Stage 04: Draft Modification Report

What stage is this document in the process?

01 Initial Written Assessment

02 Definition Procedure

03 Assessment Procedure

04 Report Phase

P250: Prevention of "Timing Out" of Authority decisions on Modification Proposals

P250 Proposed Modification would oblige the BSC Panel to construct Implementation Dates for all Modification Proposals in a way that cannot cause the Authority to 'time out' from making a decision. It would also formalise the ability for the BSC Panel to write to the Authority.

P250 Alternative Modification would enable the Authority to instruct the BSC Panel to provide additional Implementation Dates where the Authority was unable to meet the original 'decision by' dates. The Panel would consult with industry in order to construct the additional Implementation Dates.

Initially, the Panel recommends
Rejection of both the Proposed Modification and Alternative Modification

Medium Impact:
BSC Panel, the Authority, Modification Groups, ELEXON and all participants affected by Modification Proposal Implementation Dates.

© ELEXON Limited 2010

Contents

1	Summary	3
2	Why Change?	5
3	Solution	9
4	Alternative Solution	10
5	Impacts & Costs	11
6	Implementation	14
7	The Case for Change	16
8	Panel's Initial Discussions	21
9	Recommendations	24
10	Further Information	24
Attachment **A**: Assessment Report		24
Attachment **B**: Detailed Assessment		24
Attachment **C**: Legal Text for P250 Proposed Modification		24
Attachment **D**: Legal Text for P250 Alternative Modification		24
Attachment **E**: Reject Modification P93 Authority decision		24
Attachment **F**: P198/P200/P203/P204 Judicial Review Judgement		24
Attachment **G**: Report Phase Consultation questions		24

About this document:

This document is a Draft Modification Report, which ELEXON will present to the Panel on 8 April 2010. The Panel will consider the recommendations, and agree a final view on whether or not this change should be made.

Any questions?

Contact:
Andrew Wright

andrew.wright@elexon.co.uk

020 7380 4217

© ELEXON Limited 2010

1 Summary

Why Change?

The current working practice for constructing Modification Proposal Implementation Dates can potentially cause the Authority to be 'timed out' from making a decision. This occurs when the Authority has not made a decision by the last 'decision by' date provided in the Final Modification Report.

P250 proposes to introduce measures so that 'timing out' of Authority decisions could not occur as a result of the way Implementation Dates are constructed.

Proposed Modification

P250 Proposed Modification would introduce an obligation on the BSC Panel to propose Implementation Dates for every Modification Proposal in such a way that these dates cannot cause an Authority decision to 'time out'.

It would also introduce a formal mechanism for the Panel to:

- ask the Authority for a likely decision date on a Modification Proposal; and
- advise the Authority if the analysis contained in the Final Modification Report has become (or may shortly become) out of date.

Alternative Modification

Under the P250 Alternative Modification, the Panel would continue to propose Implementation Dates as they do now. However, if the Authority was unable to make a decision before the last 'decision by' date (in the Final Modification Report) they could instruct the Panel to provide additional Implementation Dates.

If instructed by the Authority, the Panel would consult with the industry, BSC Agents, Core Document Owners and ELEXON in order to create appropriate additional Implementation Dates. During this consultation the Panel would also ask the industry if there are any 'time-sensitive' issues in the Final Modification Report which arise by creating additional Implementation Dates (for example, out of date analysis or a change to implementation lead times or costs). To prevent the Modification Proposal timing out the Panel would need to return the additional Implementation Dates before the last 'decision by' date.

If the Authority were unable to meet the 'decision by' dates in these additional Implementation Dates then they could again direct the Panel to provide further additional Implementation Dates.

Under both the Proposed Modification and the Alternative Modification, the Panel would not have the ability to revise the analysis or its original recommendation as to whether the Modification Proposal should be made.

Impacts & Costs

P250 would impact the BSC Panel, the Authority, Modification Groups, ELEXON, BSC Agent and all Parties and Party Agents impacted by Modification Proposal Implementation Dates. Parties reported that P250 would increase their impact assessment and implementation costs.

© ELEXON Limited 2010

Implementation

The Panel recommends an Implementation Date (for either the Proposed Modification or the Alternative Modification) of **10 Working Days after an Authority decision**.

The Panel also agreed that, if approved, the P250 rules would only apply to Modification Proposals raised on or after the P250 Implementation Date. Modification Proposals raised prior to the Implementation Date would be progressed in line with the current rules.

The Case for Change

The Panel **unanimously** believe the **Proposed Modification should be rejected** and a **majority** of the Panel believe the **Alternative Modification should be rejected**, as they:

- increase uncertainty as to when changes would be implemented;
- make it difficult for participants to accurately assess the costs, impacts and required implementation lead times of a Modification Proposal because these may vary according to when the change is implemented;
- therefore increases costs in assessing and implementing Modification Proposals;
- would be a particular problem for smaller Parties and new entrants who may be less able to deal with uncertain Implementation Dates. This would be a barrier to entry; and
- Would be unnecessary as the Panel can already construct Implementation Dates that cannot 'time out' and write to the Authority for any reason.

A **minority** of the Panel believe that the **Alternative Modification would be better** than the current arrangements as:

- It is a pragmatic way to remove the potential for Authority decisions on Modification Proposals to 'time out', thereby preventing a potential waste of industry resource and associated costs.

The **majority** of the Panel believe the **Alternative is better than the Proposed**. They commented that the Alternative:

- enables greater use of industry expertise in deciding appropriate additional Implementation Dates;
- only applies to Modification Proposals which require an extension to the decision timetable (unlike the Proposed Modification which applies to all Modification Proposals);
- gives greater flexibility regarding date construction; and
- achieves the same end result as the Proposed Modification, but in a way which causes less uncertainty and associated effort/costs for the industry.

