

Rules for the Conduct and Disposal of Appeals in Energy Code Modification Cases

Consultation draft

Introduction

This consultation document seeks views on the rules of procedure (the Energy Code Modification Rules) that the Competition Commission (the Commission) proposes to make for appeals against a decision of the Gas and Electricity Markets Authority (GEMA), (commonly known as Ofgem) either to veto or to allow a modification to certain energy codes.¹ Such appeals are provided for by section 173 of the Energy Act 2004 (the Act) and the rules are made under paragraph 12 of Schedule 22 to the Act.

Responses

You can respond to this consultation:

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by post to:

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Enquiries to

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¹The Secretary of State intends to designate the Transco Network Code for gas, and the Balancing and Settlement Code and the Connection and Use of System Code for electricity.

Closing date

Responses should be received by 28 February 2005.

Date of implementation

It is anticipated that the appeal provisions of the Act will be given effect on 1 April 2005.

Guidance on the rules

During the period of consultation on these rules the Commission will produce guidance to assist parties to appeals, also for consultation. We shall seek responses on that guidance also by 28 February 2005.

Background to the appeal jurisdiction

The gas and electricity industries have in force various codes governing matters such as use of the system, connection, energy balancing, supply point administration and security of supply. A party to a code can seek its modification by putting forward a code modification for consideration within the industry and by a code panel. After wide consultation within the industry and consideration by expert groups, the code panel makes a recommendation to GEMA as to whether the proposal should be accepted or rejected. GEMA publishes a decision and, hitherto, these decisions have been open to judicial review.²

The Government made a commitment in its Energy White Paper published in February 2003³ to work with GEMA to strengthen the code modification process and the DTI's Consultation Paper of April 2003 *Gas and Electricity Codes: Strengthening the transparency and accountability of the gas and electricity industry code modification process* included the option of an appeal mechanism against GEMA's decisions on code modifications to

²For more information on the codes, see the DTI's April 2003 document *Gas and Electricity Codes: Strengthening the transparency and accountability of the gas and electricity industry code modification process* available at: www.dti.gov.uk/energyconsultations/elec_mod.pdf.

³Paragraphs 9.13 to 9.18 of the DTI Energy White Paper *Our energy future—creating a low carbon economy* available at: www.dti.gov.uk/energy/whitepaper/index.shtml#wp.

Transco's Network Code, and the electricity industry's Balancing and Settlement Code and Connection and Use of System Code. The Government concluded in its response to that consultation paper of April 2003⁴ that an appeal mechanism was the appropriate way to improve the accountability and transparency of the code modification process, but that such a mechanism must minimize regulatory uncertainty and delay and so be tightly constrained. To ensure security of supply, appeals on decisions concerning code modifications which were urgent were to be excluded.

Accordingly, the Act makes provision for appeals to the Commission from GEMA's decisions on code modifications.

Summary of the rules

The purpose of the appeal system created by the Act is to provide a fast and authoritative review by the Commission of the merits of GEMA's decision. The rules provide the procedural mechanism for that review. They are to be read together with sections 173 to 176 of, and Schedule 22 to, the Act. In the draft attached the Commission has at the end of many of the rules provided a short note to assist the reader. These notes do not purport to state the effects of the relevant statutory provision.

The key features of the appeal jurisdiction are these.

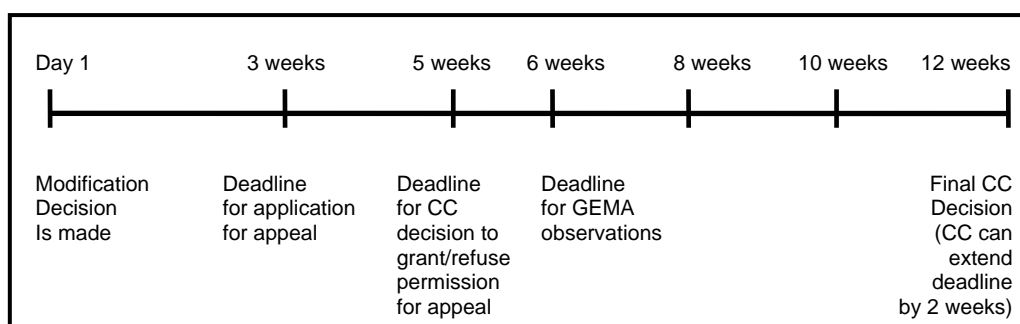
First, it is an appeal: the Commission will carry out a merits-based review of GEMA's decision. The Act requires the Commission to decide whether GEMA's decision is right or wrong. In reaching its decision, the Commission will not carry out an investigation, or hold what is effectively a rerun of the process by which GEMA reached its decision. The Commission will *review* GEMA's decision.

⁴DTI's November 2003 document *Gas and Electricity Codes: Strengthening the transparency and accountability of the gas and electricity industry code modification process: Government Response* available at: www.dti.gov.uk/energyconsultations/govresponse.pdf.

Second, the corollary of the fact that the Commission will not carry out an investigation is that the appeal will be adversarial, although the Act confers upon the Commission some information-gathering powers.

Third, the Commission must reach a decision within a short period of time: in most cases, it will give its decision on the appeal within the period of 12 weeks beginning with the day on which GEMA made its decision on the relevant code modification recommendation.

Timeline



The principal stages in an appeal will be these:

- ***The application for permission:*** to bring an appeal, an applicant must obtain permission from the Commission. The application for permission must be made within 15 working days of GEMA’s decision and must include, among other things, the applicant’s statement of case stating the grounds of appeal and the facts and reasons relied on.
- ***The Commission’s decision on the application for permission:*** the Commission must decide whether to allow an appeal to proceed within 10 working days of the application.
- ***GEMA’s reply:*** GEMA must submit its observations on the appeal within 15 working days of the applicant’s request for permission.
- ***The Commission’s decision:*** this must be given within 30 working days of the last date that GEMA could have made its observations on the appeal.

Third parties may seek to intervene in the appeal, there will normally be one or more hearings, and there may be case management conferences and pre-hearing reviews. Where the appeal is against GEMA's decision to consent to a modification, the Act allows for an application to be made for the suspension of the modification pending the Commission's determination of the appeal.

These appeal proceedings will be more formal than the Commission's procedure in other jurisdictions, and this formality is reflected in the rules.

The draft rules are self explanatory and there are no particular issues that we wish to draw to consultees' attention. We would, however, welcome comments on the guidance either of a general nature or on any specific points.

How to respond

See above for contacts and final date.

When responding, please state whether you are responding as an individual or representing the views of an organization. If responding on behalf of an organization, please make it clear whom the organization represents and, where applicable, how the views of members were assembled.

Copies of this consultation document are available from the Commission's web site: www.competition-commission.org.uk

Confidentiality

The Commission may wish to publish your response. If you do not want all or part of your response, or your name, made public, please state this clearly in the response. Any confidentiality disclaimer that may be generated by your organization's IT system or included

as a general statement in your fax cover sheet will be taken to apply only to information in your response for which confidentiality has been requested.

A summary of the consultation and outcome will be provided by end March 2005 on www.competition-commission.org.uk and the final rules and guidance will be published.

Downloads

[Rules for the Conduct and Disposal of Appeals in Energy Code Modification Cases](#)

[Press Release](#)

Note by CC 31 March 2005

The implementation timetable has been delayed and we will provide a summary and publish the rules and guidance as soon as possible. When we do so we will post an alert on the home page of the web site.