

# ENERGY ACT 2011

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 2: Security of Energy Supplies**

##### *Chapter 1: Electricity Supply*

##### ***Section 79: Annual Report by Gas and Electricity Markets Authority on security of electricity supply***

201. This section imposes a requirement for GEMA to report annually to the Secretary of State with its assessment of how much capacity GB will need in the future. The total capacity need is that which can meet peak demand while still maintaining an appropriate margin of spare supply to cope with unexpected events.
202. *Subsection (1)* requires GEMA to prepare a report in accordance with subsection (2) before 1 September 2012, and before that date in any subsequent calendar year; and to send that report to the Secretary of State.
203. *Subsection (2)* requires GEMA to forecast peak demand for the supply of electricity, and to provide a range of assessments of the capacity margin needed for that supply.
204. *Subsection (3)* states the report must cover the position for each of the four years following publication of the report, but also enables the Secretary of State to specify different reporting periods by order.
205. *Subsection (5)* sets out variables the assessment must take into account, including the generation of electricity, operation of interconnectors, storage of electricity, and extent to which available capacity may be lower than maximum capacity. *Subsection (6)* allows the assessment to be made based on information provided by someone with existing expertise, including the holder of a transmission licence or any other person.
206. *Subsection (7)* permits the Secretary of State to give GEMA directions regarding the form of the report and the manner in which it must be expressed or sent.
207. *Subsection (8)* contains definitions for the purposes of this section.

##### ***Section 80: Annual report by Secretary of State on security of energy supplies***

208. This section imposes a requirement for the Secretary of State to publish his view on what electricity supply capacity is needed to meet demand, including spare capacity to cope with unexpected events. It amends section 172 of the Energy Act 2004, under which the Secretary of State is already required to report on security of supply including by reference to generating capacity in Great Britain.
209. *Subsection (2)* supplements the existing reporting requirements set out in section 172 of the Energy Act 2004 by requiring the Secretary of State to include in the report his assessment of the capacity needed to meet demand for electricity in Great Britain. As in section 79, the assessment must: be included from 2012 and in each subsequent year;

cover each of the four years following the year of the report and or any other periods the Secretary of State may specify by order; and take account of a number of variables.

## **Chapter 2: Gas Supply**

### **Section 81: Power of the Gas and Electricity Markets Authority to direct a modification of the Uniform Network Code**

210. This section gives a power to the Gas and Electricity Markets Authority (GEMA) to direct a modification of the Uniform Network Code. The Uniform Network Code (UNC, or ‘the Code’) is a legal document which forms the basis of the arrangements between companies that transport gas, and those whose gas they transport.
211. *Subsection (1)* inserts a new section - 36C - into the Gas Act 1986, which allows GEMA to direct a modification to the UNC, which must be in relation to the arrangements in the UNC in respect of a gas emergency and must be a modification which the Authority considers to be a market based modification. The subsections within the new section 36C set out a number of conditions concerning the circumstances and way in which GEMA may modify the UNC, including: that the Authority may only direct a modification if it considers that it will decrease the likelihood of a gas supply emergency occurring and/or decrease the duration or severity of a gas supply; and only after consultation with appropriate persons.
212. *Subsection (2)* states that the said requirement for consultation in the new section – 36C – may be satisfied by consultation undertaken before the commencement of the Act.
213. *Subsections (4) to (6)* ensure that in the event that a change were made to the UNC, those parties directly affected by the change would be able to appeal to the Competition Commission under amendments to rules set out in the Energy Act 2004 (sections 173 – 175 and Schedule 22 of that Act). *Subsection (4)* enables the Secretary of State to exclude the right of appeal in certain cases.

## **Chapter 3: Upstream Petroleum Infrastructure**

### **Section 82: Acquisition of rights to use upstream petroleum infrastructure**

214. This section sets out the procedure for where a person who has previously sought to secure access to a relevant pipeline or facility by application to the owner, but who has not been able to reach agreement with the owner, may apply to the Secretary of State for a notice granting that access. It sets out: the circumstances within which an access dispute may be resolved by the Secretary of State; the considerations the Secretary of State must take into account when deciding how to deal with the application; and the process the Secretary of State must follow.
215. *Subsections (1) to (3)* set out the scope of the dispute resolution procedure, including the persons involved, the types of infrastructure addressed and its geographical extent.
216. *Subsection (4)* allows a person who has previously sought to secure access to a relevant pipeline or facility by application to the owner, but who has not been able to reach agreement with the owner, to apply to the Secretary of State for a notice granting that access.
217. Under *subsection (5)*, the Secretary of State may not consider such an application unless satisfied that the applicant and owner have had a reasonable time in which to reach an agreement.
218. *Subsection (6)* requires that the Secretary of State must first consider whether the application should be adjourned to enable further negotiation, considered further, or rejected. In the event that he decides to give it further consideration, he must give an opportunity to be heard to the applicant and the owner, to anyone with usage rights in

the pipeline or facility, to the Health and Safety Executive and such other persons as he considers appropriate.

