



Stage 04: Final Modification Report

What stage is this document in the process?

01 Initial Written Assessment

02 Definition Procedure

03 Assessment Procedure

▶ 04 Report Phase

P262: Code Governance Review: Significant Code Reviews, Self-Governance and Code Administration Code of Practice

The Ofgem Code Governance Review has recently amended the Transmission Licence to introduce a Significant Code Review Process, the ability for the BSC Panel to make decisions on Self-Governance Modifications and provisions for a Code Administrators Code of Practice.

P262 seeks to introduce the necessary procedures and requirements into the BSC to enable the delivery of the new Transmission Licence obligations.



The Panel recommends **Approval** of the Alternative Modification



High Impact:
BSC Panel, Parties progressing or partaking in the Modifications process, ELEXON

P262
Final Modification Report

12 November 2010

Version 1.0

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About this document:

This document is a Final Modification Report, which was sent to the Authority on 12 November 2010, on behalf of the Panel. The Authority will consider the Panel’s recommendations, and decide whether or not this change should be made.

There are 5 documents for this Final Modification Report:

This is the **main document**. It outlines the solution, impacts, costs, benefits and implementation approach for the change. It includes the Panel’s final recommendation on whether the change should be approved.

Attachment A provides further supporting details of how the Modification Group’s discussions have led it to its initial views. It also contains details of how the Proposer has amended their solution based on discussions with Ofgem and the Modification Group.

Attachment B contains Proposed Modification legal text.

Attachment C contains Alternative Modification legal text.

Attachment D contains P262 Proposed/Alternative Modification and P263 draft BSCP40 ‘Change Management’ redlined changes.



Any questions?

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Why Change?

In July 2010 Ofgem directed that licence modifications be made to implement the Code Governance Review Final Proposals. They also noted that the industry codes would need to be updated by 31 December 2010. The Transmission Licensee has raised Modification Proposals in order to align the BSC with the new processes and policies coming into effect in the Transmission Licence.

Proposed Solution

The Proposed Modification would align the BSC to the updated Transmission Licence by introducing the following concepts and processes into the BSC:

- Significant Code Reviews (SCRs)
- Self-Governance
- Code Administration Code of Practice (CACoP)

Alternative Solution

The Alternative Modification is identical to the Proposed Modification with the exception that it would place a BSC requirement on ELEXON to gain explicit Panel agreement before proposing any changes to the CACoP. Under the Proposed Modification, ELEXON would gain explicit Panel agreement as a working practice rather than a BSC requirement and would seek to add this requirement to the CACoP rather than the BSC.

Impacts & Costs

P262 would impact the Parties participating in the Modification Procedures, Panel, Modification Groups and ELEXON. The ELEXON cost to implement P262 is estimated at £2,400, equating to 10 man days effort.

Implementation

P262 has an Implementation Date of:

- 31 December 2010 if an Authority decision is received on or before 10 December 2010; or
- 15 Working Days after an Authority decision if a decision is received after 10 December 2010.

The Case for Change

The **majority** of the Panel agreed that **both the Proposed and Alternative** Modifications **would be better** than the current arrangements against **Applicable BSC Objectives (a) and (d)**. A **minority** also cited benefits against **Applicable BSC Objective (c)**.

A **minority** believed that **neither the Proposed nor Alternative** Modification would be better than the current arrangements against **Applicable BSC Objectives (a), (c) and (d)**.

Recommendations

The majority recommendation of the Panel is to approve the P262 Alternative Modification.

Code Governance Review

The industry codes contain the contractual arrangements for participating in the Electricity and Gas markets. In November 2007 Ofgem launched the Code Governance Review. The aim of the review was to reduce the complexity and fragmentation, and to increase the transparency and accessibility, of these arrangements. In July 2010 National Grid agreed to Ofgem-directed Transmission Licence changes that implement the Code Governance Review Final Proposals. Ofgem noted that the industry codes would need to be updated by 31 December 2010. To fulfil its requirement to ensure the BSC is consistent with the Transmission Licence, National Grid raised Modification Proposals to align the BSC with the modified Transmission Licence.

The supporting BSC changes fall into 5 distinct areas:

- SCRs
- Self-Governance
- CACoP
- Send Back Process
- Environmental Assessment

National Grid has split the relevant Transmission Licence changes into 2 Modification Proposals. This Modification Proposal covers:

- Significant Code Reviews
- Self-Governance
- CACoP

Significant Code Reviews

The SCR process has been introduced to facilitate the progression of significant industry changes in the most efficient manner. Ofgem has the sole right to raise SCRs, but will consult on the scope of the review before commencing the SCR.

Once commenced, the SCR will utilise a number of industry workshops to develop an SCR conclusion. The SCR conclusion may result in an Authority direction that:

- Requires National Grid as the licensee to raise a Modification(s) to the BSC; or
- States no changes to the BSC are needed

The period between the SCR commencing and SCR closing is known as the 'SCR Phase'. Further details on the SCR process can be found in the final licence modifications (see the following [link](#)).

Whilst specific details of the SCR process are outside the scope of the BSC, changes to the BSC are required to accommodate this new process.

Self-Governance

The amendments to the Transmission Licence provide for a Self-Governance route for those Modification Proposals which the Panel deem unlikely to have a material effect on:

- Existing or future electricity customers;
- Competition in generation or supply;
- The operation of the transmission system;
- Security of supply;
- Governance of the BSC,

and if the Panel believe the Modification is unlikely to discriminate against different classes of BSC Parties.

The Self-Governance route allows the Panel to make a determination on a Modification rather than a recommendation to the Authority, who in turn make the final determination.

Code Administration Code of Practice

The Code Governance Review has created a CACoP for all Code Administrators to adhere to. The idea of the Code of Practice is to help spread consistency across the industry codes by providing guidelines on minimum standards and practices.

Other related Code Governance Review changes

[P263](#) has been raised alongside P262 and supports the Code Governance Review changes in the areas of:

- Send Back Process
- Environmental Assessment

As P263 requires no further assessment and development the Panel has directed it straight to Report Phase. The Report Phase Consultation took place at the same time as the P262 Assessment Procedure Consultation.

In addition, National Grid has raised similar changes under the CUSC and the Uniform Network Code (UNC). Once again, although we need to be mindful these changes exist, they do not directly interact with P262.

Although not raised to facilitate the Code Governance Review, [P264](#) has been raised as a result of the introduction of SCRs with the aim being to protect Parties' appeal rights for licence-originated Modification Proposals. [P264](#) proposes that when the BSC Panel votes to determine their final recommendation on a Modification the Licensee as been obligated to raise, a two-thirds majority will be required. If a two-thirds majority is not reached, the Modification will be progressed as recommended for rejection. [P264](#) is currently undergoing Assessment.

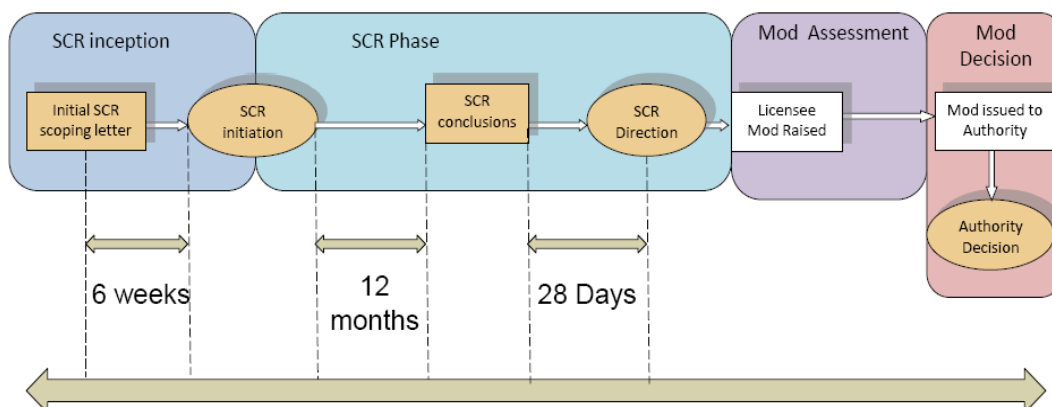
Significant Code Reviews

The SCR process can be split into three main sections:

- **SCR inception** – the period between the Authority publishing an initial scoping letter and the commencement of the SCR. This period is likely to last around 6 weeks.
- **SCR Phase** – the period starts from the date the SCR is launched, as directed by the Authority, and ends either:
 - When the licensee raises a Modification Proposal as directed by the Authority as a result of the SCR conclusions;
 - 28 days after the Authority has published its SCR conclusions; or
 - If the Authority issue a statement that no directions will be made to the BSC.
- **Post SCR Phase** – the period following the SCR Phase where Modification Proposals are potentially raised by the Licensee in order to enact the SCR conclusions.

