

Competition Commission: Guide to appeals in Energy Code Modification Cases

**Competition Commission
January 2005**

Introduction

“We have provided for a tightly constrained right of appeal to prevent trivial and vexatious appeals, and a tightly defined process to ensure a swift outcome.”

Lord Whitty, House of Lords, Hansard 11 December 2003, Column 834

The Competition Commission’s appeal jurisdiction under section 173 of the Energy Act 2004 (the Act) represents a significant development in accountability in the regulation of gas and electricity markets. The Commission has published procedural rules, the Energy Code Modification Rules, to govern these appeals. The publication of this guide is intended to complement those rules and to assist parties concerned in appeals, and their advisers, to understand the procedural framework of the new appeals.

In normal cases, the Commission must determine an appeal within 12 weeks of GEMA making the decision subject to appeal. This is a short period of time. The Commission’s tasks, and the tasks of the parties, are made easier by the procedural framework in this guide. The framework is flexible, and will be adapted in the interests of common sense and good practice.

In every case the Commission will expect a high degree of cooperation from the parties. The Commission expects parties and their advisers to present the technical issues in dispute with particular clarity. As part of that presentation of technical issues parties are also expected to make every effort to agree a glossary of the technical terms relevant to the appeal.

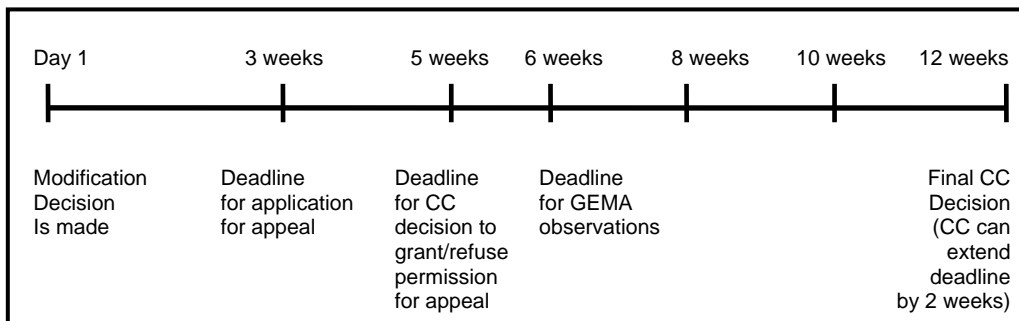
The Commission’s understanding of the procedural requirements of the section 173 jurisdiction will no doubt develop. This guide will be revised periodically in the light of experience. Parties who wish to make suggestions as to how the Commission’s procedure might develop should write to the appeal administrator after the conclusion of their appeal.

Paul Geroski
Chairman
Competition Commission
January 2005

1. The scheme of this guide

- 1.1 The Act and the Rules contain the procedural provisions subject to which appeals will be conducted. Not every provision of the Act relevant to appeal procedure, and not every Rule, will be applied in every case. This guide explains the procedural framework that the Commission envisages will be followed in most appeals. Parties who follow this guide will normally be assisting the Commission to meet the overriding objective of Rule 2.2. Conduct that does not further the overriding objective may be reflected in the Commission’s award of costs.
- 1.2 This guide is divided into four parts. Part 2 contains general observations about appeals. In Part 3, there is further guidance about the mechanism for each appeal. Part 4 gives guidance on *inter partes* costs.
- 1.3 The timetable that will apply in most cases appears below.

Timeline



Where this guide refers to ‘the 30-day period’, it is a reference to the 30 working day period allowed to the Commission in which to determine the appeal. The 30-day period starts on the first working day after the period allowed to GEMA to submit its reply.

1.4 In this guide:

- the Act means the Energy Act 2004;
- the Commission means the Competition Commission;
- day means working day;
- GEMA means the Gas and Electricity Markets Authority;
- intervention notice means a notice under Rule 8;
- reply means a reply under Rule 7;
- the Rules mean the Energy Code Modification Rules from time to time in force;
- Schedule 22 means Schedule 22 to the Act;
- sensitive information means either commercial information the disclosure of which would, or might, significantly harm the legitimate business interests of an undertaking to which it relates, or information

relating to the private affairs of an individual the disclosure of which would, or might significantly harm the interests of that individual.

