

Guidance on modifying the standard licence conditions of gas and electricity licences

September 2003

Summary

Section 11A of the Electricity Act 1989 and section 23 of the Gas Act 1986 provide that the Secretary of State may prescribe the market share calculations that are to be used by the Gas and Electricity Markets Authority ('the Authority') in determining whether a modification can be made to the standard licence conditions (SLCs) of gas and electricity licences (a collective licence modification)¹. The Secretary of State may also prescribe the percentage for determining whether a licence modification can be made ('the blocking minority threshold')². In July 2002, the Department of Trade and Industry (DTI) consulted on a draft Statutory Instrument that set out proposed market share calculations and blocking minority threshold percentages. On 12 June 2003³ a draft Order prescribing the blocking minority thresholds and market share calculations was laid before Parliament for consideration. The Order⁴ was made on 15 July 2003.

Ofgem⁵ considered that it would be appropriate to provide guidance to licensees and other interested parties on how the collective licence modification arrangements set out in sections 11A of the Electricity Act 1989 and section 23 of the Gas Act 1986 will be administered. On 3 July 2003 Ofgem therefore published a consultation paper providing parties with an opportunity to comment on draft Guidance that was based upon the proposals set out in the draft Order. The deadline for responses was 31 July 2003. Ofgem has carefully considered the views of respondents in finalising the Guidance and has published a letter to industry on its website which summarises the responses and sets out Ofgem's views on the representations made.

The Guidance issued below sets out the procedures that Ofgem will follow in proposing and making collective licence modifications. The Guidance:

¹ Section 11A(6)(b) of the Electricity Act 1989 and Section 23(7)(b) of the Gas Act 1986.

² Section 11A(7) of the Electricity Act 1989 and Section 23(8) of the Gas Act 1986.

³ Draft Electricity and Gas (Modification of Standard Conditions of Licences) Order 2003 <http://www.legislation.hmsso.gov.uk/si/si2003/draft/20036478.htm>.

⁴ Statutory Instrument 2003 No. 1746, The Electricity and Gas (Modification of Standard Conditions of Licences) Order 2003. This document is available at http://www.hmsso.gov.uk/cgi-bin2/hmsso_hl?DB=hmsso-new&STEMMER=en&WORDS=modification+licenc+ga+electr+&COLOUR=Red&STYLE=s&URL=http://www.hmsso.gov.uk/si/si2003/20031746.htm#muscat_highlighter_first_match.

⁵ Ofgem is the office of the Gas and Electricity Markets Authority. The terms Ofgem and the Authority are used interchangeably in this document.

- ◆ sets out procedures relating to the proposing of collective licence modifications
- ◆ explains how licensees who are able to 'object' to a proposed collective licence modification can register their objection
- ◆ explains what data will be used by Ofgem in making the calculations
- ◆ explains how and when Ofgem will collect the required data, and
- ◆ outlines the arrangements relating to the auditing and publication of the results of a collective licence modification proposal.

Interested parties should note that the Guidance does not affect the calculations or blocking minority thresholds themselves, which are a matter for Parliament.

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1. Introduction

- 1.1. The Electricity Act 1989 ('the Electricity Act') and the Gas Act 1986 ('the Gas Act') provide for the SLCs of electricity and gas licences to be modified. The legislation gives the Secretary of State power to make a Statutory Instrument setting out the market share calculations that are to be used by Ofgem in determining whether a proposed collective licence modification can be made.
- 1.2. A draft Order was laid before Parliament on 12 June 2003⁶ and the Order was made on 15 July 2003⁷.
- 1.3. In order to provide clarity for licensees on how the information to be used for these calculations will be collected and used, and to explain more clearly the process that will be adopted in proposing and making licence modifications, Ofgem is publishing Guidance on the procedures that it will follow when proposing and making collective licence modifications.
- 1.4. The Guidance describes:
 - ◆ the procedures to be followed when Ofgem proposes to modify a SLC of gas or electricity licences (collective licence modification)
 - ◆ the way in which relevant licence holders may register their objection to a proposal to make a collective licence modification
 - ◆ how Ofgem intends to calculate licensees' market shares in accordance with the proposals set out in the Order as provided for by section 11A of the Electricity Act and section 23 of the Gas Act, and
 - ◆ the manner in which Ofgem will publish and verify the results of any consultation exercise and of any voting process relating to the proposal to make a collective licence modification.
- 1.5. The Guidance has been prepared on the basis of the market share calculations set out in the Order that was made on 15 July 2003. As stated above, interested

⁶ See footnote 3 above.

⁷ See footnote 4 above.

parties should note that the calculations and blocking minority thresholds themselves are a matter for Parliament and cannot be affected by this Guidance.

Structure of the Guidance

- 1.6. Chapter 2 of the Guidance sets out the background including the legal framework, the consultation process and the way in which statutory objections should be made. Chapter 3 describes how market share will be determined for the purpose of a collective licence modification, including the relevant time period and the approach to data collection. Chapter 4 of this paper sets out Ofgem's approach to auditing and publishing the voting calculations where a statutory objection has been received.

Summary Impact Assessment

- 1.7. The arrangements for dealing with collective licence modifications and the relevant market share calculations are set out in legislation. This Guidance document explains the legislation and the administrative arrangements that Ofgem intends to put in place to support this process. In Ofgem's view the procedures described in the Guidance impose the minimum burden on industry while ensuring that it can carry out the prescribed calculations effectively and in a manner which commands confidence.