The sections below detail the impact the different SCR sections have on Modifications going through the process.

Figure 1: The SCR process



Modifications raised prior to the SCR Phase

Modification Proposals raised before the commencement of the SCR Phase (during SCR inception or earlier) progress through the standard BSC Modification Process as normal.

Modification Groups and the Panel may take into account the ongoing SCR work when forming their recommendations, as they currently do with other wider industry issues, but there are no other obligations or restrictions.

When a SCR Phase commences ELEXON will have discussions with those Proposers that have Modification Proposals already in the process, providing advice on any likely impact. If there is an impact Proposers may wish to withdraw their Modification Proposals, but they do not have to.

Proposer requested suspension

The Proposer of any Modification Proposals raised before the start of a SCR Phase can request to the Panel that progression is suspended on their proposal whilst the SCR Phase is ongoing. The Proposer would need to provide rationale as to why this suspension was justified. The Proposer can make this request at any time up until the final Modification Group recommendation in the Assessment Procedure.

ELEXON would present this request to Panel who would then make a decision about suspending progression until completion of the SCR Phase. The Authority would have no veto on extending the Assessment Procedure in this case.

This decision is a 'one way ticket' – once suspended a Modification Proposal will not be progressed until the completion of the SCR Phase. Once suspended the Modification Proposal would be a 'SCR Suspended Modification Proposal'. The Proposer can withdraw their SCR Suspended Modification Proposal at any time.

Impact of Send Back Process

[P263](#) is proposing to introduce the ability for the Authority to send a Modification Report back into the process. If this situation was to occur, any Modification Proposal raised before the commencement of a SCR Phase which is sent back by the Authority during an SCR Phase would not be subject to the SCR provisions.

Modifications raised during a SCR Phase

The amended Transmission Licence gives Ofgem the ability to 'Subsume' a Modification Proposal if it is raised during the SCR Phase. If a Modification is subsumed it will 'freeze' in the Modification Process until the conclusion of the SCR Phase. The intention is to subsume those Modifications that are linked to the SCR topic to prevent the same work being done under the BSC and the SCR. If Ofgem believe a Modification is not linked to a SCR then they may declare it exempt and it will progress through the Modifications Process as normal.

The sections below detail how Modification Proposals will be treated during an SCR Phase.

Raising a Modification Proposal

If a Modification Proposal is raised during a SCR Phase ELEXON will, prior to the BSC Panel meeting:

- Discuss with the Proposer and the Authority whether or not they believe the Modification falls within the scope of the SCR; and
- Capture the views and rationale of Proposer, Authority and ELEXON in the Initial Written Assessment (IWA) report that is presented to the Panel.

To assist in the discussions, the Modification Proposal form (contained in BSCP40 'Change Management') will be updated to include a new section allowing the Proposer to justify why their Modification Proposal is not linked to an SCR, and therefore exempt.

Proposer wishing to contribute to a SCR should contact Ofgem directly rather than raising a Modification Proposal. ELEXON can help Parties by facilitating any discussions with Ofgem.

SCR exempt Modifications

At any point, from being raised up until the Panel's final recommendation, the Authority may declare a Modification Proposal exempt from the SCR process.

To do this, the Authority inform the BSC Panel that the Modification Proposal is SCR exempt either at a Panel meeting, or in writing, detailing their rationale. It is envisaged that the Authority would generally do this verbally when the IWA is presented to Panel.

Modification Proposals that have been declared SCR exempt enter the normal Modification Procedures following the timetable as detailed in the IWA, or a suitable timetable as agreed by the Panel and the Authority.

SCR Subsumed Modification Proposals

Modification Proposals which are not SCR exempt will be 'Subsumed' by the Authority. Once the Authority has declared a Modification Proposal to be Subsumed:

- ELEXON will inform the Proposer and other participants within 1 Working Day of the decision to subsume a Modification Proposal; and
- The Modification Proposal's progression through the Modification process freezes until the end of SCR Phase.

The Proposer has the right to withdraw their Subsumed Modification Proposal at any time during the SCR Phase.

SCR Suitability Assessment

When directed by the Authority the Panel are required to undertake a 'SCR Suitability Assessment'. The SCR Suitability Assessment allows the Panel to provide an assessment to the Authority on whether a Modification Proposal is linked to an SCR and should be subsumed.

As part of an SCR Suitability Assessment the BSC Panel:

- Shall form a recommendation to the Authority as to whether or not the Modification Proposal is linked to an ongoing SCR;
- May consult with industry (optional); and
- Shall direct ELEXON to issue the result of the SCR Suitability Assessment to the Authority for determination. This includes the Modification Proposal, Panel discussions and any relevant representations.

Once the Authority has an SCR Suitability Assessment there are two outcomes:

- The Modification Proposal is not linked to a SCR and will be declared **SCR exempt** by the Authority; or
- Modification Proposals linked to a SCR will be declared **SCR Subsumed** by the Authority. The Authority will direct the Panel, in writing, to freeze the progress of that Modification Proposal until the completion of the SCR Phase.

While the SCR Suitability Assessment is being undertaken the Modification Proposal will not 'freeze' in the process and shall progress as normal through the Modification Procedures. The progression will only stop if the Authority declares a Modification Subsumed.

Only the Authority can direct the Panel to conduct a SCR Suitability Assessment. If the Panel, of its own volition, wishes to conduct a SCR Suitability Assessment on a Modification Proposal then it must first gain agreement from the Authority.

Treatment of Alternative Modifications

Alternative Modifications will be progressed in line with the Proposed Modifications to which they relate.

For example, if a Modification Proposal is declared SCR exempt, all potential Alternative Modifications are also considered to be SCR exempt until otherwise directed by the Authority.

If the Authority directs the Panel to conduct a SCR Suitability Assessment on a Modification Proposal, both the Proposed and any Alternative Modifications would undergo the SCR Suitability Assessment.

If the Proposed Modification is Subsumed then any Alternative Modifications are also Subsumed.

Subsumed Modifications – Request for Urgency

The Proposer of a SCR Subsumed Modification can request that their Modification be considered Urgent at any time. To do this:

- The Proposer provides the Panel with justification and rationale as to why they believe their Modification is now urgent;
- The Panel review the request and make a recommendation on urgency to the Authority;
- The Panel recommendation, along with the Proposer's justification would be sent to the Authority for determination;
- The Authority determine whether the Proposal can be considered urgent or not. There are two outcomes:
 - Not urgent – Modification Proposal remains Subsumed; or
 - Urgent – Modification Proposal exits Subsumed process and Panel agrees an urgent progression timetable and steps.

Proposers would be able to request urgency any number of times.

Post SCR Phase

Licensee raised Modifications as a result of a SCR

If the Authority directs the Licensee to raise a Modification Proposal as a result of the SCR conclusions then:

- The Panel cannot refuse to accept such a SCR Modification Proposal on the basis that it has substantially the same effect as a Pending Modification Proposal or a Rejected Modification Proposal;
- The Licensee cannot withdraw the Modification from the process without prior consent from the Authority;
- If a SCR Modification Proposal is withdrawn then the current adoption rules apply. However, we would expect Parties who adopted a withdrawn SCR Modification Proposal to do so because they wanted to progress a viable Alternative Modification which had been developed by the Modification Group;
- If the Licensee has withdrawn its SCR Modification Proposal it would be able to raise another SCR Modification Proposal (including in the event that their original SCR Modification Proposal was adopted). The same SCR Modification Proposal rules apply to this new SCR Modification Proposal;

- The SCR Modification Proposal shall not be amalgamated with any other Modification Proposal without prior consent of the Authority; and
- The voting rights of the BSC Panel and Modification Groups are not fettered in any way when making recommendations or decisions on the SCR Modification Proposal.

What happens to Subsumed Modifications after the SCR Phase?

Once the SCR Phase has ended, Subsumed Modification Proposals will re-enter the Modification Procedures. At this point the following will happen:

- ELEXON will discuss with Proposers whether they want to continue the progression of their Modification Proposal. Proposers can choose to continue progression or withdraw their Modification Proposal (normal withdrawal processes and rules will apply).
- If the Proposer chooses to progress their Modification Proposal, ELEXON will present an updated timetable to the Panel for approval. This timetable will include all the activities required to complete the Modification Proposal's progression.
- In formulating the timetable ELEXON will consider whether it is possible to restart the timetable at the point where the Modification Proposal was subsumed. It may be that previous analysis will need to be repeated as it is now out of date. If need be, ELEXON would discuss the progression timetable with the Proposers and other relevant experts.
- Once the Panel has approved the timetable ELEXON (and, if need be, a Modification Group) will complete all required activities.

