



# Competition Commission Energy Licence Modification Appeals Rules

September 2012



# Competition Commission Energy Licence Modification Appeals Rules

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## 1. Introduction, citation and commencement

- 1.1 These Rules are made in exercise of the powers conferred by paragraph 11(1) of Schedule 4A to the Gas Act 1986<sup>1</sup> and paragraph 11(1) of Schedule 5A to the Electricity Act 1989<sup>2</sup> for the purpose of regulating the conduct and disposal of appeals under section 23B of the Gas Act 1986 and section 11C of the Electricity Act 1989.
- 1.2 Before making these Rules the CC consulted such persons as it considered appropriate.
- 1.3 These Rules are to be known as the ‘CC Energy Licence Modification Appeals Rules’.
- 1.4 These Rules will have effect from 25 September 2012.

## 2. Interpretation

- 2.1 In these Rules:
- (a) **‘the Acts’** means the Electricity Act 1989 and the Gas Act 1986;
  - (b) **‘the Authority’** means the Gas and Electricity Markets Authority;
  - (c) **‘the CC’** means the Competition Commission;
  - (d) **‘electronic form’** means in a form capable of being transmitted electronically such that the document so transmitted is capable of being reproduced in legible form;
  - (e) **‘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;
  - (f) **‘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;
  - (g) **‘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;<sup>3</sup> and
  - (h) **‘sensitive information’** means information which is either:
    - (i) commercial information, the disclosure of which would, or might, significantly harm the legitimate business interests of an undertaking to which it relates; or
    - (ii) information relating to the private affairs of an individual, the disclosure of which would, or might, significantly harm the individual’s interests.
- 2.2 In these Rules, unless the contrary intention appears, words in the singular include the plural and words in the plural include the singular.

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<sup>1</sup> 1986 c44, as amended in particular by the Electricity and Gas (Internal Markets) Regulations 2011 (SI 2011/2704).

<sup>2</sup> 1989 c29, as amended in particular by the Electricity and Gas (Internal Markets) Regulations 2011 (SI 2011/2704).

<sup>3</sup> The ‘Schedules’ in these footnotes.

- 2.3 Words defined by paragraph 13 of the Schedule have the same meaning in these Rules as they have in the Schedule.

### 3. Application of rules

- 3.1 These Rules are supplementary to the provisions of the Acts. In the event of any conflict between the Rules and the Acts, the latter will prevail.<sup>4</sup>

### 4. Overriding objective

- 4.1 The overriding objective of these Rules is to enable the CC to dispose of appeals fairly and efficiently within the time periods prescribed by the Acts. The CC will apply these Rules so as to give effect to the overriding objective.
- 4.2 Parties to the appeal<sup>5</sup> and interested third parties must assist the CC to further the overriding objective.

### 5. Notice of appeal<sup>6</sup>

- 5.1 Any person who wishes to make an application for permission to bring an appeal must send a notice, marked Notice of Appeal, Energy Licence Modification, to the CC within the period specified in paragraph 1(3) of the Schedule.<sup>7</sup>
- 5.2 The appellant must state in the notice of appeal:
- 5.2.1 the decision of the Authority the appellant wishes to appeal and the date it was published;
  - 5.2.2 the grounds of appeal on which the appellant is relying;
  - 5.2.3 a statement of the relief which the appellant is seeking and any directions necessary to give effect to that relief;
  - 5.2.4 the capacity in which the appellant is making the application;
  - 5.2.5 if the appellant is not the relevant licence holder, a description of the interests that the appellant believes are materially affected by the decision; and
  - 5.2.6 where applicable, a statement as to why the appellant believes it is to be regarded as a qualifying body or association whose functions are or include representing persons in respect of interests of theirs which are materially affected by the decision.
- 5.3 The notice of appeal must include the following:
- 5.3.1 a statement of the facts and reasons supporting each ground of appeal on which the appellant is relying;

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<sup>4</sup> Section 23C of the Gas Act 1986 and section 11D of the Electricity Act 1989 exclude energy licence modification appeals from the general functions of the CC regulated by Part 2 of Schedule 7 to the Competition Act 1998 (manner in which general functions are to be carried out). Instead, the Schedules make provision for the procedural aspects of these appeals. Paragraph 11(1) of the Schedules empowers the CC to make these Rules.

<sup>5</sup> Paragraph 13(2) of the Schedules provides that references to a party to an appeal are references to (a) the appellant; or (b) the Authority.

<sup>6</sup> See also paragraphs 1 and 5 of the Schedules.

