

ENERGY ACT 2004

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Chapter 1: Electricity Trading and Transmission

Section 133: “New trading and transmission arrangements”

343. **Section 133** sets out what is meant by “new trading and transmission arrangements”. This phrase is used principally in sections 134, 137 and 139 of the Act in order to limit the powers given to the Secretary of State.

Section 134: Power to modify licence conditions

344. **Section 134** gives the Secretary of State the ability to modify the conditions of electricity licences in GB in order to implement the new trading and transmission arrangements. The new arrangements will have most impact on transmission licensees but there will also be necessary changes to other types of electricity licences.

Section 135: Alteration of transmission activities requiring licence

345. **Section 135** amends section 4 of the Electricity Act by replacing the prohibition on unlicensed transmission with a prohibition on unlicensed participation in transmission. Participation in transmission is described as either of two separate transmission activities. These activities are: (1) co-ordinating and directing the flow of electricity onto the transmission system e.g. balancing the demand and supply of electricity close to real time (done under the new arrangements by a system operator); or (2) making available for use for the purposes of such a transmission system anything that forms part of it. This is to reflect the separation of roles between the transmission system operator and the transmission asset owners under BETTA.

Section 136: Transmission licences

346. **Section 136** makes changes to sections 6 and 7 of the Electricity Act in the following ways:
- it amends the power of GEMA to grant a transmission licence to that of granting a licence to participate in transmission, reflecting the change to the prohibition explained above;
 - it removes the restriction stopping GEMA from granting more than one transmission licence in any given geographical area;
 - it allows GEMA to alter, with the consent of the licence holder, the geographical scope of a licence;
 - it allows for licence conditions that can restrict the activities of a transmission licence holder and/or restrict the area within which authorised activities can be undertaken.

347. In particular subsection (3) amends section 7 of the Electricity Act and thereby extends the scope of conditions that may be included in a transmission licence. It allows a licence condition to restrict the holder from carrying on an activity otherwise authorised by the grant of the licence or restrict the carrying on of that activity to a specific geographic area. This change is necessary because each licence will simply be a licence to participate in transmission. It is the conditions imposed in the licence that will determine which transmission activities can be undertaken by the licensee.

Section 137: New standard conditions for transmission licences

348. Subsection (1) of section 137 gives the Secretary of State power to determine a whole new set of standard conditions for transmission licences, whilst subsection (2) requires the publication of such conditions. This power is required because it is expected that a new set of standard conditions for transmission licence holders will be required for BETTA and the power in section 134 only allows for the modification of individual conditions, not the wholesale replacement of a set of standard conditions. Subsection (4), following the approach in section 33(2) of the Utilities Act, permits the inclusion of conditions which make provision in respect of the operation of other standard conditions, in particular for other conditions not to be brought into operation, or to be re-activated or suspended in the circumstances specified in the condition, i.e. for conditions to be switched on and off as appropriate during the implementation of BETTA. Subsections (5) and (6) ensure that section 8A of the Electricity Act operates, in the case of transmission licences, by reference to the standard conditions determined under subsection (1). Subsection (7) restricts the time during which the Secretary of State may use this power to eighteen months after subsection (1) comes into force (or if earlier, once subsections (5) and (6) come into force, by which time the power should have been exercised).

Section 138 and Schedule 17: Conversion of existing transmission licences

349. This section gives Schedule 17 effect. Schedule 17 provides for a licensing scheme or schemes to be made by the Secretary of State. The scheme or schemes will be used to transform each existing transmission licence into a licence to participate in transmission. This is necessary to ensure that the existing licence holders will not be in breach of the prohibition in section 4 of the Electricity Act when the amendments made under section 135 of this Act come into force. It also allows for the new set of standard transmission licence conditions to be incorporated into each transmission licence. The Secretary of State is also given the power to make incidental, supplemental and consequential modifications to the licences and make appropriate transitional provision. The Schedule places an obligation on the Secretary of State to publish the text of each amended licence as soon as possible after the making of a new scheme. It also allows the Secretary of State, by statutory instrument subject to annulment, to make appropriate modifications to the licensing scheme after implementation.

Section 139: Grant of transmission licences

350. **Section 139** gives the Secretary of State power to direct GEMA to grant or refuse a new licence to participate in transmission. Subsection (2) requires the Secretary of State to consult GEMA before issuing such directions, whilst subsections (3) to (6) draw the boundaries for when and how the Secretary of State may make such directions.

Section 141 and Schedule 18: Property arrangements scheme

351. **Section 141** gives Schedule 18 effect. Schedule 18 provides the mechanism for GEMA to make a scheme or schemes for the transfer of property, rights or liabilities from a transmission licence holder to the system operator (who will also be a transmission licence holder) or for the creation of rights in favour of the system operator over property, rights or liabilities of a transmission licence holder. This facility is required to ensure that the new trading and transmission arrangements are implemented in

a timely and efficient manner and that the system operator has access to and use of all the property and equipment required to do its job effectively before the new trading and transmission arrangements can commence operation. In particular, GEMA has the power to determine disputes between the transmission licence holders. Only transmission licence holders may apply for the Authority to make a scheme under this Schedule. GEMA will then determine any point of dispute using the criteria set out in the Schedule and will also be able to override a third party's consent where it would otherwise be required.

352. **Schedule 18** also allows for an appeal against GEMA's decision. Aggrieved parties can appeal to the Competition Appeal Tribunal within seven days of the decision being made. The Tribunal has, among other things, the power to overturn, or amend GEMA's determination of any disputed point. Schedule 18 also provides for the Tribunal to have the power to make interim arrangements whilst the Tribunal is assessing the case.

Section 143 and Schedule 19: Amendments consequential on Chapter 1 of Part 3

353. Subsection (1) brings Schedule 19 into effect, whilst subsection (2) provides that a transmission licence holder retains his powers under Schedule 4 of the Electricity Act in relation to any geographic area that is no longer part of the area covered by his licence as a result of modifications under section 134 or the making of a licensing scheme under Schedule 17.

