


Guidance – general licences August 2015

Guidance for completing ‘Application Form for a Water Services Licence and/or a Sewerage Services Licence’ – for general licences.

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1. Introduction

This guidance for applicants is intended to provide potential applicants for a general water services licence and/or a general sewerage services licence with the information they need to allow them to make a complete licence application.

Applicants for specialist or self-supply licences should refer to the separate guidance available on our website: www.watercommission.co.uk.

The guidance includes an outline of the legal framework for licence applications. It then outlines the steps involved in the application process and provides advice regarding the information to be submitted with an application, including the completion of the application form and the preparation of a business plan.

To ensure that the application process is as transparent as possible, we have also set out in this guidance our approach to assessing applications and the fitness of applicants to fulfil the activities authorised by the licences applied for.

2. The legal framework

These guidance notes, along with the application and assessment processes that have been established by the Commission, are based upon the provisions of two pieces of legislation – the Water Services etc. (Scotland) Act 2005 (“the 2005 Act”) and the Water Services and Sewerage Services Licences (Scotland) Order 2006 (“the Order”)¹.

The 2005 Act introduced the licensing framework for the water industry in Scotland. It requires that water services and sewerage services providers be licensed² and that applications for licences be made to us³. We may grant licences⁴, but must first be satisfied that applicants have the ability to perform adequately the activities authorised by the licence for which the application has been made⁵.

Under the 2005 Act all licence applications must be made in the form and manner prescribed by Scottish Ministers, and should contain such information as Scottish Ministers prescribe. Scottish Ministers prescribed the form and manner of applications and the information they must contain in the Order. Specifically, under the Order Scottish Ministers have set out:

- their requirements for the information to be submitted by applicants in their applications for licences; and
- their requirements regarding the publication of notice of an application.

Further, all applicants must provide us with such further information (including information in the form of a document) as we may reasonably require in order to determine the application.

In this guidance, we set out the application and assessment processes that we have designed in compliance with the 2005 Act and the Order, which will allow us to judge consistently, fairly and transparently whether each applicant will be able to perform adequately the licensed activities.

¹ SSI 2006/464

² Section 4(6) of the 2005 Act for water services and section 5(6) for sewerage services

³ Section 7 and Paragraph 1 of Schedule 2 to the 2005 Act

⁴ Section 6 of the 2005 Act

⁵ Section 7(1) of the 2005 Act

The 2005 Act contemplates a licensed provider being legally distinct from each of its customers.⁶ This may, at first glance, create an issue for a licensed provider wishing to provide retail services in respect of premises it occupies (the “customer” will be the occupier of the premises). This arises for general licensed providers, self-supply licensed providers and specialist licensed providers. However, in order to resolve such an issue, an applicant for a general licence may wish to consider arranging for a separate legal entity to:

- seek an additional self-supply licence for the purposes of supplying its own premises; or
- become the occupier of the premises in which the licensed provider operates.

As a final point, all applicants should note that under the 2005 Act⁷, any applicant who makes a false or misleading statement in connection with an application is guilty of an offence and is liable for:

- on summary conviction, a fine not exceeding the statutory maximum; or
- on indictment, a fine.

⁶ Section 6(1)(a)(i) of the 2005 Act.

⁷ Paragraph 1(7) of Schedule 2 to the 2005 Act

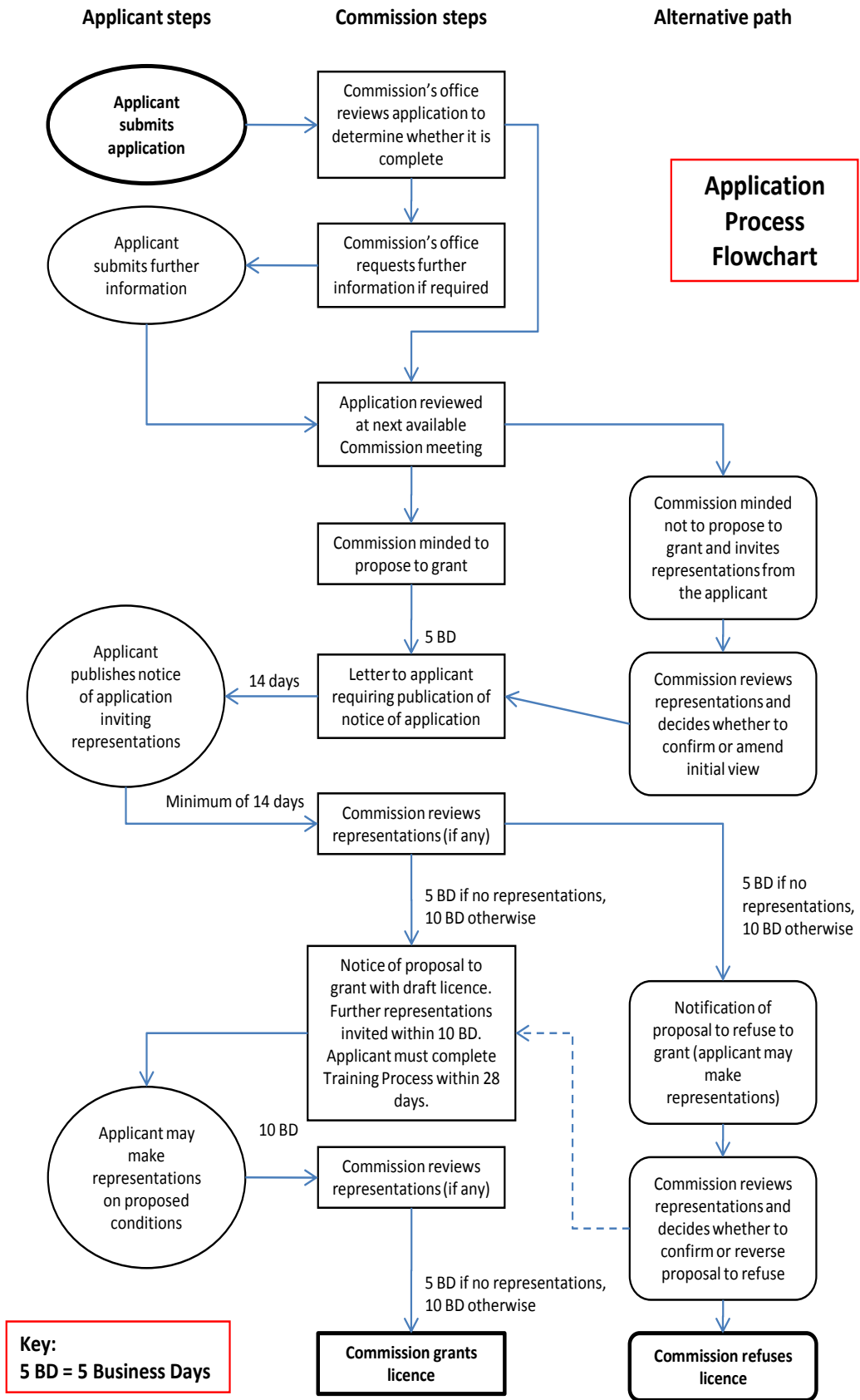
3. The application process

A transparent, orderly and accountable process

In developing the competitive retail market, we have been guided by the principle that applicants and licensed providers should have sufficient information to allow them to predict with confidence how we will operate the licensing regime.

We will process applications for all water services and sewerage services licences in a way that is consistent with the 2005 Act and the Order. The application process for water services and sewerage services licences is illustrated in the flowchart on the following page. The process was designed to ensure that it treats all applicants fairly, equally and transparently.

Please be aware that the timescales shown in the process are indicative only. The application process may, for instance, take longer if the content of an application requires to be supplemented (e.g. following a request from us for further information) or in other more complex cases (e.g. where we have received conflicting representations regarding the application).



Steps in the application process

Application timescales

In the application process set out below, we have indicated timescales for each step. Applicants should note, however, that many of the timescales are flexible and the process may take longer if, for example, we require further information or clarification or the application raises any complex issues.

We may also suspend our consideration of an application in certain circumstances: for example, if further information is required, or if, as a result of third party representations, the applicant needs to take action before we will grant a licence. In such instances, we will inform the applicant about the suspension and any action it needs to take. The application might not receive any further consideration until such action has been taken.

Pre-application

We would encourage potential applicants to discuss the licensing process and raise any queries or issues of concern with us before an application is submitted.

At this stage, applicants may also indicate if, and why, they believe it may be appropriate for us to exercise our discretion to relax or vary any of our information requirements.

We assume most applicants will wish to apply for both a water services licence and a sewerage services licence. However, it is possible to apply for one or the other. Applicants intending to apply for only one licence may wish to contact the Commission to ensure they understand the implications of this choice.

Submission and checking of application

The application must contain all of the information required by us pursuant to the Act and the Order before we will assess whether the licence(s) should be granted. We will tell the applicant as soon as possible if their submission is incomplete and invite them to provide further information.

Section 4 of this guidance provides more details regarding the information to be provided in the application and on the completion of the application form and any accompanying material, for example, the applicant's submission giving details of its relevant experience.

Section 5 of this guidance provides more details regarding the Commission's approach to assessing financial viability and the fitness of the Applicant.

Section 6 of this guidance provides further information regarding the application, including information about fees.

Initial review by the Commission

Once all the information required has been received, all applications will be reviewed by us at the next available Commission meeting. We will review the application and will determine:

1. whether the application is complete; and
2. whether, in our initial view, we are:
 - a. minded to propose to grant the applicant the licence(s), subject to representations from stakeholders; or
 - b. minded to propose to refuse the applicant the licence(s), and our reasons for reaching this initial view.

We would highlight that at this stage our view is in no way determinative. It merely indicates the Commission's initial view on the information provided with the completed application. It is intended that our communication of our initial view at this stage would enable applicants to address any concerns that may exist with their application and provide further representations accordingly.

As part of this initial review, the Commission will make an initial assessment of whether the applicant has the abilities to perform adequately the activities authorised by the licence and, in particular, will look at the applicant's:

- A. knowledge, expertise and experience; and
- B. financial acumen and business viability⁸.

Notice of application

If we are minded to propose to grant the applicant the licence(s), we will aim to write to the applicant within 5 business days of the Commission meeting confirming there is sufficient information to determine the application and that we are minded to propose to grant.

⁸ In accordance with Section 4 and 5 of this guidance, where the applicant does not have a demonstrable business track record the Commission may advise the applicant that the creation of an escrow account and the maintenance of a specific balance is a condition of any licence that may be granted following the completion of the procedure outlined below.

Our letter will also inform the applicant that it must, within 14 days of receipt of our letter, publish, in at least one national newspaper available both north and south of the border and on its website (if it has one), a notice of application for a licence.

The notice of application must invite representations from stakeholders to be submitted to us on the application. Further, the notice must state that we will only accept representations on the application during the period prescribed by the Commission. The usual period for consultation will be 14 days from the date of publication of the notice by the applicant, but this may be extended should it be considered appropriate due to the nature of the application. A copy of the form of the notice, as prescribed under the Order, will be sent with the letter.

