

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



Making a positive difference
for energy consumers

Date: 29 August 2017

Dear Sir/Madam,

Consultation on the Energy Licence Modification Appeals Rules and Guide

Thank you for the opportunity to respond to your Consultation on Energy Licence Modification Appeals Rules and Guide published on 24 July 2017.

The Gas and Electricity Markets Authority (which is supported by the Office of Gas and Electricity Markets or Ofgem) is one of the Authorities whose decisions to modify energy licences can be appealed to the CMA. We are, therefore, directly affected by the rules and guide on which you are consulting.

Question 1: Do you have any comments on the draft Energy Licence Modification Appeal Rules and Guide

In reviewing the draft rules and guide we have noted a number of drafting issues and have set these out, together with possible fixes, in the Annex below.

Question 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?

We note the CMA's intention of providing greater clarity and adding a permission stage for interveners, which allows the CMA to ensure that the intervener is materially interested in the outcome of the appeal, is able to assist the CMA in determining the appeal and that the intervention is proportionate to the matters to be determined.

We welcome these changes. However, we note that in replacing the definition of "interested parties" in Rule 2.1 with the definition for "interveners", the requirement to be an interested party within the meaning of section 11C(2) of the Electricity Act 1989 or section 23B(2) of the Gas Act 1989 has been lost. This has the potential to substantially increase the range of parties who are potentially able to intervene and seems contrary the policy intention expressed by the CMA in wanting to ensure interveners assist them in determining the appeal. We therefore suggest the definition of "intervener" is amended to both refer to obtaining permission under Rule 10 and by reference to the Acts.

If you have any queries regarding this response please contact Clare Ball.

Yours faithfully,

David Ashbourne
Partner, Networks Legal

Annex

Energy Licence Modification Appeals: Competition and Markets Authority Rules			
<i>Page</i>	<i>Rule</i>	<i>Issue</i>	<i>Suggested fix</i>
9	10.7	<p>The deadline to apply to intervene is 10 days after the publication of permission to appeal. Whereas the deadline for the Authority to send its response to the CMA is 15 days after the grant of permission to appeal.</p> <p>Rule 10.7 makes the deadline for representations about applications to intervene 5 days after the Authority sends its response to the CMA.</p> <p>It's possible that grant and publication of permission to appeal do not happen on the same day. This could leave very little time for representations to be made and in an extreme case, the deadline for representations could be before the application to intervene is even made.</p> <p>Further, by referring to the Authority sending its response (rather than the deadline for sending it) rule 10.7 assumes that the Authority will always send a response under Rule 9. If, for example, the Authority chooses to rely on observations made at permission stage there is no way to calculate the deadline for representations on applications to intervene.</p>	<p>The intention seems to be to give parties 10 days to respond to an application to intervene and to make sure the Authority has at least 5 days after sending in their observations. We agree this is sensible as it may not be practical for the Authority to consider an application to intervene at the same time as settling its substantive response to the appeal.</p> <p>This can be achieved by making the deadline the later of two periods referable to receipt of the application to intervene and the deadline for the Authority sending its response to the CMA.</p> <p>Suggested wording, "before the end of the period of ten working days beginning with the first working day after the day on which the application was received by them or five working days beginning with the first working day after the deadline for the Authority to send its response to the CMA and the appellant under Rule 9, whichever is later."</p>
10	12.2(a)	Refers to paragraph 3(2) of the Schedule, which only sets the deadline for such observations.	Refer to rule 6.2 instead.
	12.2(c)	Refers to rule 10.8 and 10.9.	Refer to rule 10.6 and 10.7 instead.
	12.2(d)	Refers to rule 10.12, which does not exist.	Remove reference.
11	14.2(b)	Use of brackets seems unnecessary.	Remove brackets.
14	17+18	Footnotes 21 and 22 refer to "footnote 21 above".	Refer to footnote 19 instead.
	18	Footnote 23 refers to "footnote 9 above".	Refer to footnote 8 instead.

Energy Licence Modification Appeals: Competition and Markets Authority Guide			
<i>Page</i>	<i>Paragraph</i>	<i>Issue</i>	<i>Suggested fix</i>
5	2.6	Uses "non-confidential" instead of "non-sensitive", which is the term now used in the rules.	Replace with "non-sensitive".
7	3.10	Even though all four provisions are the same, footnote 18 only refers to paragraph (4) of Article 14F of the NI Orders, whereas it refers to both subsections (3) and (4) in relation to the Acts.	Refer to Article 14F(3)-(4) for both NI Orders.
11	3.26	Footnote 31 uses "non-confidential" instead of "non-sensitive".	Replace with "non-sensitive".
	3.28	Uses "non-confidential" instead of "non-sensitive".	Replace with "non-sensitive".
12	3.31	Second sentence is missing a footnote.	Add footnote referencing rule 7.6.
13	4.2	Uses "non-confidential" instead of "non-sensitive".	Replace with "non-sensitive".
	4.6+4.7	Both paragraphs refer to paragraph 3 of the Schedule, which only provides the time limit for such submissions.	Refer to the rules instead.
14	4.9	Uses "non-confidential" instead of "non-sensitive".	Replace with "non-sensitive".
	4.12	Based on the reference to rule 10.12 (which does not exist) in rule 12.2(d), we assume there was an earlier draft that included a power to make directions in relation to interveners in rule 10. If the decision has been made that the powers in rule 14 are adequate for these purposes it might be useful to make this clear.	Add reference to rule 14.
19	4.38	The first sentence misses out the year of the Utilities Act 2000.	Add the year.
22	6.2	Refers to rule 21.3.	Refer to rule 21.4 instead.