



# Energy Licence Modification Appeals: Competition Commission Guide

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## 1. Introduction

- 1.1 This guide has been prepared to assist participants involved in licence modification appeals under the Electricity Act 1989 and the Gas Act 1986 (the Acts). It may be revised and supplemented from time to time and as the CC gains experience of such appeals. Comments in this guide are not intended to bind the CC in its consideration of particular cases.
- 1.2 The CC has published procedural rules, the *Competition Commission Energy Licence Modification Appeals Rules (CC14)*, to govern these appeals. This guide should be read in conjunction with the Acts and those Rules.
- 1.3 The procedural framework is designed to enable the CC to conduct a satisfactory appeal process within the strict time frames set out in the Acts. The framework is flexible and will be adapted in the interests of common sense and good practice as the CC gains experience of handling appeals under it.
- 1.4 The Rules seek to ensure that the CC has flexibility to manage appeals fairly and expeditiously, having regard to the interests of the parties to the appeal and interested third parties and the statutory time frames. This sentiment is reflected in the overriding objective which is set out in Rule 4. Those involved in appeals are required to assist the CC in meeting this objective.
- 1.5 In every case, the CC will look for a high degree of cooperation from participants. The CC expects appellants to be realistic in drafting their grounds of appeal and all participants to present their submissions clearly.
- 1.6 This guidance does not contain details of all the provisions of the Acts and Rules relevant to appeals and is not intended to modify or constrain the full application of those provisions to particular cases.

### 1.7 In this guide:

**‘the Acts’** means the Electricity Act 1989 and the Gas Act 1986, as amended in particular by the Electricity and Gas (Internal Markets) Regulations 2011 (SI 2011/2704);

**‘the CC’** means the Competition Commission;

**‘GEMA’** means the decision-making Gas and Electricity Markets Authority—referred to as the Authority in the Rules and the Acts—which is supported by the Office of Gas and Electricity Markets;

**‘interested third party’** means any person, qualifying body or association referred to in section 11C(2) of the Electricity Act 1989 or section 23B(2) of the Gas Act 1986 (as the case may be) who is not an appellant;

**‘the NCC’** means the National Consumer Council;<sup>1</sup>

**‘participants’** means all persons with standing to participate in the appeal, both parties to the appeal and interested third parties;

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<sup>1</sup> The NCC, which is part of Consumer Focus, may bring an appeal on behalf of consumers whose interests are materially affected by GEMA’s decision.

**'relevant licence holder'** has the same meaning as in section 11A(10) of the Electricity Act 1989 and section 23(10) of the Gas Act 1986;

**'the Rules'** mean the *Competition Commission Energy Licence Modification Appeals Rules (CC14)*;

**'the Schedule'** means whichever of Schedule 5A to the Electricity Act 1989 and Schedule 4A to the Gas Act 1986 is relevant to the particular appeal.

## 2. Background

- 2.1 The Acts set out the process that GEMA must adopt in making modifications to licences for the supply of gas and electricity. They also set out the appeal mechanism in respect to licence modifications.<sup>2</sup> An appeal against a decision of GEMA to amend the conditions of a licence may be made to the CC by a relevant licence holder; certain materially affected licence holders; qualifying bodies and associations in the capacity of representing those licence holders and the NCC in the capacity of representing consumers whose interests are materially affected by GEMA's decision.
- 2.2 The CC may allow appeals only to the extent that it is satisfied that GEMA's decision was wrong on one or more of the following grounds: that GEMA failed properly to have regard to, or give appropriate weight to, the matters to which GEMA must have regard, in the carrying out of its principal objective and certain duties; that the decision was based, wholly or partly, on an error of fact; that the modifications fail to achieve, in whole or in part, the effect stated by GEMA in its decision;<sup>3</sup> that the decision was wrong in law.<sup>4</sup> To the extent that the CC does not allow the appeal, it must confirm the decision appealed against.<sup>5</sup>
- 2.3 If the CC allows the appeal, it can do one or more of the following:
- (a) In relation to a price control decision:<sup>6</sup> quash GEMA's decision (to the extent that the appeal is allowed); remit the matter back to GEMA for reconsideration and determination in accordance with any directions given by the CC; substitute its own decision for that of GEMA's decision (to the extent that the appeal is allowed) and give any directions to GEMA or any other party to the appeal.
  - (b) In relation to any other decision: quash GEMA's decision (to the extent that the appeal is allowed); remit the matter back to GEMA for reconsideration and determination in accordance with any directions given by the CC.
- 2.4 Key elements of the procedures for regulating appeals, including the time periods for appealing and completing them and provision relating to the payment of costs by the parties to the appeal, are set out in the Acts. The Acts, however, also provide that the CC may make rules of procedure regulating the conduct and disposal of these appeals.
- 2.5 The CC's appeal process may involve the parties to the appeal—the appellant and GEMA—and any interested third parties who would have had standing under the Acts to appeal the relevant decision. In order to facilitate the conduct of the appeal the CC may publish non-confidential versions of the submissions of the participants, its decisions and its directions in regard to the conduct of the appeal on its website.<sup>7</sup>

