

Smart Metering Implementation Programme

Government Response to the consultation on a draft Statutory Instrument
the Electricity and Gas (Smart Meters Licensable Activity) Order 2012

July 2012

Department of Energy and Climate Change
3 Whitehall Place
London
SW1A 2AW

Telephone: 0300 068 4000
Website: www.decc.gov.uk

© Crown copyright 2012

Copyright in the typographical arrangement and design rests with the Crown.
This publication (excluding logos) may be re-used free of charge in any format or medium provided that it is re-used accurately and not used in a misleading context. The material must be acknowledged as crown copyright and the title of the publication specified.

This Consultation response can also be found on DECC's website

Published by the Department of Energy and Climate Change.

Table of Contents

1.	Executive Summary	4
2.	Introduction	5
3.	The DCC licensable activity	7
4.	Scope of the Order	8
5.	Drafting of the Order	11
6.	Consequential amendments	12
7.	Standards of performance	12
8.	Statutory Undertakers	14
9.	General points	15
	Annex A: Digest of Consultation Questions	16
	Annex B: The Order and Explanatory Memorandum as laid in Parliament	17

1. Executive Summary

- 1.1 The Government's vision is for every home and smaller business in Great Britain to have smart electricity and gas meters. The rollout of smart meters will play an important role in Britain's transition to a low-carbon economy and help us meet some of the long-term challenges we face in ensuring an affordable, secure and sustainable energy supply.
- 1.2 In February 2012 the Government consulted on detailed proposals and legal drafting for the DCC licensable activity (the February 2012 consultation). This response document deals with the introduction into legislation of the DCC licensable activity. This will make it unlawful to undertake the activities intended to be performed by the DCC without a licence. This new licensable activity will be introduced through a Statutory Instrument – the Electricity and Gas (Smart Meters Licensable Activity) Order 2012 (this has been previously referred to as the prohibition order, but will throughout this document be referred to as “the Order”).
- 1.3 This document sets out the Government's conclusions in respect of: the scope of the Order (section 4); the legal drafting and consequential amendments included in the Order (sections 5 and 6); consideration of the inclusion of the DCC within the existing standards of performance frameworks (section 7); and consideration of the inclusion of DCC as a “statutory undertaker” (section 8). A number of general points were also raised in responses to the consultation which are dealt with in section 9.
- 1.4 The Order has now been laid in Parliament and it will be debated in both the House of Commons and the House of Lords in due course. Subject to the approval of Parliament the Order will come into force the day after it is “made”¹. The regulations for the DCC licence application process will then be made, allowing the competition for the award of the first DCC licence to start in due course.

¹ A Statutory Instrument is “made” when it is signed and dated by the relevant Minister

2. Introduction

Policy context

- 2.1 The Government's vision is for every home in Great Britain to have smart energy meters, empowering people to manage their energy consumption and reduce their carbon emissions. Businesses and public sector users will also have smart or advanced energy metering suited to their needs. The rollout of smart meters will play an important role in our transition to a low-carbon economy, and help us meet some of the long-term challenges we face in ensuring an affordable, secure and sustainable energy supply.
- 2.2 The strategic aim of the Smart Metering Implementation Programme is to rollout 53 million smart electricity and gas meters to all domestic properties and smart or advanced meters to small and medium non-domestic sites in Great Britain by 2019. This will affect approximately 30 million premises.
- 2.3 The rollout must be achieved in a cost-effective way, optimising the benefits to consumers, energy suppliers, network operators and other providers of energy services to deliver environmental and other policy goals. Smart meters will provide consumers with better information on energy usage to encourage energy efficiency, enable the transition to a low-carbon Britain, and contribute to ensuring the supply of energy which is secure, affordable, efficient and sustainable. Whilst Government plays an important enabling role, Smart Metering is a programme led by Industry.
- 2.4 The rollout of smart metering will involve a total present value cost estimated at around £11.5bn over the next twenty years, delivering total present value benefits of over £18.6bn, and resulting in an overall net benefit to Great Britain of around £7.2bn. Taking into account all costs and benefits, the average dual fuel household will see bill savings of £25 per annum by 2020, rising to £40 by 2030. For small and medium businesses, average annual bill savings are expected to be approximately £190 by 2020, rising to over £200 per year by 2030.
- 2.5 The communications and data transfer and management required to support smart metering are to be organised by a new central communications body, referred to as the Data and Communications Company (the DCC). The DCC will provide a service of remotely communicating with smart meters on behalf of parties including electricity and gas suppliers, electricity distribution companies, gas transporters and other third parties authorised by the consumer, such as energy services companies. It is the Government's intention to appoint a DCC for a fixed period of time (current expectation is a term of twelve years) and to periodically run a competitive process to identify the best candidates to undertake the role for the next licence term.

Regulatory framework

- 2.6 Implementation of the Government's smart metering policy will require changes to the existing regulatory and commercial framework governing the electricity and gas markets. The Energy Act 2008 gives the Secretary of State for Energy and Climate Change ("the Secretary of State") powers to amend existing licences and industry codes for the purpose of delivering smart metering. In addition, under powers introduced by that Act, the Secretary of State can also introduce a new smart metering licensable activity into the Electricity and Gas Acts that will underpin the introduction of the DCC and allow for its regulation.

2.7 The DCC and the parties that it provides services to will be subject to appropriate regulatory controls through five regulatory interventions:

1. the DCC licensable activity – created through amendments to primary legislation establishing the requirement for DCC to be regulated;
2. the DCC Licence Application Regulations – the process for running the competition for the award of the DCC licences;
3. the DCC Licence – to place obligations and restrictions on the DCC’s conduct;
4. a range of new conditions in existing supplier and distribution/transporter licences and changes to existing codes; and
5. the Smart Energy Code (SEC) – a new industry code introduced under the DCC licence setting out the day-to-day rules, rights and obligations for the different industry participants using smart metering equipment. Among other things it will detail the relationships between the DCC and the users of its services.

2.8 This response document deals with the first of these, the introduction into legislation of the DCC licensable activity. This will make it unlawful to undertake some of the activities intended to be performed by the DCC without a licence. This new licensable activity will be introduced through a Statutory Instrument – *the Electricity and Gas (Smart Meters Licensable Activity) Order 2012* (this has been previously referred to as the prohibition order, but will throughout this document be referred to as “the Order”). This document responds to the February consultation on the Order.

2.9 In April 2012, the Government launched consultations on draft versions of the DCC Licence, associated application regulations and on the SEC. These can be found on the DECC website². Responses from stakeholders to these consultations, which closed in May and June 2012, are currently being considered and the Government’s conclusions will follow. The Department has an ongoing process of consultations on the suite of new conditions in existing licences and changes to existing codes. More information on the timetable for the development of these conditions is set out in the overall programme plan which is also available on the DECC website³.

Next Steps

2.10 The Order has now been laid in Parliament and it will be debated in both the House of Commons and the House of Lords in due course. Subject to the approval of Parliament the Order will come into force the day after it is “made”. The regulations for the DCC licence application process will then be made, allowing the competition for the award of the first DCC licence to start in due course.

² http://www.decc.gov.uk/en/content/cms/consultations/cons_smip/cons_smip.aspx

³ http://www.decc.gov.uk/en/content/cms/tackling/smart_meters/smart_meters.aspx

3. The DCC licensable activity

Introduction

- 3.1 The Electricity Act 1989 and Gas Act 1986 prohibit the undertaking of certain activities (“licensable activities”) except under licence. Examples of licensable activities include the generation of electricity, the shipping of gas and the supply of gas or electricity. Licences include conditions that the licensee must adhere to, which can be enforced by the Gas and Electricity Markets Authority, as the sector regulator.
- 3.2 The Government is using its powers in section 56FA of the Electricity Act 1989 and section 41HA of the Gas Act 1986 to introduce new licensable activities into those Acts relating to activity of the DCC. There will in fact be two licensable activities, one under the Electricity Act 1989 and one under the Gas Act 1986. However, the activity in the Order in each case is substantively the same, save for the reference to gas or electricity suppliers as relevant. In practice, the Government expects that there will be a single combined DCC licence document having effect for the purposes of both Acts, although in legal terms it would incorporate two licences. It is the Government’s intention that there will only be one DCC licence holder at any one time, with the exception being during a limited handover period between one DCC and another.

Consultation

- 3.3 In February 2012 the Government consulted on detailed proposals and legal drafting for the DCC licensable activity (“the February 2012 consultation”). The February 2012 consultation responded to comments received on the proposed approach to the development of the licensable activity, which had been set out in the September 2011 consultation on the detailed policy design of the regulatory and commercial framework for the DCC⁴. The February 2012 consultation delivered the next level of detail of the regulatory framework for the DCC setting out the legal drafting of the Statutory Instrument and seeking views on a number of associated broader policy issues.
- 3.4 The February 2012 consultation closed on 23 March 2012. Seventeen responses were received from a range of stakeholders including Energy Suppliers, Network Operators, other industry representative groups, the regulator and consumer groups. The majority of respondents were supportive of the approach set out in the consultation and recognised the significance of the DCC licensable activity as one of the critical elements in the implementation of the rollout of smart metering across Great Britain.
- 3.5 The responses – with the exception of those marked confidential by the stakeholder – will be published on the DECC website alongside this response. The Government has now considered the responses received and this document sets out its conclusions. The document is structured as follows, with each section outlining the issue considered, the consultation question(s), an overview of stakeholder views and the Government’s conclusions:

Section 4: Scope of the Order (Q1&2)

Section 5: Drafting of the Order (Q3,4 &6)

⁴ DECC, *A consultation on the detailed policy design of the regulatory and commercial framework for DCC*, September 2011 <http://www.decc.gov.uk/assets/decc/11/consultation/smart-metering-imp-prog/2883-cons-detailed-policy-design-of-dcc.pdf>

Section 6: Consequential amendments (Q5)

Section 7: Standards of performance (Q7)

Section 8: Statutory undertakers (Q8)

Section 9: General points raised

Annex A: Digest of consultation questions

Annex B: Order and Explanatory Memorandum as laid in Parliament

4. Scope of the Order

Q1.	Do you think any party other than DCC would be captured by the Prohibition Order as set out? If you consider other parties would be captured please identify them and indicate whether you consider this a short term or long term issue.
Q2	Do you have any views on the definition of a smart meter set out in the draft Order?