We will ask applicants to confirm publication of their notice of application and we will confirm that publication on our own website.

Granting a licence

We will have regard to any representations received in response to the applicant's notice of application when determining the application. However, if, having received representations from stakeholders, we propose to grant the applicant the licence(s) we will publish a notice to that effect. We will aim to complete our assessment of any representations we receive within 10 business days of the closure of the representation period. If we receive no representations we will aim to publish a notice of proposal to grant within 5 business days.

The notice of proposal to grant will contain a copy of the proposed licence(s), including any proposed ordinary conditions or modifications to standard conditions that will apply for the particular applicant.

This notice will be sent to the applicant and to interested third parties, including Scottish Water and any third party who made representations to us regarding the application⁹. When we send the notice to the applicant, we will ask them to confirm whether or not there has been any material change in circumstance or information since they submitted the licence application. We will also publish the notice on our website. The notice of proposal to grant will invite representations from both the applicant and stakeholders on the proposed grant of the licence(s) and comments on the proposed ordinary conditions or applicant-specific modifications to the standard conditions.

⁹ It will also be sent to the Scottish Ministers where there is modification or exclusion of standard licence conditions

The notice of proposal to grant will usually invite representations within 10 business days of its publication. In more complex cases, a longer consultation period may be allowed. For example, where the notice proposes applicant-specific modifications to the standard licence conditions, a minimum 28-day period for the submission of representations will be provided.

As with representations received in response to the applicant's notice of application, we will have regard to any representations received in response to the notice of proposal to grant, including considering any material changes in circumstance or information since the application was submitted. We will aim to complete our assessment of any representations that we receive within a further 10 business days. If we receive no representations we will aim to grant the licence(s) within 5 business days. Accordingly, if there are no representations the period between publication of the notice of proposal to grant and the date of granting the licence(s) may be 15 business days, as shown in Figure 1.

Where a longer period has been allowed for the submission of representations, the time between publication of the notice of proposal to grant and actual granting of the licence(s) will be longer, for example, where we have proposed applicant-specific modifications to standard licence conditions.

To grant the applicant a licence(s), the Commission will require the applicant to have completed the Training Process (including self-certifying its readiness to participate in the market using the Low Volume Interface) in accordance with Section 3.3 of Market Code Subsidiary Document 0001 (Market Training and Assurance Strategy for the Water Market in Scotland).

The applicant will have a maximum of 28 days from publication of the notice of proposal to grant in which to complete the Training Process.

Where we decide to grant a licence, we will send the applicant and Scottish Water a copy of the licence as soon as practicable. Scottish Water may, within 14 days following the date the licence was sent to them, appeal to the Court of Session against the granting of the licence on a question of law¹⁰. If this occurs the licence is suspended until the appeal is withdrawn or finally determined. Under the 2005 Act

¹⁰ Paragraph 1(10) of Schedule 2 to the 2005 Act. In certain circumstances, an applicant or Scottish Water may also request the Commission to make a reference to the Competition and Markets Authority in respect of the conditions included in a licence granted under the 2005 Act (see the Water Services etc. (Scotland) Act 2005 (Consequential Provisions and Modifications) Order 2005, SI 2005/3172)

the Court of Session may either quash or uphold our decision to grant a licence. The decision of the Court is final.

Refusal to grant a licence

If, following publication of the notice of application and receipt of any representations, we propose to refuse an application we will give the applicant notice of that fact (together with our reasons) and specify the date by which the applicant can make representations to us about the proposed refusal. If we propose to refuse an application as a result of adverse representations about the application, we will include details of those representations.

We must have regard to any representations received from the applicant in response to our notice when finally determining their application.

If, following assessment of any representations, we refuse to grant a licence we must inform the applicant and Scottish Water as soon as practicable.

Where the applicant has failed to complete the Training Process within 28 days from publication of the notice of proposal to grant, the Commission may treat such failure as grounds for refusal of the application.

Under the 2005 Act, where an application has been refused the applicant may, within 14 days of the date on which refusal was intimated, appeal to the Court of Session against the refusal on a question of law. The Court of Session may either quash or uphold our decision to refuse to grant a licence. The decision of the Court is final.

4. Guidance regarding the information to be provided in an application

What needs to be submitted?

In submitting a licence application, an applicant must provide:

- a completed application form (including any additional sheets required by the applicant in order to provide complete responses); and
- the relevant fee¹¹.

Sections below describe how to complete the application form and the information that we are seeking.

Guidance for the completion of the application form

A copy of the application form is included as Appendix 2. The questions included in the form reflect the requirements outlined by Scottish Ministers in the Order.

Applicants should answer every question included on the form. Applications will not be treated as complete unless all relevant information is provided. Applicants should note that provision of the information prescribed by Scottish Ministers in the Order is mandatory – we cannot agree to any relaxation or variation in relation to such prescribed information.

Please note that any applicant who knowingly or recklessly makes a statement, in connection with an application for a licence, that is false or misleading in a material particular is guilty of an offence under the 2005 Act.

¹¹ The relevant fee for any given licence application is set out in the Form of Fees Scheme which is available on our website

The application form

A. *Application type (covering questions 1-2)*

1. Applicants should tick the box of the type of licence that they are applying for. An applicant for a general licence should tick the relevant box in the first column.
2. The effective-from date cannot pre-date the grant of licence.

B. *Applicant details (covering questions 3-7)*

3. Where the applicant is an individual, please indicate the contact details (home and business address, telephone number and email address) and date and place of birth of the applicant. Where the applicant is not an individual, please indicate the jurisdiction in which the applicant is established and the address of its principal place of business. In setting out the applicant's legal status, please indicate whether the applicant is, for instance, a body corporate, partnership, unincorporated association, individual or some other entity.
4. The persons concerned in the direction or management of the applicant's affairs would typically include, in the case of companies, their directors (executive and non-executive) and, in the case of partnerships, each of the partners. In addition, details of any other persons occupying senior management positions (e.g. chief executive, financial controller etc) should be provided where those individuals will be directly accountable for the licensed part of the applicant's business. If the applicant is an individual, the answer to this question should be "Not applicable" or "N/A".
5. If the applicant has no ultimate controller, the response to this question should be, "Not applicable" or "N/A".

For the purpose of the application as a whole, "ultimate controller" means a person or undertaking who, acting alone or jointly, has control of the applicant and is not itself controlled by another person or undertaking¹². Where the applicant is the member of a group of companies, for instance, details would typically be required of the parent company within that group.

¹² The expression "control" should be construed by applicants and their advisers in accordance with article 3 of Council Regulation 139/2004/EC

6. The type of restrictions we would expect to see listed in response to this question will include, for instance, any director's disqualification orders, individual or corporate insolvency, sequestration or administration proceedings. Please note that this question is not limited to restrictions imposed in Scotland.

C. Ongoing litigation/criminal convictions (covering questions 8-9)

8. Applicants should include pending and anticipated litigation, as well as ongoing litigation. Disclosure should cover not only court proceedings, but also those raised by or before any other tribunal or regulatory agency. Applicants should also indicate the jurisdiction in which each litigation has been raised. Where there is a large number of cases to disclose, e.g., in relation to routine debt collection, we are willing to consider disclosure of information on a categoric basis.
9. We do not expect applicants to submit information about minor convictions or penalties, such as routine traffic violations. If applicants are unsure about whether or not something is a 'minor' conviction or penalty, then they should raise it, on a categoric basis, with us prior to making their application. Applicants should also indicate the jurisdiction in which each sentence or penalty was imposed. Applicants should note that we regard civil penalties as including any enforcement orders issued by a court, tribunal or other regulatory agency. In some jurisdictions there is more than one alternative to a 'not-guilty' plea or conviction. For example, we understand that in the USA, it is sometimes possible for an accused to submit a 'nolo contendere' or 'no contest' plea, whereby a conviction is held against them but it is not a 'guilty' one. Applicants should raise any such convictions with us on a categoric basis.

D. Previous experience / licences (covering question 10)

10. In setting out relevant experience, applicants should list any professional qualifications or industry specific qualifications they have or that are held by the persons referred to in questions 4 or 5.

In addition to any experience in the water and sewerage industry, previous retail experience or previous experience of other regulated utilities such as electricity, gas or telecommunications will be particularly relevant.

Applicants should give details of all previous or similar applications for a licence by the applicant or any of the persons referred to in questions 4 or 5, including applications that were refused, withdrawn or otherwise unsuccessful.

Applicants should also include details of every occasion on which the applicant or any of the persons referred to in questions 4 or 5 has been involved with a relevant utility business which has been the subject of enforcement or revocation proceedings in respect of its licence or other authorisation, as well as details of any insolvency event.

E. Purpose of application / Financial information (covering questions 11-13)

11. Applicants should describe the types of customers to which they intend to offer services to customers.
12. It is important that applicants demonstrate their financial viability including the ability to meet either the prepayment of wholesale charges and CMA charges on an ongoing basis¹³ or evidence of a sufficient alternative to prepayment such as a guarantee from a suitable guarantor¹⁴. More information about how we intend to assess financial viability is provided in part 5 of this guidance under the heading "Evidence of financial viability".

We may require additional information, which could include:

- audited accounts (and annual reports) for the applicant and for the applicant's ultimate controller, and/or
 - a formal business plan (including detailed future plans for operating the licence(s) applied for).
13. Applicants should indicate here whether they intend to prepay their wholesale charges (with or without an escrow account¹⁵) or whether they intend to use an alternative to prepayment such as a guarantee.

¹³ In some cases, we may require an applicant who is going to prepay to establish an escrow account.

¹⁴ We will require any guarantor to have a minimum investment grade credit rating as detailed in Section 5 of this guidance.

¹⁵ If applicants wish to prepay but cannot provide evidence of a demonstrable business track record the Commission may satisfy itself as to the financial viability of the applicant by requiring a clear and ongoing financial commitment to the market in the form of an escrow account to be used for the payment of monies owed to Scottish Water by the applicant. More information is provided in part 5 of this guidance under the heading "Evidence of financial viability".

F. Compliance with regulatory requirements (covering questions 14-15)

14. In order to operate successfully in the water industry in Scotland, licensees will, of course, be required to comply with all of the conditions of their licences. In addition, however, they will need to comply with the provisions of the various codes and agreements that govern the behaviour of industry participants (including their wholesale services agreement; the Operational Code; Market Code and the Disconnections Document) and with any directions issued by us under section 11 of the 2005 Act.

Explanations of how the applicant intends to comply with all of the regulatory requirements (including consideration of how it will deal with amendments and additions to existing requirements) should be included a separate annex to the application form.

15. We have determined a set of standard conditions which apply to all permanent licences granted under the 2005 Act. In the case of a general licence, the conditions in Part A and Part B of the standard conditions will apply.

