

*These notes refer to the Energy Act (Northern Ireland) 2011  
(c.6) which received Royal Assent on 10 February 2011*

# Energy Act (Northern Ireland) 2011

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

Comments are not given where the wording is self-explanatory.

#### **Part 1 – Gas**

Part 1 of the Act (sections 1 to 16) specifically relates to the gas industry.

#### **Standards of performance**

Sections 1 to 8 concern standards of performance.

Section 1 concerns standards of performance in individual cases. Subsection (1) gives the Utility Regulator the power (with the consent of the Department) to make regulations prescribing such standards of performance in connection with the activities of gas suppliers and gas conveyors, affecting customers (or potential customers) in individual cases. Subsection (2) provides that the gas supplier or conveyor must pay the prescribed compensation where it fails to meet the relevant standard of performance. Subsections (3) and (4) provides that the regulations may contain rules relating to provision of information to customers, how compensation is to be made, which persons may be exempt from the regulations and how some suppliers (and conveyors) may be treated differently from other suppliers (and conveyors). Subsection (5) clarifies that payment of compensation does not prejudice any other remedy that may be available in respect of the failure to meet the prescribed standard of performance.

Section 2 provides that any dispute relating to standards of performance in individual cases shall be determined (on reference to it) by the Utility Regulator. The Department may make regulations concerning the practice and procedures to be followed when the Utility Regulator makes its determination in any dispute.

Section 3 concerns overall standards of performance for gas suppliers and conveyors and gives the Utility Regulator the power to determine (and arrange for the publication of) standards of overall performance in connection with the provision of gas supply services by gas suppliers and in connection with the activities of gas conveyors. Different standards may be determined for different suppliers, if the Utility Regulator thinks it will not cause undue disadvantage in competition. Under subsection (4), each gas supplier and gas conveyor is

required to conduct its business in such a way as can reasonably be expected to lead to the achievement by that gas supplier or gas conveyor of the overall standards of performance determined by the Utility Regulator.

Section 4 sets out the procedure for determining and prescribing standards of performance. The Utility Regulator must arrange for appropriate research to be conducted, and consult with persons or bodies it thinks are likely to be affected. In respect of overall standards of performance, it must also consult the Consumer Council and gas suppliers and conveyors, publish a notice of its proposals (together with reasons) and consider representations received (after giving not less than 28 days for such representations to be made).

Section 5 gives the Utility Regulator the power to determine standards of performance in connection with the promotion of the efficient use of gas by consumers. Before doing so, it must first consult gas suppliers and other persons it considers are likely to be affected. Different standards may be determined for different suppliers, if the Utility Regulator thinks it will not cause undue disadvantage in competition. Gas suppliers must take steps to inform its customers of the applicable standards of performance, and the level of performance achieved by the supplier. The Utility Regulator may determine the frequency and manner of the provision of such information.

Section 6 requires the Utility Regulator to collect information with respect to compensation paid under section 1, the level of overall performance achieved by suppliers and conveyors and the level of performance achieved by suppliers in respect of the promotion of the efficient use of gas by consumers. Gas suppliers and conveyors are required to provide the Utility Regulator with information concerning the levels of compensation paid and the levels of performance achieved, and subsection (3) creates a criminal offence for failing to provide the relevant information. Under subsections (4) and (5), the Utility Regulator must arrange for this information to be published (at least once a year), although it may decide not to publish certain information if to do so would seriously and prejudicially affect the interests of a person or body.

Section 7 requires each gas supplier and gas conveyor to take steps to inform customers of suppliers of the applicable overall standards of performance, and the level of performance achieved by the supplier and conveyor. The Utility Regulator can determine how often this should be done, although it cannot specify a frequency of less than once every 12 months.

Section 8 places each gas supplier under a duty to establish a procedure for dealing with complaints made by customers (or potential customers) and to publish that procedure (and also to send it free of charge upon request). Before doing so, the Consumer Council must be consulted, and the procedure cannot be established until approved by the Utility Regulator. The Utility Regulator has the power to give a direction requiring the gas supplier to review its procedures and provide a report to the Utility Regulator, following which it may require modifications to be made to the procedure.

