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DRAFT STATUTORY INSTRUMENTS

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**2003 No.**

**The Energy (Northern Ireland) Order 2003**

**PART V**

**LICENCES**

*Modification of licences following Competition Commission report*

**Modification of electricity licences following Competition Commission report**

**36.**—(1) In Article 17 of the Electricity Order after paragraph (4) there shall be inserted—

“(5) After considering any representations or objections made in response to proposals set out in a notice under paragraph (3) the Authority shall give notice to the Competition Commission—

- (a) setting out the modifications it proposes to make to remedy or prevent the adverse effects specified in the report; and
- (b) stating the reasons for making the modifications.

(6) The Authority shall include with the notice under paragraph (5) a copy of any representations or objections received in relation to the notice under paragraph (3).

(7) If the period of four weeks from the date on which the notice under paragraph (5) is given elapses without a direction under Article 17A(1)(a) having been given to it, the Authority shall—

- (a) make the modifications set out in the notice; or
- (b) if a direction under Article 17A(1)(b) has been given, make the modifications which are not specified in the direction.”.

(2) After Article 17 of the Electricity Order there shall be inserted—

**“Competition Commission’s power to veto modifications following report**

**17A.**—(1) The Competition Commission (in this Article referred to as “the Commission”) may, within the period of four weeks after the date on which it is given a notice under Article 17(5), direct the Authority—

- (a) not to make the modifications set out in that notice; or
- (b) not to make such of the modifications as may be specified in the direction;

and the Authority shall comply with any such direction.

(2) The Department may, within the period of four weeks after the date on which the Commission is given a notice under Article 17(5) and on the application of the Commission, direct that the period for giving a direction under paragraph (1) (and, accordingly, the period mentioned in Article 17(7)) shall be extended by 14 days.

(3) The power to give a direction under paragraph (1) may only be exercised in respect of such of the modifications set out in the notice under Article 17 (5)(a) as appear to the Commission not to be the modifications which are requisite for the purpose of remedying or preventing all or any of the adverse effects specified in the report as effects which could be remedied or prevented by modifications.

(4) If the Commission gives a direction under paragraph (1), the Commission—

- (a) shall give notice setting out the modifications proposed by the Authority, the terms of the direction and the reasons for giving it; and
- (b) shall itself make such modifications of the conditions of the licence as appear to it to be requisite for the purpose of remedying or preventing—
  - (i) if the direction was given under paragraph (1)(a), the adverse effects specified in the report as effects which could be remedied or prevented by modifications;
  - (ii) if the direction was given under paragraph (1)(b), such of those adverse effects as are not remedied or prevented by the modifications made by the Authority under Article 17(7)(b).

(5) In exercising its function under paragraph (4)(b) the Commission shall have regard to the matters to which the Authority is required to have regard when determining the conditions of a licence.

(6) Before making modifications under paragraph (4)(b) the Commission shall give notice—

- (a) stating that it proposes to make the modifications and setting them out;
- (b) stating the reason why it proposes to make them;
- (c) specifying the period (not being less than 28 days from the date of publication of the notice) within which representations or objections with respect to the proposed modifications may be made,

and shall consider any representations or objections which are duly made and not withdrawn.

(7) A notice under paragraph (4)(a) or (6) shall be given—

- (a) by publishing the notice in such manner as the Commission considers appropriate for the purpose of bringing it to the attention of persons likely to be affected by the making of the modifications; and
- (b) by serving a copy on the Authority and the holder of the licence in question.

(8) After making modifications under this Article the Commission shall publish a notice stating that the modifications have been made and setting them out, with the reasons for making them.

(9) For the purposes of the law relating to defamation, absolute privilege attaches to any notice under paragraph (4)(a), (6) or (8).

(10) In giving any notice under paragraph (4)(a) or (6), or publishing any notice under paragraph (8), the Commission shall have regard to the following considerations before disclosing any information.

(11) The first consideration is the need to exclude from disclosure (so far as practicable) any information whose disclosure the Commission thinks is contrary to the public interest.

(12) The second consideration is the need to exclude from disclosure (so far as practicable)

- (a) commercial information whose disclosure the Commission thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or

(b) information relating to the private affairs of an individual whose disclosure the Commission thinks might significantly harm the individual's interests.

(13) The third consideration is the extent to which the disclosure of the information mentioned in paragraph (12)(a) or (b) is necessary for the purposes of the notice.

(14) The following sections of Part 3 of the Enterprise Act 2002 shall apply, with the modifications mentioned in paragraphs (15) and (16), for the purposes of any investigation by the Commission for the purposes of the exercise of its functions under this Article, as they apply for the purposes of any investigation on references under that Part—

- (a) section 109 (attendance of witnesses and production of documents etc.);
- (b) section 110 (enforcement of powers under section 109: general);
- (c) section 111 (penalties);
- (d) section 112 (penalties: main procedural requirements);
- (e) section 113 (payments and interest by instalments);
- (f) section 114 (appeals in relation to penalties);
- (g) section 115 (recovery of penalties); and
- (h) section 116 (statement of policy).

