

# UTILITIES ACT 2000

---

## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part IV: Amendment of the Electricity Act 1989

#### *Sections 28 – 43: Electricity licensing; and sections 74 – 75, 81 – 83 and 85 – 88: Gas licensing*

48. *Section 28: Prohibition on unlicensed distribution of electricity.* Section 4 of the 1989 Act provides that it is an offence to generate, transmit or supply electricity unless authorised by virtue of a licence or exemption under the Act. Since unauthorised distribution of electricity is not at present an offence, an electricity distributor whose activities do not extend to supply, transmission or generation does not require a licence or exemption. Distribution is not defined in the 1989 Act and it is currently regulated only through conditions in the licences of electricity suppliers (especially the public electricity suppliers who operate the distribution systems serving the great majority of customers).
49. This section amends section 4 of the 1989 Act. The amended section makes unauthorised electricity distribution a prohibited activity and defines that activity. As a result, the unauthorised distribution of electricity becomes an offence in the same way as the other activities referred to above. Distribution will be authorised by means of either a licence granted by the Authority or an exemption order made by the Secretary of State (see sections 29 and 30). Additionally, this section revises the definition of “supply” in order to reflect the creation of the prohibition on unauthorised distribution.
50. *Sections 29 (Exemptions from electricity licensing), 75 (Exceptions from section 5 of the 1986 Act) and 86 (Exemptions from gas licensing).* These sections deal with the case in which a person is carrying out one or more of the activities for which a licence would normally be required but where licensing would be unnecessarily onerous. Examples might be the owner of a caravan site who resupplies power to each of the caravans, or a local authority which operates a combined heat and power scheme for a block of flats. The sections provide powers for the exemption of such persons. Exemptions may only be granted by the Secretary of State, and may be granted either to a class of persons or to an individual person. In order to protect the interests of consumers and to allow the Authority to perform its duties, the Secretary of State may attach conditions to any exemption, and may revoke or withdraw the exemption if, for example, such a condition is breached. The effect of revocation or withdrawal is that, unless a licence is obtained, the continuation of the activity previously authorised by the exemption becomes an offence. These sections are similar to section 6A of the 1986 Act and section 5 of the 1989 Act, although the new provisions clarify the ability of the Secretary of State to attach conditions to exemptions and align the gas and electricity provisions.
51. Section 5(2) of the 1986 Act (which gives effect to Schedule 2A of that Act), provides a system by which certain activities are excepted from the licensing requirement. Section 75 repeals these sections to avoid having two methods of achieving the same result. It is the Government’s intention, however, to make exemption orders under the

new section 86 powers which will replicate the exceptions currently provided for by Schedule 2A.

