

Public

National Energy System Operator
Faraday House
Gallows Hill
Warwick
CV34 6DA

[✂]

[✂]

nationalenergyiso.com

22 November 2024

NESO response to further updated rules and guide for energy code modification appeals

Dear CMA team,

Thank you for the opportunity to respond to your consultation entitled '*Further updated rules and guide for energy code modification appeals*' (the '**Consultation Document**').

Who we are

NESO lies at the heart of the energy system as an independent, public corporation responsible for planning Great Britain's electricity and gas networks, operating the electricity system and creating insights and recommendations for the future whole energy system.

At the forefront of our efforts is delivering value for consumers. We work with government, regulators and our customers to create an integrated future-proof system that works for people, communities, businesses and industry, where everyone has access to clean, reliable and affordable energy.

NESO's primary duty is to promote three objectives: enabling the government to deliver net zero, promoting efficient, coordinated and economical systems for electricity and gas and the economy and efficiency of energy businesses and ensuring security of supply for current and future consumers. NESO is taking a whole system approach, looking across natural gas, electricity and other forms of energy and will engage participants in all parts of the energy ecosystem to deliver the plans, markets and operations of the energy system of today and the future.

Public

NESO's response to the Consultation Document

Please refer to the document attached as **Appendix 1** hereto for NESO's full responses to the consultation questions, but we have also summarised below our key points:

1. We note the objective of the revised draft Rules and Guide is to reflect:
 - Changes to the maximum period for determining energy code modification appeals from 30 working days to 4 months, with the option for the CMA to extend by a further month in certain cases.
 - Discretion for the CMA to extend the maximum period that the Gas and Electricity Markets Authority (GEMA) has to provide representations or observations in response to a granted application for permission to appeal.
 - Decisions by GEMA to modify designated documents within the meaning of Part 6 of the Energy Act 2023, once designated by notice given by the Secretary of State, may be appealed to the CMA.
2. We agree that most of the proposed changes are consequential and seek to align the Rules and Guide to the enactment of Schedule 14 of the Energy Act 2023 relating to energy code reform and licensing of code managers.
3. We consider that the broader supporting amendments proposed in the CMA's consultation will on the whole help further the overriding objective.
4. We agree that the inclusion of Rule 12.4(f) and paragraph 4.34 of the Guide (adding explicit provision for the CMA to elect to invite commentary on the CMA's reasoning among other matters) provides further helpful detail as to matters that may be included in the process; however, we consider that this could be set out more clearly and should not be stated to be available at any point in the process (but rather only where the CMA has provisional findings).
5. We agree that timing of interim steps should be amended to reflect the longer four-month period by which the CMA must determine an appeal but would invite the CMA to consider whether it would still be useful to indicate the illustrative timescales in the appeal process in the way described in the text proposed to be deleted in paragraph 3.23 of the Guide.

We look forward to engaging with you further. Should you require further information on any of the points raised in our response please contact Laura Thomson, Regulatory Policy Manager, at [redacted].

Yours sincerely

[redacted]

Bronwyn Hardie

Head of Legal

Public

Appendix 1 Consultation Question Responses

Question 1: Overall, is the way in which the Rules and Guide have been amended to take account of changes to provisions relating to the statutory timetable and appeals of GEMA decision to modify codes sufficiently clear and helpful?

NESO Response to Question 1:

Yes, the amendments proposed will help align the Rules and Guide to the changes made by Schedule 14 of the Energy Act 2023 to the Energy Act 2004, namely in relation to the extension of time permitted to the CMA to extend the period under which GEMA may provide representations or observations, and to the period by which the CMA must determine an appeal.

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

NESO Response to Question 2:

Rule 8.1 – consider whether it would be clearer to capture in the main body of Rule 8.1 the CMA’s discretion to extend the date for response currently noted in footnote 21, retaining only the reference to paragraph 4(1A) in the footnote and deleting from it the following words:

‘the CMA has discretion to extend this date by such longer period following the day on which the last application for permission to appeal is made as the CMA may allow.’

Rule 12.4(f) – Although we agree that it is helpful to add a reference to the CMA’s ability to issue a provisional determination and invite commentary, and we appreciate that it might not be appropriate to do so in all cases, we do consider that the current wording could be clarified. This is in part because it is not completely clear from the current wording what the *‘reasoning and factual accuracy’* relates to and how it is separate from Rule 12.4(b) and (e). It is also because it seems confusing to suggest that the CMA might invite such commentary *‘at any time’* – it would only do so once it has reached a provisional conclusion/finding. To clarify these points, we suggest that Rule 12.4(f) could be moved to a new Rule 12.5 as follows:

‘The CMA may in appropriate cases issue provisional findings and/or conclusions and may invite comments from parties to the appeal on the whole or part of the CMA’s reasoning and factual accuracy and/or on potential remedies being considered, where doing so would be consistent with furthering the overriding objective.’

Paragraph 3.23, Guide – we note that an appropriate amendment is made to revise the period to four months by which the CMA must determine an appeal. We note that the clarificatory wording around the indicative timescales of the appeal has been deleted from this paragraph. Notwithstanding the CMA’s discretion to run the appeals process in the best manner which it considers appropriate to further the overriding objective, we consider that it may still be helpful to provide further indicative detail here around the proposed stages to an appeal and when they might be expected to occur, perhaps demonstrating these within a scenario where the full 4-month period is required to determine an appeal. It may therefore also be helpful to also capture this

Public

further indicative detail in Annex 1 to the Guide, where we note similar deletions as those reflected in paragraph 3.23 are proposed.

Paragraph 4.34, Guide – To align this paragraph with the proposed new Rule 12.5 set out above, we suggest that this paragraph is changed to:

‘There may be cases where the CMA considers that it is appropriate to issue provisional findings and/or conclusions and invite parties to comment on part (or all of) its reasoning and factual accuracy and/or on any consideration it may be giving to potential remedies. This is provided for in Rule 12.5. In all cases, the CMA will determine what procedure is appropriate based on the circumstances of the case and in accordance with the overriding objective’.

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

NESO Response to Question 3:

Paragraph 4.12, Guide – Please consider whether an extension application as provided in Rule 12.5 would be the only way for the CMA to exercise its discretion to extend the date for GEMA to make observations or representations. We consider that Paragraph 4(1A) of Schedule 22 of the Energy Act 2004 s.4(1)(b) goes further than this and that the CMA may want to retain the ability to extend the date for response to an appropriate time of its choosing, conscious of the requirement to have regard to the overriding objective expressed in Rule 4. In addition, it appears to us that the position could mirror the position set out in paragraph 3.25 and that it would be helpful to add *‘The CMA will typically seek to give the parties an opportunity to comment before extending the date’.*