Chapter 2: Interconnectors for Electricity and Gas

Sections 145 to 148: licensing of electricity interconnectors

354. Section 4 of the Electricity Act provides that it is an offence to generate, transmit, distribute or supply electricity unless authorised by virtue of a licence and section 5 provides that in certain instances the Secretary of State may grant an exemption from this prohibition. Participation in the operation of an electricity interconnector is not addressed in the Act and is currently unregulated. There is no requirement for those participating in this activity to hold a licence or exemption.
355. **Section 145** amends section 4 of the Electricity Act to make unauthorised participation in the operation of an electricity interconnector a prohibited activity. As a result, the unauthorised participation in the operation of an electricity interconnector becomes an offence in the same way as the other activities referred to in section 4 of the Electricity Act. It also defines the activity, what is meant by an electricity interconnector and, by amending sections 5 and 6, enables the Secretary of State, or where relevant GEMA, to authorise the activity by either a licence or exemption.
356. **Section 145** also prevents an electricity interconnector licence being issued to the holder of any other type of licence under the Act and the latter from holding a licence to participate in the operation of an electricity interconnector. This is to prevent possible conflicts of interest in the allocation of capacity on interconnectors.
357. The procedures for determining standard licence conditions for electricity interconnectors are set out in section 146. These procedures are in line with those for existing licences. The concept of standard licence conditions is designed to ensure that all licences of a particular type contain the same licence conditions as far as appropriate and to facilitate the procedure in section 11A of the Electricity Act whereby licence conditions may be modified collectively. Section 146 gives the Secretary of State the power to draw up and publish the standard conditions of the electricity interconnector licence before the commencement of subsection (6). After that time the Secretary of State will have no further role in relation to the standard licence conditions although he may veto proposals made by GEMA to modify the standard licence conditions either on the grant of a licence or subsequently. Subsection (2) permits the standard conditions to make provision for a standard condition not to be brought into operation, to be

suspended or be reactivated in circumstances specified in the condition. This is intended to allow more flexible licensing arrangements.

358. Subsection (6) of section 146 amends section 8A of the Electricity Act so that the standard licence conditions determined under the power in subsection (1) will be incorporated into all licences granted after subsection (6) comes into force. Section 8A also gives GEMA the power to modify the standard conditions determined by the Secretary of State, when granting a licence and sets out the process to achieve this.
359. [Section 147](#) sets out the consequential amendments which the introduction of interconnector licensing will necessitate.
360. [Section 148](#) gives the Secretary of State the power to grant electricity interconnector licences under section 6 of the Electricity Act to persons participating in the operation of an electricity interconnector when the prohibition enters into force. The normal licence application procedure will not apply but the Secretary of State must consult a prospective licence holder, GEMA and such other persons as he considers appropriate before issuing a licence.

Sections 149 to 153: Gas interconnectors

361. Section 5(1)(a) of the Gas Act provides that it is an offence to convey gas through pipes to any premises or to a pipe-line system operated by a gas transporter unless authorised by a licence, exemption, or exception under the Act. Conveying gas through a gas interconnector currently only falls within the prohibition to the extent that the gas is being conveyed to a pipe-line system operated by a gas transporter.
362. [Section 149](#) amends section 5 of the Gas Act to exclude conveyance of gas through a gas interconnector from subsection (1)(a) of that Act and to define and make participation in the operation of a gas interconnector a prohibited activity. As a result, the unauthorised participation in the operation of a gas interconnector becomes an offence in the same way as the other activities referred to in section 5 of the Act. Participation in the operation of a gas interconnector will either be authorised by a licence granted under section 7ZA of the Gas Act (as inserted by this Act) or by an exemption order granted by the Secretary of State under section 6A of the Gas Act.
363. [Section 149](#) also prevents a gas interconnector licence being issued to the holder of any other type of licence under the Gas Act and the latter from holding a licence issued under new section 7ZA. This is to prevent possible conflicts of interest in the allocation of capacity on gas interconnectors.
364. The procedures for determining standard licence conditions for gas interconnectors are set out in section 150. These procedures are in line with those for existing licences. The concept of standard licence conditions is designed to ensure that all licences of a particular type contain the same licence conditions as far as appropriate and to facilitate the procedure in section 23 of the Gas Act whereby licence conditions may be modified collectively. Section 150 gives the Secretary of State the power to draw up and publish the standard conditions of the gas interconnector licence before the commencement of subsection (6). After that time the Secretary of State will have no further role in relation to the standard licence conditions although he may veto proposals made by GEMA to modify the standard licence conditions either on the grant of a licence or subsequently.
365. Subsection (2) of section 150 permits the standard conditions to make provision for a standard condition not to be brought into operation, to be suspended or be reactivated in circumstances specified in the condition. This is intended to allow more flexible licensing arrangements.
366. Subsection (6) of section 150 amends section 8 of the Gas Act so that the standard licence conditions determined under the power in section 150(1) will be incorporated into all licences granted after subsection (6) of section 150 comes into force. Section 8 of the Gas Act also gives GEMA the power to modify the standard conditions determined

by the Secretary of State, when granting a licence and sets out the process to achieve this.

367. **Section 151** modifies the **Pipe-lines Act 1962 (c.58)** and the **Petroleum Act 1998 (c.17)** so that the dispute settlement procedures set out therein no longer apply in relation to access by third parties to gas interconnectors. These will now be covered in the gas interconnector licence conditions.
368. **Section 152** gives the Secretary of State the power to grant gas interconnector licences under section 7ZA of the Gas Act to persons participating in the operation of a gas interconnector when GEMA's power to grant such licences enters into force. The normal licence application procedure will not apply but the Secretary of State must consult a prospective licence holder, GEMA and such other persons as he considers appropriate before issuing a licence.
369. **Section 153** amends the Gas Act so that where an act or omission taking place outside GB constitutes an offence under the Act it may be prosecuted in GB. Provisions made by or under the Act in relation to places outside GB apply to individuals and companies whether or not they are British citizens or incorporated under the law of a part of the UK.

Chapter 3: Special Administration Regime for Energy Licensees

Section 154: Energy administration orders

370. This section provides that a court may make an energy administration order appointing an energy administrator in relation to a protected energy company i.e. a company which holds a gas transportation licence or an electricity transmission or distribution licence.
371. Subsections (1), (2) and (3) explain the terms “energy administration order” and “energy administrator” and how the energy administrator is to perform his duty.
372. Subsection (4) establishes that an energy administration order can only apply to the affairs and business of a non-GB company (i.e. a company incorporated outside Great Britain and including a Northern Ireland company) which are carried out in Great Britain and to its property in Great Britain.
373. Subsection (5) sets out which licence holders may be subject to an energy administration order. These are all regulated natural monopolies.

