
An appeal under section 173 Energy Act 2004

E.ON UK plc

-and-

GEMA

Application for permission to appeal

The permission of the Competition Commission is required before an appeal may be brought under the Energy Act 2004 ('the Energy Act'). Such appeals may be brought against certain decisions by GEMA in relation to energy code modifications.

Provisions concerning applications for permission to appeal, and appeals generally, may be found in sections 173 to 177 of and Schedule 22 to the Energy Act. Applicants should ensure that they understand those provisions, SI number 1646 of 2005 and two important Competition Commission documents *The Energy Code Modification Rules CC10* ('the Rules') and *Guide to Appeals in Energy Code Modification Cases CC11* ('the Guidance') before they make an application for permission to appeal. These documents may be found on the Competition Commission web site www.competition-commission.org.uk.

Before making an application for permission to appeal, the applicant should contact the Competition Commission on 020 7271 0000 to obtain a reference number for the appeal and contact details for the appeal secretary.

An application for permission to appeal should be made on this form. The boxes in the body of this form will where necessary expand to accommodate text.

For Competition Commission use only	
Date filed	_____

Please insert the appeal reference number obtained from the Competition Commission:

Appeal reference number	02/07
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Section 1—GEMA’s decision and the jurisdiction of the Competition Commission

(a) Please identify the decision by GEMA (‘the decision’) against which permission to appeal is sought and its reference number:

Ref No 80/07	GEMA’s decisions directing: (1) that modification proposal 0116V to the UNC be implemented; and (2) that modification proposal 0116A to the UNC not be implemented.
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(b) Please state the date on which the decision was published:

5 April 2007

(c) Please attach a copy of the decision to this application notice.

(d) Please state in the box below the reason(s) why the decision in respect of which permission to appeal is sought falls within section 173(2) of the Energy Act 2004 and is not excluded by paragraphs 4 to 14 of SI 2005 No 1646.¹

GEMA’s decision does not consent to a majority recommendation of the UNC Modification Panel in its Modification report. The UNC Modification Panel recommended by a majority that modification proposal 0116A be implemented and that modification proposal 0116V not be implemented. The decision has not been excluded by GEMA under Article 12 of SI 2005/1646.

Section 2—The applicant and its standing to appeal

(a) ***The applicant’s name and address***

Applicant’s name E.ON UK plc

¹See paragraphs 2.4 to 2.7 of the Guidance.

Applicant's solicitor's name Bevan Brittan LLP

Applicant's solicitor's address or applicant's address for service

Fleet Place House 2 Fleet Place Holborn Viaduct London EC4M 7RF	Reference or contact name	Virginia Cooper
	Contact telephone number	0870 194 1000
	DX number	1058 Chancery Lane

Applicant's counsel's address (if applicable)

Alan Griffiths One Essex Court Temple London EC4Y 9AR	Reference or contact name	David Amdor
	Contact telephone number	0207 583 2000
	DX number	430 Chancery Lane

(b) Standing

Section 173(3) of the Energy Act provides that an appeal against a decision may be brought only by:

- (i) a person whose interests are materially affected by the decision; or
- (ii) a body or association whose functions are or include representing persons in respect of interests of theirs that are so affected.

In the box below, please explain why the applicant has standing to bring an appeal:

E.ON's interests are materially affected by the decision as one of the UK's largest integrated energy companies. E.ON is a major shipper, supplier and consumer of gas. E.ON is also a major user of gas storage and owns a storage facility under construction. E.ON will incur increased costs from purchasing firm rather than interruptible exit capacity. The decision will also have an adverse effect on E.ON's investment decisions about the construction of new gas-fired electricity generators. E.ON proposed MP 0116A and participated in the consultations conducted by the UNC Panel and by Ofgem.

See further paragraphs 25-31 and 183-193 of the witness statement of Peter Bolitho served with this application.

Section 3—The respondent and other persons affected by the decision

GEMA
c/o Modifications
OFGEM
9 Millbank
London SW1P 3GE
Email to: modifications@ofgem.gov.uk

Are there any other persons affected by the decision?

YES NO

If the answer is **YES** please provide the names and addresses of those persons on the last page of this form and send them and GEMA copies of this application and other documents listed in Section 10

Section 4—Time estimate for the hearing of the appeal

If your application for permission to appeal is granted, how long do you estimate that it will take to put your appeal to the Competition Commission orally?

Hours Minutes

[5 – 10] Depending on the structure of the hearings and pre-reading	00
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Who will represent you at the hearing? Solicitor Counsel Otherⁱⁱ

ⁱⁱRule 19 allows a party to be represented by a qualified lawyer having a right of audience before a court in the United Kingdom or by such other person as the Commission allows.

