DRAFT ENERGY CODE MODIFICATION APPEALS: RESPONSE TO CONSULTATIONS

CMA196 and CMA197

15 January 2025

Website: www.gov.uk/cma

Contents

1. Introduction

1.1 The Competition and Markets Authority (CMA) conducted two consultations which ran from 23 July to 3 September 2024[1] and from 9 to 22 November 2024 respectively.[2] We sought views in those consultations on proposed changes to the existing rules and guidance for energy code modification appeals (CC10 and CC11).

1.2 We refer in this document to the consultations on the proposed new rules and guide as the first and second consultations respectively. We refer to the rules and guide that were the subject of the consultations as the consultation rules and guide.

1.3 The first consultation sought views on the draft updated rules and guide, which had been amended to (i) reflect the updated legislative framework, (ii) incorporate the CMA's experience of conducting appeals, (iii) align them more closely to the CMA70 Rules and CMA71 Guide in place for energy licence modification appeals issued in 2022, and (iv) reflect the use of technology to reduce administrative burdens.

1.4 In the second consultation, we sought the views of interested parties on proposed changes to the draft updated rules and guide to take into account changes to the Energy Act 2004 introduced since the first consultation by section 201 and Schedule 14 of the Energy Act 2023.

1.5 In the first consultation, we asked the following questions:

(a) Overall, are the rules and guide sufficiently clear and helpful?

(b) 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.

(c) Is there anything else which you consider should be included in the rules and/or guide?

1.6 In the second consultation, we asked the following questions:

(a) 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 Gas and Electricity Markets Authority (GEMA) decisions to modify codes sufficiently clear and helpful?

[1] CMA consultation on updated rules and guide for energy code modification appeals
[2] CMA consultation on further updated rules and guide for energy code modification appeals

(b) 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 comments relates to.

(c) Is there anything else which you consider should be included in the rules and/or guide to reflect these changes?

1.7 We received five responses to the first consultation and three responses to the second consultation. Non-confidential versions of these responses have been published on the updated consultation webpages.[3] [4] We thank all those who responded to the consultations.

1.8 Overall, respondents were welcoming of the consultation rules and guide and of updating the rules and guide for energy code modification appeals. We consider more specific points raised by respondents in Section 2 below.

1.9 Having considered the responses to both consultations, we have made amendments to the consultation rules and guide. The amendments that we have made and the reasons for those amendments are explained in Section 2 below. We also set out our reasons for not implementing some of the changes requested by respondents. In addition, we have made some minor tidy-up and clarificatory drafting changes to the text of the consultation rules and guide.

1.10 As a result, the CMA has now finalised and adopted the final rules and guide for energy code modification appeals, which are referred to herein as the Rules and Guide.

[3] CMA consultation on updated rules and guide for energy code modification appeals
[4] CMA consultation on further updated rules and guide for energy code modification appeals

2. Issues raised by respondents and our response

2.1 This document refers to the responses we received in relation to both consultations. This section outlines key issues raised by respondents on various sections of the consultation rules and guide in the order in which they appear in those documents.

2.2 References to the Rules and Guide refer to the numbering in the final Rules and Guide unless stated otherwise. Where relevant, we have also included the previous numbering from the consultation versions of the rules and guide in brackets, for ease of reference.

Applications for permission to appeal

2.3 Rule 5 sets out the updated process and requirements for applications for permissions to appeal and the required supporting documentation. The updated guidance on which we consulted included changes on the treatment of sensitive information. It also set out steps designed to enable applicants to comply with the statutory framework for ensuring that, alongside GEMA, such persons as appear to the applicant to be affected by the decision (or their representatives) be provided with copies of key submissions. We also included an explanation of the steps prospective applicants should take before submitting a notice of appeal in the guide.

Summary of responses

2.4 Overall, respondents were positive about the additional detail provided on the application process for appeal. We received positive feedback that the guide now includes steps for pre-appeal contact with the CMA for prospective applicants.

2.5 One respondent, an energy company, highlighted GEMA's crucial role during the earlier stages of an appeal to work promptly and effectively with applicants and prospective interveners to ensure parties have appropriate information. The respondent asked that the CMA include additional wording in the Rules and Guide to clarify that the CMA expects a high degree of collaboration between parties, which may include appropriate sharing of non-sensitive information at the earliest opportunity.[5]

2.6 In relation to the changes to the procedure for sensitive information in Rule 5.4, another respondent also asked for extra clarity in the Rules and Guide to indicate

[5] See Centrica plc (Centrica)'s response to the first consultation.

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.[6]

2.7 The same respondent, noted the requirement in Rule 5.2(a)(iii) for applicants to reference the specific part of the GEMA decision an applicant wishes to appeal, and that further clarity would be beneficial to state which requirements are rules and which are best practice.[7]

2.8 One respondent, an energy company, pointed to provisions that encourage GEMA to keep a list of persons who would be materially affected by its decision and asked for further wording to be included in the Rules and Guide to encourage that this list also be shared when required.[8] Another respondent, an energy company, considered that the requirement to send the CMA and GEMA a list of affected persons was unrealistic within the short timescales, and difficult to comply with should an organisation not have appropriate contact details.[9]

2.9 In relation to the application process, this respondent also asked for more clarity on the method by which the CMA would like notification of the decision to be served to those affected by an appeal in Rule 5.6.[10]

