

## P281 Consultation Responses

Consultation issued on 19 July 2012

We received responses from the following Parties

| Company   | No BSC Parties / Non-Parties Represented | Role of Parties/non-Parties represented                                 |
|---|--|---|
| National Grid   | 1/0                                      | Transmission Company  |
| Smartestenergy Ltd                                      | 1/0                                      | Supplier  |
| Drax Power Limited                                      | 1/0                                      | Generator   |
| Electricity North West                                  | 1/0                                      | Distributor   |
| EDF Energy  | 10/0                                     | Generator/Supplier/Party Agent/Consolidator/Exemptable Generator/Trader |
| IBM UK Ltd for and on behalf of the ScottishPower Group | 7/0                                      | Supplier/Generator/Trader/Consolidator/Exemptable Generator/Distributor |
| RWE npower  | 10/0                                     | Supplier/Generator/Trader/Consolidator/Exemptible Generator/Part Agent  |
| SSE plc   | 9/0                                      | Supplier/Generator/Trader/Consolidator/Exemptible Generator             |
| E.ON  | 5/7                                      | Supplier/Generator/BSC Agent (HH & NHH DC, MOP)                         |

What stage is this document in the process?

01 Initial Written Assessment

02 Definition Procedure

03 Assessment Procedure

04 Report Phase

## Question 1: Do you agree with the Panel's view that the Proposed Modification should be rejected?

### Summary

| Yes | No | Neutral/Other |
|-----|----|---------------|
| 6   | 3  | -             |

### Responses

| Respondent             | Response | Rationale   |
|------------------------|----------|---|
| National Grid          | Yes      | <p>The Proposed Modification which restricts the Board membership to suppliers and generators could introduce a risk to Board independence and impartiality. Furthermore, if the Proposed Modification aims to better represent the BSC Parties on the Board, it is unlikely to be representative of all the Parties because of inherent restriction on Board membership. The Proposed Modification is therefore unlikely to promote efficiency in the implementation and administration of the balancing and settlement arrangements.</p> <p>National Grid agrees with the Panel's view that the Proposed Modification should be rejected.</p> |
| Smartest energy Ltd    | No       | <p>We believe the proposal to have four constituencies split in such a way that all types of parties have the opportunity to be represented on Panel is a positive thing. We supported the original P281 proposed solution, and feel that four Industry elected members would demonstrate that sufficient arrangements for Board input from BSC Parties is provided. Particularly in light of P284, which we also support, whilst recognising the importance of protecting BSC Parties interests.</p>   |
| Drax Power Limited     | Yes      | <p>We agree with the rationale provided by the Panel. In particular, the appointment of Board Members via constituency elections raises serious concerns regarding the impartiality and independence of these Board Members. Moreover, the range of members' expertise and the ability to select Board Members with necessary expertise would be more limited because the Chair's ability to appoint two independent Board Members would be removed.</p>  |
| Electricity North West | Yes      | <p>Our view is that the current independent board is fit for purpose.</p>   |
| EDF Energy             | No       | <p>No. As per our response to the Assessment consultation, we think BSC objective (d) relating to efficient delivery of the BSC could be better met by</p>  |