2. General observations on appeals under section 173

Approach to appeals

- 2.1 The Commission's jurisdiction under section 173 is designed to provide a quick and effective appeal mechanism. In keeping with this approach, the Commission has provided in Rule 2.4 that it will proceed by way of a review of the decision appealed.
- 2.2 The Commission will not consider afresh the modification proposed with a view to deciding whether it would have reached the same decision as GEMA, had the Commission and not GEMA had to decide whether to allow the modification. Rather, the Commission will decide whether the appellant has shown that GEMA reached the wrong decision on one or more of the grounds provided in section 175(4).¹ In keeping with this approach, the Commission does not expect the issues raised in the appeal to be significantly different from those that GEMA had to consider before it made its decision. In most cases the Commission does not expect to be invited to consider evidence substantially different from that before GEMA.
- 2.3 However, the Commission recognizes that the appeal will be the first occasion on which a dispute between the appellant and GEMA has crystallized and falls to be formally determined, and this will be taken into account by the Commission in its management of the case and in the exercise of its powers under the Act.

Timetable

- 2.4 In most appeals the Commission will have only 30 working days from the submission of GEMA's reply in which to determine the appeal. The Commission will issue a provisional timetable for the convenience of the parties and potential members as soon as it receives an appeal. It will confirm that timetable if and when it has granted permission to appeal.
- 2.5 The Commission envisages that there will normally be at least one case management conference and two hearings within the 30-day period. Because of the short period of time available, and in order to assist the Commission and the parties to plan the conduct of the appeal, hearings will normally be held at the same stage of each appeal. The Commission will aim to hold a case management conference on day 8 of the 30-day period. Further case management conferences will be convened as necessary. The first hearing, the clarification hearing, will be held on day 12 and if necessary day 13, and the second hearing, the final hearing, on day 21 and if necessary day 22. Where the 30-day period includes the Christmas or Easter periods, special arrangements will be made.
- 2.6 Once the timetable has been issued, it will only exceptionally be the case that the Commission will depart from it. Parties and their advisers should therefore check their availability on the notified dates at an early stage. The Commission will not normally consider that the unavailability of advisers or of counsel is a reason to depart from these dates.

¹The Competition Commission may allow the appeal only if it satisfied that the decision appealed against was wrong on one or more of the following grounds—(a) that GEMA failed properly to have regard to the matters mentioned in subsection (2); (b) that GEMA failed properly to have regard to the purposes for which the relevant condition has effect; (c) that GEMA failed to give the appropriate weight to one or more of those matters or purposes; (d) that the decision was based, wholly or partly, on an error of fact; (e) that the decision was wrong in law.'

Case management conferences

- 2.7 The purpose of a case management conference is to consider how the appeal should be managed. In preparation for a case management conference the Commission will provide the parties with an agenda, and inform them of the issues in advance. At the case management conference the Commission will discuss the issues in the appeal, and the requirements of the Commission, with the parties. The Commission will give directions as necessary. Where possible, the Commission expects that parties will seek to agree any direction to be made at, or any other action to be taken in consequence of, a case management conference.
- 2.8 One of the issues that the Commission expects to deal with in case management is the non-disclosure of sensitive information. Parties should note that although the Commission will be sympathetic to such requests, it expects parties seeking non-disclosure to be realistic and to tailor their non-disclosure requests to the recipient of the information. The Commission also expects parties to agree a basis for ensuring that those who will not see sensitive information are not thereby prejudiced. This will normally be through the use of confidentiality rings.²
- 2.9 The Commission expects that parties will be able to cooperate promptly to produce bundles, chronologies, glossaries, issues lists and case memoranda where any or all of these are necessary.

Further procedural matters

- 2.10 The Commission will seek to narrow the issues and points in dispute during the course of the appeal. The case management conferences and the clarification hearings are part of this process. The Commission may also give an interim evaluation of any ground of appeal at an early stage in the proceedings, for example after the clarification hearing.
- 2.11 Clarification and final hearings will be formal and open to the public. Where sensitive information is the subject of a submission, the hearing room will be cleared temporarily. If necessary, closed hearing will be arranged.
- 2.12 The Commission will normally give its decision on the appeal on day 28. Orders relating to costs may be made on the day on which the Commission gives its decision, or later.

Administrative matters

- 2.13 Within the Commission the administration of each appeal will be the responsibility of a designated appeal administrator. It is important that there is close liaison between parties, their advisers, and the Commission through the appeal administrator. Prior to making an application for permission to appeal, the applicant should contact [] at the Commission. The applicant will be given a reference number for the appeal and contact details for the appeal administrator.

²A confidentiality ring is an arrangement under which sensitive information is made available to, for example, the legal advisers of a party. The legal advisers are therefore able to prepare and present their client's case, but are obliged not to pass the sensitive information to their clients.

