

[14] The BSC Panel is established and constituted pursuant to and in accordance with Section B of the BSC and Standard Special Licence Condition C3 of the Electricity Transmission Licence available at: www.epr.ofgem.gov.uk

and the Panel therefore did not recommend its approval. It is noted that the Panel preferred the Proposer's original modification to the Alternate because the Panel considered that the Alternate went beyond the powers of the BSC. The Panel considered that both the original proposal and the Alternate better facilitated (a) but would be detrimental to objectives (c) and (d).

Our decision

We have considered the issues raised by P351 and the Final Modification Report (FMR) dated 25 January 2017. We have considered and taken into account the responses to the industry consultation(s) which are attached to the FMR[15]. We have concluded that:

- implementation of either P351 or the Alternate will better facilitate the achievement of the applicable objectives of the BSC compared to its current drafting;[16]
- P351 will better facilitate the achievement of the applicable objectives of the BSC compared to the Alternate; and
- directing that P351 be made is consistent with our principal objective and statutory duties.[17]

Reasons for our decision

We consider that either P351 or the Alternate would better facilitate BSC objectives (a) and (d) with a neutral impact on the other objectives.

(a) the efficient discharge by the licensee of the obligations imposed upon it by this licence

We agree with the Proposer, consultation respondents and the Panel that the Proposer's modification better facilitates relevant objective (a). Licence modifications requiring the introduction of the CGR3 governance changes into the BSC governance arrangements are now in force. Relevant licensees must ensure that these licence provisions are efficiently discharged. The changes proposed by this modification will ensure that the relevant licensee can discharge its licence obligations by bringing the BSC modification procedures into line with the CGR3 governance changes (as reflected in the licence).

Regarding the Alternate, we do not think the proposed inclusion of the 'SCR Exceptional Circumstances Criteria', and related provisions, are necessary or appropriate. We consider these provisions could be unduly restrictive and we do not consider it appropriate for the code to seek to include such a restriction on Ofgem. We are concerned they may not be consistent with the licence provisions related to the BSC change process – for example if the consideration of the criteria proposed in the Alternate meant that the Panel was bound to recommend the rejection of a modification proposal in the event it decided that at least one of the criteria was not met, rather than considering the modification proposal with reference to the BSC objectives, as set out in the licence. In any event, we note that if we undertake an Authority-led SCR, our report on any BSC changes that we may propose would include appropriate information on relevant impacts, including on consumers.

[15] BSC modification proposals, modification reports and representations can be viewed on the Elexon website at www.elexon.co.uk
[16] See footnote 9 above
[17] The Authority's statutory duties are wider than matters which the Panel must take into consideration and are detailed mainly in the Electricity Act 1989.

We therefore consider that P351 better facilitates this objective when compared to the Alternate.

(c) promoting effective competition in the generation and supply of electricity, and (so far as consistent therewith) promoting such competition in the sale and purchase of electricity

We disagree with the views of the work group, respondents and the Panel that objective (c) is adversely impacted by P351 and the Alternate modification. We note that comments focused on concerns regarding the Authority-led SCR. These include that the Authority-led process could undermine confidence in the governance of the energy market and introduce regulatory uncertainty as there would be no oversight on Ofgem developing and approving a solution. This could potentially deter new market entrants and result in unplanned costs to suppliers. It was also argued that the Authority-led process goes beyond the CMA's recommendations.

We recognise the importance of full industry engagement in the SCR process and value the input and insights that all parties can provide in reaching the most appropriate solution to a complex issue. In undertaking an Authority-led SCR we would expect all interested parties to have the opportunity to understand and consider the implementation solutions in detail. This will be done via industry meetings and industry-wide consultations. In developing our approach to conducting an SCR, we would, as with any policy development we undertake, have careful regard to our duties in respect of better regulation, including the need to act transparently and accountably. In addition, we have specific duties in respect of protecting consumers, and therefore this process would ensure the effects on them are considered throughout.

We consider that making use of the Authority-led process in this way will provide the regulatory certainty that members of the Panel were concerned would be lacking and whose absence could damage competition in the energy market.

As set out in our CGR3 Final Proposals, we recognise that the CMA's remedies may in time result in us revisiting the need for the SCR process. Following publication of the CMA's remedies we consider that it is appropriate to retain the SCR process at this time.

For these reasons we consider that P351 and the Alternate (in and of themselves) will have a neutral impact on this objective.

(d) promoting efficiency in the implementation and administration of the balancing and settlement arrangements

We disagree with the view expressed by some respondents, the work group and the Panel that objective (d) is negatively impacted because of the potential for Authority-led SCRs to be less efficient than where a modification is progressed by industry following an SCR.

The ability for Ofgem to run an end-to-end SCR process and have the ability to direct timetables for SCR modifications raised under the standard BSC process should drive forward the implementation of our SCR conclusions thereby improving the efficiency in the administration of the BSC and facilitate complex and significant changes to codes. In addition, providing a mechanism for the development of code modification text alongside our consultation with industry to inform our policy conclusions, may provide a way of working through potential implementation issues earlier in the process thereby better facilitating the administration of the BSC.

We consider that P351 better facilitates this objective than the Alternate because the Alternate would place further obligations on the Panel in discharging its duties under the BSC following an Authority-led SCR.

Decision notice

In accordance with Standard Condition C3 of NGET's Transmission Licence, the Authority hereby directs that modification proposal BSC P351: 'Align the BSC with the changes to the SCR requirements' be made.

Lesley Nugent
Head, Industry Codes & Licensing
Signed on behalf of the Authority and authorised for that purpose