| Respondent            | Response | Rationale  |
|-----------------------|----------|--|
|                       |          | <p>giving individuals with direct industry experience more influence over the approaches taken by BSCCo in delivering the BSC.</p> <p>BSCCo provides a very specialised service, tightly constrained by the BSC itself. The service is directly funded by BSC Parties, and has a direct impact on their own internal activities and systems. Most of the costs of delivering the BSC as a whole, and managing any changes, lie with BSC Parties themselves, and not in the central administrative body. Increased industry influence could help to efficiently align the interests of BSCCo itself and those of the parties it supports, and on whom it places costs both directly and indirectly through its own activities.</p> <p>We have some concerns that reduction in the number of non-industry members might reduce the ability of the Board to consider issues in a wider business context than just the electricity industry, and could reduce the counterbalance to potential vested interest of groups of industry participants. However, on balance, we continue to support the Proposed Modification over the Alternative because it better addresses the original concern highlighted by the proposer i.e. the current BSCCo Board arrangements can allow the non-Industry Directors and the Chairman to carry Board decisions against the will of the non-executive Industry Directors. Especially in the light of the proposed structural change at BSCCo, we might find that the vast majority of Elexon staff move to New Elexon and only a skeleton staff remaining at BSCCo. In that scenario, we would need a strong BSCCo Board that is capable of understanding the detailed operational and commercial aspects of the BSC.</p> |
| IBM for ScottishPower | Yes      | <p>ScottishPower agrees with the view that P281 Proposed would raise concerns around the impartiality and independence of such elected members and the proposed election arrangements (include only generator and Supplier constituencies) would discriminate against other types of BSC Parties and therefore detrimental to Objective (c). The additional election process, with increased complexity, would also detriment Objective (d) – administration efficiency.</p>   |
| RWE npower            | Yes      | <p>Although the proposed solution does better facilitate the BSC Objectives, we believe there is an underlying weakness that board members are required to act independently, yet the constituency make up of the board implies that elected members are representing a</p>  |

| Respondent | Response | Rationale   |
|------------|----------|---|
|            |          | particular group.   |
| SSE plc    | Yes      | <p>SSE believe that the Proposed Modification, whilst introducing some complexity through the proposed voting mechanism, is a relatively straightforward concept that would allow BSC Parties to nominate suitably skilled candidates (not necessarily regulatory experts) to serve on the Board and give a more direct industry input into the running and control of Elexon. SSE agree that this would help promote confidence in the way that BSC Parties funds are allocated.</p> <p>Additionally, the Proposed Modification provides for a much wider pool of candidates to be put forward for election to the Board than the current process, whilst retaining a link to industry and the need for industry expertise.</p> <p>Whilst recognising the concerns that some may have concerning the perception of a constituency based election process and whether this is consistent with candidates duties as a Company Director if elected, SSE contend that the ownership and funding arrangements of BSCCo are sufficiently unique to warrant the solution proposed. SSE would also argue that the election process is a means of identifying candidates with both suitable industry experience and the necessary skills to run a Company. Once elected, each candidate would be obliged to operate in compliance with Company Law and fulfil their duties as Company Directors, so SSE do not see that a conflict would arise in actuality, merely in perception.</p> <p>As such SSE feel that the Proposed Modification is an improvement on the current baseline.</p> <p>Having said the above, SSE recognise that perception of inequality or inefficiency in establishing the Board could prove divisive and subject to challenge. SSE feel that this issue is addressed by the Alternative Modification and therefore we prefer the Alternative Modification vs the Proposed Modification. Our agreement with the Panel recommendation is based upon this preference.</p> |
| E.ON       | No       | <p>As the proposer of the modification our aspiration for the restructuring of the BSC Board was to have something that was fully democratic by having an elected board representative of the BSC funding parties. We feel this is the best way to ensure the confidence of BSC Parties in Board decisions in a future world where Elexon have separated from the BSC Co and delivery of the BSC arrangements is achieved through a service contract procured by the BSC Board on behalf of BSC</p>   |

| Respondent | Response | Rationale   |
|------------|----------|---|
|            |          | <p>parties which is fully underwritten by them..</p> <p>Given that the risks of the contract will be fully underwritten by BSC funding parties, we were looking for parties to have a greater role in future decision making for the BSC. Our hope was that future BSC Board members would be drawn from the industry with relatively current experience of the energy market and so will understand the challenges that BSC parties are facing with electricity market reform or with other initiatives such as the role out of smart metering and that they would be better placed to ensure decision making was reflective of the industry's needs and concerns. Equally important to our proposal was the requirement that Board members were drawn equally from large and small parties so that a balanced view of the parties was reflected in future decision making.</p> <p>For this reason we do believe that the proposed better addresses the defect identified.</p> |

## Question 2: Do you agree with the Panel's view that the Alternative Modification should be approved?

### Summary

| Yes | No | Neutral/Other |
|-----|----|---------------|
| 5   | 4  | -             |