<sup>7</sup> Twenty working days beginning with the first working day after the day on which the Authority's decision is published.

- 5.3.2 any written evidence in the possession or control of the appellant which the appellant wishes to adduce in support of the appeal;
  - 5.3.3 particulars of any other documents to which the appellant contends that the CC should have regard in determining the appeal;
  - 5.3.4 a statement identifying which, if any, of the facts relied upon were, in the belief of the appellant, matters the Authority was not able to have regard in relation to the decision and why they were not brought to the attention of the Authority before it made the decision;
  - 5.3.5 a copy of the decision to be appealed;
  - 5.3.6 the appellant's name and address and, where applicable, the name and address of the appellant's solicitors and, or alternatively, the name and address of the appellant's other legal representatives; and
  - 5.3.7 an address in the UK, together with an address for electronic mail, for the purpose of receiving documents.
- 5.4 The appellant must verify the information contained in a notice of appeal by a statement of truth.<sup>8</sup>
- 5.5 Where the appellant considers that any of the information and/or written evidence required by Rules 5.2 and 5.3 contain sensitive information, the appellant must provide, with the notice of appeal, a non-confidential version of the matters required in Rule 5.2 and the statements and/or written evidence set out in Rule 5.3, with any sensitive information redacted, that is in a form suitable for publication on the CC's website.
- 5.6 At the time of making an application for permission to appeal the appellant must send to the Authority a copy of the notice of appeal.<sup>9</sup>
- 5.7 At the time of making an application for permission to appeal the appellant must send to any relevant licence holders who are not parties to the appeal a non-confidential notice setting out the matters required in Rule 5.2.
- 5.8 If the CC considers that the notice of appeal is incomplete, or is insufficiently clear, it may take this into account in considering whether to grant permission, or whether to grant permission subject to conditions.
- 6. Permission to appeal<sup>10</sup>**
- 6.1 The CC will normally consider applications for permission to bring an appeal without a hearing.
- 6.2 The Authority must send any representations or observations it wishes to make about an application for permission to appeal to the CC in writing within the period specified in paragraph 3(2) of the Schedule.<sup>11</sup>

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<sup>8</sup> Paragraph 13(1) of the Schedules provide 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.

<sup>9</sup> Paragraph 1(7) of the Schedules.

<sup>10</sup> See also paragraphs 1 and 3 of the Schedules.

<sup>11</sup> Ten working days beginning with the first working day after the day on which it received a copy of the application under paragraph 1(7) of the Schedules.

- 6.3 The CC may hold a hearing to determine an application for permission to appeal, either of its own motion or on application. Where the CC decides to hold a permission hearing the CC will give notice to the parties to the appeal and such other persons as it considers appropriate.
- 6.4 If the CC grants permission to appeal, it will notify the parties to the appeal and any relevant licence holders of its decision and of any conditions subject to which the decision to grant permission is made.
- 6.5 If the CC refuses permission to appeal, it will notify the parties to the appeal and any relevant licence holders of its decision and its reasons.
- 6.6 The CC will publish on its website, as soon as reasonably practicable after making its decision, and subject to the exclusion of sensitive information, its decision and any relevant conditions.

## 7. Application for suspension of decision<sup>12</sup>

- 7.1 The CC may consider an application for suspension of the Authority's decision, the subject of appeal with or without a hearing, and may hold any such hearing either of its own motion or on application.
- 7.2 Where an appellant makes an application for suspension, the appellant must provide with this application a non-confidential version stating that the application has been made and the basis of the application, with any sensitive information redacted, that is in a form suitable for publication on the CC's website.
- 7.3 At the time of making an application for suspension, the appellant must send to the Authority a copy of the application for suspension.<sup>13</sup>
- 7.4 At the time of making an application for suspension the appellant must send to any relevant licence holders who are not parties to the appeal a non-confidential version of the application, informing them of the fact that the application has been made and the basis of the application.
- 7.5 The Authority must send any representations or observations it wishes to make about an application for suspension to the CC in writing within the period specified in paragraph 3(2) of the Schedule.<sup>14</sup>
- 7.6 Any relevant licence holder must send any representations or observations it wishes to make about an application for suspension to the CC in writing within five working days,<sup>15</sup> beginning with the first working day after the day on which it received the notification of the application for suspension under Rule 7.4.
- 7.7 If the CC decides to hold a hearing to consider an application for suspension, it will give notice to the parties to the appeal, any relevant licence holders and such other persons as it considers appropriate.

