

Modification proposal:	<b>Balancing and Settlement Code (BSC) P378: 'Introduction of a CM Supplier Interim Charge'</b>		
Decision:	The Authority <sup>1</sup> has decided to reject this modification proposal <sup>2</sup>		
Target audience:	National Grid Electricity Transmission Plc (NGET), Parties to the BSC, the BSC Panel and other interested parties		
Date of publication:	20 February 2019	Implementation date:	n/a

## Background

The judgment of the General Court of the Court of Justice of the European Union<sup>3</sup> on 15 November 2018 had the effect of annulling the European Commission's State aid approval for the GB Capacity Market scheme<sup>4</sup>. Currently, payments from suppliers to fund the cost of payments to Capacity Providers under the Capacity Market are not being collected by the Capacity Market Settlement Body (the Electricity Settlements Company or "ESC") and payments to the Capacity Providers have been suspended.

The Government has confirmed that it is working with the European Commission to re-secure State aid approval for the full Capacity Market, and confirmed its view that a positive final State aid decision would allow deferred payments to be made to Capacity Providers who have met their obligations during the "standstill" period<sup>5</sup>. As it is unclear when such payments will be reinstated if they are required, the potential timing and size of the liability for suppliers is unknown but any deferred payments are likely to be substantial as the value of the 2018/19 Capacity Market Delivery Year is circa £1 billion.

## The modification proposal

On 20 December 2018, VPI Immingham LLP (the Proposer) raised P378.<sup>6</sup> The BSC Panel<sup>7</sup> considered P378 at an urgent BSC Panel meeting on 21 December 2018 and agreed on

<sup>1</sup> References to the "Authority", "Ofgem", "we" and "our" are used interchangeably in this document. The Authority refers to GEMA, the Gas and Electricity Markets Authority. The Office of Gas and Electricity Markets (Ofgem) supports GEMA in its day to day work. This decision is made by or on behalf of GEMA.

<sup>2</sup> This document is notice of the reasons for this decision as required by section 49A of the Electricity Act 1989.

<sup>3</sup> <http://curia.europa.eu/juris/document/document.jsf?text=&docid=207792&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=1430154>

<sup>4</sup> The judgment does not affect the State aid approval for the Supplementary Auction for the 2017/18 delivery year

<sup>5</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/767015/proposals-for-technical-amendments-to-the-capacity-market.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/767015/proposals-for-technical-amendments-to-the-capacity-market.pdf)

<sup>6</sup> <https://www.elexon.co.uk/mod-proposal/p378/>

<sup>7</sup> The BSC Panel is established and constituted pursuant and in accordance with Section B of the BSC and Standard Special Licence Condition C3 of the Electricity Transmission Licence available at: [www.epr.ofgem.gov.uk](http://www.epr.ofgem.gov.uk)

an initial recommendation to Ofgem to approve P378 and to treat it as an Urgent Modification Proposal. On 8 January 2019, we granted P378 urgent status<sup>8</sup>.

P378 seeks to introduce a new time-limited monthly BSC charge on suppliers to be known as the CM Supplier Interim Charge. The charge would cover the annual amount that suppliers would have expected to pay under the Capacity Market regulations before the standstill in respect of the Capacity Market Delivery Year October 2018 to September 2019. The key elements of this proposal are:

- The charge will form a fund, without provisions for credit cover or the mutualisation of any shortfall or interest on late payments.
- Any failure to make a payment will be treated as being in Default of the BSC, and carries the same BSC sanctions as any other Default under the BSC (as prescribed in Section H3 of the BSC).
- At the time of release, the fund will either be paid:
  - to the ESC, where the ESC invoice suppliers for the same periods;
  - back to suppliers, where the standstill is not lifted after all routes of appeal are exhausted or is lifted but without payments covering the relevant period, or the Secretary of State definitively states that there will be no payments in respect of the relevant period, each as determined by the BSC Panel on request by a supplier; or
  - back to suppliers at the end of September 2020 if no other trigger has been invoked by this point.
- The first monthly invoice will include amounts for January 2019 and subsequent months up to and including the month in which the Implementation Date occurs, with payments for October to December 2018 being smeared equally across the subsequent two invoices.
- The fund will be held in a separate Elexon bank account and be subject to existing Elexon account governance with interest accruing to Elexon to defray costs as the BSCCo.
- Elexon will report regularly on amounts invoiced and received.

The Proposer believes that P378 would better facilitate the following BSC objectives<sup>9</sup>:

- (b): the efficient, economic and coordinated operation of the National Electricity Transmission System;
- (c): promoting effective competition in the generation and supply of all electricity and (so far as consistent therewith) promoting such competition in the sale and purchase of electricity;
- (d): promoting efficiency in the implementation and administration of the balancing and settlement arrangements described in paragraph 2; and

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<sup>8</sup> <https://www.ofgem.gov.uk/publications-and-updates/p378-introduction-cm-supplier-interim-charge-decision-urgency>

<sup>9</sup> Applicable BSC objectives are set out in standard condition C3(3) of NGET's Transmission Licence, available [here](#).

(f): implementing and administering the arrangements for the operation of contracts for difference and arrangements that facilitate the operation of a capacity market pursuant to EMR legislation.

### **BSC Panel recommendation**

At the urgent BSC Panel meeting on 4 February 2019, the BSC Panel unanimously agreed that P378 would better facilitate the BSC objectives and the Panel therefore recommended its approval.

The Panel unanimously agreed with the Proposer that P378 would better facilitate objectives (b), (c), and (f), and agreed by majority that it would better facilitate objective (d). The Panel agreed with the Proposer that P378 would have a neutral impact on all other objectives.

### **Our decision**

We have considered the issues raised by the modification proposal and the Final Modification Report (FMR)<sup>10</sup> dated 5 February 2019. We have considered and taken into account the responses to Elexon's consultation on the modification proposal in the FMR, the recommendations of the BSC Panel, and the overarching regulatory framework which sets out the Authority's powers and duties.

For the reasons set out below, we have concluded that Ofgem does not have the power to approve P378. Given this conclusion, we have not considered whether the modification proposal would better facilitate the objectives of the BSC.

### **Reasons for our decision**

Ofgem does not consider that it has the power to approve a modification, that is designed to compel suppliers to pay (a proxy for) the Capacity Market Supplier Charge in light of the fact that Parliament has established a specific and bespoke statutory regime for regulating the Capacity Market (including but not limited to the provisions of the Energy Act 2013, Electricity Capacity Regulations 2014 and Electricity Capacity (Supplier) Regulations 2014, each as amended). This regime includes technical provisions, which set out how the supplier charge is to be calculated and collected, and it is through this regime that suppliers should be required to pay the supplier charge. The approval of the modification to provide for the collection of supplier charges under the BSC, on reliance of our general statutory powers e.g. as set out in the Electricity Act 1989 (in place of the specific statutory regime), would not in our view be lawful.

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<sup>10</sup> BSC modification proposals, modification reports and representations can be viewed on the Elexon website at [www.elexon.co.uk](http://www.elexon.co.uk)

## **Decision Notice**

In accordance with Standard Condition C3 of NGET's Transmission Licence, the Authority has decided that modification proposal BSC P378: 'Introduction of a CM Supplier Interim Charge' should not be made.

**Cathryn Scott**

**Director, Wholesale Markets and Commercial**

Signed on behalf of the Authority and authorised for that purpose