Section 5—The statement of case

(a) *The applicant's grounds of appeal*

The Competition Commission may allow an appeal only if it is satisfied that the decision appealed against was wrong on one or more of the grounds set out in section 175(4) of the Energy Act 2004:

- (i) that GEMA failed properly to have regard to the matters mentioned in section 175(2) of the Energy Act 2004;
- (ii) that GEMA failed properly to have regard to the purposes for which the relevant condition has effect;
- (iii) that GEMA failed to give the appropriate weight to one or more of those matters or purposes;
- (iv) that the decision was based, wholly or partly, on an error of fact; or
- (v) that the decision was wrong in law.

The applicant will rely on the following grounds of appeal:

Please see attached Statement of Case.

(b) *The applicant's reasons in support of its grounds of appeal*

The applicant will rely on the following facts and reasons in support of its appeal:

Please see attached Statement of Case.

(c) Summary of statement of case

Please attach a summary of the applicant's statement of case of not more than four pages in length in a form suitable for publication on the Competition Commission's web site. The summary should include cross-references to the statement of case and any evidence in support.

(d) Applicant seeking to rely on new matters

Section 175(3) of the Energy Act and Rule 16.3 state the approach to fresh evidence that will be followed in an appeal. Does the applicant wish to rely on fresh evidence?

YES NO

If you ticked **YES** please provide details of the relevant matter/s, and in relation to each matter:

- (i) the reason(s) why GEMA was not able to have regard to the matter/s prior to making the decision appealed against; and
- (ii) the reason(s) why GEMA would have been entitled to have regard to the matter/s had it had the opportunity to do so:

N/A

Section 6—What relief does the applicant seek from the Competition Commission?

The applicant seeks an order of the Competition Commission:

(Please tick the appropriate box (es))

- Quashing the decision appealed against.
- Remitting the matter to GEMA for reconsideration and determination in accordance with directions given by the Competition Commission.
- Quashing the refusal of GEMA to give consent and giving a direction or directions to GEMA, and such other persons as appropriate, to secure that the relevant condition has effect as if the consent had been given.

Please give further details of the relief sought and any directions necessary to give effect to that relief:

An order quashing GEMA's decision to approve modification proposal 0116V and an order quashing GEMA's decision to refuse consent to modification proposal 0116A and an order directing that GEMA approve the implementation of modification proposal 0116A.

Section 7—Documents and sensitive information

- (a) Any witness statements or other written evidence that the applicant wishes to adduce in support of the application for permission to appeal and appeal must be lodged with this application notice.

The applicant should provide a chronology and a provisional glossary as part of this application.

Please tick the boxes to identify the papers you are filing with this notice:

- the decision appealed against;
- the applicant's summary statement of case;
- the applicant's statement of case (if separate);
- any witness statements or other written evidence in support of this application and the appeal.

Please say how many witness statements and who made them, and state the number of exhibits to each witness statement (if any):

Witness statement of Peter Bolitho and one exhibit (PB1)
Expert report of Graham Shuttleworth and three exhibits (GS1, GS2, GS3)

- Provisional chronology.
- Provisional glossary.
- Copies of all relevant statutory material.
- Any other documents.

Please list any other documents:

(Copies of relevant statutory material will follow shortly)

(b) Please add anything further you wish to tell us in connection with this application:

(c) Does the applicant consider that any of the information provided to the Competition Commission is:

(i) commercial information the disclosure of which would, or might, significantly harm the legitimate business interests of an undertaking to which it relates?

YES NO

or

(ii) information relating to the private affairs of an individual the disclosure of which would, or might, significantly harm their interests?

YES NO

If the answer to (i) and/or (ii) is **YES** please give details:

Where the applicant believes that information contained in this application for permission is sensitive it may make a non-disclosure application. A non-disclosure application should be made on form ECM005 and sent to the Competition Commission with this application form. Pending the Competition Commission's decision the applicant may excise the information in respect of which the non-disclosure order is sought from copies of this application and other documents provided to GEMA and persons other than the Competition Commission.

The applicant wishes to make an application for non-disclosure.

YES NO

Section 8—Other applications

The applicant can apply for a hearing to determine the application for permission to appeal.

The applicant should if it is able lodge any application for a direction to be made at the first case management conference.

