

## Energy Code Modification Rules and the Guidance on the Rules

### Competition Commission response to the consultation on the draft Rules and Guidance

1. In December 2004 the Competition Commission (CC) issued for consultation draft *Rules for the Conduct and Disposal of Appeals in Energy Code Modification Cases*. In January 2005 the CC issued a complementary draft document *Guidance on the Rules for the Conduct and Disposal of Appeals in Energy Code Modification Cases*. The final versions are published today, under the titles of *Competition Commission: The Energy Code Modification Rules* and *Guide to Appeals in Energy Code Modification Cases*.
2. We received five responses. The responses are available at the CC's Information Centre [info@competition-commission.gsi.gov](mailto:info@competition-commission.gsi.gov). and also published on the web site [http://www.competition-commission.org.uk/rep\\_pub/consultations/past/energy\\_code\\_modification\\_submissions.htm](http://www.competition-commission.org.uk/rep_pub/consultations/past/energy_code_modification_submissions.htm)
3. Respondents were generally content with the CC's proposed approach to these appeals and welcomed the transparency of the appeal process.
4. The comments related to a number of detailed issues set out below. The CC's response is shown in **bold** type. As will be seen, we have made clarificatory amendments as a consequence of the consultation responses

#### Designation of codes

5. Several respondents said that other codes should be designated in addition to the three main Codes proposed by the Department of Trade and Industry (DTI) at the time of the consultation, that is *the Balancing and Settlement Code, the Connection and Use of System Code and the Transco Network Code*
6. **This is a matter for the DTI and as will be seen from The Electricity and Gas Appeals (Designation and Exclusion) Order 2005 (SI No 1646) laid on 23 June, the Government has decided to designate additionally the Supply Point Administration Agreement, the Master Registration Agreement and the Uniform Network Code, the successor to the Transco Network Code. We have amended our guidance accordingly.**

#### Timeframe for appellant to prepare case (Rules 4 and 8)

7. There was concern on the part of respondents about the short timeframe of three weeks for the applicant to prepare a comprehensive case in its application for permission to appeal.
8. **The CC is subject to a strict statutory timetable under which we must decide appeals. The period allowed for preparation of an appellant's case is provided**

by statute and it is our view that this is a sufficient period in which to prepare a well-thought out and realistic case. We have also provided that permission may be granted subject to conditions (Rule 4.5). It is also possible for an appellant to amend the statement of case (Rule 8.1). These Rules are not designed to allow circumvention of the statutory timetable, but they do provide some flexibility.

#### **Informing the industry (Rule 4)**

9. The Office of Gas and Electricity Markets (Ofgem) suggested that it might in future publish its decisions on the Ofgem web site and make that the date of decision for appeals purposes rather than, as at present, leaving code owners to publish decisions. This would ensure a level playing field for all parties.
10. **We welcome this suggestion and hope Ofgem will introduce it.**
11. One respondent suggested that the requirement to copy the application and evidence to those concerned could be satisfied through publication on the relevant code web site. This would avoid the need to copy substantial documents to what might be a very large number of interested third parties. In the case of the BSC there are approximately 170 signatories and a large proportion of them might be interested in any amendment. The respondent also said that there needed to be an agreed process to notify the industry of new appeals, which would be met by publication on the web site.
12. **The primary requirements as to the service of documents are statutory. We are open to suggestions such as this if they can be made compatible with the statutory framework, and if we can be confident that they will not compromise the position of possible interveners. We recognise that the requirements as to service may be onerous and are sympathetic to proposals that would alleviate the time and expense involved. At this stage we think that the correct approach is to consider suggestions on a case-by-case basis.**

#### **Permission and Suspension Applications (Rules 5 and 14)**

13. Ofgem takes the view that it should be notified of any application or suspension hearing.
14. **The rules provide that notice will not normally be given to Ofgem of such hearings. We have considered the case for automatic notification, but have concluded that flexibility should be retained. Accordingly we will not automatically notify Ofgem, but will do so wherever we think it appropriate.**

#### **Treatment of interveners (Rule 7)**

15. One respondent urged that in the case of a withdrawal by the main party, an intervener should be allowed to continue the case