Section 9 of the Act makes certain amendments to the Energy (Northern Ireland) Order 2003. These amendments are consequential to the new provisions on standards of performance. Subsection (2) extends the gas functions of the Department and the Utility Regulator under the Energy Order, to include those functions under the Act. Subsection (3) extends the definition of "relevant requirement" in Article 41(2) of the Energy Order, so that it captures the new provisions relating to standards of performance. This has the effect of extending the enforcement powers of the Utility Regulator under the Energy Order, so that the Utility Regulator is able to issue an order for compliance, where necessary. Subsection (4) concerns Article 45(2) of the Energy Order. That Article gives the Utility Regulator the power to impose a financial penalty on an electricity supply licensee it believes is failing to achieve a standard of performance (in individual cases) that have been prescribed by regulations under the Electricity Order. Subsection (4) amends Article 45(2) to extend the Utility Regulator's powers, so that it can impose a financial penalty where a gas supply or conveyance licence holder is failing to meet standards of performance (in individual cases) prescribed by regulations. Subsection (5) concerns Article 51(1)(a) of the Energy Order. That Article gives the Utility Regulator the power to require information from a licensee suspected of contravening relevant conditions or requirements. Subsection (5) extends the scope of Article 51(1) with the effect that the Authority is given information gathering powers where a gas supply or conveyance licence holder is failing to meet standards of performance (in individual cases) prescribed by regulations.

### **Miscellaneous provisions**

Sections 10 to 15 concern miscellaneous provisions relating to gas.

Section 10 establishes a criminal offence in respect of persons who intentionally or recklessly damage or allow to be damaged gas equipment used for conveying, storing or supplying gas or who tamper with a gas meter; it also allows gas companies to disconnect premises and/or remove gas meters in those circumstances.

Section 11 provides that certain gas plant belonging licensed gas conveyors and suppliers is exempt from certain enforcement processes. The purpose of section 11 is to protect licensed gas companies against the loss of gas equipment that has been let for hire or lent to a customer, by exempting such equipment from judgment and bankruptcy processes against that customer. The provision also clarifies that such equipment shall continue to be the property of the licensed gas company.

Sections 12 and 13 create a deemed contracts regime for gas supplies. Specifically, subsection (1) of section 12 deems a contract to arise when a gas supplier supplies gas to a consumer otherwise than in pursuance of a contract (for example, when an existing supply contract has expired, but the supplier continues to supply the gas to the consumer). Subsection (2) deems a contract to arise where an owner or occupier of premises takes a supply of gas without making a formal contract with a supplier (but where a

supplier has previously supplied gas to those premises) (for example, when a person moves into a house and the previous occupier had been supplied by a supplier). Subsection (3) clarifies that a deemed contract arising under (2) above is not intended to legitimise any illegal activity used to obtain the supply (for example, tampering with a gas meter or pipeline). Subsection (4) requires the Utility Regulator to publish procedures for determining who the relevant gas supplier will be where a deemed contract arises in the situation detailed at subsection (2). Subsection (6) requires each supplier to publish (in advance) a scheme that sets out the terms which are to be incorporated into deemed contracts. Under subsection (7), the scheme may include terms determining what quantity of gas was treated as supplied (or taken) during the relevant period. Subsection (8) allows a supplier to vary the terms and conditions of a scheme, for different cases or classes of cases for different areas. Subsection (9) obliges a supplier to publish its scheme, send it to the Utility Regulator, and to the Consumer Council (and also to send it free of charge upon request).

Section 13 contains provisions that have the effect of enabling the Utility Regulator to modify the conditions of supply licences (both individually and generally) in order to regulate the terms and conditions of deemed contracts. The Utility Regulator must first obtain the Department's consent, and conduct appropriate consultation.

Section 14 concerns licensed gas companies' statutory powers to enter premises. This supplements their existing powers contained in paragraphs 2, 3 and 4 of Schedule 5 of the Gas Order. Section 14 authorises licensed gas companies legally to enter customers' premises in the following circumstances: where a customer has damaged, or the gas conveyor suspects a customer of damaging, equipment provided by the relevant gas company; where a gas supplier wishes to ascertain the register of any gas meter and, in the case of a pre-payment meter, remove any money or tokens or cards belonging to the gas supplier; where a gas conveyor wishes to disconnect premises or remove equipment in the event that a supply of gas is no longer required at the relevant premises; and where a gas conveyor wishes to place new gas plant in the place of, or in addition to, existing gas plant at the relevant premises. Consistent with the provisions on existing powers of entry in the Gas Order, the relevant person requiring entry must produce evidence of authority on request. Subsection (8) clarifies that 5 to 8 of Schedule 5 to the Gas Order apply to the new powers of entry.