2. Background

Legal framework for standard licence conditions

- 2.1. The Gas Act and the Electricity Act provide for the introduction of SLCs for gas and electricity licences. SLCs apply to all licensees of a particular type – although they may be switched on or off as appropriate. On 27 September 2001 the Secretary of State determined new SLCs for gas transporters, gas shippers and gas suppliers⁸ (replacing sets of SLCs introduced previously through the Gas Act 1995) and determined new sets of SLCs for electricity generation, transmission, distribution and supply⁹.
- 2.2. Section 23(1)(b) of the Gas Act and section 11A of the Electricity Act make provision for the Gas and Electricity Markets Authority ('the Authority') to make collective modifications of gas and electricity SLCs respectively.
- 2.3. The concept of SLCs (and consequently provisions relating to the collective modification of those SLCs) has existed in relation to gas licences for a number of years. However the Utilities Act 2000 amended the existing procedure for the collective modification of gas licences in line with the new arrangements that were being introduced for electricity licences. For example, the new arrangements change the basis of the tests which any proposal for collective licence modification must satisfy in order to proceed from one where consent had to be registered by a relevant licence holder to one where opposition to a proposal has to be registered.
- 2.4. In summary, the new arrangements mean that:
 - ◆ relevant licence holders who are not content with a proposed modification will have to register their formal objection (in this document referred to as a "statutory objection") with Ofgem within the time period specified in a notice ("the statutory notice") published by Ofgem under Section 11A(3) of the Electricity Act or Section 23(3) of the

⁸ Section 81 of the Utilities Act 2000 and section 8 of the Gas Act 1986.

⁹ Section 33 of the Utilities Act 2000 and section 8A of the Electricity Act 1989.

Gas Act. There is further discussion of statutory objections at paragraphs 2.31 to 2.38 below;

- ◆ relevant licence holders who do not register their statutory objection will be deemed to have accepted the proposal; and
- ◆ numerical tests will determine the level of statutory objections to a proposal which will be measured against the blocking-minority thresholds prescribed by the Secretary of State.

2.5. There are certain circumstances in which Ofgem can make licence changes even where the blocking–minority thresholds are exceeded, in particular where it reduces a burden on licensees (see paragraphs 2.38 and 2.39 below)¹⁰. In addition, the provisions in section 12 of the Electricity Act and section 24 of the Gas Act would still enable Ofgem to make a reference to the Competition Commission on a proposed licence change in respect of any matters relating to activities which are authorised or regulated by a particular licence which operate or may be expected to operate against the public interest.

2.6. It should be noted that the arrangements set out in this paper and section 23(1)(b) of the Gas Act and section 11A of the Electricity Act do not apply to the modification of ‘special’ conditions or to any part of a SLC which is amended in relation to a particular licensee only. In both of these cases, the consent of the licensee is still required.

‘Relevant licence holders’

2.7. Under the arrangements only those licensees who are ‘relevant licence holders’¹¹ under the Gas Act (for gas licences) and the Electricity Act (for electricity licences) will be included in any calculation in determining whether a modification can be made. Where the modification is to insert a new SLC into a particular type of standard licence, relevant licence holders will be all holders of that type of gas or electricity licence, even if the new condition will not be

¹⁰ Throughout this document references to the fact that where the prescribed percentage is exceeded the proposed modification cannot be made, do not preclude the use by Ofgem of this additional test or a reference to the Competition Commission.

¹¹ Section 11A(10) of the Electricity Act 1989 and Section 23(12) of the Gas Act 1986

‘switched on’ in their licence. However, where the modification is to amend an existing condition (whether by altering it, adding to it, or by removing part or all of it), relevant licence holders are the holders of the type of gas or electricity licence to which the proposal applies and in which that SLC is switched on when the statutory notice expires.

- 2.8. For example, the holder of a gas supply licence which authorises the licensee to supply gas to non-domestic premises may register its statutory objection to any proposal to introduce a new condition within Section C – Domestic Supply Obligations and will be counted as a relevant licence holder. However, such a licensee holding a licence allowing the supply of gas only to non-domestic premises at the time at which the statutory notice expires would not be a relevant licence holder in respect of an addition to, or modification or removal of, an existing condition in Section C (which relates only to domestic premises). Despite being able to provide comment on (including objecting to) any proposal such a supplier would not be able to register a statutory objection.
- 2.9. Ofgem will in any statutory notice proposing a collective licence modification identify the type of licensee that would count as a relevant licence holder and the relevant condition (e.g. “all holders of an electricity supply licence with standard licence condition [x] paragraph [y] in force”).

Proposing collective licence modifications

Consulting affected licence holders

- 2.10. As noted above there is a statutory requirement for Ofgem to consult before it makes a collective licence modification. Before entering into a statutory consultation exercise Ofgem will, other than in exceptional circumstances, informally consult on the proposal.
- 2.11. Ofgem recognises that informal consultation presents it with an excellent opportunity to understand and address at an early stage any concerns that licence holders and others may have in respect of the proposal. Informal consultation also gives licence holders and others an opportunity to identify

errors within any proposed modification and to suggest amendments; it is therefore of great practical benefit.

2.12. In view of the Secretary of State's power to direct that a collective licence modification proposal not be made¹², Ofgem would normally include DTI in any informal consultation and would take its response into account when deciding whether or not to proceed with the statutory consultation.

2.13. That said, in exceptional circumstances Ofgem may decide not to carry out an informal consultation exercise. Exceptional circumstances might occur where:

- ◆ there is an urgent need to modify a licence to protect the interests of consumers, or
- ◆ there have been extensive discussions already through a related workstream in which relevant licence holders have been properly represented.

The statutory consultation process

2.14. The statutory consultation process begins when Ofgem publishes a statutory notice under Section 11A(3) of the Electricity Act or Section 23(3) of the Gas Act proposing a modification. The notice will be published on the licensing modifications page of Ofgem's website (www.ofgem.gov.uk/ofgem/work/index.jsp?section=licensingmodifications).

