

DRAFT ENERGY CODE MODIFICATION APPEALS: COMPETITION AND MARKETS AUTHORITY GUIDE

CMA197

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Contents

1.	Introduction.....	4
	Cooperation.....	4
	Timetable.....	5
	Interpretation	5
	Structure of this Guide.....	5
2.	Background	6
	Appeals within the CMA's jurisdiction	6
	Persons who may appeal	7
	Possible outcomes of an appeal.....	7
3.	General observations on appeals.....	9
	Approach to appeals	9
	Administrative matters	10
	Pre-appeal.....	10
	Time frames	11
	Timetable.....	12
	Procedure.....	12
	Appeal management conferences.....	13
	Permission stage.....	13
	Applications for permission to appeal.....	13
	CMA decision on whether to grant permission	15
	Other matters	16
4.	Particular issues in appeals.....	17
	Initial submissions	17
	Notice of appeal	18
	Response	18
	Interventions.....	19
	Withdrawal of appeals and summary determinations allowing an appeal	20
	Suspension of GEMA's decision	20
	Written submissions and other documentation.....	21
	Defaults in relation to evidence	22
	Appeal management	22
	Considering appeals together.....	23
	Witness statements and expert reports.....	24
	Skeleton arguments	25
	Hearings.....	25
	Confidentiality and Freedom of Information.....	27
5.	Costs	29
	CMA costs.....	29
	Inter partes costs.....	29
	Annex 1: Statutory deadlines and indicative key events	31

1. Introduction

- 1.1 This Guide has been prepared to assist parties involved in energy code modification appeals under the Energy Act 2004 (the **Act**).¹
- 1.2 The CMA has published procedural rules, the Energy Code Modification Appeals: Competition and Markets Authority Rules (CMA196) (the **Rules**), to govern these appeals. This Guide should be read in conjunction with the Act and those Rules. This Guide does not contain details of all of the provisions of the Act and the Rules relevant to appeals and is not intended to modify or constrain the full application of those provisions to particular cases. It is also not intended to replicate the text of the Rules and should be read alongside them.
- 1.3 The procedural framework is designed to further the overriding objective as set out in Rule 4. In particular, the Rules seek to ensure that the CMA has flexibility to manage Energy Code Modification Appeals fairly, expeditiously and at proportionate cost, having regard to the interests of the parties and third parties and the statutory time frames.
- 1.4 The framework will be adapted in the interests of common sense and good practice as the CMA gains experience of handling appeals under it.

Cooperation

- 1.5 In every case, the CMA will look for a high degree of cooperation from parties and expects parties to present their submissions clearly.
- 1.6 The CMA expects parties to be clear and concise in their written submissions and other documents provided to the CMA, and in particular expects parties and their advisers to provide a coherent and readily comprehensible explanation of the technical issues relevant to the appeal. To further assist, parties are also expected to make every effort to agree between them a chronology of key events during the process leading up to GEMA's decision and a glossary of the technical terms relevant to the appeal.
- 1.7 This Guide explains the procedural framework that the CMA envisages will typically be followed in appeals. Parties to an appeal must assist the CMA to further the overriding objective set out in Rule 4; following this Guide will contribute to achieving that objective. Conduct that does not further the overriding objective may be taken into consideration in any CMA award of inter partes costs.²

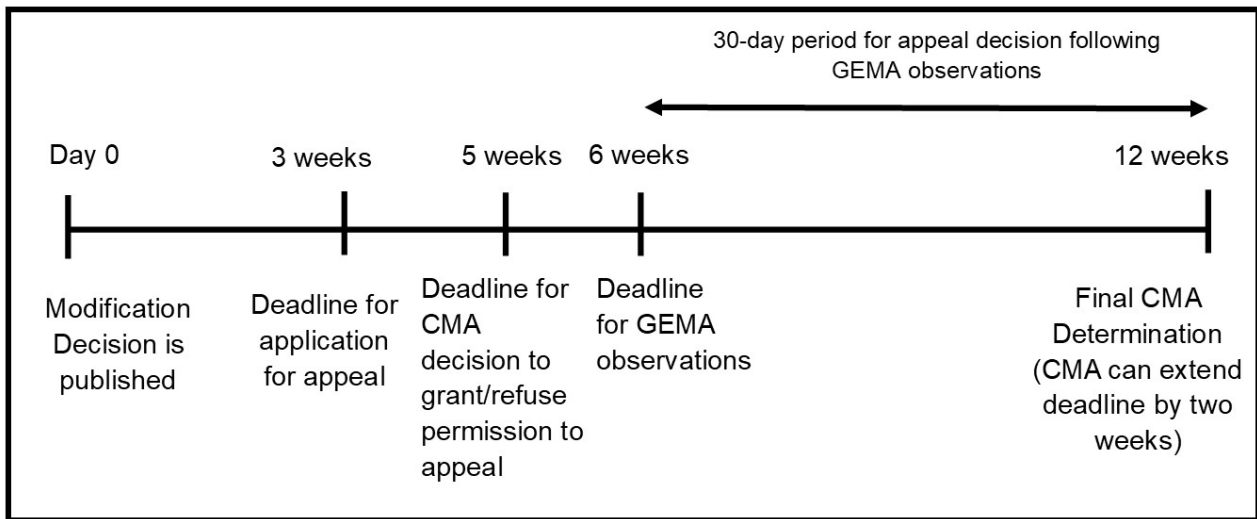
¹ Available at <https://www.legislation.gov.uk/ukpga/2004/20/contents>

² Rule 19.5(a).

Timetable

1.8 The timetable that will typically apply is set out in Figure 1.1 below. Time periods are shown in weeks for illustrative purposes only; the applicable time periods are those set out in the Schedule, expressed in terms of working days. (See Annex 1 for more details).

Figure 1.1: Indicative appeal timetable



Source: CMA

Interpretation

1.9 In this Guide:

- (a) words defined by paragraph 15 of the Schedule have the same meaning in this Guide as they have in the Schedule;
- (b) words defined by Rule 2.1 of the Rules have the same meaning in this Guide as they have in the Rules;
- (c) unless the contrary intention appears, words in the singular include the plural and words in the plural include the singular; and
- (d) 'day' means working day.

Structure of this Guide

1.10 This Guide is divided into five parts. Part 2 contains background. Part 3 provides general observations about appeals. In Part 4, there is further guidance about the mechanism for each appeal. Part 5 gives guidance on costs.

