

P263 'Code Governance Review: Send Back Process and Environmental Assessment' Consultation Responses

Consultation issued on 1 September 2010

We received responses from the following Parties

What stage is this document in the process?

01 Initial Written Assessment

02 Definition Procedure

03 Assessment Procedure

04 Report Phase

Company	No BSC Parties / Non-Parties Represented	Role of Parties/non-Parties represented
RWE npower	10/0	Generator, Supply Company, Trading Company
Scottish and Southern Energy	9/0	Supplier / Generator / Trader / Consolidator / Exemptible Generator
Centrica	10/0	Generator/Trader/Supplier
EDF Energy	13/0	Supplier/Generator/Trader/Consolidator/Exemptible Generator/Party Agent
National Grid Electricity Transmission Plc	1/0	Transmission Company
E.ON UK	6/0	Supplier / Generator / Trader / Consolidator / Exemptible Generator
Accenture Services Limited (for and on behalf of ScottishPower)	7/0	Supplier / Generator / Trader / Consolidator / Exemptible Generator / Distributor

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

Summary

Yes	No	Neutral/Other
7	1	0

Responses

Respondent	Response	Rationale
RWE npower	Yes	The proposed changes are necessary to allow the Licensee to be compliant with its license obligations and it is our view that the changes covered under MP 263 will improve the BSC change process.
Scottish and Southern Energy	Yes	We note that Modification Proposal P263 is part of a series of proposals raised by National Grid to implement the Final Proposals of the wider Code Governance Review which was initiated by Ofgem in November 2007 and taken forward for implementation via the Transmission Licence changes in July 2010. We concur with the unanimous recommendation of the Panel that, in principle, P263 does better achieve the Applicable BSC Objectives, and in particular Objectives (a) and (d). We are neutral on (b) and (c).
Centrica	Yes	The Modification ensures the BSC is consistent with the Transmission licence and therefore can be said to efficiently discharge the Transmission Company's licence obligations (objective (a)). For clarity this should be read as an endorsement of the BSC modification against the BSC objectives and not necessarily endorsement of the code governance changes to the Transmission Licence.
EDF Energy	Yes	The proposed modification appropriately aligns the BSC with the Transmission Licence following the licence modifications made to implement Ofgem's code governance review conclusions. Consequently, the proposal better facilitates applicable objective (a).
Transmission Company	Yes	We agree with the Panel's view that the Proposed Modification should be approved. We consider that P263 demonstrably achieves applicable BSC objective (a) as the proposal has resulted from Ofgem's review of the Transmission Licence; therefore National Grid is mandated by the new licence obligations to make the changes to the BSC where applicable. In addition, we

Respondent	Response	Rationale
		<p>believe that the send back process within P263 would also achieve applicable BSC objective (d) by allowing modifications to be sent back to the Panel by the Authority, thereby preventing wastage of industry time and resources and associated costs if the modification would originally have been rejected. The send back process could prevent outright rejection of a Modification by the Authority; therefore it would increase efficiency in the implementation and administration of the BSC.</p>
E.ON UK	No	<p>P263 supports BSC Objective (a) but like P262 could have negative impacts under (c) and (d). We support measures to improve efficiency in Code Governance and it would be undesirable for e.g. minor errors in legal text to halt progress of a proposal. However we are not aware of any such instances under the BSC and consider the risk of such events making a 'Send Back' facility for inadequate Modification Reports desirable to be very low, whether or not the Authority has fully engaged in the process. We are concerned though that the introduction of a Send Back facility could be counterproductive and weaken the incentives for Ofgem to both fully participate in the development of modifications and make timely decisions. As soon as a Modification is raised the Ofgem Panel representative has an opportunity to input to the Terms of Reference for the Modification Group to ensure that any analysis is undertaken to the required standard. Similarly an Ofgem attendee can provide further steering to a Modification Group undertaking or commissioning any analysis and drafting legal text. If such engagement has taken place throughout the Code Modification process and a decision is made by the Authority in line with their 25-day target there should be no need for a Send Back facility. The existence of such a facility also increases general uncertainty as to when a modification may be implemented; the fact that Send Back must be initiated before the last 'decision by' date else the modification will time out meaning little as implementation of P250A enables the Authority to request new dates.</p> <p>Furthermore the interaction of P263 with implemented P247A for Proposer Ownership is also unclear, with apparent conflict between the two modifications; further clarity or development of P263 is required on this point.</p>
Accenture Services	Yes	<p>ScottishPower agree with the views that P263 would help the Transmission Company to efficiently discharge</p>

Respondent	Response	Rationale
Limited (for and on behalf of ScottishPower)		its license by ensuring that the BSC is consistent with the updated Licence obligations and therefore better facilitate the achievement of BSC Objective (a).