A statutory notice proposing a collective modification has to set out:

- ◆ the modification that Ofgem proposes to make and the effects of the proposed modification
- ◆ the reasons that the modification is proposed, and
- ◆ the time (not less than 28 days) within which any representations or objections about the proposed modification can be made.

¹² Section 11A(5) of the Electricity Act 1989 and Section 23(5) of the Gas Act 1986.

- 2.15. Ofgem has agreed to produce Regulatory Impact Assessments (RIAs) for significant new policy proposals. Where a collective licence modification constitutes a significant new policy proposal Ofgem will carry out a RIA and publish it as part of the statutory notice.
- 2.16. A statutory notice will also include a pro forma that relevant licence holders may if they wish use to indicate whether or not they are registering a statutory objection to a proposal. Ofgem cannot compel licence holders to use the pro forma but would encourage them to do so in the interests of consistency and clarity.
- 2.17. Proposed modifications will be included on the licensing modifications page of the Ofgem website for the duration of the consultation period.
- 2.18. In addition to publishing statutory notices on its website, Ofgem will also inform interested parties, by email, that it has proposed a collective licence modification and that the statutory notice proposing the modification can be found on the Ofgem website. Parties who wish to be included on the email distribution list should register with Ofgem.
- 2.19. Ofgem will also send a copy of any statutory notice proposing a modification to:
- ◆ relevant licence holders;
 - ◆ energywatch;
 - ◆ the Secretary of State for Trade and Industry, the Minister for Economic Development (Wales) and the Minister for Enterprise and Lifelong Learning (Scotland); and
 - ◆ the Health and Safety Executive (HSE), where the HSE has indicated to Ofgem that a proposal raises safety issues.

Considering responses

- 2.20. Any representations or objections received within the time period given in the statutory notice proposing the modification, and which are not subsequently withdrawn, will be considered by Ofgem. Representations can be made by anyone including members of the public, consumer groups and gas or electricity

market participants. Ofgem may decide to amend the modification proposal in the light of representations made, which may necessitate repeating the procedure.

- 2.21. Ofgem will consider whether, in the light of any objections or representations received, it is appropriate to continue with the proposal (amended or otherwise) to make a collective licence modification. However, where the Secretary of State directs Ofgem not to make a modification it must comply with this direction¹³. The Secretary of State must issue any direction within the relevant time period for consultation responses as set out in the statutory notice that proposes the modification.

Statutory objection to a collective licence modification

- 2.22. In addition to commenting on proposed licence modifications, relevant licence holders may object to any proposal to make a collective licence modification. Statutory objection (for the purposes of blocking minority calculations) is registered by formally objecting to the proposed modification within the time set out in the published statutory notice.
- 2.23. If, having considered all the responses received to the consultation, Ofgem still considers that it is appropriate to proceed with the modification it may only do so if no statutory objection has been made or, where there has been such a statutory objection, certain tests are met (or in the circumstances detailed at paragraphs 2.38 and 2.39 below).

Blocking minority threshold tests

- 2.24. As prescribed by section 11A of the Electricity Act and section 23 of the Gas Act, Ofgem will, where a relevant licence holder (see paragraphs 2.7 to 2.9) has made a statutory objection to a proposed collective licence modification, carry out two tests of the extent of those objections. If either of the two blocking minority thresholds prescribed in the Order in relation to those tests is met the modification may not be made.

¹³ See footnote 12 above.

- 2.25. The first test will consider the number of relevant licence holders that object to the proposal, who will be counted and compared to the total number of relevant licence holders. All relevant licence holders who hold licences on the day of the expiry of the statutory notice will be included in the count.
- 2.26. The Order prescribes that if the number of relevant licence holders that have made a statutory objection is equal to or greater than 20 per cent of the total number of relevant licence holders, the proposed modification cannot be made. If the number of relevant licence holders that have made a statutory objection is less than 20 per cent then the second test will be considered.
- 2.27. The second test will consider the market share of relevant licence holders that have made a statutory objection to the proposal. In this second test, the market share of licence holders will be calculated with reference to a specific time and date (referred to in the Order as the 'relevant time'). If the market share of objectors so calculated is equal to or exceeds 20 per cent the proposed modification cannot be made.
- 2.28. These tests will be carried out as soon as practicable after the expiry of the period specified in the statutory notice. Ofgem expects to conduct the 'number of licences' test first, and carry out the second test (market share) only if the first test does not indicate that a blocking minority exists in relation to a modification proposal.
- 2.29. In March 2000 and April 2001¹⁴ the DTI invited comments on proposals for the collective modification of SLCs for gas and electricity licences. Having taken into account the comments made by a range of parties, in July 2002 the DTI consulted interested parties on a draft Order¹⁵. The purpose of that consultation was to seek views on the particular question of the operation of the measures of market share for each licence type. Having taken into account the responses to that consultation, the DTI laid the draft Order before Parliament for consideration. The Order was made on 15 July 2003.

¹⁴ See respectively "Modification of standard conditions of gas and electricity licences by the Gas and Electricity Markets Authority - collective licence modifications", DTI, March 2000 and "Modification of standard conditions of gas and electricity licences by the Gas and Electricity Markets Authority - collective licence modifications: a second DTI consultation", DTI, April 2001.

¹⁵ "Modification of standard conditions of gas and electricity licences by the Gas and Electricity Markets Authority - collective licence modifications: an informal consultation", DTI, July 2002.