52. *Section 30: Licences authorising supply etc. of electricity.* This section replaces section 6 of the 1989 Act with three new sections, sections 6, 6A and 6B. Under new section 6, the Authority will have the sole power to grant electricity licences. The Secretary of State's existing power to grant electricity licences will cease, bringing electricity into line with gas in this respect. The amended section also introduces several significant provisions relating to the separation of supply and distribution, namely:
- a power to grant a licence authorising electricity distribution (section 6(1)(c));
  - the creation of a single category of electricity supply licence and, hence, the removal of the concept of public electricity suppliers (sections 6(1)(d) and 6(3)) ; and
  - a statutory prohibition on the same legal person holding both an electricity supply licence and an electricity distribution licence (section 6(2)).
53. The new section 6A lays down the procedures to be applied in respect of the grant, extension or restriction of electricity licences and provides a power for the Authority to make regulations governing these procedures. (This power has hitherto rested with the Secretary of State.) The introduction of these provisions, and amendments to be made to the 1986 Act brings the 1986 and 1989 Acts closely into line in this respect. The new section 6B sets out additional procedures which apply in the case of electricity transmission licences, where the concept of a geographically exclusive "authorised area" is retained.
54. *Section 31: Enactments referring to public electricity suppliers.* The new section 6 of the 1989 Act separates the activity of electricity supply and distribution and ends the concept of "public electricity supplier" (see paragraph 52 above). References in existing enactments to the relevant terms need to be changed to reflect the new licensing structure. This section sets out the changes that are required. It provides that:
- references to public electricity suppliers are, after the commencement of this section, and depending on the nature of the activities carried out, to be taken to be references to electricity suppliers or distributors, or both, as defined in the 1989 Act as amended by this Act;
  - references to the supply of electricity are to be taken to be references to the supply or distribution of electricity, or both, according to the nature of the activity referred to; and
  - references to holders of supply licences under section 6(2) of the current Act (ie so-called 'second tier' supply licences, as opposed to the supply licences granted under section 6(1)(c) to the public electricity suppliers) are to be taken to be references to supply licences as provided for by this Act.
55. *Sections 32 and 74: Electricity licence conditions and gas licence conditions.* These sections amend section 7 of the 1989 Act and section 7B of the 1986 Act respectively. The purpose of these amendments is to align the powers in the two Acts as far as practicable in relation to the inclusion of conditions in licences.
56. *Sections 33 and 81: Standard conditions of electricity and gas licences.* Section 33 brings the 1989 Act into line with the 1986 Act (as amended by the Gas Act 1995) by introducing the concept of standard conditions of licences into electricity. This concept is designed to ensure that all licences of a particular type contain the same licence conditions as far as appropriate and to facilitate a procedure whereby licence conditions may be modified collectively (see section 35). Section 33(1), which follows the model established by section 8(2) of the Gas Act 1995, gives the Secretary of State the power to draw up and publish the standard conditions of the licences before a specified date. As is already the case for gas, after that date, the Secretary of State will have no further role

in making licence conditions, although he may veto proposals made by the Authority to modify the standard conditions he has established, either when granting a licence or subsequently.

57. [Section 33\(2\)](#) permits the inclusion of conditions in standard conditions of licences which make provision in respect of the operation of other standard conditions. Under this provision, a standard condition may provide for other standard conditions of the same licence type not to be brought into operation, to be suspended or to be re-activated in circumstances specified in the condition. Identical provision is made for standard conditions of gas licences in section 81(1).
58. The existence of such provisions is intended to permit more flexible licensing arrangements. For example, while all electricity suppliers will, by and large, have licences containing the same standard conditions, not all suppliers will be serving all segments of the electricity supply market. Some may decide to serve only the industrial and commercial segments. In such cases it will not normally be necessary for a licence holder to be subject to the additional standard conditions which regulate supply to the domestic market segment. Under this provision, it will be possible for these conditions to be rendered inoperative in individual licences unless and until a direction is given bringing them into force.
59. [Section 33\(3\)](#) inserts a new section 8A into the 1989 Act which incorporates by reference the standard conditions established under the power in section 33(1) into all licences granted after section 33(3) comes into force. (Part II of Schedule 7 provides for the incorporation of standard conditions into existing electricity licences by means of licensing schemes to be made by the Secretary of State.) It also gives the Authority a power to modify the standard conditions established by the Secretary of State when granting a licence. It sets out the necessary process required for this including, in line with the existing provisions of the 1989 Act, a power for the Secretary of State to veto such modifications.
60. The passage of this Act gives rise to the need to revise some of the standard conditions of gas licences. The simplest way of achieving this is to replace completely the existing sets of standard conditions with new sets, even though many of the existing conditions are to be replicated in these new sets. This is achieved by subsections (2) and (3) of section 81. The provisions of section 8(2) of the Gas Act 1995 which introduced standard conditions of licences into gas for the first time are spent and are therefore repealed as indicated in Schedule 8 of this Act.
61. Drafts of the new standard licence conditions for gas and electricity were published for consultation by OFGEM on behalf of the Secretary of State on 7 February 2000. Further consultation on the basis of a revised set of standard licence conditions is expected to take place in Autumn 2000. Copies of the draft standard conditions, and any subsequent revisions can be accessed on the OFGEM website ([www.ofgem.gov.uk](http://www.ofgem.gov.uk)).
62. [Sections 34 - 40 and 82 - 83](#): implement revised arrangements for the modification of electricity and gas licence conditions by the Authority and for licence modification references to the Competition Commission.
63. At present, under section 11 of the 1989 Act, electricity licence conditions may be modified on an individual basis and with the consent of the licence holder. Licences may also be modified without the consent of the licence holder following references made to the Competition Commission under the 1989 Act and other Acts. This is discussed more fully below – see the commentary on sections 36, 37, 38 and 40.
64. In gas, the existence of standard conditions of licences provides the basis for an additional means of licence modification, in which the standard conditions of all licences of a given type may be modified in the same way if more than a prescribed percentage of holders of that type of licence support the change. This is sometimes (though not in legislation) referred to as “collective licence modification”. In the