In granting a particular licence, we are entitled under the 2005 Act to exclude or modify any of the standard conditions to such extent as we consider appropriate in the circumstances of the case.

If applicants consider that we should exercise this power in the case of their application, they should set out their reasons in response to this question. In cases where we propose to make such a modification, responses to the modification will be invited for submission within 28 days from the date of publication of our proposal to grant statement.

G. Additional matters (covering questions 16-17)

16. If the applicant is supplying any additional information in response to this question, or to question 17, such other information may be included in any of the supporting documents submitted with the application form, or it may be included in extra sheets added to the completed form. Any extra sheets should be numbered and the applicant should indicate the number of extra sheets added on the application form.

Declaration

The declaration made here is a personal declaration made by the person signing the application form. Where that person is not an individual applicant for a licence (or licences), e.g. if the person signing the form is signing on

behalf of his or her company, the term “enquiry of the applicant” means enquiry of the company.

Except in the case of an individual applicant, we would expect this declaration to be made by one of the persons named in response to question 4 and, preferably, by the person occupying the most senior executive position within this group.

5. Our approach to assessing the fitness of applicants

Section 7(1) of the 2005 Act states that we may only grant a water services or sewerage services licence if we are satisfied that the applicant is able to perform adequately the activities authorised by the licence. This ability is the key criterion that we will use to assess applications.

Section 7(2) of the 2005 Act stipulates that in assessing this ability we must have special regard to the applicant's:

- knowledge, expertise and experience;
- financial acumen and business viability; and
- any other matters that Scottish Ministers may specify.

How we will assess the fitness of applicants

Our first priority will be to check if the applicant has provided us with sufficient information to allow us to make a proper assessment.

Our analysis will then focus on whether the applicant satisfies the statutory test, i.e. it has the ability adequately to perform the activities authorised by the licence(s). Our initial assessment will only consider the information provided by the applicant.

If it appears that the applicant would not be able adequately to perform the licensed activities, we may ask the applicant to submit further information before re-assessing the application. If the applicant fails to provide us with such information, or fails the assessment detailed above, we may not grant a licence (or licences).

If it appears that the applicant will be able to adequately perform the activities authorised by the licence(s), we may consider information received from third parties and any other relevant information. We will then determine whether the applicant has the ability to perform adequately the licensed activities.

Evidence of financial viability

As noted above, in assessing an applicant's application we must have special regard to the applicant's knowledge, expertise and experience and its financial acumen and business viability. The main way in which these factors will be assessed will be by evaluating the applicant's financial viability including the ability either to meet the prepayment of wholesale charges and CMA charges on an ongoing basis, or provide a sufficient alternative to prepayment such as a guarantee from a suitable guarantor. Where an applicant wishes to prepay their wholesale charges we may require them

to establish an escrow agreement. Further information on when we would require such escrow arrangements is provided below.

The same test of financial viability will be applied to all applicants for licences, but the evidence required from each applicant may differ depending on their particular circumstances.

Applicants should provide evidence of either :

- (a) that they have a commercially robust capital structure (given the wholesale charge payments that they expect to meet and other ongoing operating obligations); or
- (b) that they can rely on third party financial support¹⁶.

Applicants will also be required to show that they have a demonstrable business track record¹⁷. If they cannot provide any such evidence and wish to prepay their wholesale charges, the Commission may satisfy itself as to the financial viability of the applicant by requiring a clear and ongoing financial commitment to the market in the form of an escrow account to be used for the payment of monies owed to Scottish Water by the applicant.

The template WSA published by the Commission includes suggested key terms for the escrow account, which the Commission advises the applicant and Scottish Water to use for the purposes of their negotiation. The applicant must have agreed the key terms of the escrow account with Scottish Water before the Commission will grant a licence¹⁸.

Applicants who do not wish to prepay their wholesale charges may rely on third party support in order to satisfy the Commission of their financial viability, such as a guarantee from a suitable guarantor. The Commission will require any guarantor to have a minimum investment grade credit rating. The Commission has determined that the investment grade credit rating for guarantors at this time should be an 'A' rating, but the rating will be kept under review from time to time. The Commission has not specified from which ratings company a guarantor's rating should originate

¹⁶ Where relying on third party financial support, the applicant will be required to provide a warranty that no financial support, direct or indirect, is provided by another market participant.

¹⁷ A demonstrable business track record could include showing that they have accounts filed with Companies House although the Commission may ask for further information.

¹⁸ The Commission may also make the creation of the escrow account and the maintenance of a specified balance a condition of any licence it may grant.

and the appropriate rating from any of Moody, Standard and Poor and Fitch IBCA will therefore be suitable.

The template WSA published by the Commission includes suggested key terms for any guarantee that the applicant may wish to use, which the Commission advises the applicant and Scottish Water to use for the purposes of their negotiation.

More details on the use of escrow accounts and alternatives to prepayment such as the use of a guarantee can be found on the Commission's website: www.watercommission.co.uk

Other information of relevance in assessing overall ability

In addition to evaluating the applicant's financial viability, we may also assess any other information that we receive from the applicant (e.g. audited accounts or a formal business plan), from third parties (e.g. in response to the notice of application) or that we already have in our possession.

The Commission's section 11(1) duty

Under section 11(1) of the 2005 Act we also have a duty regarding market development¹⁹. In practice, this means that before we grant a licence we must be satisfied that the grant is consistent with our section 11(1) duty. If that is not the case, we can take steps to resolve the position (for example, by issuing directions or modifying licence conditions).

We will have due regard to our section 11(1) duty as part of our assessment of each licence application.

¹⁹ Section 11(1) states that we have a duty to exercise our functions relating to water services and sewerage services licences (insofar as is consistent with our general function of promoting the interests of customers) for the purposes of securing participation of licensed providers in the provision of water services and sewerage services in an orderly manner and a manner that is not detrimental to the exercise of Scottish Water's core functions.

6. Other matters

Disclosure of information

In completing an application for a licence (or licences), applicants should highlight (explaining their reasons) any information which they would not wish to be published or disclosed by us in due course. In particular, applicants should set out clearly whether, and for what length of time, they consider the information submitted to be subject to any exemptions under the Freedom of Information (Scotland) Act 2002. We will have regard to any such submissions when considering future publication or disclosure.

When deciding what information to publish or disclose during the application process, we will seek to balance the need to enable relevant parties to respond to information received from the applicant or third parties and the need to protect the commercial sensitivities of the applicant or third parties.

For example, if we receive third party representations that may influence our decision, we will aim to provide the applicant with an opportunity to respond to those representations. When we consider it necessary, we will take appropriate steps to protect commercial sensitivities.

The need for further information

In this guidance note we have endeavoured to ensure that applicants understand the processes we have designed for processing and assessing their applications for water services and/or sewerage services licences. It should be clear, however, that the application process may be an iterative one. At any stage during the process, we might need to seek clarification or further supporting information. Any such requests will usually be made where we feel it necessary to allow us to evaluate the application fairly and thoroughly, in line with our duties under the 2005 Act.

Fees

When returning the application form and ancillary documents, please remember to include a cheque for the relevant fee. We would be happy to receive payment by electronic bank transfer and can provide our bank account details on request. The level of fee is shown in the Fees Scheme which is available on our website. We may not commence our consideration of an application until we have received the relevant fee.

Guidance – specialist licences August 2015

Guidance for completing ‘Application Form for a Water Services Licence and/or a Sewerage Services Licence’ – for specialist licences.

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The guidance includes an outline of the legal framework for licence applications. It then outlines the steps involved in the application process and provides advice regarding the information to be submitted with an application, including the completion of the application form and the preparation of a business plan.

To ensure that the application process is as transparent as possible, we have also set out in this guidance our approach to assessing applications and the fitness of applicants to fulfil the activities authorised by the licences applied for.

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⁴ Section 6 of the 2005 Act

⁵ Section 7(1) of the 2005 Act

Specialist licensed providers may only supply customers for whom a departure from a charges scheme under section 29E of the Water Industry (Scotland) Act 2002 (“a section 29E departure”) is in effect or is being sought. The details of these requirements are specified in the standard licence conditions. Applicants should also familiarise themselves with the Commission’s policy and procedure for assessing applications for section 29E departures, which is available on our website, www.watercommission.co.uk.

The 2005 Act contemplates a licensed provider being legally distinct from each of its customers.⁶ This may, at first glance, create an issue for a licensed provider wishing to provide retail services in respect of premises it occupies (the “customer” will be the occupier of the premises). This may arise for a specialist licensed provider but only where the provider itself has been granted or is seeking a section 29E departure. In that situation, an applicant for a specialist licence may wish to consider arranging for a separate legal entity to:

- seek an additional self-supply licence for the purposes of supplying its own premises; or
- become the occupier of the premises in which the licensed provider operates.

As a final point, all applicants should note that under the 2005 Act⁷, any applicant who makes a false or misleading statement in connection with an application is guilty of an offence and is liable for:

- on summary conviction, a fine not exceeding the statutory maximum; or
- on indictment, a fine.

⁶ Section 6(1)(a)(i) of the 2005 Act.

