

**Association of Electricity Producers // Gas Forum
Energy Networks Association // Energy Retail Association**

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Dear Susan

ENERGY ACT APPEALS: YOUR TWO CONSULTATIONS

The attached paper responds to two Competition Commission consultations on (1) the 'Rules for the conduct and disposal of appeals in energy code modification cases', and (2) the 'Guide to appeals in energy code modification cases'. It has been prepared for and on behalf of all the members of the four trade associations named above and should therefore be taken to represent the considered views of all categories of licence holder in the energy industry on a collective basis.

As you will see from the response, while we do raise a number of issues where the draft Rules lack clarity or appear to fail fully to deal with all of the circumstances that may arise during an appeal, we are broadly content with the approach adopted by the Commission and we very much welcome the overall transparency which the Rules and the Guide, taken together, provide with regard to the process that the Commission will follow and the actions that appellants will need to take.

We continue to be concerned, as we have made clear repeatedly to the DTI, that the very demanding timeframe for the conduct and disposal of energy code cases is unrealistic and may be insufficiently robust to protect the interests of all the parties concerned. This is not the fault of the Commission, which, in framing the Rules, has necessarily reflected the effects of the statutory requirements. But, to give only one example of the difficulties that flow from these, it could be argued that having to lodge a statement of claim incorporating all of the issues from the outset is an unreasonably high hurdle for applicants to clear.

We are also somewhat concerned that your consultation on the draft Rules seems to pre-judge the outcome of the DTI's continuing consultation on the appeals order to be made under section 173 of the Energy Act 2004. This is because the Commission seems to assume that only the BSC, CUSC, and Transco's Network Code will be designated by the Secretary of State for the purposes of appeals against Ofgem's modification decisions. However, we have argued strongly to the DTI that the appeals order should include at least the Master Registration

Agreement (in electricity) and the Supply Point Administration Agreement (in gas) in addition to the three major industry codes which are generally expected to be included and on which the Commission's attention has been focused.

Thank you for providing us with an opportunity to comment. We have copied this submission to the DTI and Ofgem.

Yours sincerely

Roger Barnard

Chairman

Consultation Response Review Group

Energy Act Appeals in Energy Code
Modification Cases: Energy Industry's Response to
Competition Commission Consultations

1. Introduction

- 1.1** This is a response to two consultations by the Competition Commission about (i) the 'Rules for the conduct and disposal of appeals in energy code modification cases' ('the Rules'), and (ii) the 'Guide to appeals in energy code modification cases' ('the Guide').
- 1.2** This response is submitted jointly on behalf of the Energy Networks Association, the Energy Retail Association, the Association of Electricity Producers, and the Gas Forum. The member companies of all four bodies had the opportunity to see and comment on this response in draft, and the paper that is here submitted to the Commission reflects their views.
- 1.3** By associating themselves with this response, the members of each such organisation are not, however, precluded from submitting further comments to the Commission on their own behalf.

2. Summary

- 2.1** We welcome the overriding objective of the Rules as drafted – 'to enable the Commission to dispose of appeals fairly and efficiently within the time periods prescribed by the [Energy] Act' – as a reasonable statement of what their purpose should be.
- 2.2** Inevitably, we are concerned that the time within which appeals must be brought and disposed of is very short, and therefore that the management of appeals will be extremely challenging for all concerned. There is a degree of tension between the fairness of the process and the time available for its completion, and it is not clear that the application of the Rules in practice will prove to be capable of protecting all parties' interests.
- 2.3** However, we recognise that the Commission has very little latitude in respect of the statutory timetable and, with that in mind, we believe that the Rules as a whole reflect a reasonable attempt to define a fair process, given the constraints of timing. We acknowledge, therefore, that the draft Rules are broadly in line with their overriding objective.
- 2.4** We also welcome the general clarity that the Rules and the Guide together give as to the process that the Commission will follow and the actions that appellants will need to take.

2.5 However, we believe that there are a number of areas in which the draft Rules lack clarity or fail fully to deal with the circumstances that may arise during an appeal. In one case, we also believe that the Rules as drafted are too restrictive and will unduly limit the Commission's ability to consider relevant evidence.

2.6 We outline these concerns below. In brief, they are:

- (a) the lack of clarity as to the process at the initial permission stage;
- (b) the lack of clarity in relation to certain rules of evidence, and the limitation on the ability to introduce new evidence;
- (c) the incompleteness in the treatment of the conditions that may be attached to a permission; and
- (d) the scope for further development of the provisions for cases which are not defended or from which one of the parties may subsequently wish to withdraw.