2. Background

Appeals within the CMA's jurisdiction

- 2.1 Documents (which include codes) in respect of which the CMA has jurisdiction to hear appeals are designated in the Electricity and Gas Appeals (Designation and Exclusion) Order 2014³ (the **Order**).
- 2.2 The Order designates the following documents: documents (a) to (d) are concerned with the electricity industry, documents (e) to (g) are concerned with the gas industry and document (h) concerns both industries:
- (a) the Balancing and Settlement Code (the **BSC**);
 - (b) the Connection and Use of System Code (the **CUSC**);
 - (c) the Master Registration Agreement (the **MRA**);
 - (d) the Distribution Connection and Use of System Agreement (the **DCUSA**);
 - (e) the Network Code (the **NC**);
 - (f) the Uniform Network Code (the **UNC**);
 - (g) the Supply Point Administration Agreement (the **SPAA**); and
 - (h) the Smart Energy Code (the **SEC**).
- 2.3 However, not every decision taken by GEMA in respect of a designated document may be appealed to the CMA. The Order provides that only the following decisions of GEMA may be appealed to the CMA:⁴
- (a) decisions whereby GEMA does not consent to the majority recommendation made by the BSC Panel in the Panel's Modification Report;
 - (b) decisions whereby GEMA does not consent to the majority recommendation of CUSC Panel Members in their Modification Report;
 - (c) decisions whereby GEMA does not consent to a resolution of the MRA Executive Committee;
 - (d) decisions whereby GEMA does not consent to the deemed recommendation of the Parties pursuant to the Voting Procedure within the DCUSA;

³ <https://www.legislation.gov.uk/ukxi/2014/1293/made>

⁴ Article 4(1)(a) of the Order, which excludes decisions of GEMA that satisfy the conditions set out in articles 5 to 13 of the Order.

- (e) decisions whereby GEMA’s decision does not accord with the majority recommendation made by NC Modification Panel members in their Modification Report;
- (f) in relation to the UNC required under transportation licence Standard Special Conditions, decisions whereby GEMA does not consent to a majority recommendation made by the Modification Panel in its Modification Report;
- (g) in relation to the UNC required under transportation licence Standard Conditions, decisions whereby GEMA does not consent to the recommendation by the Panel Majority in respect of a proposed modification in a Final Modification Report;
- (h) decisions whereby GEMA does not consent to a change proposal to the SPAA; and
- (i) decisions whereby a GEMA decision does not accord with a recommendation by the Change Board⁵ in respect of a Path 1 or Path 2 Modification, or a decision by the Panel in the case of a Path 3 Modification, of the SEC.

2.4 The Order also provides that a right of appeal is excluded in respect of a decision by GEMA relating to a designated document if GEMA determines that the delay caused by an appeal would be likely to have a material adverse effect on the availability of electricity or gas to meet the reasonable demands of consumers in Great Britain.

Persons who may appeal

- 2.5 An appeal to the CMA against a GEMA decision in relation to a designated document can be brought only by:
- (a) a person whose interests are materially affected by it; or
 - (b) a body or association whose functions are or include representing persons in respect of interests of theirs that are so affected.⁶

Possible outcomes of an appeal

2.6 Where the CMA does not allow the appeal, it must confirm the decision appealed against.⁷

⁵ Section 12(2) of The Electricity and Gas Appeals (Designation and Exclusion) Order 2014 where “relevant body” means— the Change Board where, in accordance with section D8.1 of the Smart Energy Code, the Change Board has been established.

⁶ Section 173(3) of the Act.

⁷ Section 175(5) of the Act.

- 2.7 The CMA may allow the appeal only if it is satisfied that the decision appealed against was wrong on one or more of the following grounds:
- (a) that GEMA failed properly to have regard to the matters to which it must have regard in the carrying out of its principal objectives and in the performance of certain duties;⁸
 - (b) that GEMA failed properly to have regard to the purposes for which the relevant condition has effect;
 - (c) that GEMA failed to give the appropriate weight to one or more of those matters or purposes;
 - (d) that the decision was based, wholly or partly, on an error of fact;
 - (e) that the decision was wrong in law.⁹
- 2.8 Where the CMA allows the appeal, it must do one or more of the following:
- (a) quash the decision appealed against;
 - (b) remit the matter to GEMA for reconsideration and determination in accordance with the directions given by the CMA;
 - (c) where it quashes the refusal of a consent, give directions to GEMA, and to such other persons as it considers appropriate, for securing that the relevant condition has effect as if the consent had been given.¹⁰
- 2.9 The CMA must publish an order containing its determination, with reasons.¹¹

⁸ Section 175(2) of the Act.

⁹ Section 175(4) of the Act.

¹⁰ Section 175(6) of the Act.

¹¹ Section 175(9) of the Act.

3. General observations on appeals

Approach to appeals

- 3.1 The CMA's jurisdiction under section 173 is designed to provide a quick and effective appeal mechanism. It is a much shorter appeal procedure than a redetermination or a licence modification appeal.
- 3.2 The appeal must be clearly linked to the grounds of appeal set out in the Act and set out in paragraph 2.7 above.
- 3.3 The CMA will not consider afresh the decision made by GEMA. The CMA's function is to hear an appeal and it will review if the challenged decision was wrong on the grounds of appeal put forward by the appellant. The CMA will not allow an appeal merely because it would not have reached that decision had it been GEMA. The CMA may only allow an appeal where it is satisfied that the appellant has shown on the balance of probabilities that GEMA's decision was wrong on one or more of the grounds set out in the Act (see paragraph 2.7 above).
- 3.4 In conducting the appeal, the CMA will have regard to the overriding objective set out in Rule 4. The overriding objective of the Rules is to enable the CMA to dispose of appeals fairly, efficiently and at proportionate cost within the time periods prescribed by the Act. All parties to an appeal must assist the CMA to further the overriding objective. The CMA expects all parties to an appeal to conduct themselves in a way that is consistent with this approach.
- 3.5 In determining the appeal the CMA must have regard, to the same extent as is required of GEMA, to the matters to which GEMA must have regard in the carrying out of its principal objective and certain duties.¹²
- 3.6 In determining the appeal the CMA may have regard to any matter to which GEMA was not able to have regard in the case of the decision appealed against, but must not have regard to any matter to which GEMA would not have been entitled to have regard in that case had it had the opportunity of doing so.¹³
- 3.7 The CMA will seek to narrow the issues and points in dispute during the course of the appeal. It may, for example, seek to do so at appeal management conferences and hearings.
- 3.8 Consistent with Rules 5, 8 and 9, it is imperative in order to assist the CMA to further the overriding objective that all parties set out their case or position at the outset. The CMA may disregard all matters raised by a party that were not raised

¹² Section 175(2) of the Act.