16. **Interveners have by definition a lesser interest in the case. If a party has chosen to intervene rather than join in as an applicant, that party has decided to take the risk that the appellant will withdraw. There is no statutory provision to allow them to continue.**

### **Consolidation (Rule 9)**

17. One respondent suggested there should be a right of appeal against a consolidation decision by the CC.
18. **Any consolidation decision will be taken after the parties to both appeals have had their say. We have made clear in the guidance that individual appellants in consolidated cases will be given a full opportunity to state their case. We do not consider that a decision to consolidate has a material impact on the position of individual appellants. We are unwilling to introduce such an appeal because it would pose a risk to our timetable.**

### **Suspension applications (Rule 14)**

19. One respondent asked whether, if one modification related to two codes, there would need to be two appeals.
20. **We think that if there had been two decisions there would need to be separate appeals against each of the decisions, but that the CC could consolidate them.**
21. One respondent sought an assurance that Balancing and Settlement Code costs would be taken into account as well as costs to the parties when the CC decides on suspension applications.
22. **Schedule 22 makes it clear in paragraph 3(2) that it is only the applicant's costs that may be directly considered. There may, however, be scope to introduce considerations of this type of cost as part of the consideration of the balance of convenience.**

### **Treatment of admissibility of evidence (Rule 16)**

23. One respondent said that the treatment of fresh evidence in Rule 16.3 needed clarification.
24. **The CC's intention is to admit fresh evidence in the appeal only if the evidence could not reasonably have been expected to have been put before GEMA before it made its decision and is relevant to that decision, and if the evidence may be expected to have a real influence on the outcome. Rule 16.3 has been redrafted to clarify this.**

### **Representation at hearings (Rule 19)**

25. One respondent made the case that one spokesperson will not always be enough.

26. **The CC will always prefer a party to be represented by only one spokesperson. However, when that approach does not facilitate the best presentation of a party's case, more than one spokesperson may be allowed.**

### **Costs (Rules 22 and 23)**

27. One respondent wanted to replace the discretion for the CC to award costs against GEMA, if GEMA was the unsuccessful party, with a practice of non-apportionment of party costs.
28. **The CC is bound (paragraph 13 of Schedule 22), to award costs against the losing party.**

### **Withdrawal (Rule 24)**

29. One respondent asked how the CC would apply its discretion when making a summary determination, why appellants could not simply withdraw, and whether Ofgem could withdraw at the early stage of having read the applicant's case.
30. **We think that a formal stage in the proceedings is desirable to mark the abandonment of the case by either party. See the note on Rule 24 for the implications of withdrawal.**

### **Access to the CC's record (Rule 25)**

31. Ofgem asked:
- how long we will take to give permission;
  - how we will provide the information—on the premises or in response to information requests;
  - the relationship of Rule 25 to any other information requests; and
  - whether the CC will notify Ofgem before we allow access to information obtained by Ofgem, the disclosure of which might contravene section 105 of the Utilities Act 2000.
32. **We will give permission as soon as practicable and the successful applicant will be allowed to visit the CC to consult the file. As for disclosure generally, the file shown to the applicant will not contain information in respect of which the CC has allowed a non-disclosure application.**

### **Two general comments on the guidance**

33. Paragraph 3.19: Ofgem wishes to be recognized to revise and submit documentation to update the core bundle and to receive the updated or revised bundle automatically.

34. **This is what the guidance provides.**
35. Paragraph 3.22: The parties may not be able to produce an agreed list of issues and some guidance seems necessary in that event.
36. **We would, in that case like to retain a common list, but to see the issue flagged so that we understand where the disagreement lies. We have clarified the guidance.**

#### **Matters not for the CC**

37. There were a number of comments about security of supply, suggestions for other categories of exclusion from the appeal system, and preferences for a later start date which were matters of policy for the DTI and/or overtaken by events.

Competition Commission  
July 2005

**Responses were received from:**

Gas and Electricity Industry (Association of Electricity Producers/Gas Forum/Energy Networks Association/Energy Retail Association)

Total Gas and Power Limited

British Gas Trading

National Grid Transco

Ofgem