

Energy Licence Modification Appeals: Competition and Markets Authority Rules

Draft for consultation

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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 1986,¹ paragraph 11(1) of Schedule 5A to the Electricity Act 1989², paragraph 11(1) of Schedule 5A to the Electricity (Northern Ireland) Order 1992³ and paragraph 11(1) of Schedule 3A to the Gas (Northern Ireland) Order 1996,⁴ for the purpose of regulating the conduct and disposal of appeals under, as applicable, section 23B of the Gas Act 1986, section 11C of the Electricity Act 1989, Article 14B of the Electricity (Northern Ireland) Order 1992 and Article 14B of the Gas (Northern Ireland) Order 1996.
- 1.2 Before making these Rules the Competition and Markets Authority (CMA) consulted such persons as it considered appropriate.
- 1.3 These Rules are to be known as the *Energy Licence Modification Appeals: Competition and Markets Authority Rules*.
- 1.4 These Rules will have effect from [] 2017.

2. Interpretation

- 2.1 In these Rules:

'the Acts' means the Electricity Act 1989, the Gas Act 1986, the Electricity (Northern Ireland) Order 1992 and the Gas (Northern Ireland) Order 1996;

'the Authority' means the Gas and Electricity Markets Authority or the Northern Ireland Authority for Utility Regulation as the case may be;

'Authorised Member of the CMA' has the same meaning as in paragraph 13(1) of the Schedule;

'the CMA' means the Competition and Markets Authority;

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

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

³ The Electricity (Northern Ireland) Order 1992 SI 1992/231 (NI), as amended by the Gas and Electricity Licence Modification and Appeals Regulations (Northern Ireland) SI 2015/1 (NI).

⁴ The Gas (Northern Ireland) Order 1996 (NI 2), SI 1996/275, as amended by the Gas and Electricity Licence Modification and Appeals Regulations (Northern Ireland) 2015, SI 2015/1 (NI).

‘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;

‘intervener’ means any person given permission under Rule 10 to intervene in an appeal;

‘relevant licence holder’ has the same meaning as in section 11A(10) of the Electricity Act 1989, section 23(10) of the Gas Act 1986, Article 14(11) of the Electricity (Northern Ireland) Order 1992 and Article 14(11) of the Gas (Northern Ireland) Order 1996;

‘the Schedule’ means whichever of Schedule 5A to the Electricity Act 1989, Schedule 4A to the Gas Act 1986, Schedule 5A to the Electricity (Northern Ireland) Order 1992 or Schedule 3A to the Gas (Northern Ireland) Order 1996 is applicable to an appeal;

‘sensitive information’ means information which is:

- (a) commercial information, the disclosure of which would or might 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 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.

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.

4. Overriding objective

4.1 The overriding objective of these Rules is to enable the CMA to dispose of appeals fairly and efficiently and at proportionate cost within the time periods prescribed by the Acts. The CMA will apply these Rules so as to give effect to the overriding objective.

4.2 All parties to an appeal⁵ and any intervener must assist the CMA to further the overriding objective.

5. Notice of appeal⁶

5.1 Any person who wishes to make an application for permission to appeal must send a notice, marked Notice of Appeal, Energy Licence Modification ('the notice of appeal') to the CMA within the period specified in paragraph 1(3) of the Schedule.⁷

5.2 The notice of appeal must state:

- (a) the decision of the Authority the appellant wishes to appeal and the date it was published;
- (b) the grounds of appeal on which the appellant wishes to rely;
- (c) the relief sought and any directions necessary to give effect to that relief;
- (d) the capacity in which the appellant is making the application;
- (e) 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
- (f) where applicable, 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:

- (a) a statement of the facts and reasons supporting each ground of appeal on which the appellant is relying;
- (b) any evidence on which the appellant wishes to rely;
- (c) particulars of any other documents to which the appellant believes the CMA should have regard in determining the appeal;

⁵ Paragraph 13(2) of the Schedule provides that references to a party to an appeal are references to (a) the appellant; or (b) the Authority.

