
Meeting name	BSC Panel
Date of meeting	14 October 2010
Paper title	Panel Recommendations on Modification Proposals Arising from Licence Conditions
Purpose of paper	For Decision
Synopsis	The Panel is invited to consider how it reaches its Recommendations in respect to Modification Proposals arising from licence conditions to help ensure it is consistent with the statutory energy codes appeals process. This matter arises from changes to Ofgem's role in the Code modification process and is relevant to P263 and P262 but also any future Recommendations arising from Significant Code Reviews (SCRs).

1 Background

- 1.1 The new electricity trading arrangements (NETA) in 2001 provided for BSC parties and energywatch to propose changes to the BSC and for Ofgem to decide whether to approve or reject such proposals at the end of the modification process. The arrangements did not envisage Ofgem originating proposals. At that time Panel Recommendations were only intended to assist Ofgem in their determinations, but the introduction of a statutory right to appeal Ofgem code modification decisions in 2004 altered this somewhat.
- 1.2 However, apart from extending the scope of the BSC to the whole of GB, the basis for Panel Recommendations, namely better facilitation of achievement of applicable BSC objectives (a), (b), (c) and (d) has remained unchanged since then. It is important to note that objective (a) "the efficient discharge by the Transmission Company of the obligations imposed under the Transmission Licence" was intended to ensure, the BSC Panel considered for example such matters as non discrimination (SLC C7) and system security standards (SLC E16) in arriving at their Recommendation.

2 Ofgem's effective origination of modification proposals

- 2.1 Ofgem has effectively acquired powers to originate changes to the BSC by requiring the Transmission Company to bring forward proposals to implement their code governance review conclusions by agreement with them of very detailed and prescriptive licence conditions. Parliament nevertheless, has determined that in certain circumstances materially affected parties have the statutory right to challenge Ofgem Modification decisions and their determination on P263, P262 or any future proposals originating from a SCR are not excluded from this. Licence changes, procedural changes to the BSC, or the process by which the BSC Panel arrives at its Recommendation must not therefore intentionally or unintentionally undermine this statutory right.

3 Preserving statutory rights of appeal

- 3.1 Section 173 to 176 of the Energy Act 2004 sets out statutory merits based appeals process to the Competition Commission against Ofgem energy code modification decisions. Parliament did not want this to be an automatic right of appeal for all materially affected parties and a filter

mechanism was established in secondary legislation to exclude appeals in certain circumstances. The relevant statutory instrument thus prevents appeals being considered where Ofgem consents to "*a majority recommendation made by the Panel in the Modification Report*".¹ It is implicit that this requires the Panel to establish its own independent and impartial view and make a recommendation based on the merits of the proposal.

- 3.2 Simply because a proposal implements a licence change agreed between Ofgem and the Transportation company is not in itself a substantive point as it doesn't describe why the proposal is intrinsically better. It should therefore not be given any weight in the Panel Recommendation. If it were to be considered relevant the Panel might be seen to simply 'rubber stamp' Ofgem's wishes as set out in the licence (or simply following an Ofgem SCR direction provided for in the licence). This would undermine the statutory appeals process because the Panel Recommendation would be fettered by a prior decision to implement particular changes to the Transmission Licence. Statutory matters clearly take precedence, over Transmission Licence changes.
- 3.3 It is important to note that network users or other affected parties did not have the right to object to or lodge a merits based appeal against the Code Governance Review Licence changes. However depending on the Panel Recommendation an appeal route for P263 and P262 may be available to materially affected parties.

4 Recommended Way Forward

4.1 The Panel is invited to:

- a) **NOTE** that in order to avoid prejudicing potential statutory rights of appeal against Ofgem BSC Modification decisions all Panel Recommendations must reflect a merits based assessment of whether the proposal better facilitates the achievement of the applicable BSC objectives; and
- b) **AGREE** that in making Modification Recommendations only a proposal's intrinsic benefits or dis-benefits will be considered relevant under BSC objective a)².

Peter Bolitho

Panel Member

¹ Statutory Instrument 2005 No. 1646 The Electricity and Gas Appeals (Designation and Exclusion) Order 2005.

² Particular care would need to be exercised in relation to Recommendations for modification proposals arising from Transmission Licence conditions (including those originating from Ofgem Significant Code Review directions).