2.30. No market share measure has been prescribed for electricity transmission. Therefore only the first of the two tests (licence numbers) will be applied for electricity transmission when a collective licence modification is being proposed. At present there are three electricity transmission licensees and as such, on the basis of the blocking-minority threshold prescribed in the Order, each of the transmission licensees will individually have the ability to prevent a collective licence modification from being made (unless it falls within the categories described in paragraphs 2.38 and 2.39, or following a reference to the Competition Commission, or if it is a modification to a condition that they do not have switched on).

Registering a statutory objection

- 2.31. Relevant licence holders must register their statutory objection to a modification by sending an objection to the person at Ofgem specified in the statutory notice issued under section 11A(3) of the Electricity Act or section 23(3) of the Gas Act.
- 2.32. Objections may be registered by post, by fax, as an electronic document or by delivering the objection by hand. A relevant licence holder should make it clear that it wishes its objection to be counted as a registration of statutory objection. Where a response is being submitted on behalf of a number of licensee companies in a group the response should specify clearly which relevant licence holders are registering their statutory objection. The person giving the response should have appropriate authority to do so for all the licensees specified in the response. Similarly, in any circumstances where a company within a corporate group is seeking to register a statutory objection on behalf of another company which is a relevant licence holder they should clearly state that this is the case and should have appropriate authority so to act.
- 2.33. For the statutory objection to be effective Ofgem must receive it before the time specified in the statutory notice. Objections received after this time will not be considered to have been duly made and will not be counted as a registration of a statutory objection for the purpose of the blocking minority tests. Ofgem would normally expect, however, to consider the issues that are raised in any late objection or representation when deciding whether it is appropriate to proceed to a vote. It is essential that a relevant licence holder makes a clear statement as to whether or not it is objecting. For example, a statement that the licensee

“does not really like the proposal” would not be considered as a statutory objection.

- 2.34. Where a relevant licence holder registers its statutory objection within the time set out in the statutory notice, Ofgem will acknowledge that objection within two working days of receiving it. Ofgem will acknowledge receipt of objections by email, where an email address is provided, with a letter to follow in the post. Licence holders who do not receive an acknowledgement should contact Ofgem immediately but should note that their statutory objection will only be accepted as such if they can provide evidence that their objection was lodged (or is to be presumed as lodged) within the required timeframe.
- 2.35. Ofgem has no power to specify a pro forma to be used for registering statutory objections. However, a suggested pro forma is set out in an appendix to the Guidance that relevant licence holders are encouraged to use. Failure to use the pro forma will not prevent a clearly expressed objection being treated as a valid statutory objection, nor will the use of the form constitute a statutory objection where the licensee is not a relevant licence holder.

Withdrawing a statutory objection

- 2.36. A relevant licence holder who has registered an objection to a proposed modification may, at any point during the time given for the consultation, withdraw its statutory objection. Statutory objections may be withdrawn by post, by fax, as an electronic document or by delivering notice of the withdrawal of a objection by hand, marked for the attention of the person specified in the statutory notice. A notice withdrawing a statutory objection must be received (or be presumed to be received) before the time given during which objections may be made as set out in the statutory notice proposing the collective licence modification. Any notice of withdrawal received after this time period will be ignored and the objection will still be counted. As with the initial registering of an objection, Ofgem will acknowledge the withdrawal of an objection within two days of receiving it. Ofgem will acknowledge a withdrawn objection by email, where an email address is provided, with a letter to follow in the post.

Qualified objection

2.37. It is essential for the proper operation of the procedure that the status of a licensee's response is clear. Ofgem would therefore not expect to receive a qualified response unless the nature of the qualification is absolutely clear so that Ofgem can determine whether or not the qualification has been satisfied. For example, "subject to correction of the erroneous cross-reference in paragraph x, we do not object" would be considered an objection if, in fact, the cross-reference was correct and achieving an effect which was intended. Statements that the licensee believes its interests will be damaged by the proposal, considers it ill-conceived or would prefer not to see it taken forward would not be considered as a statutory objection.

Reducing the burden

2.38. As set out in Section 11A(8) of the Electricity Act and Section 23(10) of the Gas Act, Ofgem may make a collective licence modification even if one or both of the two blocking minority thresholds have been met provided that Ofgem is satisfied that:

- ◆ the existing SLC imposes a burden which affects relevant licence holders in the carrying on of their activities
- ◆ the proposed modification would remove or reduce the burden without removing any necessary protection, and
- ◆ no holder of that type of licence would be disadvantaged in competing with other holders of such licences.

2.39. Ofgem will indicate at the earliest practicable stage whether it considers that these tests are likely to be relevant. This may be during an informal consultation. Ofgem will in any event indicate this in the statutory notice so that interested parties can comment on whether they consider that the tests are satisfied.

Publishing responses

- 2.40. Ofgem expects to publish responses on its website and to make them available in the Ofgem library unless a respondent marks its response as being confidential. Where confidentiality is requested, Ofgem will publish the identity of the respondent but not the content of its response. Ofgem will set out in any decision document how it has taken account of relevant material representations made to it during the consultation process.
- 2.41. Where a collective licence modification is made the statutory direction to modify will be placed on the licensing modifications page of the Ofgem website and a copy will be sent to each relevant licence holder.
- 2.42. Proposed arrangements for the publication of any voting calculations where a statutory objection has been received are set out in chapter 4.

Amendments to notices proposing collective modifications

- 2.43. Where a statutory notice proposing a collective modification is found to require a patently non-material amendment, such as correcting a typographical error, Ofgem would not expect to repeat the consultation process. Where a material amendment is to be made, whether or not as a result of representations made by relevant licence holders or others, the statutory procedure will be repeated.

