

2024 No. 125

ENERGY

**The Independent System Operator and Planner Transfer Scheme
Compensation Regulations 2024**

<i>Made</i>	<i>30th January 2024</i>
<i>Laid before Parliament</i>	<i>7th February 2024</i>
<i>Coming into force</i>	“***”

The Secretary of State makes these Regulations in exercise of the powers conferred by sections 174 and 331(2)(b) of, and paragraphs 8(4) and 8(5) of Schedule 9 to, the Energy Act 2023(a).

Citation, commencement and extent

1.—(1) These Regulations may be cited as the Independent System Operator and Planner Transfer Scheme Compensation Regulations 2024.

(2) These Regulations come into force on [x].

(3) These Regulations extend to England and Wales and Scotland.

Interpretation

2.—(1) In these Regulations—

“the Act” means the Energy Act 2023;

“compensation” means compensation described in paragraph 8(1) of Schedule 9;

“licence” means a licence pursuant to section 6(1)(b) of the Electricity Act 1989(b) or section 7 of the Gas Act 1986(c);

“member of the transferor’s group” means any body corporate which is a parent undertaking or subsidiary undertaking of the transferor and any other body corporate (other than the transferor) which is a subsidiary undertaking of any such parent undertaking; and for the purposes of this definition “body corporate”, “parent undertaking” and “subsidiary undertaking” have the meanings given in the Companies Act 2006(d);

“price control” means licence conditions whose main purpose is to restrict or otherwise govern the revenue that the licence holder may earn in carrying out activities that are the subject of conditions in the licence, and decisions or determinations of the GEMA under those licence conditions;

(a) 2023 c. 52.

(b) 1989 c. 29. Section 6(1)(b) was substituted by section 136(1) of the Energy Act 2004 (c. 20).

(c) 1986 c. 44. Section 7 was substituted by section 5 of the Gas Act 1995 (c. 45) and amended by section 76 of, and paragraph 4 of Schedule 6 and Schedule 8 to, the Utilities Act 2000 (c. 27), by section 149(5) of the Energy Act 2004 (c. 20), and by S.I. 2011/2704.

(d) 2006 c. 46.

“target business” means the property, rights and liabilities that the Secretary of State proposes to transfer under a transfer scheme, which may include shares in a target company;

“target company” means a company, the shares in which the Secretary of State proposes to transfer under a transfer scheme;

“transfer documents” has the meaning given in regulation 5;

“valuer” means the independent valuer appointed or to be appointed under paragraph 8(3) of Schedule 9;

“valuation documents” means the transfer documents contained in the transfer offer made by the Secretary of State under regulation 3(2)(b), where there is subsequent absence of agreement under regulation 3;

“valuation parties” means the Secretary of State and the transferor, and “valuation party” means either one of them;

“working day” means a day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is specified or proclaimed as a bank holiday under the Banking and Financial Dealings Act 1971(a) in England and Wales.

(2) A reference in these Regulations to a Schedule is to that Schedule to the Act.

Absence of agreement regarding compensation

3.—(1) There is an absence of agreement regarding compensation, for the purpose of paragraph 8(2)(b) of Schedule 9, when the conditions in paragraph (2) are satisfied.

(2) The conditions are—

- (a) that the Secretary of State has made a draft offer to the transferor and has proposed arrangements to discuss the terms of the draft offer with the transferor;
- (b) that the Secretary of State has made a transfer offer to the transferor within the period beginning 1 month, and ending 24 months, after the day following that on which the Secretary of State made the draft offer; and
- (c) that the transferor has not given the Secretary of State written notice agreeing to the transfer offer within the period of 10 working days beginning with the day after that on which the Secretary of State made the transfer offer.

(3) A written notice by the transferor agreeing to the transfer offer may not contain modifications to the transfer offer.

Transfer offers and draft offers

4.—(1) Draft offers and transfer offers must be in writing.

(2) Draft offers must include transfer documents.

(3) Transfer offers must include transfer documents which are substantially complete, save only for points to be addressed by minor or technical amendments and additions which would not have more than a negligible impact on compensation, or on the obligations of the transferor or the Secretary of State, under the transfer documents.