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<sup>2</sup> The Acts implement the EU Third Energy Package of directives which require, among other things, that member states ensure that national regulatory authorities are able to take autonomous decisions in relation to specified regulatory tasks and ensure that suitable mechanisms exist at a national level under which a party affected by a decision of a regulatory authority has a suitable right of appeal to a body independent of the parties involved and of Government. GEMA is designated as the regulatory authority for Great Britain for the purposes of the relevant directives.

<sup>3</sup> Under section 11A(7)(b) of the Electricity Act 1989 and section 23(7)(b) of the Gas Act 1986, GEMA is required to state the effect of the modifications in its decision.

<sup>4</sup> See section 11E of the Electricity Act 1989 and section 23D of the Gas Act 1986.

<sup>5</sup> See section 11E(5) of the Electricity Act 1989 and section 23D(5) of the Gas Act 1986.

<sup>6</sup> Under section 11F(7) of Electricity Act 1989 and section 23E(7) of Gas Act 1986 a decision is a price control decision, in relation to the modification of a condition of a licence, if the purpose of the condition is, in the CC's opinion, to limit or control the charges on, or the revenue of, the holder of the licence.

<sup>7</sup> In accordance with Rule 12.

### 3. General observations on appeals

#### **Approach to appeals**

- 3.1 The CC must decide whether the appellant has demonstrated that GEMA's decision was wrong on one or more of the grounds set out in its notice of appeal.
- 3.2 In conducting the appeal the CC will have regard to the overriding objective set out in Rule 4. The overriding objective of the Rules is to enable the CC to dispose of appeals fairly and efficiently within the time periods prescribed by the Acts. The CC expects participants to assist it in meeting the overriding objective and to conduct themselves in a way that is consistent with this approach.
- 3.3 In determining the appeal the CC must have regard, to the same extent as is required of GEMA, to the matters to which GEMA must have regard—(a) in the carrying out of its principal objective under section 4AA of the Gas Act 1986 or section 3A of the Electricity Act 1989 (as appropriate); (b) in the performance of its duties under that section; and (c) in the performance of its duties under sections 4AB and 4A of the Gas Act 1986 or sections 3B and 3C of the Electricity Act 1989 (as appropriate).<sup>8</sup>
- 3.4 The CC may have regard to any matter that GEMA was not able to have regard to in relation to the decision which is the subject of the appeal, but must not have regard to any matter which GEMA would not have been entitled to have regard to in reaching its decision had it had the opportunity to do so.<sup>9</sup>
- 3.5 The CC encourages participants to send all their evidence to the CC at the beginning of the process. The CC does not intend the provision of evidence by participants to be an iterative process. If the CC requires supplementary evidence later in the appeal, it will make this request. The CC will seek to narrow the issues and points in dispute during the course of the appeal. It may, in particular, seek to do so at appeal management conferences and hearings.

#### **Administrative matters**

- 3.6 The CC is an expert body which conducts its work by using groups of its members who are appointed on the basis of experience, ability and background. At least one member of an appeal group must be drawn from the Utilities Panel, appointed for the purposes of deciding appeals under the Acts.<sup>10</sup>
- 3.7 The CC's staff team is led by an Appeal Director who is supported by an administrative team and professional advisers. Participants in the appeal will have a contact in the administrative team who will take enquiries and act as the main point of contact for the appeal. Once a notice of appeal is sent to the CC, the CC will write to the appellant/s and GEMA with the necessary contact details and publish these details on a designated page on the CC's website.

