

A Guide to Price Control Modification References to the Competition Commission - Licensee and Third Party Triggered References

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Target audience: Consumers and their representatives, gas and electricity transmission and distribution companies, generators and offshore gas producers/importers, suppliers, shippers, debt and equity investors, those with sustainable development interests, academics and other interested parties.

Overview:

RPI-X@20 is Ofgem's detailed review of energy network regulation. We have looked at how best to regulate energy network companies to enable them to meet the challenges and opportunities of delivering the networks required for a sustainable, low carbon energy sector.

If Britain's energy network companies are to deliver the networks needed for a sustainable energy sector, the way we regulate them needs to change. In July 2010 we published our Recommendations consultation, on a new regulatory framework, known as the RIIO model, which we would use to develop future price controls for electricity and gas transmission and distribution network companies. Following consideration of responses to the Recommendations consultation, on 4 October 2010, the Gas and Electricity Markets Authority (the Authority) published its decision to implement the RIIO model, which has been designed to promote smarter gas and electricity networks for a low carbon future.

This guidance document provides details of the process the Authority will follow in reaching a decision on whether to make a price control modification reference to the Competition Commission following a request from a third party or following the rejection of final proposals by a network licensee.

The Guidance is intended to be a living document. It will be reviewed and updated at the Authority's discretion

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Context

RPI-X@20 is Ofgem's detailed review of energy network regulation. We have looked at how best to regulate energy network companies to enable them to meet the challenges and opportunities of delivering the networks required for a sustainable, low carbon energy sector.

If Britain's energy network companies are to deliver the networks needed for a sustainable energy sector, the way we regulate them needs to change. In July 2010 we published our Recommendations consultation, on a new regulatory framework, known as the RIIO model, which we would use to develop future price controls for electricity and gas transmission and distribution network companies. Following consideration of responses to the Recommendations consultation, on 4 October 2010, the Gas and Electricity Markets Authority (the Authority) published its decision to implement the RIIO model, which has been designed to promote smarter gas and electricity networks for a low carbon future.

One of the key decisions was to publish guidance as to the circumstances in which the Authority may consider making a price control modification reference to the Competition Commission, using its powers under the Electricity and Gas Acts, following a request from a third party¹ or following the rejection of final proposals by a network licensee.

A wide range of parties are affected by network company decisions and by the price control decisions made by the Authority. As the range of decisions being made becomes more complex and the costs involved increase we recognise the benefits of seeking to facilitate and encourage greater engagement of consumers and wider stakeholders in the price control review process. Our 'Handbook for implementing the RIIO model' provides further detail on how this engagement will be taken forward during price control reviews.

The ability of third parties to request that the Authority make a price control modification reference to the Competition Commission is expected to facilitate increased and more effective stakeholder engagement by network companies and by Ofgem. It is also expected to improve the accountability and the perceived legitimacy of the decision-making of the Authority and the network companies.

Associated Documents

- Regulating energy networks for the future: RPI-X@20 decision document
<http://www.ofgem.gov.uk/Networks/rpix20/ConsultDocs/Documents1/Decision%20doc.pdf>
- Handbook for implementing the RIIO model
<http://www.ofgem.gov.uk/Networks/rpix20/ConsultDocs/Documents1/RIIO%20handbook.pdf>

¹ This could, in appropriate cases, include a modification request from a network company or other licensee.

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Summary

- 1.** The main purpose of this guidance document (the Guidance) is to give an overview of the process the Authority will follow in reaching a decision on whether to make a price control modification reference to the Competition Commission² following a request from a third party. The Guidance also covers the triggers for a modification reference following the rejection by a licensee of price control final proposals, or thereafter by the rejection by a licensee of licence modifications giving rise to price control final proposals. The Authority expects a third party request for a reference to be made at the final proposals stage, except in exceptional circumstances. A third party will normally have before it at this stage all matters capable of providing grounds for a reference. Aspects of the Guidance would also apply at the time of a mid-period review of output requirements and potentially if the Authority decided to fast-track a network company. Both of these policy areas are being developed further as part of the current price control reviews, TPCR5 and GDPCR2. The Guidance may in due course be amended to reflect developments in this area.
- 2.** The power to make a price control modification reference to the Competition Commission resides with the Authority. However, the ability to make a price control modification request to Ofgem is open to any party. While the price control modification process for licensed network companies is well understood, this is not the case for third parties. This guidance seeks to address this. Circumstances may therefore arise in future where Ofgem has published a decision document containing its final proposals and the licensees have accepted those proposals, but where the Authority at its discretion nonetheless decides to make a price control modification reference to the Competition Commission on the basis of a third party request.
- 3.** Where a licensee has agreed to final proposals, Ofgem will have sought agreement following consultation and consideration of its principal objective, various statutory and other duties, including European and public law obligations. However, Ofgem recognises that there may be circumstances where the issues raised in the course of the price control modification process give third parties legitimate and material concerns as to whether price control final proposals, as a whole or as regards one or more particular element(s) of the package:
 - a. operate against the public interest; or
 - b. may be expected to operate against the public interest.
- 4.** In order to decide to make a reference, the Authority need not go so far as to share the third party's concerns in the sense of agreeing with them; however, the Authority will need to be satisfied that the concerns raised in the request are legitimate and material and meet the public interest test. The Authority may

² The decision to refer a matter to the Competition Commission is a matter reserved to the Authority pursuant to the Rules of Procedure of the Gas and Electricity Markets Authority which can be viewed at the following link:

<http://www.ofgem.gov.uk/About%20us/Documents1/Ofgem%20Rules%20of%20Procedure.pdf>

exercise its discretion to make a reference to the Competition Commission on the basis of a third party concern whilst maintaining support for its final proposals.