### Responses

| Respondent          | Response | Rationale  |
|---------------------|----------|--|
| National Grid       | Yes      | <p>The Alternative Modification allows the BSC Parties to provide greater input into the selection process for Board members and also retains impartial industry oversight via the Panel (e.g. candidate veto). Furthermore. It also incorporates established best practice in corporate governance (e.g. nominations committee). The Alternative Modification could therefore promote efficiency in the implementation and administration of the balancing and settlement arrangements.</p> <p>National Grid agrees with the Panel's view that the Alternative Modification should be approved.</p> |
| Smartest energy Ltd | No       | <p>We do not believe the Alternative solution offers a robust process for appointment of candidates to the Board, and the process appears vague and open to</p>  |

| Respondent             | Response | Rationale  |
|------------------------|----------|--|
|                        |          | <p>interpretation. Having 'Industry experience' does not automatically mean that that candidate is well placed to represent BSC Parties. We feel that by appointing candidates as Industry board members who directly represent their relevant constituency, the Proposed solution would offer up the transparency and robustness the Alternative solution aspires to deliver.</p>   |
| Drax Power Limited     | Yes      | <p>We agree with the rationale provided by the Panel. The final Alternative Modification represents a significant improvement on earlier versions of the Alternative Modification. Changes that are particularly welcome are those which ensure that:</p> <ul style="list-style-type: none"> <li>• Panel decisions on the Nomination Committee ToR are binding on the Board</li> <li>• a majority of Board Members (excluding the Chair) must have relevant industry experience</li> <li>• at least one Nomination Committee Member must have relevant industry experience</li> </ul> <p>Overall, these changes will ensure that the BSC Parties have increased input into Board Member appointments resulting in greater industry oversight and empowerment. The changes would also increase the range of individuals and expertise from which industry Board Members may be appointed. Moreover, we believe that the proposed Board structure is particularly appropriate in the event that Elexon is allowed to diversify its business activities into non-BSC related market segments.</p> |
| Electricity North West | No       | <p>Albeit this alternative is better than the proposal our view is that the current board is fit for purpose, is equally balanced between industry and non industry participants together with an appointed Ofgem Chair thereby creating total independence. Albeit there is an attempt to mitigate independence, there is a slant towards the majority of the board being made up from industry participants.</p>   |
| EDF Energy             | No       | <p>No. As per our response to the Assessment consultation, we are concerned that the Alternative proposal could potentially reduce the influence of BSC parties, who are the main stakeholders. Recognising that BSCCo is effectively a monopoly provider, we think the Alternative might give overall outcomes that are less efficient in delivering the BSC and so not better meet BSC Objective (d).</p> <p>Although it is a common approach for a board to</p>   |

| Respondent            | Response | Rationale  |
|-----------------------|----------|--|
|                       |          | <p>approve new members itself, using a committee or otherwise, we think the BSC arrangements are sufficiently different that this is not a suitable approach for BSCCo. Most company board decisions usually have primary impact on the company itself and its shareholders, with competition for customers at stake. In the case of BSCCo, much of the impact of decisions can be directly felt by the companies it serves, who are not customers that have any other choice.</p> <p>The Alternative does not appear to address the defect stated in the proposal, that the Board might take decisions that are not supported by the majority of BSC Parties and other stakeholders affected by those decisions. The Alternative might result in less "industry" influence over Board decisions, given the uncertainty in eventual Board membership.</p> <p>On page 10 of the consultation, under the heading Panel Ratification and BSC Party input, it states that the Panel has the power to veto the appointment of a candidate to the Board. However, reading the legal text, this is not a blanket power that the Panel has; sections B6.2.9 and C4.1 suggest that removal or veto of ratification of new candidates can only be made in very limited circumstances of the candidate not meeting specific criteria. Therefore, it remains possible for the Board to take decisions that are not supported by the majority of BSC Parties as identified as the defect.</p> |
| IBM for ScottishPower | Yes      | ScottishPower agrees with the view that P281 Alternative is in line with best corporate governance practice and would deliver increased transparency and industry participation. It also removes the perceived tension caused by individuals acting as both Panel and Board industry members and therefore enables better efficient operation of the BSC. This would better facilitate the achievement of Objective (c) – competition and (d) - efficiency.  |
| RWE npower            | Yes      | The alternative solution would endorse a transparent selection process which better facilitates the BSC Objectives, above that of the proposed solution. However, the protection of industry interests relies heavily on the robustness of the Authority process for appointment of Chairman of the Board.   |
| SSE plc               | Yes      | SSE agree that the solution identified, whilst adding some complexity, aligns itself better with Corporate Governance guidelines and best practice and as such addresses any issues of perceived bias or inequality that   |