3. The determination of market share for the purposes of a collective modification of SLCs

- 3.1. As discussed in chapter 2 of this paper, section 11A of the Electricity Act and section 23 of the Gas Act provide that the Secretary of State may prescribe measures by which a licensee's market share can be calculated for the purpose of collective licence modifications. The Order sets out the market share measures that will be used. This chapter sets out how Ofgem will administer these arrangements.
- 3.2. Ofgem will obtain the relevant data as described below, using its formal powers as necessary, and will check that there are no obvious material errors. Since Ofgem will be collecting the relevant information on a continuing basis, such errors might include a significant change from that for the previous month without any obvious reason.
- 3.3. However, these checks will not be carried out to such a standard as to constitute an audit of the data. The Order does not require Ofgem to confirm the correctness of the data provided to it but rather states simply that Ofgem should calculate the market shares "on the basis of the information available to it". Any errors in that information will not invalidate the process. Ofgem considers that the onus is on those submitting data in response to a formal information request by Ofgem to ensure that the data is accurate, having regard to the purpose for which it is required and the potential consequences both for relevant licensees and the information provider if there is a material error.

The calculation of market share for electricity suppliers

- 3.4. In the case of electricity supply, the Order prescribes that market share will be calculated by comparing the number of metering points that are registered to a relevant supplier at the 'relevant time' to the total number of metering points registered to all relevant suppliers at that time.

The relevant time

- 3.5. The calculation will be made on the basis of metering points registered to a supplier at the 'relevant time' which is defined in the Order as being 23.59 hours on the last day of the calendar month preceding the day on which Ofgem publishes the statutory notice of the proposed modification.
- 3.6. For example, if Ofgem were to publish the statutory notice of a modification of electricity suppliers' SLCs on 14 November 2003, suppliers' market shares would be calculated as at 23.59 hours on 31 October 2003.

How will metering points be measured?

- 3.7. In this context, a metering point is defined in the Order as any energised or de-energised entry or exit point to, from or on a transmission system of any holder of a transmission licence or distribution system of any electricity distributor, where a meter or other metering equipment is used for the purpose of measuring electricity conveyed to or from that system. Therefore, market share will be calculated by comparing the number of metering points registered to each supplier, on the last day of the calendar month before the date of the modification proposal, with the total number of registered metering points registered to all suppliers at that time. The number of metering points in each case will be the sum of those from supply on a distribution system and supply on a transmission system.

Supply on a distribution system

- 3.8. The calculation of metering points on a distribution system will be made using Metering Point Administration Number (MPAN) data, which is a standard measure in the electricity market for many purposes.
- 3.9. Ofgem will use data on MPANs from the licensed distribution companies collected on a regular basis as part of its regular market monitoring. Where data is not already available to Ofgem or where data needs to be confirmed for the purposes of a modification vote, specific information requests will be made under Ofgem's formal information gathering powers.

- 3.10. All reporting by distribution companies will be based upon the four-letter Market Participant Identification ('MPID') code, which is allocated by Elexon¹⁶ to all electricity suppliers. Distribution companies will be asked to report the number of MPANs registered to each supplier at the end of each month (i.e. at 23.59 hours on the last day of the calendar month) allocated according to their MPID. Part of the information that Ofgem receives from electricity suppliers will include information on the MPID(s) that each supply licensee holds. This information will be used to match the list of MPIDs with the list of relevant licence holders for the purposes of calculating each licence holder's market share. This will mean that where a supply licensee has more than one MPID, the MPANs from all of its MPIDs will be included in the market share for that licensee.
- 3.11. Distribution companies will be sent a formal information request specifying the MPANs that are to be counted. This data can then be aggregated for each supplier, i.e. each supplier's MPANs on each of the licensed distribution systems can be added together to give that supplier's total number of MPANs in Great Britain.
- 3.12. The calculations will include all MPANs registered to suppliers, which will include the following:
- ◆ both half-hourly and non-half hourly MPANs whether they are energised or de-energised MPANs;
 - ◆ MPANs under objection;
 - ◆ related MPANs;
 - ◆ interruptible MPANs;
 - ◆ new connections where these have been given an MPAN;
 - ◆ unmetered MPANs, e.g. those servicing shared unmetered supplies.

¹⁶ Elexon is the Balancing and Settlement Code Company.

- 3.13. However, the calculations will not include MPANs that have been permanently removed from connection to the distribution company's network, ie. 'dead' metering points.
- 3.14. As mentioned in 3.12, the data from distribution companies includes all MPANs registered to suppliers. As such the data submitted by the distribution companies will include MPANs for embedded generation facilities which are being operated under an electricity generation licence. Ofgem does not consider that such licensed generators are being 'supplied' and as such these parties will not be counted in the market share calculations.
- 3.15. As explained in paragraphs 3.30 and 3.33, Ofgem will (as part of its data collection arrangements for the electricity generation market share measure) be receiving information from licensed embedded generators on a regular basis. Ofgem intends to use information supplied as part of that process to identify the number of embedded generation facilities that operate under generation licences and to which supplier each facility's MPAN is registered. It will then be necessary to subtract that number of MPANs from the supplier's total (and accordingly to subtract the total number of those MPANs (for all suppliers) from the overall total).

Supply on a transmission system

- 3.16. In relation to customers directly connected to a transmission system, Ofgem will formally seek information from all supply licensees, as required, regarding the number of metering points registered to the supplier and connected to the transmission system. This data will then be added to the MPAN data from the distribution companies to give total MPANs to enable the calculation of supplier market shares. If it is established that in relation to a particular customer there is no 'supply' within the meaning of the Electricity Act, that metering point will be excluded for the purposes of the calculation.