¹³ Section 175(3) of the Act.

by that party at the outset if it is necessary to do so for the purpose of securing the determination of an appeal within the relevant time periods.¹⁴

- 3.9 At the time that an application for permission to appeal is made, and before permission has been granted, there is not yet an appeal. If the CMA grants permission to appeal, it will treat the application for permission to appeal and supporting evidence as the appeal documents.
- 3.10 The CMA places great importance on transparency between parties and expects as a starting point that parties will have access to all materials relevant to the appeal to which they are a party. This applies to all documentation,¹⁵ including those the disclosure of which is not covered in detail in the Rules or this Guide, for instance additional submissions, correspondence (including pre-appeal correspondence), and any materials prepared for site visits, teach-ins and/or hearings). If any party considers that it is not appropriate for other parties to have access to a particular document of material, it should make representations to the CMA explaining why it considers that to be the case.

Administrative matters

- 3.11 The CMA's staff team is led by an Appeal Director who is supported by project delivery staff and specialist staff. Once a notice of appeal is sent to the CMA, the CMA will write to the applicant and GEMA with the necessary contact details and publish these details on a designated page on the CMA's website. Parties will have a specific contact in the project delivery team who will take enquiries and act as the main point of contact for the appeal.

Pre-appeal

- 3.12 A prospective appellant is strongly advised to provide the CMA with reasonable notice that it may appeal a GEMA decision before making an application for permission to appeal under Rule 5. Such notice may be provided informally, for example, through a call with the CMA or, where a prospective appellant does not possess a named contact at the CMA, by emailing appeals@cma.gov.uk.
- 3.13 'Reasonable notice' in this context would typically cover an initial contact with the CMA at the latest two weeks prior to submission of a notice of appeal to warn the CMA of the possibility of an appeal and to provide a high-level indication of the likely grounds of that appeal, even if no final decision to appeal has been made. This would usually be supplemented by a further contact at least one week prior to

¹⁴ Paragraph 7 of the Schedule.

¹⁵ That is material other than the notice of appeal, GEMA's response and any intervention notice.

submission to discuss logistical matters for submission of the documentation that is contained in a notice of appeal.

- 3.14 These pre-appeal contacts will be treated as confidential between the prospective appellant and the CMA.
- 3.15 The pre-appeal contacts create no obligation on the prospective appellant to submit a notice of appeal, or to submit a notice of appeal on the basis of the same grounds that the prospective appellant may have indicated to the CMA. They are rather designed to ensure as smooth an appeal process as possible and to assist the CMA with its internal resource allocation, as well as to frontload any logistical issues in terms of the submission of documents. As such, these pre-appeal contacts are beneficial for both the CMA and prospective appellants.
- 3.16 The CMA would also encourage a prospective appellant to inform GEMA that it is considering bringing an appeal. A prospective appellant should tell the CMA in its pre-appeal contacts if it has also contacted GEMA or if it plans to do so.
- 3.17 Wherever possible, the CMA expects prospective appellants and GEMA to seek to resolve non-contentious errors before reaching the appeal stage. This would cover the sort of errors that the prospective appellant and GEMA would reasonably expect could be corrected without argument. The appeal process should be reserved for substantive disagreements between the prospective appellant and GEMA.

Time frames

- 3.18 The Act prescribes the time frames within which various steps in the appeal process must be completed.
- 3.19 The Act requires that applications for permission to appeal must be made within 15 working days, beginning with the first working day after the earliest day on which GEMA's decision is published.¹⁶ An application for permission to appeal is made by submitting a 'notice of appeal' to the CMA. Applicants should be aware that the notice of appeal must be submitted within this time and the CMA does not consider it has discretion to grant permission to appeal in respect of notices of appeal not submitted within the statutory deadline.
- 3.20 The Act provides that the CMA will have 30 working days to determine an appeal. This time frame starts from the first working day after the deadline by when GEMA is required to submit any response to the CMA.¹⁷ If the CMA is satisfied that there are good reasons for doing so, it may extend the period for its determination on

¹⁶ Paragraph 1(3) of the Schedule.

¹⁷ Paragraph 6(1) of the Schedule.

one occasion only by up to a further ten working days.¹⁸ If the CMA considers it appropriate to extend the period of a determination in this way, it will consult with the parties before doing so.

3.21 Further detail on the time frames and indicative milestones is provided at Annex 1.

Timetable

3.22 The CMA only has 30 working days following the deadline for the submission of GEMA's response in which to determine the appeal (absent an extension). The CMA will issue a provisional timetable as soon as it receives an application for permission to appeal. It will confirm that timetable following a decision to grant permission to appeal.

3.23 The CMA envisages that there will typically be at least one appeal management conference, a teach-in (potentially together with a clarification hearing), and a main hearing within the 30-day period. Because of the short period of time available, and in order to assist the CMA and the parties to plan the conduct of the appeal, hearings will normally be held at the same stage of each appeal. The CMA will typically aim to hold an appeal management conference on day 8 of the 30-day period. Further appeal management conferences will be convened as necessary. Where required, a teach-in, potentially followed by a clarification hearing, will normally be held on day 12. The main substantive hearing will normally be held on day 21 with spillover into day 22, if necessary.

3.24 Once the timetable has been issued, the CMA would expect any departure from the timetable to be exceptional. Parties and their advisers should therefore check their availability on the notified dates at an early stage. The CMA will not normally consider that the unavailability of advisers or of counsel is a reason to depart from these dates.

Procedure

3.25 Rule 12 sets out a non-exhaustive list of matters upon which the CMA can give directions or make requests. Parties should be aware that the CMA will have regard to the overriding objective in managing the conduct of the appeal. The CMA will ordinarily address many procedural matters in an appeal (including the examples provided in Rule 12.2) through making requests, without it being necessary to give directions under Rule 12. However, where necessary, the CMA will give directions in relation to the conduct of the appeal. Parties may apply for directions or the CMA may of its own volition propose a direction if it appears necessary in the circumstances. The CMA will typically seek to give parties an

¹⁸ Paragraph 6(2) of the Schedule.

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. Where parties are applying for directions, the CMA expects that they would have sought to agree the direction with the other parties to the appeal beforehand.

- 3.26 The CMA expects that parties will cooperate promptly to produce bundles, chronologies, glossaries, issues lists and case memoranda where any or all of these are considered necessary by the CMA. Where it has not been possible for the parties to agree such documents, the CMA expects the parties to bring any such disagreements to the CMA's attention.
- 3.27 Where appropriate, the CMA will inform the parties in advance of the procedure and practicalities for certain aspects of the appeal process, such as any teach-ins and hearings. The CMA may prepare process notes to assist parties to the appeal with practical matters.