2.10 The same respondent also explained that it considered the requirement for parties to agree a chronology of key events, in paragraphs 1.6 and 4.29 of the consultation guide (paragraphs 1.6 and 4.32 of the final Guide), to be unrealistic and onerous. It also raised the issue that the suggested timescales in paragraph 3.13 of the consultation guide concerning reasonable notice to the CMA of a potential appeal, specifically 'at the latest two weeks prior to submission of a notice to appeal', were too onerous.[11]

2.11 Two respondents, both energy companies, raised concerns about the period allowed for the submission of applications for permission to appeal being too short.[12]

The CMA's views

2.12 We consider that the expectation of a high degree of collaboration between parties, including the need for appropriate sharing of non-sensitive information at the earliest opportunity, is already covered by the overriding objective and Rule

[6] See National Grid Electricity System Operator Limited (ESO)'s response to the first consultation. We refer to ESO with reference to their response to the first consultation, and National Energy System Operator Limited (NESO), the successor organisation to ESO, who responded to our second consultation, respectively.
[7] See ESO's response to the first consultation.
[8] See Centrica's response to the first consultation.
[9] See ScottishPower Limited (ScottishPower)'s response to the first consultation.
[10] See ScottishPower's response to the first consultation.
[11] See ScottishPower's response to the first consultation.
[12] See responses to the first consultation from EDF Energy (EDF) and ScottishPower.

4.2, which makes it clear that all parties to an appeal are required to assist the CMA to further the overriding objective.

2.13 Furthermore, in relation to the treatment of sensitive information, we note that we have provided information on the process for non-disclosure applications in the consultation rules, at rule 11 and in the consultation guide (which in the final Guide is at paragraphs 3.37 and 4.5). This already makes it clear that the CMA expects GEMA to write promptly if it considers that there are other persons to whom the non-sensitive version of the notice of appeal should be provided.

2.14 However, we agree that additional text would be helpful in the Guide to reinforce the expectation that parties should provide non-sensitive versions of their submissions or, where appropriate, indications of what information they regard to be sensitive promptly and in accordance with any timeframes set out in the Rules. We have therefore added a new paragraph 1.7 to the Guide to make that point. We consider that the Rules and Guide provide sufficient clarity on the process for non-disclosure applications and that any information will be provided to the other relevant parties unless a non-disclosure application is being made in accordance with Rule 11 such that we do not need to make any further changes.

2.15 In response to the request for greater clarity for applicants on the requirement to reference the specific parts of the GEMA decision an applicant wishes to appeal, we have added a new footnote 25 to the Guide and amended the wording of paragraph 3.34 of the Guide. This new wording makes it clear that the specific references the CMA requests as part of the application are not optional, and that the CMA expects applicants to provide them as a matter of practice. The new footnote makes clear the circumstances in which specific paragraph number references are required.

2.16 Regarding the process for sharing a non-sensitive version of the notice of appeal to such persons as appear to the applicant to be affected by the decision, the requirement in Rule 5.6(a)(ii) is that the applicant provide a list of affected persons to whom the notice of appeal has been sent to both the CMA and GEMA. This specifies that the list should be comprised of those to whom the documentation of the appealable decision has already been provided. The CMA expects that applicants would typically have the relevant contact details for affected persons from previous contact as they would have regular dealings with most of them. In any event, as the Guide makes clear, the CMA 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 in paragraph 3.37. We consider that this should be sufficient to enable GEMA to inform the applicant promptly of any other persons who should be provided with a non-sensitive version of the notice of appeal. Accordingly, we do not consider that any additions to the Rules and Guide are needed as the process should be workable.

2.17 Concerning the submission of documents, we note that Rule 21.3 requires that, unless otherwise specified, all documents be submitted to the CMA under the Act or the Rules via email. We note that it will be at the CMA's discretion to specify an alternative electronic form of submission, if, for example the size of files to be submitted makes email submission impractical. We have added a new paragraph 3.28 to the Guide to reiterate and cross-refer to this Rule 21.3 requirement, which specifies that parties should send documents to each other where required in electronic format via email, unless the CMA approves an alternative method. In any event, we refer to 3.12 of the Guide where appellants are strongly advised to make pre-appeal contact with the CMA in advance of submitting a notice of appeal to discuss the mechanics of this.

2.18 The CMA considers that a chronology of key events is beneficial to all parties to an appeal and furthers the overriding objective by providing the CMA and the parties with a single reference point. Based on the experience of previous appeals, we do not believe that the provisions set out in paragraphs 1.6 and 4.32 of the Guide are excessive or unduly onerous for potential appellants. We have updated the wording in paragraph 1.6 of the Guide and indicated that a way to achieve this requirement is for the appellant to submit a draft chronology within a notice of appeal and then cooperate promptly to agree this between the parties early in the procedure. We consider it important that parties agree this chronology where possible in order to ensure consistency. As such, we do not consider that further amendments to the Guide on this point are necessary.

2.19 The CMA does not have discretion to alter the timescales set out in the statute. With respect to the timescales for the giving of reasonable notice, we note the feedback on the suggested timescales for the pre-appeal steps in the consultation guide. In response to that feedback, we have amended the wording in paragraph 3.13 of the Guide to incorporate some additional flexibility for applicants, highlighting that initial contact with the CMA regarding a potential appeal would ideally take place two weeks prior to submission to enable the CMA to plan for receipt. We consider this to be appropriate given that it is not necessary to discuss a fully-formed proposed application at that point – rather the CMA encourages early contact ahead of submitting an application to facilitate smooth administration of the application process. However, we have also amended the text to make it clear that at the very least, the CMA would expect applicants to discuss logistical matters related to the submission of the documentation contained in a notice of appeal with the CMA at least one week prior to submission. This pre-appeal contact assists both the CMA and applicants in ensuring that the correct documentation is submitted for the appeal prior to the deadline.