#### **Time frames**

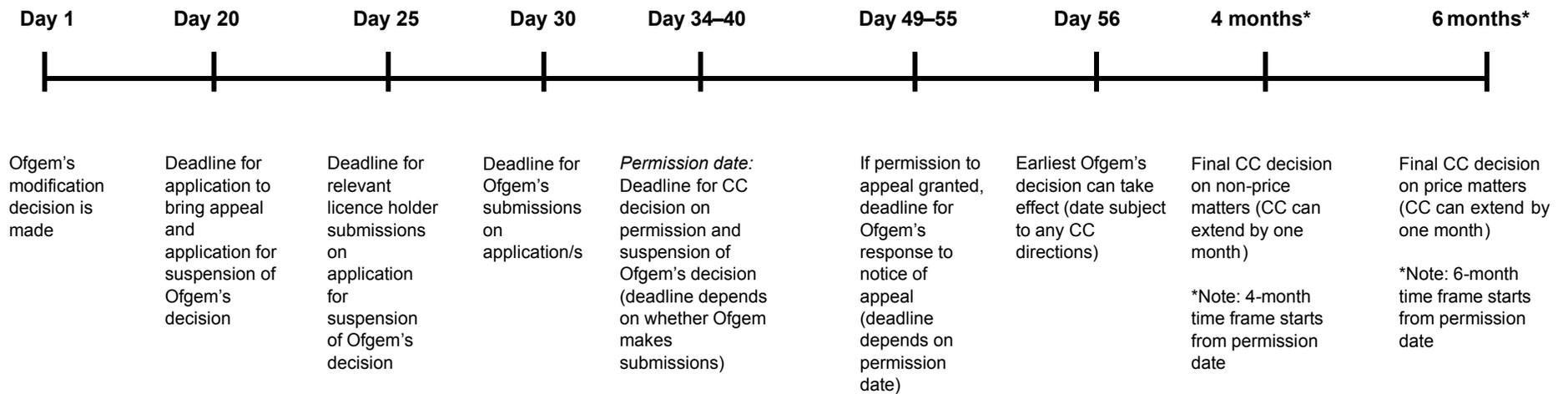
- 3.8 The Acts prescribe the time frames within which various steps in the appeal process must be completed. An indicative timetable appears below (with the references to 'Day', meaning 'working day' as defined in the Acts):

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<sup>8</sup> Section 11E(2) of the Electricity Act 1989 and section 23D(2) of the Gas Act 1986.

<sup>9</sup> Section 11E(3) of the Electricity Act 1989 and section 23D(3) of the Gas Act 1986.

<sup>10</sup> Section 104(1) and (2) of the Utilities Act 2000 as amended.



- 3.9 The Acts require that applications for permission to appeal must be made within 20 working days, beginning with the first working day after the day on which GEMA's decision is published.<sup>11</sup> Appellants should be aware that the application must be made within this time and the CC cannot grant permission to appeal for late applications.<sup>12</sup>
- 3.10 The Acts provide that the CC will have four months (in non price-control matters) and six months (in price control matters) to determine an appeal. This time frame starts from the day on which the CC grants permission to appeal.<sup>13</sup> Where the CC is satisfied that there are special reasons it may extend the period for its determination by one month.<sup>14</sup> If the CC considers it necessary or appropriate to extend the timetable during an appeal, it will consult with the participants.

### ***Administrative timetable***

- 3.11 As soon as possible after granting permission to appeal the CC will draw up an administrative timetable for the appeal in accordance with Rule 13. When drawing up the timetable the CC will have regard to the views of the participants as well as the overriding objective set out in Rule 4. Once the timetable has been set, the CC will aim to keep to it; participants should therefore check their availability on the notified dates at an early stage. The CC will not normally consider that the unavailability of advisers or of legal representatives is a reason to depart from these dates.
- 3.12 In order to conduct an efficient process, the CC expects that participants will treat the timetable as 'hard' deadlines. Should it become apparent to a participant that it will struggle to adhere to a deadline the CC should be contacted as soon as possible.