In the situation that the Proposer cannot be contacted, or refuses to participate in the Modification Procedures, the Panel can use the current provisions for withdrawing Modification Proposals where the Proposer is frustrating the process.

Other Modifications raised post SCR Phase

Once the SCR Phase has finished, the SCR Phase Modification rules described above no longer apply. All Modification Proposals raised outside of a SCR Phase will progress as normal through the process and cannot be subsumed.

If Parties have alternative proposals to the Licensee raised SCR Modification Proposal, then they should endeavour to raise these in time to be considered alongside the Licensee's SCR Modification Proposal.

4 Proposed Solution – Self-Governance

It is proposed that provisions for a Self-Governance process is introduced into the BSC to reflect the Transmission Licence drafting.

Becoming a Self-Governance Modification

Raising a Modification

The Proposer should indicate, with justification, on the Modification Proposal form as to whether they believe their Modification Proposal is Self-Governance. The Modification Proposal form will be amended to include a relevant Self-Governance section.

As part of the raising of the Modification Proposal ELEXON will:

- Discuss with the Proposer and the Authority any issues on Self-Governance and assist the Proposer in completing the form; and
- Capture the views and rationale of the Proposer, the Authority and ELEXON in the Initial Written Assessment (IWA) report that is presented to the Panel for their consideration.

Panel Self-Governance Statement

If the Panel decide that a Modification Proposal should proceed under the Self-Governance route (and no Authority determination has been made on Self-Governance - see below), the Panel must complete a "Self-Governance Statement".

The Self-Governance statement informs the Authority of the Panel's decision to proceed down the Self-Governance route. It will include the Proposal form, the Panel's rationale and discussions as to why the change is Self-Governance.

ELEXON will issue a 'Self-Governance Statement' to the Authority within 1 Working Day of the Panel decision.

If the Panel submit a Self-Governance Statement they must consult with industry on the suitability of the proposal for Self-Governance. The responses to the consultation must be issued to the Authority at least 7 days before the Panel make a final decision on the Modification Proposal.

- If a Modification Proposal is in the Assessment Procedure, the Self-Governance consultation will form part of the standard Assessment Procedure consultation. The consultation responses will be reviewed by the Panel when they consider the Assessment Report and issued to the Authority following the Panel meeting.
- If a Modification Proposal is in the Report Phase, the Self-Governance consultation will form part of the standard Report Phase consultation. Once received, the consultation responses will be issued to the Authority at least 7 days prior to the Panel meeting where a final decision is made.

It should be noted if a decision to proceed as Self-Governance is taken after the Report Phase Consultation, by either the Panel or the Authority, a consultation will be required to elicit industry opinions on the suitability of Self-Governance and/or revised Implementation Dates.

Withdrawing the Self-Governance Statement

At any time after issuing the Self-Governance Statement up until the Panel's final recommendation, the Panel may withdraw the Self-Governance Statement. The

consequence of withdrawing the Self-Governance Statement is that the Panel wave the right to make a final decision and instead make a final recommendation to the Authority.

The rationale for withdrawing the Self-Governance Statement will be captured in the Final Modification Report.

Vetoed Self-Governance Statements

At any time after issuing the Self-Governance Statement, up until the Panel's final recommendation, the Authority can veto the ability for Self-Governance.

To do this the Authority must write to the Panel with rationale as to why they believe the Self-Governance criteria has not been met.

Authority initiated Self-Governance route

At any time up to the Panel's final decision, the Authority may determine that a Modification Proposal is Self-Governance. In that case the Panel does not need to provide a Self-Governance Statement.

Panel decision on Self-Governance Modifications

If the Authority does not veto a Self-Governance Statement, and the Panel does not withdraw the Statement, then the Panel shall make a final decision on the Self-Governance Modification Proposal.

On the day of the Panel determination, ELEXON will issue a summary of the decision to participants. ELEXON will update the Final Modification Report and issue to Ofgem, National Grid and other participants within 3 Working Days of Panel's decision.

Modifications approved by the Panel may not be implemented within 15 Working Days of a Panel decision, this is to allow for any potential appeals.

Appeals process

Participants have 15 Working Days in which to raise an appeal following the Panel decision. This time period includes the day of the Panel decision.

To raise an appeal a participant must write to the Authority and the Modification Secretary outlining their appeal. Within 1 Working Day ELEXON will notify participants that an appeal has been raised and that the implementation of the Modification Proposal is now on hold.

If an appeal is launched, the implementation of a Modification Proposal will not proceed until a direction is received from the Authority.

Grounds for appeal

A Party cannot appeal on the grounds that it believes a Modification Proposal should not follow the Self-Governance route, but it can appeal on the following grounds:

1. The appealing party is, or is likely to be, unfairly prejudiced by the implementation or non-implementation of that modification or alternative proposal; or
2. In the case of a Panel decision to approve, the Proposed or Alternative Modification may not better facilitate the achievement of at least one of the Applicable BSC Objectives; or
3. In the case of a Panel decision to reject, the Proposed or Alternative Modification may better facilitate the achievement of at least one of the applicable BSC objectives; and

4. The appeal is not brought for reasons that are trivial, vexatious or have no reasonable prospect of success.

Outcome of appeals

A Self-Governance appeal to the Authority has the following outcomes:

1. The appeal is refused by the Authority due to being trivial, vexatious, having no reasonable prospect of success or being out of time. In such cases the Panel decision stands and implementation or non-implementation occurs accordingly.
2. The appeal is heard, but the Authority determines that the grounds for appeal have not been met. In such cases the Panel determination stands and implementation/non-implementation occurs accordingly.
3. Appeal is heard and the Authority determines that the grounds for appeal have been met. The Authority quashes the Panel decision (which has now become a recommendation) and issues its decision. In such cases, if the Authority decision is not in line with the Panel's recommendation, the Competition Commission appeal route is open.
4. Appeal is heard and the Authority determines that the grounds for appeal have been met. However, on quashing the Panel decision, the Authority is unable to take a decision based on the Final Modification Report. It therefore sends the Final Modification Report back under the Send Back Process (see [P263](#) for details). Once the Send Back Process is completed the Authority is able to make a decision on the Modification Proposal. If that decision is in opposition to the Panel recommendation then the Competition Commission appeal route is open.
5. The appeal is heard and the Authority determines that the grounds for appeal have been met, quash the Panel decision and direct that the Panel re-take its decision (potentially with a direction to consider particular evidence (e.g. new evidence)). In this case the Modification Proposal is still under the Self-Governance route and the Panel will need to remake their decision.

5 Proposed Solution – Code Administration Code of Practice

The following requirements would be introduced into the BSC:

- BSCCo shall act consistently with the relevant principles of the Code Administration Code of Practice;
- The BSC Modification Procedures shall be consistent with the relevant principles of the Code Administration Code of Practice;
- BSCCo, in conjunction with other code administrators, shall maintain, publish, review and amend from time to time the Code Administration Code of Practice. Any amendments to the Code of Practice shall first be approved by the Authority. As a working practice, BSCCo shall discuss any potential changes to the Code Administration Code of Practice with the BSC Panel;
- BSCCo shall assist Parties and consumer representatives with the following (but not limited to):
 - drafting modification proposals;
 - understanding the operation of the BSC;
 - understanding the Modifications Procedures, including how Parties can get involved and be represented during the processes (including but not limited to panel and/or workgroup meetings); and
 - accessing information relating to Modification Proposals;
- BSCCo shall check that the BSC is consistent with other Codes and Core Industry Documents and shall notify the Licensee and the Panel where it identifies such inconsistencies
- Introduce definitions in Section X-1 for the following:
 - Code Administration Code of Practice:
 - 'Modification Group' becomes 'Workgroup': this term has been changed in the Licence. It would be updated in Annex X-1 and throughout the BSC.

Code Administration Code of Practice Change Process

The Code of Practice contains a high level process of the steps that must be completed in order to amend the Code of Practice. Part of this process allows Code Administrators and participants to raise potential changes, the approval of which will sit with Ofgem.

Under the Proposed Modification, ELEXON has committed to taking all suggested amendments to the Panel for endorsement prior to raising them at the Code Administrators Working Group. Although this would not be a BSC requirement, ELEXON would issue a statement outlining this.

ELEXON would also raise the subject of the Code Administration Code of Practice change process at the next Code Administrators Working Group meeting with the intention of making the Code Administration Code of Practice change process more robust. ELEXON would seek to add the requirement for Code Administrators to gain Panel approval on raising CACoP changes to the CACoP.

Legal text

Final P262 Proposed Modification legal text is provided as Attachment B. Following the submission of the Assessment Report, Ofgem provided additional comments (detailed on pages 29 to 36). The Panel has updated the legal text as a result of these comments and Report Phase Consultation comments (page 24).