CMA's permission decision following submission of a notice of appeal

2.20 Rule 6 sets out the updated process for the CMA's permission decision following a notice of appeal. This includes the timescales and various steps in the process once the CMA's permission decision has been made.

Summary of responses

2.21 Overall, we received a mixed response to the procedure for the CMA taking its permission decision, with some respondents asking for additional clarification on some of the updated wording.

2.22 One respondent, GEMA[13] asked that the Rules and Guide make clear in Rule 6.3 the scope that it would have to make representations about an application for permission to appeal, both in written form and at a hearing, should the CMA decide to hold one.[14]

2.23 GEMA also queried in its response to the first consultation the wording of paragraph 3.41 (previously 3.40) of the Guide stating that a person wishing to intervene in the process relating to an application for permission should make an application under Rule 9, given that Rule 9 only appeared to apply after permission had been granted.[15]

2.24 In addition, GEMA also referred to paragraph 3.40 (previously 3.39) of the Guide which notes that the CMA may request representations from GEMA or such other persons as the CMA considers appropriate on the decision on permission. The respondent did not consider that this provides assurance that GEMA will be afforded the opportunity as a matter of practice. GEMA also noted the lack of statutory provision for representations or objections to the granting of permission, and that the CMA should permit these in the interests of furthering the overriding objective (on the basis that 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).[16]

The CMA's views

2.25 The CMA agrees with GEMA that the CMA has discretion as to whether to invite representations from GEMA on the CMA's decision to grant permission to appeal. There is no right for GEMA to make such representations set out in the statute. Indeed, this is made clear in the Guide (see footnote 32). We note that Rule 12 specifies that the CMA may at any time invite submissions and that this is one

[13] GEMA is the governing body of Ofgem (Office of Gas and Electricity Markets), or the Ofgem board. Where we refer to GEMA as a respondent, it was Ofgem who responded on behalf of GEMA. However, we refer to it as GEMA for simplicity.
[14] See Ofgem's response to the first consultation, on behalf of GEMA.
[15] See Ofgem's response to the first consultation, on behalf of GEMA.
[16] See Ofgem's response to the first consultation, on behalf of GEMA.

such example where the CMA could do so. We nonetheless recognise that, on balance, there may be merit in adding an explicit provision that refers specifically to the fact that the CMA may invite representations from GEMA in relation to the decision whether to grant permission to appeal. We have therefore added a new Rule 6.2 to that effect. However, we have made it clear that the CMA will only invite such representations if it considers that doing so would further the overriding objective.

2.26 We have also amended paragraph 3.41 of the Guide, which relates to submissions, so that it refers now to Rule 12.6 and not Rule 9. We consider that it is simpler to refer to the ability to seek permission to make submissions in accordance with Rule 12.6 than to refer to the ability to apply to intervene in order to make submissions of this sort. The CMA does not consider it appropriate to include any additional text here suggesting that GEMA involvement in the process of the permission decision would be consistent with furthering the overriding objective (which is to enable the CMA to dispose of appeals fairly, efficiently and at proportionate cost) as such involvement would not necessarily result in the saving of time and costs that GEMA has referred to.

GEMA's response to the Notice of Appeal

2.27 Rule 8 sets out the updated process for GEMA to provide a response enabling it to make representations or observations to the CMA about the decision in respect of which permission to appeal has been granted, GEMA's reasons for that decision, or the grounds on which the appeal is brought against that decision (the **response**).

2.28 Part 6 of the Energy Act 2023[17] was commenced on 10 September 2024.[18] Consequently, the Energy Act 2004 (**EA04**) has been amended in a number of respects, including to enable the CMA to extend the statutory deadline by which GEMA is able to provide a response.[19] The CMA now has discretion to extend this date by such longer period as the CMA may allow following the day on which the last application for permission to appeal is made. The CMA made various consequential changes to the Rules and Guide which it explained in the second consultation.

Summary of responses

2.29 Respondents broadly supported our approach in this area, subject to some specific points discussed below.

[17] See Part 6 of the Energy Act 2023.
[18] See regulation 2(b)(x) of The Energy Act 2023 (Commencement No. 2) Regulations 2024.
[19] See paragraph 4(1) Schedule 22 of the Act, as amended by paragraph 11(2) of Schedule 14 of the Energy Act 2023 and regulation 2(b)(x) of The Energy Act 2023 (Commencement No. 2) Regulations 2024.

2.30 One respondent, an energy system operator, asked the CMA to consider whether it would be clearer to capture the CMA's discretion to extend the date for a response in the main body of Rule 8.1, as the draft rules had set it out in footnote 21.[20]

2.31 Another respondent, an energy company, stated that the maximum length of the extension period does not appear to be defined in paragraph 4(1A)(b) of Schedule 14, which reads '[the relevant period means] such longer period following that day as an authorised member of the CMA may allow.' The respondent invited the CMA to clarify the maximum period that an authorised member of the CMA may allow for an extension and submitted that such clarity is very important to lessen ambiguity in the process and to ensure fairness and efficiency in the disposal of the appeal.[21]