⁶ See also paragraphs 1 and 5 of the Schedule.

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

- (d) a statement identifying which, if any, of the matters relied on in any ground of appeal were, in the belief of the appellant, matters to which the Authority was unable to have regard in reaching its decision and why such matters were not brought to the attention of the Authority before it reached its decision;
- (e) a copy of the decision to be appealed;
- (f) 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
- (g) 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.⁸

5.5 Where the appellant considers that the notice of appeal contains sensitive information the appellant must provide the CMA with a non-sensitive version with the notice of appeal. The non-sensitive notice of appeal should be in a form suitable for publication on the CMA's website.

5.6 The appellant must send the Authority a copy of the notice of appeal at the same time as it is sent to the CMA.⁹

5.7 When the appellant sends its notice of appeal to the CMA it must send to any relevant licence holders who are not parties to the appeal a non-sensitive notice setting out the matters required in Rule 5.2.

5.8 If the CMA 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 appeal¹⁰

6.1 The CMA will normally consider applications for permission to appeal without a hearing.

⁸ 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.

⁹ Paragraph 1(7) of the Schedule.

¹⁰ See also paragraphs 1 and 3 of the Schedule.

- 6.2 The Authority must send the CMA and the appellant any representations or observations it wishes to make about the application for permission to appeal in writing within the period specified in paragraph 3(2) of the Schedule.¹¹
- 6.3 The CMA may hold a hearing to determine an application for permission to appeal, either of its own motion or on application. Where the CMA decides to hold a permission hearing the CMA will give notice to the parties to the appeal, and may give notice to any relevant licence holder and such other persons as it considers appropriate.
- 6.4 If the CMA grants permission to appeal, it will notify the parties to the appeal and any relevant licence holders of its decision, giving reasons, and of any conditions subject to which the decision to grant permission is made.
- 6.5 If the CMA 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 CMA will normally publish its decision on its website subject to the exclusion of sensitive information as soon as reasonably practicable after it is made.

7. Application for suspension of decision¹²

- 7.1 The CMA may consider an application for suspension of the Authority's decision, with or without a hearing, and may hold any such hearing either of its own motion or on application.
- 7.2 On making an application for suspension the appellant must provide a non-sensitive version of the application in a form suitable for publication on the CMA's website.
- 7.3 When the appellant sends its application for suspension to the CMA, it must at the same time send a copy to the Authority.¹³
- 7.4 When the appellant sends its application for suspension to the CMA, it must at the same time send a non-sensitive copy to any relevant licence holder.

¹¹ 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 Schedule.

¹² See paragraphs 2 and 3 of the Schedule.

¹³ Paragraph 2(4) of the Schedule.

- 7.5 The Authority must send any representations or observations it wishes to make about an application for suspension to the CMA and the appellant in writing within the period specified in paragraph 3(2) of the Schedule.¹⁴
- 7.6 Any relevant licence holder must send any representations or observations it wishes to make about an application for suspension to the CMA in writing within five working days, 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 CMA 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.
- 7.8 The CMA 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 CMA's website.

8. Withdrawal of application

- 8.1 An appellant may apply to the CMA 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 CMA for a summary determination allowing the appeal.
- 8.3 When the CMA grants permission to withdraw an application for permission to appeal, an application for suspension or an appeal, or issues a summary determination, it may make an order as to costs.

9. The Authority's response¹⁵

- 9.1 Where the CMA has granted permission to appeal, the Authority may make representations or observations to the CMA about its reasons for the decision, and/or any grounds on which the appeal is brought. It must send its

¹⁴ 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 Schedule.