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<sup>12</sup> See paragraphs 2 and 3 of the Schedules.

<sup>13</sup> Paragraph 2(4) of the Schedules.

<sup>14</sup> Ten working days beginning with the first working day after the day on which it received a copy of the application under paragraph 2(4) of the Schedules.

<sup>15</sup> Paragraph 13(1) of the Schedules provides that 'working day' means any day other than (a) Saturday or Sunday; (b) Christmas Day or Good Friday; (c) a day which is a bank holiday in England and Wales or Scotland under the Banking and Financial Dealings Act 1971.

- 7.8 The CC will notify the parties to the appeal, any relevant licence holders and such other persons as it considers appropriate of its decision and reasons and, as soon as reasonably practicable after making its decision, publish it on the CC's website.

## 8. Withdrawal of application

- 8.1 An appellant may apply to the CC for permission to withdraw the application for permission to appeal, the application for suspension of the Authority's decision, or the appeal.
- 8.2 The Authority may apply to the CC for a summary determination allowing the appeal.
- 8.3 When the CC grants permission for an appeal to be withdrawn, or issues a summary determination, it may make an order as to costs.

## 9. The Authority's response<sup>16</sup>

- 9.1 Where the CC has granted permission to appeal, the Authority may make representations or observations to the CC about its reasons for the decision, the subject of appeal, and/or any grounds on which the appeal is being brought against that decision. It must send its representations or observations to the CC in writing within the period specified in paragraph 3(4) of the Schedule.<sup>17</sup>
- 9.2 At the time of sending its response to the CC, the Authority must send to the appellant:
- 9.2.1 a copy of the statement in response; and
  - 9.2.2 a copy of any written evidence it has adduced.
- 9.3 The Authority's response should contain the following:
- 9.3.1 a statement, identifying the facts and reasons why it believes the appeal should not succeed and, or alternatively, why it believes the relief sought should not be allowed;
  - 9.3.2 any written evidence it wishes to adduce in support of that response; and
  - 9.3.3 a non-confidential version of the statement in response and any written evidence adduced in support of that response, with any sensitive information redacted.
- 9.4 The non-confidential version of the statement in response and any written evidence adduced in support of that response should be in a form suitable for publication on the CC's website.

## 10. Interested third party representations

- 10.1 Where the CC has granted permission to appeal, an interested third party may make representations or observations to the CC about the grounds on which the appeal is being brought. Any interested third party must send its representations or

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<sup>16</sup> See paragraph 3 of the Schedules.

<sup>17</sup> Fifteen working days beginning with the first working day after the day on which permission to bring the appeal was granted.



observations to the CC in writing within the period allowed to the Authority and specified in paragraph 3(4) of the Schedule.<sup>18</sup>

- 10.2 At the time of sending its representations or observations to the CC, the interested third party must send to the appellant and the Authority:
- 10.2.1 a copy of the non-confidential version of its representations; and
  - 10.2.2 a copy of the non-confidential version of any written evidence it has adduced.
- 10.3 The interested third party's representations or observations should contain the following:
- 10.3.1 a statement, identifying the facts and reasons why it believes the appeal should or should not succeed and, or alternatively, why it believes the relief sought should or should not be allowed;
  - 10.3.2 any written evidence it wishes to adduce in support of its representations; and
  - 10.3.3 a non-confidential version of the representations and any written evidence adduced in support of those representations, with any sensitive information redacted.
- 10.4 The non-confidential version of the representations and any written evidence adduced in support of those representations should be in a form suitable for publication on the CC's website.

## 11. Non-disclosure applications

- 11.1 Where a party to the appeal or an interested third party is required by these Rules or a direction made under these Rules to send to any person a confidential version of any document or submissions and the party to the appeal or interested third party considers that any information contained within the document or submission is sensitive information which should not be disclosed to that person, it may:
- 11.1.1 make a non-disclosure application to the CC at the same time that it sends the document or submission to the CC; and
  - 11.1.2 pending the CC's direction, excise the sensitive information from the relevant document or submission sent in accordance with these Rules.

## 12. Publication on the CC's website

- 12.1 The CC may publish on its website, as soon as reasonably practicable after receipt, non-confidential versions of:
- 12.1.1 the notice of appeal provided under Rule 5.5;
  - 12.1.2 any application for suspension of the decision under appeal provided under Rule 7.2;

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<sup>18</sup> Fifteen working days beginning with the first working day after the day on which permission to bring the appeal was granted.