### ***Procedure and directions***

- 3.13 Where necessary the CC may issue directions in relation to the conduct of the appeal under Rule 14. Participants may apply for directions or the CC may propose that a direction appears necessary in the circumstances. The CC will usually give participants an opportunity to comment ahead of issuing a direction. Depending on the circumstances, applications for directions may be dealt with in writing or at an appeal management conference.
- 3.14 Where participants are applying for directions the CC expects that they will seek to agree the direction with the other participants in the appeal.
- 3.15 Rule 14 sets out a non-exhaustive list of matters upon which the CC can give directions. Participants should be aware that the CC will have regard to the overriding objective in managing the conduct of the appeal.
- 3.16 The CC expects that participants will be able to cooperate promptly to produce bundles, chronologies, glossaries, issues lists and case memoranda where any or all of these are necessary.

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<sup>11</sup> Paragraph 1(3) of the Schedule.

<sup>12</sup> *ibid.*

<sup>13</sup> Section 11G(1) of the Electricity Act 1989 and 23F(1) of the Gas Act 1986.

<sup>14</sup> See section 11G(3)-(4) of the Electricity Act 1989 and 23F(3)-(4) of the Gas Act 1986.

## **Appeal management conferences**

3.17 Appeal management conferences may be held under Rule 15. These are opportunities for the CC to manage the appeal. The CC will normally expect to invite the parties to the appeal, any relevant licence holders who are not parties to the appeal and any interested third parties who have declared their interest in the appeal to the appeal management conferences. Active appeal management will be an important tool in ensuring that the CC makes the right decision in the time allowed.

## **Permission stage**

- 3.18 The Acts require that permission to appeal is obtained before an appeal can be brought.<sup>15</sup> Applications for permission to appeal are made when appellants send their notice of appeal in accordance with Rule 5, within the time frame set out in the Acts.<sup>16</sup> A copy of the notice of appeal must be sent to GEMA at the same time as the notice of appeal is sent to the CC.<sup>17</sup>
- 3.19 Once GEMA has received a copy of the notice of appeal it has ten working days,<sup>18</sup> beginning with the first working day after the day it receives the notice of appeal, to make submissions to the CC on whether the CC should grant permission to appeal. Where GEMA makes submissions, the CC then has ten working days,<sup>19</sup> beginning with the first working day after the day it receives GEMA's submissions, in which to decide whether to grant permission to appeal. If GEMA does not make submissions on the permission to appeal, the CC has 14 working days, beginning with the first working day after the day it receives the notice of appeal, in which to decide whether to grant permission to appeal.<sup>20</sup>
- 3.20 The CC will normally make a decision on permission without a hearing.<sup>21</sup> The CC may decide to hold a hearing to determine an application for permission either of its own motion or on the application of the appellant, GEMA or an interested third party. Where it decides to hold a hearing the CC will notify the appellant, GEMA and such other persons as it considers appropriate.<sup>22</sup>
- 3.21 The CC will consider whether the appellant has standing to bring the appeal and the nature of any interests they claim to be materially affected. Under the Acts appeals can only be brought by a relevant licence holder; certain materially affected licence holders; qualifying bodies and associations in the capacity of representing those licence holders and the NCC in the capacity of representing consumers whose interests are materially affected by GEMA's decision.<sup>23</sup> The CC may refuse permission on one of the following grounds: the appellant does not have standing; that the appeal is brought for reasons that are trivial or vexatious; that the appeal has no reasonable prospect of success.<sup>24</sup>
- 3.22 Rule 5.2 requires that the appellants clearly set out why they consider that they have standing to appeal in their notice of appeal. It is important that the CC has sufficient

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<sup>15</sup> Section 11C(3) of the Electricity Act 1989 and 23B(3) of the Gas Act 1986.

<sup>16</sup> Twenty working days beginning with the first working day after the day on which GEMA's decision is published. Paragraph 1(3) of the Schedule.

<sup>17</sup> Paragraph 1(7) of the Schedule and Rule 5.6.

<sup>18</sup> Paragraph 3(2) of the Schedule.

<sup>19</sup> Paragraph 1(10)(a) of the Schedule.

<sup>20</sup> Paragraph 1(10)(b) of the Schedule.

<sup>21</sup> Rule 6.1.