2.32 The same respondent also highlighted that, as the overriding objective is broad and wide-ranging in its application, it should follow that making an extension request may also be broad and wide-ranging, and considered that the CMA's application of this was too narrow. The respondent asked that the CMA include in paragraph 4.12 of the Guide an exhaustive list of the circumstances that must apply in order for GEMA to succeed in making an extension request. Alternatively, it asked the CMA to outline the circumstances and/or factors it would consider for GEMA to succeed in passing the threshold for an extension. The respondent highlighted that these additions would allow parity of dealing between parties and ensure that an appellant is not unduly disadvantaged, in terms of having less time to comply with deadlines compared to GEMA, which satisfies the fairness principle as required by the overriding objective.[22]

2.33 Another respondent, commenting on 4.12 of the Guide, asked the CMA to consider whether an extension application, as provided for in Rule 12.2(h) (previously 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. The respondent considered 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 a response to an appropriate time of its choosing, while remaining conscious of the requirement to have regard to the overriding objective expressed in Rule 4'. We understand the respondent here to mean that the CMA way wish to clarify that it has the ability to extend the deadline by which GEMA may provide a response absent any application to do so. The respondent also suggested it would be helpful to add: 'The CMA will typically seek to give the parties an opportunity to comment before extending the date.'[23]

[20] See NESO's response to the second consultation.
[21] See Centrica's response to the second consultation.
[22] See Centrica's response to the second consultation.
[23] See NESO's response to the second consultation.

2.34 Another respondent, GEMA, considered that it would be useful to set out, in section 4 of the Guide, some further examples of where the CMA may extend the relevant period[24] or at least make it clear that the possibility of extensions in the example given is not centred on the fact that there is more than one applicant. The respondent highlighted relevant circumstances in which it considers an extension may be necessary and how this may further the overriding objective.[25]

The CMA's views

2.35 In relation to the maximum duration of and criteria for permitting an extension to the period within which GEMA may submit a response, the CMA considers that:

(a) the overriding objective in Rule 4 sets the criteria for an extension request and is consistent with a fair appeals process; and

(b) as no maximum duration of extension is specified in the statute, it is not appropriate for the CMA to fetter its discretion by including a maximum duration in the Rules and Guide.

As such, we have made no further additions to the Rules and Guide.

2.36 We consider that the drafting of the Rules and Guide makes it sufficiently clear that the CMA has a discretion to extend the date of the response, in particular in Rule 8 (footnote 21), Rule 12 and in paragraphs 4.12 and 4.13 of the Guide. However, in relation to the comment about the procedure which the CMA would follow in handling extensions, we have amended the reference to the Rules in paragraph 4.12 of the Guide so that it now refers to Rule 12.2(h). We agree that paragraph 4 of Schedule 22 of the EA04 enables the CMA to extend the deadline for GEMA's response of its own motion, ie it does not need GEMA to make an application requesting such an extension. We note that Rule 12.2(h) already provides explicit means for the CMA to give a direction either on its own motion or on application and it is therefore more appropriate to refer to that Rule rather than to Rule 12.5. We do not consider it necessary to make any further changes to the Rules and Guide.

2.37 In addition, in Rule 12, with respect to the request to add a statement that the CMA will seek to give the parties an opportunity to comment before extending the date, we consider that Rule 12 already makes it clear that parties may be given an opportunity to comment on the direction of processes that affect them, if the CMA considers it appropriate. In addition, paragraph 3.25 of the Guide states that the CMA will typically seek to give parties an opportunity to comment ahead of issuing

[24] As defined in Schedule 14 of the Energy Act 2023, the ''The relevant period'' means —'15 working days following the day of the making of the application for permission to bring the appeal, or such longer period following that day as an authorised member of the CMA may allow.''
[25] See Ofgem's response to the second consultation, on behalf of GEMA.

a direction. We therefore do not consider it necessary to add any additional wording to the current drafting of the Rules and Guide.

2.38 With respect to the circumstances in which the CMA may grant an extension, we consider that it would not be appropriate to add a list to paragraph 4.12 of the Guide setting out in more detail when the CMA might consider granting such an extension. We appreciate that both potential applicants and GEMA would welcome specificity as to the circumstances in which the CMA may grant an extension: energy industry respondents want to see clear limits to limit the potential for unfairness given that applicants may not have more than 15 working days to respond and GEMA may theoretically be permitted an extension of an unbounded length; and GEMA envisages a broad range of potential scenarios in which it considers an extension would be appropriate. We note in this context that furthering the overriding objective requires the CMA, amongst other things, to dispose of appeals fairly and efficiently. It may therefore not be compatible with the overriding objective for the CMA to grant GEMA an extension that is significantly longer than the period of time the applicants have to submit their notices of appeal. However, each decision that the CMA makes to extend the deadline will depend on the specific facts of the case. We do not consider it appropriate at this stage to provide more examples of the circumstances that will be relevant to its consideration of extensions, but will keep this provision under review and consider the scope for adding more examples when the CMA has more experience of granting such extensions.

2.39 The current format of the Guide is intended to give clarity as to the expected overall approach. As we set out in 3.25 of the Guide, Rule 12 sets out a non-exhaustive list of matters upon which the CMA can give directions or make requests and indicates that it will have regard to the overriding objective in managing the conduct of the appeal. Thus, it is clear that the Rules are intended to allow the CMA to decide on the appropriate procedure in each appeal according to the specific circumstances of that particular case.

Withdrawal of application or summary determination

2.40 Rule 10 outlines the process by which an appellant may withdraw an appeal or an application for suspension of a GEMA decision and by which GEMA may apply for a summary determination of an appeal.