- 12.1.3 the Authority's statement in response and any written evidence provided under Rule 9.3.3;
  - 12.1.4 any interested third party's representations and written evidence provided under Rule 10.3.3;
  - 12.1.5 any further submissions or written evidence required by directions issued under Rule 14.2; and
  - 12.1.6 any other material which, in the view of the CC, it is necessary to publish for the purposes of the overriding objective.
- 12.2 The CC will publish a non-confidential version of the CC's determination on the appeal on its website.

### **13. Administrative timetable**

- 13.1 As soon as practicable after permission to appeal has been granted, the CC will set an administrative timetable which makes provision for the major stages of the appeal.
- 13.2 The administrative timetable may, in particular, include arrangements for the following:
- 13.2.1 considering and notifying possible directions;
  - 13.2.2 considering submissions and representations;
  - 13.2.3 clarifying and verifying information;
  - 13.2.4 holding appeal management conferences;
  - 13.2.5 holding hearings;
  - 13.2.6 notifying provisional findings; and
  - 13.2.7 publishing the CC's determination,
- provided that where these stages are mentioned in the administrative timetable, they need not necessarily take place in the order in which they are mentioned in this rule.
- 13.3 The CC will, when drawing up the administrative timetable, have regard to any views which the parties to the appeal, and any interested third parties, submit to it.
- 13.4 The CC will proceed on the basis that the parties to the appeal and interested third parties will comply with the administrative timetable.
- 13.5 Once the administrative timetable has been drawn up, the CC will notify it to the parties to the appeal, and any interested third parties who have declared their interest in the appeal, and will publish it on the CC's website.
- 13.6 If, at any point during the appeal, the CC has reason to believe that the administrative timetable will not be met for any reason, then the CC may prepare a revised timetable to which the notification and publication requirements contained in Rule 13.5 will apply.

## 14. Procedure and directions

- 14.1 Subject to the provisions of the Acts and these Rules, the CC may determine its own procedure.
- 14.2 The CC may at any time on application or of its own motion give such directions as it considers necessary for the conduct of the appeal.
- 14.3 The matters on which the CC may give directions include:
- 14.3.1 the holding of appeal management conferences;
  - 14.3.2 where there are two or more appeals pending in respect of the same decision, or in respect of decisions which in the view of the CC are closely related, the CC may direct that the appeals in whole or part should be consolidated and heard together;<sup>19</sup>
  - 14.3.3 the conduct of hearings;
  - 14.3.4 the making of further submissions;
  - 14.3.5 further evidence that may be required;
  - 14.3.6 the appointment and instruction of experts, whether by the CC,<sup>20</sup> by the parties to the appeal, or by any interested third party, and as to the manner in which expert evidence is to be given;
  - 14.3.7 the submission of witness statements or expert reports;
  - 14.3.8 the examination or cross-examination of witnesses;
  - 14.3.9 the fixing of time limits in respect of any aspect of the appeal;
  - 14.3.10 the disclosure or the production of documents, or classes of documents, between the parties to the appeal or other persons, including directions as to the treatment of sensitive information;
  - 14.3.11 the variation of the provisions of these Rules in relation to the requirements for sending documents;
  - 14.3.12 the hearing of a person who is not a party to the appeal where it is proposed to give a notice or direction in relation to that person; and
  - 14.3.13 such other matters as appear to the CC to be necessary to meet the overriding objective.
- 14.4 The CC will give written notice of its directions.
- 14.5 The CC may at any time:
- 14.5.1 put questions to the parties to the appeal or interested third parties;

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<sup>19</sup> Paragraph 1(11) of the Schedules 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 (including appeals relating to different matters or decisions and appeals brought by different persons).

<sup>20</sup> See paragraph 9 of the Schedules.

- 14.5.2 invite the parties to the appeal or interested third parties to make written or oral submissions on aspects of the appeal;
- 14.5.3 direct the parties to the appeal or interested third parties to provide information or particulars and direct them to produce documents or papers relating to the appeal; and
- 14.5.4 require the parties to the appeal or interested third parties to attend meetings or hearings.

## 15. Appeal management conferences

- 15.1 The CC may hold appeal management conferences with the parties to the appeal and any person invited under Rule 15.2 where it considers that to do so would further the overriding objective.
- 15.2 The CC will normally expect to invite 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.