<sup>22</sup> Rule 6.3.

<sup>23</sup> See Section 11C(2) of the Electricity Act 1989 and 23B(2) of the Gas Act 1986.

<sup>24</sup> Section 11C(4) of the Electricity Act 1989 and 23B(4) of the Gas Act 1986.

detail to be able quickly to establish whether an appellant has standing. Where an appellant is claiming to be materially affected it should clearly and concisely set out the interest that is affected and how it is affected. Where an appellant is a body or association representing materially affected licence holders it should be clear that the body or association has the authority to represent these licence holders.

- 3.23 The CC may grant permission subject to conditions, which include conditions designed to expedite the consideration of the appeal, limit the matters to be considered on appeal and consolidate the appeal with other appeals.<sup>25</sup>
- 3.24 Although the CC may allow the filing of further submissions and evidence by issuing a direction under Rule 14, the CC will not allow this Rule to be used to circumvent the time limit by which an application for permission to appeal must be made.
- 3.25 The CC considers that the scope of the permission stage is intended to be limited. The basis for granting or refusing permission to appeal is set out in the Acts<sup>26</sup> and the time frame to determine permission to bring an appeal is strict. The CC would therefore normally expect to deal with this stage without the involvement of interested third parties (including any relevant licence holders who are not parties to the appeal). However, Rule 6.3 does allow for a hearing, and notice to parties to the appeal and other persons where the CC considers it appropriate.<sup>27</sup>

### ***Suspension of GEMA's decision***

- 3.26 The Schedule allows the CC to suspend GEMA's decision, the subject of appeal, where the relevant licence holder, the licence holder or consumers whose interests are materially affected (as the case may be) would incur significant costs if the decision were to have effect before the determination of the appeal and the balance of convenience<sup>28</sup> does not otherwise require effect to be given to the decision pending that determination.<sup>29</sup>
- 3.27 An application to suspend the decision must be made at the same time as making the application for permission to appeal (ie with the sending of the notice of appeal to the CC).<sup>30</sup> At the same time as sending the application for suspension to the CC, the appellant must send a copy of this application to GEMA<sup>31</sup> and a non-confidential version of the application to any relevant licence holders who are not parties to the appeal.<sup>32</sup>
- 3.28 Rule 7 sets out the requirements for suspension applications and the process that the CC will follow in considering the application. Subject to Rule 7, the CC expects that the procedure for suspension applications will depend upon the nature of the issues to be considered and the CC will set this out on a case-by-case basis.
- 3.29 In making an application for the suspension of GEMA's decision the appellant should clearly set out why it believes that it would incur significant costs if the decision were

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<sup>25</sup> Paragraph 1(11) of the Schedule.

<sup>26</sup> Section 11C(4) of the Electricity Act 1989 and section 23B(4) of the Gas Act 1986.

<sup>27</sup> The CC does not expect GEMA's submissions on the application for permission to bring an appeal to be available to participants (other than the appellant – see paragraph 3(5) of the Schedule) prior to making its decision on the application. However, the CC may publish a non-confidential version of GEMA's submissions on its website (see Rule 12).

<sup>28</sup> In applying this test the CC will consider the risk of damage to the licence holder, relevant licence holder (where they are not the appellant) and other materially affected persons if the decision were to be suspended.

<sup>29</sup> Paragraph 2(2) of the Schedule.

<sup>30</sup> Paragraph 2(2)(a) of the Schedule.

<sup>31</sup> Paragraph 2(4) of the Schedule.

<sup>32</sup> Rule 7.4.

to have effect before the determination of the appeal and why the balance of convenience favours the suspension of the decision.