4.1 To be effective, it is important that the Order adequately captures the activity that the DCC, and as far as possible only the DCC, will be doing. It is also important to ensure that other persons carrying out smart meter-related or other activities are not inadvertently caught by the Order or any of the definitions contained therein. Otherwise, they would need a licence or a licence exemption to continue to carry out such activities. The consultation sought views on the scope of the draft Order.

Stakeholder views

4.2 Six respondents considered that there was a risk that existing bodies which are already providing communications services with smart meters in consumers' homes would be captured by the proposed wording. Most suggested that this could be mitigated by the early implementation of an exemption regime for the period of transition. Some suggested a blanket exemption be put in place from the time the order was made, which lasted at least until the DCC became operational and possibly beyond that date.

4.3 Some respondents noted that some early smart meters might be unable to be enrolled into the DCC at all and may require exemption for the life of the meter. Five respondents also identified existing pre-payment systems (particularly in the gas sector) where electronic messages regarding consumption and payments are transmitted between a supplier and the meter. Here too there was a feeling that exemptions may be required or that the Government would need to specifically clarify that these were not captured and why.

4.4 Parties highlighted by respondents as at risk of being captured were Energy Service Companies (ESCOs), companies who gather and supply information to a meter via a prepayment key and companies providing hardware or software services to all suppliers, since they may form a link in a chain of communication with smart meters. One respondent also identified meter manufacturers, meter installers and meter operators as parties who may all need to have two-way communication with the meter during the installation and commissioning process.

4.5 In relation to the definition of a smart meter set out in the Order, six respondents expressed support for the definition as it currently appears although two of these suggested that whilst it was sufficient for the purposes of the Order there would be a need to further define it when setting standards for compliance. Six respondents expressed concern that the definition was too general and allowed for the capture of prepayment services and/ or some existing meters that may not immediately be enrolled into the DCC.

Conclusion

4.6 The Government's view is that, in the long term enduring smart meter market, the scope of the Order and its associated definitions will capture the intended activity of the DCC and only the DCC. The scope of the Order has been narrowed as far as possible to minimise the potential for inadvertently capturing persons or activities. In particular *"making arrangements with all active licensed domestic suppliers..."* is considered a relatively high bar to reach.

4.7 However, it is intended that the Order will come into force as soon as possible after it receives parliamentary approval, enabling the regulations underpinning the licence application process to be made and the competition to award the first DCC licence to start. In the absence of any transitional regime, as soon as the Order comes into force it would become unlawful to undertake the licensable activity without holding a licence to do so. A number of responses to the consultation noted that this would mean that activity supporting the foundation stage and potentially some current meter support activities would be caught by the Order. They argued for exemptions to be put in place to allow such activity to continue.

4.8 The Government has considered the arguments regarding the need for exemptions to the Order. Given the anticipated effective date of the Order, there is a risk of inadvertently capturing certain parties communicating with smart meters, the Government has concluded that an exemption regime is necessary.

4.9 In considering an exemption regime, it is necessary to balance the aim of enabling activity to support smart meters during foundation with the need for certainty for potential DCC and DCC service provider bidders about the nature of the market in the long term. Some early deployments of smart meters are already taking place and it is important that these can continue to be supported so that they deliver anticipated benefits to consumers and suppliers, as well as providing important lessons for the mass rollout.

4.10 In order to balance the immediate need to support foundation activity with the delivery of an effective DCC for the long term the exemption regime will consist of two elements:

4.11 A **general transitional exemption** has been included in the Order itself. This exempts all parties (except for the DCC licence holder) from the need to have a licence until a specified point in time, after which it would become unlawful to undertake the prohibited activity without a licence. This transitional exemption will finish 36 months after the Order comes into force, which it is considered will provide certainty for foundation stage activity.

4.12 Once this general transitional exemption ends there may continue to be some types of activity that it is not desirable to licence. For these, the Government intends to introduce **specific exemption orders** to ensure these activities could continue. The aim will be to have any necessary specific exemptions in place before the general transitional exemption ends. The 36 month end date of the transitional exemption should allow sufficient time for policy positions to

be finalised on the need for any enduring exemptions after award of the first DCC licence and in the run up to DCC “go-live”. Experience in the run up to “go-live” can therefore also be taken into account in considering the need for specific enduring exemptions, and for formulating and delivering them. It also allows for issues arising during the testing/trialling and early operational phases of the DCC to be considered.

4.13 Specific exemptions to the Order can be made through orders made by the Secretary of State under the Electricity and Gas Acts. Such orders are subject to the negative resolution procedure. We anticipate that it may take around nine months, from the point where a firm policy proposal is reached, to having an exemption in force. This allows for the necessary consultation with stakeholders and parliamentary procedure. At the current time it is envisaged that specific exemptions will be required for:

- ADMs⁵/non-SMETS compliant domestic smart meters operated – to support activity during foundation stage and enable suppliers and/ or their service providers to continue to support these meters. These meters will be replaced before the end of the mass rollout (that is the exemption would be required until the end 2019 at the latest);
- SMETS 1⁶ meters – suppliers and/ or their service providers will need to be able to continue to support these meters which, at this stage, need not be enrolled into the DCC or replaced by the rollout completion date (see also para 4.14). The exemption will need to allow them to be supported to the end of their economic lives when they will be replaced by DCC enrolled meters.

4.14 As policy decisions are made, for example on the enrolment criteria for the DCC or in the light of practical experience, it may become necessary to consider additional exemptions or to change the exemptions for new installations. It is envisaged that such exemptions will be limited in scope to ensure that the DCC business case is not eroded. The Government’s general principle, as set out in April 2012, is that smart metering systems should be operated through the DCC. However at this stage, meters complying with the initial version of the SMETS will not be required to be enrolled into the DCC. Work is underway to develop the Government’s policy for enrolment criteria and a paper will be published in due course with more detailed coverage of enrolment issues⁷.

4.15 In response to the consultation, a number of stakeholders expressed the view that prepayment meters would be caught by the licensable activity. The Government has considered this issue and, because the final chain of “communication” with the meter in the prepayment system is generally understood to be the customer physically interacting with the meter to apply the credit, this type of prepayment service provision is not considered to fall within the scope of the licensable activity – the person providing the service is not communicating with the meter. In the future should prepayment services develop that involve remotely applying credit to a meter in such a way that the service provider would be caught by the activity, a specific exemption may be required. This would be considered in light of future developments.

⁵ Advanced meter – A meter which, either on its own or with an ancillary device, stores measured electricity or gas consumption data for multiple time periods, and provides remote access to such data by the licensee

⁶ SMETS is the Smart Meter Equipment Technical Specification, the technical specifications for the equipment that suppliers will be required to ensure is installed in consumer premises to comply with their roll-out licence conditions

⁷ Government Response to the Consultation on draft licence conditions and technical specifications for the roll-out of gas and electricity smart metering equipment, April 2012 <http://www.decc.gov.uk/assets/decc/11/consultation/smart-metering-imp-prog/4965-gov-resp-cons-tech-spec-smart-meters.pdf>

4.16 This approach to introducing an exemption regime is designed to provide the necessary confidence for the continuation of business as usual activities with a variety of different meters and to support supplier activity in foundation, during the period of the transitional exemption. In the run up to the award of the first DCC licence the Government will seek stakeholders' views on the need for and coverage of specific exemptions.

4.17 With the inclusion of the exemption regime outlined above the Government is satisfied that the scope of the Order will support the long term operation of smart metering without inadvertently capturing other persons.

5. Drafting of the Order

Q3.	Do you have any further comments on the approach being adopted to structuring the licensable activity?
Q4.	Do you have any comments on the draft licensable activity as set out in article 4 of the draft Order?
Q6.	Do you have any comments on the consequential amendments as set out in the draft Order?

5.1 The consultation sought views on the legal drafting and structure of the Order, including the consequential amendments it contained.

Stakeholder views

5.2 There were relatively few specific responses to these questions and no common areas of concern were identified. The majority of respondents either made no comment or simply confirmed support for the drafting.

5.3 Five respondents expressed views on whether the Order should be limited to the DCC making arrangements with just *active* suppliers as proposed in the February consultation as opposed to *all* suppliers. Three were of the view that this was a sensible limitation, the other two considered that it may cause unnecessary confusion.

