



APPEALS AGAINST OFGEM CODE MODIFICATION DECISIONS

The right of appeal:

The Energy Act introduced a right to appeal Ofgem code modification decisions to the Competition Commission.

Key aims:

- To increase regulatory accountability
- Not to introduce unnecessary uncertainty

The codes covered:

BSC, CUSC, MRA, **UNC**, short form network codes, and SPAA

Some restrictions on the right of appeal:

Ofgem decisions on modifications to the UNC & short form Network Codes can be appealed...

...but **only if** Ofgem disagrees with “a majority recommendation made by the modification panel in the modification report” ...

...and **not if** “the delay caused by the holding of the appeal would be likely to have a material adverse effect on the availability of electricity or gas [to GB customers]”.

Exclusion where Ofgem agrees with the panel

(“the decision accords with a majority recommendation made by the modification panel in modification report”)

Issue: Need to ensure potential appellants have sufficient information to judge if an appeal is possible - i.e. whether Ofgem’s decision accords with the panel view

Issue: How does the code governance cater for situations where there is no majority?

Security of Supply Exclusion

“the delay caused by the holding of the appeal would be likely to have a material adverse effect on the availability of electricity or gas [to GB customers]”

Ofgem decides whether to exercise its power to exclude decisions from appeal on security of supply grounds, and gives notice to interested parties “at the same time or as soon as reasonably practicable”.

When Ofgem uses this power, it is required to publish a notice stating its reasons for doing so.

Suspension of decisions

The Competition Commission may direct that a decision giving consent to a modification be suspended (or partially suspended) pending determination of an appeal, if an affected party makes an effective case for doing so.

Applications to suspend, and directions by the Commission, can be made at any time before the determination of the appeal.

Issue: Need to be able to deal with such directions by the Competition Commission as and when they are received

Timing of the process (weeks)

- 0 Ofgem decision on the modification
- 3 Application to appeal within 15 working days
- 5 Commission grants/refuses permission to appeal within 10 working days of application
- 6 Ofgem makes representations to Commission within 15 working days of application
- 12 The appeal is determined within 30 working days of the deadline for Ofgem representation
- (14) The Commission can optionally extend this by 2 weeks

Issue: Modifications not implemented during the 3 / 5 week 'window' to seek / be granted leave to appeal?

Possible outcomes of an appeal

- 1 – **Appeal not upheld** – Ofgem decision stands
- 2 – **Appeal upheld** – Ofgem decision [to approve modification] is quashed
- 3 – **Appeal upheld** – matter remitted to Ofgem for reconsideration and determination in line with directions from the Commission
- 4 – **Appeal upheld** – Ofgem & others directed to give effect to the modification decision [that Ofgem vetoed]

Competition Commission costs

Appeal allowed: GEMA pays

Appeal dismissed: Appellant pays. If there are several appellants, the Commission can allocate costs.

Parties' costs:

The Commission can direct that payments be made between parties (i.e. award costs). Normally loser pays – but the Commission has discretion here.

Guidance for appellants

Policy guidance: DTI's policy decision document, together with Q&A and responses to points raised in the consultation, will be published shortly.

Process: The Competition Commission will publish "Rules for the conduct and disposal of appeals..." – contains detailed procedural guidance.

Legislation: Section 173-177 and Schedule 22 of the Energy Act 2004, and the statutory instrument to be laid in Parliament shortly, set the legal framework, including grounds upon which appeals can be allowed.