- 3.30 Once GEMA has received a copy of the application for suspension, it has ten working days, beginning with the first working day after the day on which it receives the application, to make any submissions to the CC about this application.<sup>33</sup> Any relevant licence holders, who are not parties to the appeal, must send any submissions in relation to suspension of GEMA's decision to the CC within five working days, beginning with the first working day after the day on which it receives the notification of the application for suspension. Where GEMA does make submissions, the CC then has ten working days, beginning with the first working day after the day it receives GEMA's submissions, to take its decision.<sup>34</sup> If GEMA does not make submissions, the CC has 14 working days, beginning with the first working day after the day it receives the application for suspension, to take its decision.<sup>35</sup>
- 3.31 The CC may consider an application for suspension of GEMA's decision under appeal with or without a hearing. It will decide whether to hold any such hearing depending on the nature of the applications and whether it appears to the CC that such a hearing is necessary. So far as possible and necessary any suspension hearing will be held at the same time as any hearing about the application for permission. Where the CC decides to hold a hearing in relation to the suspension application, it will notify the appellant, GEMA, any relevant licence holders who are not parties to the appeal and any other person the CC considers appropriate.<sup>36</sup>

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<sup>33</sup> Paragraph 3(2) of the Schedule.

<sup>34</sup> Paragraph 2(3)(a) of the Schedule.

<sup>35</sup> Paragraph 2(3)(b) of the Schedule.

<sup>36</sup> See Rule 7.7.

## 4. Particular issues in appeals

### ***Commencing an appeal***

- 4.1 Appellants apply for permission to bring an appeal by sending a notice of appeal in accordance with paragraph 1 of the Schedule and with Rule 5.
- 4.2 To assist the appellant in complying with Rule 5.7 (sending a non-confidential notice to any relevant licence holders who are not parties to the appeal), the CC expects GEMA to append a list of the relevant licence holders to its decision.
- 4.3 The notice of appeal should be set out in consecutively numbered paragraphs and be paginated. It should include cross-references to the relevant parts of GEMA's decision, the grounds of appeal etc.
- 4.4 Unless notified otherwise by the CC, documents must be sent to the CC both by email and in hard copy (by first class post or delivered personally).<sup>37</sup>
- 4.5 The CC has no power to extend the period of time within which an application for permission is to be made. The CC will, by prior arrangement, accept delivery of an application for permission at any time up to midnight on the last day in which it can be made. An appellant wishing to deliver documents to the CC outside normal office hours (after 6pm or before 8:30am) should liaise with the CC in advance to ensure delivery.

### ***GEMA's submissions***

- 4.6 If GEMA wishes to make submissions pursuant to paragraph 3 of the Schedule, it should submit a response under the relevant Rule (including Rules 6, 7 and 9).
- 4.7 GEMA must send a copy of any submissions it makes under paragraph 3 of the Schedule to the appellant.<sup>38</sup>
- 4.8 Where the CC has granted permission to appeal, GEMA may make submissions to the CC about its reasons for the decision in which the appeal is being brought and/or any grounds of appeal on which that appeal is being brought against that decision. GEMA has 15 working days beginning with the first working day after the day on which permission to bring the appeal was granted to make such submissions.<sup>39</sup>
- 4.9 GEMA's submissions should contain a statement identifying the facts and reasons why it believes the appeal should not succeed and/or why it believes the relief sought should not be allowed and include any written evidence it wishes to adduce in support of its response. GEMA should also provide a non-confidential version of the statement in response and any written evidence adduced in support of that response that is suitable for publication on the CC's website.<sup>40</sup>

### ***Third party involvement***

- 4.10 Although the Acts do not set up a formal framework for intervention in appeals, the CC recognizes that interested third parties should be afforded the opportunity to

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<sup>37</sup> Rule 2.1(d) and Rule 21.

<sup>38</sup> Paragraph 3(5) of the Schedule.

<sup>39</sup> Paragraph 3(4) of the Schedule.

<sup>40</sup> Rule 9.3 and Rule 9.4.

submit views or respond to the grounds of appeal as appropriate, having regard to the nature of their interest.

- 4.11 An interested third party considering whether to make submissions will assist the CC by advising it at the earliest opportunity that it is considering whether to do so.
- 4.12 Where the CC has granted permission to appeal, interested third parties may make submissions to the CC about the grounds on which the appeal is being brought and the relief sought within 15 working days beginning with the first working day after the day on which permission to bring an appeal was granted. Submissions by interested third parties must be sent in accordance with Rule 10.