Appeal management conferences

- 3.28 Appeal management conferences may be held under Rule 14. These are opportunities for the CMA to manage the appeal. The CMA will invite the parties to attend the initial appeal management conference. The CMA may also invite any applicants or potential applicants for permission to intervene.
- 3.29 Active appeal management will be an important tool in assisting the CMA to further the overriding objective.

Permission stage

Applications for permission to appeal

- 3.30 Applicants 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.
- 3.31 Rule 5.2 provides that a notice of appeal should comprise a main submission, which should include the items set out at Rule 5.2(a) and a bundle of supporting documentation (which should comprise the items set out at Rule 5.2(b)). Unless otherwise specified, where the Rules refer to the 'notice of appeal', they refer to all of the content required pursuant to Rule 5.2.
- 3.32 Rule 5.2(a)(iv) requires the applicant to set out as part of its notice of appeal why it considers that it has standing to appeal. It is important that the CMA has sufficient detail to be able quickly to establish whether an applicant has standing. Where an applicant claims to be materially affected by the decision to be appealed it should clearly and concisely set out the interest that is affected and how it is affected.

Where an applicant is a body or association whose functions are or include representing persons in respect of interests of theirs that are materially affected by that decision, it should clearly evidence the basis on which that body or association has those functions and set out clearly and concisely the interests that are affected and how they are affected.

- 3.33 A copy of GEMA's decision to be appealed is required to be included as part of the bundle under Rule 5.2(b). The CMA is greatly assisted where applicants identify the specific parts of the decision to be appealed including by reference to page numbers where relevant, and where they include copies of prior GEMA decisions that are relevant to the appeal, with the relevant parts so identified.
- 3.34 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 CMA.¹⁹ The CMA would not typically expect the notice of appeal to contain sensitive information that cannot be shared with GEMA. An applicant should contact the CMA if there are particular circumstances that may warrant the sharing of a non-sensitive version of the notice of appeal with GEMA.
- 3.35 A non-sensitive version of the notice of appeal must also be sent to such other persons as:
- (a) appear to the applicant to be affected by the GEMA decision by the end of the first working day following the date of submission of the notice of appeal and
 - (b) GEMA may require the applicant to keep informed about their prospective appeal, by the end of first working day following receipt by the applicant of such a request from GEMA.²⁰
- 3.36 The applicant must inform the CMA and GEMA of the persons to whom the non-sensitive version of the notice of appeal has been sent.²¹ This enables GEMA to inform the applicant of any other persons whom it requires be provided with a non-sensitive version of the notice of appeal. Pursuant to the overriding objective, the CMA will expect GEMA to write to the applicant (copying the CMA) promptly with any such requests. To assist with this, the CMA strongly encourages GEMA to prepare a list of who should be kept informed of any appeal at the same time or shortly after making an appealable decision.

¹⁹ Paragraph 1(6) of the Schedule and Rule 5.5.

²⁰ Paragraph 1(7)(b) of the Schedule and Rule 5.6.

²¹ Rule 5.6(a)(ii).

CMA decision on whether to grant permission

- 3.37 The CMA has ten working days following the day on which it received the application for permission to appeal in which to decide whether to grant permission to appeal.²²
- 3.38 The CMA will normally make a decision on permission without a hearing.²³ The CMA may decide to hold a hearing to determine whether permission should be granted either of its own motion or on the application of the applicant for permission to appeal or GEMA. Where it decides to hold a hearing the CMA will notify the applicant, GEMA and such other persons as it considers appropriate.
- 3.39 The CMA may also request additional information or representations from the applicant or GEMA (as applicable) or such other persons as the CMA considers appropriate (subject to any confidentiality claims made by the applicant or GEMA at the time of submission).²⁴ For instance, the CMA may require additional information or representations where there may be a dispute about the CMA's jurisdiction, for example in circumstances where GEMA has indicated in its decision that the modification is excluded from the CMA's jurisdiction by order of the Secretary of State.²⁵
- 3.40 If a person wishes to intervene in the process relating to an application for permission to appeal, it should make an application under Rule 9 for permission to intervene in the permission application.
- 3.41 Where an application for permission to appeal against a decision of GEMA is brought by a person with standing,²⁶ the CMA may refuse permission if the appeal is brought for reasons that are trivial or vexatious, or if the appeal has no reasonable prospect of success.²⁷
- 3.42 The CMA will apply the grounds on which it grants permission rigorously. This is in keeping with the Government's intention to create 'a tightly constrained right of appeal'.²⁸
- 3.43 The CMA may grant permission subject to conditions,²⁹ which include conditions to expedite the determination of the appeal, to limit the matters to be considered on appeal and to consider the appeal together with other appeals.³⁰ Where the

²² Paragraph 1(8) of the Schedule.

²³ Rule 6.2.

²⁴ Rule 6.3.

²⁵ There is no statutory provision for GEMA or any other person to submit representations or objections to the granting of permission to appeal.

²⁶ See persons who may appeal, paragraph 2.5 above.

²⁷ Section 173(5) of the Act

²⁸ 'We have provided for a tightly constrained right of appeal to prevent trivial and vexatious appeals, and a tightly defined process to ensure a swift outcome.' Lord Whitty, House of Lords, Hansard 11 December 2003, Column 834.

²⁹ Paragraph 1(10) of the Schedule.

³⁰ Paragraph 1(11) of the Schedule.

CMA is considering granting permission to appeal subject to conditions, it may inform the applicant and GEMA and may invite them to make representations.

- 3.44 Although the CMA may allow the filing of further submissions and evidence either by making a request or by issuing a direction under Rule 12, the CMA will not allow this Rule to be used to circumvent the time limit by which a notice of appeal must be submitted. The CMA has power under paragraph 7 of Schedule 22 to disregard matters not contained in the application for permission to appeal or to intervene or in GEMA's response.
- 3.45 The CMA 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 Act³¹ and the time frame to determine whether to grant permission to bring an appeal is strict. The CMA would therefore normally expect to deal with this stage without the involvement of interested third parties (including any persons with standing who have not applied for permission to appeal). However, Rule 6.3 does allow for a hearing, and notice to parties and other persons where the CMA considers it appropriate.

Other matters

- 3.46 Rule 7 covers suspension applications, pursuant to paragraph 3 of the Schedule. The CMA will direct the procedure to be followed in suspension applications on a case-by-case basis.

³¹ Section 173 of the Act.