- 5.** Each request for a modification reference will be considered on its merits and by reference to this Guidance. In general, however, the Authority is unlikely to refer a modification request to the Competition Commission if a third party has not demonstrated that its request performs well against each of the criteria laid out in chapter 2 of this Guidance.
- 6.** The criteria in this Guidance have been developed to address price control modification references to the Competition Commission by the Authority - whether triggered by a licensee's rejection of final proposals or being made following a request by a third party. The Guidance is therefore limited in its application to price control modification references. However, the powers in the Gas Act and Electricity Act to make a modification reference to the Competition Commission have wider application, and apply to other categories of licence modification beyond price controls. In these other circumstances, the Authority will consider on a case-by-case basis whether to make a reference to the Competition Commission, whether as a result of a licensee's rejection or a third party request. This includes consideration of the public interest test. The application of this test differs necessarily from one context to another, and the interpretation at Appendix 2 of this document is intended to apply only to price control modification references.
- 7.** This Guidance is not intended to be, and should not be read as, a substitute for the relevant statutory provisions in the Gas Act and the Electricity Act and any other relevant legislative provisions.

1. Introduction

1.1. The power of the Authority to make a price control modification reference, at its discretion, is embedded in the price control review process. The prospect of the Authority making a reference following a request by a third party will be flagged as a possibility throughout the process and feature in Ofgem's consultations on the price control. As part of this, stakeholders will be informed of the existence of this Guidance as part of each price control review.

1.2. Price control final proposals continue to be an Authority decision. Existing licensees continue to have the right to reject the proposals and thus trigger a modification reference by the Authority to the Competition Commission. Final proposals are also subject to third parties being able to make a request to the Authority to make a price control modification reference to the Competition Commission. The Authority will consider any such request on its merits and by reference to the criteria contained in this Guidance.

1.3. The Guidance is intended to set out the Authority's indicative process for considering whether to make a price control modification reference to the Competition Commission following a third party request. The Guidance focuses on the process following the publication of final proposals. However, aspects of the Guidance would also apply at the time of a mid-period review of output requirements and potentially if the Authority decided to fast-track a network company. Both of these policy areas are being developed further as part of the current price control reviews, TPCR5 and GDPCR2. The Guidance may in due course be amended to reflect developments in this area³. Price control decisions remain susceptible to challenge by way of Judicial Review. The Guidance applies equally to Electricity Transmission & Distribution and Gas Transmission & Distribution Price Controls.

1.4. The Guidance is based on the statutory powers under both the Gas Act and Electricity Act as of October 2010. It is intended to be a living document. It will be reviewed and updated at the Authority's discretion:

- in light of experience and the Authority's views on best practice;
- in light of any relevant legislative changes, including the introduction or amendment of any measures which implement European legal obligations (e.g. in light of legislative changes resulting from Third Package implementation); and
- any other matters reasonably considered by the Authority to make updating appropriate.

³ Further details of the mid-period review of output requirements and fast-tracking can be found in the 'Handbook for implementing the RIIO model': <http://www.ofgem.gov.uk/Networks/rpix20/ConsultDocs/Documents1/RIIO%20handbook.pdf>

2. Criteria for making a price control modification reference

2.1. This section provides separate guidance for licensed network companies and third parties on the criteria in respect of which the Authority will normally need to be satisfied to, at its discretion, make a price control modification reference to the Competition Commission.

Licensed network companies

2.2. Where a network licensee rejects price control final proposals or licence modifications giving effect to final proposals, the Authority may, at its discretion, make a modification reference to the Competition Commission. Exceptionally, the Authority may consider the concern raised by the licensee and make an adjustment to final proposals. The Authority will consider each case on its merits, and will consider what process to follow on a case-by-case basis.

Third parties

2.3. In general, the Authority will only make a price control modification reference to the Competition Commission where the request performs well in respect of each of the criteria set out in paragraph 2.4 below⁴. However, the Authority may decide to make a reference where the request is inadequate in respect of one or more of the criteria but:

(i) the third party explains to the Authority's satisfaction (including, where appropriate by providing evidence) why its reference does not perform adequately against the criterion and why the Authority should, nonetheless, make a reference; and/or

(ii) the circumstances are otherwise exceptional.

2.4. The price control modification reference request submitted by the third party should:

- a. provide a detailed explanation of the third party's particular interest in the price control review process;
- b. clarify what licensee(s) the price control modification request applies to and provide a full explanation of how the issue(s) raised in the modification request relate to the price control final proposals. See Appendix 3 for details of matters which may, save in exceptional cases, be considered to be out of scope by the Authority because they could be addressed more appropriately by other means and processes;

⁴ The criteria listed are not intended to be exhaustive, but are intended to provide guidance for third parties on the criteria in respect of which the Authority will normally need to be satisfied to, at its discretion, make a price control modification reference to the Competition Commission.