219. *Subsection (7)* lists a number of matters which the Secretary of State must, so far as relevant, take into account in giving further consideration to such an application; including the capacity which may reasonably be made available, incompatibilities of technical specification, the reasonable needs of the owners, and the interests of other parties.
220. *Subsection (8)* provides that the Secretary of State may only issue an access notice if satisfied that it will either not prejudice the reasonable expectations of the owners and their associates, or the exercise of existing rights by other parties in respect of conveyance or processing (*subsection (9)*); or that the notice contains provision for compensation to be paid to any person who suffers loss as a result of any such prejudice (*subsection (10)*).
221. *Subsections (11) and (12)* provide for any such notice to contain such provision as the Secretary of State thinks necessary to secure the applicant an effective right of access and any appropriate ancillary rights; to regulate the charges for the right granted; to allow the owner to recover payments by way of consideration for any right granted; and to permit assignment of the right.
222. *Subsection (13)* provides that a notice under subsection (11) must be given to both the owner and the applicant, and, in the event that it contains any compensation provision under subsection (10), to any person with relevant rights; and does not come into force unless accepted by the applicant within the time specified.
223. *Subsection (19)* defines the ‘owner’ of any upstream infrastructure for the purposes of this section and section 83.

***Section 83: Power of Secretary of State to give a notice under section 82(11) on own initiative***

224. This section sets out the new process by which the Secretary of State may issue an access notice on his or her own initiative.
225. *Subsection (1)* limits the use of the power to situations in which an access application has been made to an owner, but the owner and the applicant do not reach agreement on the application. Where it applies, *subsection (2)* allows the Secretary of State to issue an access notice, but subject to section 82(8) above, and to the two following subsections.
226. Under *subsection (3)*, the Secretary of State may not issue such a notice unless satisfied that the applicant and owner have had a reasonable time in which to reach an agreement (as in section 82); but must further be satisfied that there is no reasonable prospect of them doing so.
227. Under *subsection (4)* the Secretary of State must, in considering whether to exercise the power, take into account the matters specified in section 82(7) and also give an opportunity to be heard to the persons identified in section 83(5).

***Section 84: Compulsory modification of upstream petroleum infrastructure***

228. This section deals with compulsory modifications to the infrastructure in question, where it appears that these will be necessary to give effect to an access right sought under section 82.
229. *Subsection (1)* provides that the section applies where an application has been made to an owner, and the Secretary of State is considering whether to give an access notice under section 82(11).
230. *Subsection (2)* enables the Secretary of State to issue a notice requiring modifications to the pipeline or facility in question, where it appears to him that this can and should

be done in order to increase the capacity of the pipeline or facility, or to connect to the applicant's pipeline.

231. *Subsection (3)* provides that such a notice must: specify the modifications to be made and the recompense due to the owner; require the applicant to make appropriate arrangements to secure payment of these sums; require the owner to make the modifications if the payment arrangements are made; and authorise the owner to recover the relevant sums from the applicant when the modifications are made.
232. *Subsection (4)* provides that the notice may also provide for compensation for any loss which may be incurred by other users as a result of the making of the modifications; and *subsection (5)* provides that a notice containing any such provision is to be given to any person with relevant rights, as well as to the owner and the applicant.
233. *Subsection (7)* provides that before giving such a notice, the Secretary of State must take into account the matters specified in 82(7), and must give an opportunity to be heard to the persons specified in *subsection (8)*.
234. *Subsection (10)* defines the 'owner' of any upstream infrastructure for the purposes of this section – it should be noted that this definition is more limited than that which applies in sections 82 and 83.