⁷ Paragraph 1(7) of Schedule 2 to the 2005 Act

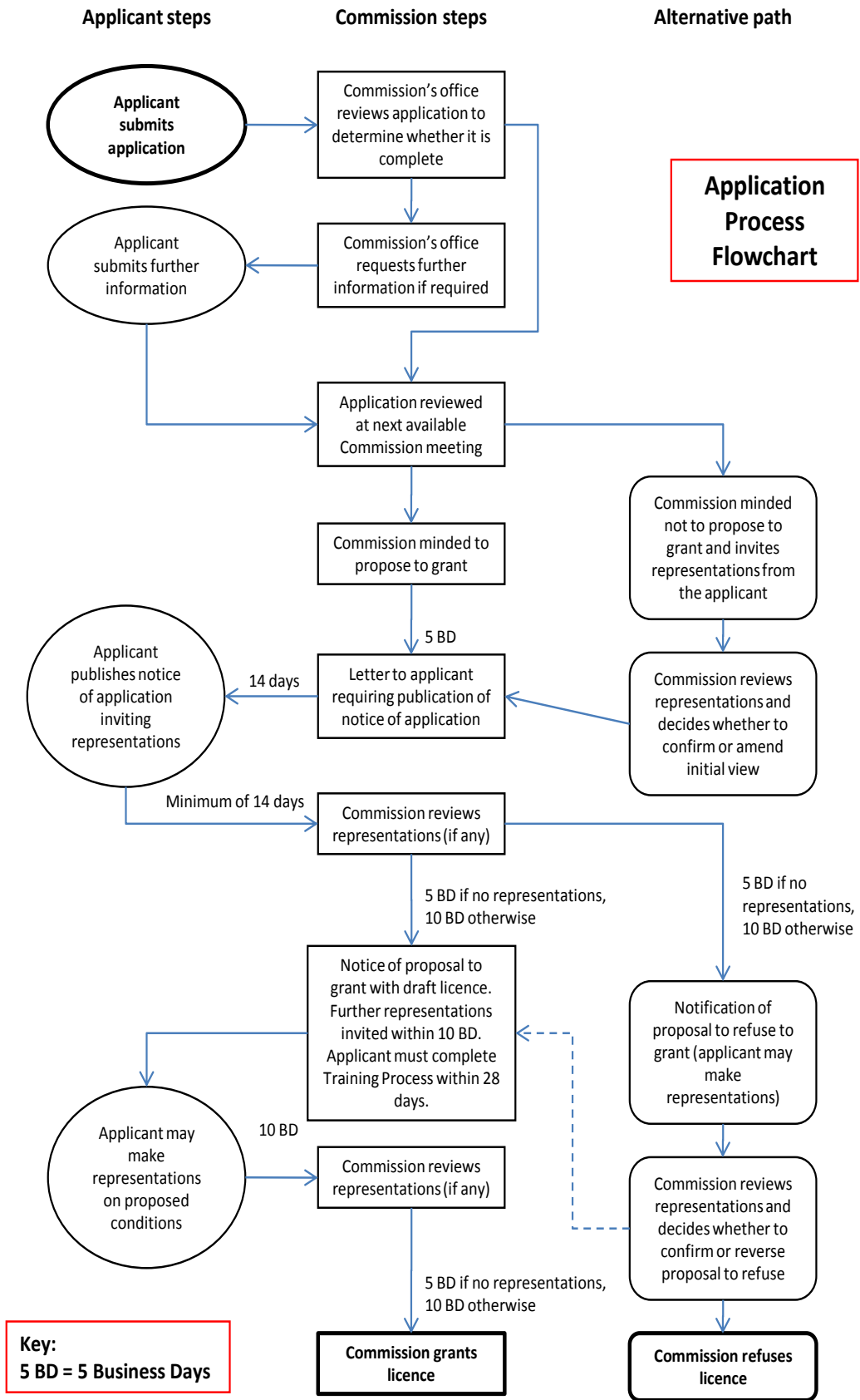
3. The application process

A transparent, orderly and accountable process

In developing the competitive retail market, we have been guided by the principle that applicants and licensed providers should have sufficient information to allow them to predict with confidence how we will operate the licensing regime.

We will process applications for all water services and sewerage services licences in a way that is consistent with the 2005 Act and the Order. The application process for water services and sewerage services licences is illustrated in the flowchart on the following page. The process was designed to ensure that it treats all applicants fairly, equally and transparently.

Please be aware that the timescales shown in the process are indicative only. The application process may, for instance, take longer if the content of an application requires to be supplemented (e.g. following a request from us for further information) or in other more complex cases (e.g. where we have received conflicting representations regarding the application).



Steps in the application process

Application timescales

In the application process set out below, we have indicated timescales for each step. Applicants should note, however, that many of the timescales are flexible and the process may take longer if, for example, we require further information or clarification or the application raises any complex issues.

We may also suspend our consideration of an application in certain circumstances: for example, if further information is required, or if, as a result of third party representations, the applicant needs to take action before we will grant a licence. In such instances, we will inform the applicant about the suspension and any action it needs to take. The application might not receive any further consideration until such action has been taken.

Pre-application

We would encourage potential applicants to discuss the licensing process and raise any queries or issues of concern with us before an application is submitted.

At this stage, applicants may also indicate if, and why, they believe it may be appropriate for us to exercise our discretion to relax or vary any of our information requirements.

We assume most applicants will wish to apply for both a water services licence and a sewerage services licence. However, it is possible to apply for one or the other. Applicants intending to apply for only one licence may wish to contact the Commission to ensure they understand the implications of this choice.

Submission and checking of application

The application must contain all of the information required by us pursuant to the Act and the Order before we will assess whether the licence(s) should be granted. We will tell the applicant as soon as possible if their submission is incomplete and invite them to provide further information.

Section 4 of this guidance provides more details regarding the information to be provided in the application and on the completion of the application form and any accompanying material, for example, the applicant's submission giving details of its relevant experience.

Section 5 of this guidance provides more details regarding the Commission's approach to assessing financial viability and the fitness of the Applicant.

Section 6 of this guidance provides further information regarding the application, including information about fees.

Initial review by the Commission

Once all the information required has been received, all applications will be reviewed by us at the next available Commission meeting. We will review the application and will determine:

1. whether the application is complete; and
2. whether, in our initial view, we are:
 - a. minded to propose to grant the applicant the licence(s), subject to representations from stakeholders; or
 - b. minded to propose to refuse the applicant the licence(s), and our reasons for reaching this initial view.

We would highlight that at this stage our view is in no way determinative. It merely indicates the Commission's initial view on the information provided with the completed application. It is intended that our communication of our initial view at this stage would enable applicants to address any concerns that may exist with their application and provide further representations accordingly.

As part of this initial review, the Commission will make an initial assessment of whether the applicant has the abilities to perform adequately the activities authorised by the licence and, in particular, will look at the applicant's:

- A. knowledge, expertise and experience; and
- B. financial acumen and business viability⁸.

Notice of application

If we are minded to propose to grant the applicant the licence(s), we will aim to write to the applicant within 5 business days of the Commission meeting confirming there is sufficient information to determine the application and that we are minded to propose to grant.

⁸ In accordance with Section 4 and 5 of this guidance, where the applicant does not have a demonstrable business track record the Commission may advise the applicant that the creation of an escrow account and the maintenance of a specific balance is a condition of any licence that may be granted following the completion of the procedure outlined below.

Our letter will also inform the applicant that it must, within 14 days of receipt of our letter, publish, in at least one national newspaper available both north and south of the border and on its website (if it has one), a notice of application for a licence.

The notice of application must invite representations from stakeholders to be submitted to us on the application. Further, the notice must state that we will only accept representations on the application during the period prescribed by the Commission. The usual period for consultation will be 14 days from the date of publication of the notice by the applicant, but this may be extended should it be considered appropriate due to the nature of the application. A copy of the form of the notice, as prescribed under the Order, will be sent with the letter.

We will ask applicants to confirm publication of their notice of application and we will confirm that publication on our own website.

Granting a licence

We will have regard to any representations received in response to the applicant's notice of application when determining the application. However, if, having received representations from stakeholders, we propose to grant the applicant the licence(s) we will publish a notice to that effect. We will aim to complete our assessment of any representations we receive within 10 business days of the closure of the representation period. If we receive no representations we will aim to publish a notice of proposal to grant within 5 business days.

The notice of proposal to grant will contain a copy of the proposed licence(s), including any proposed ordinary conditions or modifications to standard conditions that will apply for the particular applicant.

This notice will be sent to the applicant and to interested third parties, including Scottish Water and any third party who made representations to us regarding the application⁹. When we send the notice to the applicant, we will ask them to confirm whether or not there has been any material change in circumstance or information since they submitted the licence application. We will also publish the notice on our website. The notice of proposal to grant will invite representations from both the applicant and stakeholders on the proposed grant of the licence(s) and comments on the proposed ordinary conditions or applicant-specific modifications to the standard conditions.

⁹ It will also be sent to the Scottish Ministers where there is modification or exclusion of standard licence conditions

The notice of proposal to grant will usually invite representations within 10 business days of its publication. In more complex cases, a longer consultation period may be allowed. For example, where the notice proposes applicant-specific modifications to the standard licence conditions, a minimum 28-day period for the submission of representations will be provided.

As with representations received in response to the applicant's notice of application, we will have regard to any representations received in response to the notice of proposal to grant, including considering any material changes in circumstance or information since the application was submitted. We will aim to complete our assessment of any representations that we receive within a further 10 business days. If we receive no representations we will aim to grant the licence(s) within 5 business days. Accordingly, if there are no representations the period between publication of the notice of proposal to grant and the date of granting the licence(s) may be 15 business days, as shown in Figure 1.

Where a longer period has been allowed for the submission of representations, the time between publication of the notice of proposal to grant and actual granting of the licence(s) will be longer, for example, where we have proposed applicant-specific modifications to standard licence conditions.

To grant the applicant a licence(s), the Commission will require the applicant to have completed the Training Process (including self-certifying its readiness to participate in the market using the Low Volume Interface) in accordance with Section 3.3 of Market Code Subsidiary Document 0001 (Market Training and Assurance Strategy for the Water Market in Scotland).

The applicant will have a maximum of 28 days from publication of the notice of proposal to grant in which to complete the Training Process.

Where we decide to grant a licence, we will send the applicant and Scottish Water a copy of the licence as soon as practicable. Scottish Water may, within 14 days following the date the licence was sent to them, appeal to the Court of Session against the granting of the licence on a question of law¹⁰. If this occurs the licence is suspended until the appeal is withdrawn or finally determined. Under the 2005 Act

¹⁰ Paragraph 1(10) of Schedule 2 to the 2005 Act. In certain circumstances, an applicant or Scottish Water may also request the Commission to make a reference to the Competition and Markets Authority in respect of the conditions included in a licence granted under the 2005 Act (see the Water Services etc. (Scotland) Act 2005 (Consequential Provisions and Modifications) Order 2005, SI 2005/3172)

the Court of Session may either quash or uphold our decision to grant a licence. The decision of the Court is final.

Refusal to grant a licence

If, following publication of the notice of application and receipt of any representations, we propose to refuse an application we will give the applicant notice of that fact (together with our reasons) and specify the date by which the applicant can make representations to us about the proposed refusal. If we propose to refuse an application as a result of adverse representations about the application, we will include details of those representations.

We must have regard to any representations received from the applicant in response to our notice when finally determining their application.

If, following assessment of any representations, we refuse to grant a licence we must inform the applicant and Scottish Water as soon as practicable.

Where the applicant has failed to complete the Training Process within 28 days from publication of the notice of proposal to grant, the Commission may treat such failure as grounds for refusal of the application.

Under the 2005 Act, where an application has been refused the applicant may, within 14 days of the date on which refusal was intimated, appeal to the Court of Session against the refusal on a question of law. The Court of Session may either quash or uphold our decision to refuse to grant a licence. The decision of the Court is final.

4. Guidance regarding the information to be provided in an application

What needs to be submitted?

In submitting a licence application, an applicant must provide:

- a completed application form (including any additional sheets required by the applicant in order to provide complete responses); and
- the relevant fee¹¹.

Sections below describe how to complete the application form and the information that we are seeking.

Guidance for the completion of the application form

A copy of the application form is included as Appendix 2. The questions included in the form reflect the requirements outlined by Scottish Ministers in the Order.

Applicants should answer every question included on the form. Applications will not be treated as complete unless all relevant information is provided. Applicants should note that provision of the information prescribed by Scottish Ministers in the Order is mandatory – we cannot agree to any relaxation or variation in relation to such prescribed information.

Please note that any applicant who knowingly or recklessly makes a statement, in connection with an application for a licence, that is false or misleading in a material particular is guilty of an offence under the 2005 Act.