Permission

- 2.14 Although the time available to an applicant to produce its permission application is short, the Commission considers that it is sufficient to produce a well-presented and selective application.
- 2.15 The Commission has ten working days in which to decide whether to grant permission to appeal. It will normally make a decision on permission without a hearing. Where a hearing is necessary, notice of that hearing may be given to GEMA.
- 2.16 It is likely that notice will be given to GEMA where there may be a dispute about the Commission's jurisdiction, for example in circumstances where GEMA has indicated in its decision that the modification is excluded from the Commission's jurisdiction by order of the Secretary of State.
- 2.17 If a person wishes to intervene in the process by which an application for permission to appeal is made, for example to dispute the Commission's jurisdiction in relation to a decision, it should lodge an acknowledgement of service and make an application under Rule 15 for permission to intervene in the permission application.
- 2.18 Where an appeal lies against a decision of GEMA, and an application for permission to appeal is brought by a person with standing, the Commission may refuse permission if the appeal is brought for reasons that are trivial or vexatious, or if the appeal has no reasonable prospect of success.
- 2.19 The Commission will apply the grounds on which it grants permission rigorously. This is in keeping with the thoroughness of the process by which GEMA has reached its decision, and of the code modification process generally, and with the Government's intention to create 'a tightly constrained right of appeal'.
- 2.20 Although the Commission may allow an amendment to an application for permission to appeal under Rule 9, the Commission will not allow Rule 9 to be used to circumvent the time limit by which an application for permission to appeal must be made. The Commission has power under paragraph 7 of Schedule 22 to disregard matters not contained in the application for permission to appeal, reply or intervention notice.

Other matters

- 2.21 Rule 15 provides for other applications to be made to the Commission in respect of existing appeals. Because the proceedings are appellate, the Commission does not expect there to be numerous applications in any case. Rule 14 provides for suspension applications, pursuant to paragraph 3 of Schedule 22. The Commission will direct the procedure to be followed in suspension applications on a case by case basis.
- 2.22 The Commission may appoint Counsel to assist it with any appeal. Should it do so, the advice received will not be disclosed to the parties.

3. The appeal procedure in detail

Commencing an appeal

- 3.1 Every appeal will begin with an application for permission to appeal.
- 3.2 An application for permission should be headed with the Commission's reference number for the appeal and then a heading in the form:

An appeal under section 173 Energy Act 2004

AA
– and –
GEMA

Any reply should have the same reference number and heading. An intervention notice should also display the Commission's reference number and should be headed

An appeal under section 173 Energy Act 2004

AA
[BB intervening]
– and –
GEMA
[DD intervening]

- 3.3 The application for permission must be served by the applicant, in accordance with paragraph 1 of Schedule 22 and with Rule 4.
- 3.4 The statement of case (and any statement in reply or statement of intervention) should bear the same reference number and heading. The description of the document should be inserted below the heading. The document should be set out in consecutively numbered paragraphs and paginated.
- 3.5 Each statement of case (and any statement in reply or statement of intervention) should be accompanied by a summary. The summary should be in a form suitable for publication on the Commission web site. It should not exceed four pages in length. It should include cross-references to the relevant statement of case, reply or intervention.
- 3.6 The appellant should provide to the Commission a provisional glossary and chronology as part of an application for permission—see paragraphs 3.15 and 3.16.
- 3.7 The Commission accepts documents sent electronically. Any person wishing to send documents to the Commission electronically should contact the appeal administrator. The Commission is normally able to arrange encryption facilities for the exchange of confidential material.

- 3.8 The Commission has no power to extend the period of time within which an application is to be made. The Commission will, by prior arrangement with the appeal administrator, accept delivery of an application for permission at any time up to midnight on the last day in which it can be made. An applicant wishing to deliver documents to the Commission outside normal office hours (after 6.30 pm or before 7.00 am) should liaise with the appeal administrator to ensure delivery.
- 3.9 Each person who receives a copy of the application for permission should file an acknowledgement of service. An example of an acknowledgement of service, and of other appeal documents [to be listed in due course], can be found on the Commission web site at www.competition-commission.org.uk.

Responses

- 3.10 If GEMA wishes to make observations or representations pursuant to paragraph 4 of Schedule 22, it should submit a reply under Rule 6. If GEMA wishes to rely on its decision alone, it should submit a reply to this effect.
- 3.11 Any reply must be served by GEMA in accordance with paragraph 4 of Schedule 22 and Rule 6. Each person who receives a copy of the reply should file an acknowledgement of service.