5.4 There were some comments related to the fact that the Order makes no reference to non-domestic suppliers or non-domestic meters or the relationship of the DCC to networks, non-domestic suppliers or other persons who may be communicating with meters.

Conclusion

5.5 The Government confirms its view that it is sensible to include a definition of domestic supplier in the Order that refers only to suppliers who are both permitted in accordance with their licence conditions to supply to domestic premises, and who actively supply electricity to such premises. The Order references contracting only with *all active licensed domestic suppliers*, which avoids requiring dormant licence holders to have a contract with the DCC in order for the regime to work.

5.6 The more general comments about the inclusion of non-domestic suppliers, networks and other persons in the Order have been noted. The Government does not consider that further changes to the Order are required in this respect because the Order on its own is not intended to govern

all the relationships between the DCC and its users. It is one element of the overall regulatory framework governing these relationships and should be seen in combination with the others – the DCC licence, the SEC and licence obligations. Nothing in the Order would preclude the DCC from providing services with respect to smart meters which are installed in the premises of non-domestic customers. By focussing the definition of the licensable activity to domestic suppliers, it narrows the definition which is targeted on the core activity over which DCC is to have a monopoly (that is the domestic sector) and reduces the risk of unintended capture of other parties.

5.7 Some drafting adjustments have been made to the Order in the light of responses to the consultation and further analysis undertaken.

6. Consequential amendments

Q5. Do you have any comments on the conclusions set out in respect of the proposed consequential amendments or on those assessed as unnecessary?

6.1 As a consequence of introducing the new licensable activity for the DCC, it will be necessary to make a number of changes to existing legislation and licences. These are amendments that arise directly from creating a new licensable activity relating to the DCC. During the course of previous consultations and analysis a number of amendments had been identified and included in the draft Order for comment.

Stakeholder views

6.2 The majority of respondents (nine) either had no comments to make or commented only to express their support for the proposed consequential amendments. Of the remaining responses, most concerned the issue of whether or not the DCC should be included within the scope of the Consumers, Estate Agents and Redress (CEAR) Act 2007 in relation to standards of performance (which is dealt with in section 7).

Conclusion

6.3 The Government has reviewed the drafting of the consequential changes in view of the comments made and is confident that the consequential amendments set out in the Order are fit for purpose.

7. Standards of performance

Q7. Do you think that the DCC should be included in the standards of performance framework? Do you have any general views on the regulation of DCC's relationship with consumers?

7.1 A number of potential amendments to legislation have been considered which relate to the consumer relationship with the DCC and whether, as part of its performance management arrangements, the DCC should be included in some of the existing frameworks for consumer redress, in particular the existing standards of performance regime (under which certain licence holders are required, in certain limited circumstances, to provide fixed compensation to consumers where certain performance standards are not met). A key example of such a regime

is guaranteed standards on electricity distribution businesses for the reconnection of customers where supplies are interrupted in poor weather conditions. Consumer redress regimes are not a universal feature of the energy regulatory framework.

Stakeholder views

- 7.2 There was varied opinion on this issue with most respondents suggesting that the SEC was the most appropriate tool through which to assure the DCC's performance and that its inclusion in the existing standards of performance framework was unnecessary.
- 7.3 One respondent felt that the DCC should fall within the scope of the CEAR Act, arguing that whilst suppliers ought to be prepared to accept responsibility for any failings of the DCC, they may not, and the consumer could therefore only be comprehensively protected if the DCC were also subject to the same legislation. Two respondents did not support its inclusion arguing that this would complicate the supplier-consumer relationship and that any redress could be dealt with contractually between SEC parties. One respondent also made the point that the DCC will not be resourced to deal with consumer complaints nor indeed have any consumer facing element.
- 7.4 Four respondents felt that the DCC should be included in the standards of performance framework but they also commented that the DCC should not interact directly with consumers. One also commented that whilst the current intention was for there to be no consumer interaction with the DCC, there remained the possibility that this could change in the future and that it was therefore sensible to include the DCC in the framework. Another respondent agreed that it was sensible to allow for regulations prescribing standards of performance to be made for the DCC, arguing that suppliers could only be expected to compensate consumers for failures on the part of the DCC if they then had recourse to be remunerated by the DCC.
- 7.5 There were some arguments for the inclusion of enabling powers which allowed DECC (or the Gas and Electricity Markets Authority⁸) to make regulations prescribing standards of performance for the DCC at some point in the future rather than prescribing standards now. It was argued that this would offer flexibility to respond to future needs.

Conclusion

- 7.6 The Government recognises the need for an effective performance management regime as part of the DCC regulatory framework to ensure that it operates effectively and effectively. Given guaranteed standard regimes do not have universal coverage across all licence holders or all the activities undertaken by those licence holders, the Government has considered the benefits and dis-benefits of taking an enabling power to include the DCC in such a regime. It has considered whether it is necessary to create such a regime for the DCC, given the wider performance management framework to which the DCC will be subjected.
- 7.7 Through the DCC licence and SEC, the DCC will be subject to a range of incentives to deliver good performance to its service users (supplier, networks and other authorised parties). The SEC will set out the agreed service standards that the DCC must deliver to its service users. Where DCC does not meet the contractual service terms set out in the SEC to a user(s), it will

⁸ The Gas and Electricity Markets Authority (The Authority) is the name used in legislation for the regulator. Ofgem is, in effect, the secretariat for the Authority

have to provide service credits to that user(s). It is these service users who are the DCC's customers and it is to them and the regulator that the DCC is accountable. Supplier and consumer interests will be aligned on the level of service provided by the DCC, and therefore it is anticipated that in the event of any DCC poor performance, the supplier would take action to resolve the issues quickly.

- 7.8 As well as needing to meet service standards in the SEC, the DCC will be bound by the conditions of its licence. Key performance indicators for the DCC will be set, and failure to meet these requirements may result in a restriction of the DCC's allowable revenue. In this way the DCC will be subject to powerful financial incentives to deliver services that meet required standards. If the DCC delivers poor service, which does not meet these standards, then it will be financially penalised.
- 7.9 The final aspect of the performance management regime on DCC is the ability for Ofgem to take normal enforcement action in the event of the DCC not meeting its licence obligations. As with all enforcement cases, Ofgem will be responsible for taking licence enforcement action where necessary in line with its guidelines and if breaches are found, Ofgem can impose penalties of up to ten per cent of turnover.
- 7.10 Therefore, with regard to standards of performance, the Government believes its proposed framework (described below) delivers the right incentives for the DCC to deliver good performance for its users and indirectly for consumers. The Government does not envisage the DCC should have a direct relationship with energy consumers, which is the implications of extending the guaranteed standards regime. Doing so, would change the nature of, and commercial risks associated with, being the DCC.
- 7.11 Therefore, it is the Government's view that the inclusion of an enabling power for a consumer compensation scheme would bring little additional benefit. However, as mentioned above, it would change the nature of the DCC as an organisation, creating commercial risks to the service provider procurement and DCC licensing competition. These risks would be unquantifiable and would be likely to result in applicant applying risk premiums to their bid price. This could flow through to the prices paid by consumers.
- 7.12 The Government does not therefore believe that consumer interests are best served by taking this power. However, the Government will keep this issue under review.

8. Statutory Undertakers

Q8.	Do you consider it necessary for the DCC (or its service providers) to be considered a "statutory undertaker"? Please explain the reason for your answer.
------------	--

- 8.1 A wide variety of legislation includes special protections, rights, responsibilities or exemptions for certain existing licensed parties in the energy sector (including suppliers, electricity network operators and gas transporters). The protections provided include, amongst others, exemptions from certain planning laws and entitlements to advance notice before works are carried out on land. The licensed parties afforded these protections are generally described as "statutory undertakers" or in similar terms in the legislation. Consideration has been given to whether the DCC should be considered as a statutory undertaker.

Stakeholder views

8.2 There were mixed responses to this question. Three respondents felt it was necessary for the DCC to be considered a Statutory Undertaker and nine respondents felt it was not. The arguments in favour of such status pointed out the potential installation requirements that could fall to the DCC and more generally that an organisation with the coverage that the DCC would have may benefit from such status. Those who felt this was unnecessary pointed out that the DCC would be simply managing contracts and would have little or no need of this status. Some responses noted that its service providers would be expected to have this status without the need for extending the existing provisions.

Conclusion

8.3 The Government considers that it is unlikely that the DCC will itself own or operate land or equipment, which could give rise to the need for statutory undertaker status, but that its service providers may do so.

8.4 Having undertaken a trawl of the relevant legislation the Government is content that existing powers are sufficient for the DCC's service providers and their contracted third parties. Where persons providing services to the DCC are not already classed as statutory undertakers the infrastructure likely to be used by them is unlikely to require the type of protection or lead to the same obligations as the equipment or land uses to which current statutory undertaker duties relate. Where these rights, etc are required or appropriate, they are generally (or can be) extended to operators under the Electronic Communications Code (ECC operators), and providers of direct or indirect services to the DCC will be or can become ECC operators if necessary.

8.5 The Government has therefore concluded that there should be no changes to the Order in this respect.

9. General points

9.1 A number of general points were raised in responses to the February 2012 consultation that were not specifically related to the Order or the consultation questions directly.

9.2 One respondent was concerned that uncertainty over a fixed specification for smart meters posed a risk to any decisions being taken at this stage. These are issues which are being dealt with in the ongoing work to develop technical specifications for smart meters and the regulatory framework being developed to support their roll-out and operation.