- c. be supported by detailed reasons and evidence demonstrating legitimate and material concerns why the third party considers that the price control final proposals, whether the package as a whole or one or more particular element(s) of it:
 - i. operates against the public interest⁵; or
 - ii. may be expected to operate against the public interest;
- d. demonstrate how it is consistent with the Authority's principal objective and other statutory, European and public law duties⁶. It should be consistent with the Authority's principal objective, explaining why such a reference would be in the interests of existing and future consumers. It should also take account of the Authority's wider statutory duties, including the need to ensure that licence holders are able to finance their activities;
- e. state (and provide evidence where appropriate) that the third party has engaged effectively throughout the price control review process with Ofgem, Network Licensees and any other relevant party; and
- f. be comprehensive in nature and explain clearly, supported by evidence where appropriate, how the third party had brought the argument and/or evidence it seeks to rely upon in the price control modification request to Ofgem's attention during the price control review process, prior to the publication of final proposals.

2.5. In order to promote regulatory certainty, the third party seeking the price control modification reference must, save in exceptional circumstances, make their request within the same timescales afforded to network licensees following the publication of final proposals (see chapter 6 for further details) - as opposed to the statutory consultation on licence modifications giving effect to final proposals. A third party will normally have before it at the final proposals stage all matters capable of providing grounds for a reference. Any party who intends to seek a modification reference outside this timeline should give early notice of its intention to the Authority together with the expected date for delivery of its request and a full explanation of the reasons for the delay.

⁵ See Appendix 2 for further information.

⁶ Please see Appendix 4 for further information on the Authority's Powers and Duties.

3. Consideration by the Authority of a request for a price control modification reference

3.1. For any price control modification reference, whether as a result of a licensee rejecting final proposals or as a result of a third party concern, the Authority will exercise its discretion in determining whether the reference deals with:

- a. the whole price control package specified in final proposals; or
- b. a single issue in isolation from the price control package specified in final proposals.

3.2. Ordinarily, the Authority would expect to refer the package as a whole but could decide, if appropriate, to make a reference on a single issue that was considered to be separable.

3.3. The section below provides separate guidance on the procedure by which the Authority will consider a request for a price control modification by a licensed network company or by third parties.

Licensed network companies

3.4. If a network licensee does not agree with the Authority's decision on the price control, it is the Authority, and not the licensee, that decides whether or not to refer the matter to the Competition Commission. In the main, and subject to consideration of case specific concerns, we expect that the Authority would exercise its discretion to refer. It is for the Authority to define the scope of the reference to the Competition Commission (see paragraph 3.1). Assuming the Secretary of State does not veto the Authority's reference, the Competition Commission will proceed to investigate and report on the matter.

Third parties

3.5. The ability of a third party to make a request for a price control modification reference to the Authority is embedded in the process for carrying out a price control review and will feature in Ofgem's consultation(s) on the price control.

3.6. The Authority will consider each request for a price control modification reference by a third party on its merits and by reference to the criteria in this Guidance (see paragraph 2.4). The Authority will follow a transparent process when considering any such request, which is set out below. The Authority may, at its discretion, publish and seek views on a modification request before reaching a decision on whether to make a reference.

3.7. The Authority will publish its decision on whether to make, or refuse, a price control modification reference following a modification request by a third party. This will be supported by a statement of the reasons for its decision. Save in exceptional cases, we would expect the Authority to discuss with affected licensees the prospect of a proposed reference before it reaches a decision on whether to refer. The decision and the reasons for that decision will:

- a. be made in a timely manner and where possible within six weeks of receipt⁷;
- b. be made available on Ofgem's website;
- c. provide a transparent assessment of how the price control modification request meets or does not meet the required criteria set out in paragraph 2.4;
- d. where appropriate, reflect discussion with (i) parties involved in enhanced engagement during the price control review process and (ii) the relevant licensee(s); and
- e. where appropriate, reflect discussions with the third party making the price control modification reference request.

The Authority makes or rejects a reference request by a third party

3.8. In deciding whether to make a price control modification reference to the Competition Commission, the Authority will consider the request against the following matters:

- a. the criteria for making a price control modification request (see chapter 2); and
- b. the Authority's principal objective and wider statutory and public law duties, including European Union legal obligations.

3.9. Where the Authority decides to make a reference on the basis of a request by a third party, the Authority will settle the modification reference to the Competition Commission taking account of, at its discretion, the matters raised in the price control modification request by the third party.

⁷ Save for statutory periods, all references to timescales in the Guidance are indicative. Third parties will be given the same time to make a modification request as licensees have to consider final proposals. Further detail on the timescale can be found in chapter 6.

4. Payment of costs

4.1. There are two issues to consider in relation to costs, first the costs of a modification request, and second the costs of a modification reference.

The costs of a modification request

4.2. The costs of making a price control modification request to Ofgem, including the draft modification reference and associated documentation, will be borne by the party making the request. The party making the price control modification request will also be liable to cover the costs of providing the Authority with any additional information the Authority reasonably requests and which the third party agrees to provide.

4.3. For the avoidance of doubt, the costs incurred by Ofgem in considering the request will be borne by Ofgem and not the third party.

The costs of a modification reference

4.4. In all circumstances where the Authority makes a modification reference to the Competition Commission, licensees and third parties will bear their own costs associated with the reference.

4.5. In terms of the costs of the Competition Commission, they will only be recovered via licensee charges. How the costs are apportioned between licensees will be determined by the Competition Commission at its discretion under the power contained in section 177(3) of the Energy Act 2004. This will be decided once their work on the modification reference is complete⁸.