#### ***Section 85: Variation of notices under sections 82 and 84***

235. This section allows for variation of notices under sections 82 and 84 once they have been issued, enabling amendments to be made to a notice without having to restart the dispute resolution procedure from the beginning.
236. *Subsection (1)* allows the persons to whom notice is given to agree to, vary or set aside the notice.
237. *Subsection (2)* allows the Secretary of State to vary a notice on the application of one of the persons to whom it has been given.
238. *Subsection (3)* provides that he may do so only if satisfied that it is necessary to resolve a dispute about the notice between its recipients.
239. *Subsection (4)* requires the Secretary of State to give an opportunity to be heard to the persons specified in the subsection.

#### ***Section 86: Publication of notices and variations***

240. This section allows the Secretary of State to publish any access notice, modification notice or variation notice, in whole or in part or in summary. But before doing so, he must give an opportunity to be heard to the persons to whom the notice has been given and to such other persons as he considers appropriate (*subsection (3)*).

#### ***Section 87: Powers of Secretary of State to require information***

241. This section gives the Secretary of State new powers to require information about the progress of access negotiations.
242. *Subsection (1)* provides that where the Secretary of State has reason to believe that an application for access to upstream petroleum infrastructure has been made, he may require either the applicant or the owner to confirm this.
243. *Subsection (2)* allows the Secretary of State to require any applicant or owner to provide such information as he may specify, in order for him to decide whether to exercise any function under sections 82, 83 and 84, and if so, how.

*These notes refer to the Energy Act 2011 (c.16)  
which received Royal Assent on 18 October 2011*

- 244. *Subsections (3) and (4)* provide analogous powers to require information from anyone seeking a variation of an access notice, and from the other person to whom the notice in question was given.
- 245. *Subsection (5)* confirms that the information which may be required includes financial information.
- 246. *Subsection (6)* requires the Secretary of State not to disclose information supplied under this section except with the consent of the person who supplied it, or in accordance with his or her statutory obligations.

***Section 88: Enforcement***

- 247. This section provides for the enforcement of the requirements imposed in this Chapter.
- 248. *Subsections (1) to (3)* create a new offence, for the giving of false information to the Secretary of State for the purpose of influencing the exercise of his functions under this Chapter. This offence can be committed either when a person knows or believes the information in question is false, or is reckless as to whether the information is false. A person guilty of such an offence is liable to a fine not exceeding level five on the standard scale (currently £5000 in England, Wales and Scotland).
- 249. *Subsections (4) to (6)* make related provision for proceedings, and for offences by bodies corporate, in relation to that offence.
- 250. *Subsection (7)* provides that the duty of a person to comply with an access notice or a modification notice is a duty owed to any person who may be affected by a failure to comply with it.
- 251. *Subsection (8)* provides that any such duty may be enforced by a person to whom it is owed, as if it were a contractual right.
- 252. *Subsection (9)* provides that the duty of a person to comply with an information request under section 87 is enforceable by civil proceedings by the Secretary of State.

***Section 89: Minor, consequential and supplemental provision***

- 253. This section, and Schedule 2 to the Act, provide for various matters which are consequential or supplemental to the main provisions of this Chapter.
- 254. The Schedule amends the parts of the Petroleum Act 1998 and the Pipelines Act 1962 which set out the current regime for third party access to offshore pipelines, and for onshore pipelines, respectively, so that they no longer apply to upstream petroleum infrastructure within the scope of this Chapter. They do however continue in effect so far as other pipelines are concerned (in particular, the 1962 Act continues in effect with respect to onshore pipelines which are not upstream petroleum pipelines). The Schedule therefore provides amendments which are necessary to ensure that the new regime does not conflict with the existing regime.
- 255. The Schedule also provides for the repeal of certain provisions of the Gas Act 1995 and the Energy Act 2008, which are entirely subsumed by the new provision in this Chapter.

***Section 90: Interpretation***

- 256. This section provides definitions for various terms used in the Chapter. The definitions of ‘upstream petroleum pipeline’, ‘gas processing facility’ and ‘oil processing facility’ are of particular importance, being central to the scope of the Chapter – see section 82(1), etc. These three definitions in turn depend on the meaning of other terms defined in this section. The definition of ‘payments’ is also of note since it allows for payment to be given in money or money’s worth – in other words, it provides for payments in kind.