¹¹ The relevant fee for any given licence application is set out in the Form of Fees Scheme which is available on our website

The application form

A. *Application type (covering questions 1-2)*

1. Applicants should tick the box of the type of licence that they are applying for. An applicant for a specialist licence should tick the relevant box in the second column.
2. The effective-from date cannot pre-date the grant of licence.

B. *Applicant details (covering questions 3-7)*

3. Where the applicant is an individual, please indicate the contact details (home and business address, telephone number and email address) and date and place of birth of the applicant. Where the applicant is not an individual, please indicate the jurisdiction in which the applicant is established and the address of its principal place of business. In setting out the applicant's legal status, please indicate whether the applicant is, for instance, a body corporate, partnership, unincorporated association, individual or some other entity.
4. The persons concerned in the direction or management of the applicant's affairs would typically include, in the case of companies, their directors (executive and non-executive) and, in the case of partnerships, each of the partners. In addition, details of any other persons occupying senior management positions (e.g. chief executive, financial controller etc) should be provided where those individuals will be directly accountable for the licensed part of the applicant's business. If the applicant is an individual, the answer to this question should be "Not applicable" or "N/A".
5. If the applicant has no ultimate controller, the response to this question should be, "Not applicable" or "N/A".

For the purpose of the application as a whole, "ultimate controller" means a person or undertaking who, acting alone or jointly, has control of the applicant and is not itself controlled by another person or undertaking¹². Where the applicant is the member of a group of companies, for instance, details would typically be required of the parent company within that group.

¹² The expression "control" should be construed by applicants and their advisers in accordance with article 3 of Council Regulation 139/2004/EC

6. The type of restrictions we would expect to see listed in response to this question will include, for instance, any director's disqualification orders, individual or corporate insolvency, sequestration or administration proceedings. Please note that this question is not limited to restrictions imposed in Scotland.

C. Ongoing litigation/criminal convictions (covering questions 8-9)

8. Applicants should include pending and anticipated litigation, as well as ongoing litigation. Disclosure should cover not only court proceedings, but also those raised by or before any other tribunal or regulatory agency. Applicants should also indicate the jurisdiction in which each litigation has been raised. Where there is a large number of cases to disclose, e.g., in relation to routine debt collection, we are willing to consider disclosure of information on a categoric basis.
9. We do not expect applicants to submit information about minor convictions or penalties, such as routine traffic violations. If applicants are unsure about whether or not something is a 'minor' conviction or penalty, then they should raise it, on a categoric basis, with us prior to making their application. Applicants should also indicate the jurisdiction in which each sentence or penalty was imposed. Applicants should note that we regard civil penalties as including any enforcement orders issued by a court, tribunal or other regulatory agency. In some jurisdictions there is more than one alternative to a 'not-guilty' plea or conviction. For example, we understand that in the USA, it is sometimes possible for an accused to submit a 'nolo contendere' or 'no contest' plea, whereby a conviction is held against them but it is not a 'guilty' one. Applicants should raise any such convictions with us on a categoric basis.

D. Previous experience / licences (covering question 10)

10. In setting out relevant experience, applicants should list any professional qualifications or industry specific qualifications they have or that are held by the persons referred to in questions 4 or 5.

In addition to any experience in the water and sewerage industry, previous retail experience or previous experience of other regulated utilities such as electricity, gas or telecommunications will be particularly relevant.

Applicants should give details of all previous or similar applications for a licence by the applicant or any of the persons referred to in questions 4 or 5, including applications that were refused, withdrawn or otherwise unsuccessful.

Applicants should also include details of every occasion on which the applicant or any of the persons referred to in questions 4 or 5 has been involved with a relevant utility business which has been the subject of enforcement or revocation proceedings in respect of its licence or other authorisation, as well as details of any insolvency event.

E. Purpose of application / Financial information (covering questions 11-13)

11. Applicants should state the purpose of their application. In the case of a specialist licence, the applicant may wish to indicate how it plans to approach the opportunities available for itself and its customers under section 29E.
12. It is important that applicants demonstrate their financial viability including the ability to meet either the prepayment of wholesale charges and CMA charges on an ongoing basis¹³ or evidence of a sufficient alternative to prepayment such as a guarantee from a suitable guarantor¹⁴. More information about how we intend to assess financial viability is provided in part 5 of this guidance under the heading "Evidence of financial viability".

We may require additional information, which could include:

- audited accounts (and annual reports) for the applicant and for the applicant's ultimate controller; and/or
 - a formal business plan (including detailed future plans for operating the licence(s) applied for).
13. Applicants should indicate here whether they intend to prepay their wholesale charges (with or without an escrow account¹⁵) or whether they intend to use an alternative to prepayment such as a guarantee.

¹³ In some cases, we may require an applicant who is going to prepay to establish an escrow account.

¹⁴ We will require any guarantor to have a minimum investment grade credit rating as detailed in Section 5 of this guidance.

¹⁵ If applicants wish to prepay but cannot provide evidence of a demonstrable business track record the Commission may satisfy itself as to the financial viability of the applicant by requiring a clear and ongoing financial commitment to the market in the form of an escrow account to be used for the payment of monies owed to Scottish Water by the applicant. More information is provided in part 5 of this guidance under the heading "Evidence of financial viability".

F. Compliance with regulatory requirements (covering questions 14-15)

14. In order to operate successfully in the water industry in Scotland, licensees will, of course, be required to comply with all of the conditions of their licences. In addition, however, they will need to comply with the provisions of the various codes and agreements that govern the behaviour of industry participants (including their wholesale services agreement; the Operational Code; Market Code and the Disconnections Document) and with any directions issued by us under section 11 of the 2005 Act.

Explanations of how the applicant intends to comply with all of the regulatory requirements (including consideration of how it will deal with amendments and additions to existing requirements) should be included a separate annex to the application form.

15. We have determined a set of standard conditions which apply to all permanent licences granted under the 2005 Act. In the case of a specialist licence, the conditions in Part A and Part D of the standard conditions will apply. In particular, applicants should note the requirements of Part D, including the time limits which apply to the provision of services to customers for whom a section 29E departure is not in effect.

In granting a particular licence, we are entitled under the 2005 Act to exclude or modify any of the standard conditions to such extent as we consider appropriate in the circumstances of the case.

If applicants consider that we should exercise this power in the case of their application, they should set out their reasons in response to this question. In cases where we propose to make such a modification, responses to the modification will be invited for submission within 28 days from the date of publication of our proposal to grant statement.

G. Additional matters (covering questions 16-17)

16. If the applicant is supplying any additional information in response to this question, or to question 17, such other information may be included in any of the supporting documents submitted with the application form, or it may be included in extra sheets added to the completed form. Any extra sheets should be numbered and the applicant should indicate the number of extra sheets added on the application form.

Declaration

The declaration made here is a personal declaration made by the person signing the application form. Where that person is not an individual applicant for a licence (or licences), e.g. if the person signing the form is signing on behalf of his or her company, the term “enquiry of the applicant” means enquiry of the company.

Except in the case of an individual applicant, we would expect this declaration to be made by one of the persons named in response to question 4 and, preferably, by the person occupying the most senior executive position within this group.

5. Our approach to assessing the fitness of applicants

Section 7(1) of the 2005 Act states that we may only grant a water services or sewerage services licence if we are satisfied that the applicant is able to perform adequately the activities authorised by the licence. This ability is the key criterion that we will use to assess applications.

Section 7(2) of the 2005 Act stipulates that in assessing this ability we must have special regard to the applicant's:

- knowledge, expertise and experience;
- financial acumen and business viability; and
- any other matters that Scottish Ministers may specify.

How we will assess the fitness of applicants

Our first priority will be to check if the applicant has provided us with sufficient information to allow us to make a proper assessment.

Our analysis will then focus on whether the applicant satisfies the statutory test, i.e. it has the ability adequately to perform the activities authorised by the licence(s). Our initial assessment will only consider the information provided by the applicant.

If it appears that the applicant would not be able adequately to perform the licensed activities, we may ask the applicant to submit further information before re-assessing the application. If the applicant fails to provide us with such information, or fails the assessment detailed above, we may not grant a licence (or licences).

If it appears that the applicant will be able to adequately perform the activities authorised by the licence(s), we may consider information received from third parties and any other relevant information. We will then determine whether the applicant has the ability to perform adequately the licensed activities.

Evidence of financial viability

As noted above, in assessing an applicant's application we must have special regard to the applicant's knowledge, expertise and experience and its financial acumen and business viability. The main way in which these factors will be assessed will be by evaluating the applicant's financial viability including the ability either to meet the prepayment of wholesale charges and CMA charges on an ongoing basis, or provide a sufficient alternative to prepayment such as a guarantee from a suitable guarantor. Where an applicant wishes to prepay their wholesale charges we may require them

to establish an escrow agreement. Further information on when we would require such escrow arrangements is provided below.

The same test of financial viability will be applied to all applicants for licences, but the evidence required from each applicant may differ depending on their particular circumstances.

Applicants should provide evidence of either:

- (a) that they have a commercially robust capital structure (given the wholesale charge payments that they expect to meet and other ongoing operating obligations); or
- (b) that they can rely on third party financial support¹⁶.

Applicants will also be required to show that they have a demonstrable business track record¹⁷. If they cannot provide any such evidence and wish to prepay their wholesale charges, the Commission may satisfy itself as to the financial viability of the applicant by requiring a clear and ongoing financial commitment to the market in the form of an escrow account to be used for the payment of monies owed to Scottish Water by the applicant.

The template WSA published by the Commission includes suggested key terms for the escrow account, which the Commission advises the applicant and Scottish Water to use for the purposes of their negotiation. The applicant must have agreed the key terms of the escrow account with Scottish Water before the Commission will grant a licence.¹⁸

Applicants who do not wish to prepay their wholesale charges may rely on third party support in order to satisfy the Commission of their financial viability, such as a guarantee from a suitable guarantor. The Commission will require any guarantor to have a minimum investment grade credit rating. The Commission has determined that the investment grade credit rating for guarantors at this time should be an 'A' rating, but the rating will be kept under review from time to time. The Commission has not specified from which ratings company a guarantor's rating should originate

¹⁶ Where relying on third party financial support, the applicant will be required to provide a warranty that no financial support, direct or indirect, is provided by another market participant.

¹⁷ A demonstrable business track record could include showing that they have accounts filed with Companies House although the Commission may ask for further information.

¹⁸ The Commission may also make the creation of the escrow account and the maintenance of a specified balance a condition of any licence it may grant.

and the appropriate rating from any of Moody, Standard and Poor and Fitch IBCA will therefore be suitable.

The template WSA published by the Commission includes suggested key terms for any guarantee that the applicant may wish to use, which the Commission advises the applicant and Scottish Water to use for the purposes of their negotiation.