(4) Where the Secretary of State makes a draft offer or a transfer offer, the Secretary of State is under no obligation to make a transfer scheme, or to enter into contractual arrangements, on the terms set out in the draft offer or transfer offer.

Transfer documents

5. In these Regulations “transfer documents” means a set of documents comprising—

- (a) a draft of the transfer scheme to be made under paragraph 1(1) of Schedule 9;

(a) 1971 c. 80.

- (b) draft terms of any agreements to be entered into pursuant to the transfer scheme, which for a draft offer can be a summary of terms;
- (c) details of the proposed compensation and any mechanism to adjust that compensation; and
- (d) any other documents or information which the Secretary of State considers to be relevant to the proposed compensation,

from which the proposed compensation can be assessed.

Absence of agreement regarding valuer

6.—(1) There is an absence of agreement regarding appointment of a valuer for the purpose of paragraph 8(3)(b) of Schedule 9 when the conditions in paragraphs (2) and (3) are satisfied.

(2) The condition is that—

- (a) the Secretary of State has proposed at least one valuer to the transferor and proposed arrangements to discuss the appointment of a valuer with the transferor;
- (b) the Secretary of State has considered any valuers proposed by the transferor, where the transferor has made such proposal within the period of 5 working days beginning on the day after that on which the Secretary of State proposes a valuer under sub-paragraph (a);
- (c) the Secretary of State has offered to jointly apply with the transferor to a senior officer of such an independent expert or professional body agreed by the valuation parties, or as determined by the Secretary of State if not agreed within the period of 5 working days beginning on the day after that on which the Secretary of State makes such offer; and
- (d) where the transferor agrees to apply under sub-paragraph (c), an officer of a body to whom application is made pursuant to sub-paragraph (c) has not appointed a valuer on behalf of the valuation parties within the period of 15 working days beginning on the working day after the day on which such application is made.

(3) The condition is that a valuer has not been appointed within a period of 5 working days beginning on the day after that on which the condition in paragraph (2) is satisfied.

(4) The conditions in paragraphs (2) and (3) may be satisfied before there is absence of agreement regarding compensation under regulation 3.

Proposals for and appointment of a valuer

7.—(1) In proposing or appointing a valuer the Secretary of State and the transferor must have regard to—

- (a) the extent to which the valuer has relevant experience of the regulated energy or infrastructure sector in Great Britain;
- (b) the extent to which the valuer has relevant experience of performing valuation work of complex, high value businesses;
- (c) the extent to which the valuer is sufficiently resourced to carry out the compensation determination as soon as practicable after being appointed;
- (d) whether the valuer has appropriate professional indemnity insurance;
- (e) any conflicts of interest of the valuer which might arise between its engagement in determining the compensation and its provision of other services;
- (f) whether the valuer has appropriate measures in place to mitigate any conflicts of interest.

(2) The valuer may be an individual or an organisation.

Procedure for valuer compensation determination and valuation party representations