Interventions

- 3.12 A person considering whether to intervene will assist the Commission by advising it at the earliest opportunity that it is considering whether to intervene. This is particularly important where the intervener requires the permission of the Commission to serve an intervention notice.
- 3.13 An intervention notice must be served by the intervener in accordance with paragraph 2 of Schedule 22 and Rule 7. Each person who receives a copy of an intervention notice should file an acknowledgement of service.

Amendments

- 3.14 An application for permission to appeal, a reply or an intervention notice may be amended with the permission of the Commission. A party seeking permission to amend should normally seek consent of the other parties to the amendment. The amended document should show the original and the amended text. Where the amendments are extensive, a clear copy of the document should also be produced.

Other documentation

- 3.15 The Commission expects the parties to provide it with a coherent explanation of the technical issues relevant to the appeal. As part of this explanation, the Commission should be provided with a glossary of technical terms.
- 3.16 The Commission will also expect to see a chronology of the modification proposal from inception to GEMA's decision. The purpose of the chronology is to provide the Commission and the parties with a single reference point from which to understand the development of the code modification proposal up to the point at which GEMA decided whether to approve it or not. The chronology should be uncontroversial and should be agreed if possible. Where there is disagreement between the parties about

an event, or description of it, that should be stated and the competing versions concisely set out.

- 3.17 The purpose of a glossary of technical terms is to provide the Commission and the parties with a single reference point. The glossary should therefore be agreed if possible, and should as far as possible be consistent with the usage of technical terms by GEMA and others prior to GEMA's decision. Where there is disagreement between the parties about the use of a term, that disagreement should be stated and the competing understandings set out concisely.

Case management

- 3.18 All appeals will be subject to active case management by the Commission. The Commission expects the parties to be represented at case management conferences and pre-hearing reviews.
- 3.19 As part of the management of the appeal, the Commission expects the parties to:
- 3.19.1 produce a case memorandum, a list of issues and, in cases with significant amounts of paper, a core bundle. These should be produced either by the time fixed for the first case management conference or as directed by the Commission;
 - 3.19.2 update and revise the case memorandum, list of issues and core bundle on a running basis during the appeal; and
 - 3.19.3 produce and disclose interim statements of costs.
- 3.20 The case memorandum should be a concise and uncontroversial description of the case, including a brief and uncontroversial summary of the procedural history of the case.
- 3.21 The appellant is responsible for producing and maintaining the case memorandum.
- 3.22 The parties must produce an agreed list of the important issues in the case, including issues of fact and law. The issues list should contain cross-references to GEMA's decision and the statements of case, reply or intervention. The issues list should also include a statement of those matters that are common ground between the parties.
- 3.23 Where it is necessary to produce a core bundle, it should contain (a) the decision appealed; (b) the statement of case, and any statement in reply or intervention statement; (c) the written evidence, other than evidence which is relevant only to the permission stage of the appeal; (d) the case memorandum; (e) the list of issues; and (f) the directions given in the appeal.
- 3.24 If the core bundle is updated or revised, it should be delivered to the Commission at least two days before the next hearing. It is for the appellant to revise and update the core bundle as the appeal proceeds.
- 3.25 Parties should produce drafts of the directions they seek. In due course, the Commission may produce standard directions.
- 3.26 Where the Commission directs an act to be done by a certain date without specifying a time, it is to be done by 5.30 pm on that day.

Applications under Rule 15

- 3.27 Applications other than permissions to appeal or suspension applications are made under Rule 15, for example applications at case management conferences for directions under Rule 10. Such applications are served by the applicant, and not by the Commission.
- 3.28 Although Rule 15 contains no stipulations for evidence, the Commission may be unable to decide the application without evidence. If that is likely to be the case, and if the necessary evidence has not already been lodged with the Commission, the applicant should lodge a witness statement and serve it with the application.
- 3.29 Where an applicant believes that a hearing will be required, it should request one in its application form and state the reasons for this request.
- 3.30 Where a hearing is necessary, the hearing of an application under Rule 15 will normally be heard in public.

Interim evaluation

- 3.31 After the clarification hearing and where the appellant and GEMA so request, the Commission may at the request of the appellant and GEMA give an interim evaluation of some or all of the issues in the appeal.
- 3.32 The Commission will provide an interim evaluation only when it appears that to do so is likely to assist in the determination of the appeal.
- 3.33 An interim evaluation will not be a fully reasoned provisional finding. It will not bind the Commission as to its final decision.