9.3 A small number of responses questioned the DCC model or whether its aims might be compromised by the installation of ADMs and SMETS 1 compliant meters during the foundation stage because of the approach to the enrolment of these meters. Alternative approaches such as the use of supplier licences or the enshrining smart metering protocols into a metering certification process were suggested as ways to achieve interoperability and security. The overall approach has been the subject of a number of consultations through the course of smart meter policy development and new evidence was not provided in responses. The approach to enrolment will be consulted on in due course.

Annex A: Digest of Consultation Questions

1.	Do you think any party other than DCC would be captured by the Prohibition Order as set out? If you consider other parties would be captured please identify them and indicate whether you consider this a short term or long term issue.
2.	Do you have any views on the definition of a smart meter set out in the draft Order?
3.	Do you have any further comments on the approach being adopted to structuring the licensable activity?
4.	Do you have any comments on the draft licensable activity as set out in article 4 of the draft Order (Annex 2)?
5.	Do you have any comments on the conclusions set out in respect of the proposed consequential amendments or on those assessed as unnecessary?
6.	Do you have any comments on the consequential amendments as set out in the draft Order?
7.	Do you think that the DCC should be included in the standards of performance framework? Do you have any general views on the regulation of DCC's relationship with consumers?
8.	Do you consider it necessary for the DCC (or its service providers) to be considered a "statutory undertaker"? Please explain the reason for your answer.

Annex B: The Order and Explanatory Memorandum as laid in Parliament

Draft Order laid before Parliament under section 56FB(3) of the Electricity Act 1989 and section 41HB(3) of the Gas Act 1986, for approval by resolution of each House of Parliament.

D R A F T S T A T U T O R Y I N S T R U M E N T S

2012 No. 0000

ELECTRICITY

GAS

**The Electricity and Gas (Smart Meters Licensable Activity)
Order 2012**

<i>Made</i>	- - - -	<i>2012</i>
<i>Coming into force</i>	- -	<i>2012</i>

This Order is made in exercise of the powers conferred by section 56FA(1), (5) and (6) and section 60 of the Electricity Act 1989^(a) and section 41HA(1), (5) and (6) and section 47 of the Gas Act 1986^(b).

The Secretary of State has in accordance with section 56FB(1) of the Electricity Act 1989 and section 41HB(1) of the Gas Act 1986 consulted—

- (a) the Gas and Electricity Markets Authority; and
- (b) such other persons as the Secretary of State thinks appropriate.

A draft of this instrument has been approved by a resolution of each House of Parliament pursuant to section 56FB(3) of the Electricity Act 1989 and section 41HB(3) of the Gas Act 1986.

Accordingly, the Secretary of State makes the following Order.

PART 1

General

Citation and commencement

1. This Order may be cited as the Electricity and Gas (Smart Meters Licensable Activity) Order 2012, and comes into force on the day after the day on which it is made.

^(a) 1989 c. 29. Sections 56FA and 56FB were inserted by section 91 of and Schedule 4 to the Energy Act 2008 (c. 32). Section 56FB was amended by section 73 of the Energy Act 2011 (c. 16). Section 60 was amended by section 3(2) of the Utilities Act 2000 (c. 27).

^(b) 1986 c. 44. Sections 41HA and 41HB were inserted by section 91 of and Schedule 4 to the Energy Act 2008 (c. 32). Relevant amendments to section 47 were made by section 3(2) of the Utilities Act 2000 (c. 27) and section 10(1) of the Gas Act 1995 (c. 45). Section 41HB was amended by section 73 of the Energy Act 2011 (c. 16).

PART 2

Amendments to the Electricity Act 1989

Amendments to the Electricity Act 1989

2. The Electricity Act 1989^(a) is amended in accordance with articles 3 to 16.

Amendment to section 3A (the principal objective and general duties of the Secretary of State and the Authority)

3. In section 3A(5)^(b)—

(a) in paragraph (a)—

(i) after “transmission of electricity”, for “or”, substitute “,”; and

(ii) after “electricity interconnectors”, insert “or to provide a smart meter communication service”; and

(b) after each instance of “supply of electricity”, insert “or the provision of a smart meter communication service”.

Amendment to section 4 (prohibition on unlicensed supply etc)

4.—(1) Section 4^(c) (prohibition on unlicensed supply etc) is amended as follows.

(2) In subsection (1)—

(a) omit the word “or” after paragraph (c); and

(b) after paragraph (d), insert—

“; or

(e) provides a smart meter communication service.”.

(3) After subsection (3F), insert—

“(3G) A reference in this Part to providing a smart meter communication service is a reference to making arrangements with each domestic supplier to provide a service, for such suppliers, of communicating relevant information to and from smart meters through which electricity is supplied to domestic premises.”.

(4) After subsection (5), insert—

“(6) In this section—

“domestic supplier” means an electricity supplier—

(a) who is authorised, in accordance with the conditions of a licence, to supply electricity to domestic premises; and

(b) who supplies electricity to domestic premises in accordance with that licence;

“external electronic communications network” means a network which—

(a) is an electronic communications network, within the meaning of section 32 of the Communications Act 2003^(d); and

(b) does not form part of a smart meter;

“relevant information” means information relating to the supply of electricity; and

“smart meter” means—

^(a) 1989 c. 29.

^(b) Section 3A was inserted by section 13 of the Utilities Act (c. 27). Subsection (5) was amended by sections 83, 143(1), 147 and 179 the Energy Act 2004 (c. 20), sections 83(2)(c) and 108 of the Energy Act 2008 (c. 32) and section 17(1) and (6) of the Energy Act 2010 (c. 27).

^(c) Relevant amendments were made by section 108 of and Schedule 8 to the Utilities Act 2000 (c. 27) and sections 89, 135, 145 and 197 of the Energy Act 2004 (c. 20).

^(d) 2003 c. 21. Section 32 was amended by SI 2011/1210.

- (a) an electricity meter which can send and receive information using an external electronic communications network; or
- (b) an electricity meter and a device which is associated with or ancillary to that meter and which enables information to be sent to and received by the meter using an external electronic communications network.”.

Amendment to section 5 (exemptions from prohibition)

5. In section 5(1)^(a), for “(c) or (d)”, substitute “(c), (d) or (e)”.

Amendment to section 6 (licences authorising supply, etc)

6.—(1) Section 6^(b) is amended in accordance with paragraphs (2) to (4).

(2) In subsection (1)—

(a) omit the word “or” after paragraph (d); and

(b) after paragraph (e), insert—

“; or

(f) subject to subsection (1C), a licence authorising a person to provide a smart meter communication service (“a smart meter communication licence”).”.

(3) After subsection (1), insert—

“(1A) Subject to subsection (1B), the Secretary of State may grant a smart meter communication licence.

(1B) The Secretary of State may not grant a smart meter communication licence after 1 November 2018.

(1C) The first smart meter communication licence may only be granted by the Secretary of State.”.

(4) After subsection (2A), insert—

“(2B) A person may not be granted a smart meter communication licence unless the same person is at the same time granted a licence under section 7AB of the Gas Act 1986^(c).”.

(5) A reference in any enactment to a licence under section 6(1) of the Electricity Act 1989 or a licence under section 6(1)(f) of that Act, shall be deemed to include any licence under section 6(1A) of that Act.

Amendment to section 6A (procedure for licence applications)

7.—(1) Section 6A(1)^(d) is amended as follows.

(2) In paragraph (a), after “licence” insert “(but this is subject to subsection (1A))”.

(3) After subsection (1) insert—

“(1A) At any time when regulations made under section 56FC^(e) are in force, this section does not apply to an application for a smart meter communication licence.”.

Amendment to section 7 (conditions of licences: general)

8.—(1) Section 7^(f) is amended as follows.

^(a) Section 5 was substituted by section 29 of the Utilities Act 2000 (c. 27) and amended by section 145 of the Energy Act 2004 (c. 20).

^(b) Section 6 was substituted by section 30 of the Utilities Act 2000 (c. 27). Relevant amendments were made by sections 136, 145 and 197 of the Energy Act 2004 (c. 20).

^(c) Section 7AB of the Gas Act 1986 (c. 44) is inserted by article 21 of this Order.

^(d) Section 6A was inserted by section 30 of the Utilities Act 2000 (c. 27). Relevant amendments were made by section 143 of the Energy Act 2004 (c. 20).

^(e) Section 56FC of the Electricity Act 1989 (c. 29) was inserted by section 91 and Schedule 4 to the Energy Act 2008 (c. 32).

^(f) Relevant amendments were made by section 32 of the Utilities Act 2000 (c. 27).

(2) In subsection (1)(a), for the “Authority”, substitute “grantor”.

(3) After subsection (3A), insert—

“(3B) Without prejudice to the generality of paragraph (a) of subsection (1), conditions which are described in subsection (3C) may be included in a smart meter communication licence by virtue of that paragraph, in respect of circumstances where a person holds such a licence (the “licence holder”), and another person has applied or is considering whether to apply for a smart meter communication licence (“the applicant”).