Recommendations

The Panel unanimously recommends rejecting the Proposed and by majority recommend rejecting the Alternative Modification.

© ELEXON Limited 2010

How do we currently construct BSC Modification Implementation Dates?

The BSC requires ELEXON (in consultation with any Modification Group) to provide "the proposed steps, timetable and programme plan for such implementation consistent with the proposed Implementation Date".

The BSC itself does not set out a specific construction for Implementation Dates, but just refers to a 'proposed Implementation Date'. It obliges:

- Modification Groups to provide a 'proposed Implementation Date' to the Panel in its Assessment Report;
- The Panel to provisionally recommend a 'proposed Implementation Date', and consult Parties on that recommendation as part of its Draft Modification Report; and
- The Panel to provide its final 'proposed Implementation Date' to the Authority in the Final Modification Report.

Each Modification requires a lead time to implement, time to make the necessary system, process and/or document changes. This lead time can range from days to months, depending on the implementation activities involved. As such, each proposed Implementation Date comes with a 'decision by date'. This is the date by which the Authority needs to make a decision in order to implement the Modification Proposal on the relevant Implementation Date.

The Modification Group and ELEXON initially create the Implementation Dates and 'decision by' dates taking account of the implementation lead times provided as part of the impact assessments from Parties, Party Agents, ELEXON, BSC Agents and any other affected participants. In developing these dates, we also estimate (using any advice provided by the Authority during the Modification Proposal's progression) how long the Authority is likely to require to make its decision. This includes considering whether the Authority may need to undertake a Regulatory Impact Assessment (RIA).

Implementation Dates usually (though not always) take the form of one of the following two constructions:

Example 1 – Two set decision dates with linked Implementation Dates

"The recommended Implementation Date for PXXX is:

- **[Implementation Date A]** if an Authority decision is received on or before **['decision by' date 1]**; or
- **[Implementation Date B]** if an Authority decision is received after **['decision by' date 1]** but on or before **['decision by' date 2]**.

We use this Implementation Date construction when there is significant work required by either the industry or ELEXON. This provides ELEXON and the industry with certainty for planning implementation activities and associated resources. These types of Implementation Dates are often aligned with the dates of standard BSC Releases (usually for system changes). However, there may be other reasons for aligning implementation with a fixed date – for example, annual contract rounds, implementation of primary legislation, a change to another industry code, or the start of a BSC/financial year.

Where this date construction is used, it is current working practice to provide the Authority with two Implementation Dates where the second date is a 'fall-back' to be used if the Authority cannot meet the first 'decision by' date.

© ELEXON Limited 2010

Example 2 – Set number of Working Days after an Authority decision

The recommended Implementation Date for PXXX is:

- **[X] Working Days** following an Authority decision.

We use this Implementation Date construction where there are documentation only changes that do not need to be tied to a particular fixed date, or, potentially, if it is an Urgent Modification where a quick Implementation Date is required.

Other constructions may occasionally be used (e.g. in exceptional circumstances some changes may have a retrospective Implementation Date).

The implementation approach that is put forward in the Final Modification Report depends on what the industry, Modification Groups and the Panel believe to be the most appropriate and efficient approach at that time.

What's 'timing out' of Authority decisions and why is it a problem?

In 2007/08 the Authority was unable to make a decision on Modification Proposals P198, P200, P203 and P204 by the final 'decision by' date provided in the Final Modification Report. A subsequent Judicial Review ruled that if the Authority did not make a decision by the last 'decision by' date in the report then it lost its ability to make a decision on the Modification Proposals (such that they were effectively 'timed out'). The Judgement is provided for information as Attachment E.

'Timing out' of a Modification Proposal may cause additional work for the Panel, the industry and ELEXON. If a Party wants to progress a 'timed out' Modification (i.e. it is still seen as a good idea) then a new Modification Proposal must be raised. This requires ELEXON and the industry to assess the new Modification Proposal on its own merits which may cause some duplication in process and assessment. Note that a Party can also raise a Modification Proposal similar to a Modification rejected by the Authority after a short period (2 months following an Authority decision to reject).

'Timing out' can only occur where an Implementation Date includes a fixed 'decision by' date as in Example 1. Other constructions such as that in Example 2 are 'open-ended' dates in the sense that these dates cannot 'time out'.

Can 'timing out' only affect changes on which the Authority has not yet made a decision?

Yes. In 2005, Approved Modification P180 'Revision to BSC Modification Implementation dates, where an Authority determination is referred to appeal or judicial review' introduced BSC provisions to deal with circumstances where an Approved Modification or Rejected Modification Proposal could be 'timed out' as a consequence of a legal challenge (a Judicial Review to the High Court, or an appeal to the Competition Commission).

This occurred in 2004 for Modification Proposal P82. P82 had been approved by the Authority, but subsequently became the subject of a Judicial Review which resulted in the modification being remitted to the Authority for it to re-make its decision (effectively quashing the Authority's earlier approval). Because the original 'decision by' dates had gone past, P82 was 'timed out' and the implementation work which the industry had already completed was lost (with an associated cost).

© ELEXON Limited 2010

The P180 BSC provisions oblige the Panel, where an Approved Modification or Rejected Modification Proposal is subject to a legal challenge, to propose 'extra' Implementation Dates ('Conditional Implementation Dates') to the Authority if needed to stop the possibility of 'timing out'. The Panel proposes these dates after consultation with the industry, and they effectively overwrite either the approved Implementation Date (for an Approved Modification) or the proposed dates in the Final Modification Report (for a Rejected Modification Proposal).