Witness statements

- 3.34 Rule 16 stipulates that evidence used in the appeal will normally be written evidence. Although the Act and the Rules make provision for oral evidence and cross-examination, the Commission expects that these provisions will be used very rarely if ever. Rule 17 requires written evidence to be in the form of a witness statement. A witness statement should be in the witness's own words and should contain only matters to which the witness could speak if cross-examined.
- 3.35 Witness statements should:
- 3.35.1 be headed with the title of the appeal and the reference number;
 - 3.35.2 be clearly marked at the top right-hand corner with the name of the party on whose behalf the witness statement is made, the initials and surname of the witness, the number of the statement in relation to that witness, the identifying initials and number of each exhibit referred to and the date the statement was made;
 - 3.35.3 state the full name of the witness and his or her residence;
 - 3.35.4 state his or her place of residence or, if the statement is made in a professional, business or other occupational capacity, the address at which he or she works or the position held and the name of the firm or employer;

- 3.35.5 state the occupation of the witness;
- 3.35.6 state the relationship of the witness to the party on whose behalf the evidence is given;
- 3.35.7 be paginated.
- 3.36 In a witness statement, the witness must indicate which of the statements are made from his or her own knowledge, and which are matters of information or belief. In relation to matters of information or belief, the witness should state the source of that information or belief.
- 3.37 A witness statement should be as concise as the circumstances allow. It should not contain long quotations from documents. Documents used in conjunction with a witness statement should be verified and identified by the witness and placed in an exhibit separate from the witness statement. The location of the document in the exhibit should be made obvious in the witness statement.
- 3.38 Where the witness refers in a witness statement to correspondence, the letters should be collected together and exhibited in chronological order with the earliest at the top.
- 3.39 Photocopies may be used instead of original documents provided the originals are available for inspection by the other parties and by the Commission if necessary.
- 3.40 Where an exhibit contains more than one document, the front page should list the documents contained in the exhibit and should give the date of each document. The exhibit should be paginated.
- 3.41 Witness statements and exhibits should be fully legible. Witness statements should be typed on one side of the paper only and should be divided into numbered paragraphs.
- 3.42 Documents within the core bundle should be repaginated in the bottom right-hand corner. However, the original pagination should not be deleted. The files in which the core bundle is presented should be numbered and named.

Expert evidence

- 3.43 Parties to an appeal may be permitted to rely on expert evidence. The Commission will apply the same rules to determine the admissibility of expert evidence that are applied to any other evidence.
- 3.44 The Commission expects parties to ensure that expert witnesses provide assistance to the Commission by way of their objective opinion in relation to matters within their expertise.
- 3.45 Expert witnesses should consider all material relevant to their expertise. Their evidence should clearly state the limits of their expertise. Where an expert considers that he or she has been provided with insufficient material to form a proper conclusion or view on any point, the evidence of the expert must indicate where that is the case, and what further material the expert needs to see in order to form a conclusion or view.

- 3.46 If, after seeing the submissions or evidence of any other party to the appeal, an expert witness wishes to change his or her view, that change should be communicated to the Commission and to the parties without delay.
- 3.47 Expert witnesses should expect the Commission to raise in writing issues arising out of their evidence. The Commission will expect prompt responses on the issues raised.
- 3.48 Where in an appeal there is conflicting expert evidence, the Commission may direct that the experts should meet. The purpose of such a meeting will be to discuss the issues, and to decide, as a consequence, whether they can agree on any of the issues otherwise in dispute.
- 3.49 The discussions at an expert meeting are private and, save to the extent they result either in the experts agreeing that some issues are no longer in dispute, or in one of the experts wishing to change his or her evidence, they are not to be referred to the Commission.
- 3.50 Parties and their advisers are not to attend an expert meeting without the permission of the Commission. Neither parties nor their advisers should put pressure on expert witnesses not to amend their position as a consequence of an expert witness meeting.
- 3.51 If after an expert meeting the experts wish to change their view on any point, the parties are not bound by the change of view of their expert.

Skeleton arguments

- 3.52 Prior to a hearing, the Commission may ask the representative of any party to produce a skeleton argument. A skeleton argument should be delivered to the Commission and to the other parties to the appeal by midday on the working day before a hearing. The Commission will expect a skeleton argument where the appeal raises a point of law and points of law are to be dealt with at the next hearing.
- 3.53 The purpose of the skeleton argument is to identify for the parties and the Commission those points which are, and which are not, in issue at a hearing and the nature of the argument in relation to the points in issue.
- 3.54 The skeleton should state concisely the background facts relevant to the particular issues and points, identify relevant submissions of fact with reference to the evidence, and identify propositions of law involved with reference to authority.