***Section 91: Meaning of “associate” for the purposes of section 82***

257. This section provides the definition of “associate” in section 82.

***Chapter 4: Downstream Gas Processing Facilities***

***Section 92: Acquisition of rights to use gas processing facilities for downstream purposes***

258. [Section 92](#) amends section 12 of the Gas Act 1995.
259. *Subsection (2)* amends the heading of section 12 to clarify that this section now applies only where access to a gas processing facility is sought for a downstream purpose. *Subsections (4), (6), and (7)* ensure that section 12 only applies in such cases.
260. *Subsections (3), (8), (9) and (10)* amend section 12 so that obligations under that section will be enforceable by the Gas and Electricity Markets Authority, under the regime in sections 28 to 30F of the Gas Act 1986.
261. *Subsection (5)* requires the owner of a gas processing facility to publish in draft the conditions on which access will be granted to their facility, and take any representations into account, before finalising those conditions. This implements, in relation to downstream gas processing facilities, the consultation requirement in Article 33 of Directive [2009/73/EC](#).
262. *Subsection (10)* also amends section 12 to insert a new subsection (5A), which provides for the meaning of “downstream purpose”.
263. *Subsections (11) and (12)* amend and supplement, as necessary, the existing definitions in section 12.

***Chapter 5: Special Administration***

***Section 93: Amendment of section 166 of the Energy Act 2004***

264. This section requires that as soon as practicable after issuing an indemnity in respect of a special administration (whether of an electricity or gas transmission company, a network distribution company, or an energy supply company) the Secretary of State must lay a statement of the agreement before Parliament. It also requires the Secretary of State to report to Parliament where a sum is paid out under such an indemnity.

**Special administration under this Chapter**

***Section 94: Energy supply company administration orders***

265. This section provides that a court may make an energy supply company administration order (esc administration order) in relation to an energy supply company. An energy supply company is defined in *subsection (5)* as a company that holds a licence from GEMA to supply gas or electricity.
266. *Subsection (1)* describes an esc administration order as an order made by the court in relation to an energy supply company, which directs that the affairs, business and property of the company are to be managed by a person appointed by the court, while the order is in force.
267. *Subsections (2) and (3)* explain that the person appointed by the court for the purposes of an esc administration order is known as the ‘energy administrator’, who must perform the duties of an energy administrator to achieve the objectives set out in section 95.
268. *Subsection (4)* provides that an energy supply company administration order applies only to those affairs and business of a non-GB company which are carried out in Great Britain and to its property in Great Britain.

***Section 95: Objectives of an energy supply company administration***

269. This section states the objectives of an energy supply company administration.
270. *Subsection (1)* states the objectives as: ensuring that the supply of gas and electricity to customers is continued at the lowest cost which it is practicable to incur; and making continuation of the energy supply company administration unnecessary by rescuing the company or making a transfer in accordance with subsection (2).
271. *Subsection (2)* stipulates the ways the continuation of energy supply company administration may be made unnecessary. These are either the rescue of the energy supply company as a going concern or transfers which satisfy subsection (3). *Subsection (3)* states what type of transfers are permissible under the section, and *subsection (4)* provides for how such transfers may take place.
272. *Subsection (5)* provides that rescue is to be preferred to transfer in achieving the objective of energy supply company administration and states that transfers are only to be effected when; rescue is not reasonably practicable without transfers; where the objective of the energy supply company 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 96: Application of certain provisions of the Energy Act 2004 in relation to esc administration orders***

273. This section modifies the provisions in sections 156 to 167 of and Schedules 20 and 21 to the Energy Act 2004 (the existing special administration regime for energy licensees), and sections 171 and 196 (interpretation) so they apply in relation to an energy supply company (esc) administration order.
274. The provisions applied include:
- Section 156 of the Energy Act 2004, which provides that an application to the court for an esc administration order can be made only by the Secretary of State or by the Gas and Electricity Markets Authority (GEMA) with the consent of the Secretary of State;
  - Section 157 which empowers the court in relation to an application for an esc administration order. The court can make an esc administration order only 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 supply company administration) to wind up the company in the public interest;
  - Section 158 which stipulates the status of the energy administrator. It provides that the administrator must exercise management functions for the purpose of achieving the objective of the energy supply company administration as quickly and efficiently as is reasonably practicable and must exercise powers and perform duties in the manner which, in so far as it is consistent with the objective of the energy supply company 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 Schedule 20 which apply the rule making power in section 411 of the [Insolvency Act 1986 \(c.45\)](#). Schedule 20 provides for certain provisions, with modifications, of Schedule B1 to the Insolvency Act 1986 (covering detailed rules relating to administration) to have effect in relation to energy supply company administration. It also grants the Secretary of State the power to make such modifications to primary legislation relating to insolvency (including the provisions of the Act) as the Secretary of State considers appropriate in relation to energy supply company administration;

