

Energy Licence Modification Appeals Rules and Guide

Consultation document

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1. Introduction

- 1.1 The Competition and Markets Authority (CMA) is consulting on draft rules of procedure (the draft *Energy Licence Modification Appeals Rules*) to be applied in licence modification appeals made to it under any of the Gas Act 1986,¹ the Electricity Act 1989,² the Electricity (Northern Ireland) Order 1992³ or the Gas (Northern Ireland) Order 1996 (the Acts).⁴ The CMA is at the same time also consulting on a draft guide that is intended to assist participants involved in such appeals.

Background

- 1.2 The Acts set out the process that the Gas and Electricity Markets Authority (which is supported by the Office of Gas and Electricity Markets, or Ofgem) and Northern Ireland Authority for Utility Regulation (NIAUR) (each of which will henceforth be referred to as the Authority, unless otherwise stated) must adopt in making modifications to licences for the supply and distribution of gas and electricity. They also set out the appeal mechanism in respect of licence modifications.⁵ An appeal against a decision of the Authority to amend the conditions of a licence may be made to the CMA by:

- (a) a relevant licence holder;
- (b) certain materially affected licence holders;
- (c) qualifying bodies and associations in the capacity of representing those licence holders; and
- (d) Citizens Advice, Citizens Advice Scotland and the General Consumer Council for Northern Ireland in the capacity of representing consumers whose interests are materially affected by the Authority's decision.

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

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

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

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

⁵ 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. The Authority is designated as the regulatory authority for Great Britain for the purposes of the relevant directives.

- 1.3 The CMA may allow appeals only to the extent that it is satisfied that the Authority's decision was wrong on one or more of the following grounds:
- (a) That the Authority failed properly to have regard to, or give appropriate weight to, the matters to which the Authority must have regard, in the carrying out of its principal objective and certain duties.
 - (b) That the decision was based, wholly or partly, on an error of fact.
 - (c) That the modifications fail to achieve, in whole or in part, the effect stated by the Authority in its decision.⁶
 - (d) That the decision was wrong in law.⁷
- 1.4 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 CMA may make rules of procedure regulating the conduct and disposal of these appeals.
- 1.5 The Competition Commission, the CMA's predecessor, adopted CC14 *Competition Commission Energy Licence Modification Appeals Rules* in September 2012, 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, in respect of licence modification decisions made by Ofgem in Great Britain. At the same time, the Competition Commission adopted CC15 *Energy Licence Modification Appeals: Competition Commission Guide* to assist participants involved in such appeals.
- 1.6 The Competition Commission was abolished on 1 April 2014 and its functions, including that of determining energy licence modification appeals, vested in the CMA on that day. Both CC14 and CC15 were adopted unamended by the CMA board.
- 1.7 The EU Third Energy Package was implemented in Northern Ireland through various legislative changes, the latest of which came into operation on 6 February 2015.⁸ This legislation substantially aligned the Northern Ireland energy licence modification appeals regime with that of Great Britain,

⁶ Under section 11A(7)(b) of the Electricity Act 1989, section 23(7)(b) of the Gas Act 1986 and Article 14(8)(b) of the Electricity (Northern Ireland) Order 1992 and Article 14(8)(b) of the Gas (Northern Ireland) Order 1996 the Authority is required to state the effect of the modifications in its decision.

⁷ See section 23D of the Gas Act 1986, section 11E of the Electricity Act 1989, Article 14D of the Electricity (Northern Ireland) Order 1992 and Article 14D of the Gas (Northern Ireland) Order 1996.

⁸ Namely, the Gas and Electricity Licence Modification and Appeals Regulations (Northern Ireland) 2015 (SI 2015/1). The NIAUR is the designated regulatory authority for Northern Ireland.

including providing that energy licence modification decisions made by the NIAUR are appealable to the CMA.

- 1.8 In view of those developments, the CMA decided in 2015 to use CC14 – adapted as necessary to refer to the Northern Ireland legislation and decisions of the NIAUR – to govern the procedure for appeals against NIAUR energy licence modification decisions. The CMA did not make any substantive changes to CC14 for those purposes. This decision was taken following a public consultation.⁹
- 1.9 The CMA has determined three energy licence modification appeals to date.¹⁰