More details on the use of escrow accounts and alternatives to prepayment such as the use of a guarantee can be found on the Commission's website: www.watercommission.co.uk

Other information of relevance in assessing overall ability

In addition to evaluating the applicant's financial viability, we may also assess any other information that we receive from the applicant (e.g. audited accounts or a formal business plan), from third parties (e.g. in response to the notice of application) or that we already have in our possession.

The Commission's section 11(1) duty

Under section 11(1) of the 2005 Act we also have a duty regarding market development¹⁹. In practice, this means that before we grant a licence we must be satisfied that the grant is consistent with our section 11(1) duty. If that is not the case, we can take steps to resolve the position (for example, by issuing directions or modifying licence conditions).

We will have due regard to our section 11(1) duty as part of our assessment of each licence application.

¹⁹ Section 11(1) states that we have a duty to exercise our functions relating to water services and sewerage services licences (insofar as is consistent with our general function of promoting the interests of customers) for the purposes of securing participation of licensed providers in the provision of water services and sewerage services in an orderly manner and a manner that is not detrimental to the exercise of Scottish Water's core functions

6. Other matters

Disclosure of information

In completing an application for a licence (or licences), applicants should highlight (explaining their reasons) any information which they would not wish to be published or disclosed by us in due course. In particular, applicants should set out clearly whether, and for what length of time, they consider the information submitted to be subject to any exemptions under the Freedom of Information (Scotland) Act 2002. We will have regard to any such submissions when considering future publication or disclosure.

When deciding what information to publish or disclose during the application process, we will seek to balance the need to enable relevant parties to respond to information received from the applicant or third parties and the need to protect the commercial sensitivities of the applicant or third parties.

For example, if we receive third party representations that may influence our decision, we will aim to provide the applicant with an opportunity to respond to those representations. When we consider it necessary, we will take appropriate steps to protect commercial sensitivities.

The need for further information

In this guidance note we have endeavoured to ensure that applicants understand the processes we have designed for processing and assessing their applications for water services and/or sewerage services licences. It should be clear, however, that the application process may be an iterative one. At any stage during the process, we might need to seek clarification or further supporting information. Any such requests will usually be made where we feel it necessary to allow us to evaluate the application fairly and thoroughly, in line with our duties under the 2005 Act.

Fees

When returning the application form and ancillary documents, please remember to include a cheque for the relevant fee. We would be happy to receive payment by electronic bank transfer and can provide our bank account details on request. The level of fee is shown in the Fees Scheme which is available on our website. We may not commence our consideration of an application until we have received the relevant fee.

Guidance – self-supply licences August 2015

Guidance for completing ‘Application Form for a Water Services Licence and/or a Sewerage Services Licence’ – for self-supply licences.

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1. Introduction

This guidance for applicants is intended to provide potential applicants for a self-supply water services licence and/or a self-supply sewerage services licence with the information they need to allow them to make a complete licence application.

Applicants for general or specialist licences should refer to the separate guidance available on our website: www.watercommission.co.uk.

The guidance includes an outline of the legal framework for licence applications. It then outlines the steps involved in the application process and provides advice regarding the information to be submitted with an application, including the completion of the application form and the preparation of a business plan.

To ensure that the application process is as transparent as possible, we have also set out in this guidance our approach to assessing applications and the fitness of applicants to fulfil the activities authorised by the licences applied for.

2. The legal framework

These guidance notes, along with the application and assessment processes that have been established by the Commission, are based upon the provisions of two pieces of legislation – the Water Services etc. (Scotland) Act 2005 (“the 2005 Act”) and the Water Services and Sewerage Services Licences (Scotland) Order 2006 (“the Order”)¹.

The 2005 Act introduced the licensing framework for the water industry in Scotland. It requires that water services and sewerage services providers be licensed² and that applications for licences be made to us³. We may grant licences⁴, but must first be satisfied that applicants have the ability to perform adequately the activities authorised by the licence for which the application has been made⁵.

Under the 2005 Act all licence applications must be made in the form and manner prescribed by Scottish Ministers, and should contain such information as Scottish Ministers prescribe. Scottish Ministers prescribed the form and manner of applications and the information they must contain in the Order. Specifically, under the Order Scottish Ministers have set out:

- their requirements for the information to be submitted by applicants in their applications for licences; and
- their requirements regarding the publication of notice of an application.

Further, all applicants must provide us with such further information (including information in the form of a document) as we may reasonably require in order to determine the application.

In this guidance, we set out the application and assessment processes that we have designed in compliance with the 2005 Act and the Order, which will allow us to judge consistently, fairly and transparently whether each applicant will be able to perform adequately the licensed activities.

¹ SSI 2006/464

² Section 4(6) of the 2005 Act for water services and section 5(6) for sewerage services

³ Section 7 and Paragraph 1 of Schedule 2 to the 2005 Act

⁴ Section 6 of the 2005 Act

⁵ Section 7(1) of the 2005 Act

The self-supply licence will be available to any public or private sector entity which is prepared to take on the responsibilities of the retailer in respect of all members of its group. The self-supply arrangements could be appropriate for either single or multi-site operating customers.

For private sector bodies, if the supply is within the same corporate group it would be classed as self-supply. This means that, for example, a trade association supplying its members would not be treated as self-supply.

For public sector bodies, this criterion would not be suitable. Instead, the Commission will review each application by a public sector body on a case by case basis. For each licence granted to a public sector body, the Commission will specify the members of its group and the self-supply licensed provider will be required to take on the responsibilities of supplying all members of that group.

Self-supply licensed providers will be required to ensure they are supplying all members of their self-supply group and not supplying any customer who is not a member of their self-supply group. However, self-supply licensed providers will be able to add or remove members of their group during the term of their licence subject to the terms of Part C of the standard licence conditions.

The 2005 Act contemplates a licensed provider being legally distinct from each of its customers.⁶ Applicants should bear this in mind when preparing an application for a self-supply licence and may wish to consider arranging for a separate legal entity to hold the licence.

As a final point, all applicants should note that under the 2005 Act⁷, any applicant who makes a false or misleading statement in connection with an application is guilty of an offence and is liable for:

- on summary conviction, a fine not exceeding the statutory maximum; or
- on indictment, a fine.

⁶ Section 6(1)(a)(i) of the 2005 Act.

⁷ Paragraph 1(7) of Schedule 2 to the 2005 Act

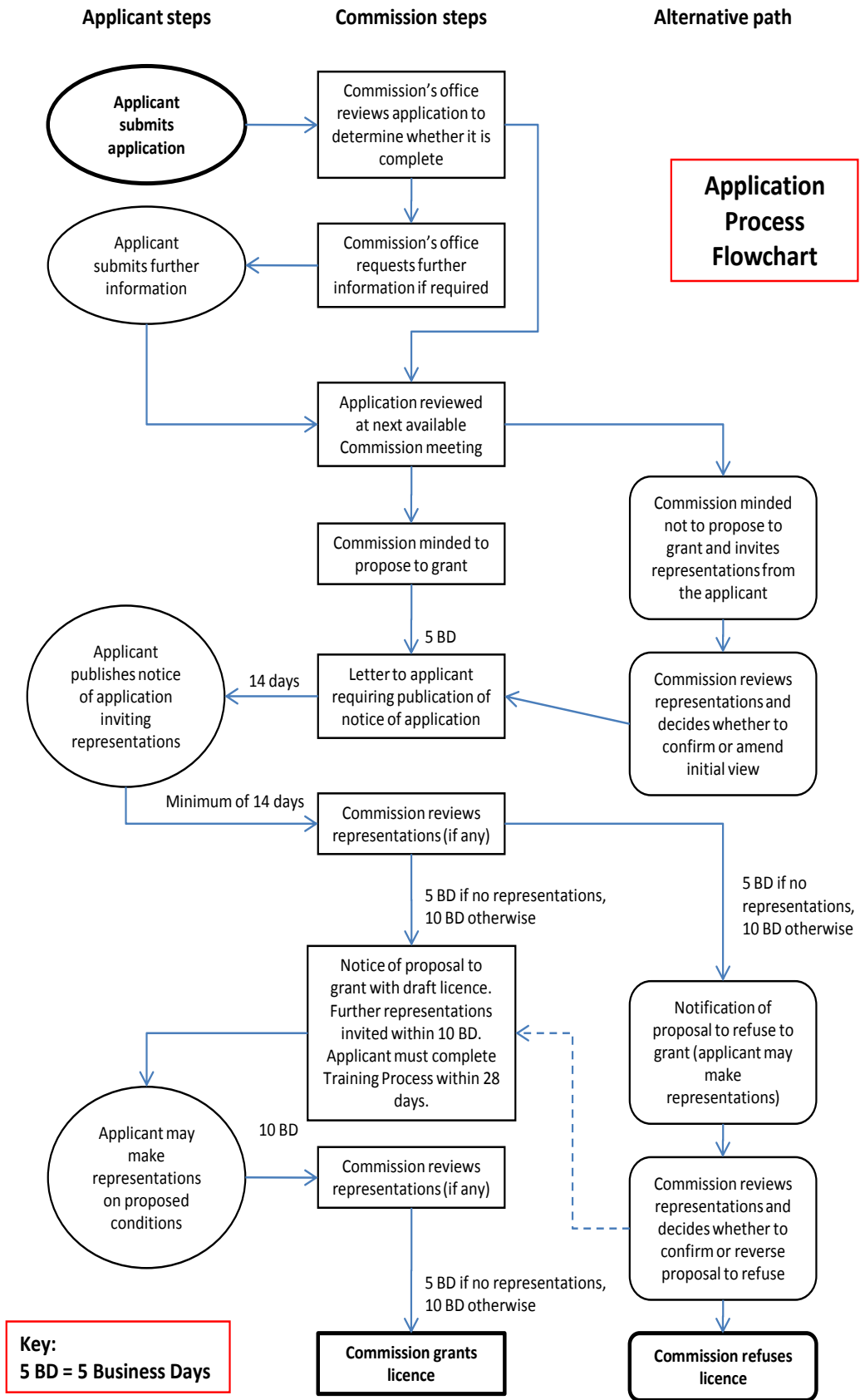
3. The application process

A transparent, orderly and accountable process

In developing the competitive retail market, we have been guided by the principle that applicants and licensed providers should have sufficient information to allow them to predict with confidence how we will operate the licensing regime.

We will process applications for all water services and sewerage services licences in a way that is consistent with the 2005 Act and the Order. The application process for water services and sewerage services licences is illustrated in the flowchart on the following page. The process was designed to ensure that it treats all applicants fairly, equally and transparently.

Please be aware that the timescales shown in the process are indicative only. The application process may, for instance, take longer if the content of an application requires to be supplemented (e.g. following a request from us for further information) or in other more complex cases (e.g. where we have received conflicting representations regarding the application).



Steps in the application process

Application timescales

In the application process set out below, we have indicated timescales for each step. Applicants should note, however, that many of the timescales are flexible and the process may take longer if, for example, we require further information or clarification or the application raises any complex issues.