3. The Permission Stage

3.1 Section 173(5) of the Energy Act 2004 ('the Act') describes two circumstances in which the Commission may refuse permission to appeal. They are: (a) where the appeal is frivolous or vexatious, and (b) where it has no reasonable prospect of success.

3.2 It appears, however, that the Commission has concluded, from the logic of the statutory framework for appeals, that it must determine two additional matters: (c) whether it has jurisdiction to hear the appeal, and (d) whether the applicant has standing to bring an appeal.

3.3 Accordingly, these latter two decisions are reflected in the required content of the application for permission (see Rules 4.1.5 and 4.1.6). Moreover, the determination mentioned at (c) – but not that at (d), even though it has the potential to give rise to disputed issues of fact – is referred to under the heading of 'Permission' in the Guide as an issue about which GEMA may be given notice (paragraph 2.16). It is unclear, however, when and how either decision will be made.

3.4 Are these decisions to be treated as aspects of the decision whether or not to give permission to appeal, as the Guide implies at least in the case of (c)? They appear rather to be distinct from the two grounds on which permission may be withheld, as set out in the Act. It might be considered that they are preliminary questions, since they go to the matter of whether the applicant had any right to seek permission in the first place.

3.5 These are important issues, and we believe that both the Rules and the Guide, in their current draft form, do not deal with them adequately.

3.6 To remedy this, the Rules should either:

(a) reflect the fact that issues of jurisdiction and standing are preliminary questions, distinct from the matter of ‘permission’ as it is defined in the Act (in which case, there may be significant implications for timeframe and process); or

(b) if issues of jurisdiction and standing are to be dealt with under the general heading of ‘Permission’, make it absolutely clear that these are discrete questions to be determined as such by the Commission in addition to the matters made explicit in the Act.

3.7 In our view, it should also be made clear from the Guide that, as a matter of practice, there will normally be a hearing to establish the facts where the Commission has any doubt as to the applicant’s standing to appeal.

4. Evidence

4.1 The treatment of evidence, and the circumstances in which that evidence may or may not be adduced, is probably the single most important issue with which the Rules are concerned. However, we do not believe that they have sufficient clarity to guide parties in relation to the process for the admission of evidence.

4.2 In part, this is because the principles underlying the Commission’s role in relation to proceedings are expressed in terms that will be confusing to many parties. This is most obvious in the note to draft Rule 10, which states that proceedings will be adversarial rather than investigatory, but that the Commission may adopt a role which is ‘interventionist’ and has the power to adopt lines of enquiry and appoint experts.

4.3 At best, these distinctions appear over-subtle, and in any event they are not clearly reflected in the content of the draft Rules themselves.

4.4 For example, the ability of the Commission to call for any evidence that it wishes to be presented in any form that it wishes (Rule 16.1), and for it to control the issues to be addressed at any hearing (Rule 18.3), has the hallmark of an investigatory process. On the other hand, the Commission’s ability to exclude evidence that would otherwise be admissible (Rule 16.4) is contrary to all the general principles of adversarial processes. On both counts, what the Rules currently provide for seems to be inconsistent with the Commission’s claims about the nature of its own proceedings.

- 4.5** The latter provision, Rule 16.4, is particularly problematic on two grounds:
- (a)** It does not work in drafting terms. Rule 16.4 refers to the Commission using ‘its powers under this rule’ to exclude evidence. In fact, Rule 16 contains no power to exclude evidence. Rule 16.1 relates to evidence that the Commission calls for itself. Rule 16.2 says that certain evidence may not be relied on in an appeal without the permission of the Commission. And Rule 16.3 gives the Commission the power to admit evidence that would not otherwise be admissible. But none of these is a power to exclude evidence as such. If Rule 16.4 intends to create such a power, it should do so.
 - (b)** As a matter of policy, the rules of admissibility should be clear and should be adhered to. When a party is deciding whether or not to appeal, it will do so on the basis of advice as to the strength of its case, and this in turn will rely on the evidence that can be adduced. To deprive a party in the course of the appeal of the right to rely on evidence that it had properly expected to be admissible is unfair to that party, and can only lead to wasted costs in pursuing (and defending) appeals that might never have been brought had it been known that the evidence would be excluded.
- 4.6** For the reason just suggested, clear principles of admissibility should be written into the Rules. In the current draft, they appear to be lacking. Rule 16.2 implies, for instance, that evidence lodged in accordance with the Rules – presumably as part and parcel of the application (Rule 4.2) or the reply (Rule 6.3) – is admissible and that only additional evidence requires permission. But Rule 16.3 implies that evidence that was not adduced to GEMA at the time that it made its decision is not admissible – presumably even at the time of the application – without special permission.
- 4.7** On a related question, the Guide (paragraph 3.43) states that parties ‘may be’ permitted to rely on expert evidence and that the Commission will determine that question by having regard to its general rules of admissibility. But nowhere in the Rules is it clear that parties need permission to rely on expert evidence. So any applicant for permission to appeal would naturally submit that evidence with its application on the expectation that, under Rule 16.2, it will be admissible.
- 4.8** What the Rules therefore lack is a clear statement about admissibility. It should be clear to every applicant: (i) what evidence may be admitted at the application stage without permission; (ii) what evidence is fundamentally admissible but will require permission; (iii) what evidence is fundamentally excluded but may be admitted with permission; and (iv) how and when any required permission is to be sought.

