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| <b>Meeting name</b>     | BSC Panel   |
| <b>Date of meeting</b>  | 14 June 2007  |
| <b>Paper title</b>      | Issue 25 Report   |
| <b>Purpose of paper</b> | For Information   |
| <b>Synopsis</b>         | This paper sets out the discussions from the Issue 25 Group |

## 1 Introduction

1.1 Issue 25 was raised by npower and submitted to the Governance Standing Modification Group. Issue 25 sought industry views on the following questions:

- Should there be an appeal mechanism for PAB decisions?
- For a decision where PAB has discretion, is it appropriate that PAB should hear any appeal on that decision? If not, who should be the appeal body?

1.2 The Issue 25 Group met once on 12 December 2006.

## 2 Group Discussion

### 2.1 *Proposers introduction*

2.1.1 The proposer introduced the issue to the group outlining that BSC Parties have no means to appeal a PAB decision (other than for Certification/Accreditation matters). The issue stems from npower's challenge of Supplier Charges arising from a Supplier of Last Resort appointment. The PAB decision was, in the view of npower, not consistent with the BSC. However, there was no means to appeal the decision. It was noted that the specific issues relating to this matter were being discussed as Issue 26. Issue 25 relates solely to the broader issue of whether an appeals mechanism for PAB decisions is appropriate. The questions for consideration were therefore whether there should be an appeal mechanism introduced for PAB decisions, who should this be to and on what grounds would an appeal be made?

2.1.2 The Group noted that there was a difference between unreasonable decisions on the sanctions or actions required in respect of an acknowledged non-compliance and decisions based on a disputed interpretation of the Code as to whether a Party was in fact non-compliant (which it may or may not be possible to address via the Modification process). Some members stated that an appeal mechanism should not be able to be used to change the Code so as to turn a genuine non-compliance into a compliance.

### 2.2 *Question of ability to appeal*

2.2.1 The Group was sympathetic to the idea of appeals (noting arguments in favour of natural justice) and believed that it would be reasonable to have some means of escalating a decision from the PAB to another body. It was however noted that an appeal could take some time and differentiating between when to appeal and when to raise a modification was important. Members noted that modifications are not usually retrospective in nature whereas an appeal can rectify a

poor determination. Some members questioned how an appeals mechanism would work in practice and asked whether a mechanism for referrals would be more appropriate.

### 2.3 *Appeals Body*

- 2.3.1 The Group first considered that the BSC Panel should be the appellant body. This raised the question of what would occur if the Panel was also acting as the PAB. It was suggested that one option would be to remove the ability for the Panel to act as the PAB. Some members were unsure if this would be a sufficient measure. (It should be noted that Modification P207, if approved, will remove the ability of the Panel to act as PAB.)
- 2.3.2 The second consideration was the ability to appeal to the Authority. There was limited appetite for this from the Group members who thought the Authority would not be keen on hearing appeals of this nature (as opposed to Certification/Accreditation/Qualification appeals, which are already provided for), suggesting that appeals to the Authority are not always consistent with the principles of "better regulation". Ofgem has a statutory duty to only regulate where this is required and to minimise intervention. Thus an appeal to the Authority in the instances of PAB determinations may not meet the criteria of consistency, transparency and proportionality. However, some members still felt that there are scenarios where the Authority might be the most appropriate body to hear an appeal against a Panel/PAB decision (e.g. where the issue concerned interpretation of wording in the Code that had been approved by the Authority).
- 2.3.3 The Group considered whether there were any other bodies that could be appealed to. One suggestion was the Supplier Volume Allocation Group (SVG), although this was not considered appropriate by the Group. One member noted that a possibility could be a separate appeals body made up of independent and representative experts as was the case for notification errors when NETA was set up. In this case it was envisaged that an appeal would be escalated to the Panel who would have the ability to delegate to an expert group. However, this was thought to be expensive and inefficient. One member also noted that the burden to clarify and simplify issues should be on the Party making the appeal (perhaps with the assistance of BSCCo). It was further suggested that a minimum financial threshold should apply to ensure frivolous appeals do not occur.
- 2.3.4 It should also be noted that the Code (section H7) specifically excludes the use of the arbitration process (under the rules of the Electricity Arbitration Association) for issues between a Party and the Panel or a Panel Committee (or a Modification Group).

### 2.4 *Grounds for appeal*

- 2.4.1 The proposer set out potential grounds for an appeal in slides presented to the Group. These were as follows:
- the PAB not following procedures correctly;
  - the PAB placing undue weight upon certain evidence or the lack of certain evidence (which would be taken to include not placing due weight on particular evidence or lack of evidence);
  - PAB misinterpretation of all or some of the evidence presented (which could include the text of Code provisions);
  - that the decision would unfairly prejudice the interests of a party (This was viewed as more contentious and would have to be considered in the context of the objectives of the Code);
- and

- that a PAB decision could cause a Party to be in breach of the Electricity Act.

2.4.2 The group agreed that the first three potential grounds for appeal referred to in 2.4.1 would be a good starting point of reasonable grounds in any Modification Proposal.

### 2.5 *Next steps from Issue meeting*

2.5.1 The proposer agreed that sufficient information was available to draft a proposal. If a proposal were forthcoming this could be distributed to the Group for feedback and comments. A decision on whether another meeting is required or the issue can be closed would be made after discussions between the proposer and ELEXON.

### 2.6 *Progress of Modification Proposal P207*

2.6.1 Subsequent to the Issue meeting the proposer noted the progress of P207 and the discussions regarding appeal of decisions. Recognising that provisional thinking was being sought in this area the proposer requested that the Issue remain on hold pending the outcome of P207 discussions.

2.6.2 The Modification Report for P207 has been sent to the Authority. The appeals mechanism contained in the P207 solution does not specifically resolve the issues identified under Issue 25; in particular, because there are some decisions (e.g. on the interpretation of the Code and application of Supplier Charges in accordance with prescribed rules) that are arguably outside the scope of "the approval of Risk Management Plans". The proposer has contacted ELEXON and suggested that Issue 25 should be closed pending the decision on P207 and further consideration of the issue of appeals. It is quite likely that a new issue may be raised, focusing specifically on the aspects not addressed by the appeals mechanism proposed under Modification P207. The Group were therefore asked to review the report and confirm there were no further issues to be discussed at this stage.

## 3 Recommendations

3.1 The Panel is invited to:

- a) **NOTE** the discussion of the Issue 25 Group; and
- b) **NOTE** a further Issue may be raised in the future in the area of PAB Governance.

David Jones

### ELEXON Change Delivery

Appendix 1 – List of Issue 25 Attendees

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| <b>Member</b>    | <b>Organisation</b>             | <b>12/12</b> |
|------------------|---------------------------------|--------------|
| David Jones      | ELEXON (Chairman)               | √            |
| Chris Stewart    | ELEXON (Lead Analyst)           | √            |
| Richard Harrison | Proposer                        | √            |
| Rosie McGlynn    | E.ON                            | √            |
| Andrew Latham    | Centrica                        | √            |
| Chris Carberry   | ScottishPower Energy Settlement | √            |
| Colin Prestwich  | Smartestenergy                  | √            |

| <b>Attendee</b>                   | <b>Organisation</b> |   |
|-----------------------------------|---------------------|---|
| Nick Rubin                        | Ofgem               | √ |
| Richard Hall (via teleconference) | Ofgem               | √ |
| Abid Sheikh                       | energywatch         | √ |
| James Evans                       | British Energy      | √ |
| Ysanne Hills                      | ELEXON              | √ |
| Gareth Forrester                  | ELEXON              | √ |