¹⁵ See paragraph 3 of the Schedule.

representations or observations (its 'response') to the CMA in writing within the period specified in paragraph 3(4) of the Schedule.¹⁶

- 9.2 At the time of sending its response to the CMA, the Authority must send to the appellant:
- (a) a copy of the response; and
 - (b) any written evidence on which it wishes to rely.
- 9.3 The response should contain:
- (a) a statement, identifying the facts and reasons why the appeal should not succeed and, or alternatively, why the relief sought should not be allowed;
 - (b) any evidence in support of that response; and
 - (c) a non-sensitive 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-sensitive version of the statement in response and any evidence adduced in support of that response should be in a form suitable for publication on the CMA's website.

10. Interveners

- 10.1 Where the CMA has granted permission to appeal, it may on the application of any person (which includes associations or bodies representing consumers whose interests are affected by the decision) give permission to intervene.
- 10.2 An application for permission to intervene shall be made before the end of the period of ten working days beginning with the first working day after the day on which the decision granting permission to appeal is published on the CMA's website.
- 10.3 In considering whether to give permission, the CMA shall take account of all the circumstances including:
- (a) whether the applicant is materially interested in the outcome of the appeal;

¹⁶ Fifteen working days beginning with the first working day after the day on which permission to bring the appeal was granted.

- (b) whether the applicant's intervention in the appeal will assist the CMA to determine the appeal; and
 - (c) whether the nature and extent of the intervention sought is proportionate to the matters to be determined.
- 10.4 The application for permission to intervene shall contain a concise statement, identifying the facts and reasons for making the request, including as to the matters in Rule 10.3 as may be applicable to the applicant.
- 10.5 At the time of making an application for permission to intervene the applicant must send to the parties to the appeal a copy of the application.
- 10.6 At the time of sending its application for permission to intervene to the CMA, the applicant must send a non-sensitive version of the application in a form suitable for publication on the CMA's website.
- 10.7 The parties to the appeal may make representations on an application to intervene provided that such representations are made before the end of the period of five working days beginning with the first working day after the day on which the Authority sends its response to the CMA and the appellant under Rule 9.
- 10.8 The CMA may consider an application for permission to intervene with or without a hearing, and may hold any such hearing either of its own motion or on application. Where the CMA decides to hold a permission hearing the CMA will give notice to the parties to the appeal, the applicant and such other persons as it considers appropriate.
- 10.9 The CMA may grant permission to intervene subject to any conditions it considers appropriate.

11. Non-disclosure applications

- 11.1 Where anyone is required by these Rules, or a direction made under these Rules, to send to any person any document, and they consider that information contained within the document is sensitive information which should not be disclosed to that person, it may:
 - (a) make a non-disclosure application to the CMA at the same time that it sends the document to the CMA; and
 - (b) pending the CMA's direction, excise the sensitive information from the relevant document sent in accordance with these Rules.

12. Publication on the CMA's website

- 12.1 The CMA will normally publish on its website, as soon as reasonably practicable after receipt, the non-sensitive version of:
- (a) the notice of appeal provided under Rule 5.5;
 - (b) any application for suspension of the decision under appeal provided under Rule 7.2.
- 12.2 The CMA may publish on its website in such manner and at such time as it considers appropriate:
- (a) a non-sensitive version of the Authority's observations on the application for permission to appeal and/or on an application for suspension, provided under paragraph 3(2) of the Schedule;
 - (b) the Authority's statement in response and any written evidence provided under Rule 9.3(c);
 - (c) any non-sensitive version of an application for permission to intervene provided under Rule 10.8 and any representations under Rule 10.9;
 - (d) any further submissions or written evidence required or permitted by directions issued under Rule 10.12 and/or 14.2; and
 - (e) any other material which, in the view of the CMA, is necessary to publish for the purposes of the overriding objective.
- 12.3 The CMA will publish a non-sensitive version of the CMA'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 CMA 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:
- (a) considering and notifying possible directions;
 - (b) considering submissions and representations;
 - (c) clarifying and verifying information;