We also provide proposed redlined changes to BSCP40 (Attachment F), in particular to the Modification Proposal form, that are required as a result of:

- P262 changes on SCR and Self-Governance
- P263 changes on Environmental Assessment

6 Alternative Solution

Approval of CACoP Changes

The Group agreed an Alternative Modification which is identical to Proposed Modification aside from one detail. The Alternative would place a requirement in the BSC for ELEXON to gain explicit agreement from the Panel for all ELEXON suggested CACoP changes. Under the Proposed Modification, ELEXON would gain explicit Panel agreement as a working practice rather than a BSC requirement and would seek to add this requirement to the CACoP rather than the BSC.

Potential inconsistency with the Transmission Licence

The Group requested ELEXON provide legal advice as to whether this alternative would be inconsistent with the Transmission Licence. ELEXON's legal view advised that the Alternative Modification may be inconsistent with the Transmission Licence and therefore recommended to the Proposer that this alternative be incorporated into the Alternative Modification rather than the Proposed Modification. Full details of ELEXON's legal advice on the potential inconsistencies are on page 8 of Attachment A.

Legal text

Final P262 Alternative Modification legal text is provided as Attachment C. Following the submission of the Assessment Report, Ofgem provided additional comments (detailed on pages 29 to 36). The Panel has updated the legal text as a result of these comments and Report Phase Consultation comments (page 24).

We also provide proposed redlined changes to BSCP40 (Attachment F), in particular to the Modification Proposal form, that are required as a result of:

- P262 changes on SCR and Self-Governance
- P263 changes on Environmental Assessment

7 Impacts & Costs

Implementation Costs

| ELEXON Cost | ELEXON Service Provider cost | Total Cost |
|----------------------|------------------------------|---------------|
| £2,400 (10 Man Days) | £0 | £2,400 |

Implementation Impacts

Impact on BSC Systems and process

None identified

Impact on BSC Parties and Party Agents

Most respondents noted minimal impacts to implement P262. However, one respondent was concerned that “regulatory uncertainty will be increased, with a consequent increase in time and costs to manage the risks and a negative impact on our ability to plan and invest with confidence.”

Impact on Transmission Company

If raising a Modification due to a SCR conclusion, the Transmission Company will have to be aware of the regulations surrounding such a change.

The Transmission Company also noted in their Impact Assessment response that there was no impact on their systems, Security of Supply or their ability to discharge their Transmission Licence obligations.

Impact on ELEXON

| Area of ELEXON | Potential impact |
|-------------------|--|
| Change Management | ELEXON will be required to update all processes relating to the Modification Process. And to give assistance to parties wishing to use the process. As a Code Administrator ELEXON will have to adhere to the principles of the CACoP. |

Impact on Code

| Code section | Potential impact |
|-----------------------|---|
| Section B, C, F and H | To allow for the new processes as defined above |
| Section X Annex X-1 | For the inclusion of new definitions |

Impact on Code Subsidiary Documents

| CSD | Potential impact |
|--------|--|
| BSCP40 | Updates to the Modification Proposal form. |

Impact on Core Industry Documents and other documents

| Document | Potential impact |
|-----------------------------------|---|
| Connection and Use of System Code | The CUSC is introducing similar provisions. |
| Uniform Network Code | The UNC is introducing similar provisions. |

8 Implementation

National Grid has a 'best endeavours' licence obligation to implement the Code Governance Review BSC changes by 31 December 2010. Hence we are proposing an Implementation Date of:

- 31 December 2010 if an Authority decision is received on or before 10 December 2010; or
- 15 Working Days after an Authority decision, if a decision is received after 10 December 2010.

9 Modification Group views on the Case for Change

Proposed and Alternative Modifications vs. current arrangements

Majority Approve

The majority of the Group agreed that both the Proposed and Alternative Modifications would be better than the current arrangements. A minority believed that neither the Proposed nor Alternative Modification would be better than the current arrangements.

All Group members agreed the Proposed and Alternative Modifications would better facilitate **Applicable BSC Objective (a)** as P262 would ensure that the BSC is consistent with the Transmission Licence in an efficient and effective manner therefore allowing the Licensee to efficiently discharge its obligations under the Transmission Licence.

The majority of Group members also noted a benefit under **Applicable BSC Objective (d)** as the introduction of Self-Governance would increase the efficiency of progressing Modifications with no material impact.

One member of the Group believed there was some detrimental impact under **Applicable BSC Objective (c)**, as outlined below, but that, on balance, this was outweighed by the positive impact under **Applicable BSC Objectives (a) and (d)**.

Minority Reject

Whilst noting the arguments against the objectives above, one member of the Group believed that drawbacks under **Applicable BSC Objectives (c) and (d)** would outweigh any benefits under **Applicable BSC Objective (a)**.

Drawbacks under Applicable BSC Objective (c):

- The introduction of SCRs would potentially stifle the raising, development and progression of Proposed and Alternative Modifications during SCR Phase - this could be considered anticompetitive. It could deter Parties engagement in the Modification Procedure which may reduce the number of Modification Proposal raised. This could limit the Modifications which the Authority would be able to make decisions on, potentially reducing the quality of available solutions. Parties may also be dissuaded from raising alternatives to SCR Modification Proposals believing that their alternatives would have no chance of approval.
- The SCR process (as set out in the Transmission Licence) does not have the appropriate checks and balances in place. Ofgem are placed in the position of "judge, jury and executioner". Ofgem has effectively placed itself in the position of being able to raise and decide upon changes. This changes the regulatory balance as previously only BSC Parties (and Consumer Focus and other designated third

parties) could raise change, leaving Ofgem in the position of independent decision maker. This will no longer be the case.

- The SCR process increases regulatory uncertainty – Parties would not know whether Modification Proposals would be progressed or Subsumed during SCR Phase (which may last for 12 months), and would be concerned about the potential outputs from the SCR. This would impact Parties' business planning and increase the concern that inefficient solutions may be enforced. This increased regulatory uncertainty may also reduce the numbers of new entrants.
- The SCR process prevents 'quick wins' on a SCR topic from being implemented in a timely manner.

Drawbacks under Applicable BSC Objective (d):

- The implementation of SCRs risks stifling development of alternatives and the enforcement of inefficient solutions that were developed through the SCR but are later found not to be optimal in BSC Modification Groups.
- SCRs risk repeating work on areas where there has been significant discussion. This would increase costs for the industry.

Proposed Modification vs. Alternative Modification

The majority of the Group preferred the Alternative Modification. They believed that when compared with the Proposed Modification, the Alternative better facilitated **Applicable BSC Objective (d)**, as it would introduce appropriate checks and balances on ELEXON to ensure all ELEXON raised CACoP changes were in the best interest of the BSC. The Group also noted that it would align the approach ELEXON would follow for raising CACoP change proposals with the BSC change process where ELEXON needs Panel endorsement to raise Modification Proposals.

One Group member also believed the Alternative Modification would better facilitate **Applicable BSC Objective (c)** when compared to the Proposed, as it would provide transparency and comfort to industry regarding CACoP changes.

One member disagreed with this view. They believed that **Applicable BSC Objective (d)** was not better facilitated; but that **Applicable BSC Objective (a)** was, since the Alternative could potentially conflict with the CACoP Principles, and that the CACoP change process should be dealt within the CACoP rather than the BSC.

Group's views on considering P262 against the Applicable BSC Objectives

The Group noted that one Assessment Consultation respondent had been concerned that P262 was characterised as a Modification Proposal the industry had to support as the obligations were already in the Transmission Licence.

The Group noted that this was **not** the case. As with any Modification Proposal, the Group had considered P262 against all of the Applicable BSC Objectives. The Group noted that Report Phase Consultation respondents and the Panel should also consider P262 against all of the Applicable BSC Objectives and not just rely on Objective (a).

Can the BSC place requirements on the Authority?

Section 5.2.4 of the legal text details the Authority notifying the Panel of whether a Modification should be SCR Subsumed. One Panel member questioned why Ofgem has requested a change from "the Authority shall" to the "Authority may" in the wording of Section 5.2.4. ELEXON explained that the BSC cannot place requirements on the Authority as they are not a BSC Signatory. The BSC can state that "the Authority may", but not "the Authority shall". Another member was concerned that this would increase regulatory uncertainty. ELEXON noted that if the Authority did not SCR Subsume a Modification Proposal, then it would continue through the Modification Procedures. A member noted that in that scenario there was a danger of incurring unnecessary progression costs.