Summary of responses

2.41 Only one respondent, GEMA, commented on this section. Its comments are discussed in more detail below.

2.42 GEMA referred to the process for allowing appellants to withdraw an appeal in part in Rule 10.1. This process permits an appellant to withdraw from the appeal in its entirety or in part. By contrast, GEMA claimed that it could only apply for a

summary determination allowing the appeal (ie concede the appeal in its entirety). GEMA requested that the same position should also apply to it and stated that doing so would be consistent with the approach the CMA took following the High Court's decision in *R (on the application of SSE Generation Ltd) v Competition and Markets Authority* [2022] (SSE JR).[26]

2.43 GEMA also highlighted in its response to the first consultation that the updated drafting of Rule 10.1 left open an interpretation that the appellant only has to notify the CMA of its withdrawal, whereas GEMA has to apply for a summary determination. It further noted that, considering the drafting of paragraph 4.20 of the consultation guide (4.21 of the final Guide), it would appear that the appellant is still required to apply to withdraw its appeal. GEMA requested that the drafting be updated to make this position clearer.[27]

2.44 GEMA also noted that the ECMA regime makes no explicit accommodation for the 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). GEMA used the CMP317/327 appeal as an example, stating that it believed that the CMA should interpret the relevant provisions of the EA04 in a flexible way to avoid creating unfair or perverse outcomes.[28]

The CMA's views

2.45 In relation to the withdrawal of appeals, we have removed the wording from paragraph 4.21 of the Guide, which previously stated that a hearing and detailed argument may be necessary for the withdrawal of an appeal. We consider that this is clearer as it more closely aligns paragraph 4.21 of the Guide with Rule 10.1.

2.46 As regards GEMA's application for a summary determination, we note GEMA's reference in its consultation response to the CMA's approach following the High Court decision in the SSE JR. The CMA's subsequent final costs determination recognised the SSE JR's finding that section 175 of the Act includes the power to quash part of GEMA's decision.[29]

2.47 On that basis, we consider it appropriate to make it clear in Rule 10.2 that GEMA may apply to the CMA for a summary determination allowing the appeal either in whole or in part and have amended that Rule accordingly.

2.48 We note that the description of the process by which an appellant may withdraw an appeal is different from the description of the process by which GEMA may seek to abandon its defence of an appeal. However, we consider that it is

[26] See Ofgem's response to the first consultation, on behalf of GEMA.
[27] See Ofgem's response to the first consultation, on behalf of GEMA.
[28] See Ofgem's response to the first consultation, on behalf of GEMA.
[29] SSE Generation Limited v GEMA and National Grid Electricity System Operator Limited (Intervener) and Centrica plc/British Gas Trading Limited (Intervener), Final determination on costs, paragraphs 49 to 60.

appropriate to maintain that distinction to reflect the differences between an appellant deciding that it does not wish to pursue an appeal or part of an appeal, and GEMA applying to the CMA on the basis that it wishes to abandon its defence of all or part of an appeal and is seeking to persuade the CMA that it is appropriate for the CMA to stop work on the appeal or part of an appeal and make a summary determination in relation to it.

Procedure

2.49 Rule 12 sets out updated general information on the appeals procedure, highlighting that the CMA may determine its own procedure and providing some illustrative examples of the types of directions or requests it may issue.

Summary of responses

2.50 Overall, we received broad support for the proposals to update and streamline the existing rules of procedure and guidance for energy code modification appeals, and respondents noted that the amendments we had made largely improved the transparency and efficiency of the energy code modification appeals process. We received feedback that the updated wording now provided in the Guide offered further clarity on teach-ins and written clarifications.

2.51 One respondent, GEMA, referred to 12.2(j) of the Rules, noting that paragraph 8 of Schedule 22 of the Energy Act 2004 only provides for the CMA to order parties, by notice, to produce documents to the CMA and makes no provision in relation to the CMA's ability to require disclosure to 'other persons' (those not party to an ECMA).[30]

2.52 Another respondent, an energy company, mentioned the CMA's ability in Rule 12.2(j) to give a direction, which includes providing 'estimates, forecasts, returns or other information', and asked for further clarification on what category of information the CMA is seeking.[31]

2.53 This respondent also highlighted that the new rules consulted upon 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.[32]

2.54 Another respondent, highlighted that there is currently no explanation of the process for appeals against the CMA's decision and requested the inclusion of some detail on this point, such as information on the relevant forum and timelines

[30] See Ofgem's response to the first consultation, on behalf of GEMA.
[31] See ScottishPower's response to the first consultation.
[32] See ScottishPower's response to the first consultation.

for such an appeal, and an outline of the process the CMA would expect to follow within the Guide.[33]

The CMA's views

2.55 We agree with GEMA that paragraph 8 of Schedule 22 of EA04 provides for the CMA to order parties, by notice, to produce documents to the CMA. However, paragraph 12(1) of Schedule 22 of EA04 empowers the CMA to 'make rules regulating the conduct and disposal of appeals under section 173'. Furthermore, paragraph 12(2) of that Schedule provides that '[t]hose rules may include provision supplementing the provisions of this Schedule in relation to any application, notice, hearing or requirement for which this Schedule provides.' Consequently, the CMA considers that it has the vires to make directions requiring the disclosure or production of documents between the parties to the appeal or to other persons. As such, no further change is required to the Rules and Guide.

2.56 We consider that the types of documents listed as examples of requests in Rule 12.2(j) are indicative examples only. As such, we have updated Rule 12.2(j) to reflect this, clarifying that these are examples and should not be read to be an exhaustive list.