## 16. Oral hearings<sup>21</sup>

- 16.1 The procedure at a hearing will be determined by the CC.
- 16.2 Hearings will be opened and directed by the chair of the Group or by such other member of the CC as is appropriate.<sup>22</sup>
- 16.3 The CC will decide the extent, if any, to which at a hearing persons other than parties to the appeal are allowed:
  - (a) to be present or to be heard, either by themselves or by their representatives;
  - (b) to cross-examine witnesses; and
  - (c) otherwise to take part.
- 16.4 If no previous direction has been made, at the start of the hearing the attendees will be directed as to the length of their oral submissions, the issues on which the CC wishes to concentrate at the hearing, and the order in which the CC wishes to hear the submissions.

## 17. The production of documents, calling witnesses and the production of written statements<sup>23</sup>

- 17.1 Where the CC requires a person to produce a document, to attend and give evidence or to produce a written statement pursuant to paragraphs 6, 7 and 8 of the Schedule,

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<sup>21</sup> See paragraphs 7 and 10 of the Schedules in relation to oral hearings. Paragraphs 6, 7 and 8 of the Schedules provide the CC with powers to issue notices to any person requiring the provision of documents, the attendance at hearings and the making of written statements. Where a person (a) fails to comply with a notice issued or other requirement imposed by these paragraphs; (b) in complying with a notice under paragraph 8, makes a statement that is false in any material particular; or (c) in providing information verified in accordance with a statement of truth required by these Rules, provides information that is false in a material particular, paragraph 10 of the Schedules provides that the High Court or Court of Session may punish the defaulter as if the person had been guilty of contempt of court.

<sup>22</sup> See paragraph 4 of the Schedules.

<sup>23</sup> See paragraphs 6, 7, 8 and 10 of the Schedules and footnote 21 above.

it may provide a copy of the notice to each party to the appeal and interested third parties.

- 17.2 The CC will specify in a notice requiring the production of a written statement issued pursuant to paragraph 8 of the Schedule, the time and place that the statement is to be produced and that it is required to be verified by a statement of truth.

## 18. Written evidence<sup>24</sup>

- 18.1 Subject to the direction of the CC, written evidence must be in the form of a witness statement.
- 18.2 A witness statement must be verified by a statement of truth<sup>25</sup> signed by the witness.
- 18.3 If a person wishes to rely on facts contained in a notice of appeal, an application for suspension of the Authority's decision, any representations or observations or any other application, those facts must be verified by a statement of truth.

## 19. Costs<sup>26</sup>

- 19.1 When it determines an appeal, the CC will make an order for the payment of its own costs in accordance with paragraph 12(2) of the Schedule.
- 19.2 When it determines an appeal, the CC may also make such order as it thinks fit for requiring a party to the appeal to make payments to another party in respect of costs reasonably incurred by that other party in connection with the appeal.
- 19.3 In deciding what order to make under Rule 19.2, the CC will have regard to all the circumstances, including:
- 19.3.1 the conduct of the parties, including:
    - 19.3.1.1 the extent to which each party has assisted the CC to meet the overriding objective;
    - 19.3.1.2 whether it was reasonable for a party to raise, pursue or contest a particular issue;
    - 19.3.1.3 the manner in which a party has pursued its case or a particular aspect of its case;
  - 19.3.2 whether a party has succeeded wholly or in part; and
  - 19.3.3 the proportionality of the costs claimed.

## 20. Slip rule

- 20.1 Where any order or decision of the CC contains a clerical error, or a slip or omission, that error, slip or omission may be corrected and a further order or decision issued by any person who could have made the original order or decision.

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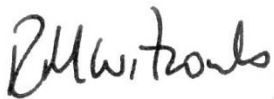
<sup>24</sup> See paragraphs 8 and 10 of the Schedules and footnote 21 above.

<sup>25</sup> See footnote 8 above.

<sup>26</sup> See paragraph 12 of the Schedules.

## 21. Sending of documents

- 21.1 All confidential documents sent to the CC or any other person should be marked to identify sensitive information.
- 21.2 Unless a person is notified otherwise by the CC, any document that is to be sent to the CC under the Acts or these Rules must be sent both in electronic form and in hard copy:
- (a) by email to: [info@cc.gsi.gov.uk](mailto:info@cc.gsi.gov.uk); and
  - (b) by first class post or personal delivery, marked for the attention of the Information Centre Manager, Competition Commission, Victoria House, Southampton Row, London WC1B 4AD.
- 21.3 Unless a person is notified otherwise by the CC, any document required to be sent to a person other than the CC under these Rules may be:
- 21.3.1 delivered personally;
  - 21.3.2 sent by first class post; or
  - 21.3.3 sent by electronic mail.



Roger Witcomb  
Chairman  
Competition Commission