Initial views against the Applicable BSC Objectives

Proposed Modification vs. current arrangements

The **majority** of the Panel believed the Proposed Modification was **better** than the current arrangements. Of those Panel members that believed the Proposed Modification was better, all cited benefits against **Applicable BSC Objectives (a) and (d)**. A minority also cited benefits against **Applicable BSC Objective (c)**. The reasons were as follows:

Applicable BSC Objective (a)

- P262 would ensure that the BSC is consistent with the Transmission Licence in an efficient and effective manner.

Applicable BSC Objective (c)

- The introduction of Self-Governance will allow Ofgem to focus their attention on the more significant or material BSC Modification Proposals. This will benefit competition as Ofgem will be able to be a more proportionate regulator.

Applicable BSC Objective (d)

- The introduction of Self-Governance would increase the efficiency of progressing Modifications with no material impact.

A **minority** of the Panel believed the Proposed Modification was **worse** than the current arrangements under **Applicable BSC Objectives (a), (c) and (d)**. The reasons were as follows:

Applicable BSC Objective (a)

- One member noted that in coming to their decision they saw zero benefits against Applicable BSC Objective (a).

Applicable BSC Objective (c)

- The SCR process does not have the appropriate checks and balances in place. Ofgem are placed in the position of "judge, jury and executioner". Ofgem would effectively be able to raise and decide upon BSC Modification Proposals. This changes the regulatory balance as previously only BSC Parties (and Consumer Focus and other designated third parties) could raise changes, leaving Ofgem in the position of independent decision maker. This will no longer be the case. The SCR process should have included a regulatory counter-balance.

- The SCR process increases regulatory uncertainty – Parties would not know whether Modification Proposals would be progressed or Subsumed during SCR Phase (which may last for 12 months), and would be concerned about the potential outputs from the SCR. This would impact Parties’ business planning and increase the concern that inefficient solutions may be enforced. This increased regulatory uncertainty may also reduce the numbers of new entrants.

Applicable BSC Objective (d)

- The implementation of SCRs risks stifling the development of Alternative Modifications and the enforcement of inefficient solutions that were developed through the SCR but are later found not to be optimal in BSC Modification Groups.
- SCRs risk repeating work on areas where there has been significant discussion. This would increase costs for the industry.

Alternative Modification vs. current arrangements

The views for the Alternative Modification compared to the current arrangements were the same as for the Proposed Modification. The **majority** of the Panel believed the Alternative Modification was **better** than the current arrangements. Of those Panel members that believed the Alternative Modification was better than the current arrangements, all cited benefits against **Applicable BSC Objectives (a) and (d)**. A minority also cited benefits against **Applicable BSC Objective (c)**. The reasons are detailed above. Panel members also noted an additional benefit under **Applicable BSC Objective (d)**, as the Alternative Modification would introduce appropriate checks and balances on ELEXON to ensure all ELEXON raised CACoP changes were in the best interest of the BSC. The Panel also noted that it would align the approach ELEXON would follow for raising CACoP change proposals with the BSC change process where ELEXON needs Panel endorsement to raise Modification Proposals.

A **minority** of the Panel believed the Alternative Modification was **worse** than the current arrangements under **Applicable BSC Objectives (a), (c) and (d)**.

In addition, Panel members noted the potential inconsistency of the Alternative Modification with the Transmission Licence and viewed that the Authority would clarify this when making its decision.

Alternative Modification vs. Proposed Modification

The **majority** of the Panel believed the **Alternative Modification** was **better** than the current Proposed Modification. One Panel member did not specify a preference as they preferred neither. The Panel members that preferred the Alternative agreed with the Modification Group that the Alternative better facilitated **Applicable BSC Objective (d)**, as it would introduce appropriate checks and balances on ELEXON to ensure all ELEXON raised CACoP changes were in the best interest of the BSC. The Group also noted that it would align the approach ELEXON would follow for raising CACoP change proposals with the BSC change process where ELEXON needs Panel endorsement to raise Modification Proposals.

The Panel members that preferred the Alternative also noted that they viewed the Proposed Modification as better than the current arrangements. And so, in the absence of the Alternative Modification, the Panel would recommend the Proposed Modification should be made.

Further Ofgem legal text comments

ELEXON noted that Ofgem would provide further legal text clarifications. These changes are detailed in full in Appendix 1. In each case, ELEXON has agreed a way forward with Ofgem and recommends these changes be included in the final legal text. The updated legal text is Attachments D and E. In summary the changes are as follows:

- Amending F5.1.3 to clarify that SCR Phase can end on the raising of a SCR Modification Proposal rather than the issuing of direction to the Transmission Company by the Authority;
- Amending F5.3.1 to clarify the Authority may direct the Transmission Company to raise make a SCR Modification Proposal;
- Amending F5.3.1(b) to clarify the Licensee cannot without a SCR Modification Proposal without Authority approval;
- Amending F6.1.4(a) to clarify the process for Ofgem directing a Modification is or is not Self-Governance;
- Amending F6.2.1 to clarify a Self-Governance Statement cannot be withdrawn after the Panel decision;
- Amending F6.4.2 and F6.4.3 to clarify the Self-Governance appeals process to clearly specify:
 - For Ofgem, an appeal will be a two stage process. The first stage is for Ofgem to check that the appeal:
 - has been made in time (within 15 Working Days of the Panel determination);
 - has been made against at least one of the Applicable BSC Objectives or on the basis of unfair prejudice; and
 - is not trivial, vexatious or have no reasonable prospect of success
 - If the first stage is satisfied then the second stage is for Ofgem to consider the appeal in detail and either confirm the Panel's decision, quash the decision and make their own decision or remit back to the Panel,
 - We have also amended F6.4.3(b)(i) to ensure this is clear that an appellant can satisfy the appeal criteria, but have their appeal rejected (and the decision of the Panel confirmed);
- Correcting a cross-reference in F6.4.8;
- Amending F5.2.3 and F5.2.5 to include "such of those persons listed in paragraph 2.1.10(a)";
- F5.2.5 Inclusion of the following: "such of those persons listed in paragraph 2.1.10(a)"; and
- Deletion of the word "Proposal" in F6.1.6(a) and (d).

11 Report Phase Consultation Responses

Summary

The Report Phase Consultation received 7 responses, the majority of which supported the Panel's initial recommendations. The table below summarises the respondents' views. The responses can be viewed [here](#).

| Report Phase Consultation responses | | | |
|---|-----|----|-------------------|
| Question | Yes | No | Neutral/ other |
| Should the P262 Proposed Modification should be rejected? | 6 | 1 | 0 |
| Should the P262 Alternative Modification should be approved? | 5 | 2 | 0 |
| Is the Alternative Modification better than the Proposed? | 5 | 2 | 0 |
| Do you agree with an Implementation Date? | 7 | 0 | 0 |
| Does the legal text and BSCP40 changes deliver the intention of the Proposed? | 6 | 1 | 0 |
| Does the legal text and BSCP40 changes deliver the intention of the Alternative? | 6 | 1 | 0 |
| Do you agree with ELEXON's proposed clarifications resulting from Ofgem's comments? | 6 | 0 | 1 |
| Do you have any other comments? | 3 | 4 | 0 |

Consultation views against the Applicable BSC Objectives

Majority support initial Panel recommendation

The majority of respondents agreed with the Panel's initial majority recommendation that both the Proposed Modification and the Alternative Modification are better than the current arrangements. The majority of respondents cited the **Applicable BSC Objectives (a) and (d)**.

Applicable BSC Objective (a)

- P262 would ensure that the BSC is consistent with the Transmission Licence in an efficient and effective manner.

Applicable BSC Objective (d)

- The introduction of Self-Governance would increase the efficiency of progressing Modifications with no material impact.

One respondent also noted additional benefits under **Applicable BSC Objective (d)** as:

- The introduction of SCRs can lead to a more efficient process by reducing the duplication of similar Modification Proposals; and
- The CACoP would promote transparency for Code Administrators and also provides an emphasis on supporting the smaller industry parties which promotes effective competition.

The majority of respondents also agree that the Alternative Modification was better than the Proposed Modification as, under **Applicable BSC Objective (d)**, it would introduce appropriate checks and balances on ELEXON to ensure all ELEXON and would align the

approach ELEXON would follow for raising CACoP change proposals with the BSC change process where ELEXON needs Panel endorsement to raise Modification Proposals.

One respondent disagreed with ELEXON's legal advice that the Alternative Modification may be inconsistent with the Transmission Licence. They believed the Alternative Modification was consistent with the Transmission Licence and hence supported the Alternative Modification over the Proposed Modification.

Minority do not support initial Panel recommendation

One respondent (the Proposer) disagreed with the Panel's initial preference for the Alternative Modification over the Proposed Modification. In their view the Proposed Modification should be made in preference to the Alternative Modification. They commented that the:

- CACoP change process should not be detailed within the BSC but in the CACoP as stated in CACoP Principle 4 which deals specifically with amendments to the Code of Practice.
- Appropriate checks and balances are already in place as any changes to the CACoP would have to be approved by the Authority.
- Alternative may also be inconsistent with the Licence for the reasons outlined in the draft Modification Report.