*These notes refer to the Utilities Act 2000 (c.27)  
which received Royal Assent on 28th July 2000*

absence of standard conditions of licences in electricity prior to the coming into force of sections 33-35 of this Act, there is no provision in the 1989 Act for collective licence modification.

65. *Section 34* amends section 11 of the 1989 Act, which deals with the modification of the conditions of individual licences, to reflect the introduction into electricity licensing of standard conditions and to bring arrangements for modifying individual electricity licences into line with the existing arrangements in gas. Section 11(1) is replaced by two new subsections (1) and (1A). The new subsection (1) makes clear that section 11 (as amended) relates only to the modification of conditions of a particular licence. Subsection (1A) provides that the modification of a standard condition of an individual electricity licence shall be so as to meet the circumstances of the case and shall not unduly disadvantage any holder of that type of licence in competing with any other such licence holder. Provision made by section 34(2) ensures that where a standard condition is modified in part, the unmodified part of the condition continues to be considered as a standard condition of the licence. This provision, taken from existing gas legislation, is repeated throughout the licence modification sections of this Act wherever provision exists which would permit the modification of a standard condition of an individual licence.
66. *Section 35* inserts a new section 11A into the 1989 Act which provides for collective modification by the Authority of the standard conditions of all electricity licences of a given type and for the making of any such incidental and consequential modifications as the Authority deems necessary. The new section sets out the procedures to be followed by the Authority in the case of such a modification. The Authority must give notice of its proposals both generally, by publishing a notice in such manner as it considers appropriate to bring the notice to the attention of those likely to be affected by the modification, and specifically to the Council and the Secretary of State. The Secretary of State may veto the proposed modification. There must be an opportunity for representations or objections to be made by any interested party, which includes but is not limited to “relevant licence holders” (see below).
67. The proposed modifications may not be made if the proportion of “relevant licence holders” who register an objection to the proposal exceeds either of two blocking minority thresholds. These thresholds relate to: (i) the proportion of “relevant licence holders” who object (expressed as a percentage of all “relevant licence holders”); and (ii) the same proportion, weighted by the market share of the objectors. Different thresholds may be prescribed for cases (i) and (ii). “Relevant licence holders” are defined as, in the case of a modification which creates new conditions, all holders of the given licence type and, in the case of modification or omission of existing conditions, any licence holder in whose licence the relevant conditions are operative. “Operative” here means that a condition has not been rendered inoperative by the making of a direction under a licence condition included in the licence by virtue of the power in section 33(2).
68. The section provides that the Secretary of State may determine by order (subject to affirmative resolution procedures) the values of the blocking minority thresholds for each test for each licence type, and the means by which licence holders' market share is to be determined for the purposes of the second test.
69. *Section 82* (save for subsection (1)) amends section 23 of the 1986 Act so that the provisions for collective modification of gas licences mirror those described in the preceding paragraphs for electricity. Subsection (1) amends section 8(7) of that Act to align it with section 8A(6) of the 1989 Act as introduced by section 33(3) of this Act.
70. *Sections 36, 37, 38 and 40* amend sections 12, 13, 14 and 15 of the 1989 Act respectively. Sections 12 to 14 of that Act relate to licence modification references to the Competition Commission by the Director, reports on such references by the Competition Commission and modifications of licences which may result. Section 15 provides for licences to be modified by the Secretary of State following adverse

public interest findings by the Commission made following references made to it under other Acts of Parliament. The amendments made by section 36 to section 12 allow the Authority to make licence modification references to the Competition Committee either in the case of individual licences or in respect of collective licence modifications such as are provided for by the new section 11A of the 1989 Act. The changes made by sections 36 and 37 to sections 13 and 14 are largely consequent on this. The changes made by section 40 to section 15 allow the Secretary of State, following a reference report by the Commission made under another Act, either to modify the conditions of individual licences or to modify collectively the standard conditions of all licences of a given type. The resulting provisions of the 1989 Act mirror very closely the corresponding provisions of section 24 to 27 of the 1986 Act as amended by this Act. These sections also include changes which are a consequence of the separation of supply and distribution and of the establishment of the Council.