Section 155: Objective of an energy administration

374. Subsection (1) establishes that the objective of the energy administrator in performing his duty is (i) to secure that the company's system (as defined in subsection (6)) is maintained and developed efficiently and economically, and (ii) to render the continuation of the energy administration unnecessary for this purpose by one of the means in subsection (2).
375. Subsection (2) defines the means by which energy administration may be rendered unnecessary. These are either the rescue of the company as a going concern or transfers which satisfy subsection (3).
376. Subsection (4) provides examples of the types of transfer which may satisfy subsection (3).
377. Subsection (5) provides that rescue is to be preferred to transfer in achieving the objective of energy administration. Transfers are only to be effected when rescue is not reasonably practicable without transfers, where the objective of the energy administration cannot be achieved through rescue without transfers or where such transfers would produce a better result for the creditors or members of the company.

Section 156: Applications for energy administration orders

378. This section sets out that an application for an energy administration order can only be made by the Secretary of State or by GEMA with the consent of the Secretary of State. It also requires the applicant to give notice to relevant persons, listed in subsection (2), as soon as reasonably practicable after the making of the application.

Section 157: Powers of court

379. This section sets out the powers of the court in relation to an energy administration order.
380. Subsection (1) sets out the court's powers on hearing an application for energy administration.
381. Subsection (2) provides that the court can only make an energy administration order if it is satisfied that the company is insolvent, facing insolvency or that on a petition from the Secretary of State under section 124A of the [Insolvency Act 1986 \(c.45\)](#) it would be just and equitable (aside from the objective of energy administration) to wind up the company in the public interest.
382. Subsections (3) and (4) provide that in certain circumstances the court cannot make an energy administration order.
383. Subsection (6) provides that an interim order made under subsection 1(d) may, amongst other things, restrict the exercise of a power of the company or its directors or confer a discretion on a qualified insolvency practitioner in relation to the protected energy company.
384. Subsection (8) provides that the company will be deemed to be insolvent in accordance with sections 123 or 222 to 224 of the [Insolvency Act 1986 \(c.45\)](#).

Section 158: Energy administrators

385. This section defines the status of the energy administrator. It further provides that he must exercise his management functions for the purpose of achieving the objective of the energy administration as quickly and efficiently as is reasonably practicable and that he must exercise and perform his powers and duties in the manner which, insofar as it is consistent with the objective of the energy administration, best protects the interests of the creditors of the company as a whole and, subject to those interests, the interests of the members of the company as a whole.

Section 159 and Schedules 20 and 21: Conduct of energy administration, transfer schemes etc

386. This section gives effect to Schedules 20 and 21 and applies the rule making power in section 411 of the [Insolvency Act 1986 \(c.45\)](#) for the purpose of giving effect to this Chapter.
387. [Schedule 20](#) provides for certain provisions of Schedule B1 of the 1986 Insolvency Act (introduced by section 248 and Schedule 16 of the [Enterprise Act 2002 \(c.40\)](#)) to have effect in relation to energy administration. A version of Schedule B1 to the 1986 Act as amended to apply to energy administration is available on the DTI website¹. The Schedule also grants the Secretary of State a power to make modifications to the provisions of insolvency law having effect in the case of unregistered companies in relation to energy administration (paragraph 33). This power is subject to the negative resolution procedure. It also grants the Secretary of State the power to make such modifications to primary legislation relating to insolvency including the Energy Act

1 www.dti.gov.uk/energy/leg_and_reg/acts/index.shtml

as he considers appropriate in relation to energy administration (paragraph 46). This power is subject to the affirmative resolution procedure.

388. **Schedule 21** covers the content and effect of transfer schemes which can be made as described in section 155(3) i.e. transfers to another company or companies as a going concern of so much of the protected energy company's assets as are necessary to ensure that the objective of the energy administration is met. The transfer may include assets other than the network system (vehicles, for example) but must include enough assets to constitute a going concern as a transportation, transmission or distribution company. It may be the case that all of the protected energy company's assets will be transferred to one company but the protected energy company may also be separated into several going concerns; for example in the case of an electricity distribution company it might be possible to separate the assets on geographical lines creating several smaller regional distribution networks. All transfers are subject to veto or amendment by the Secretary of State.
389. **Paragraphs 1 to 4** of Schedule 21 enable a protected energy company (through its energy administrator) to make a scheme or schemes for the transfer of property, rights and liabilities to a new company subject to the approval of the Secretary of State, who in turn must consult GEMA. Paragraph 5 provides that all or part of a licence can be included in a transfer scheme, whilst paragraph 6 provides that powers and duties which fall to the old energy company (i.e. the protected energy company in respect of which the energy administration order was made) under statutory provisions can be transferred to the extent that they are exercisable or required by the new energy company given the extent of the transfer of the business to it. The Secretary of State is given the power to modify the scheme before giving approval although he will require the consent of the old energy company and the new energy company to the modifications (paragraph 3). Similarly he may modify it subsequently with the consent of those parties and after consulting GEMA (paragraph 9).
390. **Paragraph 7** of Schedule 21 deals with a number of matters which provide for the smooth transition of property, rights etc from the protected energy company to the new energy company.
391. **Paragraphs 10 to 11** of Schedule 21 provide for cases where the energy company is a foreign company or foreign property, rights and liabilities are being transferred.

Section 160 to 164: Restrictions

392. These sections prevent energy administration being frustrated by prior orders of various types being granted before the Secretary of State or GEMA have been given an opportunity to apply for an energy administration order or by other steps being taken when an energy administration order has been made or an application is outstanding.

Section 160: Restrictions on winding-up orders

393. This section provides that a winding up order sought by a person other than the Secretary of State in respect of a protected energy company cannot be made unless notice has been served on the Secretary of State and GEMA and at least fourteen days have passed since the last of those notices was served. It also provides that if an application for an energy administration order is received before the winding up order is made the court can consider that application instead of making the winding up order.