Another respondent believed that neither the Proposed nor the Alternative Modification was better than the current baseline. They cited similar views to the minority of the Panel who believed both should be rejected. They noted that if the separate elements of P262 had been separate Modification Proposals they would have supported the introduction of Self-Governance provisions and the Code Administration Code of Practice. However, they believed that the introduction of SCRs would be detrimental to **Applicable BSC Objectives (c) and (d)**.

Applicable BSC Objective (c)

- The SCR process does not have the appropriate checks and balances in place on the Authority.
- The SCR process increases regulatory uncertainty – Parties would not know whether Modification Proposals would be progressed or Subsumed during SCR Phase (which may last for 12 months), and would be concerned about the potential outputs from the SCR. This would impact Parties' business planning and increase the concern that inefficient solutions may be enforced. This increased regulatory uncertainty may also reduce the numbers of new entrants.

Applicable BSC Objective (d)

- The implementation of SCRs risks stifling the development of Alternative Modifications and the enforcement of inefficient solutions that were developed through the SCR (particularly in areas where the Licensee lacks expert knowledge) but are later found not to be optimal in BSC Modification Groups. A better approach would have been for the SCR to develop a range of options that are then developed by industry through the Modification process.

ELEXON's proposed legal text clarifications resulting from Ofgem's comments

The majority of respondents supported ELEXON's proposed legal text clarifications resulting from Ofgem's comments (Appendix 1). One respondent noted two concerns:

- The Proposer might not agree with the clarifications; and
- It could become general custom and practice for ELEXON and Ofgem to alter legal text after the Assessment Procedure.

ELEXON has discussed the legal text clarifications with the Proposer who agrees with them (and noted this agreement in their consultation response). ELEXON also endeavours to fully develop legal text with Modification Group during the Assessment Procedure. This will continue to be custom and practice. However, the BSC Report Phase does allow for the Panel to agree alterations to the legal text. This is a logical step as the Report Phase Consultation requests Parties review the legal text and provide comments. Any comments can be incorporated into the legal text at the Panel's discretion. ELEXON continues to believe that this is an appropriate mechanism to ensure any identified errors are corrected before the legal text is issued to the Authority.

On the basis of consultation support ELEXON proposes the changes detailed in Appendix 1 should be included in the final legal text.

Additional legal text comments

ELEXON received a number of comments on the legal text as part of and outside of the consultation.

| Reference | Comment | ELEXON legal response |
|--------------|--|---|
| C3.1.1 (r) | Remove the 'and' after the semi-colon. | ELEXON propose this change should be included |
| F5.2.2 | New paragraphs 5.2.2(i), (ii) and (iii) should be numbered (a), (b), (c) as per the standard for the BSC for this paragraph level. | ELEXON propose this change should be included |
| F6.4 title | The title is missing a word 'Appeal relating <u>to</u> the Panel's determination of a Self-Governance Modification Proposal' | ELEXON propose this change should be included |
| F6.4.3(b)(i) | Additional space required: "...pursuant to paragraph 6.3.1 ₁ was correct" | ELEXON propose this change should be included |

ELEXON has drafted the above changes into Attachments D and E and recommends to the Panel that the above additions be included in the final version of the legal text issued to the Authority.

Views on the redlined BSCP40

One consultation respondent suggested:

"With respect to the BSCP40 changes we believe that, for the avoidance of doubt, it should be mandatory for proposers to confirm (i) if there is a material environmental impact (ii) if their proposal is to be dealt with as 'Self-governance' and (iii) if there is a linkage to any ongoing SCR. In this way there is a clear statement (from proposer) on

these matters to assist ELEXON and the Panel (which will need to opine on these matters in due course).”

ELEXON discussed the comment with the respondent. On the one hand, ELEXON did not want to increase the form filling burden on Parties raising Modification Proposals, hence why the rows were initially ‘optional’. However, the respondent noted that it would be useful to have a clear audit trail in place to understand whether a respondent had made a statement on the above processes. As a compromise ELEXON and the respondent agreed that these rows could be mandatory, but that the guidance in BSCP40 would be updated to remind Proposers that ELEXON would assist them in filling in the form to prevent there an unnecessary burden.

ELEXON also received the following two comments:

| Reference | Comment | ELEXON legal response |
|----------------------|---|---|
| Page 9, final bullet | This mentions ‘Urgent’ rather than ‘Self-Governance’ proposals. | ELEXON propose this change should be included |
| Page 10 | “Because of their non-material nature, Self-Governance Modification Proposals are do not require an Authority decision.” | ELEXON propose this change should be included |

ELEXON has drafted the above changes into Attachment F and recommends to the Panel that the above additions be included in the final version of the BSCP40 changes issued to the Authority.

Other comments

Cost of industry progression

One respondent questioned whether the industry progression costs were recorded in the draft Modification Report. The costs can be found on page 15 of Attachment A and have been updated following the Report Phase Consultation.

Self-Governance Appeals process starts on day of Panel determination

One respondent noted their concern that the Self-Governance Appeals process starts on the day of Panel determination rather than at the point that Parties are notified of the appeal. The respondent noted that they hoped that Ofgem, ELEXON and the Panel will add this potential risk to their respective risk registers.

During the development of the P262 solution the Group had similar discussions to the respondent’s comment. They were mindful of placing a provision in the BSC which was potentially inconsistent with the Transmission Licence. The Group agreed a compromise whereby the Modification Secretary would publish a summary of the decisions on the day of the Panel determination. This would allow Parties to start preparing their appeal. Then ELEXON would publish the Self-Governance Modification Report within 3 days of the Panel decision. The Group and Proposer agreed this would be consistent with the Transmission Licence, allow Parties the full 15 Working Days to consider their appeal and give Parties the full detail of the Panel discussions within a reasonable time period.

Further work needed on the SCR process

One respondent noted that further work needs to be done to ensure the appropriate checks and balances are in place for SCRs. They noted that if P264 proved insufficient then further Modification Proposals may need to be raised.

Why do we have SCRs?

One respondent was concerned that page 5 the draft Modification Report was insufficiently objective when describing the reason that Ofgem has introduced SCRs. They noted that Ofgem's own guidance describes SCRs as:

"A SCR provides a role for Ofgem to holistically review a code based issue (for the main commercial industry codes) and speed up industry reform."

12 Panel's Final Views and Recommendations

Why does the Proposer support the Proposed Modification over the Alternative?

One Panel member asked the Transmission Company member why they, as Proposer, preferred the Proposed Modification over the Alternative Modification. The Transmission Company member answered that their preference for the Proposed was marginal and was based on the ELEXON's legal view that the Alternative may be inconsistent with the updated Transmission Licence (see page 8 and 9 of Attachment A).

Another Panel member asked ELEXON whether the Modification Group were concerned about the potential inconsistency. ELEXON responded that the Group noted the legal advice but were comfortable to support the Alternative Modification over the Proposed Modification.

Additional Panel views against the Applicable BSC Objectives

Panel members provided views against the Applicable BSC Objectives in addition to their initial views (pages 19 to 20).

One Panel member reiterated that they considered the Proposed and Alternative Modifications had no benefit against **Applicable BSC Objective (a)**. They considered the only point of relevance in the Transmission Licence was the new requirements which had no intrinsic benefit to the Transmission Licence as a whole, or the BSC.

Another Panel member noted that in situations where the Transmission Licence had been updated the Licensee has an obligation to ensure the BSC is consistent with the updated Licence. And if the BSC changes efficiently and effectively align the BSC with the Transmission Licence then this is a benefit under **Applicable BSC Objective (a)**. In their view P262 demonstrably did this. They also noted that the proper forum for debating changes to the Transmission Licence was outside of the BSC and that correct due process had been followed for the Code Governance Review. They were concerned that Section 9 (pages 17 to 18) of the draft Modification Report underplayed the benefits of P262 under Applicable BSC Objective (a). They requested ELEXON update Section 9 to fully reflect those benefits.

Aside from a clear benefit under Applicable BSC Objective (a) the Panel member noted benefits to competition (**Applicable BSC Objective (c)**) and efficiency (**Applicable BSC Objective (d)**). They were disappointed that the Modification Group had not been able to



Recommendation

The Panel recommends by majority that the P262 Alternative Modification should be made.

identify benefits with the SCR process or the CACoP that went beyond Applicable BSC Objective (a). In their view P262 had the following benefits in addition to those listed on pages 17 to 20:

Applicable BSC Objective (c)

- CACoP would benefit competition as it emphasises that Code Administrators should support small Parties.
- The SCR process introduces an improved and more proportionate regulatory environment in which the Authority can operate. Thus, current Parties and new entrants can have greater confidence that significant code issues will be dealt with in a fitting manner.