2.57 Under the procedure adopted for energy licence modification appeals, there is no automatic opportunity or statutory 'right' for an appellant to submit an answer to GEMA's response to the Notice of Appeal. Rather, in both energy licence modification appeals and energy code modification appeals, the CMA has discretion over whether to permit any limited reply to a response, taking into account the specific circumstances of the case and whether doing so would further the overriding objective. As such, we do not consider further changes to the Rules and Guide to be necessary.

2.58 We consider the process for appeals against the CMA's decisions to be outside the scope of this procedural guidance, which focus on the CMA's procedure in conducting appeals. We have therefore not included this suggestion in the Guide. We will, however, consider how best to ensure that parties are aware of their rights of onward appeal (via judicial review) in respect of future CMA energy code modification appeal determinations.

Submissions on arguments, reasoning and potential remedies

2.59 Our second consultation document on the updated rules and guide noted that the energy code modification appeal regime continues to differ in material respects from others such as energy licence modification appeals where a provisional determination would normally be issued. The second consultation document explained why, in light of the different legislative framework and the process that

[33] See Ofgem's response to the first consultation.

was envisaged to be a tightly defined process to ensure a swift outcome, the CMA would not normally issue a provisional determination. However, the consultation explained that we recognised that the new four-month maximum time frame provided the CMA with greater flexibility and in appropriate circumstances the CMA might invite the parties to make focused submissions on part (or potentially all of) the CMA's reasoning, factual accuracy and/or any possible remedies that the CMA may be considering. Accordingly, we have provided more explicitly for that possibility in a new Rule 12.5 (previously rule 12.4(f)).

Summary of responses

2.60 One respondent to the first consultation, an energy company, noted that the consultation rules did not provide for the CMA to issue a provisional determination. The respondent said that the issuing of a provisional determination is extremely helpful as it allows parties to comment on and prevent errors in the final determination and that also allows the parties to begin discussing and agreeing potential remedies. The respondent said that whilst it appreciated the shorter timescales involved in energy code modification appeals, it felt that it would be useful to have some idea of the CMA's minded-to decision prior to it issuing its determination. The respondent suggested that an informal consultation with the parties on the provisional determination would be a useful addition to allow the parties to begin discussing and agreeing potential remedies.[34]

2.61 One respondent to the second consultation, an energy system operator, highlighted that it was helpful to add a reference to the CMA's ability to issue a provisional determination and invite commentary from the parties, but appreciated that it might not be appropriate to do so in all cases, and therefore considered that the current wording could be clarified. The respondent highlighted that the current drafting does not make it completely clear what 'reasoning and factual accuracy' relates to and how it is separate from consultation rules 12.4(b) and (e). It submitted that 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, the respondent suggested that the consultation Rule 12.4(f) could be moved to a new Rule 12.5 and provided suggested wording.'[35]

2.62 Another respondent to the second consultation, GEMA, also referred to the consultation rule 12.4(f) and asked the CMA to clarify the wording on this point. The respondent stated that the explicit reference to the overriding objective in this rule differed from the other parts of rule 12.4, which do not explicitly refer to the overriding objective, and highlighted that this could lead readers to believe that the

[34] See ScottishPower's response to the first consultation.
[35] See NESO's response to the second consultation.

furthering of the overriding objective is only considered in respect of the consultation rule 12.4(f).[36]

The CMA's view

2.63 We consider that the drafting of the Rules and Guide makes it sufficiently clear that there should be no expectation of a provisional determination, as for reasons highlighted above this may not be appropriate. As explained in our second consultation, while it would be open to the CMA to invite such submissions under Rule 12.4(b) or (e), we consider that it would be helpful to provide more explicitly for that possibility in a new Rule 12.5 (previously 12.4(f)). In paragraph 4.34 of the final Guide, we make this clear that the CMA would only invite such comments where doing so would be consistent with furthering the overriding objective.

2.64 We consider that it should already be sufficiently clear that the overriding objective applies to the entire appeals process, and therefore also to the remainder of Rule 12.4. However, we have adjusted the wording to make this point clearer by moving the wording of consultation rule 12.4(f) into a new Rule 12.5.

The production of documents, calling witnesses and the production of written statements

2.65 Rule 16 outlines the updated process for the production of documents, calling witnesses and requesting the production of written statements.

Summary of responses

2.66 Respondents broadly supported our approach in this area, subject to one specific point discussed below.

2.67 One respondent, GEMA, suggested that the new wording in Rule 16 revert 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. It indicated that the sharing of such a notice would appear to be in the interests of fairness and efficiency.[37]

The CMA's view

2.68 As highlighted in our first consultation document, the Rules and Guide have been adjusted to align more closely with CMA70, CMA71 and current practice, while retaining some wording from the previous CC10 and CC11. We consider that the reference to the fact that the CMA 'may' share a notice is consistent with what is set out in CMA71 and also the language from the Water References Rules and Guide (CMA204 and CMA205). This wording in Rule 16 reflects the fact that the

[36] See Ofgem's response to the second consultation, on behalf of GEMA.
[37] See Ofgem's response to the first consultation, on behalf of GEMA.

CMA has discretion to do this in the statute. We therefore consider that this wording is sufficiently clear and aligns with the CMA's current practice for regulatory appeals.

Costs

2.69 Rule 19 sets out the CMA's approach to determining costs within the appeals process. We highlighted in our first consultation document that the new drafting of the Rules and Guide had been adjusted to align more closely with CMA70, CMA71 and current practice, while retaining some wording from the previous CC10 and CC11.