- 4.9** The Rules on these matters at present are incomplete and appear to be inconsistent. As the question of admissibility will affect the assessment by an applicant of the merits of its case (as we have already noted above), these matters go to the fairness and cost-efficiency of the proceedings and, therefore, to the overriding objective of the Rules.
- 4.10** In addition to the desire for clarity, we have a significant concern about the effect of the provision at Rule 16.3, which appears to provide that evidence not adduced to GEMA at the time of its decision is fundamentally inadmissible, and may only be admitted (with permission) if it could not reasonably have been obtained before that decision was made.
- 4.11** We believe that this is substantially more restrictive than the limitation set out at section 175(3) of the Act. At the time of making its decision, GEMA does not see any ‘evidence’ in the sense in which that word is used in the context of the Rules. At most, it will have available to it the arguments submitted in the context of the consultation about the Code modification. It would be highly impracticable for the submissions to be accompanied by evidence at that stage.
- 4.12** The Act more properly refers to the ‘matter[s]’ to which GEMA was able to have regard at the time that it made its decision. This should be read as a reference to broad arguments rather than to specific evidence in support of them. Rule 16.3 in our view misapplies this principle to evidence in a way that is overly restrictive and cannot be in line with what the Act intends. The Commission should rethink its approach to this matter.

5. Conditions

- 5.1** The Act (paragraphs 10 and 11 of Schedule 22) states that applications may be made subject to conditions (which may be procedural or substantive, or both). The draft Rules refer to this indirectly in the case of applications (see Rule 4.5) and directly in the case of interventions (see Rule 7.9).
- 5.2** It is not clear why the express provisions relating to conditions that may be attached to interveners are not repeated in the case of applicants. The Rules ought to say the same thing in both cases and, in our view, should also include a requirement that the Commission give reasons for any conditions that are attached, in particular if there is a condition to limit the matters that are to be considered on appeal.
- 5.3** We recognise that some matters which might be the subject of conditions could also be dealt with under the heading of ‘Case Management’ (Rule 10). It would aid the clarity of that rule if it was stated that Rule 10.2 was a complete list of all the possible directions to which Rule 10.1 refers.

6. Withdrawal

6.1 The draft Rules make provision for parties to withdraw from an appeal (see Rule 24), but these are inadequate in a number of respects. In particular:

- (a) The draft appears to assume that there are only two parties to an appeal. But there may be interveners, on either side of the case. It is unclear how their interests can be protected by any process of summary determination. One of them may wish to continue with the case, even if the other wishes to withdraw.
- (b) It is equally unclear what ‘summary determination’ means in this context, or how any application for a summary determination will be treated by the Commission, the considerations that will be applied to it, and the grounds on which it will be allowed.
- (c) If there is more than one party on the same side of the appeal (for example, if the original applicant has been joined by an intervener), it should be possible for one to withdraw from the case without that necessarily entailing the end of the case for the other. Withdrawal and a determination of the appeal need not be linked in all cases.
- (d) If GEMA concedes an appeal, a determination will need to be made in order to quash its original decision – something that GEMA has no power to do of its own motion. But if an appellant wishes to concede, there ought to be no need for a formal determination against it, as it will be sufficient if the case is simply abandoned. Appellants seem to us to be less likely to withdraw if they know that this will entail an order being formally made against them: in such a case they may prefer to pursue the appeal to its conclusion, even if their chances of success are limited.

Therefore, in the interests of ensuring an efficient process in which the parties do not continue an action for longer than is necessary, appellant parties (subject only to a costs order) should be able to elect to abandon their case.

- (e) It is possible that GEMA may decide at the outset that it does not wish to contest an appeal, having regard to the strength of the appellant’s case as reflected in its application. It should be clear in the provisions relating to the reply to an application (Rule 6) that GEMA may indicate a desire not to contest the case at this stage.