

Competition and Markets Authority  
The Cabot  
25 Cabot Square  
London  
E14 4QZ

2 September 2024

Dear Sir/Madam

**DRAFT RULES AND PROCEDURE AND GUIDANCE FOR ENERGY CODE  
MODIFICATION APPEALS**

We welcome the opportunity to respond to your consultation on your draft rules and procedure and guidance for energy code modification appeals.

Our comments are in Annex 1 attached.

Yours faithfully,

[✂]

**Richard Sweet**  
Director of Regulatory Policy

**DRAFT RULES AND PROCEDURE AND GUIDANCE FOR ENERGY CODE  
MODIFICATION APPEALS – SCOTTISHPOWER COMMENTS**

**Draft Energy Code Modification Appeals: Competition and Markets Authority Rules (CMA 196)**

**Rule 5.6 & 9.8**

The notification requirements for the applicant to send a copy of the notice of appeal by the end of the first working day following submission to “*such persons (apart from GEMA) as appear to the applicant to be affected by the decision*” are unrealistic and unclear.

It is not clear by which method the CMA would like notification to be served and we would appreciate clarity on this point. We might also not have an appropriate contact within the required organisations to allow us to fulfil this requirement in these short timescales.

We also consider the requirement to send the CMA and GEMA a list of the names and contact information, including email and physical addresses, unrealistic within the short timescales and could be difficult to comply with in practice if we do not have an appropriate contact for each organisation.

**Rule 7**

Additional detail has been included on the requirements to apply for a suspension of a decision pending the determination of the appeal. Some of the detail did not previously feature and the policy reasons behind this change have not been explained in the consultation document.

Unlike the CMA70 Rules, there are no timescales/deadlines within the CMA196 Rules as presently drafted on applications for suspension of decisions by GEMA. We would appreciate clarity within the rules or guidance on when an application for suspension can be brought and any other associated deadlines.

**Rule 12.2(i)**

This rule provides that the CMA can give a direction around the disclosure or the production of documents or classes of documents. The addition proposed by the CMA includes “*estimates, forecasts, returns or other information*”. It is unclear what category of information the CMA is seeking here. We asked for clarity on this point within our response to the CMA’s 2022 consultation on changes to the energy licence modification appeals rules and did not receive this, so consider it worth raising again.

**Rule 12.5**

This rule *allows* parties to apply to the CMA for permission to make further submissions or provide supplementary evidence. However, parties are essentially required to justify their ‘late’ submissions or supplementary evidence and the CMA has the right to reject same.

The CMA196 rules as presently drafted do not allow the applicant to lodge an answer to GEMA’s response to the Notice of Appeal, but applicants do have this opportunity in energy licence modification appeals. We appreciate the different timescales for these appeals but further restricting the applicant’s ability to lodge additional submissions/ evidence after

reviewing GEMA's response may hinder its case and we would therefore ask the CMA to adopt a more lenient approach when deciding which additional submissions/evidence to allow.

### **Rule 17**

Unlike the CMA70 rules, there is nothing in the CMA196 rules as presently drafted on the CMA issuing a provisional determination.

In our experience, the issuing of a provisional determination is extremely helpful as it allows parties to comment on and prevent errors in the final determination. It also allows the parties to begin discussing and agreeing potential remedies as well. We appreciate the shorter timescales involved in energy code modification appeals but feel it would be useful to have some idea of the CMA's minded-to decision prior to it issuing its determination. We wonder if an informal consultation with just the parties on the provisional determination would be useful.

### **Rule 19.5**

The CMA is proposing to amend this rule firstly to state that the CMA "may" (as opposed to "will") have regard to all circumstances when deciding what inter partes costs order to make. We consider this to be an inappropriate amendment. It's crucial that the CMA has regard to all the circumstances when making a decision about inter partes costs.

## **Draft Energy Code Modification Appeals: Competition and Markets Authority Guide (CMA 197)**

### **Paragraph 3.13**

We consider the provision of reasonable notice to the CMA of a potential appeal "*at the latest two weeks prior to submission of a notice to appeal*" too onerous in the context of the 15 working day time limit for appellants to submit an application for permission to appeal. This would essentially mean having to provide the CMA with notice, and an overview of the potential grounds of appeal, 5 working days after the final decision. Applicants are unlikely to be in a position to be able to provide this notice in these short timescales when they will still be doing their own internal assessments of the final decision.

We understand from the consultation document that this early contact assists the CMA, and would propose closer to one weeks' notice would be more appropriate which we consider appellants will find easier to comply with but also allow the CMA the advance notice it has requested.

### **Paragraphs 1.6 & 4.29**

The requirement for parties to the appeal 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*" as part of the notice of appeal is unrealistic and onerous, particularly given the short timescales involved in energy code modification appeals.

**ScottishPower**  
September 2024