(15) Section 110 shall, in its application by virtue of paragraph (14), have effect as if—

- (a) subsection (2) were omitted;
- (b) in subsection (4), for the words “the publication of the report of the Commission on the reference concerned” there were substituted “the publication by the Commission of a notice under Article 17A (8) of the Electricity (Northern Ireland) Order 1992 in connection with the reference concerned or, if no direction has been given by the Commission under Article 17A(1) of that Order in connection with the reference concerned and within the period permitted for that purpose, the latest day on which it was possible to give such a direction within the permitted period”;
- (c) in subsection (9) the words from “or section” to “section 65 (3)” were omitted.

(16) Section 111 (5)(b) shall, in its application by virtue of paragraph (14), have effect as if for sub-paragraph (ii) there were substituted—

“(ii) if earlier, the day on which a notice is published by the Commission under Article 17A (8) of the Electricity (Northern Ireland) Order 1992 in connection with the reference concerned or, if no direction is given by the Commission under Article 17A(1) of that Order in connection with the reference concerned and within the period permitted for that purpose, the latest day on which such a direction may be given within the permitted period.”.

(17) Provisions of Part 3 of the Enterprise Act 2002 which have effect for the purposes of sections 109 to 116 of that Act (including, in particular, provisions relating to offences and the making of orders) shall, for the purposes of the application of those sections by virtue of paragraph (14), have effect in relation to those sections as applied by virtue of that paragraph.

(18) Accordingly, corresponding provisions of this Order shall not have effect in relation to those sections as applied by virtue of that paragraph.”.

### **Modification of gas licences following Competition Commission report**

**37.**—(1) In Article 17 of the Gas Order after paragraph (5) there shall be inserted—

“(5A) After considering any representations or objections made in response to proposals set out in a notice under paragraph (4), the Authority shall give notice to the Competition Commission—

- (a) setting out the modifications it proposes to make to remedy or prevent the adverse effects specified in the report; and
- (b) stating the reasons for making the modifications.

(5B) The Authority shall include with the notice under paragraph (5A) a copy of any representations or objections received in relation to the notice under paragraph (4).

(5C) If the period of four weeks from the date on which the notice under paragraph (5A) is given elapses without a direction under Article 17A(1)(a) having been given to it, the Authority shall—

- (a) make the modifications set out in the notice; or
- (b) if a direction under Article 17A(1)(b) has been given, make the modifications which are not specified in the direction.”.

(2) After Article 17 of the Gas Order there shall be inserted—

**“Competition Commission’s power to veto modifications following report**

**17A.—**(1) The Competition Commission (in this Article referred to as “the Commission”) may, within the period of four weeks after the date on which it is given a notice under Article 17(5A), direct the Authority—

- (a) not to make the modifications set out in that notice; or
- (b) not to make such of the modifications as may be specified in the direction;

and the Authority shall comply with any such direction.

(2) The Department may, within the period of four weeks after the date on which the Commission is given a notice under Article 17(5A) and on the application of the Commission, direct that the period for giving a direction under paragraph (1) (and, accordingly, the period mentioned in Article 17(5C)) shall be extended by 14 days.

(3) The power to give a direction under paragraph (1) may only be exercised in respect of such of the modifications set out in the notice under Article 17(5A)(a) as appear to the Commission not to be the modifications which are requisite for the purpose of remedying or preventing all or any of the adverse effects specified in the report as effects which could be remedied or prevented by modifications.

(4) If the Commission gives a direction under paragraph (1), the Commission—

- (a) shall give notice setting out the modifications proposed by the Authority, the terms of the direction and the reasons for giving it; and
- (b) shall itself make such modifications of the relevant conditions as appear to it to be requisite for the purpose of remedying or preventing—
  - (i) if the direction was given under paragraph (1)(a), the adverse effects specified in the report as effects which could be remedied or prevented by modifications;
  - (ii) if the direction was given under paragraph (1)(b), such of those adverse effects as are not remedied or prevented by the modifications made by the Authority under Article 17(5C)(b).

(5) In exercising its function under paragraph (4)(b) the Commission shall have regard to the matters to which the Authority is required to have regard when determining the conditions of a licence.

(6) Before making modifications under paragraph (4)(b) the Commission shall give notice—

- (a) stating that it proposes to make the modifications and setting them out;

- (b) stating the reason why it proposes to make them;
- (c) specifying the period (not being less than 28 days from the date of publication of the notice) within which representations or objections with respect to the proposed modifications may be made,

and shall consider any representations or objections which are duly made and not withdrawn.