Question 2: Do you agree with the Panel's suggested Implementation Date?

Summary

Yes	No	Neutral/Other
7	0	0

Responses

Respondent	Response	Rationale
RWE npower	Yes	The Code needs to be changed to meet the deadline for the License changes to prevent the Licensee being in breach.
Scottish and Southern Energy	Yes	Noting the typo error on pages 3 and 15, we agree with implementation on 31st December 2010 if an Authority decision is received on or after 10th December 2010 or 15 Working Days following an Authority decision if its received after 10th December 2010.
Centrica	Yes	-
EDF Energy	Yes	The suggested implementation date is reasonable given the licence requirement on National Grid to implement the code governance changes.
Transmission Company	Yes	National Grid supports the Panel's preferred Implementation approach and consider that the proposed 15 Working days implementation timescale should be sufficient time to implement this modification
E.ON UK	Yes	But only if P263's interaction with P247 is clarified; thus dependent on updated documentation being made available for industry review.
Accenture Services Limited (for and on behalf of ScottishPower)	Yes	In view of the fact that Transmission Company has a 'best endeavours' licence obligation to implement the Code Governance Review BSC changes by 31 December 2010, ScottishPower agree that P263

Respondent	Response	Rationale
		should be implemented by that date or as soon as possible thereafter.

Question 3: Do you agree that the legal text delivers the intention of P263?

Summary

Yes	No	Neutral/Other
5	2	0

Responses

Respondent	Response	Rationale
RWE npower	Yes	-
Scottish and Southern Energy	No	<p>We have a number of comments on the draft legal text, which are detailed below.</p> <p>1) Is there a closing bracket missing in 2.7A.3 (b) (iv) given the opening bracket before "and, without prejudice..."? </p> <p>2) For the reasons we detail in Q5 below ('Version 2 of the Modification Proposal form') we believe that paragraph 2.7A.4 in the draft legal text should be deleted entirely (and the "subject to paragraph 2.7A.4" be deleted from 2.7A.3).</p> <p>3) It is not clear to us, from the draft legal text (and the Report Phase consultation document) if the Proposer of the Modification that is 'sent back' has any rights (as introduced by P247).</p> <p>For example, where a Modification Group is (re)convened to consider (as stated on page 6, under 'Send Back Process' (1.1)) "the additional steps (including drafting or amending existing drafting of the modification to the BSC" this would appear to bring it into potential conflict with the aim of P247 which, according to Elexon, "would allow the</p>

Respondent	Response	Rationale
		<p>Proposer [only] to vary the solution of the Proposed Modification, and/or withdraw their Modification Proposal, at any time before the Modification Group makes its final recommendation to the Panel”.</p> <p>Furthermore, any “drafting or amending [of] existing drafting of the modification” that is carried out (be that by Elexon, the Modification Group or the Panel) as a result of the Send Back Direction has the potential “to vary the solution of the Proposed Modification” in a way that is at odds with the views of the Proposer (as to what that Modification is).</p> <p>In addition this would seem to run counter to the Authority’s view (in their ‘Reasons for Authority Decision’ set out in the P247 decision letter) about “the ability for the Proposer to control the development of their modification”.</p> <p>It appears therefore that a conflict may arise in the scenario we describe above - does the Proposer ownership rights (as introduced with P247) take precedence, or not, with respect to changes ‘required’ by the Send Back Direction (introduced with P263)?</p> <p>In our view this uncertainty should be clarified in the final legal text to avoid any confusion or dispute at a later date.</p> <p>For the avoidance of doubt, given the ownership principle set out in the Code Administration Code of Practice, we believe that the Proposer should retain ownership during the ‘send back’ process; thus no change to their original proposed Modification could be undertaken against their will.</p>
Centrica	Yes	-
EDF Energy	Yes	-
Transmission Company	Yes	<p>We believe that the legal text delivers the intention of P263; however there is no reference to the pre requisites of the send back process, whereby the send back process must be initiated by the Authority before the last decision by date in the Final Modification Report.</p>