Section 15 clarifies the meaning of 'store', for the purpose of the gas storage provisions in the Gas Order. Specifically a new paragraph (6) is inserted in Article 6 of the Gas Order, to clarify that it is only the operator of a gas storage facility that stores gas for the purposes of the Gas Order (rather than, for example, the user of a gas storage facility).

Section 16 relates to the appointment of gas meter examiners. Under Article 22 of the Gas Order, the Utility Regulator is responsible for appointing meter examiners. Article 22 currently operates on the basis that meter examiners

are members of the Utility Regulator's staff. The new provision removes the restriction and will allow the Utility Regulator to arrange with an appropriate body for the appointment of meter examiners from wider sources.

## **Part 2 – Special administration regime for protected energy companies**

Part 2 of the Act (sections 17 to 33) creates a special administration regime for gas conveyance and electricity transmission and distribution companies facing actual or threatened insolvency. Usual insolvency arrangements would mean that, in the unlikely event that a utility becomes insolvent, the primary responsibility is towards creditors. However, the Act provides for gas and electricity networks to remain in place and operational to ensure gas and electricity supply to customers can continue. Responsibility for a utility which becomes insolvent will be transferred to a Special Administrator appointed by the High Court. The Special Administrator will put the interests of energy consumers above those of creditors and shareholders.

Section 17 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 conveyance licence or an electricity transmission licence. Subsections (1), (2) and (3) explain the terms "energy administration order" and "energy administrator" and how the energy administrator is to perform its duty. Subsection (4) establishes that an energy administration order can only apply to the affairs and business of a non-NI company (i.e. a company incorporated outside Northern Ireland) which are carried out in Northern Ireland and to its property in Northern Ireland. Subsection (5) sets out which licence holders may be subject to an energy administration order (i.e. all regulated natural monopolies in the energy sector).

Section 18 establishes that the objective of the energy administrator in performing its duty is (i) to secure that the company's system is maintained and developed as an efficient, economical and co-ordinated system; and (ii) to render the continuation of the energy administration unnecessary for this purpose by one of the means in subsection (2). 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).

Subsection (4) provides examples of the types of transfer which may satisfy subsection (3). 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 19 provides that an application for an energy administration order can only be made by the Department or by the Utility Regulator with the consent of the Department. 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 20 sets out the powers of the court in relation to an energy administration order. Subsection (1) sets out the court's powers on hearing an application for energy administration. 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 Department under Article 104A of the Insolvency Order it would be just and equitable (aside from the objective of energy administration) to wind up the company in the public interest. Subsections (3) and (4) provide that in certain circumstances the court cannot make an energy administration order. 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.

Subsection (8) provides that the company will be deemed to be insolvent in accordance with Articles 103 or 186 to 188 of the Insolvency Order.

Section 21 defines the status of the energy administrator. It further provides that the administrator must exercise its management functions for the purpose of achieving the objective of the energy administration as quickly and efficiently as is reasonably practicable and that it must exercise and perform its 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 22 gives the Department the power to make regulations for the purpose of applying provisions of the Insolvency Order (with or without modifications) in relation to an energy administration order or an application for such an order. It also gives effect to the Schedule, which makes provision for transfer schemes to achieve the objective of an energy administration.

Sections 23 to 27 prevent an energy administration being frustrated by prior orders of various types being granted before the Department or the Utility Regulator 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 23 provides that a winding up order sought by a person other than the Department in respect of a protected energy company cannot be made unless notice has been served on the Department and the Utility Regulator 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 24 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 Department and the Utility Regulator 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 25 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. It also provides that an ordinary administration order must not be granted by the court and the court must not exercise its powers under paragraph 14 of Schedule B1 to the Insolvency Order (including its powers to make interim orders) unless notice has been served on the Department and the Utility Regulator, fourteen days have elapsed since the service of the last of those notices, and no energy administration order is outstanding.