The trigger for these provisions is a legal challenge being brought against a modification on which the Authority has already made a decision. The P180 provisions therefore cannot be used for Modification Proposals on which the Authority has not made a decision. This is the case even if the Modification Proposal is subject to a legal challenge through a Judicial Review (as was the case for P198, P200, P203 and P204).[1] If the Authority is unable to make its decision on a Modification Proposal by the last 'decision by' date in the Final Modification Report, then, under the ruling of the High Court in 2008, the Modification Proposal would be 'timed out'.

Previous industry discussion

The industry has previously discussed the possibility of adopting a different date construction which cannot 'time out'. These discussions have either considered changes using a working practice change, a BSC Modification Proposal, or a new Transmission Licence requirement[2].

Details of these discussions can be found in:

- P93 'Introduction of a Process for Amendment of Proposed Modification Implementation Dates' Authority decision letter – Attachment D
- Panel paper 80/004 (August 2004);[3]
- The Standing Issue 10 Group's report to the Panel (October 2004);
- Panel paper 144/08 (September 2008);
- The BSC Panel's and ELEXON's responses to Ofgem's November 2008 open letter (January 2009); and
- The BSC Panel's and ELEXON's responses to Ofgem's May 2009 consultation.

Ofgem has previously consulted on draft Transmission Licence changes designed to remove the possibility of 'timing out' under the BSC, Connection and Use of System Code and Uniform Network Code (see the November 2008 open letter and the May 2009 consultation referred to above). However, the Proposer of P250 considers that it is preferable if any obligations are developed and introduced through the industry code change processes.

[1] A Party can only appeal Approved Modifications or Rejected Modification Proposals to the Competition Commission, because the criteria for an appeal are that the Authority's decision was contrary to the Panel's recommendation. However, the ability to bring a Judicial Review is not limited in this way.

[2] A Transmission Licence change would be required to implement one of the potential alternative solutions proposed by a Modification Group member. Under this solution a similar implementation process for changes to Charging Methodologies would be adopted for BSC Modification Proposals, where a Panel decision becomes binding unless vetoed by the Authority. This change cannot be an Alternative Modification. For further details see Attachment A, 'Other potential alternative solutions'.

[3] Historic Panel papers have been archived from the BSC Website, but you can request a copy of these through the Lead Analyst or the BSC Helpdesk.

© ELEXON Limited 2010

Industry concerns about removing time constraints on Authority decisions

During the previous industry discussion, concerns were raised about removing time constraints on the Authority's decision-making ability. Participants in favour of retaining 'decision by' dates noted that:

- they provide certainty regarding potential Implementation Dates; and
- that the original analysis in the Final Modification Report could become out of date if a long period of time elapses between the submission of the report and the Authority's decision.

How does the Panel currently communicate with the Authority?

The Panel can write to the Authority (or publicly question the Authority at a Panel meeting) for any purpose under the current arrangements, albeit as a working practice which is not current formalised in the BSC.

The Proposer is proposing to introduce a more formal BSC process for the Panel to write to the Authority, in order to recognise industry concerns that providing 'open-ended' Implementation Dates would reduce the pressure on the Authority to make a decision within a reasonable period of time.

© ELEXON Limited 2010

3 Solution

The P250 Proposed Modification would introduce a BSC obligation on the Panel to propose Implementation Dates in such a way that 'timing out' can be avoided in future. In practice this would mean that the Panel must always include an 'open ended' Implementation Date as part of the Final Modification Report.

The exact construction would be decided by the Panel. Possible constructions include:

- **[Implementation Date A]** if an Authority decision is received on or before **['decision by' date 1]**;
- **[Implementation Date B]** if an Authority decision is received after **['decision by' date 1]** but on or before **['decision by' date 2]**; or
- **[X] Working Days** following an Authority decision if an Authority decision is received after **['decision by' date 2]**.

Or:

- The **next BSC Release to occur no less than [X] months** after an Authority decision.

Or:

- **[X] Working Days** after an Authority decision.

The Proposed Modification would also introduce a formal mechanism for the Panel to:

- ask the Authority for a likely decision date on a Modification Proposal; and
- advise the Authority if the analysis contained in the Final Modification Report has become (or may shortly become) out of date.

Report Phase Consultation question
Do you agree with the Panel's unanimous view that the Proposed Modification should be rejected?
The Panel invites you to give your views using the response form in Attachment G.

Report Phase Consultation question
Do you agree that the legal text delivers the intention of the Proposed Modification?
The Panel invites you to give your views using the response form in Attachment G.

© ELEXON Limited 2010

Alternative Modification Solution

Rather than obliging the Panel to set 'open ended' Implementation Dates for all Modification Proposals, the P250 Alternative Modification would require the Panel to provide additional Implementation Dates only where the Authority indicates it is unable to meet the original 'decision by' dates in the Final Modification Report.

A new process would be introduced into the BSC whereby:

- The Authority, unable to make a decision before the final 'decision by' date, directs the Panel to set one or more additional Implementation Dates. As part of this the Authority could:
  - instruct that the revised proposed Implementation Date(s) shall not be prior to a specified date;
  - specify a reasonable period by which the Panel should provide it with additional Implementation Dates (this must be before the last 'decision by' date in the Final Modification Report;
  - provide reasons for why it is unable to make the original dates;
- Once instructed the Panel would consult with the industry in order to create appropriate additional Implementation Dates;
- During the consultation the Panel would also ask the industry if there are any 'time-sensitive' issues (e.g. out of date analysis or a change to implementation lead times), as provided in the Final Modification Report, which should be highlighted to the Authority; and
- Finally, the Panel would provide the Authority with the consulted upon additional Implementation Dates and would highlight any time-sensitive issues raised by respondents or Panel members.

