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Dear Susan,

Competition Commission Consultations: *Rules for the conduct and disposal of appeals in energy code modification case and Guide to appeals in energy code modification cases.*

Thank you for the opportunity to comment on your two consultation documents regarding the rules and guidance for the conduct and disposal of appeals in energy code modification cases. The Office of the Gas and Electricity Markets Authority (Ofgem) welcomes the publication of the draft rules and finds the complementary draft guidance to be very helpful. Given the obvious connection between the two, please consider this letter to be Ofgem's combined response to both documents.

Rule 4

Paragraph 1(3) of schedule 22 of the Act provides a time limit of 15 working days from the earliest day on which the decision was published within which to make an appeal; this is incorporated by reference into Rule 4. Whilst it may seem a minor point, it may be worth clarifying what is meant by the decision being published. Currently, Ofgem does not publish and circulate its decision letters directly in the first instance, but provides them to the relevant Code owner¹. It is then the role of the Code owner to circulate that decision, via onward email and/or publication on their website. In the past this situation has worked well, as the Code owners are best placed to keep the list of interested parties in their Code up-to-date. However, this could raise some issues in the context of the appeals window. Firstly, the current situation could give the Code owners something of an advantage over other potential appellants. Further, should there be any delay (legitimate or otherwise) in the onward communication of Ofgem's decision, some interested parties may receive the letter one or more days after the letter is dated, and may therefore have less than the allowed 15 days within which to appeal. Ofgem considers that the 15 days should commence from a fixed point, being the day on which the decision letter is first issued. In order to address this potential issue we will give consideration to publishing Code modification decisions on the Ofgem website rather than via the Code owner in the first instance.

¹ In the case of the Balancing and Settlement Code, Elexon.

Rule 5

Ofgem continues to believe that it should be notified of any hearing that may be held during the appeal process. Whilst we understand that notification will be determined on a case by case basis, Ofgem considers that the stated overriding objective of the rules will be best served by operating hearings in a transparent manner, with prior notification to all relevant parties. Indeed, given that under Rule 18 hearings will be held in public, Ofgem does not understand the rationale for notification not being given, as stated in Rule 5.4.

Rule 14

Ofgem notes the provisions under Rule 14 for suspension of a Code modification decision. Whilst Ofgem considers these provisions to be reasonable, there may be instances where a decision to suspend a modification may have a significant impact upon parties other than the appellant. In such circumstances, counter-parties may be better placed than Ofgem to provide relevant evidence of the potential impacts of suspension, and Ofgem anticipates that the provisions under Rule 7 regarding intervention can be applied equally to the matter of suspension, as to the appeal itself.

Ofgem notes that under Rule 14.5 the Commission will normally hold a hearing to determine an application for suspension. Ofgem would welcome confirmation that, outwith the discussion on Rule 5.4, it will be notified of any hearing on suspension.

Rule 19

Ofgem notes that under Rule 19 the Commission expects each party to normally have only one spokesperson at hearings. However, we also note that under paragraph 3.55 of the guidance document, subject to prior agreement with the Commission, there may be more than one person, particularly in order to facilitate a clear presentation of technical issues. Ofgem acknowledges this flexibility, but considers it unrealistic to expect that the norm will be a single spokesperson. Each of the three industry documents envisaged as being in the scope of the appeal mechanism cover a plethora of matters, some of which are highly technical in nature. The formulation of a code modification decision can be a collective effort calling upon several fields of expertise; it may prove necessary for this also to apply to representation. For example, there are likely to be both legal and technical issues which are best addressed by the relevant expert.

Rule 25

Rule 25 allows any person to apply to the Commission for permission to inspect its record. The note for Rule 25 states that the purpose of this rule is to enable persons not served with permission to appeal to consider whether to intervene. Ofgem notes that a direction allowing an intervention must be sought within 20 working days after permission to appeal is applied for (though the Commission may consider a request for permission made later), and therefore considers it will be helpful to offer some further guidance regarding the provision of information. For instance, it may be useful to state how many working days the Commission anticipates will be required in order to consider and confirm permission to inspect the record. It may also be appropriate to confirm whether the applicant attends the Commission's premises in person, or may submit information requests. If the latter, this may again benefit from some indication of

timing. It appears that the intent of Rule 25 by necessity goes beyond the requirements of the Freedom of Information Act 2000, particularly with respect to timing. Although Rule 25.3 specifies what the Commission's record will normally comprise, it may be beneficial, not least to the Commission, to further clarify the scope of Rule 25 vis-à-vis any other information requests and the relevant timetables that will apply.

In addition, in allowing parties to apply to inspect its record, the Commission could be permitting access to information obtained by Ofgem, the disclosure of which could be in contravention of Section 105 of the Utilities Act 2000. The Commission should be aware of the implications of contravening this provision. Ofgem would be obliged if the Commission would notify it before access is allowed to any such information.

General comments on the guidance

It is noted that under paragraph 3.19 of the guidance document, the Commission expects parties to update the core bundle, amongst other things, on a running basis during the appeal. However, paragraph 3.24 goes on to state that if the core bundle is updated or revised it should be delivered to the Commission at least two days before the next hearing, and that this is a function of the *appellant*. Whilst Ofgem has no objection to this appellant fulfilling this role, we would wish to confirm that there will also be opportunity for GEMA, if it considers appropriate, to revise and submit documentation for inclusion in the core bundle, whether directly or via the appellant. If the latter, it would be appropriate for the appellant to provide acknowledgement of receipt. We also request that it is specified in the guide that should the core bundle be updated or revised, it also be delivered to GEMA at the same time as the Commission.

Ofgem considers there may be instances where it is not possible for the parties to produce an agreed list of issues, as required by paragraph 3.22. Indeed differences in views of the important or even relevant issues of the case may have led to the appeal in the first place. As noted in previous discussions, whereas Ofgem must have regard to the relevant objectives of the particular code and its own statutory duties, commercial organisations are primarily obligated to act in the best interest of their shareholders. It would appear more practical for each party to individually produce a list of issues that they consider important. This would not preclude a statement of those matters that are common ground being produced, as is also required by paragraph 3.22.

Conclusion

At the time of writing, Ofgem remains uncertain as to the Government intent with respect to the Order, particularly with respect to the criteria that may be used to exclude certain decisions from appeal. In its response to the Department of Trade and Industry (DTI) Ofgem raised some concerns with the drafting of the order. For convenience I have attached a copy of this earlier correspondence. As these concerns were focused primarily on the potential number and scope of decisions that may be appealed, Ofgem does not consider that this should have any specific impact upon the manner in which those appeals are handled, as dealt with by these Competition Commission documents. Ofgem also welcomes the statements from the Commission Chairman that the framework is intended to be flexible and that the guide will be revised periodically in the light of experience. Ofgem anticipates that such a review would extend to the rules themselves, where appropriate.

Although Ofgem is also seeking confirmation from the DTI that 1 April 2005 remains the anticipated date for the appeals mechanism to come into effect, it seems appropriate for work on the rules and guidance to proceed ahead of the completion of the Order and on the assumption that 1 April 2005 remains the relevant date, unless confirmed otherwise.

Notwithstanding its concerns with the proposed Order, Ofgem considers that the Commission's rules and accompanying guidance will provide very clear and workable arrangements for the conduct and disposal of appeals in energy code modification cases and as such, subject to the specific comments on the rules as made above, have Ofgem's support.

If you would like to discuss any of the issues raised in this letter, or any related matter, please feel free to contact me.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'N. Simpson', written over a horizontal line.

Nick Simpson
Director, Modifications