(7) A notice under paragraph (4)(a) or (6) shall be given—

- (a) by publishing the notice in such manner as the Commission considers appropriate for the purpose of bringing it to the attention of persons likely to be affected by the making of the modifications; and
- (b) by serving a copy on the Authority and the holder of the licence in question or, as the case may be, the relevant licence holders.

(8) After making modifications under this Article the Commission shall publish a notice stating that the modifications have been made and setting them out, with the reasons for making them.

(9) Where, in consequence of a reference under Article 15 (2) the Commission modifies under paragraph (4)(b) the standard conditions of licences of any type (that is to say, licences under Article 8(1)(a) or (b) or (c)) the Authority may make such incidental and consequential modifications as it considers necessary or expedient of any conditions of licences of that type granted before that time.

(10) Where the Commission modifies the standard conditions of licences of any type as mentioned in paragraph (9) the Authority—

- (a) shall make (as nearly as may be) the same modifications of those conditions for the purposes of their incorporation in licences of that type granted after that time; and
- (b) shall publish the modifications made for those purposes in such manner as it considers appropriate.

(11) The modification under this Article of part of a standard condition of a particular licence in consequence of a reference under Article 15(1) shall not prevent any other part of the condition from continuing to be regarded as a standard condition for the purposes of this Part.

(12) For the purposes of the law relating to defamation, absolute privilege attaches to any notice under paragraph (4)(a), (6) or (8).

(13) In giving any notice under paragraph (4)(a) or (6), or publishing any notice under paragraph (8), the Commission shall have regard to the following considerations before disclosing any information.

(14) The first consideration is the need to exclude from disclosure (so far as practicable) any information whose disclosure the Commission thinks is contrary to the public interest.

(15) The second consideration is the need to exclude from disclosure (so far as practicable)

- (a) commercial information whose disclosure the Commission thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or
- (b) information relating to the private affairs of an individual whose disclosure the Commission thinks might significantly harm the individual's interests.

(16) The third consideration is the extent to which the disclosure of the information mentioned in paragraph (15)(a) or (b) is necessary for the purposes of the notice.

(17) The following sections of Part 3 of the Enterprise Act 2002 shall apply, with the modifications mentioned in paragraphs (18) and (19), for the purposes of any investigation by

the Commission for the purposes of the exercise of its functions under this Article, as they apply for the purposes of any investigation on references under that Part—

- (a) section 109 (attendance of witnesses and production of documents etc.);
- (b) section 110 (enforcement of powers under section 109: general);
- (c) section 111 (penalties);
- (d) section 112 (penalties: main procedural requirements);
- (e) section 113 (payments and interest by instalments);
- (f) section 114 (appeals in relation to penalties);
- (g) section 115 (recovery of penalties); and
- (h) section 116 (statement of policy).

(18) Section 110 shall, in its application by virtue of paragraph (17), have effect as if—

- (a) subsection (2) were omitted;
- (b) in subsection (4), for the words “the publication of the report of the Commission on the reference concerned” there were substituted “the publication by the Commission of a notice under Article 17A (8) of the Gas (Northern Ireland) Order 1996 in connection with the reference concerned or, if no direction has been given by the Commission under Article 17A(1) of that Order in connection with the reference concerned and within the period permitted for that purpose, the latest day on which it was possible to give such a direction within the permitted period”;
- (c) in subsection (9) the words from “or section” to “section 65 (3)” were omitted.

(19) Section 111 (5)(b) shall, in its application by virtue of paragraph (17), have effect as if for sub-paragraph (ii) there were substituted—

- “(ii) if earlier, the day on which a notice is published by the Commission under Article 17A (8) of the Gas (Northern Ireland) Order 1996 in connection with the reference concerned or, if no direction is given by the Commission under Article 17A(1) of that Order in connection with the reference concerned and within the period permitted for that purpose, the latest day on which such a direction may be given within the permitted period.”.

(20) Provisions of Part 3 of the Enterprise Act 2002 which have effect for the purposes of sections 109 to 116 of that Act (including, in particular, provisions relating to offences and the making of orders) shall, for the purposes of the application of those sections by virtue of paragraph (17), have effect in relation to those sections as applied by virtue of that paragraph.

(21) Accordingly, corresponding provisions of this Order shall not have effect in relation to those sections as applied by virtue of that paragraph.”.

### **Modification of licences: general provisions**

**38.**—(1) In exercising any power to modify an electricity licence under the Electricity Order or this Order, the Department, the Authority, the Secretary of State, the Office of Fair Trading or the Competition Commission (as the case may be) shall have regard to the requirements and prohibitions laid down in European Parliament and Council Directive 96/92 EC concerning common rules for the internal market in electricity.

(2) In exercising any power to modify a gas licence under the Gas Order or this Order, the Department, the Authority, the Secretary of State, the Office of Fair Trading or the Competition Commission (as the case may be) shall have regard to the requirements and prohibitions laid down in European Parliament and Council Directive 98/30 EC concerning common rules for the internal market in natural gas.