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- Schedule 21 which provides for the transfers to another company or companies as a going concern of so much of the energy supply company's assets as are necessary to ensure that the objective of the energy supply company administration is met. Such transfer schemes are to be made by the energy administrator with the approval of the Secretary of State, after he has consulted GEMA;
- Sections 160 to 164 which prevent energy supply company administration being frustrated by prior orders of various types being granted before the Secretary of State or Gas and Electricity Markets Authority have been given an opportunity to apply for an esc administration order or by other steps being taken when an esc administration order has been made or an application is outstanding;
- Section 165 which enables the Secretary of State, with the consent of the Treasury, to give a grant or loan to a company in energy supply company administration in order to achieve the objective of energy supply company administration. It also enables the Secretary of State to set the terms of a grant or loan including the requirement that all or part of a grant should be repaid;
- Section 166 which 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;
- Section 167 which enables the Secretary of State, with the consent of the Treasury, to provide guarantees in relation to an energy supply company in energy supply company administration and requires the Secretary of State to lay a statement of any guarantees given before Parliament as soon as practicable; and
- Section 171 which provides interpretations of various specific terms and Section 196 which provides interpretations of various general terms.

***Section 97: Conduct of administration, transfer schemes etc***

275. This section gives the Secretary of State powers to make rules under section 411 of the Insolvency Act 1986 in order to give effect to this Chapter.

***Section 98: Modifications of particular or standard conditions***

276. This section confers powers on the Secretary of State to modify the conditions of any gas or electricity licence held by a particular person in order to recover any shortfall in meeting the costs of energy supply company administration. The modifications that can be made are specified in section 99.
277. *Subsections (3) to (5)* require the Secretary of State to consult the holder of any licence being modified and anyone else he thinks appropriate before making a modification and to publish modifications made under this section.
278. *Subsection (7)* stipulates the requirement on GEMA to incorporate any modification of standard conditions made by the Secretary of State into new licences it grants and to publish these modifications.
279. *Subsection (8)* limits the exercise of the powers under this section to eighteen months after commencement of this section.
280. *Subsections (9) to (12)* provide that modifications made under this section to standard conditions of (i) electricity generation, distribution and supply licences, (ii) gas transporter, supply and shipping licences, and (iii) gas and electricity interconnector licences, are reflected in the sections of the Utilities Act 2000 and the Energy Act 2004 which govern the standard conditions of those licences.



***Section 99: Licence conditions to secure funding of energy supply company administration***

281. This section specifies the modifications that the Secretary of State can make to gas and electricity licences to secure funding of energy supply company administration.
282. *Subsections (1) and (2)* state the modifications that may be made under section 98 include requiring the holder of the licence to raise the charges imposed by them so as to raise such amounts as may be determined by the Secretary of State and to pay the amounts raised to specified persons for the purpose of making good a shortfall in the property of an energy supply company available to meet the expenses of energy supply company administration. This will allow the costs of energy supply company administration to be recouped via the licence mechanism from the industry and ultimately from consumers.
283. *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 supply company 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.
284. *Subsection (4)* defines relevant debts and includes obligations to repay the grants, loans, sums paid out under an indemnity and sums paid out under guarantees under sections 165, 166 and 167 of the Energy Act 2004 as applied by section 96 of this Act.

***Section 100: Modifications under the Enterprise Act 2002***

285. This section provides the power to modify or apply enactments conferred on the Secretary of State by sections 248, 277 and 254 of the Enterprise Act 2002 and includes a power to make consequential modifications to this Chapter of the Act where the Secretary of State considers this appropriate. This power is designed to ensure that the current provisions do not get out of line where the Enterprise Act 2002 provisions are used to modify or apply enactments.

***Section 101: Power to make further modifications of insolvency legislation***

286. This section gives the Secretary of State the power to make modifications to any provisions under this Chapter. This power is designed to enable the Secretary of State to amend the detail of the regime as experience of its application highlights any difficulties or areas of concern. This is particularly so as the energy market continues to develop rapidly.

***Section 102: Interpretation of Chapter 5***

287. This section defines the terms used in sections 93 to 101.

***Chapter 6: Continental Shelf***

***Section 103: Revocation etc of designations under Continental Shelf Act 1964***

288. This section enables designations under section 1(7) of the Continental Shelf Act 1964 to be revoked, amended and re-enacted. This will provide flexibility in making arrangements about maritime boundaries with the United Kingdom's neighbours by enabling us to swap areas which have already been designated under section 1(7).