Section 161: Restrictions on voluntary winding-up

394. This section prevents a protected energy company voluntarily winding itself up without the permission of the court and prevents the court from granting permission unless notice has been served on the Secretary of State and GEMA and at least fourteen days have elapsed since the service of the last of those notices. It also provides that if an

application for an energy administration order is received before such permission is given the court can consider that application instead of granting the permission.

Section 162: Restrictions on making of ordinary administration orders

395. Subsection (2) prevents a protected energy company entering ordinary administration if it is already in energy administration, or an energy administration order has been made but is not yet in force.
396. Subsection (3) provides that an ordinary administration order must not be granted by the court and the court must not exercise its powers under paragraph 13 of Schedule B1 to the 1986 Act (including its powers to make interim orders) unless notice has been served on the Secretary of State and GEMA, fourteen days have elapsed since the service of the last of those notices, and no energy administration order is outstanding.

Section 163: Restrictions on administrator appointments by creditors etc.

397. This section provides that an administrator cannot be appointed for a company by its secured creditors, directors or the company itself, if an energy administration order in relation to the company is in force, has been made but is not yet in force, or has been applied for. An administrator cannot be appointed to a protected energy company unless none of the above conditions apply and, additionally, the Secretary of State and GEMA have been served with copies of all relevant documents filed or lodged with the court and at least 14 days have elapsed since the service of the last of these copies.

Section 164: Restrictions on enforcement of security

398. This section provides that security over the property of a protected energy company cannot be enforced unless the Secretary of State and GEMA have been notified of the intention to enforce the security and at least 14 days have elapsed since the service of the last of those notices.

Section 165: Grants and loans

399. This section enables the Secretary of State, with the consent of the Treasury, to give a grant or loan to a company in energy administration where this appears to the Secretary of State to be appropriate to achieve the objective of energy administration.
400. Subsections (2), (3), (4) and (5) enable the Secretary of State to set the terms of a grant or loan including: requiring whole or part of a grant to be repaid if other terms on which the grant is made are breached and setting terms for the grant of any loan – i.e. terms for repayment of a loan, the rates of interest due on it and changing these loan terms by direction.
401. Subsection (6) requires the Secretary of State to secure Treasury consent before giving grants or loans and giving any directions in respect of the terms on which any loan is granted under subsection (5) of this section.

Section 166: Indemnities

402. This section enables the Secretary of State, with the consent of the Treasury, to indemnify persons in respect of liabilities incurred or loss or damage sustained in connection with the exercise of the energy administrator's powers and duties.
403. Subsections (2), (3), (4) and (5) enable the Secretary of State to set the terms of an indemnity including requiring that where any sums are paid out by him in respect of the indemnity to the energy administrator, to direct that the protected energy company pay such amounts as are directed towards the repayment of those sums and interest on them.
404. Subsection (6) provides that subsection (4) does not apply if the sums paid out by the Secretary of State are paid to the company in energy administration.

- 405. Subsection (7) requires the Secretary of State to secure Treasury consent before setting any of the terms of an indemnity under subsections (2), (4) and (5).
- 406. Paragraph (b) of subsection (8) enables the Secretary of State to agree to indemnify persons who become relevant to the energy administration subsequent to the initial agreement e.g. persons who become employees of the energy administrator in the course of the energy administration.
- 407. Subsection (9) specifies the categories of person who may be indemnified under the terms of this section.

Section 167: Guarantees where energy administration order is made

- 408. This section enables the Secretary of State, with consent of the Treasury, to provide guarantees in relation to a protected energy company in energy administration.
- 409. Subsections (2) and (3) set out that the Secretary of State may guarantee sums borrowed by the protected energy company, the payment of interest on those sums and the discharge of any other related financial obligation, and that the Secretary of State may set the terms of the guarantee as he sees fit.
- 410. Subsection (4) requires the Secretary of State to lay a statement before Parliament as soon as practicable after any guarantee is made.
- 411. Subsections (5) and (6) enable the Secretary of State, where any sums are paid out by him in respect of the guarantee to direct that the protected energy company pay such amounts as are directed towards the repayments and interest on those amounts whilst they are outstanding.
- 412. Subsections (7) and (8) require the Secretary of State to lay a statement before Parliament about any sum paid out under such a guarantee as soon as practicable after the end of the first financial year in which a payment is made and at the end of every subsequent year until the company has discharged the liability.
- 413. Subsection (9) requires the Secretary of State to obtain Treasury consent before giving any guarantee or direction under subsection (5) or (6) of this section.

Sections 168 to 169: Licence modifications relating to energy administration

- 414. These sections enable the Secretary of State to modify the conditions of gas and electricity licences. It outlines that such modifications can provide for circumstances where there is a shortfall in the property of a protected energy company, which is or has been in energy administration, for meeting the costs of energy administration. In particular, the Secretary of State can require that in such circumstances the protected energy company or its successor raises a levy on other protected energy companies and uses the sums raised to discharge debts incurred during energy administration. These will include sums paid by the Secretary of State under sections 165, 166 and 167.

Section 168: Modifications of particular or standard conditions

- 415. Subsection (1) enables the Secretary of State to modify the conditions of any one particular licence and the standard conditions of gas and electricity licences in relation to the new regime for energy administration.
- 416. Subsection (2) extends the power under subsection (1) to include the making of incidental, consequential or transitional modifications.
- 417. Subsection (3) and (4) require the Secretary of State to consult the holder of any licence being modified and anyone else he thinks appropriate before making a modification.
- 418. Subsections (5) and (6) require the Secretary of State to publish modifications made under this section.

419. Subsection (8) requires GEMA to incorporate any modification of standard conditions made by the Secretary of State into new licences it grants and to publish these modifications.
420. Subsection (9) limits the exercise of the powers under this section to the eighteen months after commencement of this section.