- (d) holding appeal management conferences;
- (e) holding hearings;
- (f) notifying provisional findings; and
- (g) publishing the CMA'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 CMA will, when drawing up the administrative timetable, have regard to any views which the parties to the appeal, and any interveners, submit to it.
- 13.4 The CMA will proceed on the basis that the parties to the appeal and interveners will comply with the administrative timetable.
- 13.5 Once the administrative timetable has been drawn up, the CMA will notify it to the parties to the appeal, and any interveners or applicant interveners and will publish it on the CMA's website.
- 13.6 If, at any point during the appeal, the CMA has reason to believe that the administrative timetable will not be met for any reason, then the CMA 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 CMA may determine its own procedure.
- 14.2 The CMA may at any time on application or of its own motion give such directions as it considers necessary for the conduct of any appeal including but not limited to any of the following matters:
 - (a) the holding of appeal management conferences;
 - (b) (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 CMA are

closely related) that the appeals in whole or part should be consolidated and heard together;¹⁷

- (c) the conduct of hearings;
- (d) the making of further submissions;
- (e) the filing and service of further evidence;
- (f) the appointment and instruction of experts, whether by the CMA,¹⁸ by the parties to the appeal, or by any intervener, and as to the manner in which expert evidence is to be given;
- (g) the submission of witness statements or expert reports;
- (h) the examination or cross-examination of witnesses;
- (i) the fixing of time limits in respect of any aspect of the appeal;
- (j) the disclosure or the production of documents, or classes of documents, between the parties to the appeal or to other persons (including relevant licence holders) and to give directions as to the treatment of sensitive information;
- (k) the variation of the provisions of these Rules in relation to the requirements for sending documents;
- (l) 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
- (m) such other matters as appear to the CMA to be necessary to meet the overriding objective.

14.3 The CMA will give written notice of its directions.

14.4 The CMA may at any time:

- (a) put questions to the parties to the appeal or interveners;
- (b) invite the parties to the appeal or interveners to make written or oral submissions on aspects of the appeal;

¹⁷ Paragraph 1(11) of the Schedule provides that the CMA 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).

¹⁸ See paragraph 9 of the Schedule.

- (c) direct the parties to the appeal or interveners to provide information or particulars and direct them to produce documents or papers relating to the appeal; and
- (d) require the parties to the appeal or interveners to attend meetings or hearings.

15. Appeal management conferences

- 15.1 The CMA may hold appeal management conferences with the parties to the appeal and any intervener and any person invited under Rule 15.2 where it considers that to do so would further the overriding objective.
- 15.2 The CMA may invite any relevant licence holders and applicants for permission to intervene to the appeal management conferences.

16. Oral hearings¹⁹

- 16.1 The procedure at a hearing will be determined by the CMA.
- 16.2 Hearings will be opened and directed by the chair of the Group or by such other member of the CMA as is appropriate.²⁰
- 16.3 The CMA will decide the extent, if any, to which at a hearing the parties and any intervener are allowed:
 - (a) to be present or to be heard, in person 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 CMA wishes to concentrate at the hearing, the order in which the

¹⁹ See paragraphs 7 and 10 of the Schedule in relation to oral hearings. Paragraphs 6, 7 and 8 of the Schedule provide the CMA 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 Schedule provides that the High Court or Court of Session may punish the defaulter as if the person had been guilty of contempt of court.

²⁰ See paragraph 4 of the Schedule.

CMA wishes to hear the submissions, and when and how the CMA will pose questions of the attendees.

16.5 At a hearing a party may be represented by:

(a) a qualified lawyer having a right of audience before a court in the United Kingdom; or

(b) such other person as the CMA allows.

17. The production of documents, calling witnesses and the production of written statements²¹

17.1 Where the CMA 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, it may provide a copy of the notice to each party to the appeal and interveners.

