
An appeal under section 173 Energy Act 2004

UTILITA ELECTRICITY LIMITED

– and –

GEMA

**Decision of the Competition Commission on
Permission to Appeal**

GEMA's decision

1. On 23 March 2006 the Gas and Electricity Markets Authority (“GEMA”) published its decision “Balancing and Settlement Code (BSC) Modification Proposal P194 “Revised Derivation of the Main Energy Imbalance Price”—Decision and Direction” (“the Decision”).
2. In the Decision, GEMA directed that Balancing and Settlement Code Modification Proposal P194, raised by National Grid Electricity Transmission on 26 August 2005, should be implemented.

The application

3. Under paragraph 1(3) of Schedule 22 to the Energy Act 2004 (“the Act”) an application for permission to appeal against the Decision has to be made within 15 working days following the earliest day on which the Decision was published. Pursuant to paragraph 1(8) of Schedule 22, the Competition Commission’s (“the Commission”) decision on an application for permission to appeal must be made before the end of 10 working days following the day on which it received the application.
4. On 13 April 2006 Utilita Electricity Limited (“Utilita”) returned to the Commission a form ECM001. Form ECM001 is the form on which the Commission expects applications for permission to appeal under section 173 of the Act to be made.

The formal requirements of an application for permission

5. Under paragraph 1(4) of Schedule 22, an application for permission must be accompanied by all such information as may be required by the Commission's Energy Code Modification Rules ("the Rules"). Rule 4 sets out the necessary contents of an application for permission. The most important requirements of Rule 4 for present purposes are these:
 - (a) Rule 4.1.5 provides that an application for permission to appeal must include "a statement of those interests of the applicant that it believes are materially affected by the decision, or a statement explaining why the applicant believes it is to be regarded as a body or association whose functions include the representation of persons whose interests are materially affected in respect of such interests";
 - (b) Rule 4.1.7 provides that the application must include "the applicant's statement of case, stating the grounds of appeal and the facts and reasons relied upon, together with a clear and concise summary of that statement of case";
 - (c) Rule 4.2 provides that "The applicant should lodge with the Commission any written evidence that it wishes to adduce in support of the appeal when it makes its application for permission to appeal";
 - (d) Rule 4.4 provides that "At the time that it makes its application for permission to appeal the applicant must send: (a) a copy of the application for permission; (b) a copy of any written evidence; and (c) a copy of any further application to GEMA and to such other persons as appear to the applicant to be affected by the decision". The requirements as to service are derived from paragraphs 1(6) and (7) of Schedule 22 which provide that the applicant for permission to appeal must send GEMA a copy of its application and such other information as may be required by the Rules, as well as sending a copy of that application and information to such persons other than GEMA as appear to the applicant to be affected by the decision appealed against.

6. The Commission has provided notes to the Rules to assist applicants to understand the Commission's requirements. In the note on rule 4 the Commission states that "this rule ... indicate[s] that the Commission expects parties to bring forward their case at the outset" before going on to record that "paragraph 7 of Schedule 22 enables the Commission to disregard matters not so brought forward in certain circumstances".

The test for standing to bring an appeal and the basis on which the Commission may refuse permission

7. Under section 173 of the Act at sub-section (3) it is provided that "an appeal against a decision may be brought under this section only by—(a) a person whose interests are materially affected by it; or (b) a body or association whose functions are or include representing persons in respect of interests of theirs that are so affected". Section 173(5) provides that the Commission may refuse permission "only on one of the following grounds—(a) that the appeal is brought for reasons that are trivial or vexatious; (b) that the appeal has no reasonable prospect of success".

8. At paragraph 2.23 of the Commission's "Guide to Appeals in Energy Code Modification Cases" ("the Guide") the Commission has stated that "the Commission will apply the grounds on which it grants permission rigorously. This is in keeping with the

thoroughness of the process culminating in GEMA's decision, with the Code Modification process generally, and with the Government's intention to create "a tightly constrained right of appeal".

The issues on which the Commission must now make decisions

9. The issues that now arise for the Commission are these:

- (a) does the form ECM001 returned to the Commission by Utilita constitute an application for permission?
- (b) does Utilita have standing to bring an appeal? and
- (c) should the Commission grant permission to appeal?

Has an application been served, and does it disclose an appeal that has no reasonable prospect of success?