Section 169: Licence conditions to secure funding of energy administration

421. This section outlines how the Secretary of State can amend the conditions of gas and electricity licences to secure the funding of energy administration.
422. Subsection (1) specifies that the modifications that the Secretary of State can make to gas and electricity licences include requiring the holder of the licence to raise the charges imposed by him so as to raise such amounts as may be determined and to pay the amounts raised to specified persons for the purpose of making good a “shortfall” (as defined in subsection (3)) in the property of a protected energy company available to meet the expenses of energy administration, or for contributing to the making good of such a shortfall.
423. Subsection (2) provides that the modifications may require a licence holder to which the sums raised under subsection (1) are paid to apply those sums towards discharging the “shortfall”.
424. Subsection (3) defines a “shortfall” in meeting the expenses of energy administration as the property of the company being insufficient to meet the costs of energy administration. It also defines making payment to make good the shortfall as discharging “relevant debts” which cannot otherwise be met out of the available property.
425. Subsection (4) defines “relevant debts”. These include obligations to repay the grants, loans, sums paid out under an indemnity and sums paid out under guarantees under sections 165, 166 and 167.

Section 170: Modification of Chapter 3 of Part 3 under Enterprise Act 2002

426. This section provides that the power to modify or apply enactments which is conferred on the Secretary of State by sections 248, 277 and 254 of the Enterprise Act (c.40) includes a power to make consequential modifications to this Chapter of the Act (i.e. these energy administration provisions) where the Secretary of State considers this appropriate in connection with other provisions made under the powers conferred by those sections.

Section 171: Interpretation of Chapter 3 of Part 3

427. This section defines the terms used in sections 154 to 170.

Chapter 4: Further Provisions about Regulation

Section 172: Annual report on security of energy supplies

428. This section requires the Secretary of State to publish an annual report on the availability of electricity and gas for meeting the reasonable demands of consumers in Great Britain, and to lay that report before Parliament. The report must deal with both the short and long term, and must cover in particular:
- electricity generating capacity;
 - the availability of capacity in electricity transmission and distribution systems;
 - the availability of capacity in gas infrastructure; and

- the availability of capacity in licensed gas pipe-line systems.

The report must be prepared jointly by the Secretary of State and GEMA.

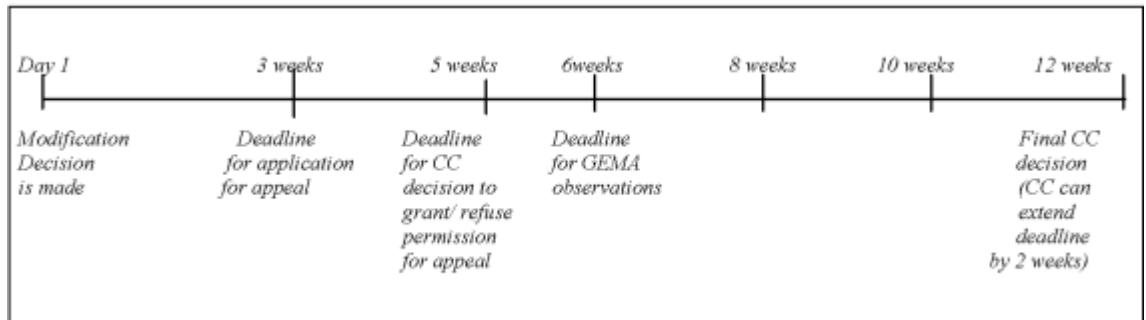
Section 173: Appeals to the Competition Commission

429. This section sets out on what grounds a permission for an appeal may be granted, and by whom, and gives the Secretary of State powers to designate by order what codes come within the scope of the appeals procedure and what sort of decisions are excluded.
430. Subsection (2) restricts appeals to decisions on modifications to those codes designated by the Secretary of State, which do not match the description of decisions that are excluded by the Secretary of State under subsection (2)(d). It enables the Secretary of State to make an order by negative resolution designating the codes where modification decisions are to be appealable. The Government will consult on the codes to be designated, but its initial view is that the appeals mechanism is to be applicable to modifications to the Transco Network Code for gas, and the Balancing and Settlement Code (“BSC”) and the Connection and Use of System Code (“CUSC”) for electricity.
431. Subsection (3) restricts the right of appeal to people “materially affected” by the decision or bodies representing people so “materially affected”. Those “materially affected” are likely to include but may not be restricted to: parties to the framework agreement applicable to the code which is the subject of the appeal; persons holding licences granted under section 6 of the [Electricity Act 1989 \(c.29\)](#) and sections 7 and 7A of the [Gas Act 1986 \(c.44\)](#) who are obliged by licence condition to comply with the relevant code; Energywatch and other interested groups representing consumer, licensee or other trading party interests. All applicants for appeal will have to meet the “materially affected” test in the circumstances of the particular appeal.
432. Subsections (4) and (5) provide that the Competition Commission may refuse permission to appeal if the appeal is trivial or vexatious or has no reasonable prospect of success.
433. Subsection (6) requires the Secretary of State, when making an order under subsection (2) which designates a code or excludes certain types of decision from the appeals process, to consult with GEMA and other appropriate persons. Subsection (8) provides that such an order is to be subject to the negative resolution procedure. The Government will consult on the terms of the order, but its initial view is that decisions should be excluded which are urgent or where the delay occasioned by an appeal could impact on security of supply or where GEMA’s decision agrees with the recommendation of the panel in the case of the BSC, or with a certain proportion of code participants in the case of the CUSC and the Transco Network Code.

Section 174 and Schedule 22: Procedure on appeals

434. The effect of section 174 and Schedule 22 is to set out an appeals procedure whereby applicants have 15 working days (counting from the day after the day on which GEMA’s decision is published) to submit an appeal against a GEMA decision on a code modification to the Competition Commission. An application for permission to appeal must be accompanied by all such information as the Competition Commission may require under its appeal rules. The Competition Commission has 10 working days from the submission of the application to decide whether to grant or refuse the application for permission to appeal. GEMA has 15 working days after the submission of the application for permission to appeal to submit its representations or observations, should it choose to do so. The Competition Commission will then carry out a review to a tight timetable of whether GEMA discharged its duties correctly; this may include a hearing at which the parties can make representations and answer questions, and a further hearing to determine the appeal. It must normally reach its decision within 30 working days following the last day for the making of representations or observations

by GEMA but it can extend this period by a maximum of 10 working days if necessary. The Competition Commission will be able to confirm or quash the original decision, or remit it to GEMA with directions to reconsider taking into account certain factors. This time line is presented below:



435. Further information can be found in the notes to Schedule 22.

Section 175: Determination of appeals

436. This section sets out how the Competition Commission is to reach its decisions on appeals and what it must do on reaching a decision.