⁸ The relevant provisions of the 2004 Act were commenced by the Energy Act 2004 (Commencement No.6) Order 2005 SI 2005 No. 2965 which can be viewed at the following link: http://www.opsi.gov.uk/si/si2005/uksi_20052965_en.pdf

5. Price control interim arrangements

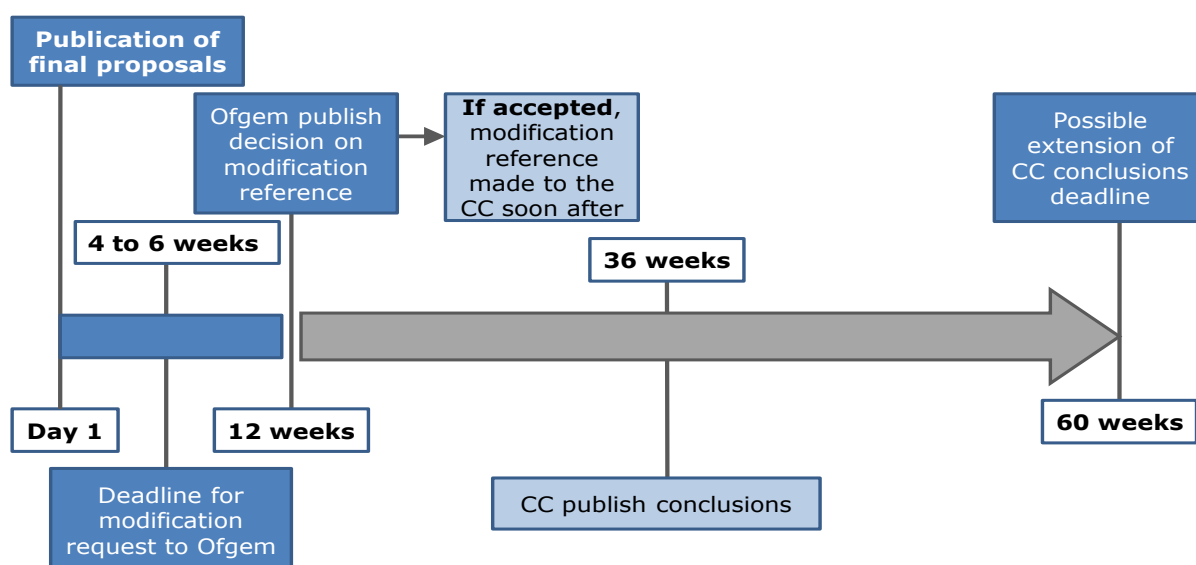
5.1. Based on the timetable set out in Chapter 6, the Competition Commission's conclusions are unlikely to be delivered before the start of the new price control period, normally 1 April. In these circumstances, the Authority will consider whether, and if so how, to modify the prevailing price control licence conditions at the time of making a reference.

5.2. The Authority will consider on a case-by-case basis what arrangements should apply in circumstances where it makes a price control modification reference to the Competition Commission. Where licensees agree final proposals, the Authority may consider it appropriate to apply on a provisional basis the new price control terms (as published in final proposals) from 1 April – this would be without prejudice to the recommendations of the Competition Commission in its report following a price control modification reference.

5.3. We expect that the Authority would normally take this course of action. If this course is pursued, the Authority would make adjustments retrospectively after the Competition Commission recommendations. In the event of a reference relating to a 'single issue' only, the Authority will consider modifying the licence to reflect all aspects of the final price control proposals save, where possible, the single issue referred.

6. Timetable for modification request and referral

6.1. The timetabling is subject to existing legislative requirements and constraints. An indicative price control modification reference timeline, following the publication of final proposals, is illustrated below. Standard options for raising concerns (e.g. requests for modification references to the Competition Commission and Judicial Review) would, if appropriate, also apply at the time of a mid-period review of output requirements or to the Authority's decision to fast-track a network company. In both cases a similar timescale to that outlined below would be expected to be followed. Both of these areas are being developed further as part of the current price control reviews, TPCR5 and GDPCR2. The guidance may in due course be amended to reflect developments in this area.



6.2. A third party who wishes to make a request for a price control modification reference is expected, following publication of final proposals, to make the request within the period allowed to licensees to consider the proposals. The time allowed to licensees varies, but is in the region of four to six weeks and will be specified in Final Proposals.

6.3. The Authority will consider any request for a price control modification reference and, where possible, publish its decision on the request within six weeks of receipt. Equally, the Authority will consider and publish on Ofgem's website its decision on

the course of action it proposes to follow in respect of any rejection of price control final proposals by a network licensee.

6.4. It is for the Authority to define the scope of any price control modification reference to the Competition Commission. Where the Authority decides to make a price control modification reference, the Authority will, save in exceptional circumstances, settle the reference itself. In doing so, it will at its discretion take into account the terms of the price control modification request submitted by the third party, and will make the reference as soon as practicable following the publication of its decision to do so.

6.5. Section 12(5) of the Electricity Act 1989 and section 24(4A) of the Gas Act 1986 provide that the Secretary of State may direct the Competition Commission not to proceed with a modification reference or to give effect to the variation of the reference.

6.6. The Authority sets the deadline for the Competition Commission to deliver its conclusions. That deadline may not be longer than six months⁹ from the date of the price control modification reference to the Competition Commission, although the Authority may extend it by up to a further six months if the Competition Commission makes reasoned representations why this is necessary. An overview of the Electricity Act 1989 consolidated provisions relating to modification references to the Competition Commission is contained at Appendix 1.