Modifications affecting only certain electricity supply licensees

- 3.17. In some cases, a proposal to modify a SLC may not affect all electricity suppliers. Where a modification proposal is made to introduce a completely new SLC for electricity suppliers all such licensees would be included in any voting process, even if the new condition will not be 'switched on' in their licence.

- 3.18. However, for modifications to existing SLCs only those supply licensees who have the SLC 'switched on' will be included in the calculations. Suppliers that do not have a domestic licence in which that condition is 'switched on' would therefore not be relevant licence holders within the meaning of section 11A of the Electricity Act.
- 3.19. Having established those licensees who are relevant licence holders for the purpose of a modification, the Order provides that all meter points of the relevant licence holder are counted. In view of this in such situations the market share calculations need to be based upon all the MPANs that are supplied by a relevant licence holder rather than just being limited to those of the type of customer to which the modification relates (i.e. in relation to a proposed collective licence modification of an existing licence condition that applies only to domestic suppliers, the suppliers' domestic and non-domestic MPANs will all be counted).
- 3.20. For example, consider a supplier with 100 MPANs registered to it in total, 80 of which relate to domestic customers and 20 of which relate to non-domestic customers. In relation to a modification proposal relating to a domestic SLC, this supplier would be a relevant licence holder as it has the SLCs in Part C of its licence switched on. All the meter points of this licence holder would be counted and so it would have a voting share of 100 MPANs.

The calculation of market share for electricity distributors

- 3.21. In the case of electricity distribution, the Order prescribes that market share will be calculated by comparing the number of metering points that are registered to suppliers and located on the distributor's network at the relevant time to the number of metering points located on all licensed electricity distribution systems at that time.

The relevant time

- 3.22. For electricity distribution, as for electricity supply, the 'relevant time' will be 23.59 hours on the last day of the calendar month preceding the day on which Ofgem gives notice of a proposed modification.

How will metering points be measured?

- 3.23. For electricity distribution, metering points will be measured on the same basis as is set out above for electricity supply except that metering points on transmission systems will not be included in the calculations. Therefore, each distributor's market share will be calculated by comparing the total number of MPANs registered to all suppliers on its network at the relevant time to the total number of MPANs registered to all suppliers on all licensed distribution systems at that time.
- 3.24. Ofgem's preferred method is to collect data from the electricity distribution companies in the manner described above in relation to electricity supply.
- 3.25. As discussed above only relevant licence holders (see paragraphs 2.7 to 2.9) will be entitled to register a statutory objection. Having established the relevant licence holders as at the end of the period specified in the statutory notice, all their metering points will be counted.

The calculation of market share for electricity generators

- 3.26. For electricity generation, the Order prescribes that market share will be calculated with reference to a generator's share of total registered generating capacity at the relevant time.

The relevant time

- 3.27. The Order requires that this calculation be made on an average annual basis. This is because of the need to take account of planned or unplanned maintenance schedules or short-term mothballing on a generator's capacity. The average capacity will be determined on a four-weekly basis with the sum of 13 four-week averages being used to determine a licensee's market share for voting purposes. The calculation is for the 12 month period which ends at the 'relevant time'.
- 3.28. The 'relevant time' is defined in the Order for these purposes as 23.59 hours on the Monday preceding the date of expiry of the statutory notice for the proposed collective licence modification. For example, if Ofgem were to publish a statutory notice that expired at 5pm on Wednesday 20 August 2003, generators'

market shares would be calculated for the year ending at 23.59 hours on Monday 18 August 2003. Therefore, data for the 52 weeks ending on that date would be used to calculate the four-weekly averages and hence each generator's market share.

- 3.29. The calculation for electricity generation will be based upon a generator's total registered capacity.

How will capacity be measured?

Generators registering capacity with the CRA

- 3.30. All generators connected to the electricity transmission system in England and Wales provide the Central Registration Agent (CRA) with details of their Generation Capacity for each Balancing Mechanism Unit (BMU) (that is to say the maximum amount of electricity that the plant is expected to generate). Under Section K of the Balancing and Settlement Code, generators must notify the CRA of changes in these registered capacities. In addition, some embedded generators (i.e. generators connected to distribution systems) register capacity with the CRA.
- 3.31. Elexon publishes its information on a weekly basis for each generator. Using this information, a four weekly average of these capacities will be calculated by Ofgem. This data will then be combined with other data (collected in relation to England and Wales embedded generators who do not register their capacity with the CRA and generation connected in Scotland, see 3.33 and 3.34), to derive an annual average registered capacity for each generator, compared to the annual average registered capacity for all licensed generators in Great Britain.
- 3.32. While Ofgem intends to make use of the data that is already available to it from Elexon it is possible that in some situations additional information may be required. Ofgem will collect such information as and when required using its formal information gathering powers.

Embedded generators not registering with the CRA

- 3.33. In the case where an operator of embedded plant in Great Britain holds a generation licence, and does not register its capacity centrally as outlined above,

Ofgem will collect this information directly from the licensee. This will be done by way of a formal information request, whereby the licensee will provide Ofgem with details of its available generating capacity. On an ongoing basis the licensee will also be asked to notify Ofgem of any material changes to its available generating capacity. The four-weekly average capacity for each such licensee will be based on this information. It should be noted that any embedded generation plant that is not operated under a generation licence will not be included in any part of the calculation of the generation market shares.