(3C) The conditions in this subsection are conditions which require the licence holder to comply with a direction given by the Secretary of State or the Authority requiring the licence holder to provide to the applicant—

- (a) information in relation to the activities authorised by the licence; or
- (b) such other assistance as may be reasonably required by the applicant, including access to any facilities or equipment being used in connection with the activities authorised by the licence, in order that the applicant can—
 - (i) determine whether to apply for a licence; or
 - (ii) take part in a competition for a licence.

(3D) Subject to subsection (3F) and without prejudice to the generality of paragraph (a) of subsection (1), conditions which are described in subsection (3E) may be included in a smart meter communication licence by virtue of that paragraph, in respect of circumstances where such a licence held by a person (the “first licensee”) will cease to have effect, and another such licence is to be granted or has been granted to a different person (the “second licensee”).

(3E) The conditions in this subsection are conditions which require compliance with a direction given by the Secretary of State or the Authority requiring—

- (a) the transfer of property, rights or liabilities from the first licensee to the second licensee;
- (b) the creation of rights in relation to property, rights or liabilities in favour of the second licensee;
- (c) the creation of other rights and liabilities as between the first and second licensee;
- (d) the first or second licensee to enter into a written agreement with each other, or the first licensee to execute an instrument of another kind in favour of the second licensee;
- (e) the first or second licensee to pay compensation to the other, or to any third party who is affected by any of the matters referred to in paragraphs (a) to (d).

(3F) Conditions included in a licence by virtue of subsection (3D) must provide that the licensee does not have a duty to comply with a direction of the kind referred to in subsection (3E) unless, in relation to that direction, the following conditions have been satisfied prior to it being given—

- (a) the Secretary of State or the Authority (as appropriate) has given written notice to the first licensee, the second licensee and any other person who would potentially be affected by the direction, including a copy of the proposed direction and inviting them to submit written representations, giving a minimum period of 21 days in which those representations can be made; and
- (b) after the end of the period set out in the notice under paragraph (a), the Secretary of State or the Authority (as appropriate) has considered those representations and determined that—
 - (i) it is appropriate in all the circumstances that the proposed direction is given; and
 - (ii) the arrangements of a type referred to in paragraphs (a) to (d) of subsection (3E) in the direction are necessary or expedient for the operational purposes of the second licensee, or are agreed by the first licensee and the second licensee to be necessary or expedient for those purposes.

(3G) For the purposes of subsection (3F), the operational purposes of the second licensee are the purposes of performing any functions which the second licensee has, or will have—

- (a) under or by virtue of the smart meter communication licence which has been, or is to be, granted; or
- (b) under or by virtue of any enactment, in the second licensee’s capacity as holder of that licence.”.

Amendment to section 7A (transfer of licences)

9.—(1) Section 7A^(a) is amended as follows.

(2) After subsection (10), insert—

“(10A) Subject to subsection (10C), the Authority shall, following consideration of any representations or objections under subsection (9), give the Secretary of State not less than 28 days’ notice of any proposal to give consent to the transfer of the whole or any part of a smart meter communication licence.

(10B) If, before the expiry of the time specified in a notice under subsection (10A), the Secretary of State directs the Authority not to give consent, the Authority shall comply with that direction.

(10C) Where the Secretary of State does not give a direction under subsection (10B), the Authority may give consent to the transfer of the licence after—

- (a) the expiry of the time specified in the notice under subsection (10A); or
- (b) if earlier than the time in paragraph (a), the time at which the Secretary of State informs the Authority that no direction will be given under subsection (10B) in relation to the notice.

(10D) Subsections (10A) to (10C) do not apply after 1 November 2018.”.

(3) After subsection (11), insert—

“(11A) A smart meter communication licence may not be transferred to a person unless a licence granted under section 7AB of the Gas Act 1986 is also transferred to the same person at the same time.”.

Amendment to section 47 (general functions)

10. In section 47(1)^(b) after “by such heat” insert “, and to the provision of smart meter communication services”.

Amendment to section 56A (power to alter activities requiring licence)

11. In section 56A(4)^(c), after “supply of electricity”, insert “, or with providing a smart meter communication service”.

Amendment to section 58 (directions restricting the use of certain information)

12. In section 58(2)^(d), after “electricity interconnectors”, insert “or to provide a smart meter communication service”.

Amendment to section 64 (interpretation etc of Part 1)

13. In section 64(1)^(e), insert in the relevant position—

““providing a smart meter communication service” has the meaning given in section 4(3G) above, and cognate expressions shall be construed accordingly;”.

^(a) Section 7A was inserted by section 41 of the Utilities Act 2000 (c. 27).

^(b) Section 47(1) was amended by section 3 of the Utilities Act 2000 (c. 27).

^(c) Section 56A was inserted by section 43 of the Utilities Act 2000 (c. 27).

^(d) Relevant amendments were made by sections 143 and 147 of the Energy Act 2004 (c. 20).

^(e) There are amendments to section 64 which are not relevant for the purposes of this Order.

Amendment to section 96 (directions for preserving security)

14.—(1) Section 96 is amended as follows.

(2) In subsection (1)(a), after “supply of electricity”, insert “or the provision of a smart meter communication service”.

(3) In subsection (6), after “supply electricity”, insert “or the provision of a smart meter communication service”.

Amendment to section 98 (provision of statistical information)

15. In section 98(1)^(a)—

(a) after “the use of electricity interconnectors”, insert “or the provision of a smart meter communication service”; and

(b) after “operation of electricity interconnectors”, insert “or to provide a smart meter communication service”.

Amendment to Schedule 6A (provisions imposing obligations enforceable as relevant requirements)

16.—(1) Schedule 6A^(b) is amended as follows.

(2) In paragraph 1, after “licence holders”, insert “(except the holder of a smart meter communication licence)”.

(3) Insert after paragraph 9—

“Smart meter communication licence holders

9A. The following are relevant provisions in relation to the holder of a smart meter communication licence—

(a) section 42C^(c); and

(b) section 25(5) of the Consumers, Estate Agents and Redress Act 2007^(d) (directions to comply with requirements under section 24 of that Act).”.

PART 3

Amendments to the Gas Act 1986

Amendments to the Gas Act 1986

17. The Gas Act 1986^(e) is amended in accordance with articles 18 to 28.

Amendment to 4AA (the principal objective and general duties of the Secretary of State and the Authority)

18.—(1) Section 4AA^(f) is amended as follows.

(2) In subsection (5)—

^(a) Section 98(1) was amended by section 147 of the Energy Act 2004 (c. 20).

^(b) Schedule 6A was inserted by SI 2011/2704.

^(c) Section 42C of the Electricity Act 1989 (c. 29) was inserted by section 61 of the Utilities Act 2000 (c. 27) and was amended by SI 2009/1941.

^(d) 2007 c. 17. There are amendments to sections 24 and 25 of the Act which are not relevant for the purposes of this Order.

^(e) 1986 c. 44.

^(f) Section 4AA was substituted by section 9 of the Utilities Act 2000 (c. 27). Relevant amendments were made by section 83 of the Energy Act 2004 (c. 20), sections 83 and 149 of the Energy Act 2008 (c. 32) and section 16 of the Energy Act 2010 (c. 27).

- (a) in paragraph (b), after “conveyed through pipes”, insert “or the provision of a smart meter communication service”; and
 - (b) in the last line, after “gas through pipes”, insert “or the provision of a smart meter communication service”.
- (3) In subsection (8), for “or 7A”, substitute “, 7A or 7AB”.

Amendment to section 5 (prohibition on unlicensed activities)

19.—(1) Section 5^(a) (prohibition on unlicensed activities) is amended as follows.

(2) In subsection (1)—

- (a) omit the word “or” after paragraph (b); and
- (b) after paragraph (c), insert—
 - “; or
 - (d) provides a smart meter communication service,”.

(3) After subsection (10), insert—

“(11) A reference in this Part to providing a smart meter communication service is a reference to making arrangements with each domestic supplier to provide a service, for such suppliers, of communicating relevant information to and from smart meters through which gas is supplied to domestic premises.

(12) In this section—

“domestic supplier” means a gas supplier—

- (a) who is authorised, in accordance with the conditions of a licence, to supply gas to domestic premises; and
- (b) who supplies gas to domestic premises in accordance with that licence;

“external electronic communications network” means a network which—

- (a) is an electronic communications network, within the meaning of section 32 of the Communications Act 2003^(b); and
- (b) does not form part of a smart meter;

“relevant information” means information relating to the supply of gas; and

“smart meter” means—

- (a) a gas meter which can send and receive information using an external electronic communications network; or
- (b) a gas meter and a device which is associated with or ancillary to that meter and which enables information to be sent to and received by the meter using an external electronic communications network.”.

Amendment to section 6A (exemptions from prohibition)

20. In section 6A(1)^(c), for “or (c)”, substitute “, (c) or (d)”.

Insertion of section 7AB (licensing of a person providing a smart meter communication service)

21. After section 7A^(d), insert—

^(a) Section 5 was substituted by section 3 of the Gas Act 1995 (c. 45). Relevant amendments were made by section 108 of and Schedules 6 (Part 1, paragraphs 1 and 3) and 8 to the Utilities Act 2000 (c. 27) and section 149 of the Energy Act 2004 (c. 20).

^(b) 2003 c. 21, as amended by SI 2011/1210.

^(c) Section 6A was inserted by section 2 of the Gas (Exempt Supplies) Act 1993 (c. 1) and substituted by section 4 of the Gas Act 1995 (c. 45). Relevant amendments were made by section 86 of the Utilities Act 2000 (c. 27) and section 149 of the Energy Act 2004 (c. 20).