⁹ References to months are calendar months.

Appendices

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Appendix 1 - Overview of the Electricity Act 1989 consolidated provisions - modification references to the Competition Commission¹⁰

12 Modification references to the Competition Commission

(1) The Authority may make to the Competition Commission a reference which is so framed as to require the Commission to investigate and report on the questions—

- a. whether any matters which relate to the carrying on of activities authorised or regulated by a particular licence and which are specified in the reference operate, or may be expected to operate, against the public interest; and
- b. if so, whether the effects adverse to the public interest which those matters have or may be expected to have could be remedied or prevented by modifications of the conditions of the licence.

(1A) The Authority may make to the Competition Commission a reference which is so framed as to require the Commission to investigate and report on the questions—

- a. whether any matters which relate to the carrying on of activities authorised or regulated by licences of any type mentioned in section 6(1), and which are specified in the reference operate, or may be expected to operate, against the public interest; and
- b. if so, whether the effects adverse to the public interest which those matters have or may be expected to have could be remedied or prevented by modifications of the standard conditions of licences of that type.

(2) The Authority may, at any time, by notice given to the Competition Commission vary a reference under this section by adding to the matters specified in the reference or by excluding from the reference some . . . of the matters so specified; and on receipt of any such notice the Commission shall give effect to the variation.

(3) The Authority may specify in a reference under this section, or a variation of such a reference, for the purpose of assisting the Competition Commission in carrying out the investigation on the reference—

- a. any effects adverse to the public interest which, in its opinion, the matters specified in the reference or variation have or may be expected to have; and
- b. any modifications of the relevant conditions by which, in its opinion, those effects could be remedied or prevented.

¹⁰ There are parallel provisions in the Gas Act 1986 at sections 23 – 27. References to legislation and other documents that are publicly available in this Guidance are high level references only and are not a substitute for the primary text.

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(4) As soon as practicable after making a reference under this section or a variation of such a reference, the Authority—

- a. shall serve a copy of the reference or variation on the holder of the licence or, as the case may be, the relevant licence holders and the Council; and
- b. shall publish particulars of the reference or variation in such manner as it considers appropriate for the purpose of bringing the reference or variation to the attention of persons likely to be affected by it.

(5) The Authority shall also send a copy of a reference under subsection (1A), or a variation of such a reference, to the Secretary of State; and if, before the end of the period of 28 days beginning with the day on which the Secretary of State receives the copy of the reference or variation, the Secretary of State directs the Competition Commission not to proceed with the reference or, as the case may require, not to give effect to the variation, the Commission shall comply with the direction.

(6) It shall be the duty of the Authority, for the purpose of assisting the Competition Commission in carrying out an investigation on a reference under this section or in carrying out functions under section 14A, to give to the Commission—

- a. any information in its possession which relates to matters falling within the scope of the investigation or the carrying out of those functions and—
 - (i) is requested by the Commission for that purpose; or
 - (ii) is information which, in its opinion, it would be appropriate for that purpose to give to the Commission without any such request; and
- b. any other assistance which the Commission may require, and which it is within its power to give, in relation to any such matters;
- c. and the Commission, for the purpose of carrying out any such investigation or such functions, shall take account of any information given to them for that purpose under this subsection.

(6A) In this section and sections 12A, 13, 14 and 14A—
“relevant conditions”—

- a. in relation to a reference under subsection (1), means the conditions of the licence to which the reference relates; and
- b. in relation to a reference under subsection (1A), means the standard conditions of the licences to which the reference relates; and
- c. “relevant licence holder” means the holder of a licence to which a reference under subsection (1A) relates.

(7) In determining for the purposes of this section whether any particular matter operates, or may be expected to operate, against the public interest, the Competition Commission shall have regard to the matters as respects which duties are imposed on the Secretary of State and the Authority by section 3A to 3C.

(8) . . .

(8A) . . .

(9) . . .

(9A) . . .

12A References under section 12: time limits

- (1) Every reference under section 12 above shall specify a period (not longer than six months beginning with the date of the reference) within which a report on the reference is to be made.
- (2) A report of the Competition Commission on a reference under section 12 above shall not have effect (and no action shall be taken in relation to it under section 14 below) unless the report is made before the end of the period specified in the reference or such further period (if any) as may be allowed by the Authority under subsection (3) below.
- (3) The Authority may, if it has received representations on the subject from the Competition Commission and is satisfied that there are special reasons why the report cannot be made within the period specified in the reference, extend that period by no more than six months.
- (4) No more than one extension is possible under subsection (3) above in relation to the same reference.
- (5) The Authority shall, in the case of an extension made by it under subsection (3) above—
- a. publish that extension in such manner as it considers appropriate for the purpose of bringing it to the attention of persons likely to be affected by it; and
 - b. send a copy of what has been published by it under paragraph (a) above to the holder of the licence or, as the case may be, the relevant licence holders.

12B References under section 12: powers of investigation

- (1) The following sections of Part 3 of the Enterprise Act 2002 shall apply, with the modifications mentioned in subsections (2) and (3) below, for the purposes of references under section 12 above as they apply for the purposes of 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).
- (2) Section 110 shall, in its application by virtue of subsection (1) above, have effect as if—
- a. subsection (2) were omitted; and

b. in subsection (9) the words from "or section" to "section 65(3)" were omitted.