Applicable BSC Objective (d)

- SCRs would provide a far more efficient process for progressing major industry changes. SCRs would remove the conflict and fragmentation that can sometimes exist when a change cuts over several industry codes.
- The CACoP would improve the transparency of the BSC.

Final Panel views

Having considered the additional views against Applicable BSC Objectives the majority of the Panel agreed that the Proposed and Alternative Modifications were better than the current arrangements. Two Panel members believed neither Proposed nor Alternative Modifications were better than the current arrangements.

The majority of the Panel also agreed that the Alternative Modification was better than the Proposed Modification. Although, one member, who considered neither to be better than the current arrangements, noted that they considered the Alternative Modification to be the “least worst” option. Another member noted that they preferred neither, as both were worse than the current arrangements.

The majority of the Panel noted that although they believed both the Proposed and Alternative Modifications were better than the current arrangement, they preferred the Alternative Modification, and hence recommended that the Proposed Modification should not be made and the Alternative Modification should be made.

The Panel also agreed the proposed changes to the legal text and BSCP40.

Recommendations

Having considered the P262 draft Modification Report, the BSC Panel recommends:

- that both the P262 Proposed Modification and Alternative Modification are better than the current arrangements;
- that P262 Proposed Modification should not be made;
- that P262 Alternative Modification should be made;
- an Implementation Date for P262 Proposed Modification or Alternative Modification of:
 - 31 December 2010 if an Authority decision is received on or before 10 December 2010; or
 - 15 Working Days after an Authority decision if a decision is received after 10 December 2010;
- the proposed text for modifying the Code and BSCP40 as set out in the Modification Report.

13 Further Information

More information is available in:

Attachment **A**: Detailed Assessment

- Modification Group membership
- Modification Group discussions
- Process followed for P262

Attachment **B**: Proposed Modification Legal Text

Attachment **C**: Proposed Modification Legal Text

Attachment **D**: P262 Proposed/Alternative Modification and P263 draft BSCP40 redlined changes

This document includes changes to BSCP40, in particular to the Modification Proposal form, that are required as a result of:

- P262 changes on SCR and Self-Governance
- P263 changes on Environmental Assessment

All other related documents, including the Assessment and Report Phase Consultation responses, are available on the [P262](#) page of the ELEXON website.

Appendix 1 - Further Ofgem legal text comments

SCRs

| Reference | Ofgem Comment | ELEXON legal response |
|-----------|---|---|
| 5.1.2 | In respect of the statement required in 5.1.2(a), that "this review constitutes a Significant Code Review", we note that it will be clear from the notice that we are launching a Significant Code Review and the rest of 5.1.2 and 5.1.1 makes clear that the notice is notifying a Significant Code Review. We consider this will fulfil what is required in 5.12(a) even where that specific statement contained in 5.12(a) is not stated in our letter/notice. Therefore, we suggest deleting 5.1.2(a). | We have agreed with Ofgem that this change is not required. It reflects the Transmission Licence drafting of "significant code review" definition. |
| 5.1.3 | <p>We note your corrections. However we note that the SCR phase does not end with the direction, if one is given, as the clause currently states. The clause requires tweaking so that if a direction is issued within 28 days of conclusions then the phase will actually end once the licensee's SCR mod is raised (see definition of "significant code review phase" which states under (b) that the SCR phase ends on the date the licensee has made a modification proposal). This means that clause 5.1.4 should be deleted.</p> <p><u>Suggested drafting:</u></p> <p>We consider that 5.1.3 would be best redrafted as follows and later in these comments we suggest an amendment to clause 5.3.1 so there is a clear link between these clauses:</p> <p>Subject to paragraph 5.1.4, A Significant Code Review Phase shall commence on the date specified by the Authority pursuant to paragraph 5.1.2(b) and shall be deemed to have ceased for the purposes of the Code on the date that:</p> <p>(a) <u>on the date the Company makes an SCR Modification Proposal in accordance with a direction from the Authority under paragraph 5.3.1 issues a direction</u> to the Transmission Company <u>to make a Modification Proposal</u> in connection with the relevant</p> | We have agreed revised wording to address Ofgem's comment that that SCR Phase ends on the raising of a SCR Modification Proposal rather than the issuing of direction to the Transmission Company by the Authority. |

| Reference | Ofgem Comment | ELEXON legal response |
|-----------|---|---|
| | <p>Significant Code Review; or</p> <p>(b) <u>on the date that</u> the Authority issues a statement to Parties to the effect that no direction in accordance with paragraph 5.1.3(a) will be issued; <u>or</u></p> <p>(c) provided that the events described in paragraphs 5.1.3(a) or (b) occur within 28 days after the Authority publishes its Significant Code Review Conclusions <u>if neither a direction is issued to the Company by the Authority under paragraph 5.3.1 nor a statement is made by the Authority under 5.1.3(b).</u></p> <p>If either of the events described in paragraphs 5.1.3(a) or 5.1.3(b) do not occur within 28 days after the date on which the Authority publishes its Significant Code Review Conclusions then, for the purposes of the Code, a Significant Code Review Phase shall be deemed to have ended on the 29th day after publication of the Significant Code Review Conclusions.</p> | |
| 5.3.1 | <p>The reference to 5.3.1: we consider that 5.1.3 should then begin as follows:</p> <p>If, pursuant to paragraph 5.1.3(a), The Authority <u>may</u> direct the Transmission Company to raise <u>make</u> a SCR Modification Proposal and then:</p> | We have amended as suggested. |
| 5.3.1(b) | <p>For clarity, we consider that the reference to "the Transmission Company and/or the Panel may" should be a reference to "the Transmission Company and/or the Panel shall" as under SLC C3, definition of "directions", the licensee must not withdraw an SCR proposal without Authority consent.</p> | We have amended as suggested. |
| 5.3.1 | <p>For clarity, we consider that it may be worth including a clause for the avoidance of doubt to the effect that "A SCR Modification Proposal shall proceed in accordance with paragraph 2 unless otherwise specified in this paragraph 3". This would have similar effect to clause 6.1.6 which is included for the avoidance of doubt in respect of self governance.</p> | We have agreed with Ofgem that this change is not required. A SCR Modification Proposal is a "Modification Proposal" (as defined in the Code) that has been raised pursuant to a direction by the Authority i.e. it will be treated as a Mod Proposal |

| Reference | Ofgem Comment | ELEXON legal response |
|-----------|---------------|--|
| | | except as set out in F5. A Proposed Self Governance Modification is defined differently and is treated differently in some respects by the legal text so we do not consider that the drafting in F6.1.6 needs to be reflected in F5.3.1. |

Self-Governance

| Reference | Ofgem Comment | ELEXON legal response |
|-------------|--|---|
| 6.1.3 | We consider the words “contained in the Self-Governance Modification Report” should be inserted after the words “associated Alternative Self-Governance Modification” for clarity. | We have agreed with Ofgem that this change is not required. This drafting reflects the equivalent wording (relating to a Modification Proposal) earlier in Section F and we do not believe this change would add any clarity. |
| 6.1.4A | We consider that 6.1.4(a) should be deleted. This is because once a self governance statement is submitted to the Authority, the Authority simply may direct that its decision is required (see SLC C3(13A)(c)) i.e. not suitable for self governance route, meaning that normal Authority decision process applies. It would not direct that its determination is required of whether self governance applies or not, and then direct it’s approve/reject decision is required. Therefore, we consider 6.1.4(a) requires deletion. | We have amended 6.1.4(a) to reflect Ofgem’s comment. |
| 6.2.1/6.3.1 | We query whether a Self-Governance Modification Report would be sent to the Authority prior to Panel making a determination under paragraph 6.1.3? It appears that the Panel may potentially withdraw the Self-Governance Statement under 6.2.1 after they determine a proposal but before the Self-Governance Modification Report is sent to the Authority under 6.3.2 as paragraph 6.3.2 provides for the report to be finalised and sent to the Authority 3 days after panel decision? Do you consider 6.2.1 should be clarified to say “prior to making its decision under | We have amended as suggested. |

| Reference | Ofgem Comment | ELEXON legal response |
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| | paragraph 6.1.3" instead of "prior to submitting a Self-Governance Modification Report to the Authority"? | |
| 6.3.4 | The implementation date in the report cannot be any earlier than 16 business days after the panel's determination which means there is scope for the implementation date to be as short as immediately after the 16 days. However, we consider that an appeal and decision may not be complete within 16 days i.e. an appeal could come to us on the 15th day. Grateful for views on how this would work if an appeal was raised on 15th day but an implementation date in the report was for the 17th day. | We have agreed with Ofgem that this change is not required. The drafting reflects the solution agreed by the Modification Group i.e. F6.4.6 suspends the implementation timetable pending an appeal. The Modification Group agreed that the Implementation Date in the Final Report should include provisions for how the implementation timetable would be affected in the event of an appeal. The view was that this would allow for more flexibility than the inclusion of drafting in the legal text. Please note, however, that we have amended the cross reference from 6.3.1 to 6.1.3. |