Hearings

- 3.55 Parties will be directed as to the issues on which the Commission wishes to hear their submissions, and the length of time that will be allowed them to make these submissions, normally before a hearing. The Commission will indicate the order in which it wishes to hear the parties. The Commission expects that parties will normally be represented by one spokesperson or advocate only at each hearing, and that the same spokesperson or advocate will appear at each hearing. However, subject to prior agreement with the Commission, they may be represented by more than one person and the Commission will be sympathetic to such arrangements to facilitate the clear presentation of technical issues. At hearings parties may present their submissions using, for example, a Powerpoint presentation if they consider that

would assist the Commission. Parties who wish to employ technology during their submissions should make prior arrangements with the Commission.

- 3.56 Hearings will normally begin at 10.00 am. There will be a break between 1.00 pm and 2.00 pm. The day's proceedings will normally end at 5.00 pm. At the start of a hearing, the appellant and GEMA will normally be invited to make a short opening statement of no more than 20 minutes' duration. Interveners will not normally be invited to make an opening statement. Parties will then make submissions as invited, and answer questions from members of the Commission. At the end of a hearing the appellant and GEMA will be invited to make a short closing statement. There will normally be no written closing statement.
- 3.57 A transcript will be taken of all hearings. Parties who wish to use a different transcription service to that used by the Commission should liaise with the appeal administrator.
- 3.58 At the end of the final hearing the Commission will usually reserve its decision. Where it does, the Commission will fix a date, normally day 28 of the 30-day period, on which it will give its decision, either orally or in writing.
- 3.59 Where a written decision will be given, a draft of the decision will normally be provided to the parties and their advisers the day before the decision is to be given.
- 3.60 The parties or their advisers should inform the Commission of typographical and similar errors as soon as possible.
- 3.61 Where the Commission discloses a draft in advance of giving a decision, the substance of the draft decision is confidential to the Commission and the parties may not disclose it or any part of it.
- 3.62 The Commission's draft decision is not its final decision, and distribution of a decision in draft does not bind the Commission.
- 3.63 Copies of the Commission's decision will be made available and will be published on the Commission web site.

4. Costs

- 4.1 In Rule 22 the Commission states that it will normally order an unsuccessful party to pay the costs of the successful party, but may make a different order. Factors influencing the Commission's decision include the conduct of the parties, a party's degree of success, and the proportionality of the costs claimed having regard to the matters in issue and the resources of all the parties.
- 4.2 Where the Commission makes an order for costs in favour of one or more of the parties, the costs recoverable may include all those fees, charges, disbursements, expenses and remuneration incurred by a party in the preparation and conduct of the appeal. However, the Commission will not normally allow any amount in respect of costs incurred before GEMA first published its decision.
- 4.3 At the first case management conference or on day 8 of the 30-day period, whichever is earlier, each party should file an interim statement of costs and its prediction of the costs it will incur in the appeal in future. At the final hearing each party should file a second interim statement. Each party should file a final statement of costs the day before that on which the Commission gives its decision. Each statement of costs should be disclosed to any party to the appeal who may become liable to pay those costs.
- 4.4 All interveners should file an interim statement of costs and a prediction of their future costs no later than day 8 of the 30-day period or two days after their intervention is permitted, if later.
- 4.5 Each statement of costs should state:
- 4.5.1 the amount to be claimed in solicitor's costs by reference to:
 - 4.5.3.1 the number of hours claimed;
 - 4.5.3.2 the hourly rate claimed;
 - 4.5.3.3 the seniority of the solicitor or other fee earner;
 - 4.5.3.4 the nature of the work performed, broken down by category including attendances on client, attendances on counsel, attendance at the Commission, the preparation of documents served on the Commission, contact with the Commission and contact with other parties to the appeal;
 - 4.5.2 the amount claimed in respect of disbursements other than counsel's fees;
 - 4.5.3 counsel's fee for:
 - 4.5.3.1 hearings;
 - 4.5.3.2 other matters.
- 4.6 Each statement of costs should be signed by the party or its legal adviser.
- 4.7 The Commission may make an order for costs at the time that it gives its decision. However, the Commission may choose to reserve its position on costs and make a subsequent written order.