^(d) Section 7A was inserted by section 6 of the Gas Act 1995 (c. 45).

“Licensing of a person providing a smart meter communication service

7AB.—(1) Subject to subsections (4) and (5), the Authority may grant a licence authorising a person to provide a smart meter communication service (“a smart meter communication licence”).

(2) Subject to subsections (3) and (5), the Secretary of State may grant a smart meter communication licence.

(3) The Secretary of State may not grant a smart meter communication licence after 1 November 2018.

(4) The first smart meter communication licence may only be granted by the Secretary of State.

(5) A person may not be granted a smart meter communication licence unless the same person is at the same time granted a licence under section 6(1)(f) of the Electricity Act 1989^(a).”.

Amendment to section 7B (licences: general)

22.—(1) Section 7B^(b) is amended as follows.

(2) After subsection (2A), insert—

“(2B) At any time when regulations made under section 41HC^(c) are in force, subsections (1) to (2A) do not apply to an application for a smart meter communication licence.”.

(3) In subsection (4)(a), for “Authority”, insert “grantor”.

(4) In subsection (5)(b)(ii), after “7A”, insert “or 7AB”.

(5) After subsection (5), insert—

“(5A) Without prejudice to the generality of paragraph (a) of subsection (4), conditions which are described in subsection (5B) may be included in a smart meter communication licence by virtue of that paragraph, in respect of circumstances where a person holds such a licence (the “licence holder”), and another person has applied or is considering whether to apply for a smart meter communication licence (“the applicant”).

(5B) The conditions in this subsection are conditions which require the licence holder to comply with a direction given by the Secretary of State or the Authority requiring the licence holder to provide to the applicant—

- (a) information in relation to the activities authorised by the licence; or
- (b) such other assistance as may be reasonably required by the applicant, including access to any facilities or equipment being used in connection with the activities authorised by the licence, in order that the applicant can—
 - (i) determine whether to apply for a licence; or
 - (ii) take part in a competition for a licence.

(5C) Subject to subsection (5E) and without prejudice to the generality of paragraph (a) of subsection (4), conditions which are described in subsection (5D) may be included in a smart meter communication licence by virtue of that paragraph, in respect of circumstances where such a licence held by a person (the “first licensee”) will cease to have effect, and another such licence is to be granted or has been granted to a different person (the “second licensee”).

(5D) The conditions in this subsection are conditions which require compliance with a direction given by the Secretary of State or the Authority requiring—

- (a) the transfer of property, rights or liabilities from the first licensee to the second licensee;

^(a) Section 6(1)(f) of the Electricity Act 1989 (c. 29) is inserted by article 6 of this Order.

^(b) Section 7B was inserted by section 7 of the Gas Act 1995 (c. 45). Relevant amendments were made by sections 3, 74 and 108 of and Schedules 6 (Part 1 paragraphs 1 and 5) and 8 to the Utilities Act 2000 (c. 27).

^(c) Section 41HC of the Gas Act 1986 (c. 44) was inserted by section 91 of and Schedule 4 to the Energy Act 2008 (c. 32).

- (b) the creation of rights in relation to property, rights or liabilities in favour of the second licensee;
- (c) the creation of other rights and liabilities as between the first and second licensee;
- (d) the first or second licensee to enter into a written agreement with each other, or the first licensee to execute an instrument of another kind in favour of the second licensee;
- (e) the first or second licensee to pay compensation to the other, or to any third party who is affected by any of the matters referred to in paragraphs (a) to (d).

(5E) Conditions included in a licence by virtue of subsection (5C) must provide that the licensee does not have a duty to comply with a direction of the kind referred to in subsection (5D) unless, in relation to that direction, the following conditions have been satisfied prior to it being given—

- (a) the Secretary of State or the Authority (as appropriate) has given written notice to the first licensee, the second licensee and any other person who would potentially be affected by the direction, including a copy of the proposed direction and inviting them to submit written representations, giving a minimum period of 21 days in which those representations can be made; and
- (b) after the end of the period set out in the notice under paragraph (a), the Secretary of State or the Authority (as appropriate) has considered those representations and determined that—
 - (i) it is appropriate in all the circumstances that the proposed direction is given; and
 - (ii) the arrangements of a type referred to in paragraphs (a) to (d) of subsection (5D) in the direction are necessary or expedient for the operational purposes of the second licensee, or are agreed by the first licensee and the second licensee to be necessary or expedient for those purposes.

(5F) For the purposes of subsection (5E), the operational purposes of the second licensee are the purposes of performing any functions which the second licensee has, or will have—

- (a) under or by virtue of the smart meter communication licence which has been, or is to be, granted; or
- (b) under or by virtue of any enactment, in the second licensee's capacity as holder of that licence.”.

Amendment to section 8AA (transfer of licences)

23.—(1) Section 8AA^(a) is amended as follows.

(2) After subsection (10), insert—

“(10A) Subject to subsection (10C), the Authority shall, following consideration of any representations or objections under subsection (9), give the Secretary of State not less than 28 days' notice of any proposal to give consent to the transfer of the whole or any part of a smart meter communication licence.

(10B) If, before the expiry of the time specified in a notice under subsection (10A), the Secretary of State directs the Authority not to give consent, the Authority shall comply with that direction.

(10C) Where the Secretary of State does not give a direction under subsection (10B), the Authority may give consent to the transfer of the licence after—

- (a) the expiry of the time specified in the notice under subsection (10A); or
- (b) if earlier than the time in paragraph (a), the time at which the Secretary of State informs the Authority that no direction will be given under subsection (10B) in relation to the notice.

^(a) Section 8AA was inserted by section 10 of the Gas Act 1995 (c. 45) and substituted by section 85 of the Utilities Act 2000 (c. 27).

(10D) Subsections (10A) to (10C) do not apply after 1 November 2018.”.

(3) After paragraph (11), insert—

“(11A) A smart meter communication licence may not be transferred to a person unless a licence granted under section 6(1)(f) of the Electricity Act 1989 is also transferred to the same person at the same time.”.

Amendment to section 23B (appeal to the Competition Commission)

24. In section 23B(2)(b)^(a) for “or 7A(1) or (2)”, substitute “, 7A(1) or (2) or 7AB”.

Amendment to section 36 (keeping of register)

25. In section 36(1) and (2)(d)^(b), for “or 7A”, substitute “, 7A or 7AB”.

Amendment to section 41C (power to alter activities requiring licence)

26. In section 41C(4)^(c)—

(a) omit the word “or” after paragraph (b); and

(b) after paragraph (c), insert—

“; or

(d) the provision of a smart meter communication service.”.

Amendment to section 48 (interpretation of Part 1 and savings)

27. In section 48(1)^(d)—

(a) in the definition of “licence”, for “or 7A”, substitute “, 7A or 7AB”; and

(b) insert in the relevant position—

““providing a smart meter communication service” has the meaning given in section 5(11) above, and cognate expressions shall be construed accordingly;”;

““smart meter communication licence” has the meaning given to that term in section 7AB(1);”.

Amendment to Schedule 4B (provisions imposing obligations enforceable as relevant requirements)

28.—(1) Schedule 4B^(e) is amended as follows.

(2) In paragraph 1, after “all licence holders”, insert “(except the holder of a smart meter communication licence)”.

(3) After paragraph 9, insert—

“Smart meter communication licence holders

9A. The following are relevant provisions in relation to the holder of a smart meter communication licence—

(a) section 33F^(f); and

^(a) Section 23B was inserted by SI 2011/2704.

^(b) Subsections (1) and (2) of section 36 were substituted by section 3 of the Gas (Exempt Supplies) Act 1993 (c. 1) and amended by section 10 of the Gas Act 1995 (c. 45), sections 3, 95 and 108 of and Schedule 8 to the Utilities Act 2000 (c. 27) and section 149 of the Energy Act 2004 (c. 20).

^(c) Section 41C was inserted by section 88 of the Utilities Act 2000 (c. 27) and amended by section 149 of the Energy Act 2004 (c. 20).

^(d) Relevant amendments to section 48 were made by section 108 of and paragraphs 1 and 19 of Part 1 of Schedule 6 to the Utilities Act 2000 (c. 27) and section 149 of the Energy Act 2004 (c. 20).

^(e) Schedule 4B was inserted by SI 2011/2704.

^(f) Section 33F of the Gas Act 1986 (c. 44) was inserted by section 97 of the Utilities Act 2000 (c. 27) and was amended by SI 2009/1941.

- (b) section 25(5) of the Consumers, Estate Agents and Redress Act 2007^(d) (directions to comply with requirements under section 24 of that Act).”

PART 4

Amendments to other primary legislation

Amendment to the Insolvency Act 1986

29. In paragraph 10(1)(b) of Schedule 2A of the Insolvency Act 1986^(b) (interpretation of regulated business for the purposes of section 72D of that Act), for “or 7A”, substitute “, 7A or 7B”.

Amendments to the Utilities Act 2000

30.—(1) The Utilities Act 2000^(c) is amended as follows.

(2) In section 5A(2)(b) (duty of authority to carry out impact assessment), after “supply of electricity”, insert “or in the provision of smart meter communication services (in respect of electricity meters or gas meters)”.