Self-Governance Appeals

| Reference | Ofgem Comment | ELEXON legal response |
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| 6.4.1, 6.4.2 | We consider changes were required to the text to correct this issue and we note that you have clarified 6.4.1 to say "relevant Panel determination was notified" and deleted reference to the Self-Governance Modification Report being notified. Many thanks. | Noted. |
| 6.4.3, 6.4.5 | We note the tweaks to paragraph 6.4.3 and 6.4.5. However, we disagree that the natural consequence of the Authority <i>permitting</i> the appeal is that the relevant Panel determination is quashed. It may be that we consider the grounds for an appeal <i>may</i> exist therefore we should hear and decide it. For example, looking at SLC C3(13B)(a)(ii)(1), in the case of implementation, there may be some evidence that the proposal <i>may</i> not better facilitate one of the applicable objectives. | <p>We understand Ofgem's comment and have agreed a way forward. We have amended 6.4.2 and 6.4.3 to clearly specify:</p> <ul style="list-style-type: none"> For Ofgem, an appeal will be a two stage process. The first stage is for Ofgem to check that the appeal: <ul style="list-style-type: none"> has been made in time (within 15 |

| Reference | Ofgem Comment | ELEXON legal response |
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| | <p>This does not automatically mean the panel decision was wrong and therefore we have to quash it. Upon allowing the appeal and hearing the appeal, it would be possible to find that <i>on balance</i> the decision the panel arrived at was the right one, therefore hold the appeal unsuccessful and confirm the panel's decision.</p> <p>Therefore we request that that paragraph 6.4.3 is clarified as follows:</p> <p>Where an appeal is raised in relation to a determination of the Panel pursuant to paragraph 6.3.1 the Authority may:</p> <p>(a) refuse permission to appeal where:</p> <p>(i) <u>in the opinion of the Authority</u> the appeal does not comply with paragraphs 6.4.1 and 6.4.2; or</p> <p>(ii) in the opinion of the Authority the appeal has been brought for reasons which are trivial, vexatious or have no reasonable prospect of success;</p> <p>(b) reject the appeal where, in the opinion of the Authority, none of the criteria for appeal set out in paragraph 6.4.2 are satisfied; or</p> <p>(c) subject to paragraph 6.4.5, allow the appeal where, in the opinion of the Authority, at least one of the criteria for appeal set out in paragraph 6.4.2 are satisfied.</p> <p>We consider that 6.4.3(b) is not required in light of 6.4.3(a).</p> <p>We request that that paragraph 6.4.3 is clarified as follows:</p> <p>6.4.5 Without prejudice to paragraph 6.4.9, where the Authority allows an appeal in accordance with paragraph 6.4.3(be), it shall<u>may</u>:</p> <p>(a) quash the relevant Panel determination appealed against and determine whether or not the relevant Proposed Self-Governance Modification and any associated Alternative Self-Governance Modification</p> | <p>Working Days of the Panel determination);</p> <ul style="list-style-type: none"> has been made against at least one of the Applicable BSC Objectives or on the basis of unfair prejudice; and is not trivial, vexatious or have no reasonable prospect of success If the first stage is satisfied then the second stage is for Ofgem to consider the appeal in detail and either confirm the Panel's decision, quash the decision and make their own decision or remit back to the Panel. <p>We also note that the appellant can satisfy the appeal criteria, but have their appeal rejected (and the decision of the Panel confirmed). We have clarified 6.4.3(b)(i) to ensure this is clear.</p> |

| Reference | Ofgem Comment | ELEXON legal response |
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| | <p>should be implemented, provided that in such event the <u>Self-Governance Modification Report in respect of the relevant Panel determination appealed against shall, for the purposes of the Code, be treated as a Modification Report and the Panel determination shall be treated as containing</u> a recommendation of the Panel pursuant to paragraph 2.7.7; or</p> <p>(b) <u>quash the relevant Panel determination appealed against and</u> remit the Proposed Self-Governance Modification and any associated Alternative Self-Governance Modification back to the Panel for re-consideration and a further determination by the Panel pursuant to paragraph 6.1.3; <u>or</u></p> <p>(c) <u>confirm the relevant Panel determination appealed against and hold the appeal unsuccessful,</u></p> <p><u>and such decision shall be final.</u></p> | |
| 6.4.4 | <p>We consider this provision should be subject to expiry of the 15 business day period for appeals for example, an appeal could be brought and permission refused before the 15 day period expires which means the proposal should not be implemented until the full 15 period is over.</p> | <p>We have agreed with Ofgem that this change is not required. The paragraph states that the proposal should be implemented in accordance with 6.3.3(a) (which notice will include a timetable) so there would be no grounds for a proposal to be implemented prior to its implementation date.</p> |
| 6.4.6 | <p>We query whether the reference to "Proposed Self-Governance Modification" should be a reference to "Approved Self-Governance Modification Proposal or Rejected Self-Governance Modification Proposal" in accordance with your defined terms?</p> | <p>We have agreed with Ofgem that this change is not required. The terms used are consistent with their usage in the rest of paragraph 6.4. We note that "Approved Self-Governance Modification Proposal" and "Rejected Self-Governance Modification Proposal" have a specific use in F6.4.2 so</p> |

| Reference | Ofgem Comment | ELEXON legal response |
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| | | we do not consider their use in 6.4.6 would be appropriate. |
| 6.4.7 | We consider the reference to “upholds an appeal” should be a reference to “allows an appeal” in the spirit of our earlier comment on 6.4.3 and 6.4.5 and consistent with what you have provided in 6.4.3(c). | We have not amended to “allows” as “upholds” is used consistently throughout Section F. |
| 6.4.8 | We consider the reference to 6.4.3(c) should be a reference to 6.4.5(b). | We have amended as suggested. |

Small Participants

| Reference | Ofgem Comment | ELEXON legal response |
|-----------|--|--|
| 1.2.4A | We consider that a reference to small participants and consumer representatives could be inserted for clarity and particularly the corresponding definition of “small participant” reflecting SLC C3(4)(ac). | We have agreed with Ofgem that this change is not required. This was considered by the Modification Group and rejected. The legal text requires BSCCo to provide assistance to any person listed in F2.1.1 who has vires to raise a modification – this will include any small participants and consumer groups who have such vires. |

Definitions

| Reference | Ofgem Comment | ELEXON legal response |
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| “Alternative Self-Governance Modification” | You say such a proposal “would better facilitate”. Is this correct? i.e. it may not but would still be an alternative? | This reflects the BSC definition of “Alternative Modification” so is correct. |
| “Approved Self-Governance Modification Proposal” | Should reference to 6.3.2 be a reference to 6.3.1? | We consider that the cross reference should be 6.3.3 so have amended. |
| “Industry Code” | The word “of” is omitted before “the Gas Act”. | We have amended as suggested. |
| “SCR Modification Proposal” | A reference to the direction in accordance with paragraph 5.3.1 would make clear. | We have agreed with Ofgem that this change is not required. |
| “Self- | After the words “submitted to the | We have agreed with Ofgem |

| Reference | Ofgem Comment | ELEXON legal response |
|---|---|--|
| Governance Statement" | Authority" a reference back to the relevant paragraph would add clarity. | that this change is not required. |
| "Proposed Self-Governance Modification" | Should this be a proposal which is not determined in accordance with 6.3.1 yet as opposed to "made" in accordance with 6.3.3? | We have agreed with Ofgem that this change is not required. This definition is consistent with the Code definition of Proposed Modification. |
| "Significant Code Review" | We note this definition is incomplete – possibly due to formatting error. Grateful if you could correct this. | We have agreed with Ofgem that this change is not required. The legal text distinguished between the (i) definition of a significant code review and (ii) the requirements for a significant review notice (which is included in the Transmission Licence definition of "significant code review"). The former has been reflected in the BSC definitions and the latter is included in F5.1.2. |

Other ELEXON clarifications

| Reference | ELEXON legal response |
|-------------------|---|
| F5.2.3 | Inclusion of the following: "such of those persons listed in paragraph 2.1.10(a)" |
| F5.2.5 | Inclusion of the following: "such of those persons listed in paragraph 2.1.10(a)" |
| F6.1.6(a) and (d) | Deletion of the word "Proposal" |