We may also suspend our consideration of an application in certain circumstances: for example, if further information is required, or if, as a result of third party representations, the applicant needs to take action before we will grant a licence. In such instances, we will inform the applicant about the suspension and any action it needs to take. The application might not receive any further consideration until such action has been taken.

Pre-application

We would encourage potential applicants to discuss the licensing process and raise any queries or issues of concern with us before an application is submitted.

At this stage, applicants may also indicate if, and why, they believe it may be appropriate for us to exercise our discretion to relax or vary any of our information requirements. Public sector applicants for a self-supply licence may also wish to discuss the membership of their proposed self-supply group with us at this point.

We assume most applicants will wish to apply for both a water services licence and a sewerage services licence. However, it is possible to apply for one or the other. Applicants intending to apply for only one licence may wish to contact the Commission to ensure they understand the implications of this choice.

Submission and checking of application

The application must contain all of the information required by us pursuant to the Act and the Order before we will assess whether the licence(s) should be granted. We will tell the applicant as soon as possible if their submission is incomplete and invite them to provide further information.

Section 4 of this guidance provides more details regarding the information to be provided in the application and on the completion of the application form and any accompanying material, for example, the applicant's submission giving details of its relevant experience.

Section 5 of this guidance provides more details regarding the Commission's approach to assessing financial viability and the fitness of the Applicant.

Section 6 of this guidance provides further information regarding the application, including information about fees.

Where a public sector body applies for a self-supply licence, we would expect the application to propose what the membership of its self-supply group should be.

Initial review by the Commission

Once all the information required has been received, all applications will be reviewed by us at the next available Commission meeting. We will review the application and will determine:

1. whether the application is complete; and
2. whether, in our initial view, we are:
 - a. minded to propose to grant the applicant the licence(s), subject to representations from stakeholders; or
 - b. minded to propose to refuse the applicant the licence(s), and our reasons for reaching this initial view.

At this stage, we would express our view of what the appropriate membership of the applicant's self-supply group should be.

We would highlight that at this stage our view is in no way determinative. It merely indicates the Commission's initial view on the information provided with the completed application. It is intended that our communication of our initial view at this stage would enable applicants to address any concerns that may exist with their application and provide further representations accordingly.

As part of this initial review, the Commission will make an initial assessment of whether the applicant has the abilities to perform adequately the activities authorised by the licence and, in particular, will look at the applicant's:

- A. knowledge, expertise and experience; and
- B. financial acumen and business viability⁸.

⁸ In accordance with Section 4 and 5 of this guidance, where the applicant does not have a demonstrable business track record the Commission may advise the applicant that the creation of an escrow account and the maintenance of a specific balance is a condition of any licence that may be granted following the completion of the procedure outlined below.

Notice of application

If we are minded to propose to grant the applicant the licence(s), we will aim to write to the applicant within 5 business days of the Commission meeting confirming there is sufficient information to determine the application and that we are minded to propose to grant.

Our letter will also inform the applicant that it must, within 14 days of receipt of our letter, publish, in at least one national newspaper available both north and south of the border and on its website (if it has one), a notice of application for a licence.

The notice of application must invite representations from stakeholders to be submitted to us on the application. Further, the notice must state that we will only accept representations on the application during the period prescribed by the Commission. The usual period for consultation will be 14 days from the date of publication of the notice by the applicant, but this may be extended should it be considered appropriate due to the nature of the application. A copy of the form of the notice, as prescribed under the Order, will be sent with the letter.

We will ask applicants to confirm publication of their notice of application and we will confirm that publication on our own website.

Granting a licence

We will have regard to any representations received in response to the applicant's notice of application when determining the application. However, if, having received representations from stakeholders, we propose to grant the applicant the licence(s) we will publish a notice to that effect. We will aim to complete our assessment of any representations we receive within 10 business days of the closure of the representation period. If we receive no representations we will aim to publish a notice of proposal to grant within 5 business days.

The notice of proposal to grant will contain a copy of the proposed licence(s), including any proposed ordinary conditions or modifications to standard conditions that will apply for the particular applicant. We will publish a draft direction specifying the membership of the applicant's self-supply group.

This notice and draft direction (if applicable) will be sent to the applicant and to interested third parties, including Scottish Water and any third party who made representations to us regarding the application⁹. When we send the notice to the

⁹ It will also be sent to the Scottish Ministers where there is modification or exclusion of standard licence conditions

applicant, we will ask them to confirm whether or not there has been any material change in circumstance or information since they submitted the licence application. We will also publish the notice and draft direction on our website. The notice of proposal to grant will invite representations from both the applicant and stakeholders on the proposed grant of the licence(s), the proposed self-supply group and any ordinary conditions or applicant-specific modifications to the standard conditions.

The notice of proposal to grant will usually invite representations within 10 business days of its publication. In more complex cases, a longer consultation period may be allowed. For example, where the notice proposes applicant-specific modifications to the standard licence conditions, a minimum 28-day period for the submission of representations will be provided.

As with representations received in response to the applicant's notice of application, we will have regard to any representations received in response to the notice of proposal to grant, including considering any material changes in circumstance or information since the application was submitted. We will aim to complete our assessment of any representations that we receive within a further 10 business days. If we receive no representations we will aim to grant the licence(s) within 5 business days. Accordingly, if there are no representations the period between publication of the notice of proposal to grant and the date of granting the licence(s) may be 15 business days, as shown in Figure 1.

Where a longer period has been allowed for the submission of representations, the time between publication of the notice of proposal to grant and actual granting of the licence(s) will be longer, for example, where we have proposed applicant-specific modifications to standard licence conditions.

To grant the applicant a licence(s), the Commission will require the applicant to have completed the Training Process (including self-certifying its readiness to participate in the market using the Low Volume Interface) in accordance with Section 3.3 of Market Code Subsidiary Document 0001 (Market Training and Assurance Strategy for the Water Market in Scotland).

The applicant will have a maximum of 28 days from publication of the notice of proposal to grant in which to complete the Training Process.

Where we decide to grant a licence, we will send the applicant and Scottish Water a copy of the licence as soon as practicable. We will issue a direction simultaneously specifying the membership of the self-supply group.

Scottish Water may, within 14 days following the date the licence was sent to them, appeal to the Court of Session against the granting of the licence on a question of law¹⁰. If this occurs the licence is suspended until the appeal is withdrawn or finally determined. Under the 2005 Act the Court of Session may either quash or uphold our decision to grant a licence. The decision of the Court is final.

Refusal to grant a licence

If, following publication of the notice of application and receipt of any representations, we propose to refuse an application we will give the applicant notice of that fact (together with our reasons) and specify the date by which the applicant can make representations to us about the proposed refusal. If we propose to refuse an application as a result of adverse representations about the application, we will include details of those representations.

We must have regard to any representations received from the applicant in response to our notice when finally determining their application.

If, following assessment of any representations, we refuse to grant a licence we must inform the applicant and Scottish Water as soon as practicable.

Where the applicant has failed to complete the Training Process within 28 days from publication of the notice of proposal to grant, the Commission may treat such failure as grounds for refusal of the application.

Under the 2005 Act, where an application has been refused the applicant may, within 14 days of the date on which refusal was intimated, appeal to the Court of Session against the refusal on a question of law. The Court of Session may either quash or uphold our decision to refuse to grant a licence. The decision of the Court is final.

¹⁰ Paragraph 1(10) of Schedule 2 to the 2005 Act. In certain circumstances, an applicant or Scottish Water may also request the Commission to make a reference to the Competition and Markets Authority in respect of the conditions included in a licence granted under the 2005 Act (see the Water Services etc. (Scotland) Act 2005 (Consequential Provisions and Modifications) Order 2005, SI 2005/3172)

4. Guidance regarding the information to be provided in an application

What needs to be submitted?

In submitting a licence application, an applicant must provide:

- a completed application form (including any additional sheets required by the applicant in order to provide complete responses); and
- the relevant fee¹¹.

Sections below describe how to complete the application form and the information that we are seeking.

Guidance for the completion of the application form

A copy of the application form is included as Appendix 2. The questions included in the form reflect the requirements outlined by Scottish Ministers in the Order.

Applicants should answer every question included on the form. Applications will not be treated as complete unless all relevant information is provided. Applicants should note that provision of the information prescribed by Scottish Ministers in the Order is mandatory – we cannot agree to any relaxation or variation in relation to such prescribed information.

Please note that any applicant who knowingly or recklessly makes a statement, in connection with an application for a licence, that is false or misleading in a material particular is guilty of an offence under the 2005 Act.

¹¹ The relevant fee for any given licence application is set out in the Form of Fees Scheme which is available on our website

The application form

A. *Application type (covering questions 1-2)*

1. Applicants should tick the box of the type of licence that they are applying for. An applicant for a self-supply licence should tick the relevant box in the third column.
2. The effective-from date cannot pre-date the grant of licence.

B. *Applicant details (covering questions 3-7)*

3. Where the applicant is an individual, please indicate the contact details (home and business address, telephone number and email address) and date and place of birth of the applicant. Where the applicant is not an individual, please indicate the jurisdiction in which the applicant is established and the address of its principal place of business. In setting out the applicant's legal status, please indicate whether the applicant is, for instance, a body corporate, partnership, unincorporated association, individual or some other entity.
4. The persons concerned in the direction or management of the applicant's affairs would typically include, in the case of companies, their directors (executive and non-executive) and, in the case of partnerships, each of the partners. In addition, details of any other persons occupying senior management positions (e.g. chief executive, financial controller etc) should be provided where those individuals will be directly accountable for the licensed part of the applicant's business. If the applicant is an individual, the answer to this question should be "Not applicable" or "N/A".
5. If the applicant has no ultimate controller, the response to this question should be, "Not applicable" or "N/A".

For the purpose of the application as a whole, "ultimate controller" means a person or undertaking who, acting alone or jointly, has control of the applicant and is not itself controlled by another person or undertaking¹². Where the applicant is the member of a group of companies, for instance, details would typically be required of the parent company within that group.

¹² The expression "control" should be construed by applicants and their advisers in accordance with article 3 of Council Regulation 139/2004/EC

6. The type of restrictions we would expect to see listed in response to this question will include, for instance, any director's disqualification orders, individual or corporate insolvency, sequestration or administration proceedings. Please note that this question is not limited to restrictions imposed in Scotland.

C. Ongoing litigation/criminal convictions (covering questions 8-9)

8. Applicants should include pending and anticipated litigation, as well as ongoing litigation. Disclosure should cover not only court proceedings, but also those raised by or before any other tribunal or regulatory agency. Applicants should also indicate the jurisdiction in which each litigation has been raised. Where there is a large number of cases to disclose, e.g., in relation to routine debt collection, we are willing to consider disclosure of information on a categoric basis.
9. We do not expect applicants to submit information about minor convictions or penalties, such as routine traffic violations. If applicants are unsure about whether or not something is a 'minor' conviction or penalty, then they should raise it, on a categoric basis, with us prior to making their application. Applicants should also indicate the jurisdiction in which each sentence or penalty was imposed. Applicants should note that we regard civil penalties as including any enforcement orders issued by a court, tribunal or other regulatory agency. In some jurisdictions there is more than one alternative to a 'not-guilty' plea or conviction. For example, we understand that in the USA, it is sometimes possible for an accused to submit a 'nolo contendere' or 'no contest' plea, whereby a conviction is held against them but it is not a 'guilty' one. Applicants should raise any such convictions with us on a categoric basis.