8.—(1) In making a compensation determination the valuer must—

- (a) except as otherwise specified in the valuation documents, make the compensation determination in relation to the target business only;
 - (b) make a compensation determination on a market value (MV) basis, as defined in paragraph 30.1 and construed in accordance with paragraph 30 (*IVS-Defined Basis of Value – Market Value*) of the International Valuation Standards as published on 31st July 2021 and effective from 31st January 2022(a).
- (2) In making a compensation determination the valuer must have regard to—
- (a) any representations regarding the details of the compensation in the valuation documents made in writing by a valuation party to the valuer, provided that such representations are made within the period of 10 working days beginning with the later of—
 - (i) the day on which the valuer notifies the valuation parties under paragraph (3); or
 - (ii) the day after that on which the conditions in regulation 3 are satisfied such that there is an absence of agreement regarding compensation for the purpose of paragraph 8(2)(b) of Schedule 9;
 - (b) any representations made in writing by a valuation party in response to representations made by the other valuation party under sub-paragraph (a), provided that such representations are made within the period of 10 working days beginning with the day after that on which the relevant representations under sub-paragraph (a) are made.
- (3) The valuer must provide written notice to the valuation parties on the day that the valuer commences work on the compensation determination, informing them of the same.
- (4) The valuation parties may by written agreement vary the time limits—
- (a) to make representations to the valuer in accordance with paragraph (2)(a); and
 - (b) to respond to representations made by the other valuation party in accordance with paragraph (2)(b).
- (5) The compensation determination may—
- (a) determine the compensation as at a reference date set out in the valuation documents;
 - (b) contain a statement of assumptions made by the valuer in making the compensation determination;
 - (c) where the valuation documents contain an adjustment mechanism by which the compensation as at the reference date may be adjusted by reference to the transfer date, contain recommendations for modifications to that mechanism to give effect to the assumptions referred to in sub-paragraph (b) and the compensation determination.
- (6) The valuer must use reasonable endeavours to provide a compensation determination as soon as practicable after being appointed.
- (7) Each valuation party must cooperate with the valuer to enable the valuer to provide a compensation determination as soon as practicable after being appointed.
- (8) Before providing a compensation determination, the valuer must provide a draft compensation determination to each valuation party.
- (9) Each valuation party may make representations in writing to the valuer with respect to the draft compensation determination within the period of 10 working days beginning on the day after that on which the draft was provided.
- (10) The valuer must consider such representations and may make revisions before providing the compensation determination.
- (11) When providing a compensation determination, the valuer must include a report detailing how the valuer has arrived at the compensation determination, and any documentation and material (other than referred to in these Regulations) to which the valuer had regard in making the compensation determination.

(a) Available online at https://www.rics.org/content/dam/ricsglobal/documents/standards/ivsc_effective_31_jan_2022.pdf, starting at page 22. For information on how to obtain a hard copy, contact NESO@energysecurity.gov.uk.

(12) If either valuation party is of the opinion that there has been a manifest error in the compensation determination, it must within the period of 10 working days beginning on the day after that of the valuer providing the compensation determination, notify the valuer and the other valuation party, setting out a full explanation of the alleged manifest error.

(13) The valuer must consider such notification and as soon as practicable determine whether the compensation determination may require revision having regard to the matters raised.

(14) If the valuer considers that revision may be necessary, the valuer must provide a draft of the revision to the valuation parties and grant the valuation parties the opportunity to respond in writing within a period of 5 working days beginning on the day after that on which the draft revision is provided, before re-issuing the compensation determination, which may include revisions.

Factors applicable to compensation determination

9.—(1) In making a compensation determination the valuer must have regard to—

- (a) the terms and conditions set out in the valuation documents;
- (b) any rights and liabilities which would transfer—
 - (i) under the TUPE regulations as a direct result of the implementation of the transfer scheme; or
 - (ii) as a result of provision made under Schedule 10;
- (c) to the extent that it is, in the valuer's opinion, relevant to the value of the target business—
 - (i) any obligation of the target company or the transferor under any enactment;
 - (ii) the terms and conditions of a licence held by the target company or the transferor, and any direction, consent, determination or other instrument given by the GEMA or the Secretary of State in relation to such licence;
 - (iii) any codes or agreements to which the target company or transferor is a party by virtue of a licence;
 - (iv) any relevant price control of the target company or transferor;
- (d) any reports or information provided by the GEMA regarding the target company or transferor's compliance with or performance under a licence, price control or an enactment;
- (e) the fact that the compensation determination is in relation only to the target business and therefore except to the extent provided for in the valuation documents, excludes and makes no provision for—
 - (i) compensation for any loss or damage which is suffered by a member of the transferor's group in consequence of anything done by the Secretary of State in preparation for or in connection with the designation of a person under section 162(1) of the Act to which the proposed transfer scheme that is the subject of the compensation determination relates;
 - (ii) any amount which is in a category of costs or financial impact which category is recoverable through price control under any licence held by the transferor, the target business or any member of the transferor's group;
 - (iii) in particular, any amount falling within sub-paragraph (ii) which the relevant licensee has sought to recover and which the GEMA has disallowed or not approved as eligible for recovery;
 - (iv) any amount which is a cost or expenditure recoverable pursuant to paragraphs 12(8) or 14(1) of Schedule 9;
 - (v) in particular, any amount which the transferor, a member of the transferor's group or the target business has sought to recover under paragraphs 12(8) or 14(1) of Schedule 9 and which the Secretary of State has declined to reimburse.