### ***Other documentation***

- 4.13 The CC expects the participants to provide it with a coherent and readily comprehensible explanation of the technical issues relevant to the appeal. As part of this explanation, the CC should if necessary be provided with a glossary of technical terms. The purpose of the glossary of technical terms is to provide the CC and the participants 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 to the appeal about the use of a term, that disagreement should be stated and the competing understandings set out concisely.
- 4.14 The CC will also find it helpful to see a chronology of the modification proposal from its inception to GEMA's decision. The purpose of the chronology is to provide the CC and the participants with a single reference point from which to understand the development of the licence modification proposal up to the point at which GEMA published its decision. The chronology should be uncontroversial and should be agreed if possible. Where there is disagreement between the parties to the appeal about an event or description of it, that disagreement should be stated and the competing versions concisely set out.

### ***Appeal management***

- 4.15 All appeals will be subject to active appeal management by the CC. The CC does not require participants to be represented at the appeal management conferences and hearings. The CC does, however, want focused arguments from the participants.

### ***Consolidation of appeals***

- 4.16 The Acts provide that the CC may grant permission to bring an appeal subject to conditions which may include conditions requiring that the appeal be considered together with other appeals.<sup>41</sup> The Rules includes provision for directions being made by the CC relating to consolidation of appeals.
- 4.17 Individual appellants and GEMA will be given the opportunity to state their case before the CC makes any decision to consolidate their appeals.

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<sup>41</sup> Paragraph 1(11)(c) of the Schedule.

## **Witness statements**

- 4.18 The CC expects that evidence used in the appeal will normally be written evidence. Although the Acts and the Rules make provision for oral evidence and cross-examination, the CC expects that these provisions will be used very rarely.
- 4.19 Subject to the direction of the CC, written evidence must be in the form of a witness statement. A witness statement must be verified by a statement of truth,<sup>42</sup> signed by the witness.
- 4.20 Witness statements should:
- 4.20.1 be headed with the title of the appeal;
  - 4.20.2 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;
  - 4.20.3 state the full name of the witness;
  - 4.20.4 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 and the position held and the name of the firm or employer;
  - 4.20.5 state the occupation of the witness;
  - 4.20.6 state the relationship of the witness to the party on whose behalf the evidence is given; and
  - 4.20.7 be paginated.
- 4.21 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.
- 4.22 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 set out in the witness statement.
- 4.23 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.
- 4.24 Photocopies may be used instead of original documents provided that the originals are available for inspection by the CC if necessary.

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<sup>42</sup> Paragraph 13(1) of the Schedule provides that a 'statement of truth' in relation to the production of a statement or provision of information by a person, means a statement that the person believes the facts stated in the statement or information to be true.

- 4.25 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.
- 4.26 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.

### **Hearings**

- 4.27 The CC will not normally conduct hearings on these appeals in public.
- 4.28 Where the CC decides to hold a hearing on the substance of the appeal, the date of the hearing will normally be stated in the administrative timetable, which will be published on the CC's website.
- 4.29 The CC notes that interested third parties who meet the requirements for appellants in the Acts may request a hearing. The CC will consider any such request and the reasons for the request and decide whether to invite the interested third party to a stand-alone hearing or to all or part of any hearing with the appellant and GEMA.
- 4.30 Hearings will normally be held with the Group<sup>43</sup> but CC staff will also participate.
- 4.31 Hearings are formal and will normally be led by the chair of the Group or by such other member of the CC as is appropriate.
- 4.32 Participants will normally be directed as to the matters on which the CC wishes to hear submissions and the length of time they will be allowed to make submissions, before the hearing. The CC will indicate the order in which it wishes to hear the participants. The CC expects that participants will normally be represented by one spokesperson or advocate only at each hearing. However, subject to prior agreement with the CC, they may be represented by more than one person and the CC will be sympathetic to such arrangements to facilitate the clear presentation of technical issues. At hearings participants may present their submissions using, for example, a PowerPoint presentation, if they consider that would assist the CC. Participants who wish to employ technology during their submissions should make prior arrangements with the CC.
- 4.33 Verbatim transcripts are taken of hearings. Transcripts will be sent to the relevant party after the hearing for checking and the identification of confidential material.

### **Staff meetings**

- 4.34 The CC may conduct meetings or make phone calls to clarify specific facts; for example, CC staff may hold meetings with GEMA or other participants to discuss modelling issues. A transcript will not normally be taken but where practical other participants may be invited to send observers.