(3) Section 111(5)(b)(ii) shall, in its application by virtue of subsection (1) above, have effect as if—

- a. for the words "published (or, in the case of a report under section 50 or 65, given)" there were substituted "made";
- b. for the words "published (or given)", in both places where they appear, there were substituted "made"; and
- c. the words "by this Part" were omitted.

(4) 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 subsection (1) above, have effect in relation to those sections as applied by virtue of that subsection.

(5) Accordingly, corresponding provisions of this Act shall not have effect in relation to those sections as applied by virtue of that subsection.

13 Reports on modification references

(1) In making a report on a reference under section 12 above, the Competition Commission—

- a. shall include in the report definite conclusions on the questions comprised in the reference together with such an account of their reasons for those conclusions as in their opinion is expedient for facilitating a proper understanding of those questions and of their conclusions;
- b. where they conclude that any of the matters specified in the reference operate, or may be expected to operate, against the public interest, shall specify in the report the effects adverse to the public interest which those matters have or may be expected to have; and
- c. where they conclude that any adverse effects so specified could be remedied or prevented by modifications of the relevant conditions, shall specify in the report modifications by which those effects could be remedied or prevented.

(1A) For the purposes of sections 14 and 14A below, a conclusion contained in a report of the Competition Commission is to be disregarded if the conclusion is not that of at least two-thirds of the members of the group constituted in connection with the reference concerned in pursuance of paragraph 15 of Schedule 7 to the Competition Act 1998.

(1B) If a member of a group so constituted disagrees with any conclusions contained in a report made on a reference under section 12 above as the conclusions of the Competition Commission, the report shall, if the member so wishes, include a statement of his disagreement and of his reasons for disagreeing.

(2) . . .

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(3) For the purposes of the law relating to defamation, absolute privilege attaches to any report made by the Competition Commission on a reference under section 12 above.

(3A) In making any report on a reference under section 12 above the Competition Commission must have regard to the following considerations before disclosing any information.

(3B) The first consideration is the need to exclude from disclosure (so far as practicable) any information whose disclosure the Competition Commission thinks is contrary to the public interest.

(3C) The second consideration is the need to exclude from disclosure (so far as practicable)—

- a. commercial information whose disclosure the Competition 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 Competition Commission thinks might significantly harm the individual's interests.

(3D) The third consideration is the extent to which the disclosure of the information mentioned in subsection (3C)(a) or (b) above is necessary for the purposes of the report.

(4) A report of the Competition Commission on a reference under section 12 above shall be made to the Authority.

(5) Subject to subsection (6) below, the Authority—

- a. shall, on receiving a report on a reference under section 12(1), send a copy of it to the licence holder and to the Secretary of State; and
- b. shall, not less than 14 days after that copy is received by the Secretary of State, send another copy to the Council and publish that other copy in such manner as it considers appropriate for bringing the report to the attention of persons likely to be affected by it.

(5A) Subject to subsection (6), the Authority shall—

- a. on receiving a report on a reference under section 12(1A), send a copy of it to the Secretary of State; and
- b. not less than 14 days after that copy is received by the Secretary of State—
 - (i) send another copy to the Council and to each relevant licence holder; and
 - (ii) not less than 24 hours after complying with sub-paragraph (i) above, publish the copy sent to the Council in such manner as it considers appropriate for bringing the report to the attention of persons likely to be affected by it.

(6) If it appears to the Secretary of State that the publication of any matter in such a report would be against the public interest or the commercial interests of any

person, he may, before the end of the period of 14 days mentioned in subsection (5) or (5A), direct the Authority to exclude that matter from the copy of the report, or (as the case may be) each copy of the report, to be sent and published as mentioned in paragraph (b) of that subsection.

14 Modification following report

(1) Where a report of the Competition Commission on a reference under section 12 above—

- a. includes conclusions to the effect that any of the matters specified in the reference operate, or may be expected to operate, against the public interest;
- b. specifies effects adverse to the public interest which those matters have or may be expected to have;
- c. includes conclusions to the effect that those effects could be remedied or prevented by modifications of the relevant conditions; and
- d. specifies modifications by which those effects could be remedied or prevented; and
- e. the Authority shall, subject to the following provisions of this section, make such modifications of the relevant conditions as appear to it requisite for the purpose of remedying or preventing the adverse effects specified in the report.

(1A) Where at any time it modifies under subsection (1) the standard conditions of licences of any type in consequence of a reference under section 12(1A), 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.

(2) Before making modifications under this section, the Authority shall have regard to the modifications specified in the report.

(3) Before making modifications under this section, the Authority shall give notice—

- a. stating that it proposes to make the modifications and setting out their effect;
 - b. stating the reasons why it proposes to make the modifications; and
 - 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.

(4) A notice under subsection (3) above shall be given—

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

(5) After considering any representations or objections made in response to proposals set out in a notice under subsection (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 subsection (5) a copy of any representations or objections received in relation to the notice under subsection (3).

(7) If the period of four weeks from the date on which the notice under subsection (5) is given elapses without a direction under section 14A(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 section 14A(1)(b) has been given, make the modifications which are not specified in the direction.

(8) The modification under subsection (1) of part of a standard condition of a particular licence in consequence of a reference under section 12(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.

