

Corporate Response Form 'Ofgem Licence Modification Appeals' Consultation
URN 10D/807 Open: 01/10/2010 Close: 29/10/2010

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Consultation Questions

What should be the scope of the appeal mechanism?

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| 1 | Does the fundamental nature of price controls require they be subject to different treatment from other licence modifications? Please explain what changes you consider are required, why you consider they are required and how they would be compatible with the Third Package. |
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We accept that in the context of a proposed shortened licence condition modification appeal process price controls may be treated differently from other licence conditions. However, it still needs to be remembered that other licence condition modifications may have a very significant impact on licence holders. Furthermore, there needs to be an extended timescale for proposed licence modifications that are complex both in technical and legal terms.

What should be the structure of the appeal?

2 Do you agree that a rehearing approach to appeals for modifications other than price controls strikes the right balance between appropriate economic scrutiny of the regulator's decisions and a timely appeals process that controls potential costs for the parties?

The consultation describes a rehearing as an adjudicative process where the appeal body would consider evidence submitted by the parties being able to request further information for clarification of that evidence before weighing up the arguments and evidence to reach a decision. It states that the process is similar to the Energy Act 2004's Energy Code Modification Appeals process, which restricts admissible new evidence to that which with the exercise of reasonable diligence could not have been provided to the regulator before it made the decision. However, if we were to accept that a full investigation was not possible given the time constraints, we might request the appeal body's discretion to admit such new evidence if relevant to the appeal.

3 Do you agree there should be a full investigative hearing for price controls?

We accept that in the context of a proposed shortened licence condition modification appeal process price controls there is a strong case for a wider remit for price controls. However, in addition to a full investigative hearing, DECC has not explained in the consultation whether this only means different timescales.

Grounds for appeal

4 Do you agree with our proposal for an appeal on the merits?

We do not agree with DECC's proposal for an appeal on the merits. We are not convinced of the case against the continued application by Competition Commission of the existing public interest grounds which appears to be in terms of structure and timescales. In considering the application of the code modification grounds, a factor which distinguishes licence condition modifications from code modifications is that industry parties may propose further modifications to improve the codes.

Even if we accepted the case for the approach set out in the consultation we do not consider that it is sufficiently similar to that set out in the Energy Act 2004's sections 173 to 177 and Schedule 22. In particular, the Act refers to the purpose of the relevant condition (s. 175 (4)) and the wider regard that Competition Commission may have than Ofgem was able to have in making its decision (s. 175 (3)).

We agree with the proposal to give the appeal body the discretion to dismiss trivial and vexatious appeals as well as those with no reasonable chance of success as set out in the Energy Act 2004.

5 Would our proposed grounds allow for consideration of legitimate legal, factual and economic issues, without undermining regulator independence? If not, please state why.

Our view is that the proposed grounds would not cause issues with regard to the requirements for the independence of the regulator as the Electricity and Gas Directives provide the right of appeal to a body independent of the parties involved and of any government.

What who are the affected parties who should have right of appeal?

6 Do you see any case for extending the right of appeal in relation to an Ofgem decision to any licensees or other materially affected parties beyond directly affected licensees? Please explain which and why.

We agree with DECC's proposed approach to allow directly affected parties, i.e. licencees subject to the modification, to appeal.

Once an appeal has been accepted, we see merit in DECC's proposal along the lines of intervention process for those wishing to become a party to the appeal under the Competition Commission's Energy Code Modification Rules, but we would like to see more scope for providing evidence along the lines of the public hearing to interested parties, where we might consider limiting interested parties to those that had responded to the policy change and/or subsequent licence condition modification.

The appeal body

7 Do you agree the CC is the most appropriate appeal body? Why/ why not?

We agree that the CC is the most appropriate appeal body because of its economic approach and its sectoral knowledge and experience.

Outcome	
8	<p>The Government would welcome views on whether the appeal body should have the power to vary Ofgem's decisions on matters, other than price controls, or whether such cases would be better handled by remitting decisions back to Ofgem to re-take, with any necessary binding recommendations.</p> <p>We agree with DECC's proposals to give the appeal body the powers to confirm or quash the decision, remit the decision back to the regulator and to make specific recommendations with the addition of a further step. In line with the existing licence modification process, where Ofgem drafts the new condition, the appeal body needs to have the power to reject it where the appeal body considers it is not "requisite for the purposes of remedying or preventing all or any of the adverse effects ... which could be remedied or prevented by the modifications." (Electricity Act 1989 s.14A (3))</p>
Time Limits for the process	
9	<p>Do you think the Government's suggested timescales of 4 weeks to lodge an appeal, and a period of 4 months for the hearing of most appeals will ensure appropriate scrutiny and efficient decision making?</p> <p>Whilst current consultation process would generally consider the issue followed by statutory notice of at least 28 days on the licence modification when representations (and objections) may be made before Ofgem arrives at its decision, until that point when the final text is decided upon it may not be clear whether there is a need to appeal. Therefore, although we accept the need to operate an appeals process in a timely manner, we are concerned about the pressure and difficulty involved in putting together the grounds for an appeal and the supporting evidence within four weeks. Therefore, we would request that this period is extended to six weeks. There is then the period for the appeal body to decide whether or not to accept the appeal which under the Energy Code Modification Rules is two weeks. We would envisage that this would be followed by a period of four months for the hearing of most appeals, other than those where the appeal body considered that the complexity of the appeal in terms of technical or legal issues would require an extended hearing of six months.</p>