Summary of responses

2.70 Respondents broadly supported our approach in this area, subject to two specific points discussed below.

2.71 One respondent, an energy company, referred to the change in Rule 19.5 to state that the CMA **may** as opposed to **will** have regard to all the circumstances in an appeal when determining costs. Its response requested that this language reverted to 'will', to make it clear that it is crucial that the CMA has regard to all the circumstances when determining an appeal.[38] Another respondent, GEMA, also asked the CMA to revert 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.[39]

2.72 The same respondent, GEMA, highlighted in its response to the first consultation that the current drafting of the costs section 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.[40] In its response to the second consultation, GEMA stated that it was unclear why corresponding changes had not been made to other aspects of the appeal process to provide explicitly for further alignment (including the explicit ability for the CMA to make split costs orders in respect of its own costs; and noted that proposed changes were consulted upon by the Department for Business and Trade in its consultation of 22 November 2023).[41]

The CMA's views

2.73 In relation to the language used in the updated rules and guide in the first consultation, the wording had been updated to align with that of the energy licence modification appeals, which state that the CMA **may** as opposed to **will** have regard to all the circumstances in an appeal when determining costs. Given

[38] See ScottishPower's response to the first consultation.
[39] See Ofgem's response to the first consultation, on behalf of GEMA.
[40] See Ofgem's response to the first consultation, on behalf of GEMA.
[41] See Ofgem's response to the second consultation, on behalf of GEMA.

stakeholder feedback, in this instance we have reversed the change to Rule 19.5 and paragraph 5.5 of the Guide so that it now reads 'will have regard to all relevant circumstances' as we consider this to be a more accurate reflection of the process that the CMA adopts.

2.74 We consider that adding additional wording to paragraphs 4.23 of the Guide would provide helpful clarity regarding the calculation of costs in the context of a summary determination and have therefore updated that paragraph to state that the CMA may also require GEMA to pay the costs that the appellant has reasonably incurred in connection with the appeal, 'having regard to the factors set out in Rule 19.5'. As the Department for Business and Trade (**DBT**) has not yet taken forward any legislative changes to allow for split cost orders to be made as set out in its consultation in November 2022, the CMA cannot make any split cost orders in respect of its own costs in the event of an appeal being partially upheld (see also paragraphs 2.87 and 2.91 below).

Timeframes for appeals

2.75 The updated Guide sets out various statutory deadlines and indicative timelines in the appeals process. The statutory changes brought in by Schedule 14 of the Energy Act 2023 were reflected in the second consultation versions of the Rules and Guide, which now allow for up to a four-month period in which to decide an appeal.

Summary of responses

2.76 Respondents broadly supported our approach in this area, subject to some specific points discussed below. The addition of teach-ins in the drafting of paragraph 3.23 of the Guide was welcomed by consultation respondents.

2.77 In its response to the first consultation, one respondent, an energy system operator, invited the CMA to provide further detail on the objectives of teach-ins and their role in further supporting its determination of the appeal.[42]

2.78 In its response to the second consultation, the same respondent noted that as a result of amending the Rules and Guide to revise the period in which the CMA must determine an appeal to four months, the clarificatory wording around the indicative timescales of the appeal had been deleted from paragraph 3.23 of the consultation guide. The respondent considered that it might still be helpful to provide further indicative detail here around the proposed stages of an appeal and when they might be expected to occur, perhaps demonstrating these within a scenario where the full four-month period is required to determine an appeal. The

[42] See ESO's response to the first consultation.

respondent also advised that it would also be helpful to capture this further indicative detail in Annex 1 of the Guide.[43]

2.79 Another respondent to the second consultation, an energy company, also mentioned the removal of set hearing dates from paragraph 3.23 of the consultation guide in light of the new statutory changes. This respondent highlighted that it would be useful to all parties to have the certainty of set hearing dates, as before, which would allow sufficient preparatory time and assist all parties in satisfying the overriding objective.. The respondent therefore asked the CMA to include amended set hearing dates, which factor in the extended relevant period.[44]

The CMA's view

2.80 As highlighted in the first consultation document, CC10 envisaged holding clarification hearings as a primary means of obtaining clarification of submissions. In our experience, factual teach-ins and written clarifications can often be more efficient than clarification hearings. The Rules and Guide therefore provide flexibility as to how the clarification process is conducted. Teach-ins can be a useful aspect of the appeals process which may be used by the CMA to receive presentations and oral submissions on the factual background and technical points (agreed upon between the parties), assisting with its understanding of the context and of matters relevant to its determination of the appeal. Where teach-ins are to be used, the CMA will determine the topics to be covered in discussion with the parties and will advise how they will be run. We have added footnote 23 to paragraph 3.23 of the Guide to reflect this.

2.81 We consider that following the extension of the 30-day period to a period of up to four months, the precise additional detail around indicative timescales and the indicative appeal timetable previously in section 1 of the consultation guide and in paragraph 3.23 of the consultation guide are no longer useful. This is due to the wider range of possible timetables which could apply, and which will be decided upon by the CMA in light of the specific circumstances of each case. The level of detail provided by the wording of the updated Rules and Guide is now more in line with CMA71 and other similar CMA procedural guidance on the conduct of appeals. As such, we do not consider it appropriate to add any additional detail on this point to the Rules and Guide.

Suggestions requiring legislative changes

2.82 The Electricity and Gas Appeals (Designation and Exclusion) Order 2014 (the **Order**), as reflected in the first consultation version of section 2 of the guide, listed the energy codes that may be subject to an appeal. Two of the energy codes

[43] See NESO's response to the second consultation.
[44] See Centrica's response to the second consultation.

designated under the Order, the Master Registration Agreement (the **MRA**) and the Supply Point Administration Agreement (the **SPAA**) have been consolidated to form the Retail Energy Code (**REC**); however, the REC is not designated under that Order.