(9) Where the Authority modifies the standard conditions of licences of any type as mentioned in subsection (1A), the Authority—

- a. shall also 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.

14A Competition Commission's power to veto modifications following report

(1) The Competition Commission (in this section referred to as “the Commission”) may, within the period of four weeks after the date on which it is given a notice under section 14(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;
- c. and the Authority shall comply with any such direction.

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

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(3) The power to give a direction under subsection (1) may only be exercised in respect of such of the modifications set out in the notice under section 14(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 subsection (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 subsection (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 subsection (1)(b), such of those adverse effects as are not remedied or prevented by the modifications made by the Authority under section 14(7)(b).

(5) In exercising its function under subsection (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 subsection (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 subsection (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 section 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 section 12(1A), the Commission modifies under subsection (4)(b) the standard conditions of licences of any type, 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 subsection (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 section of part of a standard condition of a particular licence in consequence of a reference under section 12(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.

(11A) For the purposes of the law relating to defamation, absolute privilege attaches to any notice under subsection (4)(a), (6) or (8).

(11B) In giving any notice under subsection (4)(a) or (6), or publishing any notice under subsection (8), the Commission must have regard to the following considerations before disclosing any information.

(11C) 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.

(11D) 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.

(11E) The third consideration is the extent to which the disclosure of the information mentioned in subsection (11D)(a) or (b) is necessary for the purposes of the notice.

(11F) The following sections of Part 3 of the Enterprise Act 2002 shall apply, with the modifications mentioned in subsections (11G) and (11H), for the purposes of any investigation by the Commission for the purposes of the exercise of its functions under this section, 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

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h. section 116 (statement of policy).

(11G) Section 110 shall, in its application by virtue of subsection (11F), 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 section 14A(8) of the Electricity Act 1989 in connection with the reference concerned or, if no direction has been given by the Commission under section 14A(1) of that Act 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;” and
- c. in subsection (9) the words from “or section” to “section 65(3)” were omitted.

(11H) Section 111(5)(b) shall, in its application by virtue of subsection (11F), 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 section 14A(8) of the Electricity Act 1989 in connection with the reference concerned or, if no direction is given by the Commission under section 14A(1) of that Act 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.”

(11I) 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 subsection (11F) above, have effect in relation to those sections as applied by virtue of that subsection.

(11J) Accordingly, corresponding provisions of this Act shall not have effect in relation to those sections as applied by virtue of that subsection.

(12) . . .

(13) . . .

(14) This section does not apply to the modification of a licence following a report of the Commission made before the commencement of section 39 of the Utilities Act 2000.

Appendix 2 – Interpretation of the public interest

1.1. This appendix looks at the interpretation of the public interest in the context of a price control licence modification request from a third party¹¹.

1.2. The price control modification request should demonstrate legitimate and material concerns supported by detailed reasons and evidence why they consider price control final proposals, whether the package as a whole or a particular element(s) of it:

- a. operates against the public interest; or
- b. may be expected to operate against the public interest.

1.3. At the highest level, the Authority will consider whether those concerns, if justified, would lead to the conclusion that alternative proposals may be more consistent with the Authority's principal objective and wider statutory, European and public law duties. The Authority need not go so far as to share the third party's concerns in the sense of agreeing with them, but may recognise that there is a legitimate and material argument to the contrary. Each request for a modification reference will be considered on its merits and by reference to this Guidance. The Authority may exercise its discretion to make a reference on the basis of a third party concern to the Competition Commission whilst maintaining support for its final proposals.

1.4. A successful request would therefore be likely to include argument and evidence to demonstrate why Ofgem's final proposals are not expected to meet the desired outcomes (objectives) of our new regulatory framework, namely that the framework should encourage energy network companies to:

- a. play a full role in delivery of a sustainable energy sector; and
- b. deliver long-term value for money network services for existing and future consumers.

1.5. The areas in final proposals that might be considered include, but are not limited to:

- a. the outputs that networks are required to deliver;

¹¹ The Authority will consider each request for a modification reference on a case-by-case basis, including the public interest test. The criteria in this Appendix are indicative only and are provided for guidance purposes to highlight the factors the Authority would expect a third party to cover in a request for a price control modification reference.

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- b. the total level of revenue that companies are allowed to recover from consumers to finance the delivery of these outputs; and/or
- c. specific elements of the determination of revenue, including the cost of capital, the level of allowed investment and the depreciation profile.

1.6. As well as providing evidence to demonstrate that the price control modification request is consistent with the criteria laid out in chapter 2, the Authority would expect a request for a price control modification referral to be supported by robust evidence which might include, in appropriate cases, but is not limited to:

- a. economic analysis to demonstrate how final proposals are not expected to meet the desired outcomes of Ofgem's regulatory framework;
- b. research on what consumers want and/or need, which is demonstrated to be consistent with better meeting Ofgem's statutory duties;
- c. evidence based analysis of the costs that the network company might need to deliver the price control package;
- d. financial analysis that points to concerns with the cost of capital assessment; and/or
- e. analysis that the incentive properties of the regime are unlikely to deliver the desired outcomes.

1.7. Notwithstanding the above, the Authority may also decide to accede to a request, in appropriate circumstances, that raises legitimate and material concerns requiring less complex analysis. Such a request may, for instance, be appropriate where the third party raises concerns over the environmental impact of the proposals. However, even in such a case, any third party intending to make such a request is advised strongly to comply with the guidance in chapter 2.