18. Written evidence²²

18.1 Subject to any direction of the CMA, written evidence must be in the form of a witness statement.

18.2 A witness statement must be verified by a statement of truth²³ 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. Provisional determination

19.1 The CMA will normally issue a provisional determination stating its provisional conclusions on the appeal.

19.2 When the CMA issues a provisional determination, it shall notify the parties to the appeal and interveners of that provisional determination on such terms and in such manner as the CMA considers appropriate.

²¹ See paragraphs 6, 7, 8 and 10 of the Schedule and footnote 21 above.

²² See paragraphs 8 and 10 of the Schedule and footnote 21 above.

²³ See footnote 9 above.

- 19.3 The provisional determination will not normally be published on the CMA's website.
- 19.4 The provisional determination will normally contain:
- (a) the CMA's provisional findings on the grounds of appeal raised by the appellant;
 - (b) an explanation for the CMA's provisional conclusions and findings; and
 - (c) the relief which the CMA is proposing to grant.
- 19.5 Where the CMA issues a provisional determination, it will at the same time invite the parties to the appeal including any interveners to make submissions in response to the provisional determination within such time as the CMA considers appropriate.

20. The CMA's powers where an appeal is allowed²⁴

- 20.1 Where the CMA allows an appeal in relation to a price control decision, it must do one or more of the following:
- (a) quash the decision (to the extent that the appeal is allowed);
 - (b) remit the matter back to the Authority for reconsideration and determination in accordance with any directions given by the CMA;
 - (c) substitute the CMA's decision for that of the Authority and (to the extent that the appeal is allowed) give directions to the Authority or any other party to the appeal.
- 20.2 If the appeal is in relation to any other decision, the CMA must do one or both of the following:
- (a) quash the decision (to the extent that the appeal is allowed);
 - (b) remit the matter back to the Authority for reconsideration and determination in accordance with any directions given by the CMA.

²⁴ Section 23E of the Gas Act 1986, section 11F of the Electricity Act 1989, Article 14E of the Electricity (Northern Ireland) Order 1992 and Article 14E of the Gas (Northern Ireland) Order 1996.

21. Costs²⁵

- 21.1 The CMA Group that determines an appeal must make an order for the payment of its own costs in accordance with paragraph 12(2) of the Schedule.
- 21.2 The CMA Group that determines an appeal 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.
- 21.3 Any party to the appeal seeking an award of costs in its favour should file a statement of costs when invited by the CMA, which should be disclosed to any party to the appeal who may become liable to pay those costs.
- 21.4 In deciding what order to make under Rule 21.2, the CMA Group will have regard to all the circumstances, including:
- (a) the conduct of the parties, including:
 - (i) the extent to which each party has assisted the CMA to meet the overriding objective;
 - (ii) whether it was reasonable for a party to raise, pursue or contest a particular issue;
 - (iii) the manner in which a party has pursued its case or a particular aspect of its case;
 - (b) whether a party has succeeded wholly or in part;
 - (c) the proportionality of the costs claimed; and
 - (d) whether the appeal is brought on behalf and/or for the benefit of consumers.

22. Slip rule

- 22.1 Where any order or decision of the CMA 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.

²⁵ See paragraph 12 of the Schedule.

23. Filing of documents

- 23.1 All sensitive documents sent to the CMA or any other person should be marked to identify sensitive information.
- 23.2 Unless a person is notified otherwise by the CMA, any document that is to be sent to the CMA under the Acts or these Rules must be sent both in electronic form and in hard copy:
- (a) by email to appeals@cma.gsi.gov.uk; and
 - (b) by first class post or personal delivery, marked for the attention of the Regulatory Appeals Team, Competition and Markets Authority, Victoria House, Southampton Row, London WC1B 4AD.
- 23.3 Unless a person is notified otherwise by the CMA, any document required to be sent to a person other than the CMA under these Rules may be:
- (a) delivered personally;
 - (b) sent by first class post; or
 - (c) sent by electronic mail.