When would the Authority request additional Implementation Dates?

This process must be completed before the last 'decision by' date in the Final Modification Report in order to prevent the Modification Proposal 'timing out'. In practice, this would mean the Authority would need to direct the Panel to provide them with additional Implementation Dates at least one month before the 'decision by' date in the Final Modification Report. This would provide ELEXON the time to:

- prepare and issue the consultation documents for 10 Working Days to Parties, Party Agents, BSC Agents, Core Document Owners and ELEXON; and
- present the proposed additional Implementation Dates and consultation responses to the Panel for decision; and
- issue the additional Implementation Dates to the Authority.

What happens if the Authority cannot make a decision by the new additional 'decision by' dates?

If the Authority were unable to meet the new additional 'decision by' dates then they could start the process again by directing the Panel to provide further additional Implementation Dates. However, if the Authority are unable to make a decision by the new additional 'decision by' dates and fail to direct the Panel to provide further additional Implementation Dates, then the Modification Proposal would 'time out'.

© ELEXON Limited 2010

Report Phase Consultation question
Do you agree with the Panel's majority view that the Alternative Modification should be rejected?
The Panel invites you to give your views using the response form in Attachment G.

Report Phase Consultation question
Do you agree with the Panel's majority view that the Alternative Modification is better than the Proposed Modification?
The Panel invites you to give your views using the response form in Attachment G.

Report Phase Consultation question
Do you agree that the legal text delivers the intention of the Alternative Modification?
The Panel invites you to give your views using the response form in Attachment G.

5 Impacts & Costs

Impacts

The Assessment Consultation and Impact Assessment identified the following impacts

Impact on BSC Systems and process
Proposed Modification and Alternative Modification
None

Impact on BSC Agent/service provider contractual arrangements
Proposed Modification and Alternative Modification
The BSC Agents noted that it would be impacted in the following ways: • The BSC Agent's ability to suggest and implement service improvements may be hindered. This would occur if there would be an increase in the Modification Proposals implemented outside of scheduled Releases. This would reduce the ability of the BSC Agent to align testing of service improvements with Modification Proposals and could reduce the efficiency of implementing service improvements • If the BSC Agent is not sure when a Modification Proposal is likely to be implemented it would make it harder to manage the BSC Agent resources required for implementation • Subsequent BSC Agent impact assessments may be required to reflect changes in anticipated Implementation Dates • Implementation costs may change if there is significant time between the original impact assessment and the Authority's decision

Impact on BSC Parties and Party Agents	
Proposed Modification	Alternative Modification
The majority of respondents to the Assessment Consultation noted that the Proposed Modification would have	The majority of respondents to the Assessment Consultation noted that the Alternative Modification would have

© ELEXON Limited 2010

Impact on BSC Parties and Party Agents	
Proposed Modification	Alternative Modification
considerable negative impacts upon them. It would: • make it harder for participants to plan their implementation activities • make it harder for participants to understand the impact of a Modification on their business systems and processes • reduce certainty and increase costs for investors/ participants • increase the costs of implementation as Parties would need to keep standing resource at the ready to implement Modification Proposals where the point of the Authority's decision was unknown.	**negative impacts** upon them: It would • make it harder for participants to plan their implementation activities as the original Implementation Date may change • make it harder for participants to understand the impact of a Modification on their business systems and processes • reduce certainty and increase costs for investors/ participants

Impact on Transmission Company
Proposed Modification and Alternative Modification
As part of the Transmission Company Analysis, the Transmission Company noted they were not impacted by P250.

Impact on ELEXON		
Area of ELEXON's business	Proposed Modification	Alternative Modification
Change Delivery (including the Modification Secretary)	The implementation cost for ELEXON would be 3 man days or £720. ELEXON would be required to assist Modification Groups and the Panel in formulating Implementation Dates in a way that prevents Modification Proposals being timed out as a result of the construction of those dates. The Modification Secretary would be required to write to the Authority if instructed by the Panel in order to: • ask the Authority for a likely decision date on a Modification Proposal; or • advise the Authority if the analysis contained in the Final Modification Report has become (or will shortly become) out of date.	The implementation cost for ELEXON would be 3 man days or £720. ELEXON would be required to assist the Panel in formulating additional Implementation Dates. This would include issuing consultations, collating the responses, presenting to the Panel and writing to the Authority.

Impact on Code

© ELEXON Limited 2010

Impact on Code		
Code section	Proposed Modification	Alternative Modification
Section F	Additional obligations would need to be inserted into Section F.	New processes would need to be inserted into Section F.

Impact on Core Industry Documents and other documents	
Document	Proposed Modification and Alternative Modification
Connection and Use of System Code (CUSC)/Uniform Network Code (UNC)	National Grid has raised CAP179 and UNC 281 to prevent 'timing out' occurring under the CUSC and UNC.