- (2) In making a compensation determination, the valuer must apply assumptions that—
- (a) the compensation determination reflects the transferor’s only entitlement to compensation pursuant to the transfer scheme;
 - (b) the target business will continue to operate with none of the changes to the legal and regulatory regime under which it operates that would apply upon designation of the ISOP under section 162(1) of the Act.

(3) The compensation determination may conclude that the compensation that the transferor is entitled to is higher or lower than or the same as the level set out in the valuation documents.

Information required by the valuer

10.—(1) The valuation parties must provide the valuer with such information and assistance, within such period, as the valuer reasonably requires to make a compensation determination.

(2) Such assistance may include attendance at meetings, providing answers to questions posed by the valuer or taking other steps regarding provision of information as the valuer in their discretion considers appropriate.

(3) If either valuation party does not provide such information or assistance within the time period specified by the valuer, the valuer may make reasonable assumptions regarding the information or assistance not provided.

(4) A valuation party that provides any information or document to the valuer under paragraph (1) or makes any representations to the valuer, must at the same time also provide the other valuation party with a copy or other means of accessing the relevant information, document or representations.

Transfer scheme compensation

11. If the Secretary of State makes a transfer scheme based on transfer documents within six months of a valuer providing a compensation determination relating to materially the same transfer documents (including with any adjustments to them of the nature recommended by the valuer in the compensation determination pursuant to regulation 8(5)(c)), then the compensation to which the transferor is entitled is as set out in the compensation determination, unless the valuation parties agree otherwise.

Independent valuer remuneration

12.—(1) It is the responsibility of the Secretary of State to pay the valuer’s remuneration and expenses.

(2) The transferor must provide reasonable cooperation to the Secretary of State to ensure that the valuer’s remuneration and expenses are kept at a reasonable level.

30th January 2024

Graham Stuart
Minister of State
Department for Energy Security and Net Zero

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations, which apply in Great Britain, make provision regarding the compensation determination by an independent valuer under a transfer scheme relating to the establishment or functioning of the Independent System Operator and Planner established under Part 5 of the Energy Act 2023 (c. 52, the “Act”).

Regulations 3, 4 and 5, define when there is absence of agreement between the Secretary of State and the transferor regarding compensation under a transfer scheme. This occurs when the Secretary of State has made a draft offer and a transfer offer, and has proposed arrangements to discuss, and the transfer offer is not accepted within 10 days by the transferor. Under the Act, where there is absence of agreement regarding compensation, the compensation is determined by an independent valuer.

Regulations 6 and 7 set out the conditions that have to be met before there is absence of agreement regarding the appointment of a valuer, and the matters to have regard to when appointing a valuer. Where there is absence of agreement regarding a valuer, the Act provides for the Secretary of State to appoint a valuer on behalf of both the Secretary of State and the transferor.

Regulation 8 sets out procedures that apply and steps to be followed when the valuer is making a compensation determination. For example, the valuation must be made on a market value basis. It also provides for the Secretary of State and the transferor to make representations to the valuer regarding the compensation.

Regulation 9 lists the matters the valuer must have regard to in reaching a compensation determination, as well as the assumptions the valuer must apply.

Regulation 10 specifies the information, documents, and assistance available to the valuer.

Regulation 11 entitles the transferor to the level of compensation specified in the compensation determination, if the Secretary of State makes a transfer scheme within six months of the valuer’s compensation determination which is materially the same as the scheme covered in the determination.

Regulation 12 deals with the valuer’s remuneration and expenses.

A full Impact Assessment has not been published in support of this instrument, as no significant impact on the private, voluntary or public sector is foreseen.

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