2.83 GEMA's delivery of energy code reform under the Energy Act 2023 increases the likelihood of further code consolidation or the creation of new energy codes, as highlighted in our first consultation.

Summary of responses

2.84 Two respondents to the first consultation, both energy companies, raised the issue of energy code reform, which is part of ongoing discussions with GEMA, Department for Energy Security and Net Zero (DESNZ) and energy companies, highlighting that decisions to modify the REC are not appealable to the CMA, following the consolidation of the SPAA and the MRA to form the REC.[45] To streamline the appeals process, one respondent requested that the CMA seek to address this uncertainty with GEMA and the Government as soon as practicable.[46]

2.85 One respondent highlighted that there is no route to appeal a GEMA decision regarding a REC code modification.[47]

2.86 The other respondent asked that the Guide should clarify in Section 2 that the CMA shall have jurisdiction to hear appeals to all successor codes which result from consolidation of those designated in the Order.[48]

2.87 In addition, another respondent, GEMA, in relation to the statutory changes to the timeline for the appeals process set out in Schedule 14 of the Energy Act 2023, felt that, based on the explanatory notes to the Energy Act 2023, this extension was provided to bring energy code modification appeals in line with appeals of other GEMA decisions, such as licence modifications. It stated that it was unclear why corresponding changes had not been made to other aspects of the appeal process to provide explicitly for further alignment (including time for representations and indeed the explicit ability for the CMA to make split costs orders in respects of its own costs (see paragraphs 2.72 and 2.74 above); and noted that both of these proposed changes were consulted upon by the Department for Business and Trade in its consultation of 22 November 2023).[49]

[45] See responses to the first consultation from Centrica and EDF.
[46] See Centrica's response to the first consultation.
[47] See EDF's response to the first consultation.
[48] See Centrica's response to the second consultation.
[49] See Ofgem's response to the second consultation, on behalf of GEMA and the Department of Business and Trade's smarter regulation consultation

The CMA's view

2.88 The CMA referred to the proposed energy code reform under the Energy Act 2023 in its consultations. The CMA's appellate jurisdiction is set by the designations made by the Secretary of State. While we might expect that when a new designation is made, it would include the successor codes which result from consolidation of those designated in the Order, we are unable to pre-empt such a designation for those successor codes. As noted in our second consultation document, we had included in the second consultation guide new wording which made it clear that the designated documents are subject to change, reminding stakeholders to ensure they have checked for any changes to the designations since the issue of the rules and guide. In particular, we added wording to paragraph 2.1 of the consultation guide to state that the codes listed are ones which have been designated by the Secretary of State as at the date of adoption of the guide. We also added a new paragraph 2.5 in the consultation guide, explicitly to state that this designation is subject to periodic review. This reflects the fact that to the extent that new or different codes are designated they will, at the point of designation, become appealable to the CMA. We have also amended the Guide to remove mention of the SPAA and the MRA which no longer exist. Therefore, we do not consider it appropriate to make any further changes in the Rules and Guide.

2.89 We understand from DESNZ that it is preparing to issue the required designation notices in line with the process laid out in the Energy Act 2023. The designation process has two key steps, the first of which is that DESNZ will issue a qualifying designation notice allowing GEMA to use its transitional powers to begin making modifications to relevant codes.[50] The second is that a final designation process will then occur following which the appointment of code managers will take place. For both designation steps to occur, they must each be proceeded by Ofgem sending a Letter of Recommendation to DESNZ specifying which codes they deem should be designated. We understand that DESNZ is currently working with GEMA to finalise timings for this process. Based on this joint planning with GEMA, DESNZ is planning to consult on appeals in Spring 2025. This would then be followed by the process for issuing an updated Appeals Order in due course.

2.90 In respect of the changes to the timeline for the appeals process set out in Schedule 14 of the Energy Act 2023, we do not consider that the extension of the period within which the CMA must determine an energy code modification appeal indicates an intention to fully align energy code modification appeal processes with those of energy licence modification appeals. We consider that the energy code modification appeal regime is designed to be a quick and effective appeal mechanism. While the CMA may now take 'up to' four months to hear such appeals, it may be the case that some such appeals can be heard in a shorter

[50] Full details can be found in GEMA's consultation decision on the implementation of energy code reform: and on the Department for Energy Security and Net Zero's consultation outcome.

period of time than many licence modification appeals, and we have designed the appeal process to provide sufficient flexibility to be adapted to suit the needs of the particular case.

2.91 We note that there were a number of proposed areas for further improvement which DBT had consulted upon and of which we remain supportive.[51] We understand that DBT is keeping the responses to its consultation under consideration.

[51] CMA response to DBT consultation Smarter regulation strengthening the economic regulation of the energy, water and telecoms sectors, available on the CMA's website at: CMA consultation responses and evidence regarding regulation and the role of regulators in the UK.

3. List of respondents

1. Centrica plc (Centrica) (first and second consultation)
2. EDF Energy (first consultation)
3. National Grid Electricity System Operator Limited (ESO) (first consultation)
4. National Energy System Operator Limited (NESO) (successor organisation to ESO, second consultation)
5. Office of Gas and Electricity Markets (Ofgem), on behalf of the Gas and Electricity Markets Authority (GEMA) (first and second consultation)
6. ScottishPower Limited (ScottishPower) (first consultation)