Other Impacts		
Item impacted	Proposed Modification	Alternative Modification
BSC Panel	The Panel would have a new obligation to propose Implementation Dates in a way that prevents Modification Proposals being timed out as a result of the construction of these dates. The Panel would also have a formal mechanism to: • ask the Authority for a likely decision date on a Modification Proposal; and • advise the Authority if the analysis contained in the Final Modification Report has become (or will shortly become) out of date.	The Panel would have a new obligation to provide additional Implementation Dates when directed to by the Authority. To do this the Panel would consult on the Implementation Date(s) with industry. At the same time the Panel would also consult on whether there are any 'time-sensitive' issues (such as out of date analysis) that have arisen since the Final Modification Report was submitted and that the Authority should be aware of.
Authority	The Authority's decision making process would be impacted as: • Implementation Dates would be constructed such that they cannot cause the Authority to 'time out'; and • The Panel could write to the Authority to ask the Authority for a likely decision date on a Modification Proposal, or advise the Authority if the analysis contained in the Final Modification Report has become (or will shortly become) out of date. The BSC could not oblige the Authority to take any action as a result of this letter. However, the	The Authority's processes would be impacted as it could direct the Panel to provide additional Implementation Dates. This would be a new process as (under the High Court's judgement on P198/P200/P203/P204) the Authority cannot currently direct the Panel to construct additional Implementation Dates on Modification Proposals where it has not made a decision.

© ELEXON Limited 2010

Other Impacts		
Item impacted	Proposed Modification	Alternative Modification
	Authority may wish to update the analysis itself under its existing RIA process.	

6 Implementation

How would P250 be implemented?

The Panel recommends an implementation approach (for both the Proposed and the Alternative Modification) of:

- **10 Working Days after an Authority decision.**

P250 only applies to Modification Proposals raised after the P250 Implementation Date

The Panel and P250 Group agreed that the new P250 Implementation Date rules would only apply to Modification Proposals that were raised on or after the P250 Implementation Date. Modification Proposals raised prior to the P250 would be progressed in line with the current rules for Implementation Dates.

Both the Panel and the Group believed it was important for a Modification Proposal to be progressed using the same set of BSC arrangements that were in existence when it was raised. A change to the arrangements during the progression of a Modification Proposal could cause uncertainty and require considerable additional work. For example, a change to the Implementation Date rules would require the Modification Groups to reassess the Implementation Dates and any other aspects of their work which were time-sensitive (for example, cost-benefit analysis conducted assuming that a Modification Proposal would be implemented by a certain date).

Why 10 Working Days?

At the Group meeting the Ofgem representative questioned why the Group were considering an Implementation Date of 10 Working Days as the ELEXON implementation activities could be completed within 5 Working Days.

The Group noted that 5 Working Days implementation timescales are used for when a change is very simple (i.e. a housekeeping Modification Proposal) or needs to be put in place quickly. For example, the recent offshore transmission Modification Proposals had 5 Working Day implementation periods in order to give the industry commercial certainty as quickly as possible.

For P250 the Group believed that 10 Working Days was more appropriate as it:

- allowed Parties who were developing Modification Proposals to understand the impact of P250 on their potential changes before P250 is implemented; and
- was inline with the best practice approach which the CUSC used (as noted by one consultation respondent) where 10 Working Days is the standard implementation timescale.

One member noted that it would appear contradictory to constrain the industry's implementation date period for P250, yet were advocating no constraints on Ofgem's

© ELEXON Limited 2010

decision making processes. The Ofgem representative noted that the implementation date period for P250 should reflect the timescale needed for activities to implement P250.

ELEXON noted that we would seek the views of the Panel and the industry (via the Report Phase Consultation) on the appropriateness of the P250 implementation timescale.

Other Group comments on Implementation Dates

The majority of the Group also noted that they were not against constructing Implementation Dates that cannot time out where it is appropriate (such as for documentation only changes like P250). But the majority did not believe that the BSC should mandate such a construction methodology for all Modification Proposals. These members believed that fixed Implementation Dates were appropriate for system changes, due to the uncertainty and planning difficulties they could create. Instead these members believed that the current process (where the Panel decides whether to use a 'fixed' or 'open-ended' date on a case by case basis) should continue.

Report Phase Consultation question
Do you agree with the Panel's suggested Implementation Date of 10 Working Days after an Authority decision? • Please consider whether you would prefer a period of 5 Working Days or 10 Working Days?
The Panel invites you to give your views using the response form in Attachment G.

© ELEXON Limited 2010

7 The Case for Change

This section summarises Group's and consultation respondents' views and key arguments for P250. The detailed debate is contained in Attachment B.

Proposed Modification vs. the current arrangements

Majority - worse than the current arrangements

The **majority** of the Group and consultation respondents viewed the **Proposed Modification** as **considerably worse than the current arrangements.** The Group cited arguments against Applicable BSC Objectives (a), (c) and (d).

The Group believe the Proposed Modification would:

- substantially increases regulatory risk and uncertainty in the industry;
- increase industry costs;
- not allow the industry to amend implementation timescales in the event they are no longer appropriate;
- be a particular problem for smaller Parties and new entrants who may be less able to deal with uncertain Implementation Dates. This would present a barrier to entry;
- apply unnecessarily to all Modification Proposals (unlike the Alternative Modification which is targeted at those Modification Proposals which require additional Implementation Dates); and
- be unnecessary as the Panel can already construct Implementation Dates that cannot time-out.

Further details on why the Proposed Modification is worse than current arrangements can be found in Attachment A. Below are the Group's high level observations:

Applicable BSC Objective (a):

- One Group member viewed P250 Proposed Modification as being potentially illegal and therefore not better facilitating the efficient discharge by the Transmission Company of the obligations imposed upon it by the Transmission Licence. Their opinion was:

  "The Judge noted [in the P198/P200/P203/P204 Judgement paragraphs 62 and 66)] that the Authority "have a reasonable period in which to take a decision". However, what is being proposed, with P250 Proposed Modification, is that the Authority would have, as noted at the P250 Modification Group meeting, till "infinity" (neither the Proposer or the Ofgem representative disputed this) to make a decision. Only in this way can we be assured that the Panel will never 'time out' the Authority.