4. Particular issues in appeals

Initial submissions

- 4.1 The front page of an application for permission to appeal should state the name of the decision to be appealed, be dated with the date of submission, and then include a heading in the form:

An appeal under section 173 Energy Act 2004

AA

– and –

GEMA

- 4.2 The front page of any response should similarly state the name of the decision being appealed, using the same heading as the notice of appeal, be dated with the date of submission of the response and specify that it constitutes GEMA's response by means of a clear subsequent heading also on the front page.
- 4.3 The front page of an intervention notice should also state the name of the decision being appealed against, be dated with the date of submission and then include a heading in the form:

An appeal under section 173 Energy Act 2004

AA

[BB intervening]

– and –

GEMA

[DD intervening]

- 4.4 The main submission required under Rule 5.2(a) (and any application for suspension under Rule 7.2, statement under Rule 8.2(a) or main submission under 9.2(a)) 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 and should highlight the significance of supporting documentation included in the bundle required under Rule 5.2(b) to particular grounds of appeal.

- 4.5 Where the main submission under Rule 5.2(a) (and any application for suspension under Rule 7.2) contains sensitive information, it should be accompanied by a non-sensitive version. The non-sensitive version should be in a form suitable for publication on the CMA website.
- 4.6 The CMA requires that documents be sent via email, unless otherwise notified by the CMA.³² The CMA is normally able to arrange encryption facilities for the exchange of confidential material.

Notice of appeal

- 4.7 Application for permission to appeal is made by sending a notice of appeal in accordance with paragraph 1 of the Schedule and with Rule 5.
- 4.8 The applicant should provide to the CMA a provisional glossary and chronology of key events during the process leading up to GEMA's decision as part of an application for permission (see paragraphs 4.29 and 4.30).
- 4.9 The CMA has no power to extend the period of time within which an application is to be made. Applicants should contact the CMA well in advance (at least two weeks beforehand) to establish the means of submission, and conduct a test submission at least one day before the deadline, in order to resolve any technical problems. The CMA will, by prior arrangement, accept delivery of an application for permission at any time up to midnight on the last working day in which it can be made. An applicant wishing to submit documents to the CMA outside normal business hours (after 6pm or before 8.30am) should liaise with the CMA to ensure delivery.

Response

- 4.10 If GEMA wishes to make observations or representations pursuant to paragraph 4 of the Schedule, it should submit a response as required by Rule 8. If GEMA wishes to rely on its decision alone, it should submit a response to this effect.
- 4.11 GEMA has 15 working days beginning with the first working day after the day on which the application for permission to appeal was made to the CMA to make such representations or observations.³³ GEMA's representations or observations 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 evidence in the form of witness statements, expert reports or documents it wishes to adduce in support of its statement.³⁴ Where GEMA wishes

³² Rule 21.

³³ Paragraph 4(1) of the Schedule.

³⁴ Rule 8.2.

to rely on interlinkages with other parts of its decision, it should include a description of these interlinkages in its statement. To the extent that GEMA wishes to refer to supporting documents already provided to the CMA by the appellant, rather than submitting duplicates of those documents, it should request the CMA's approval to do so before submitting its response.

- 4.12 The CMA has no power to extend the period of time within which GEMA may make observations or representations.

Interventions

- 4.13 A person considering whether to intervene will assist the CMA by informing the CMA at the earliest opportunity that it is considering whether to intervene.
- 4.14 An intervention notice must be served by the intervener in accordance with paragraph 2 of the Schedule and Rule 9.
- 4.15 When considering whether to grant permission to intervene pursuant to Rule 9.3, the CMA may take into consideration all the circumstances, including the extent to which the intervention will assist the CMA to meet the overriding objective, the scope of the intervention in terms of grounds of appeal covered and arguments raised, the value of the applicant's business to which the code modification relates, as well as the potential added cost to the other parties and the CMA of dealing with such intervention(s).³⁵ The CMA may also consider whether an alternative means of involvement is more appropriate in the circumstances, such as requesting an applicant to submit its evidence under Rule 12.4(e). The CMA may also elect to limit an intervention to particular grounds of appeal.
- 4.16 The application should indicate the degree of involvement in the appeal that the applicant would wish to have, if it were to be granted permission to intervene, such as whether it would wish to have no further involvement beyond the submissions made in its application or whether it would wish to attend hearings and to make its own oral representations to the CMA.
- 4.17 An applicant must apply for permission to intervene within 20 working days following the day on which an application for permission to appeal is made. The CMA has discretion to allow a longer period.³⁶ In deciding whether to allow such longer period, the CMA will consider all the circumstances, including in particular any reason why the intervention notice could not have been given within the 20 working day period. The CMA will consider whether such an extension would assist the CMA to further the overriding objective.

³⁵ Permission shall not be granted if it is considered that it would prevent the determination of the appeal within the applicable statutory timetable (paragraph 2(6) of the Schedule).

³⁶ Paragraph 2(1)(b) of the Schedule.

- 4.18 The CMA may of its own motion issue any directions it considers fit to interveners, including where practicable and appropriate that two or more interveners liaise with each other (and/or the party whom they support) to reduce duplication, or that they file joint submissions.

Withdrawal of appeals and summary determinations allowing an appeal

- 4.19 The purpose of Rule 10 is to provide a mechanism by which a party may abandon its pursuit³⁷ or defence of an appeal and thereby, for example, limit its liability to costs. Although this is a summary procedure it may nevertheless be the case that a hearing and detailed argument is necessary.
- 4.20 Where the CMA grants permission to an appellant to withdraw its appeal, it will make the appropriate determination, having regard to all the circumstances. It will make an order for its own costs that reflects the nature of the determination, in accordance with Rule 19.1 and paragraph 13 of the Schedule. The CMA in such circumstances may also make an order for payment of inter partes costs under Rule 19.3 and in accordance with paragraph 13 of the Schedule, having regard to the factors set out in Rule 19.5.
- 4.21 Where the CMA makes a summary determination allowing the appeal, pursuant to an application under Rule 10.2, it will make an order against GEMA requiring the payment to the CMA of the costs incurred by the CMA in connection with the appeal.³⁸ In such circumstances, the CMA may also require GEMA to pay the costs that the appellant has reasonably incurred in connection with the appeal.³⁹
- 4.22 Any costs of the CMA relating to a withdrawn application for suspension of GEMA's decision will be taken into account when, having determined the appeal, the CMA makes an order for recovery of its own costs incurred in connection with the appeal. The CMA may require the appellant to pay GEMA's costs reasonably incurred in connection with a withdrawn application for suspension, even where the appeal is successful.
- 4.23 All such orders for costs will be made in accordance with the process set out in Rule 19. Section 5 below covers orders for costs in more detail.