| Respondent | Response | Rationale  |
|------------|----------|--|
|            |          | <p>might arise from the Proposed Modification.</p> <p>It allows for a very wide talent pool to be accessed for the selection of candidates to serve on the Board, thus addressing a key restriction in the current arrangements. Equally, it provides for the need to retain a minimum industry experience and a role for the industry in the establishment and oversight of the selection process, thus allowing industry to derive greater confidence in the constitution and operation of the BSCCo Board.</p> <p>SSE therefore agree with the Panel recommendation to approve the Alternative Modification as we feel it will improve upon the current baseline.</p> |
| E.ON       | No       | <p>The alternative removes the democratic process that we sought to introduce into the selection of Board members, and therefore doesn't address the defect in the BSC that we identified. Equally we are concerned that the nomination and selection process of Board members will not achieve the objective of the proposal – to have a Board constituted from BSC funding parties who ultimately bear the risk of the Board decisions.</p>  |

### Question 3: Do you agree with the Panel's recommended Implementation Date for P281 Proposed and Alternative Modifications?

#### Summary

| Yes | No | Neutral/Other |
|-----|----|---------------|
| 6   | 3  | -             |

#### Responses

| Respondent         | Response | Rationale   |
|--------------------|----------|---|
| National Grid      | Yes      | National Grid agrees with the Panel's recommended implementation date of 10 Working Days following approval by the Authority, for both P281 Proposed and Alternative. |
| Smartestenergy Ltd | Yes      | -   |
| Drax Power Limited | Yes      | The proposed implementation dates for both Modifications appear reasonable.   |

| Respondent             | Response | Rationale   |
|------------------------|----------|---|
| Electricity North West | No       | We do not believe either Modification is acceptable.  |
| EDF Energy             | No       | In the absence of a firm transition process in the legal text, an implementation period greater than 10 days could be required to put in place all the required arrangements.   |
| IBM for ScottishPower  | Yes      | ScottishPower agrees that the Nominations Committee should commence the process as soon as possible in accordance with its Terms of Reference and the P281 Alternative provisions, after taking into account the need to preserve some continuity, experience and expertise on the Board. Presumably, only the industry members are replaced initially, with existing non-industry Board members retained for continuity, which also avoids the issue with the early termination of appointment of existing non-industry Board members.   |
| RWE npower             | Yes      | -   |
| SSE plc                | No       | For the Proposed Modification, given that the BSC Panel elections for Term 2012-2014 have just concluded, we do not agree that the initial Supplier and Generator Board elections should be conducted at the same time as the next feasible Panel Election following implementation. This would create an unnecessary and unwelcome delay to reform. Were the Proposed Modification to be approved, SSE believe that elections should be conducted as soon as possible following approval and implementation.<br><br>SSE agree with the recommended Implementation Date for the Alternative Modification. |
| E.ON                   | Yes      | -   |

Question 4: Do you agree that the Proposed Modification legal text delivers the P281 Proposed solution?

#### Summary

| Yes | No | Neutral/Other |
|-----|----|---------------|
| 8   | -  | 1             |

## Responses

| Respondent             | Response | Rationale   |
|------------------------|----------|---|
| National Grid          | Yes      | -   |
| Smartest energy Ltd    | Yes      | Surely, the legal text is included in Attachment A not page 8. However, we agree that the legal text delivers the P281 Proposed Solution. |
| Drax Power Limited     | Yes      | We believe so.  |
| Electricity North West | N/A      | -   |
| EDF Energy             | Yes      | -   |
| IBM for ScottishPower  | Yes      | The legal text appears appropriate.   |
| RWE npower             | Yes      | -   |
| SSE plc                | Yes      | -   |
| E.ON                   | Yes      | -   |

Question 5: Do you agree that the Alternative Modification legal text delivers the P281 Alternative solution?