  However, such a time-frame (of infinity) clearly goes beyond a reasonable period and would also, in my view, fall foul of the Judge's comments with respect to the Authority not having the power "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."

  In essence whilst we are free to change the legal text in the Code, we are always 'confined' to the requirements to comply with the law, both in terms of the relevant energy related laws (such as from the Electricity Act 1989 to the Energy Act 2008) as well as general law (such as the 'reasonableness' 'test' noted by the Judge in P198)."

© ELEXON Limited 2010

- ELEXON legal advice is that P250 Proposed Modification is not illegal:

  "The suggestion has been made that the Proposed Modification is unlawful as it would, in effect, enable the Authority to make a decision in respect of a Modification within an unreasonable period.

  The Proposed Modification seeks to prevent the 'timing out' of the Authority's decision in respect of a Modification Proposal by providing that the proposed Implementation Date shall not prevent the Authority making a decision in relation to a relevant Modification by reason of the proposed Implementation Date having passed.

  Reference is made to the court's judgment in respect of the judicial review application brought by various claimants challenging the legality of the Authority's decision letter of 14 September 2007 ("the judgment").

  At paragraph 66 of the judgment, the judge notes that the Authority is obliged to take a decision in respect of a Modification Report within a reasonable time in light of the prevailing circumstances following receipt of the relevant report. In our view, the Proposed Modification is not in conflict with such obligation on the Authority nor does it fetter the ability of the Authority to take a decision within a reasonable period or otherwise.

  The Proposed Modification simply prevents a proposed Implementation Date being set which might impose a deadline by which the Authority must make a decision in respect of a Modification. The timing of the decision following receipt of the Modification Report is entirely within the gift of the Authority as the decision maker. It is therefore a matter for the Authority to determine what is a reasonable period in light of the relevant circumstances then existing.

  Indeed, the judgment acknowledges implicitly that the absence of a deadline for an Authority decision in the timetable set out in a Modification Report is not, in itself, objectionable when it states at paragraph 63 that, "If the Panel sets a timetable in a Modification Report that simply proposes that implementation should follow the Authority's decision, there is no tension between the Panel's timetable for implementation and the Authority's timetable for decision making".

  For the above reasons, we do not consider that the Proposed Modification is unlawful."

Applicable BSC Objective (c):

- P250 Proposed Modification does not benefit competition as it would introduce Implementation Date rules which would substantially increase uncertainty and regulatory risk, particularly in relation to material Modification Proposals. It would make it harder for the industry to:
  - plan and prepare for when change would be implemented; and
  - provide accurate impact assessments as circumstances may change if Ofgem requires a significant time period to make a decision.
- It would make it more expensive for industry as without fixed Implementation Dates the industry would need to incur additional costs in order to be prepared to implement a Modification with an open Implementation Date at any time. Even where an 'open' Implementation Date is tied to the 'next available Release no less than X months after an Authority decision', this would still require the industry to plan for the possibility of implementation in any scheduled Release over an unlimited time period.

© ELEXON Limited 2010

Applicable BSC Objective (d):

- P250 Proposed Modification would reduce the efficient operation of the BSC as:
  - the solution it would introduce can already be achieved under the current BSC arrangements. Implementation Dates can be constructed to allow reasonable time for an Authority decision, in some cases not including a fixed 'decision by' date. Additionally, the Panel already has the ability to write to the Authority. Making this process formal in itself provides no obvious significant benefit as the Authority cannot be obliged to act on any correspondence;
  - the Modification Group would be required to prepare cost benefit analysis that would be relevant for an indefinite period – this would be virtually impossible and would potentially undermine the cost benefit analysis; and
- P250 goes against the findings of the P198/P200/P203/P204 Judgement (paragraph 83) as if the Authority took a significant time to come to a decision then it may be deciding on a different Modification Proposal from the one the Panel gave their recommendations against. This would potentially cause issues if a Party wanted to appeal the Authority decision to the Competition Commission.

Minority – better than the current arrangements

One member of the Group (the Proposer's representative) and one consultation respondent believed the Proposed Modification would be better than the current arrangements. The minority of the Group cited arguments against Applicable BSC Objective (d).

Applicable BSC Objective (d):

- P250 Proposed Modification would remove the potential for Authority decisions on Modification Proposals to 'time out', thereby preventing a potential waste of industry resource and the associated costs incurred; and
- P250 Proposed Modification would ensure that the validity of underlying analysis which support a Panel recommendation can be questioned should circumstances surrounding the Modification Proposal change after a period of time has elapsed.

Alternative Modification vs. the current arrangements

Majority - worse than the current arrangements

The **majority** of the Group and consultation respondents believed the **Alternative Modification would not be better than the current arrangements**. The Group cited arguments against Applicable BSC Objectives (c) and (d).

Applicable BSC Objective (c):

- P250 Alternative Modification would be detrimental to competition, as even though the additional Implementation Dates proposed by the Panel could be 'fixed' rather than open-ended (and would only be proposed where needed rather than for every Modification Proposal), the possibility that Implementation Dates could be varied would create uncertainty and the risk that analysis could become outdated.

Applicable BSC Objective (d):

© ELEXON Limited 2010

- P250 Alternative Modification would reduce the efficient operation of the BSC as it would introduce greater uncertainty as to when Modification Proposals would be implemented.