437. Subsection (2) provides that in determining the appeal the Competition Commission must have regard, to the same extent as GEMA, to the statutory duties which are placed on GEMA. Subsection (3) provides that the Competition Commission must not have regard to any matter which GEMA was not entitled to have regard to when making its decision, though it may consider fresh evidence if GEMA would have been entitled to have regard to it had it had the opportunity to do so. Subsection (4) provides that the Competition Commission may allow the appeal only if it is satisfied: that GEMA failed to have proper regard to the applicable code objectives, or to the regulator's statutory obligations, or failed to give the proper weight to one or more of the above; that the decision was based on an error of fact and/or that the decision was wrong in law.

438. Subsection (6) provides that if the appeal is successful then the Competition Commission must do one or more of the following: (i) quash the decision, (ii) remit it to GEMA with directions for reconsideration and determination or, (iii) if it is quashing a refusal of consent, give appropriate directions for securing that the relevant condition has effect as if the consent had been given.

439. Subsection (9) sets out the way in which the Competition Commission is required to publish its decision, including the reasons for the decision.

440. Subsection (10) allows the Commission to exclude certain information from the reasons for its decision on the grounds of confidentiality when publishing its decision for the attention of persons beyond the parties under subsection (9).

Section 176: Specialist members of Competition Commission

441. This section provides that the Competition Commission's functions with respect to appeals are to be treated as functions of the Competition Commission under section 104 of the Utilities Act 2000 (c.27).

Section 177: Modifications of standard conditions for funding appeals and references

442. This section gives the Secretary of State power, after consulting licence holders, to make an order amending gas and electricity licences to change the licence charges in order to fund the appeals mechanism provided for in sections 173 to 176, and the existing arrangements for licence modification references. It is intended to use this power in

respect of appeals to allow GEMA to raise the funds it needs to pay the costs of an appeal as ordered by the Commission. Where an appeal is upheld this will consist of its own costs, possibly the costs of the appellant and the costs of the Competition Commission. It is intended to use this power in respect of licence condition references to give the Competition Commission, rather than GEMA, the discretion to allocate the Competition Commission's costs in licence modification references. These costs will then be recovered by GEMA, after the Competition Commission has indicated the proportions that individual licensees should pay of the Competition Commission's costs.

Section 178: Duty to have regard to best regulatory practice

443. **Section 178** inserts a subsection into section 4AA of the Gas Act 1986 and section 3A of the Electricity Act 1989 which provides that the Secretary of State and GEMA are to have regard to the principles of best regulatory practice when performing their functions in accordance with the principal objective and general duties. The key principles of best regulatory practice are: transparency, accountability, proportionality, consistency and targeting.

Section 179: Meaning of electricity supply

444. **Section 179** provides for electricity conveyed by a transmission system to a substation, and then supplied from there to premises, to be brought within the definition of supply in section 4 of the Electricity Act 1989, as amended by the Utilities Act. This will close an anomaly in the definition of supply which defines electricity supply as supply by means of a distribution system and therefore excludes the conveyance of electricity to customers whose supply of electricity does not pass through a distribution network.

Section 180: Meaning of "high voltage line"

445. This section defines "high voltage line" in respect of offshore electric lines as such lines which are of a nominal voltage of 132 kilovolts or more. This is the same as the definition of high voltage lines in Scotland. The section does not change the definition of "high voltage line" in respect of onshore electric lines in Great Britain.

Section 181: Prepayment meters

446. **Section 181** provides GEMA with the power, with the consent of the Secretary of State, to make regulations to extend the range of sums that could be collected from a prepayment meter. GEMA is required to consult interested parties, including the Gas and Electricity Consumers Council, before making regulations.
447. At present, sums recovered through a prepayment meter may only be in respect of an individual fuel and may only be in respect of supply to the premises at which the meter is sited or the provision of the meter. The section makes clear that the extended range of sums that could be collected includes debts owed to a person other than the current gas or electricity supplier, debts accrued in respect of other premises, or debts accrued in respect of the supply of other fuels. Any sums covered by the new regulations may only be recovered with the agreement of the consumer, the circumstances in which such an agreement may be made being set out in the regulations.

Section 182: Additional inspectors

448. **Section 182** fulfils the Government's commitment set out in paragraph 4.33 of the Energy White Paper, "*Our energy future – creating a low carbon economy*" (Cm 5761), to apply proposals by Government for major infrastructure projects handled in the planning process in England to major energy projects in England and Wales where consents are awarded by the Secretary of State. The proposals are to streamline the public inquiry process by allowing lead inspectors to be assisted by further inspectors to share the work and allow issues to be considered concurrently rather than sequentially as

at present. These proposals for major infrastructure projects are contained in section 44 of the [Planning and Compulsory Purchase Act 2004 \(c.5\)](#). This section seeks to allow that approach to be adopted for power stations and overhead line developments considered by the Secretary of State under section 36 and section 37 respectively of the Electricity Act.

449. The Energy White Paper noted that such an approach should help streamline planning processes for large renewable energy developments and other large generation plant and for major upgrades of the transmission network. It was not anticipated that it would be used for all public inquiries into power stations and overhead line developments since some inquiries could be adequately handled by a single inspector. But it would be an option available if a particular development warranted it.
450. The section provides for the Secretary of State to direct an inspector appointed for a public inquiry into a particular development to expressly consider the handling of that inquiry and for that inspector to then make recommendations on that to the Secretary of State. It is anticipated that one of the handling issues would be whether the inquiry could be effectively, and more efficiently, handled by having some issues handled concurrently. In the light of the inspector's recommendations the Secretary of State would then appoint an appropriate number of additional inspectors for the public inquiry. These additional inspectors would then work to the inspector initially appointed (the lead inspector) handling particular issues. The lead inspector would then report to the Secretary of State taking account of the reports of the additional inspectors on particular issues.
451. This alternative approach to the handling of a public inquiry it is anticipated will require some adjustment to the current public inquiry rules governing procedural matters which are based on a single inspector considering matters, the [Electricity Generating Stations and Overhead Lines \(Inquiries Procedure\) Rules 1990 \(SI 1990/528\)](#). Revised rules would therefore need to be drawn up in consultation with the Department for Constitutional Affairs and placed before Parliament for scrutiny in due course.
452. The section covers the exercise of the Secretary of State's powers and as such would extend to proposals in England and Wales, the territorial sea adjacent to England and Wales, and to proposals in Renewable Energy Zones established under Part 2 of this Act. Decisions on section 36 and 37 developments in Scotland and in the territorial sea adjacent to Scotland are handled by Scottish Ministers.