Scope and purpose of this consultation

- 1.10 In view of the experience that the CMA has gained of energy licence modification appeals, as well as the developments discussed in paragraphs 1.5 to 1.7 above, the CMA is proposing to update its existing rules for good order, and in the process is proposing to make one change to its existing rules in the light of experience conducting appeals (see in this regard, paragraph 1.11 below). We have also made some small administrative updates to the rules. We also propose to publish an updated guide intended to assist participants in such appeals.
- 1.11 These draft rules and guide among other things therefore change references in CC14 and CC15 from the Competition Commission to the CMA and take into account the developments in Northern Ireland referred to in paragraph 1.6 above.
- 1.12 These draft rules also clarify how third parties may participate in energy licence modification appeals. The Acts do not make any explicit provision for third parties to be able to intervene or otherwise participate in energy licence modification appeals. The CMA nevertheless considers that third parties with a sufficient degree of interest in such appeals may be able to provide valuable assistance to the CMA. Moreover, Rule 10 of CC14 currently permits ‘an interested third party’ to make representations or observations to the CMA about the grounds on which the appeal is brought.¹¹
- 1.13 The experience gained by the CMA in energy licence modification appeals suggests that it is desirable to modify the approach taken in Rule 10 of CC14

⁹ See [Energy licence modification appeals rules for Northern Ireland: consultation outcome](#).

¹⁰ See press release (29 September 2015), [CMA publishes final determinations on electricity distribution appeals](#) and news story (26 June 2017), [CMA issues final determination in NI gas distribution appeal](#).

¹¹ See CC14, Rule 10.1.

so as to provide greater clarity as to which third parties may participate in appeals and how they could seek to do so.

- 1.14 The CMA proposes to amend Rule 10 to provide that the CMA may take into account whether a third party is materially interested in the outcome of the appeal, when it is considering whether to allow that person to intervene in an energy licence modification appeal. In the CMA's view, this provides greater clarity than the current approach under Rule 10, while at the same time allowing interventions from a class of third parties best able to assist the CMA. We would particularly invite consultees to consider this proposed change.
- 1.15 The objective of this consultation is specifically to gather views on the updated rules and their use in effectively implementing the regime set out in the Acts. We are not at this stage reviewing any broader aspects of the appeals regime.

Questions for consultees

1.16 We are asking consultees the following questions:

- 1. Do you have any comments on the draft *Energy Licence Modification Appeals Rules and Guide*?**
- 2. What is your view on the CMA's proposed approach in Rule 10 of the draft *Energy Licence Modification Appeals Rules*, which is to provide that the CMA may take into account whether a third party is materially interested in the outcome of the appeal, when it is considering whether to allow that person to intervene in an energy licence modification appeal?**

2. Consultation process

2.1 This consultation is being published on the CMA webpages.

2.2 The CMA is seeking views on the following questions:

1. **Do you have any comments on the draft *Energy Licence Modification Appeals Rules and Guide*?**
2. **What is your view on the CMA's proposed approach in Rule 10 of the draft *Energy Licence Modification Appeals Rules*, under which the CMA may take into account whether a third party is materially interested in the outcome of the appeal, when it is considering whether to allow that person to intervene in an energy licence modification appeal?**

2.3 When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and the organisation's role and your role in it.

2.4 In accordance with its policy of openness and transparency, the CMA will publish non-confidential versions of responses on its webpages, along with a summary of responses received that fall within the scope of the consultation. Respondents will be notified when they are available.

2.5 If your response contains any information you regard as sensitive and that you would not wish to be published, please also provide a non-confidential version for publication and explain why you regard the information excluded as sensitive.

2.6 The consultation will run for four weeks, from 24 July 2017 to 29 August 2017. Responses should be submitted by post or email, **by no later than 5pm on 29 August 2017** and should be sent to:

The Regulatory Appeals Team
Competition and Markets Authority
Victoria House
37 Southampton Row
London
WC1B 4AD

Email: steven.preece@cma.gsi.gov.uk

Compliance with government consultation principles

- 2.7 In consulting, we have taken into account the government consultation principles, which set out the principles that government departments and other public bodies should adopt when consulting with stakeholders. Full details can be found on [GOV.UK](https://www.gov.uk).

Data use statement for responses

- 2.8 Personal data received in the course of this consultation will be processed in accordance with the Data Protection Act 1998. Our use of information received (including personal data) is subject to Part 9 of the Enterprise Act 2002. We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, as far as that is practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, would or might, in our opinion, significantly harm the individual's interests, or as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, that information should be marked 'confidential information' and an explanation given as to why you consider it is confidential.
- 2.9 Please note that information provided in response to this consultation, including personal information, may be the subject of requests from the public for information under the Freedom of Information Act 2000. In considering such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and our obligations under Part 9 of the Enterprise Act 2002.