D. Previous experience / licences (covering question 10)

10. In setting out relevant experience, applicants should list any professional qualifications or industry specific qualifications they have or that are held by the persons referred to in questions 4 or 5.

In addition to any experience in the water and sewerage industry, previous retail experience or previous experience of other regulated utilities such as electricity, gas or telecommunications will be particularly relevant.

Applicants should give details of all previous or similar applications for a licence by the applicant or any of the persons referred to in questions 4 or 5, including applications that were refused, withdrawn or otherwise unsuccessful.

Applicants should also include details of every occasion on which the applicant or any of the persons referred to in questions 4 or 5 has been involved with a relevant utility business which has been the subject of enforcement or revocation proceedings in respect of its licence or other authorisation, as well as details of any insolvency event.

E. Purpose of application / Financial information (covering questions 11-13)

11. Applicants should state the purpose of their application. In the case of a self-supply licence, the applicant should describe its self-supply group in its answer to this question. In the case of a private sector applicant, this would be the applicant's corporate group, as mentioned above. Public sector applicants should propose the self-supply group that they wish to supply.
12. It is important that applicants demonstrate their financial viability including the ability to meet either the prepayment of wholesale charges and CMA charges on an ongoing basis¹³ or evidence of a sufficient alternative to prepayment such as a guarantee from a suitable guarantor¹⁴. More information about how we intend to assess financial viability is provided in part 5 of this guidance under the heading "Evidence of financial viability".

We may require additional information, which could include:

- audited accounts (and annual reports) for the applicant and for the applicant's ultimate controller, and/or
 - a formal business plan (including detailed future plans for operating the licence(s) applied for).
13. Applicants should indicate here whether they intend to prepay their wholesale charges (with or without an escrow account¹⁵) or whether they intend to use an alternative to prepayment such as a guarantee.

¹³ In some cases, we may require an applicant who is going to prepay to establish an escrow account.

¹⁴ We will require any guarantor to have a minimum investment grade credit rating as detailed in Section 5 of this guidance.

¹⁵ If applicants wish to prepay but cannot provide evidence of a demonstrable business track record the Commission may satisfy itself as to the financial viability of the applicant by requiring a clear and ongoing financial commitment to the market in the form of an escrow account to be used for the payment of monies owed to Scottish Water by the applicant. More information is provided in part 5 of this guidance under the heading "Evidence of financial viability".

F. Compliance with regulatory requirements (covering questions 14-15)

14. In order to operate successfully in the water industry in Scotland, licensees will, of course, be required to comply with all of the conditions of their licences. In addition, however, they will need to comply with the provisions of the various codes and agreements that govern the behaviour of industry participants (including their wholesale services agreement; the Operational Code; Market Code and the Disconnections Document) and with any directions issued by us under section 11 of the 2005 Act.

Explanations of how the applicant intends to comply with all of the regulatory requirements (including consideration of how it will deal with amendments and additions to existing requirements) should be included a separate annex to the application form.

15. We have determined a set of standard conditions which apply to all permanent licences granted under the 2005 Act. In the case of a self-supply licence, the conditions in Part A and Part C of the standard conditions will apply. In particular, applicants should note the requirements in Part C including the time limits that apply when members join or leave the self-supply group.

In granting a particular licence, we are entitled under the 2005 Act to exclude or modify any of the standard conditions to such extent as we consider appropriate in the circumstances of the case.

If applicants consider that we should exercise this power in the case of their application, they should set out their reasons in response to this question. In cases where we propose to make such a modification, responses to the modification will be invited for submission within 28 days from the date of publication of our proposal to grant statement.

G. Additional matters (covering questions 16-17)

16. If the applicant is supplying any additional information in response to this question, or to question 17, such other information may be included in any of the supporting documents submitted with the application form, or it may be included in extra sheets added to the completed form. Any extra sheets should be numbered and the applicant should indicate the number of extra sheets added on the application form.

Declaration

The declaration made here is a personal declaration made by the person signing the application form. Where that person is not an individual applicant for a licence (or licences), e.g. if the person signing the form is signing on behalf of his or her company, the term “enquiry of the applicant” means enquiry of the company.

Except in the case of an individual applicant, we would expect this declaration to be made by one of the persons named in response to question 4 and, preferably, by the person occupying the most senior executive position within this group.

5. Our approach to assessing the fitness of applicants

Section 7(1) of the 2005 Act states that we may only grant a water services or sewerage services licence if we are satisfied that the applicant is able to perform adequately the activities authorised by the licence. This ability is the key criterion that we will use to assess applications.

Section 7(2) of the 2005 Act stipulates that in assessing this ability we must have special regard to the applicant's:

- knowledge, expertise and experience;
- financial acumen and business viability; and
- any other matters that Scottish Ministers may specify.

How we will assess the fitness of applicants

Our first priority will be to check if the applicant has provided us with sufficient information to allow us to make a proper assessment.

Our analysis will then focus on whether the applicant satisfies the statutory test, i.e. it has the ability adequately to perform the activities authorised by the licence(s). Our initial assessment will only consider the information provided by the applicant.

If it appears that the applicant would not be able adequately to perform the licensed activities, we may ask the applicant to submit further information before re-assessing the application. If the applicant fails to provide us with such information, or fails the assessment detailed above, we may not grant a licence (or licences).

If it appears that the applicant will be able to adequately perform the activities authorised by the licence(s), we may consider information received from third parties and any other relevant information. We will then determine whether the applicant has the ability to perform adequately the licensed activities.

Evidence of financial viability

As noted above, in assessing an applicant's application we must have special regard to the applicant's knowledge, expertise and experience and its financial acumen and business viability. The main way in which these factors will be assessed will be by evaluating the applicant's financial viability including the ability either to meet the prepayment of wholesale charges and CMA charges on an ongoing basis, or provide a sufficient alternative to prepayment such as a guarantee from a suitable guarantor. Where an applicant wishes to prepay their wholesale charges we may require them

to establish an escrow agreement. Further information on when we would require such escrow arrangements is provided below.

The same test of financial viability will be applied to all applicants for licences, but the evidence required from each applicant may differ depending on their particular circumstances.

Applicants should provide evidence of either :

- (a) that they have a commercially robust capital structure (given the -wholesale charge payments that they expect to meet and other ongoing operating obligations); or
- (b) that they can rely on third party financial support¹⁶.

Applicants will also be required to show that they have a demonstrable business track record¹⁷. If they cannot provide any such evidence and wish to prepay their wholesale charges, the Commission may satisfy itself as to the financial viability of the applicant by requiring a clear and ongoing financial commitment to the market in the form of an escrow account to be used for the payment of monies owed to Scottish Water by the applicant.

The template WSA published by the Commission includes suggested key terms for the escrow account, which the Commission advises the applicant and Scottish Water to use for the purposes of their negotiation. The applicant must have agreed the key terms of the escrow account with Scottish Water before the Commission will grant a licence¹⁸.

Applicants who do not wish to prepay their wholesale charges may rely on third party support in order to satisfy the Commission of their financial viability, such as a guarantee from a suitable guarantor. The Commission will require any guarantor to have a minimum investment grade credit rating. The Commission has determined that the investment grade credit rating for guarantors at this time should be an 'A' rating, but the rating will be kept under review from time to time. The Commission has not specified from which ratings company a guarantor's rating should originate

¹⁶ Where relying on third party financial support, the applicant will be required to provide a warranty that no financial support, direct or indirect, is provided by another market participant.

¹⁷ A demonstrable business track record could include showing that they have accounts filed with Companies House although the Commission may ask for further information.

¹⁸ The Commission may also make the creation of the escrow account and the maintenance of a specified balance a condition of any licence it may grant.

and the appropriate rating from any of Moody, Standard and Poor and Fitch IBCA will therefore be suitable.

The template WSA published by the Commission includes suggested key terms for any guarantee that the applicant may wish to use, which the Commission advises the applicant and Scottish Water to use for the purposes of their negotiation.

More details on the use of escrow accounts and alternatives to prepayment such as the use of a guarantee can be found on the Commission's website: www.watercommission.co.uk

Other information of relevance in assessing overall ability

In addition to evaluating the applicant's financial viability, we may also assess any other information that we receive from the applicant (e.g. audited accounts or a formal business plan), from third parties (e.g. in response to the notice of application) or that we already have in our possession.

The Commission's section 11(1) duty

Under section 11(1) of the 2005 Act we also have a duty regarding market development¹⁹. In practice, this means that before we grant a licence we must be satisfied that the grant is consistent with our section 11(1) duty. If that is not the case, we can take steps to resolve the position (for example, by issuing directions or modifying licence conditions).

We will have due regard to our section 11(1) duty as part of our assessment of each licence application.

¹⁹ Section 11(1) states that we have a duty to exercise our functions relating to water services and sewerage services licences (insofar as is consistent with our general function of promoting the interests of customers) for the purposes of securing participation of licensed providers in the provision of water services and sewerage services in an orderly manner and a manner that is not detrimental to the exercise of Scottish Water's core functions

6. Other matters

Disclosure of information

In completing an application for a licence (or licences), applicants should highlight (explaining their reasons) any information which they would not wish to be published or disclosed by us in due course. In particular, applicants should set out clearly whether, and for what length of time, they consider the information submitted to be subject to any exemptions under the Freedom of Information (Scotland) Act 2002. We will have regard to any such submissions when considering future publication or disclosure.

When deciding what information to publish or disclose during the application process, we will seek to balance the need to enable relevant parties to respond to information received from the applicant or third parties and the need to protect the commercial sensitivities of the applicant or third parties.

For example, if we receive third party representations that may influence our decision, we will aim to provide the applicant with an opportunity to respond to those representations. When we consider it necessary, we will take appropriate steps to protect commercial sensitivities.

The need for further information

In this guidance note we have endeavoured to ensure that applicants understand the processes we have designed for processing and assessing their applications for water services and/or sewerage services licences. It should be clear, however, that the application process may be an iterative one. At any stage during the process, we might need to seek clarification or further supporting information. Any such requests will usually be made where we feel it necessary to allow us to evaluate the application fairly and thoroughly, in line with our duties under the 2005 Act.

Fees

When returning the application form and ancillary documents, please remember to include a cheque for the relevant fee. We would be happy to receive payment by electronic bank transfer and can provide our bank account details on request. The level of fee is shown in the Fees Scheme which is available on our website. We may not commence our consideration of an application until we have received the relevant fee.