Respondent	Response	Rationale
E.ON UK	No	<p>It is not clear to us as the Proposer of implemented Proposer Ownership modification P247, from either P263's Report Phase consultation or draft legal text, how these modifications would interact. P247 established the rights of the Proposer but it is unclear how those of the Proposer of a Modification 'sent back' would be maintained if P263 was implemented according to the current wording.</p> <p>Apparently P263 would specify Send Back requirements for 'the additional steps (including drafting or amending existing drafting of the modification to the BSC' (Draft MR 'Send Back Process' 1.1 p6, and Legal text v0.3 2.7A.1a). Amendment of the existing modification by Elexon, a re-convened Group or the Panel would conflict with the aim of P247A as approved by the Authority in their decision letter to allow only the Proposer to control development of their Proposed solution. This could potentially be to the extent of redrafting the modification in a way that the Proposer would not agree with. If this happened under a reformed Modification Group it would seem that the Proposer would have the ability to withdraw the modification, but would this always be the case, e.g. if a Group was not reconvened but only the Panel asked to reconsider its recommendation?</p> <p>Would Proposer ownership rights as introduced with P247 take precedence, or not, with respect to changes 'required' by the Send Back Direction if/as introduced by P263?</p> <p>In our view this conflict must be clarified in both the Modification Report and legal text to avoid any confusion.</p>
Accenture Services Limited (for and on behalf of ScottishPower)	Yes	ScottishPower agree that the drafted legal text seems appropriate.

Question 4: What are the impacts and costs of P263 on your organisation?

Responses

Respondent	Response	Rationale
RWE npower	None	-
Scottish and Southern Energy	Yes	We expect the impact and cost of P263 to be minimal.
Centrica	Minor	Minor process documentation changes to reflect the new modification processes.
EDF Energy	No	No process or systems costs are expected.
Transmission Company	No	National Grid does not anticipate any significant impacts or costs with regards to the Proposed Modification
E.ON UK	-	It seems likely that even where e.g. environmental analysis is outsourced, the Modification Group stage is likely to be more drawn out, so requiring further resource commitment from our participants in Modification Groups.
Accenture Services Limited (for and on behalf of ScottishPower)	Yes	There will be procedural and process impact with minimal costs.

Question 5: Do you have any further comments on P263?

Responses

Respondent	Response
RWE npower	No
Scottish and Southern Energy	<p>We have comments on the two elements of P263, namely 'Send Back' and 'Environmental Assessment' which are detailed below.</p> <p>To begin with we have some general comments on the 'Consultation Timeframe', 'Alternatives' and 'Version 2 of the Modification Proposal form'.</p> <p>Consultation Timeframe</p>

Respondent	Response
	<p>We note the comments, on page 13, under 'Panel's Initial Discussions' that:-</p> <p>"ELEXON did note that, in order to give participants as long as possible to respond to the Report Phase Consultation, the maximum consultation period (15 Working Days) would be used."</p> <p>We are extremely concerned that Elexon continues to believe that the maximum consultation period should be 15 working days. In our view this is a direct contravention of Principle 10 of the Code Administration Code of Practice, which states that:-</p> <p>"The consultation time set by code panels will take account of the complexity of the issue being considered, the timetable for the Modification and the potential impact on user resource from other cross industry business but, in the absence of other considerations, a standard 15 business day period will apply"</p> <p>As we understand it the issue, from Elexon's perspective, is that the (current) BSC 'norm' of a ten working days consultation period ensures conformance with Panel paper day etc. In other words a consultation can be (i) circulated to industry, (ii) responses received and (iii) the documents issued in time for the next scheduled Panel meeting (all within a calendar month).</p> <p>However, this issue was clearly highlighted at the time the Code Administration Code of Practice was being discussed/developed. Ofgem has concluded on 15 working days as the standard period for industry consultations.</p> <p>This is the 'standard' (or 'minimum' in our view) NOT the 'maximum' (as Elexon indicates in the P263 document). In our view there may be circumstances where additional time, over and above the 'standard' 15 working days of consultation maybe warranted.</p> <p>In light of the new standard set out in Principle 10 we believe that the BSC ten working days 'norm' will have to change (to 15, as a minimum) which means that the it will no longer be possible to meet the single calendar month timeframe for the three steps (i-iii) noted above</p> <p>If the BSC consultation period 'norm', going forward, is consistently less than 15 working days (as opposed to meeting the 15 working days or exceeding it) then no doubt this will be highlighted to the Authority by BSC Parties.</p> <p>If Elexon were; in the months after the Code Administration Code of Practice goes live; to consistently be recommending less than 15 days (for consultations) then this would indicate to us that they were willing to flout the requirements of Principle 10 and, therefore, it would be helpful, in that case, for Elexon to also indicate to BSC Parties (and the Panel) which of the other Principles within the Code Administration Code of Practice that they also did not intend to</p>