(3) In section 106(1) (interpretation), in the definition of “gas licence”, for “or 7A”, insert “, 7A or 7AB”.

Amendments to the Enterprise Act 2002

31. In section 168 of the Enterprise Act 2002^(d) (regulated markets), in subsections (3)(c), (4)(c) and (6), for “or 7A”, substitute “, 7A or 7AB”.

Amendment to the Consumers, Estate Agents and Redress Act 2007

32. In section 25 of the Consumers, Estate Agents and Redress Act 2007^(e) (enforcement by a regulator of notices under section 24 of that Act), in the table at the end of subsection (3), for “or 7A”, substitute “, 7A or 7AB”.

Amendment to the Energy Act 2008

33.—(1) Section 88 of the Energy Act 2008^(f) (power to amend licence conditions etc: smart meters) is amended as follows.

(2) In subsection (1)—

(a) after paragraph (d), insert—

“(da) a condition of a particular licence under section 6(1)(f) of the Electricity Act 1989, or under section 7AB of the Gas Act 1986 (smart meter communication licences);”;

(b) in paragraph (e), for “or 7A”, substitute “, 7A or 7AB”.

(3) In subsection (6)—

(a) in paragraph (b), for “or 7A”, substitute “, 7A or 7AB”;

(b) in paragraph (c), for “or (d)”, substitute “, (d) or (f)”.

^(a) 2007 c. 17.

^(b) 1986 c. 45. Schedule 2A was inserted by section 250 of the Enterprise Act 2002 (c. 40).

^(c) 2000 c. 27. Section 5A was inserted by section 6 of the Sustainable Energy Act 2003 (c. 30).

^(d) 2002 c. 40. There are amendments to section 168 which are not relevant for the purposes of this Order.

^(e) 2007 c. 17.

^(f) 2008 c. 32. Section 88 was amended by section 73 of the Energy Act 2011 (c. 16).

PART 5

Amendments to secondary legislation

Amendment to the Public Interest Disclosure (Prescribed Persons) Order 1999

34. In the Schedule to the Public Interest Disclosure (Prescribed Persons) Order 1999^(a), in the second column in the entries relating to the Gas and Electricity Markets Authority—

- (a) after “(as defined in section 4(3E) of the Electricity Act 1989)”, insert “or providing a smart meter communication service (as defined in section 4(3G) of that Act^(b))”; and
- (b) after “(as defined in section 5(8) of the Gas Act 1986)”, insert “or providing a smart meter communication service (as defined in section 5(11) of that Act^(c))”.

Amendment to the Electricity Safety, Quality and Continuity Regulations 2002

35.—(1) The Electricity Safety, Quality and Continuity Regulations 2002^(d) are amended as follows.

(2) In regulation 1(5) (interpretation), insert into the relevant place—

““smart meter communication provider” means a person who holds a licence under section 6(1)(f) of the Electricity Act 1989;”.

(3) In regulation 4 (duty of co-operation) for “and meter operators”, substitute “, meter operators and smart meter communication providers”.

PART 6

Amendments to standard conditions of electricity licences

Amendments to the standard conditions of electricity distribution licences

36.—(1) The standard conditions incorporated by virtue of section 8A^(e) of the Electricity Act 1989 in licences under section 6(1)(c) of that Act are amended in accordance with subsection (2).

(2) In condition 1.3 (definitions for standard conditions) in the definition of “Authorised Electricity Operator”, for “or participate in the operation of an Interconnector”, substitute “, participate in the operation of an Interconnector or provide a smart meter communication service”.

Amendments to the standard conditions of electricity supply licences

37.—(1) The standard conditions incorporated by virtue of section 8A of the Electricity Act 1989 in licences under section 6(1)(d) of that Act are amended in accordance with subsection (2).

(2) In condition 1.3 (definitions for standard conditions) in the definition of “Authorised Electricity Operator”, for “or participate in the operation of an Interconnector”, substitute “, participate in the operation of an Interconnector or provide a smart meter communication service”.

^(a) SI 1999/1549, Schedule substituted by SI 2003/1993 and a relevant amendment was made by SI 2005/2464.

^(b) Section 4(3G) is inserted by article 4(3) of this Order.

^(c) Section 5(11) is inserted by article 19(3) of this Order.

^(d) SI 2002/2665, to which there are amendments which are not relevant for the purposes of this Order.

^(e) Section 8A of the Electricity Act 1989 inserted by section 33 of the Utilities Act 2000 (c. 27), with a relevant amendment made by section 137 of the Energy Act 2004 (c. 20).

PART 7

Transitional exemptions

Smart meter communications service exemptions

38.—(1) This article applies for a period of 36 months beginning on the date on which this Order comes into force.

(2) Paragraph (3) applies to a person who is not the holder of a licence under section 6(1)(f) of the Electricity Act 1989^(a).

(3) Exemption is granted from section 4(1)(e) of the Electricity Act 1989^(b) to a person to whom this paragraph applies.

(4) Paragraph (5) applies to a person who is not the holder of a licence under section 7AB(1)^(c) of the Gas Act 1986.

(5) Exemption is granted from section 5(1)(d)^(d) of the Gas Act 1986 to a person to whom this paragraph applies.

Date

Name
Parliamentary Under Secretary of State
Department of Energy and Climate Change

^(a) Section 6(1)(f) is inserted by article 6(2)(b) of this Order.
^(b) Section 4(1)(e) is inserted by article 4(2)(b) of this Order.
^(c) Section 7AB(1) is inserted by article 21 of this Order.
^(d) Section 5(1)(d) is inserted by article 19(2)(b) of this Order.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order amends the Electricity Act 1989 (“the 1989 Act”) and the Gas Act 1986 (“the 1986 Act”) to provide for new licensable activities relating to the provision of communication services with respect to smart meters. The Order also makes consequential amendments to those Acts and to other legislation, as well as making transitional provision.

Articles 2 to 16 provide for amendments to the 1989 Act.

Article 3 amends section 3A to provide that when the Secretary of State and the Gas and Electricity Authority (“the Authority”) carry out their respective functions under the Act, they do so in the manner best calculated to promote efficiency and economy on the part of persons authorised by to provide a service of communicating with smart meters for each licensed supplier of electricity to domestic premises and that they consider the environmental and public safety implications that relate to the provision of such a service.

Article 4 amends section 4 to make it a criminal offence to, without a licence, arrange to provide a service of communicating with smart meters on behalf of each licensed supplier of electricity to domestic premises (excluding suppliers who have a licence but do not actually supply electricity).

Article 5 amends section 5 so that the Secretary of State is able to grant exemptions from the requirement for a licence inserted into the Act by article 4.

Article 6 amends section 6 to enable the Authority or the Secretary of State to issue licences authorising persons to undertake the new licensable activity inserted into the Act by article 4. Provision is made to ensure that such a licence may only be granted to a person who is also at the same time granted an equivalent licence under section 7AB of the 1986 Act (inserted by article 21 of this Order).

Article 7 amends section 6A so that the provisions in that section relating to the application process for licences under the 1989 Act apply to the new class of licence, but only where a competitive licence award process for the licences of the new class is not provided for in regulations made under the powers in section 56FC of the 1989 Act.

Article 8 amends section 7 to enable particular conditions to be included in the new class of licence which provide for arrangements that may be necessary to facilitate a transition between successive holders of such licences.

Article 9 amends section 7A to provide for a right for the Secretary of State to direct the Authority not to consent to the transfer of a licence of the new class to a particular person. This right applies until 1 November 2018.

Article 10 amends section 47 to provide that the Authority has duties to keep under review and to collect information on the undertaking of the new licensable activity, in addition to the existing equivalent duties in respect of the existing licensable activities.

Article 11 amends section 56A to provide that activities connected with the new licensable activity can become new licensable activities in accordance with the existing processes in that section.

Article 12 amends section 58 to extend an existing direction power which restricts the use by transmission licence holders of information they have gained from other licence holders, so that information gained from holders of the new class of licence is captured.

Article 13 amends section 64 to add new defined terms to the 1989 Act.

Article 14 amends section 96 to provide that directions that can be made under that section in respect of the security of buildings used in the energy system, include those buildings used in connection with undertaking the new licensable activity.

Article 15 amends section 98 to extend the provisions in that section allowing the Secretary of State to serve notices on licence holders requiring them to provide statistical information to holders of the new class of licence so that information can be sought in respect of the new licensable activity.

Article 16 amends Schedule 6A, which sets out the provisions in legislation which are treated as relevant requirements which renders them capable of enforcement under the 1989 Act by the Authority. The amendment adds relevant requirements with respect to the new class of licence.

Articles 17 to 28 provide for amendments to the 1986 Act.

Article 18 amends section 4AA. The amendments have an equivalent effect to the amendments made to the 1989 Act by article 3.

Article 19 amends section 5. The amendments have an equivalent effect to the amendments made to the 1989 Act by article 4.

Article 20 amends section 6A. The amendments have an equivalent effect to the amendments made to the 1989 Act by article 5.

Article 21 inserts a new section 7AB, which authorises the Authority or the Secretary of State to issue licences enabling persons to undertake the new licensable activity inserted into the Act by article 19.

Article 22 amends section 7B. The amendments have an equivalent effect to the amendments made to the 1989 Act by articles 7 and 8.

Article 23 amends section 8AA. The amendments have an equivalent effect to the amendments made to the 1989 Act by article 9.