Appendix 3 – Scope of modification request by a third party

1.1. The Authority may refuse, at its discretion, a price control modification request in respect of its price control final proposals where the issue(s) raised are considered to be out of scope because they could be addressed more appropriately elsewhere. For example, the Authority may refuse to refer where the request¹²:

- a. relates to matters the Authority considers, at its discretion, not to be amenable to a modification reference and which may, for example, be best dealt with by way of an application to the Administrative Court for Judicial Review;
- b. raises matters relating uniquely or principally to industry codes which can be altered by reference to the governance rules in the relevant code (e.g. issues relating to the modification of charging methodologies); and
- c. concerns planning matters. These are almost certain to be appropriate for consideration within the planning process and by the relevant planning bodies. Planning matters are covered by a process independent of the price control review, and it is via this process that stakeholders are expected to influence planning decisions.

¹² This list is not intended to be exhaustive.

Appendix 4 - The Authority's Powers and Duties

1.1. Ofgem is the Office of Gas and Electricity Markets which supports the Gas and Electricity Markets Authority (“the Authority”), the regulator of the gas and electricity industries in Great Britain. This appendix summarises the primary powers and duties of the Authority. It is not comprehensive and is not a substitute to reference to the relevant legal instruments (including, but not limited to, those referred to below).

1.2. The Authority's powers and duties are largely provided for in statute (such as the Gas Act 1986, the Electricity Act 1989, the Utilities Act 2000, the Competition Act 1998, the Enterprise Act 2002 and the Energy Acts of 2004, 2008 and 2010) as well as arising from directly effective European Community legislation.

1.3. References to the Gas Act and the Electricity Act in this appendix are to Part 1 of those Acts¹³. Duties and functions relating to gas are set out in the Gas Act and those relating to electricity are set out in the Electricity Act. This appendix must be read accordingly¹⁴.

1.4. The Authority's principal objective is to protect the interests of existing and future consumers in relation to gas conveyed through pipes and electricity conveyed by distribution or transmission systems. The interests of such consumers are their interests taken as a whole, including their interests in the reduction of greenhouse gases and in the security of the supply of gas and electricity to them.

1.5. The Authority is generally required to carry out its functions in the manner it considers is best calculated to further the principal objective, wherever appropriate by promoting effective competition between persons engaged in, or commercial activities connected with,

- the shipping, transportation or supply of gas conveyed through pipes;
- the generation, transmission, distribution or supply of electricity;
- the provision or use of electricity interconnectors.

1.6. Before deciding to carry out its functions in a particular manner with a view to promoting competition, the Authority will have to consider the extent to which the interests of consumers would be protected by that manner of carrying out those functions and whether there is any other manner (whether or not it would promote competition) in which the Authority could carry out those functions which would better protect those interests.

1.7. In performing these duties, the Authority must have regard to:

¹³ Entitled “Gas Supply” and “Electricity Supply” respectively.

¹⁴ However, in exercising a function under the Electricity Act the Authority may have regard to the interests of consumers in relation to gas conveyed through pipes and vice versa in the case of it exercising a function under the Gas Act.

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- the need to secure that, so far as it is economical to meet them, all reasonable demands in Great Britain for gas conveyed through pipes are met;
- the need to secure that all reasonable demands for electricity are met;
- the need to secure that licence holders are able to finance the activities which are the subject of obligations on them¹⁵; and
- the need to contribute to the achievement of sustainable development.

1.8. In performing these duties, the Authority must have regard to the interests of individuals who are disabled or chronically sick, of pensionable age, with low incomes, or residing in rural areas¹⁶.

1.9. Subject to the above, the Authority is required to carry out the functions referred to in the manner which it considers is best calculated to:

- promote efficiency and economy on the part of those licensed¹⁷ under the relevant Act and the efficient use of gas conveyed through pipes and electricity conveyed by distribution systems or transmission systems;
- protect the public from dangers arising from the conveyance of gas through pipes or the use of gas conveyed through pipes and from the generation, transmission, distribution or supply of electricity; and
- secure a diverse and viable long-term energy supply,
- and shall, in carrying out those functions, have regard to the effect on the environment.

1.10. In carrying out these functions the Authority must also have regard to:

- the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed and any other principles that appear to it to represent the best regulatory practice; and
- certain statutory guidance on social and environmental matters issued by the Secretary of State.

1.11. The Authority may, in carrying out a function under the Gas Act and the Electricity Act, have regard to any interests of consumers in relation to communications services and electronic communications apparatus or to water or sewerage services (within the meaning of the Water Industry Act 1991), which are affected by the carrying out of that function.

1.12. The Authority has powers under the Competition Act to investigate suspected anti-competitive activity and take action for breaches of the prohibitions in the legislation in respect of the gas and electricity sectors in Great Britain and is a designated National Competition Authority under the EC Modernisation Regulation¹⁸ and therefore part of the European Competition Network. The Authority also has concurrent powers with the Office of Fair Trading in respect of market investigation references to the Competition Commission.

¹⁵ Under the Gas Act and the Utilities Act, in the case of Gas Act functions, or the Electricity Act, the Utilities Act and certain parts of the Energy Acts in the case of Electricity Act functions.

¹⁶ The Authority may have regard to other descriptions of consumers.

¹⁷ Or persons authorised by exemptions to carry on any activity.

¹⁸ Council Regulation (EC) 1/2003.