Respondent	Response
	<p>comply with going forward.</p> <p>Alternatives</p> <p>We note the comments, on page 13, under 'Panel's Initial Discussions' that:-</p> <p>"ELEXON requested participants inform them of any potential alternatives a number of times during the development of the Code Governance Modification Proposals. None had been suggested."</p> <p>We think this last statement is perhaps being economical with the actualité. We are mindful that a number of 'alternatives' were suggested during the development of the Code Governance Modification Proposals, such as at the workshop held at Elexon in June, and that these have been reflected, by the Proposer, in the P263 (and P262) Modification Proposal(s).</p> <p>Version 2 of the Modification Proposal form</p> <p>We note the comments, on page 14, under 'Why v2.0 of the Modification Proposal form' that:-</p> <p>"ELEXON explain that the attached Modification Proposal form was at v2.0 since the Proposer had made a slight amendment to the solution since it was submitted."</p> <p>And</p> <p>"The Proposer has updated the Modification Proposal form (Attachment A) and ELEXON has updated the draft legal text (Attachment B) to reflect these changes."</p> <p>We note that Elexon permitted a Proposer to amend their Amendment Proposal Form itself after it had been submitted. We are concerned that could set two poor examples and precedents to other Proposers.</p> <p>First, it might encourage Proposers to submit an original form that is 'light' on certain details, in the hope / expectation of a Report Phase consultation only to then amend the form with their intended detail. In the event that the Panel does choose an Assessment Phase (rather than Report Phase) then the Proposer has lost nothing (they mealy use the 'ownership' principle to incorporate the change as the Modification proceeds through the Working Group deliberations).</p> <p>Second, the inference is that Elexon, rather than the Panel, can determine what is "a slight amendment to the solution" (and thus 'acceptable' for inclusion via an amended Modification Proposal form). In this regard we are mindful of the comments, on page 14, that:-</p> <p>"The Panel noted the pre-requisite clarification when agreeing to send P263 to Report Phase Consultation."</p>