Article 24 amends section 23B to provide that a holder of the new class of licence in the new section 7AB inserted by article 21 is able to bring appeals against licence modifications in the same way as the holders of other licences under the Act.

Article 25 amends section 36, to provide that the Authority's register includes details of licences and exemptions granted in respect of the new activity inserted by article 19.

Article 26 amends section 41C. The amendments have an equivalent effect to the amendments made to the 1989 Act by article 11.

Article 27 amends section 48. The amendments have an equivalent effect to the amendments made to the 1989 Act by article 13.

Article 28 amends Schedule 4B. The amendments have an equivalent effect to the amendments made to the 1989 Act by article 16.

Articles 29 to 32 make consequential amendments to the Insolvency Act 1986, the Utilities Act 2000 and the Enterprise Act 2002 to ensure that the new class of licence in the Gas Act 1986 is captured by existing provisions in those Acts which relate to existing classes of licence.

Article 33 makes a consequential amendment to section 88 of the Energy Act 2008 to provide that the power in that Act, which is available until 2018, to amend licence conditions for the purposes of regulating smart meters includes a power to make necessary amendments to licences of the new classes inserted by this Order.

Article 34 makes a consequential amendment to the Public Interest Disclosure (Prescribed Persons) Order 1999 to provide that the provisions in that Order, which protect employees where they make certain disclosures to the Authority concerning regulated energy activities, extend to the new classes of activity inserted by this Order.

Article 35 makes a consequential amendment to the Electricity Safety, Quality and Continuity Regulations 2002 so that the holders of the new class of licence created by the amendment to the 1989 Act in Article 6 are required to share information and co-operate to ensure that those Regulations can be complied with.

Articles 36 and 37 make consequential amendments to the definition of authorised electricity operator in the standard conditions of electricity distribution and supply licences, to provide that that definition includes reference to the holder of a licence of the new class, or to a person who is exempt from the obligation to hold such a licence.

Article 38 makes transitional provision, providing that persons who undertake the activities inserted into the 1989 Act and the 1986 Acts by Articles 4 and 19 respectively do not require a licence for a period of 36 months after the Order comes into force.

An explanatory memorandum is available alongside this Order on www.legislation.gov.uk. A full impact assessment of the effect that this instrument will have on the costs of business and the voluntary sector is published with the Explanatory Memorandum alongside the instrument on www.legislation.gov.uk.

EXPLANATORY MEMORANDUM

1. This explanatory memorandum has been prepared by the Department of Energy and Climate Change (DECC) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Order introduces a new licensable activity into each of the Electricity Act 1989 and the Gas Act 1986, which it will be unlawful to undertake without holding a licence. The new activity relates to the provision of a service of communicating with smart energy meters on behalf of all licensed energy suppliers. The Order also makes consequential amendments to legislation to allow for the effective regulation of holders of the new class of licence.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 The Order is the first use of powers in section 56FA of the Electricity Act 1989 and section 41HA of the Gas Act 1986, which allow for the amendment of the scope of activities requiring regulation under those Acts. It will be the first of a number of measures that DECC will be taking to provide the regulatory framework for the rollout of smart meters by the end of 2019, including measures under section 88 of the Energy Act 2008, which allows for the amendment of electricity and gas licences with respect to the rollout.

4.2 In particular, a further statutory instrument setting out the licence application process will be made under section 41HC of the Gas Act 1986 and section 56FC of the Electricity Act 1989 to support the competitive process to appoint the new central communications body, which will then be granted a licence to carry out the new licensable activities.

4.3 This Order does not directly implement European legislation. However, Directives 2009/72/EC and 2009/73/EC concerning common rules for the internal market in electricity and gas require that Member States take certain actions in order to implement smart metering systems and ensure the interoperability of those systems.

5. Territorial Extent and Application

5.1 This instrument applies to Great Britain.

6. European Convention on Human Rights

The Minister of State for Energy has made the following statement regarding Human Rights:

In my view the provisions of the Electricity and Gas (Smart Meters Licensable Activity) Order 2012 are compatible with the Convention rights.

7. Policy background

What is being done and why

7.1 The Government is committed to the rollout of smart gas and electricity meters to every home in Great Britain by the end of 2019. This will empower people to manage their energy consumption and reduce their carbon emissions. The rollout programme also extends to businesses and public sector users. The rollout of smart meters will play an important role in Great Britain's transition to a low-carbon economy, and help us meet some of the long-term challenges we face in ensuring an affordable, secure and sustainable energy supply.

7.2 This is a major programme and a Coalition Agreement commitment, which aims to support the rollout of some 53 million gas and electricity meters to domestic properties and to medium sized non-domestic sites in Great Britain by the end of 2019. This will impact approximately 30 million premises and deliver a net benefit estimated to be approximately £7 billion.

7.3 The communications and data transfer and management required to support smart metering are to be organised by a new central communications body, referred to as the Data and Communications Company (DCC). The DCC will provide a service of remotely communicating with smart meters on behalf of parties including electricity and gas suppliers, electricity distribution companies, gas transporters and other third parties authorised by the consumer, such as energy services companies. This model delivers the necessary security and interoperability required for the smart meter system as well as facilitating market access for new entrants.

7.4 Implementation of the Government's smart metering policy will require changes to the existing regulatory and commercial framework governing the electricity and gas markets. The Order provides the foundation to regulate the DCC by introducing a new smart metering licensable activity into each of the Electricity Act 1989 and the Gas Act 1986, which it will be unlawful to undertake without holding a licence. In addition, the Energy Act 2008 provides powers to amend existing licences and industry codes for the purpose of delivering smart metering. Alongside this Order, the Government has been developing draft conditions for the licence to be awarded under the new activity, and a draft Smart Energy Code (versions of which are available on the DECC website^a). These and other regulatory changes will be introduced over the coming twelve months to give effect to the Government's policies across the whole smart meter programme, including obligations on licensed suppliers to use the communication services offered by the DCC.

7.5 The DCC will be a new national monopoly provider of services and it will need to be regulated by Ofgem to control its behaviour. This Order will enable the necessary regulatory control to be exerted over the DCC through the issue of its licence and, taken together with the other regulatory interventions set out in paragraph 7.4 to prevent unlicensed persons from undertaking the licensable activity. The scope of the DCC licensable activity set out in the Order itself is narrowly focused on the activity of making arrangements with all active licensed suppliers to provide communications services to smart meters in respect of certain energy related information. This approach is designed to minimise the risk of unintended capture of parties other than the DCC within scope of the licensable activity.

Consolidation

^a http://www.decc.gov.uk/en/content/cms/consultations/cons_smip/cons_smip.aspx

7.6 This Order amends the Gas Act 1986, the Electricity Act 1989 and various other Acts and Orders. However, there is no intention to consolidate any of these instruments.

8. Consultation outcome

8.1 The Government consulted on the detailed policy design of the regulatory and commercial framework for the DCC in September 2011. This consultation included a section seeking views on the approach to the licensable activity for the DCC, which is the subject of this Order. The majority of respondents who addressed questions related to the licensable activity supported the Government's proposed approach. Most responses were received from the energy industry, consumer groups and the regulator. There were few responses from members of the public.

8.2 In February 2012 a further consultation was published focused only on this Order and in particular the licensable activity for the DCC. This included the Government's response to the relevant sections of the September 2011 consultation and included, for comment, a draft of the Order. Responses to this consultation remained broadly supportive of the approach taken and the drafting of the Order, which remains substantively in the same form as set out in the consultation. Again the majority of responses were from industry stakeholders.

8.3 Arguments were put forward by stakeholders in response to the February 2012 consultation that in the period before the DCC was established it would be important that organisations currently offering DCC-type services should not be inadvertently caught by the Order. In response to these concerns, the Government has concluded that a transitional exemption should be included and this is reflected in the Order, which grants a transitional exemption lasting for 36 months from the coming into force of the Order. This will allow sufficient time for existing providers of DCC-type services to respond to the new arrangements and for the Government to consider the case for any enduring exemptions from the Order.

9. Guidance

9.1 The Government does not intend to publish any guidance related to this Order.

10. Impact

10.1 The direct impact on business, charities or voluntary bodies is nil. However, the Order lays the foundations for the implementation of the overall smart meter programme, which as an estimated NPV benefit of approximately £7 billion.

10.2 The impact on the public sector is nil.

10.3 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on www.legislation.gov.uk.

11. Regulating small business

11.1 The legislation applies to small business. The Order is intended to ensure that a licence is held by any person undertaking the defined DCC licensable activity. It is important that regulatory control can be exerted over this activity. The Government has therefore not exempted small businesses from the need to obtain a licence in order to undertake this licensable activity because to do so would undermine the effectiveness of the Order.

12. Monitoring & review

12.1 DECC will ensure that the smart meters programme is subject to a comprehensive and integrated review and evaluation process, both during the initial stage and towards the end of the main rollout. Annex 4 of the Impact Assessment sets out further detail of the proposed approach, within which this Order should be considered.

13. Contact

Robert Thornes at the Department of Energy and Climate Change Tel: 0300 068 5128 or email: robert.thornes@decc.gsi.gov.uk can answer any queries regarding the instrument.

© Crown copyright 2012
Department of Energy & Climate Change
3 Whitehall Place
London SW1A 2AW
www.decc.gov.uk

URN 12D/255