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ESO Response to updated rules and guide for energy code modification appeals consultation

Dear Energy Code team,

Thank you for the opportunity to respond to your consultation on Updated rules and guide for energy code modification appeals.

Who we are

As the Electricity System Operator (ESO) for Great Britain, we are at the heart of the energy system, balancing electricity supply and demand second by second.

Our mission, as the UK moves towards its 2050 net zero target, is to drive the transformation to a fully decarbonised electricity system by 2035, one which is reliable, affordable, and fair for all. We play a central role in driving Great Britain's path to net zero and use our unique perspective and independent position to facilitate network and market-based solutions to the challenges posed by the energy trilemma.

As National Energy System Operator (NESO) we will continue to build on the ESO's position at the heart of the energy industry, acting as an enabler for greater industry collaboration and alignment. We will unlock value for current and future consumers through more effective strategic planning, management, and coordination across the whole energy system.

Our key points

- We welcome the revision to the Rules and Guide. They now contain a more detailed, logical process that provides clarity to the market.
- The Guide now includes steps for pre-appeal contact with the CMA for prospective applicants – we think this is a helpful step in supporting the CMA's work. We would suggest that this step, although not strictly required by the Rules, could be included in the revised timetable and more detailed steps list in Annex 1 of the Guide as a preliminary step. Similarly, the CMA may want to consider whether a similar process could be adopted with respect to prospective interveners, providing further opportunity to support the CMA in its determination of appeals.
- We welcome the further clarity now provided in the Guide with respect to teach-ins and written clarifications which we understand better align with furthering the overriding objective. Specifying that written clarifications may be required as appropriate is useful in helping to narrow the issues.

We look forward to engaging with you further. Should you require further information on any of the points raised in our response please contact Steve Wright, European Frameworks Lead, at [✗].

Yours sincerely

Zoe Morrissey

Director of Legal & Regulation

Appendix 1 Consultation Question Responses

Question 1: Overall, are the Rules and Guide sufficiently clear and helpful?

ESO Response

- We think the updated Rules and Guide together provide a clear process for parties involved in energy code modification appeals. Reordering the Rules to more closely follow the steps of an appeal is helpful. Items such as the revised timetable in Figure 1.1 of the revised Guide and the associated more detailed outline of steps in Annex 1 serve as particularly useful materials in outlining the various stages of an appeal.
- **Clarification hearings** – We welcome the further clarity now provided in the Guide with respect to teach-ins and written clarifications which we understand better align with furthering the overriding objective. Specifying that written clarifications may be required as appropriate is useful in helping to narrow the issues. Integrating teach-ins within the 30-day working day period for a determination is a useful addition. We would invite the CMA to provide further detail as to the objectives of teach-ins and their role in further supporting its determination of the appeal.

Question 2: What aspects of the Rules and Guide, if any, do you consider need further clarification or explanation? In responding, please specify which Rule and/or part of the Guide each of your comments relates to.

ESO Response

- **Pre-appeal contact with the CMA for prospective applicants** – Appreciating the short timeframes within which the CMA must determine an appeal, we agree with the principle in the revised Guide which advises prospective appellants to provide reasonable notice prior to submission of a notice of appeal. It may be beneficial to consider whether further provision in the Guide could be made around encouraging prospective appellants to provide available information where possible to assist the CMA at this preparatory stage. Considering also that applications for permission to appeal must be made within 15 working days beginning with the first working day following GEMA's published decision, it might be helpful to describe the reasonable notice period in similar terms, so that two weeks in para 3.13 reads as 10 working days. We suggest it may also be helpful to capture this pre-appeal contact stage in the timetable in Figure 1.1 and in the more detailed Annex 1 list.
- **Transparency** – Provision in the revised Rules (5.4, 7.4, 8.4) is made for various parties to be required to send the CMA a non-sensitive version in their respective representations. In line with the current version of the CC10 Rules (4.7, 6.7, 7.13), perhaps some clarificatory language can be included in the revised Rules to reflect the understanding that any sensitive information will still be provided to the other relevant parties unless a non-disclosure application is being made in accordance with Rule 11.
- **Draft Guide paragraph 2.3 (f)-(g)** – we understand that this guidance reflects paragraph 2.6(f) in the current Guide. We would suggest that unless there is a reason for the differences in wording between the two provisions in the proposed Guide, then the wording in para 2.3(g) could align with that in para 2.3(f) so that it would conclude with the words *“whereby GEMA does not consent to a majority recommendation made by the Modification Panel in its Modification Report”*. If the CMA agrees that the wording between the two paragraphs should be consistent, perhaps the two provisions could be amalgamated so that the paragraph begins *“in relation to the UNC required under transportation licence Standard Conditions, or transportation licence Standard Special Conditions...”*.
- **Draft Guide paragraph 3.33 and Rule 5.2(a)(iii)** – the revised Rules now capture a requirement for an applicant to reference the parts of the GEMA decision they wish to appeal. It might be helpful to further clarify in the Guide which elements of the requirements are Rules and which are best practice, so that applicants are clear about the information they are submitting in their notice. So for example if it is a rule that applicants must reference specific parts of the decision they wish to appeal, the Guide should be amended to reflect this so that it reads something like *“Applicants are required to identify the specific parts of the decision to be appealed and can include reference to page numbers relevant”* or similar.

Question 3: Is there anything else which you consider should be included in the Rules and/or Guide?

ESO Response

- **Engagement prior to a notice of intervention** - In line with the above provision for pre-notice to a notice of appeal, the CMA may want to consider whether similar provision in the Guide could be included where interveners could be urged to engage with the CMA prior to submission of an intervention notice. Currently, paragraph 4.13 of the revised Guide encourages informing the CMA “*at the earliest opportunity*” which reflects the approach of the existing Guide. A more detailed process in this area however could provide the opportunity for earlier engagement.