Minority - better than the current arrangements

A **minority** of the Group believed the **Alternative Modification would be better than the current arrangements**. The minority of the Group cited arguments against Applicable BSC Objectives (c) and (d).

Applicable BSC Objective (c):

- P250 Alternative Modification better facilitates competition as it would introduce a process that would allow industry to be consulted on any additional Implementation Dates and any 'time-sensitive' issues (such as whether the analysis contained in the Final Modification Report was out of date, or whether the original implementation lead times/costs had changed).

Applicable BSC Objective (d):

- P250 Alternative Modification would provide a mechanism by which the Authority could ensure that it does not 'time out' purely as a result of Implementation Date construction. This would prevent a potential waste of industry resource and the associated costs incurred;
- P250 Alternative Modification would allow industry to inform the Authority if the analysis which supported a Panel recommendation is out of date; and
- P250 Alternative Modification would go some way to better preserving the regulatory balance between the Authority and the Panel when compared to the Proposed. As stated by the Judge in the P198/P200/P203/P204 Judgement:

  "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."

Alternative Modification vs. the Proposed Modification

Unanimous Group view – Alternative Modification better than Proposed Modification

The Group (including the Proposer) **unanimously** believed that the **Alternative Modification would be better than the Proposed Modification**. This view was supported by the majority of consultation respondents. The Group and respondents noted the following reasons:

Applicable BSC Objective (a):

- None of the Group members view the Alternative Modification as potentially illegal.

Applicable BSC Objective (c):

- The Alternative Modification introduces a process which gives industry expertise the opportunity to assist (during the consultation) on the construction of additional Implementation Dates. This is likely to make for more appropriate Implementation Dates than would be achieved under the Proposed Modification as the Alternative Modification allows the Panel to take account of any changes in lead

© ELEXON Limited 2010

time/implementation approach that might be appropriate. It also allows revised 'fixed' dates to be put forward, whereas the Proposed requires 'open-ended' dates;

- The Alternative Modification introduces a process which gives industry expertise the opportunity to assist (during the consultation) the Panel as to whether the analysis contained in the Final Modification Report is out of date. This is a more efficient process than under the Proposed Modification as the Alternative Modification:
  - applies only where needed (unlike the Proposed Modification which is arguably a disproportionate response to the defect); and
  - allows changes in circumstances (including costs and implementation lead times) to be flagged nearer the time rather than 'second-guessed' up front (as would need to happen with the Proposed Modification; and
- The Alternative Modification would introduce a process based in part on an existing process (the Conditional Implementation Date process introduced by P180). This makes for a clearer and more easily understood process for industry.

Applicable BSC Objective (d):

- P250 Alternative Modification would only apply to Modification Proposals where the Authority in unable to make a decision before the final 'decision by' date. Whereas the Proposed Modification applies inappropriately to all of Modification Proposals; the vast majority of which have no chance of timing out; and
- P250 Alternative Modification goes some way towards better preserving the regulatory balance between the Authority and the Panel when compared to the Proposed. As stated by the Judge in the P198/P200/P203/P204 Judgement:

  "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."

© ELEXON Limited 2010

8 Panel's Initial Discussions

Panel's consideration of the Assessment Report

What are the benefits of having BSC System Releases?

One member noted that the Modification Report should include details of the advantages of having set dates for BSC System Releases. ELEXON noted that we have three BSC Systems Releases each year so that industry can plan for change. By batching up changes into Releases ELEXON and industry can reduce the cost of implementing changes by combining overheads costs from several changes into one reduced cost. Under the Proposed Modification there may be more changes implemented outside of Releases. The consultation respondents noted that this is likely to increase their implementation costs.

Prevention of wasted work and effort

A Panel member noted that part of the driver for the prevention of timing out was to avoid wasting effort and 'losing' work. However they believed that the Authority should be reminded that the Panel and ELEXON are able to process an Urgent Modification in as little as one day. Turning round a Modification in such timescales may mean that the work and effort would not be lost. The Modification Group had a similar discussion. They noted that if the Authority rejected a Modification, stating they rejected it because there was insufficient time to make a decision but the analysis was still useable, then a new Modification could be raised and quickly progressed.

What is reasonable?

A Panel member questioned whether the Group had discussed the judge's comments regard the Authority having a reasonable time to make a decision (see page 17 and 18). ELEXON noted that this had been discussed in relation to a Group member's comments that the Proposed Modification was illegal. ELEXON's view is that the Proposed Modification simply prevents a proposed Implementation Date being set which might impose a deadline where the Authority could 'time out'. However, the timing of the decision following receipt of the Modification Report is entirely within the gift of the Authority as the decision maker. It is therefore a matter for the Authority to determine what is a reasonable period in light of the relevant circumstances then existing.

Indeed, the judgment acknowledges implicitly that the absence of a deadline for an Authority decision in the timetable set out in a Modification Report is not, in itself, objectionable when it states at paragraph 63 that, "If the Panel sets a timetable in a Modification Report that simply proposes that implementation should follow the Authority's decision, there is no tension between the Panel's timetable for implementation and the Authority's timetable for decision making".

No impact on the Transmission Company?

One Panel member was surprised that the Transmission Company had reported no impact from the Proposed or Alternative Modifications. The Transmission Company representative explained that they consider that under P250 Implementation Dates would be constructed in such a way that they were aligned to a Release, and gave the Transmission Company sufficient time to implement. Hence there would be no impact.