Suspension of GEMA's decision

- 4.24 Rule 7 sets out the requirements for making an application for suspension of all or part of GEMA's decision and the process that the CMA will follow in considering the application. Subject to Rule 7, the CMA expects that the procedure for

³⁷ Under Rule 10.1, an appellant may withdraw its appeal in its entirety or in part.

³⁸ Paragraph 13(2) of the Schedule.

³⁹ Paragraph 13(5) of the Schedule.

suspension applications will depend upon the nature of the issues to be considered and this will be addressed on a case-by-case basis.

- 4.25 Where an applicant for permission to appeal wishes also to make an application for suspension, it may make both applications at the same time if it considers it appropriate to do so.

Written submissions and other documentation

- 4.26 The CMA expects parties to send all their evidence to the CMA at the beginning of the process. The CMA does not intend the provision of evidence by parties to be an iterative process. If the CMA requires supplementary evidence later in the appeal, it will make this request or issue formal directions under Rule 12. If parties consider that there are good reasons why it is appropriate to make submissions or provide supplementary evidence later in the appeal, they can apply for directions under Rule 12 to make such submissions or provide such supplementary evidence. The application should include an explanation as to why it is appropriate for them to make the submissions or provide supplementary evidence and why it was not possible to do so earlier in the appeal process.
- 4.27 Parties should not submit supplementary submissions or provide supplementary evidence without a request or direction from the CMA to do so. The CMA reserves the right to reject unsolicited submissions. Parties are reminded that their conduct is taken into account for the purposes of cost orders under Rule 19.
- 4.28 Parties must also comply with any page limits set by the CMA in relation to written submissions.
- 4.29 The CMA expects the parties to provide it with a coherent and readily comprehensible explanation of the technical issues relevant to the appeal. As part of this explanation, the CMA should be provided with a glossary of technical terms. The purpose of a glossary of technical terms is to provide the CMA and the parties 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 in the lead up to GEMA's decision. Where there is disagreement between the parties about the use of a term, that disagreement should be stated, and the competing understandings set out concisely.
- 4.30 The CMA will also expect to see a chronology of key events during the process leading up to GEMA's decision. The purpose of the chronology is to provide the CMA and the parties with a single reference point to assist its understanding of the development of the code modification proposal leading up to GEMA's decision on whether to approve it or not. The chronology should be uncontroversial and should be agreed if possible, taking the chronology provided by the appellant in its notice of appeal as the starting point. Where there is disagreement between the parties

about an event, or description of it, that disagreement should be stated and the competing versions concisely set out.

- 4.31 Where parties seek to rely on and attach supporting documentation at any stage of the appeal, the parties should take care to explain clearly the relevance of each document, including pointing the CMA to relevant extracts of the document that relate to specific grounds of appeal or arguments advanced. The CMA reserves the right to disregard lengthy supporting documents submitted with no explanation given or where the parties have not cited specific references in their submissions. Parties should attach documents or extracts of documents to the relevant submission and should not only provide internet links to the relevant content.

Defaults in relation to evidence

- 4.32 Any person who fails to comply with a notice or other requirement issued by the CMA to provide documents or oral or written information, makes a statement that is false in any material particular, or contrary to a statement of truth provides information that is false in a material particular, may be certified by the CMA as a defaulter.⁴⁰
- 4.33 Such a defaulter may be punished as if they had been guilty of contempt of court, if a court is satisfied that they have failed, without reasonable excuse, to comply with the notice or other requirement, or made a statement that is false.⁴¹ The court may punish any director or other officer of a body corporate, instead or as well as that body.⁴²
- 4.34 It is an offence to wilfully alter, suppress or destroy a document that the CMA has required by notice be produced under paragraph 8 of the Schedule. Any person who does so is liable upon conviction to a fine, up to 2 years in prison, or both.⁴³

Appeal management

- 4.35 All appeals will be subject to active case management by the CMA.
- 4.36 The CMA does not require the parties to be legally represented at the appeal management conferences and hearings. The CMA does, however, require focused arguments from the parties.

⁴⁰ Paragraph 11(1) of the Schedule.

⁴¹ Paragraph 11(2) of the Schedule.

⁴² Paragraph 11(3) of the Schedule

⁴³ Paragraph 11(4) of the Schedule.

Considering appeals together

- 4.37 The Act 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.⁴⁴ The Rules include provision for directions being made by the CMA relating to considering appeals or parts of appeals together.
- 4.38 Individual appellants and GEMA will be invited to make representations before the CMA makes any decision to consider appeals together in whole or in part. Once appeals are consolidated in whole or in part, the CMA, after consultation with the parties, will determine administrative matters needed to ensure the appeals considered together proceed in accordance with the overriding objective. The CMA will aim to make clear early in the appeal process the process it intends to follow to facilitate considering appeals together, taking into account the specific circumstances of the case.
- 4.39 This process may include measures such as confidentiality rings and encouraging joint representations or responses to questions on particular issues by joined appellants where this is appropriate and proportionate in the circumstances. It may in some circumstances also be appropriate for the parties to appoint a primary spokesperson.
- 4.40 The CMA may also take appropriate measures to facilitate joint hearings and may require parties to make joint submissions in respect of particular grounds of appeal, where it is appropriate to do so. The CMA will take into account confidentiality concerns between joined parties when making arrangements for hearings (for instance, by limiting attendance where appropriate). Notwithstanding this, the CMA will consider whether it is appropriate to hear an appellant individually in addition to joint hearings. The CMA will decide on this based on the circumstances of the case and in accordance with the overriding objective.
- 4.41 The CMA will typically produce one final decision in relation to appeals dealt with together, or, in the case of appeals considered together only in part, one final decision in relation to the parts of the respective appeals considered together. Where circumstances justify a different approach, the CMA will produce separate decisions even where appeals are consolidated in whole or in part.

⁴⁴ Paragraph 1(11)(c) of the Schedule. This includes appeals relating to different matters or decisions and appeals brought by different persons.