Respondent	Response
	<p>We note that the Panel was not asked to approve Elexon’s action (in accepting “a slight amendment to the solution”). Its of concern to us that Elexon appears to be taking powers to itself that, in our view, should properly reside with the Panel. What to Elexon (and the Proposer) might appear to be “a slight amendment to the solution” might, to other BSC Parties, be much more substantial, and certainly worthy of debate / discussion / assessment. In our view, the Panel, rather than just Elexon (and the Proposer), is the appropriate body to consider what is ‘slight’ and what is ‘substantial’.</p> <p>Furthermore, whilst the August Panel was held on the 12th, the slightly amended solution was not posted onto the Elexon website till the 13th (along with the updated legal text). This too is of serious concern to us. How can we, as a BSC Party, inform Panel members of our views etc., on a particular Modification Proposal if a change (to that Modification Proposal) is not notified to us until after the Panel meeting?</p> <p>The approach taken by Elexon with respect to a second version of P263 gives us little confidence that Elexon would; if granted the powers under paragraph 2.7A.4; exercise those powers in the appropriate or proportionate way.</p> <p>In light of the above we believe that paragraph 2.7A.4 in the draft P263 legal text should be deleted entirely (and the “subject to paragraph 2.7A.4” be deleted from 2.7A.3) as it gives to Elexon a power to determine on matters that are “of a minor nature” in relation to a Send Back Direction and then “take such steps as are necessary to address the requirements of that Send Back Direction” without the Panel having (i) determined the minor nature (or not) and (ii) agreeing to that work (and associated resources) being undertaken.</p> <p>For the avoidance of doubt, we believe that where the Authority issues a Send Back Direction to the BSC Panel (as stated in paragraph 2.7A.1) that this cannot be treated as being “of a minor nature”. Rather, it warrants action from the Panel. If the Panel determines that the requirements of the Send Back Direction are “of a minor nature” then it may instruct Elexon to act in the way suggested in 2.7A.4 – but its for the Panel to determine on this (rather than Elexon).</p> <p>Send Back</p> <p>We note the comments, on page 6, under ‘Send Back Process’ (2) that:-</p> <p>“The Authority must initiate the Send Back Process before the last ‘decision by’ date in the Final Modification Report otherwise the Modification Proposal would ‘time out’”</p> <p>As a result this P263 change would seem to remove the need for</p>

Respondent	Response
	<p>P250 as, with P250, there would never be a 'last decision date' as P250 is designed to avoid such an eventuality by, for example, linking decision dates to release dates or (as in the case with this P263 Modification Proposal) to so many working days after an Authority Decision (whenever that is).</p> <p>Furthermore, we are mindful of the P198 Judicial Review Judgement (Teesside and Others v The Authority, 25th June 2008), in particular the statement in paragraph 66*[a], namely that in exercising the power to 'Send Back' the Authority will need to:-</p> <ul style="list-style-type: none"> i) act reasonably; and ii) be limited to addressing deficiencies ("such as an insufficient assessment, incorrect legal texts or other technical issues") in the Modification Report. <p>Thus the P263 'Send Back' power would not, for example, "...enable the Authority to set, for policy reasons, a different implementation date, or to sit upon a Modification Report for years and then seek to restart the exercise by a purported variation of the timetable set in the Report". It would also not "...enable the Authority to vary the Panel's timetable set in the Modification Report for any reason that seemed appropriate to the Authority".</p> <p>We note the comments, on page 6, under 'Send Back Process' (7) that:-</p> <p>"The Panel shall consider and approve the Send Back procedure and timetable. At this stage the Authority, in the form of the Ofgem Panel Representative, is able to request changes to the recommended procedure and timetable."</p> <p>In terms of the direction issued by the Authority to the Panel, we note that when the Panel considers the Authority's direction at its next meeting and makes a decision on the course of action required and the timetable to which it must work to that the Panel will need to be mindful, amongst other things, of (i) whether the direction is reasonable (for example, has sufficient time been allowed to undertake the tasks required by the Authority) and (ii) paragraph 83* [b] of the P198 Judicial Review Judgement including, in particular, the comment about remitting "...the matter to the Panel for complete reconsideration". If, for example, insufficient time is allowed to complete the required tasks and / or complete reconsideration (if required) is not permitted then, in this unlikely situation, perhaps the Panel might wish to seek external legal advice on how to proceed.</p> <p>Furthermore "the Authority, in the form of the Ofgem Panel Representative" at the Panel meeting will need to be mindful of this also when considering requesting any "changes to the recommended procedure and timetable" set by the Panel.</p>