Section 183: Exclusion of confidential information from registers

453. [Section 183](#) inserts new subsections into the Electricity Act 1989 and the Gas Act 1986 which allow GEMA, when entering information on the registers it is required to maintain under section 49 of the Electricity Act 1989 and section 36 of the Gas Act 1986, to exclude details in certain circumstances. GEMA can exclude such details as it considers appropriate to maintain the confidentiality of matters, relating either to an individual or a body of persons, where publication of those details might, in GEMA's opinion, seriously and prejudicially affect the individual or body of persons.

Section 184: Assistance for areas with high distribution costs

454. This section gives the Secretary of State the power to make an order to establish a scheme requiring authorised transmitters (in practice the Great Britain System Operator) to make a payment to a distributor when that distributor faces costs that are significantly higher than in other areas of Britain. The power will be exercisable in respect of a single area to be specified in the order. In order to qualify for a payment, the distributor must be one which distributes electricity by means of a distribution network when at least 100,000 premises are connected to that same network. The payment must be passed from the distributor to suppliers within the relevant area. The scheme will be funded by charges on suppliers across Britain.

455. The Secretary of State must consult before establishing a scheme, and must carry out a review of the scheme every three years.
456. This section is intended to replace a licence condition formerly imposed on SSE Generation Limited known as “Hydrobenefit” which was removed in January 2004. It is intended that this section will benefit customers in the north of Scotland, where there are the highest distribution costs in Britain by a significant margin.

Section 185: Adjustment of transmission charges

457. **Section 185** provides the Secretary of State with the power to adjust electricity transmission charges for renewable generators within a single area that can be shown to be of high renewable energy potential, and where evidence would indicate that unadjusted transmission charges might have a material impact on development of the generation of electricity from renewable sources. Subsection (2)(b) requires any costs arising from the scheme to be spread across all GB supply companies. The area to which the scheme is to be applied must be specified (subsection (3)) and there can only be one scheme in operation at any one time (subsection (10)). Subsections (11) and (12) specify that any one scheme can be applied for a maximum of 5 years. There is a power to renew a scheme at any time by a further order, but no scheme may be applied in relation to a time more than ten years from the commencement of the section. Subsection (15) provides for an order establishing any scheme to be subject to the affirmative resolution procedure.

Section 186: Restrictions on disclosure of information

458. This section provides for the protection of information provided under the Hydrobenefit replacement scheme (Section 184 – assistance for areas with high distribution costs) and the adjustment of transmission charges for renewable generators scheme (Section 185) through the application of section 105 of the Utilities Act 2000. It will be an offence to disclose information provided under these schemes, except in those circumstances specified under section 105.

Section 187: Payments of sums raised by fossil fuel levy

459. **Section 187** provides a power for Scottish Ministers to direct GEMA to pay into the Scottish Consolidated Fund monies from funds paid to GEMA and arising from the auctioning of electricity generated under Scottish Renewables Obligation (“SRO”) contracts. There is also a corresponding duty on Scottish Ministers to include provision in budget proposals to the Scottish Parliament that monies thus raised shall be used to promote the use of energy from renewable sources. This will enable the Scottish Executive to provide the additional support necessary to meet its commitment to increasing the amount of renewable energy produced in Scotland. Similar powers as regards monies arising from the auctioning of electricity generated under NFFO (Non Fossil Fuel Obligation) contracts in England and Wales are contained in section 7 of the [Sustainable Energy Act 2003 \(c.30\)](#).
460. The SRO was the support scheme for electricity generated from renewable sources that was introduced under the original sections 32 and 33 of the Electricity Act 1989, which were executively devolved to Scottish Ministers. Under the SRO scheme, Orders were made which required Scottish public electricity suppliers (the successors to the old nationalised electricity boards) to buy electricity generated from renewable sources under "SRO contracts". The price paid for the electricity under those contracts was above the market price for electricity and the public electricity suppliers were compensated for this by payments out of the money collected through the Fossil Fuel Levy that was provided for in section 33 of the Electricity Act. The levy was charged on the electricity supplies of all licensed electricity suppliers and was paid out to the smaller number of electricity suppliers which were subject to the SRO Orders.

461. Sections 62 to 65 of the Utilities Act inserted into the Electricity Act new sections 32 to 32C, which contain provisions allowing the introduction of the GB Renewables Obligations, the successor to the SRO scheme and its English / Welsh equivalent. This scheme has been implemented in Scotland by the [Renewables Obligation \(Scotland\) Order 2002 \(S.S.I. 2002/163\)](#). The scheme requires each licensed electricity supplier to produce evidence that it has supplied a specified proportion of its electricity from renewable sources or that other electricity suppliers have done so. The evidence that it has to produce is Renewable Obligation Certificates (“ROCs”) issued by GEMA. If the supplier does not produce the necessary number of Certificates, it has to make a payment (the buy-out price) to GEMA. It is this that gives the Certificates a value.
462. The SRO contracts are long-term, and the last of them will not expire until 2018. The price paid by the suppliers for the electricity under those contracts is above the market price, and they are compensated by payments out of the Fossil Fuel Levy. SRO output is also eligible for ROCs under the Renewables Obligation (Scotland) Order, and the proceeds of the sale by auction of such ROCs is now used to reduce Fossil Fuel Levy costs. As a result, there is no need at present to raise Levy funds via electricity bills, and the Levy rate (set by GEMA) is currently set at zero.
463. The income currently being realised through the auction of SRO ROCs exceeds its expenditure, owing to the value of the Renewable Obligation Certificates associated with the NFFO electricity. The Scottish supply successor companies are required, under subsection (5A) of section 33 of the Electricity Act (as that section is now amended and preserved in Scotland by Orders under section 67 of the Utilities Act), to pay to GEMA (the person prescribed under section 33(1)(b) of the Electricity Act) the surplus that arises from the auctioning of ROCs for electricity generated under SRO contracts, thereby avoiding a double subsidy to electricity generators with SRO contracts. Section 33 does not, however, make provision for the disposal of this surplus by GEMA, but this is now addressed by this section.
464. In order to give Scottish Ministers the required power over the surpluses in the Scottish Levy fund, a separate section, covering section 33 of the Electricity Act as it applies in Scotland, required to be inserted in the Act at Westminster. Although the existing powers under section 33 were executively devolved to Scottish Ministers, and have subsequently been amended, the legislation on using the surplus in Scotland had to be obtained through the Westminster procedures because it amends the Electricity Act in a way that is not consistent with the Executive’s limited devolved power to amend section 33 of that Act.