Witness statements and expert reports

- 4.42 A witness statement or expert report must be verified by a statement of truth⁴⁵ signed by the witness or expert.⁴⁶
- 4.43 Witness statements and expert reports should:
- (a) be headed with the title of the appeal;
 - (b) be clearly marked at the top right-hand corner with the name of the party on whose behalf the witness statement or expert report is made, the initials and surname of the witness or expert, the number of the statement or report in relation to that witness or expert, the identifying initials and number of each exhibit referred to and the date the statement or expert report was made;
 - (c) state the full name of the witness or expert;
 - (d) state their place of residence or, if the statement or expert report is made in a professional, business or other occupational capacity, the address at which they work, or the position held and the name of the firm or employer;
 - (e) state the occupation of the witness or expert (and, in the case of an expert, state the expert's qualifications);
 - (f) state the relationship of the witness or expert to the party on whose behalf the evidence is given; and
 - (g) be in numbered paragraphs and paginated.
- 4.44 In a witness statement or expert report, the witness or expert must indicate which of the statements are made from their own knowledge, and which are matters of information or belief. In relation to matters of information or belief, the witness or expert should state the source of that information or belief (including, in the case of experts, details of any literature or other material relied on in making the report).
- 4.45 In the case of experts, where there is a range of opinion on a matter dealt with in the report, the expert should summarise the range of opinion and give reasons for their own opinion. The expert should also detail any qualifications to which their opinions are subject.

⁴⁵ Paragraph 15(1) of the Schedule provides that a 'statement of truth' in relation to the production of a document means a statement that the person producing the document believes the facts stated in the document to be true. In the case of expert evidence, the expert may wish to supplement this basic statement along the lines of the standard statement of truth for experts included in CPR Practice Direction 35, paragraph 3.3 to cover the opinion element of their report. This approach would be acceptable provided that the statement includes at some point a confirmation of the expert's belief in the truthfulness of factual statements made by the expert in their report.

⁴⁶ The CMA will accept electronic signatures in witness statements and statements of truth and in all other situations where signatures are envisaged under the Rules or in this Guide.

- 4.46 A witness statement or expert report should be as concise as the circumstances allow and should only contain content that is relevant to appellant's grounds of appeal. It should not contain long quotations from documents. Documents used in conjunction with a witness statement or expert report should be verified and identified by the witness or expert and placed in an exhibit separate from the witness statement or expert report. The location of the document in the exhibit should be set out in the witness statement or expert report.
- 4.47 Where the witness or expert refers in a witness statement or expert report to correspondence, this correspondence should be collected together and exhibited in chronological order with the earliest at the top.
- 4.48 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.
- 4.49 Witness statements or expert reports and exhibits should be fully legible and machine-readable. Witness statements and expert reports should be divided into numbered paragraphs.
- 4.50 Documents within the bundle should be repaginated in the bottom right-hand corner. However, the original pagination should not be deleted.

Skeleton arguments

- 4.51 Prior to a hearing, the CMA may ask any party or their representative to produce a skeleton argument.
- 4.52 The purpose of the skeleton argument is to identify for the parties and the CMA those points which are, and which are not, in issue at a hearing and the nature of the argument in relation to the points in issue.
- 4.53 The skeleton argument should state concisely the background facts relevant to the particular issues and points, identify relevant submissions of fact with reference to the evidence, and identify propositions of law involved with reference to authority. The CMA may impose maximum page limits on the skeleton argument.

Hearings

- 4.54 The CMA will not normally conduct hearings in public. The CMA will consider whether hearings should be held in person, virtually or on a hybrid basis in accordance with the overriding objective.
- 4.55 In order to obtain clarification on any aspects of the appeal, the CMA may hold clarification hearings in advance of the main hearing or may request written clarifications, as appropriate to further the overriding objective. These clarification

hearings and/or written clarifications are primarily designed to allow the Group⁴⁷ to ask questions relevant to the appeal. The CMA may decide to use these clarification hearings and/or written clarifications to focus on narrow areas of the appeal that require clarification.

- 4.56 Hearings are formal and will be led by the CMA. The CMA will determine the appropriate structure and topics to be covered in the hearings. Subject to the CMA's direction on the topics to be covered, the hearings are an opportunity for the parties to make oral submissions to the CMA. However, they are also an opportunity for the CMA to ask such questions as it considers necessary in order to make the necessary findings in its determination. Although the Act and the Rules allow for cross-examination, the CMA expects that it will rarely be necessary to make use of this provision.
- 4.57 Interveners may request to attend a hearing. The CMA will consider any such request and the reasons for the request and decide whether to grant permission to the intervener to attend all or part of any hearing. The CMA may of its own initiative request an intervener to attend all or part of any hearing.
- 4.58 Parties will normally be directed before the hearing as to the matters on which the CMA wishes to hear submissions and the length of time they will be allowed to make submissions. The CMA will indicate the order in which it wishes to hear the parties. Parties may be represented by more than one person and the CMA will encourage such arrangements where this would facilitate the clear presentation of technical issues and ensure that the person with the requisite level of expertise and knowledge is available to answer the CMA's questions. At hearings, parties may present their submissions using, for example, an electronic presentation, if they consider that would assist the CMA. Parties who wish to employ technology during their submissions should make prior arrangements with the CMA in order to facilitate preparation for the use of that technology at the hearing. An electronic copy of any presentation or exhibits used by the parties must be provided to the CMA in advance of the hearing (for example, for use by the CMA as a backup in the event of any technical issues arising during the hearing).
- 4.59 At the start of a hearing, the appellant and GEMA will normally be invited to make a short opening statement of no more than 20 minutes' duration. Any interveners will not normally be invited to make an opening statement. The parties will then make submissions as invited, and answer questions from the CMA. At the end of a hearing, the appellant and GEMA will usually be invited to make a short closing statement. There will normally be no written closing statement.

⁴⁷ This is a group of the CMA's members, formed for the purpose of carrying out the CMA's functions (paragraph 4 of the Schedule).

4.60 Recordings are taken of hearings. Any verbatim transcripts will be sent to the relevant party after the hearing to check for accuracy and to enable the party to identify any sensitive information. The CMA may request the party to verify by a statement of truth the transcript of the statements made by it (or on its behalf) at the hearing. The CMA may share a non-sensitive version of the transcript with such other persons as it considers appropriate based on the circumstances of the case.

Confidentiality and Freedom of Information

- 4.61 The Act makes provision for the exclusion from the published version of the CMA determination of any information which the CMA is satisfied 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.⁴⁸
- 4.62 Provision for the protection of sensitive information (as defined in the Rules) is also included in the Rules.
- 4.63 Where non-sensitive versions of submissions and evidence are submitted to the CMA, the party filing the information is taken to have consented to the disclosure of that non-sensitive version. When submitting non-sensitive versions of documents, a version that highlights sensitive information should always be provided. Where a document will be published, a version with the sensitive information redacted should also be provided.
- 4.64 Where it can do so while protecting confidentiality, in order to secure fairness and assist it to perform its functions effectively, the CMA may disclose relevant material provided by or to the parties, other than communications of a purely administrative nature, and transcripts of hearings to other parties.
- 4.65 The CMA may propose that disclosure of certain information should be made solely within a 'confidentiality ring', normally comprising the parties' named legal representatives and, possibly, other external advisers or experts such as accountants and economists, subject to appropriate confidentiality undertakings, rather than to the parties themselves. The CMA will seek views from the parties as to whether a confidentiality ring is necessary. Where some grounds of appeal have been joined, it may be appropriate to establish multiple confidentiality rings.