Section 26 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 Department and the Utility Regulator 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 27 provides that security over the property of a protected energy company cannot be enforced unless the Department and the Utility Regulator 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 28 enables the Department, with the consent of the Department of Finance and Personnel, to give a grant or loan to a company in energy administration where this appears to the Department to be appropriate to achieve the objective of energy administration. Specifically, subsections (2), (3), (4) and (5) enable the Department 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. Subsection (6) requires the Department to secure Department of Finance and Personnel 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 29 enables the Department, with the consent of the Department of Finance and Personnel, 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. Specifically, subsections (2), (3), (4) and (5) enable the Department to set the terms of an indemnity. Where any sums are paid out by the Department (in respect of the indemnity) to the energy administrator, the Department can direct that the protected energy company make a payment towards the repayment of those sums, together with interest. Subsection (6) provides that subsection (4) does not apply if the sums paid out by the

Department are paid to the company in energy administration. Subsection (7) requires the Department to secure Department of Finance and Personnel consent before setting any of the terms of an indemnity under subsections (2), (4) and (5). Paragraph (b) of subsection (8) enables the Department to agree to indemnify persons who subsequently become relevant to the energy administration e.g. persons who become employees of the energy administrator in the course of the energy administration. Subsection (9) specifies the categories of person who may be indemnified under the terms of this section.

Section 30 enables the Department, with consent of the Department of Finance and Personnel, to provide guarantees in relation to a protected energy company in energy administration. Specifically, subsections (2) and (3) set out that the Department 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 Department may set the terms of the guarantee as it sees fit. Subsection (4) requires the Department to lay a statement before the Assembly as soon as practicable after any guarantee is made. Subsections (5) and (6) enable the Department, 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. Subsections (7) and (8) require the Department to lay a statement before the Assembly 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. Subsection (9) requires the Department to obtain Department of Finance and Personnel consent before giving any guarantee or direction under subsection (5) or (6) of this section.

Sections 31 and 32 enable the Department 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 Department can require that in such circumstances the protected energy company or its successor raises a levy on other energy companies and uses the sums raised to discharge debts incurred during energy administration. These will include sums paid by the Department under sections 28, 29 and 30.

Specifically, in section 31, subsection (1) enables the Department 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. Subsection (2) extends the power under subsection (1) to include the making of incidental, consequential or transitional modifications. Subsection (3) and (4) require the Department to consult the holder of any licence being modified and anyone else it thinks appropriate before making a modification. Subsections (5) and (6) require the Department to publish modifications made under this section. Subsection (8) requires the Utility Regulator to incorporate any modification of standard conditions made



by the Department into new licences it grants and to publish these modifications.

Subsection (9) limits the exercise of the powers under this section to the eighteen months after commencement of this section.

Section 32 outlines how the Department can amend the conditions of gas and electricity licences to secure the funding of energy administration. Subsection (1) specifies that the modifications that the Department 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. 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". 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. 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 28, 29 and 30.

Section 33 defines the terms used in Part 2, and how certain references are to be interpreted.

### **Part 3 – Supplementary**

Part 3 of the Act contains supplementary provisions.

Section 34 of the Act requires regulations made by the Department and the Utility Regulator under the Act to be subject to negative resolution (and, in the case of regulations made by the Utility Regulator, such regulations must be laid before the Assembly by the Department). Regulations under the Act may also make any necessary transitional provisions and amendments.

Sections 35 to 37 deal with interpretation, commencement and the title of the Act. The provisions of the Act will come into force on such day (or days) as the Department may by order appoint.

### ***Schedule***

The Schedule covers the content and effect of transfer schemes which can be made as described in section 18(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 conveyance, 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 Department.

Paragraphs 1 to 4 of the Schedule 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 Department, who in turn must consult the Utility Regulator. 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 Department is given the power to modify the scheme before giving approval although it will require the consent of the old energy company and the new energy company to the modifications (paragraph 3). Similarly it may modify it subsequently with the consent of those parties and after consulting the Utility Regulator (paragraph 9).

Paragraph 7 of the Schedule 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.

Paragraphs 10 to 11 of the Schedule provide for cases where the energy company is a foreign company or foreign property, rights and liabilities are being transferred.