© ELEXON Limited 2010

What are the reasons for not including an ability for the Panel to make new recommendations in the Alternative Modification

One member questioned why the Group had not included a facility in the Alternative Modification for the Panel to make new recommendations and redo analysis when they constructed additional Implementation Dates. ELEXON explained the Group had considered this potential alternative solution but did not carry it forward because it:

- It does not meet the defect/issue as set out in the Modification Proposal form; and
- A Transmission Licence change would be required

The Transmission Licence does not provide for re-submission of an updated Modification Report (containing new analysis or a new recommendation). Without a Transmission Licence change the Authority could not legitimately consider such a report.

The Panel member noted that they could not support the Alternative Modification as this ability to redo analysis and recommendations was not included. The Panel member asked the Ofgem representative whether they intended to include this ability in their Code Governance changes. The Ofgem representative noted that they did intend to include a 'send back' ability in their Code Governance changes.

Why would P250 increase implementation costs?

The Ofgem representative asked for more detail on why the Modification Group believed P250 would increase implementation costs. ELEXON explained that the Group was concerned that participants would be required to have standing implementation teams at the ready if they did not have certainty about when Modifications were implemented. Under the current arrangements participants only need to use change resource at certain defined points. Under P250 they may be required to keep standing teams at the ready to implement changes. This would increase costs.

Panel's initial views against the Applicable BSC Objectives

Proposed Modification vs. current arrangements

The Panel **unanimously** believes the Proposed Modification **does not** better facilitate the Applicable BSC Objectives when compared to the current arrangements. The Panel cited views against Applicable BSC Objectives (c) and (d).

Applicable BSC Objective (c):

- The Proposed Modification does not benefit competition as it would introduce Implementation Date rules which would increase uncertainty and regulatory risk. This would cause particular problems to new entrants as they would be uncertain about the regulatory regime.

Applicable BSC Objective (d):

- The Proposed Modification is not good governance as it increase uncertainty in the BSC arrangements; and
- The Proposed would over-constrain the Modifications process by requiring open-ended Implementation Dates for all Modification Proposals.

© ELEXON Limited 2010

Alternative vs. current arrangements

The Panel, **by majority**, believes the Alternative Modification **does not** better facilitate the Applicable BSC Objectives when compared to the current arrangements. The Panel cited views against Applicable BSC Objectives (c) and (d).

Applicable BSC Objective (c):

- The Alternative Modification would be detrimental to competition, as even though the additional Implementation Dates proposed by the Panel could be 'fixed' rather than open-ended, the possibility that Implementation Dates could be varied would create uncertainty and the risk that analysis could become outdated.

Applicable BSC Objective (d):

- The Alternative Modification would reduce the efficient operation of the BSC as it would introduce greater uncertainty as to when Modification Proposals would be implemented.

Alternative better than the current arrangements

A **minority** of the Panel believed the Alternative Modification **does** better facilitate the Applicable BSC Objectives when compared to the current arrangements. Those members cited Applicable BSC Objective (d) as it:

- Would introduce a pragmatic process which reduces wasted industry resource from 'timing out' in the few cases where 'timing out' is a possibility.

Alternative vs. Proposed

The Panel, **by majority**, believes the Alternative Modification better facilitates the Applicable BSC Objectives when compared to the Proposed Modification The Panel cited views against Applicable BSC Objectives (c) and (d).

Applicable BSC Objective (c):

- The Alternative Modification introduces a process which gives industry expertise the opportunity to assist during the consultation:
    - on the construction of additional Implementation Dates. This is likely to make for more appropriate Implementation Dates than would be achieved under the Proposed Modification as the Alternative Modification allows the Panel to take account of any changes in lead time/implementation approach that might be appropriate. It also allows revised 'fixed' dates to be put forward, whereas the Proposed requires 'open-ended' dates;
    - the Panel as to whether the analysis contained in the Final Modification Report is out of date.
- The Alternative Modification applies only where needed (unlike the Proposed Modification which is arguably a disproportionate response to the defect); and
- The Alternative Modification allows changes in circumstances (including costs and implementation lead times) to be flagged nearer the time rather than 'second-guessed' up front (as would need to happen with the Proposed Modification).

Applicable BSC Objective (d):

- It is more appropriate to place the trigger on the Authority (as with the Alternative), rather than the Panel (as with the Proposed) as it is best placed to know if it is in a position where 'timing out' is a possibility.

© ELEXON Limited 2010

Two members believed neither the Alternative nor the Proposed was better.

9 Recommendations

Having considered the P250 Assessment Report, the Panel initially recommend:

- that Proposed Modification should not be made;
- that Alternative Modification should not be made;
- that although neither Modification is better than the current arrangements, the Alternative Modification is better than the Proposed Modification;
- a provisional initial Implementation Date for the Proposed Modification or Alternative Modification of:
    - 10 Working Days after an Authority decision;
- the Proposed Modification legal text for modifying the Code; and
- the Alternative Modification legal text for modifying the Code.

Recommendation

The Panel unanimously recommends **rejecting the Proposed** and by majority recommend **rejecting the Alternative Modification**.

The majority of the Panel believes the **Alternative Modification is better than the Proposed Modification.**

10 Further Information

More information is available in:

Attachment **A**: Assessment Report

Attachment **B**: Detailed Assessment

Attachment **C**: Legal Text for P250 Proposed Modification

Attachment **D**: Legal Text for P250 Alternative Modification

Attachment **E**: Reject Modification P93 Authority decision

Attachment **F**: P198/P200/P203/P204 Judicial Review Judgement

Attachment **G**: Report Phase Consultation questions

All P250 documentation can be found on the P250 page of the ELEXON Website.

© ELEXON Limited 2010