## Summary

| Yes | No | Neutral/Other |
|-----|----|---------------|
| 6   | 2  | 1             |

## Responses

| Respondent             | Response | Rationale  |
|------------------------|----------|--|
| National Grid          | Yes      | -  |
| Smartest energy Ltd    | Yes      | Surely, the legal text is included in Attachment B not page 11. However, we agree that the legal text delivers the P281 Proposed Solution. |
| Drax Power Limited     | Yes      | We believe so.   |
| Electricity North West | N/A      | -  |
| EDF Energy             | No       | No. As mentioned above, it has been suggested that the Panel has the power to veto the appointment of a                                    |

| Respondent            | Response | Rationale   |
|-----------------------|----------|---|
|                       |          | candidate to the Board. However, reading the legal text, this is not a blanket power that the Panel has; sections B6.2.9 and C4.1 suggest that removal or veto of ratification of new candidates can only be made in very limited circumstances of the candidate not meeting specific criteria. Therefore, it remains possible for the Board to take decisions that are not supported by the majority of BSC Parties. |
| IBM for ScottishPower | Yes      | The legal text appears appropriate.   |
| RWE npower            | Yes      | -   |
| SSE plc               | Yes      | -   |
| E.ON                  | No       | There is a difference in the appointment of a Panel Chairman process between the Proposed and the Alternative, which in the Alternative requires consultation with the Board whereas the Proposed does not. I don't believe the appointment of the Panel Chairman was expected to differ under either Proposed or the Alternate modifications.  |

## Question 6: Do you have any further comments on P281?

### Summary

| Yes | No | Neutral/Other |
|-----|----|---------------|
| 3   | 6  | -             |

### Responses

| Respondent          | Response | Rationale  |
|---------------------|----------|--|
| National Grid       | No       | -  |
| Smartest energy Ltd | Yes      | <p>Under Section 7; 'Workgroup Discussions', we note that the suggestion to retain two independent Board members has been discarded, although we think that this approach would alleviate the risk of impartiality.</p> <p>We feel the Alternative solution is unclear and would add complexity and/or opacity to the BSC arrangements. We disagree with the Workgroup's assumption that P284 has no impact on P281 because the Alternative solution could lead to a blur in the arrangements post implementation of P284.</p> <p>Furthermore, we agree that P281 Proposed would better facilitate the achievement of the Applicable BSC</p> |

| Respondent             | Response | Rationale  |
|------------------------|----------|--|
|                        |          | Objectives, compared with the current baseline, and the Alternative solution, and that any impartiality concerns are only perceived. We do not agree that the Alternative solution would deliver a greater transparency or better facilitate the BSC Objectives and feel that should the Alternative be implemented, then arrangements could be confusing for parties, and that impartiality will become an issue.   |
| Drax Power Limited     | No       | N/A  |
| Electricity North West | No       | -  |
| EDF Energy             | No       | -  |
| IBM for ScottishPower  | Yes      | ScottishPower also believes that for good corporate governance and to avoid any conflict of interest, no company and its affiliates should have members in the BSC Panel and the BSC Board. This criterion should be in the Nomination Committee's terms of reference.   |
| RWE npower             | No       | -  |
| SSE plc                | No       | -  |
| E.ON                   | Yes      | <p>During the modification group meetings, concerns were expressed at the risk of a constitutional election process producing Board members that only represented the interests of the constituency that elected them and that would not necessarily act in the interests of the BSC, we reject this assertion completely.</p> <p>Many industry parties have employees who are directors of other code governance boards and there is no evidence of the behaviour suggested. Directors have a legal duty to act in the interest of the companies on which they serve as directors, and were this ever to happen it would clearly be grounds for removal of a director. Similarly the requirement under the BSC for a signatory to the BSC to act independently is a requirement covered in the code under Section B 2.8.1 (a) &amp; (b). We feel that this is a spurious argument that has no evidential basis and should therefore be disregarded in the assessment of the proposal.</p> |