Respondent	Response
	<p>Environmental Assessment</p> <p>We welcome the change (to BSCP40/03?) to require the Proposer to indicate whether they believe that their Proposal has a material impact on greenhouse gas emissions and, if so, what they believe that impact to be.</p> <p>Building upon this, and in light of the proposed P263 change, we believe consideration should be given to the Panel discharging its obligations (with respect to environmental assessment) by ensuring that, for all new Modification Proposals, the Panel considers if that Proposal has a material impact on greenhouse gas emission. This, we believe, can be efficiently discharged via the Initial Written Assessment and a recommendation, from Elexon as Code Administrator (being mindful of, amongst other things, the Proposer's views, as expressed on the BSC Modification Proposal Form) to the Panel on this matter; in other words perhaps something (in the IWA recommendation to the Panel) along the following lines:-</p> <p>"PXXX could [does not] have a material impact on greenhouse gas emission and the Working Group [Panel] should [should not need to] (i) evaluate this (using the latest Authority Guidance) when assessing PXXX against the Applicable BSC Objectives (and, where relevant, this evaluation should be undertaken for both original and alternative solution) (ii) consult on this for PXXX and (iii) incorporate this in their Report. The Panel does [does not] authorise the Code Administrator / Working Group to engage an external body to assist with any evaluation."</p> <p>This simple approach should ensures, for completeness, that all Modification Proposals have had at least a minimum environmental assessment (by the Proposer, Elexon and the Panel) which industry can comment on, if they wish, during the subsequent Working Group and / or Panel consultation(s).</p> <p>Finally we welcome the clarification provided by Elexon at the September Cross Codes Forum that the environmental assessment will not take account of any aspects covered by Schedule 9 of the Electricity Act (as regards the preservation of amenity in England and Wales and the preservation of amenity and fisheries in Scotland) as these relate to Section 37 applications for planning purposes.</p> <p>For the avoidance of doubt, if P263 was to incorporate this requirement, to consider Schedule 9 matters, then we would not believe it better facilitates any of the BSC Applicable Objectives as, in our view, it would be impossible for a Working Group to, realistically, consider the effect that a particular Modification Proposal could have on certain flora or fauna (or fishing in Scotland).</p>

Respondent	Response
	<p>*[a] P198 Judicial Review Teesside and Others v The Authority June 2008 - Paragraph 66.</p> <p>"I would also observe that the adjunctive power needed for the purpose would not be a wide ranging one, so as to enable the Authority to vary the Panel's timetable set in the Modification Report for any reason that seemed appropriate to the Authority. It would be a limited power to vary, solely so that the Authority could take a decision within a reasonable time in the light of the circumstances that had arisen following receipt of the Modification Report. It would not be a power that would enable the Authority to set, for policy reasons, a different implementation date, or to sit upon a Modification Report for years and then seek to restart the exercise by a purported variation of the timetable set in the Report. "</p> <p>* [b] P198 Judicial Review Teesside and Others v The Authority June 2008 - Paragraph 83.</p> <p>"The justification for a Proposed Modification put forward by the Panel might be dependent upon a very time sensitive analysis of costs and benefits, and the Panel timetable for implementation might accordingly be tailored to that time sensitive analysis. If for any reason there were then a long delay before the Authority could take a final decision, a question might arise whether the Authority was in substance and reality considering the same modification as had been submitted by the Panel, or was considering an altogether different modification, putatively predicated on a cost benefit analysis that the Panel did not, and could not have, evaluated. In such circumstances a power to remit the matter to the Panel for complete reconsideration, rather than a power in the Authority to change the timetable for implementation of what had in substance become by lapse of time a different modification, might better preserve the institutional balance between the Panel and the Authority and better serve the objectives of the BSC."</p>
Centrica	No
EDF Energy	No
Transmission Company	We do not have any further comments on P263
E.ON UK	<p>As per our answer to the P262 consultation, we are concerned that these issues have been bundled together in one modification and think separate Proposals would have been more appropriate.</p> <p>We are also concerned by the implication in the consultation documents that as P263 has been raised following a licence change hence supports Objective (a), that it 'must' be implemented, by inference without regard for the other BSC Objectives.</p>

Respondent	Response
Accenture Services Limited (for and on behalf of ScottishPower)	In terms of process, section F 2.2.4 of the BSC indicated that 'it is expected that the Panel would usually proceed directly to Report Phase pursuant to paragraph 2.2.3(b)(iii) where the Modification Proposal is of a minor or inconsequential nature and/or where the recommendation which the Panel should make to the Authority in relation to such Modification Proposal would generally be considered to be self-evident.' ScottishPower questioned whether this should be the case with P263. While by going directly to Report Phase, there are savings in term of time and costs to be made, it removes the industry's opportunity to thoroughly debate the issues and the most efficient process for this requirement, particularly when it could easily be combined with P262 assessments and discussions.