10	Do you see any circumstances in which an appeal may need to be subject to a faster timeline. If so can you provide examples?
<p>We consider that the proposed appeal process is on an extremely tight timescale and so any shortening of the timescales might weaken the validity of the process.</p>	
Can Ofgem's decisions be suspended?	
11	Do you agree the appeal body should be given the discretion to suspend Ofgem's decisions on application if they could lead to significant and potentially unnecessary expense and/or disclosure of confidential information?

We consider that it is essential for regulatory stability and investor confidence that the appeal body is able to suspend Ofgem's decision on application if the change could lead to significant and potentially unnecessary expense and/or disclosure of confidential information. Presumably an application to suspend the decision would be made at the same time as the appeal application and we would assume that the decision would be suspended until the appeal body had made its decision whether or not to suspend the decision.

How will the costs be recovered?

12 What will be the likely costs and benefits of these changes on your organisation?

We accept that there is the benefit that any directly affected party may appeal licence condition modifications. However, we consider that these changes will give the regulator more scope to make changes. We accept the argument that the existence of an appeals mechanism will be in the regulator's mind and so concentrate it as Ofgem puts forwards licence modifications. Nevertheless, without experiencing the outcomes of the proposals it is difficult to evaluate the impact of the proposed changes.

With regard to allocation of costs, we would advocate the continuation of the approach under Competition Commission's Energy Code Modification Rules where the Competition Commission will normally order an unsuccessful party to pay costs to the successful party but may consider other factors including the proportionality of the costs.

13 How do you recommend potential costs could be reduced? How could we maximise the potential benefits to the regulatory regime as a whole?

As part of better regulation, if the “one in and one out” approach were to be applied by Ofgem to licence condition modifications or new licence conditions, the decrease in the volume of modifications which could be appealed would be likely to reduce costs.

Impact Assessment Questions

These are partial Impact Assessments containing our initial qualitative assessment of the costs and benefits. We therefore would welcome any quantitative evidence to support the further development of these impact assessments. Any information provided will be treated with sensitivity and anonymity.

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| 14 | Are the assumptions made in the Impact Assessment correct and have we correctly identified the costs and benefits associated with this measure? The Government would welcome any information that could improve our analysis of the costs and benefits highlighted in the Impact Assessment. |
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15	What would be the likely costs and benefits of the 'minimum implementation option' of having two parallel separate regimes; one for those relating to regulatory tasks and Third Package duties, and one for Ofgem's domestic tasks? How would these compare to the costs and benefits of the proposed implementation option?
Additional Comments	

We reiterate our comments to the full Third Package Implementation consultation:

Our view is that DECC's approach to implementing binding decisions under the Directives raises at least the following issues:

- i) Whilst Electricity Directive (Article 37(4)) and Gas Directive (Article 41(4)) specifies duties referred to in paragraph 1, 3 and 6, DECC has chosen to apply this to Ofgem's statutory remit in GB. This would imply that all Ofgem's decision making powers both in the Directives and GB regulation need to be reconsidered in the light of the Directives requirements. For example, we would argue that there should be an appeal on the merits rather than procedural or vires grounds for final or provisional orders for securing compliance (Electricity Act 1989 s.27 and Gas Act 1986 s.30).
- ii) Given the requirements for independence of regulators from, amongst other things, any government entity (Electricity Directive (Article 35(4)) and Gas Directive (Article 39(4)), DECC needs to remove its veto on licence modification and also remove any powers of the Secretary of State to make licence modifications on the subjects covered by Article 37 of the Electricity Directive and Article 41 of the Gas Directive. In addition Ofgem's principal objective and duties need to be revised to correspond to those set out in the Directives and Regulations, and in particular Article 37 1(d) of the Electricity and 41 1(d) of the Gas Directive, "complying with, and implementing, any relevant legally binding decisions of the Agency and of the Commission".