Generation connected to Scottish transmission systems

3.34. Under the British Electricity Trading and Transmission Arrangements (BETTA) reforms that are currently being developed by Ofgem/DTI, licensed generating stations connected to transmission systems in Scotland will be required to register their capacity with Elexon. However, at present, unlike plant in England and Wales, there is currently no requirement on licensed plant in Scotland to register its available capacity centrally on an ongoing basis. Therefore, Ofgem intends, until the introduction of BETTA, to collect this information directly from licensees. This will be done by way of a formal information request, whereby the licensee will provide Ofgem with details of its available generating capacity. On an ongoing basis, the licensee will also be asked to notify Ofgem of any material changes to its available generating capacity. The four-weekly average capacity for each licensee will be based on this information. It should be noted that any Scottish generation plant that is not operated under a generation licence will not be included in any part of the calculation of the generation market shares.

3.35. In summary, a generator's market share will be calculated by:

- ◆ calculating four-weekly averages either from weekly data (in the case of generators registered with the CRA) or from formal information requests as necessary;
- ◆ calculating the sum of the four-weekly averages, as set out above, to arrive at the generator's individual total for each year;
- ◆ calculating the sum of the four-weekly averages for all licensed generators, to arrive at the overall total for the year; and

- ◆ dividing the individual total by the overall total.
- 3.36. Where a generator has begun to generate partway through the relevant period, the method of calculation is unchanged because the generator's capacity (centrally registered or otherwise) will be zero on the days before it commences its activities.

Modifications only affecting certain generators

- 3.37. As discussed above only relevant licence holders (see paragraphs 2.7 to 2.9) are entitled to register a statutory objection. As with the measures relating to supply and distribution, once a licensee has been identified as a relevant licence holder, all registered capacity for that licensee will be included in the calculations. For example, in relation to a modification proposal relating to Part C (Supplementary Standard Conditions for Scotland) or Part D (Supplementary Standard Conditions for Nuclear Generators) the calculation will be based on the generator's total capacity, not limited, for example, to its nuclear capacity.

The calculation of market share for gas suppliers

- 3.38. In the case of a modification of a SLC for gas suppliers, the Order prescribes that market share will be calculated by comparing the number of consumers that are registered to a licensed supplier at the 'relevant time' with the number of consumers registered to all licensed suppliers at that time.

The relevant time

- 3.39. For gas supply the 'relevant time' is 23.59 hours on the last day of the calendar month preceding the day on which Ofgem publishes the statutory notice of the proposed modification (this is equivalent to the relevant time adopted for electricity supply and electricity distribution). For example, if Ofgem were to propose a modification of a SLC on 14 November 2003, suppliers' market shares would be calculated with reference to 31 October 2003.

How will consumers be measured?

3.40. The principles to be used for the calculation of market share for the purposes of modifying gas suppliers' SLCs are broadly the same as those for electricity supply. Ofgem will identify the number of consumers that are supplied, at the relevant time, by those suppliers that are relevant licence holders that object to a proposed modification and compare this figure to the total number of consumers supplied by all suppliers that are relevant licence holders.

3.41. For the purposes of calculating the market share in a modification vote, a 'consumer' will be considered as equivalent to each individual supply point, which is a standard measure of supplier activity in the gas market. In the market share calculations, Ofgem will include:

- supply points on the local pipeline system operated by Transco (the Local Distribution Zone (LDZ) and on the pipeline systems of licensed gas transporters that are connected to the LDZ;
- supply points that are new connections and not only those which were obtained through the transfer process; and
- supply points of power stations.

Thus, market share will be calculated by reference to the number of supply points registered at 23.59 hours on the last day of the calendar month preceding the date of the publication of the statutory notice of the modification proposal.

3.42. Ofgem will obtain the data on supply points from gas suppliers using a standard regular reporting format. All data to be used for this purpose of a modification vote will be collected using Ofgem's formal information gathering powers.

Modifications affecting only certain supply licensees

3.43. In relation to a proposal to modify a SLC that is only switched on for some gas suppliers, the principles used for electricity supply licensees will apply. All the supply points of the relevant licence holder will be counted for the purpose of the market share calculations.

The calculation of market share for gas shippers

3.44. The calculation of gas shipper activity is based on the shipper's share of total gas flowed through Transco's National Transmission System (NTS) over a twelve month period as compared to the total flow of gas through the NTS by all gas shippers over the same period.

The relevant time

3.45. Demand for, and therefore shippers' flows of, gas has a seasonal variation. The draft Order therefore bases its measure of market share on flows over a twelve-month period, ending at the 'relevant time'.

3.46. The 'relevant time' in this case is defined in the draft Order as 0600 hours on the day that is thirty days prior to the day on which Ofgem publishes a notice of a proposed modification. For example, if Ofgem published a notice on 14 November 2003, the relevant time would be 0600 hours on 15 October 2003. Ofgem would therefore calculate each shipper's market share based on its flows in the twelve months ending at 0600 hours on 15 October 2003.

How will NTS gas flow be measured?

3.47. Transco provides Ofgem with data on each shipper's inputs to, and offtakes from, the NTS for each gas day of the year. This information is currently supplied by Transco on a monthly basis under an existing formal information request and is not publicly available.

3.48. A shipper's market share for the purposes of the collective licence modification process will be calculated by:

- ◆ calculating the average of its NTS input and NTS offtake for each gas day in the relevant period
- ◆ calculating the sum of these averages over the year to determine the shipper's individual total, and
- ◆ calculating the equivalent total figure for all other shippers.

- 3.49. The shipper's market share is calculated as its individual total divided by the sum of all shippers' individual totals.
- 3.50. Where a shipper has begun to flow gas partway through the twelve-month period, the method of calculation is unchanged. The shipper's flows will be zero on the days before it commences its activities which will provide that their market share adequately reflects their activity throughout the time period.

The calculation of market share for gas transporters

- 3.51. The calculation for gas transporters is based upon the gas transporter's share of total gas flowed through gas transportation networks in Great Britain over a twelve month period ending at the 'relevant time'.

