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for energy consumers

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Dear Michael,

**BSC Modification Proposal P378 'Introduction of a CM Supplier Interim Charge' – decision on urgency**

On 20 December 2018, VPI Immingham LLP (the Proposer) raised P378.<sup>1</sup> The Proposer requested that the modification should be treated as urgent.

On 24 December 2018 we received a request from the Chair of the BSC Panel requesting that P378 be treated as an Urgent Modification Proposal as per the Proposer's request<sup>2</sup>.

**This letter confirms our decision that Modification Proposal P378 should be progressed on an urgent basis.**

**Background**

P378 seeks to introduce a new time-limited charge on electricity suppliers in the Balancing and Settlement Code (BSC). The judgment of the General Court of the Court of Justice of the European Union<sup>3</sup> on 15 November 2018 had the effect of annulling the European Commission's State aid approval for the GB Capacity Market scheme<sup>4</sup>. Currently, payments from suppliers to fund the cost of payments to Capacity Providers under the Capacity Market are not being collected by the Capacity Market Settlement Body (the Electricity Settlements Company or "ESC") on request of the Government and payments to the Capacity Providers have been suspended.

The Government has confirmed that it is working closely with the European Commission to re-secure State aid approval for the full Capacity Market, and confirmed its view that a positive final State aid decision would allow deferred payments to be made to Capacity Providers who have met their obligations during the "standstill" period<sup>5</sup>. The Proposer

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<sup>1</sup> <https://www.elexon.co.uk/mod-proposal/p378/>

<sup>2</sup> 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.

<sup>3</sup> <http://curia.europa.eu/juris/document/document.jsf?text=&docid=207792&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=1430154>

<sup>4</sup> The judgment does not affect the State aid approval for the Supplementary Auction for the 2017/18 delivery year

<sup>5</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/767015/proposals-for-technical-amendments-to-the-capacity-market.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/767015/proposals-for-technical-amendments-to-the-capacity-market.pdf)

suggests that it would be prudent for suppliers to continue to collect payments from their customers to limit the potential for a substantial bill (to meet the costs of deferred payments) at a later date. The Proposer also suggests that suppliers currently lack a robust legal basis to collect money from customers to plan for the eventual payment to the ESC in the event that the Government successfully secures back-payments (or deferred payments) for Capacity Providers as part of the State aid approval. Therefore, the Proposal has been suggested as an industry-led contingency option for the collection of payments from suppliers to facilitate the orderly reinstatement of the Capacity Market.

## **Panel view**

The BSC Panel met on 20 December 2018 and discussed P378, the request for it to be progressed urgently and the proposed timetable. The Panel unanimously agreed to recommend to Ofgem that P378 should be progressed as an Urgent Modification Proposal for the reasons set out by the Proposer.

Reflecting the Proposer's position, the BSC Panel recommended that P378 progress according to the proposed timetable, subject to an amendment agreed by the Panel at that meeting allowing the Panel to develop an Alternative Modification Proposal under certain circumstances. The Panel also noted that it considered it important for P378 to be developed in parallel with the alternative option proposed in the Government consultation of continued collection of payments from suppliers by the ESC, to minimise potential delays.

## **Our views**

In reaching our decision on the urgency of the Modification Proposal we have considered the details within the Proposal, the Proposer's justification for urgency, the views of the Panel and we have also assessed the request against the urgency criteria set out in Ofgem's published guidance.<sup>6</sup>

Our guidance sets out that an urgent modification should be linked to an imminent issue or a current issue that if not urgently addressed, may cause:

- a significant commercial impact on parties, consumers or other stakeholder(s); or
  - a significant impact on the safety and security of the electricity and/or gas systems;
- or
- a party to be in breach of any relevant legal requirements.

In assessing whether to grant P378 urgent status, we have considered the Proposer's representations that the ongoing uncertainty in suppliers' ability to collect payments from customers (which P378 seeks to address) could have significant commercial impacts on suppliers if deferred payments are permitted as part of the State aid approval. We have also considered the Proposer's rationale that these commercial impacts would have consequential negative impacts on the wider market and consumers, if they were to materialise.

The Proposer explained that one-off "catch-up" payments at a later date could cause bill shocks for customers and that they could also cause financial distress for supply businesses. Ultimately, such distress might result in defaults which (in turn) might result in further costs for other industry parties (and ultimately consumers) under various industry schemes with mutualisation arrangements and bilateral commercial agreements. The Proposer also explained that the commercial impact on Capacity Providers of the uncertainty in suppliers' provisioning for potential future Capacity Market liabilities could adversely affect security of electricity supplies. The Proposer suggested that these risks would become more significant if the modification is not implemented urgently. In addition,

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<sup>6</sup> <https://www.ofgem.gov.uk/publications-and-updates/ofgem-guidance-code-modification-urgency-criteria-0>

the Proposer states that it is critical that there is certainty on the BSC charge proposed by P378 before the next review of the 'default tariff' price cap<sup>7</sup>.

We agree that the nature of these potential impacts meets urgency criteria (in particular, the first and second criteria listed above) and warrants more urgent consideration of the Proposal than what is provided for in the standard BSC modification process.

As regards the timetable, there should be a minimum of 10 working days for responses to be provided to the consultation and the BSC Panel should be able to propose an Alternative Modification following the consultation. The Proposer, Elexon and the BSC Panel must allow themselves sufficient time to comprehensively consider the consultation responses before any final Modification Report is submitted to the Authority. Should we identify a need to consult on the modification ourselves, this would extend the timescales for any decision we are required to make on the modification.

We also note that the Proposal contains retrospective application if approved by the Authority, irrespective of the proposed implementation date. As stated in our published guidance on urgency, it is our general view that retrospective modifications ought to be avoided. However, there may be exceptions to this general principle, and each modification with a proposed retrospective effect will be assessed on a case-by-case basis. As also set out in our guidance, notwithstanding the points raised above, we recognise that a retrospective application of a modification may negate the need for its development to follow an urgent or otherwise contracted timetable, and vice versa. We understand that Elexon is planning to take steps to raise awareness of P378 and the potential for retrospective application, were it to be approved. We encourage such action.

For the avoidance of doubt, in granting the request for urgency, we have made no assessment of the merits of the proposal (including the proposed retrospective application) and nothing in this letter in any way fetters the discretion of the Authority in respect of P378. If you have any queries or comments in relation to the issues raised in this letter, please contact [pooja.darbar@ofgem.gov.uk](mailto:pooja.darbar@ofgem.gov.uk) in the first instance.

Yours Faithfully,

**Michael Wagner**  
**Deputy Director, Wholesale Markets**

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<sup>7</sup> The default tariff price cap is a cap which limits the price a supplier can charge per kilowatt hour of electricity and gas to consumers who on a 'standard variable' energy tariff or a tariff they have not chosen (a 'default tariff').