⁴⁸ Section 175(10) of the Act.

- 4.66 Exceptionally, claims may be made that certain information is of such sensitivity that it should not be disclosed within the confidentiality ring.
- 4.67 Rule 12.2 sets out a non-exhaustive list of matters upon which the CMA can give directions. Under this rule the CMA can give directions about the handling of sensitive information. If a party has concerns about providing sensitive information to another party, it can send the proposed non-sensitive version of the document to the CMA⁴⁹ and ask it to give directions on the proposed excisions (Rule 12.2(k)). The CMA recognises the importance of protecting sensitive information. However, it also discourages parties from making excessive or blanket confidentiality claims over submissions and may consider any such claims to be inconsistent with the overriding objective.
- 4.68 The CMA may receive requests from third parties for information which it holds in connection with appeals. The CMA notes that by virtue of paragraph 1ZA of Schedule 1 to the Freedom of Information Act 2000, the general right of access to information held by a public authority does not extend to information held by the CMA as a tribunal.

⁴⁹ Under Rules 5, 7, 8, 9 and 11.

5. Costs

- 5.1 Rule 19 provides detail on (a) the procedure the CMA will follow when making an order to recover its costs and (b) the procedure the CMA will follow and the considerations it will take into account when making any order in relation to inter partes costs. Further detail on particular aspects is set out below, including in relation to the information required in statements of costs should parties wish to seek an award of costs.

CMA costs

- 5.2 Where the CMA has determined an appeal, it is required to make an order for the payment of its costs. Such an order must require those costs to be paid:
- (a) where the appeal is allowed, by GEMA; and
 - (b) where the appeal is dismissed, by the appellant(s).⁵⁰
- 5.3 The CMA's order will require payment of both its direct and indirect costs incurred in relation to the determination of the appeal.
- 5.4 Before making any order for payment of its own costs under Rule 19.1, the CMA will provide GEMA and the appellant(s) with a provisional determination on the CMA's costs and a draft of the costs order and give them a reasonable opportunity to make representations on each.

Inter partes costs

- 5.5 The CMA has discretion to make an order requiring a party⁵¹ to make payments to another party in respect of costs incurred by the other party in connection with the appeal. While the CMA would normally order GEMA or an appellant (where one of them is an unsuccessful party) to pay the costs of the successful party, it may make a different order. The CMA may have regard to all the circumstances, including (as set out in Rule 19.5) the conduct of the parties, whether the party was successful, the reasonableness and proportionality of the costs claimed and whether any chilling effects would result from a costs order on GEMA.
- 5.6 Before making any order for inter partes costs under Rule 19.3, the CMA will provide the parties with a provisional determination on costs and a draft of the

⁵⁰ Paragraph 13(2) and (3) of the Schedule.

⁵¹ A party includes an intervener who has been granted permission to become a party to the appeal for the purpose of supporting the appeal or opposing it (paragraph 15 of the Schedule).

costs order and give them a reasonable opportunity to make representations on each.⁵²

- 5.7 Where the CMA makes an order for inter partes costs, 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 CMA will not normally allow any amount in respect of costs incurred before GEMA first published its decision.
- 5.8 Any party 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 who may become liable to pay those costs.
- 5.9 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 in connection with the appeal. The CMA 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.
- 5.10 Each statement of costs should be signed by the party or, where applicable, its legal representative.

⁵² Rule 19.6.

Annex 1: Statutory deadlines and indicative key events

Working Day	Stage	Provision of the Schedule	Example timeline	Comment
0	GEMA first publishes the appealable decision	Paragraph 1(3)	Tuesday, week 0	The period within which an application for permission to appeal can be made starts from the first working day following the earliest day on which the decision was published.
15	Applicant submits application for permission to appeal	Paragraph 1(3)-(7)	Wednesday, week 3	Applicants have up to the end of 15 working days following Day 0 (ie starting from Day 1) to apply for permission to appeal, and may apply earlier, for example to mitigate the risks of technical issues arising with submission on the final day.
26	CMA grants or refuses permission to appeal	Paragraph 1(8)	Thursday, week 5	The CMA has up to the end of 10 working days following the day on which it received the application for permission to appeal to decide whether to grant or refuse permission to appeal. This example timeline assumes that the applicant takes the full 15 working days.
31	GEMA makes any response to the notice of appeal	Paragraph 4(1)-(2)	Thursday, week 6	GEMA has up to the end of 15 working days, starting with day 1 being the day following the day on which application for permission to appeal was made to the CMA. Note: where there is more than one application for permission to appeal, the period of 15 working days starts from the end of the day of the making of the last of those applications to be made.
32	Day 1 of 30-day period for the CMA's determination of an appeal	Paragraph 6(1)	Friday, week 6	The first working day after the final day on which GEMA is permitted to make any response.
36	Deadline for applying for permission to intervene in the appeal	Paragraph 2(1)	Thursday, week 7	Applicants have up to the end of 20 working days following the day of the making of an application for permission to bring an appeal, or such longer period as the CMA may allow, to apply for permission to intervene. Note, the timescale for CMA determining whether or not to grant permission to intervene is not specified in the Act.
39*	Appeal management meeting	N/A	Tuesday, week 8	Day 8 of the 30-day period (see paragraph 3.23 above)
43*	Clarification hearing / teach-in	N/A	Friday, week 8	Day 12 of the 30-day period
52-53*	Main hearings	N/A	Thursday – if necessary, Friday, week 10	Day 21 with spill over into day 22, if necessary
60*	CMA aims to issue determination	N/A	Wednesday, week 12	Day 28 of the 30-day period
62	Deadline for the CMA to issue determination (if no extension is applied)	Paragraph 6(1)	Thursday, week 12	The CMA is required to determine the appeal before the end of 30 working days following the last day for the making of representations or observations by GEMA. ⁵³ Note: this timescale is not shortened should GEMA submit a response 'early'.

*Grey shaded rows signify non-statutory indicative milestones, the inclusion and timing of which are at the CMA's discretion.

⁵³ The CMA can extend this period on one occasion only by up to 10 more working days if it is satisfied that there are good reasons for departing from the normal requirements (paragraph 6(2) of the Schedule).