The relevant time

- 3.52. As with shippers, the Order bases its measure of gas transporters' market shares on their flows over a twelve-month period, so as to minimise any bias caused by seasonal variation in flows.
- 3.53. The 'relevant time' in this case will be 0600 hours on the day that is thirty days before the day on which Ofgem publishes a notice of a proposed modification. For example, if Ofgem published a notice on 14 November 2003, the relevant time would be 0600 hours on 15 October 2003. Ofgem would therefore calculate each gas transporter's market share based on its flows in the twelve months ending at 0600 hours on 15 October 2003.

How will gas flows be measured?

- 3.54. The gas transporter calculations will be made by:
- ◆ calculating the total quantity of gas flowed through its network, and
 - ◆ dividing that total by the total quantity of gas flowed through all networks by all gas transporters.

- 3.55. The data required to undertake these calculations is not publicly available and will be collected from gas transporters, as required, using Ofgem's formal information gathering powers.
- 3.56. Where a gas transporter has begun to flow gas partway through the twelve-month period, the method of calculation is unchanged. The gas transporter's flows will be zero on the days before it commences its activities. This will provide that their market share adequately reflects their activity throughout the time period.

Modifications only affecting certain transporters

- 3.57. As discussed above only relevant licence holders (see paragraphs 2.7 to 2.9) will be entitled to register a statutory objection and having identified a relevant licence holder all their gas flows would then be counted. For example, in relation to a modification proposal relating to Section C (Transportation Services Obligations) the total flow, including that outside the area, will be counted.

4. Arrangements for publishing voting calculations where a statutory objection has been received

- 4.1. Where a voting calculation has been made it will be necessary for reasons of regulatory transparency to publish the results of that calculation when proceeding to direct any modification. A number of respondents to the DTI's July 2002 consultation document were concerned that Ofgem, as the proposer of modifications and the verifier of results, could seek to manipulate calculations to ensure that a modification is made.
- 4.2. Ofgem considered that these concerns could be addressed in part through the establishment of clear processes, including the acknowledgement of objections (and their withdrawal) by Ofgem within two working days of receipt.
- 4.3. Ofgem further considered that the industry was most likely to have concerns regarding the accuracy of the results where the percentage was close to the blocking minority threshold of 20 per cent.

Publish names and overall total

- 4.4. Ofgem intends to publish the names of all licensees that have objected to the modification, together with their aggregated market share percentage. Ofgem acknowledges that where two licensees object and one is very small it may be possible for observers to estimate approximate market shares. However, given that approximate shares are almost certainly in the public domain already, Ofgem considers that this approach offers the best balance between transparency and the need to respect confidentiality.

Adjudication/verification of results

- 4.5. Ofgem recognises that one way to address concerns regarding the accuracy of the calculations would be to provide for some form of adjudication or verification of the collective licence modification calculations.

- 4.6. Ofgem does not believe that it is necessary to seek external audit of all calculations. Ofgem considers that any potential concerns regarding the accuracy of results will occur at the margins. Therefore, Ofgem intends to seek independent verification of results where Ofgem's calculations in relation to either the licence numbers test or the market share test or both place the share of statutory objectors within the range of 15 to 25 per cent. Doing so will have cost implications for Ofgem. However, Ofgem considers that the cost will be justified if independent verification increases public confidence in the collective licence modification process.
- 4.7. These verification arrangements would be limited to ensuring that votes had been correctly allocated and counted by Ofgem. The independent verifier would not be required to ensure the integrity of the data on which Ofgem had relied in assessing market shares.
- 4.8. As stated above, Ofgem will rely on data from the industry's central systems providers and from licensees themselves. The data will be gathered using formal information requests, which could result in sanctions if licensees knowingly or recklessly supply false data. With regard to the industry's central systems, it is possible that the data in these systems contain a certain level of errors. However, it would seem disproportionate and inconsistent to accept the data for the purposes of core industry processes (such as customer registration and settlement), but not for a secondary function such as calculating licence modification votes. Moreover the cost of identifying all errors in industry data would in all likelihood be extremely high. For these reasons Ofgem does not intend to audit the data provided to it (other than, as stated above, looking for the most obviously material errors).
- 4.9. As noted in paragraph 4.2 above, the draft order does not require Ofgem to confirm the correctness of the data provided to us, but states simply that Ofgem should calculate the market shares 'on the basis of the information available to it'. Any errors in that information will not invalidate the process.

Ofgem's approach

4.10. Ofgem will:

- ◆ publish the names of licensees that have registered a statutory objection;
- ◆ publish the overall percentage;
- ◆ introduce arrangements whereby the allocation and counting of votes where the result shows an objection level between 15-25 per cent are verified by an independent party (such as a firm of auditors); and
- ◆ publish the results of any such verification.

Appendix: Suggested pro forma to register a statutory objection

- 1.1 Ofgem has no power to specify a pro forma to be used for registering statutory objections. However, a suggested pro forma is set out below that relevant licence holders are encouraged to use. Failure to use the pro forma will not prevent a clearly expressed objection being treated as a valid statutory objection, nor will the use of the form constitute a statutory objection where the licensee is not a relevant licence holder.

Proposed Modification of Standard Licence Condition(s) [insert number(s)] in [type of licence]

In response to the statutory notice dated [] in respect of the above proposed modification(s), this notice constitutes a statutory objection to that proposal on behalf of [state full name of each relevant licence holder making the objection].

I confirm that I am duly authorised to give this notice on behalf of each of the above named companies.

[Signed]

Date: []

[Address for acknowledgement, preferably including email address]