Part 4: Miscellaneous and Supplemental

Section 188: Imposition of charges

465. [Section 188](#) enables a consistent and transparent charging regime to be put in place that covers a range of energy services that the Secretary of State currently provides. These relate to the exploration, production and transmission of oil and gas; the generation, transmission and distribution or supply of electricity; renewable energy zones and renewable energy installations; and the protection of the environment from these activities. Existing legislation already provides a power for charges to be levied on certain services, such as the approval of decommissioning plans. Regulations which arise from these new powers will allow charges to be levied for individual services where full recovery of the direct costs of providing that specific service will be applied.

Section 189: International agreements relating to pipelines and offshore installations

466. [Section 189](#) provides the power for Her Majesty to modify the [Petroleum Act 1998 \(c.17\)](#) by Order in Council to give effect to international agreements relating in whole

or in part to the construction, operation, use, decommissioning or abandonment of a pipeline or offshore installation.

467. The power includes the power to provide for provision made by or under the Petroleum Act 1998 to have effect in relation to areas outside the UK and its waters and to apply to individuals and to bodies corporate whether or not they are British citizens or incorporated under the law of a part of the UK.
468. A modification could reflect the fact that an international agreement might provide that disputes over access to a pipeline on the UK Continental Shelf and the Continental Shelf of another State could either be the subject of co-determination by the UK and the other State in accordance with English law or the law of the other State or fall for sole determination by the UK or the other State. Section 17F of the [Petroleum Act 1998 \(c.17\)](#) currently gives the Secretary of State the power to make such a determination in relation to a pipeline in UK waters.

Sections 190 and 191: Application of general duties to Part 3 functions etc and Supplementary provision about licence condition powers

469. [Section 190](#) provides that, where appropriate in relation to Part 3 (as well as in relation to certain provisions in Part 2) of the Act, the principal objectives and general duties laid down in sections 4AA to 4B of the Gas Act 1986 and sections 3A to 3D of the Electricity Act 1989 shall apply to the exercise of functions conferred by Part 3 (and as mentioned above, Part 2) of the Act on the Secretary of State or GEMA. In particular, the principal objectives and general duties will apply in the case of any provisions in Part 3 which provide for the granting of licences and the determination or modification of licence conditions and to functions which relate to companies which hold electricity or gas licences (which includes, for example, the energy administration provisions in Chapter 3 of Part 3). [Section 191](#) ensures that, where any powers granted under Part 3 (and certain powers granted under Part 2) relating to the determination or modification of licence conditions are exercised, certain general provisions of the Gas and Electricity Acts which are relevant to these powers are applicable.

Section 192: Service of notifications and other documents in electronic form

470. [Section 192](#) sets out the basis on which those provisions of the Bill requiring the giving of a notification or the sending of a document to a person may be satisfied. It has effect subject to [section 194](#) which makes provision for electronic delivery of notifications and documents. [Section 195](#) makes provision for the Secretary of State to specify the timing and location of things done electronically in order to comply with any of the provisions of the Act. These powers are required in order to enable the NDA to meet the Government's targets for electronic delivery of services and in order to remove any scope for uncertainty about the form in which notifications and documents may be supplied electronically.

Section 197: Repeals

471. [Section 197](#) and [Schedule 23](#) provide for a number of repeals, including repeal of the following provisions:
- Repeal of the bulk of the provisions of the [Atomic Energy Authority Act 1995 \(c.37\)](#), with a saving in respect of the provisions relating to transfer schemes already made under that Act. The repealed provisions are no longer necessary in light of the extensive transfer scheme powers in the Act.
 - Repeal of sections 11(1) and (2) of the [Atomic Energy Authority Act 1971 \(c.11\)](#) ("the 1971 Act"). These powers are no longer needed, in light of the transfer scheme powers in the Act.

- Disapplication of loan and guarantee powers in section 11(4) and section 12(1) of the 1971 Act, and section 1(1) and (2) of the Nuclear Industry (Finance) Act 1977, in relation to Amersham plc (formerly the publicly owned Radiochemical company). These amendments remove the Government's power to take ownership of Amersham shares currently held by UKAEA, subscribe for shares in Amersham, and make and guarantee loans to Amersham. Now that Amersham plc is privately owned these powers are no longer necessary or appropriate.
- Repeal of section 11(3) of the 1971 Act. Repeal of section 11(3) will remove the requirement on the Secretary of State to hold more than 50% of the shares in BNFL and is a necessary first step for the proposed restructuring of BNFL. There is also a consequential repeal of section 1(6) of the [Atomic Energy \(Miscellaneous Provisions\) Act 1981 \(c.48\)](#).
- Repeal of section 20(4) of the 1971 Act. This provision is spent.
- Repeal of the provisions setting out the current status and jurisdiction of the UKAEA Constabulary, including the identified paragraphs in Schedule 3 of the [Atomic Energy Authority Act 1954 \(c.32\)](#); the identified paragraphs in Schedule 1 of the [Nuclear Installations Act 1965 \(c.57\)](#); section 6(3) and (4) of the [Police and Criminal Evidence Act 1984 \(c.60\)](#); and the identified provisions in the [Ministry of Defence Police Act 1987 \(c.4\)](#), the [Criminal Justice and Police Act 2001 \(c.16\)](#), the [Anti-Terrorism Crime and Security Act 2001 \(c.24\)](#) and the [Police Reform Act 2002 \(c.30\)](#). These provisions are otiose given the creation of the Civil Nuclear Police Authority and the specific provision made in the Act for the role and jurisdiction of the Civil Nuclear Constabulary.