- 10. The form ECM001 returned to the Commission by Utilita is incomplete in a number of ways. The most important deficiencies are, first, that it fails to set out a comprehensive statement of case. In particular, although the form does identify several grounds of appeal, and provides some limited argument in support of those grounds of appeal, it does not set out all the facts and reasons that would need to be relied upon if those arguments are not to be without a reasonable prospect of success. Further, Utilita has not filed any evidence in support of the matters raised in its statement of case although it appears that Utilita considers such evidence necessary and the arguments made in support of the grounds of appeal appear to require substantiation by evidence.
- 11. Secondly, Utilita omitted to serve its form ECM001 on either GEMA, or indeed any other person affected by the decision, as required by Schedule 22 and by the Rules. This omission was subsequently remedied.
- 12. The incomplete nature of the application for permission has raised serious doubts as to whether an application for permission can be said to have been made at all, and raises the question whether the appeal disclosed in the application has "no reasonable prospect of success".

Does Utilita have standing to bring an appeal?

- 13. In its form ECM001 Utilita relied on the facts that it is a party to the Balancing and Settlement Code ("BSC") and a trading party under the BSC to demonstrate standing by virtue of Utilita's being a person "whose interests are materially affected" by the Decision. On 24 April 2006 GEMA lodged with the Commission its Acknowledgement of Receipt of Utilita's application for permission. At paragraph 13 of that Acknowledgment GEMA stated that it believes that Utilita has disposed of its entire customer base of approximately 4,500 customers. Further, GEMA states that Utilita has informed GEMA that it is in the process of [X]. Consequently, GEMA states that Utilita no longer has any, or any substantive, interest in the market to which the BSC relates. Thus the Decision cannot have any material effect on Utilita's interests, and Utilita has no standing to appeal.
- 14. GEMA has raised a clear question of fact as to Utilita's standing to bring an appeal as a person "whose interests are materially affected" by the Decision.

The Commission's decision and directions for the further conduct of the appeal

15. The consequence of the serious shortcomings in the form ECM001 returned to the Commission by Utilita, in relation to the absence of a full statement of case and the issue of fact as to Utilita's standing, together with the lack of evidence to support Utilita's statement of case or claim to have standing to bring an appeal, is that the Commission cannot give Utilita unconditional permission to appeal. Consequently, the Commission grants Utilita permission to appeal subject to the satisfaction of the following two conditions by 4.00pm on Thursday 4 May 2006.
16. First, Utilita must submit a further form ECM001 with a comprehensive statement of case setting out in detail all the facts and reasons upon which Utilita relies in support of the grounds of application and the arguments advanced in the form ECM001 filed with the Commission on 13 April 2006. The statement of case must enable the Commission to conclude that it cannot be said the appeal has no reasonable prospect of success. Utilita must supply all the supporting evidence that it wishes to be considered in the appeal by the same time.
17. Secondly, Utilita's form ECM001 should show why Utilita is materially affected by GEMA's decision, together with any necessary supporting evidence.
18. Utilita must comply with the requirements of the Act and the Rules in relation to the formalities for and service of the re-submitted application for permission and other material.
19. If this material is not provided in the prescribed form, and if the requisite formalities, including service in accordance with the Rules, are not met by 4:00pm on Thursday 4 May 2006 the Commission will withdraw its conditional permission and there will be no further steps in the appeal. If, upon receipt and evaluation of the material, the Commission is not satisfied that the two conditions have been met the conditional permission will similarly be withdrawn and there will be no further steps in the appeal.
20. If necessary, a hearing may be convened for the purpose of assisting the Commission to decide whether or not Utilita has complied with these conditions, and whether, if it does comply, permission should be granted.
21. The Commission recognises that the period of time allowed to Utilita to re-submit its form ECM001 is short. However, in view of the fixed statutory timetable and the deadline for GEMA's reply of 9 May 2006 it is important that Utilita should file and serve its revised form ECM001 on 4 May 2006 to allow GEMA to respond when it files and serves its reply on 9 May 2006. The Commission recognises that this timetable does not allow GEMA much time to respond to such further material as Utilita may produce. In the event that GEMA is prejudiced by the late submission of material it may apply to the Commission for permission to amend its reply.

Other matters

22. Utilita should note that the evidence on which it wishes to rely should be presented in accordance with the Rules and in particular with Rule 17. Further guidance is to be found in the Guide at paragraphs 3.36 *et seq.* Pro forma witness statements and exhibits may be found on the Commission's website.
23. The Commission has considered whether the first ground of appeal in Utilita's form ECM001 discloses a ground of appeal that is appropriate to a code modification appeal

rather than to a judicial review. The Commission has decided not to take any decision on this point pending its final decision on permission.

24. The Commission envisages that should the appeal proceed a case management conference involving all the parties will be held on 19 May 2006.

Christopher Clarke

Authorised member of the Commission