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Date: 03 September 2024

Dear Sir/Madam,

Consultation on updated rules and guide for energy code modification appeals

Thank you for the opportunity to respond to the above consultation dated 23 July 2024.[1]

In Appendix 1, we set out a number of suggested comments on both the rules and guide for energy code modification appeals ("ECMA") as well as one suggested addition to the rules and/or guide. We hope the CMA finds these suggestions useful. We would be happy to discuss them in further detail if that would be helpful.

Kind regards,
[✂]

PP.
Joanne McDowall
Deputy Director, Energy Systems Legal
Office of the General Counsel

[1] Updated rules and guide for energy code modification appeals | Connect: Competition and Markets Authority (cma.gov.uk)

Appendix 1 – Comments on both the rules and guide for ECMAs

ECMA Rules[2]

1. Rule 6 Permission

- It would be helpful if the Rules (and / or the Guide[3]) included further detail to make clear the scope that the Gas and Electricity Markets Authority ("GEMA") will have to make representations about an application for permission, both in written form and at a hearing (should the CMA decide to hold one under Rule 6.3).

- Whilst the Guide (at 3.39) notes that the CMA may request representations from GEMA, this does not provide assurance that GEMA will be afforded the opportunity as a matter of practice. Further, 3.40 of the Guide provides that a person wishing to intervene in the process relating to an application for permission should make an application under Rule 9. However, Rule 9 appears to apply only after permission to appeal has been granted.

- Notwithstanding that there is no statutory provision for representations or objections to the granting of permission (as reflected in footnote 25 of the Guide), we consider the CMA should permit such representations (in all instances where GEMA considers it appropriate to make them) in the interests of the overriding objective, particularly the efficient disposal of appeals at proportionate cost.[4] GEMA may be able to provide representations pre-permission which make it clear that the CMA should refuse permission, therefore saving both time and costs.

2. Rules 10.1 & 10.2 – withdrawal from / summary determination of appeal

- Withdrawal from the appeal in part - the drafting of Rules 10.1 and 10.2 permit an appellant to withdraw from the appeal in its entirety or in part whilst GEMA can only apply for a summary determination allowing the appeal (i.e. concede the appeal in its entirety). We consider the same position should apply for both parties. Whilst in some (if not most) cases, GEMA conceding an appeal in part or in respect of one ground may have the effect that the full appeal is necessarily allowed e.g. if the grounds of appeal reflect different ways in which GEMA's decision was unlawful, it is also possible (as was the case in the appeal on CMP 317/327) that the decision being challenged is comprised of discrete parts such

[2] Cross reference are to the new proposed rules found here.
[3] Cross references are to the paragraph numbers of the new proposed Guide found here.
[4] The overriding objective being to enable the CMA to dispose of appeals fairly, efficiently and at proportionate cost within the time periods prescribed by the Energy Act 2004.

that a concession in part need not automatically result in the whole appeal being permitted.

- As such, we do not consider Rule 10.2 to be fair given the impact this could have in practice in relation to appeals against decisions which are comprised of discrete parts, each of which have separate effect. This could mean that GEMA would be incentivised to maintain its defence against parts of a decision in order to avoid having to concede in respect of all of the discrete parts of that decision. This is not in the interests of overriding objective and has negative impacts on all parties in relation to costs. Indeed, the ability to partially concede an appeal is consistent with the approach that the CMA took following the High Court's decision in *R (on the application of SSE Generation Ltd) v Competition and Markets Authority* [2022] EWHC 865 (Admin) (see further on this matter below).[5]

- As a general observation, we note that the ECMA regime makes no explicit accommodation for circumstances in which the GEMA decision being appealed relates to a code modification proposal made up of several discrete parts (in essence, reflecting different decisions in their own right).[6] Given the possibility of such decisions under the energy codes, as was seen in the CMP317/327 appeal, we believe that the CMA should interpret the relevant provisions of the Energy Act 2004 ("the Act") in a flexible way to avoid creating unfair or perverse outcomes. This is relevant in the context of (i) GEMA's ability to partially concede an appeal; (ii) the CMA's ability to partially quash GEMA's decision; and (iii) the CMA's ability to recover its costs for the appeal on a split basis.

- In relation to (ii) above, we would draw attention to the relief handed down by Mr Justice Swift in *R (on the application of SSE Generation Ltd) v Competition and Markets Authority* [2022] EWHC 865 (Admin), in which the Court confirmed its view that the natural reading of a power to quash a decision (like the power at section 175(6)(a) of the Act) is that it includes power to quash part of a decision. This was reflected in the relief granted by the High Court and, in turn, the CMA in the aforementioned case.

- Rule 10.1: Notification or application to withdraw: The updated drafting leaves open an interpretation that the appellant only has **to notify** the CMA of its

[5] See here for details on the approach taken by the CMA in this case.
[6] See the CMP317/327 ECMA as an example, in which the decision under appeal comprised several discrete parts each of which had separate effect.

withdrawal whereas GEMA has **to apply** for a summary determination. Considering the drafting of 4.20 of the Guide, it would appear that the appellant is still required to apply to withdraw its appeal. We would request that the drafting of Rule 10.1 is updated to make the position clear (and consistent with the current position). If the drafting of Rule 10.1 is not to be updated, then we would ask for an explanation as to the difference in language used between GEMA and appellants.

3. Rule 12.2(j)

- Paragraph 8 of Schedule 22 to the Act only provides for the CMA to order parties, by notice, to produce documents to the CMA. It makes no provision in relation to the CMA's ability to require disclosure to "other persons" e.g. those not party to an ECMA.

4. Rule 16.1

- We would suggest that this reverts to the previous approach such that the CMA **will share** a copy of the notice with other parties rather than **may share** such a notice. The sharing of such a notice would appear to be in the interests of fairness and efficiency.

ECMA Guide

1. Paragraphs 4.20 & 4.21

- Unlike 4.20, 4.21 does not make it clear that in determining inter partes costs in circumstances when a summary determination is made to allow the appeal, the CMA will have regard to the factors set out in Rule 19.5. Instead, it notes '*…the CMA may also require GEMA to pay the costs that the appellant has reasonably incurred …*" No corresponding statement is provided in paragraph 4.20 in relation to an appellant withdrawing its appeal. We suggest that both of these paragraphs should be reviewed and updated to ensure consistency of approach. There may be circumstances where a summary determination is made to allow the appeal, but the appellant should still be required to pay inter partes costs.

Possible addition to the Rules/Guide

- We note that no provision or detail is provided in relation to appeals against the CMA's decision. It may be helpful to consider inclusion of some detail in this regard. This could include information on the relevant forum and timelines for such an appeal and the process the CMA would expect to follow in the conduct of that further appeal.