71. *Sections 39 (Competition Commission's power to veto modifications following report) and 83 (Modification of licence conditions following Competition Commission report).* These sections enable the Competition Commission to review the Authority's proposals to modify electricity licences and gas licences (respectively) following the Commission's report on a reference. If it appears to the Commission that the proposed modifications are not requisite for the purpose of remedying or preventing the adverse effects specified in its report, the Commission is required to substitute its own licence modifications which are requisite for that purpose. These sections set out procedures for the notification by the Commission of its intention to substitute its own modifications and for consultation on the modifications themselves.
72. *Section 41 (Transfer of electricity licences) and 85 (Transfer of gas licences).* Currently, section 8AA of the 1986 Act permits a licence to be assigned, with the consent of the Director General of Gas Supply, to another party. In deciding whether to consent to assignment of a licence, the Director has to take into account the same considerations as he would take into account if he were granting a new licence to the assignee. There is no corresponding provision in the 1989 Act.
73. These sections provide for a similar procedure (now described as "transfer" rather than "assignment") to be adopted for both gas and electricity licences. In addition, the opportunity has been taken to amend the procedures set out in section 8AA of the 1986 Act, both to remove procedural hurdles (such as the requirement that the licence must contain a condition authorising assignment) and to ensure that there is proper consultation in appropriate cases before the Authority consents to a transfer. The purpose is to simplify procedures in cases of restructuring within the industry without removing any necessary consumer protection.
74. *Sections 42 and 87: Reasons for decisions under the 1986 Act and the 1989 Act.* These sections require the Authority and the Secretary of State to give reasons for certain of the key decisions that they take. The sections specify the decisions to which this requirement applies. In these cases, the Authority (or Secretary of State as the case may be) is required to produce a notice giving the reasons for its decision and to publish it in a manner which will bring it to the attention of those likely to be interested. A copy must also be sent to the licence-holder to whose licence, or to whom, the decision relates.
75. *Sections 43 and 88: Altering activities requiring licence or exemption in electricity and gas.* Under the current gas and electricity regimes, neither the Secretary of State nor the regulator has the ability to add to the list of activities prohibited without a licence or exemption, or to remove activities from regulatory control. The only means currently available to achieve this is primary legislation. The purpose of these sections is to introduce more flexibility into the regulatory system to adapt to developments in the structure of the electricity and gas markets. Section 43 covers the case of electricity and section 88 covers gas, the provisions being identical in substance.
76. The effect of the sections will be to give the Secretary of State an order-making power to create new licensable activities for gas and electricity, with certain restrictions, or

*These notes refer to the Utilities Act 2000 (c.27)  
which received Royal Assent on 28th July 2000*

to remove the need for a licence or exemption. Any order would be subject to the affirmative resolution procedure.

77. The key restrictions on the ability to create new licensable activities are :
- the Secretary of State may only exercise the power at the instigation of the Authority;
  - activities may only become licensable if they are activities connected with those already within the scope of existing licences or exemptions;
  - before the power can be exercised, notice must be given to those carrying on, or intending to carry on the activities in question, and to the Gas and Electricity Consumer Council; and
  - if a reference to the Competition Commission is made as a result of an objection (from a person carrying on or intending to carry on the activities) or for any other reason, the Commission must have clearly concluded that the absence of a licensing requirement for those particular activities operates against the public interest.
78. In the case of a proposal to de-regulate an activity, either the Secretary of State or the Authority may initiate the process. All those likely to be affected, the Council (and in the case of gas, the Health and Safety Executive) must be consulted before any decision to proceed with an Order.