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<sup>43</sup> This is a group of the CC's members, formed for the purpose of carrying out the CC's functions. See paragraphs 4 and 13 of the Schedule and paragraph 3.6 above.

## **Confidentiality**

- 4.35 Section 23G(2) of the Gas Act 1986 and section 11H(2) of the Electricity Act 1989 make provision for the exclusion from the published version of the CC determination of certain information:
- (a) commercial information, the disclosure of which would, or might in the CC's opinion, significantly harm the legitimate business interests of an undertaking to which it relates; or
  - (b) information relating to the private affairs of an individual, the disclosure of which would, or might in the CC's opinion, significantly harm the individual's interests.
- 4.36 Such information is defined in Rule 2.1 as 'sensitive information' and provision for its protection is included in the Rules (see, for example, Rule 11). Participants' attention is also drawn to section 105 of the Utilities Act 2000 which contains general restrictions on the disclosure of certain information obtained under or by virtue of the provisions of the relevant Parts of the Acts which relates to the affairs of any individual or to any particular business. The Utilities Act 2000 makes certain exceptions to those restrictions, including provision permitting disclosures made with consent of the individual or the person for the time being carrying on the business (section 105(2)) or made for the purpose of facilitating the performance of the functions of the CC, GEMA or other specified persons (section 105(3)(a) and 105(4) of the Utilities Act 2000).
- 4.37 Where it can do so while protecting commercial confidentiality, in order to secure fairness and assist it to perform its functions effectively, the CC may disclose relevant material provided by participants, other than communications of a purely administrative nature, and transcripts of hearings to other participants.
- 4.38 The CC may propose that disclosure of certain information should be made solely within a 'confidentiality ring', normally comprising the participants' named legal representatives and, possibly, other external advisers or experts such as accountants and economists, subject to appropriate confidentiality undertakings, rather than to the participants themselves.
- 4.39 Exceptionally, claims may be made that certain information is of such sensitivity that it should not be disclosed within the confidentiality ring.
- 4.40 Rule 14 sets out a non-exhaustive list of matters upon which the CC can give directions. Under this rule the CC can give directions about the handling of sensitive information. If a participant has concerns about providing sensitive information to another participant, it can provide the proposed version of the document to the CC and ask it to provide directions on the proposed excisions (Rule 11). The CC respects the importance of protecting sensitive information. However, it also discourages participants from making excessive or blanket confidentiality claims over submissions and may consider them to be inconsistent with the overriding objective.

## 5. Costs

- 5.1. Under the Acts, the CC is bound to make an order requiring the payment of its own costs incurred in connection with the appeal.<sup>44</sup> The CC has discretion to make an order requiring a party to the appeal (appellant or GEMA) to make payments to another party in respect of costs reasonably incurred by the other party in connection with the appeal.<sup>45</sup>
- 5.2. The CC will normally order an unsuccessful party to pay the costs of the successful party, but may make a different order. Factors influencing the CC's decision are set out in Rule 19.3 and 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.
- 5.3. While the CC does not have the power to order costs against or for interested third parties that participate in the appeals process, the CC will take into account the involvement of interested third parties in making an order for costs under Rule 19.2 and paragraph 12(3) of the Schedule.
- 5.4. Where the CC makes an order for costs in favour of one or more of the parties to the appeal under Rule 19.2, 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 CC will not normally allow any amount in respect of costs incurred before GEMA first published its decision.
- 5.5. The CC may make an order for costs at the time that it gives its determination. However, the CC may choose to reserve its position on costs and make a subsequent written order.
- 5.6. Any party to the appeal seeking an award of costs in its favour should file a statement of costs which should be disclosed to any party to the appeal who may become liable to pay those costs.
- 5.7. Each statement of costs should include detailed information about the costs (including categories such as solicitors' costs, Counsel fees, experts' costs and any other disbursements) reasonably incurred by the party to the appeal in connection with the appeal. The CC will normally expect the amounts for each category of costs to be broken down by reference to the number of hours claimed, hourly rate, position of the fee earner and the nature of the work performed.
- 5.8. Each statement of costs should be signed by the party to the appeal or where applicable its legal representative.

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<sup>44</sup> Paragraph 12(1) of the Schedule.

<sup>45</sup> Paragraph 12(3) of the Schedule.