The applicant wishes to make an application for the Competition Commission to hold a hearing to consider this application for leave to appeal:

YES NO

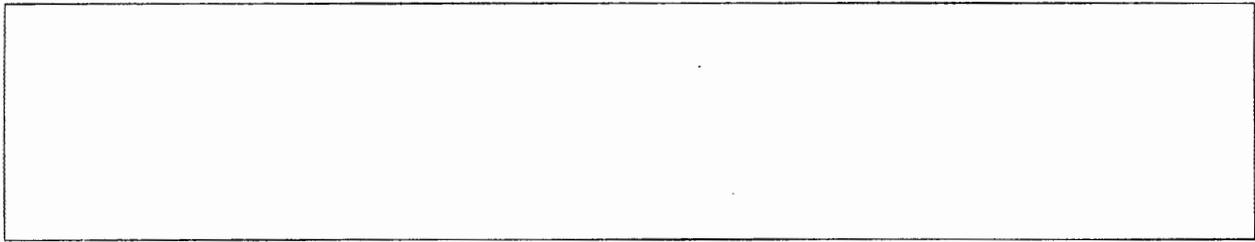
The applicant wishes to make an application for a direction to be made at the first case management conference:

YES NO

The applicant wishes to make another application:

YES NO

If the answer to any of the above is **YES**, please state concisely the nature of the application:



Applications should be made on form ECM005.

Section 9—Statement of truth

Statement of truth	
The applicant believes that the facts stated in this form are true.	
Full name	<u>Peter Bolitho</u>
Name of applicant's solicitor's firm	<u>Bevan Brittan LLP</u>
Signed _____ Applicant	Position or office held <u>Trading Arrangements Manager</u> (if signing on behalf of firm or company)
Date	<u>30 April 2007</u>

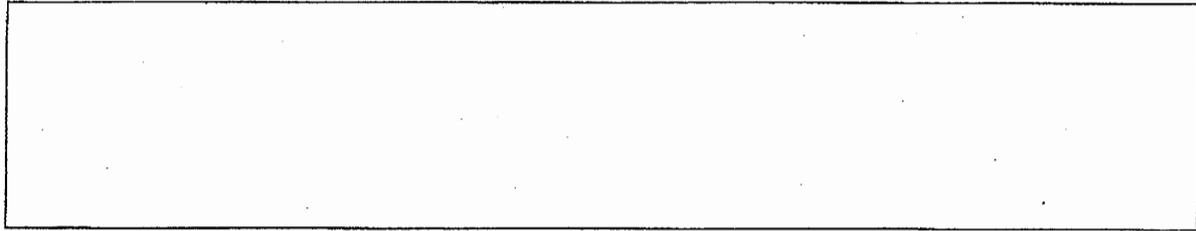
Section 10—Important notes for the applicant

- (a) This application for permission must be served by the applicant, in accordance with paragraph 1 of Schedule 22 and with Rule 4 of the Rules.
- (b) At the time that it makes its application for permission to appeal the applicant must send:
 - (i) a copy of the application for permission;
 - (ii) a copy of any written evidence; and
 - (iii) a copy of any further applicationto GEMA and such other persons as appear to the applicant to be affected by the decision (see section 3).
- (c) If the Competition Commission considers that the application is incomplete, or is insufficiently clear, it may take this into account in considering whether to grant permission, or whether to grant permission subject to conditions.
- (d) The applicant should provide the Competition Commission with five copies of its application for permission to appeal, and of any evidence in support, at the same time that it lodges its application for permission to appeal with the Competition Commission.

- (e) If the Competition Commission grants permission to appeal, it will treat the application for permission to appeal and the supporting evidence as the appeal documents.
- (f) The Competition Commission may hold a hearing to determine an application for permission either of its own motion or on application.

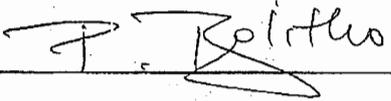
List of persons served with this application for permission to appeal and their addresses

<p align="center">GEMA</p>	<p>GEMA c/o Modifications OFGEM 9 Millbank London SW1P 3GE Email to: modifications@ofgem.gov.uk</p>
<p align="center">Joint Office of Gas Transporters (for onward transmission to the Joint Office's electronic mailing list)</p>	<p>Joint Office of Gas Transporters Ground Floor Red 51 Homer Road Solihull West Midlands B91 3QJ</p>



Applications should be made on form ECM005.

Section 9—Statement of truth

Statement of truth	
The applicant believes that the facts stated in this form are true.	
Full name <u>Peter Bolitho</u>	
Name of applicant's solicitor's firm <u>Bevan Brittan LLP</u>	
Signed <u></u> Applicant	Position or office held <u>Trading Arrangements Manager</u> (if signing on behalf of firm or company)
Date <u>30 April 2007</u>	

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