

SCHEDULE 6

Regulation 43(8)

Procedure for appeals under section 11C of the Electricity Act 1989

“SCHEDULE 5A

Section 11D

Procedure for appeals under section 11C

*Application for permission to bring appeal*

1.—(1) An application for permission to bring an appeal may be made only by sending a notice to the Commission requesting the permission.

(2) Only a person entitled under section 11C(1) to bring the appeal if permission is granted may apply for permission.

(3) Where the Authority publishes a decision to modify the conditions of any licence under section 11A(7)(2), any application for permission to appeal is not to be made after the end of 20 working days beginning with the first working day after the day on which the decision is published.

(4) An application for permission to appeal must be accompanied by all such information as may be required by appeal rules.

(5) Appeal rules may require information contained in an application for permission to appeal to be verified by a statement of truth.

(6) A person who applies for permission to bring an appeal in accordance with this paragraph is referred to in this Schedule as the appellant.

(7) The appellant must send the Authority—

- (a) a copy of the application for permission to appeal at the same time as it is sent to the Commission; and
- (b) such other information as may be required by appeal rules.

(8) The Commission’s decision whether to grant permission to appeal is to be taken by an authorised member of the Commission.

(9) Before deciding whether to grant permission under this paragraph, the Commission must give the Authority an opportunity of making representations or observations, in accordance with paragraph 3(2).

(10) The Commission’s decision on an application for permission must be made—

- (a) where the Authority makes representations or observations in accordance with paragraph 3(2), before the end of 10 working days beginning with the first working day after the day on which those representations or observations are received;
- (b) in any other case, before the end of 14 working days beginning with the first working after the day on which the application for permission was received.

(11) The grant of permission may be made subject to conditions, which may include—

- (a) conditions which limit the matters that are to be considered on the appeal in question;
- (b) conditions for the purpose of expediting the determination of the appeal; and
- (c) conditions requiring that appeal to be considered together with other appeals (including appeals relating to different matters or decisions and appeals brought by different persons).

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(1) Section 11C is inserted by regulation 43(8) of these Regulations.

(2) Section 11A(7) is inserted by regulation 43(6) of these Regulations.

(12) Where a decision is made to grant or to refuse an application for permission, the Commission must notify the decision, giving reasons—

- (a) to the appellant; and
- (b) to the Authority.

(13) A decision of the Commission under this paragraph must be published, in such manner as the Commission considers appropriate, as soon as reasonably practicable after it is made.

(14) Section 11H(2) applies to the publication of a decision under sub-paragraph (13) as it does to the publication of a decision under section 11H(3).

### *Suspension of decision*

2.—(1) The Commission may direct that, pending the determination of an appeal against a decision of the Authority—

- (a) the decision is not to have effect; or
- (b) the decision is not to have effect to such extent as may be specified in the direction.

(2) The power to give a direction under this paragraph is exercisable only where—

- (a) an application for its exercise has been made by the appellant at the same time the appellant made an application in accordance with paragraph 1(3) for permission to bring an appeal against a decision of the Authority;
- (b) the Commission has given the Authority an opportunity of making representations or observations, in accordance with paragraph 3(2);
- (c) the relevant licence holder, the licence holder or consumers whose interests are materially affected mentioned in section 11C(2) (as the case may be) would incur significant costs if the decision were to have effect before the determination of the appeal; and
- (d) the balance of convenience does not otherwise require effect to be given to the decision pending that determination.

(3) The Commission's decision on an application for a direction under this paragraph must be made—

- (a) where the Authority makes representations or observations in accordance with paragraph 3(2), before the end of 10 working days beginning with the first working day after the day on which those representations or observations are received;
- (b) in any other case, before the end of 14 working days beginning with the first working day following the day on which the application under sub-paragraph (2)(a) is received.

(4) The appellant must send the Authority a copy of the application for a direction under this paragraph at the same time as it is sent to the Commission.

(5) The Commission's decision whether to give a direction is to be taken by an authorised member of the Commission.

(6) A direction under this paragraph must be—

- (a) given by an authorised member of the Commission; and
- (b) published, in such manner as the Commission considers appropriate, as soon as reasonably practicable after it is given.

(7) Section 11H(2) applies to the publication of a direction under sub-paragraph (6) as it does to the publication of a decision under section 11H.

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(3) Section 11H is inserted by regulation 43(8) of these Regulations.

*Time limit for representations and observations by the Authority*

3.—(1) Sub-paragraph (2) applies where the Authority wishes to make representations or observations to the Commission in relation to—

- (a) an application for permission to bring an appeal under paragraph 1;
- (b) an application for a direction under paragraph 2.

(2) The Authority must make the representations or observations in writing before the end of 10 working days beginning with the first working day after the day on which it received a copy of the application under paragraph 1(7) or 2(4) as the case may be.

(3) Sub-paragraph (4) applies where an application for permission to bring an appeal has been granted and the Authority wishes to make representations or observations to the Commission in relation to—

- (a) the Authority's reasons for the decision in relation to which the appeal is being brought;
- (b) any grounds on which that appeal is being brought against that decision.

(4) The Authority must make the representations or observations in writing before the end of 15 working days beginning with the first working day after the day on which permission to bring the appeal was granted.

(5) The Authority must send a copy of the representations and observations it makes under this paragraph to the appellant.

*Consideration and determination of appeal by group*

4.—(1) The following functions of the Commission must be carried out, in accordance with appeal rules, by a group selected for the purpose by the Chairman—

- (a) considering an appeal;
- (b) determining an appeal; and
- (c) considering applications in relation to the giving of directions and taking other steps to give effect to the Commission's determination on an appeal.

(2) A group must consist of three members of the Commission.

(3) The Chairman must appoint one of the members of a group to be its chair.

(4) The Chairman may select a member of the Commission to replace another as a member of a group if—

- (a) the person being replaced has ceased to be a member of the Commission;
- (b) the Chairman is satisfied that the person being replaced will be unable, for a substantial period, to perform the person's duties as a member of the group; or
- (c) it appears to the Chairman that it is inappropriate, because of a particular interest of the person being replaced, for that person to remain a member of the group.

(5) The replacement of a member of a group does not prevent—

- (a) the group from continuing after the replacement of that member with anything begun before it;
- (b) any decision made or direction given by that member from having effect after that member has been replaced.

(6) Section 104(2) of the Utilities Act 2000 (specialist members)<sup>(4)</sup> applies in selecting members of a group by way of replacement as it applies in selecting the members of the group initially.

(7) The persons who may be selected by the Chairman to be (or to replace) a member of a group, or who may be appointed to be the chair of a group, may include the Chairman.

(8) A decision of a group is effective if, and only if—

- (a) all the members of the group are present when it is made; and
- (b) at least two members of the group are in favour of the decision.

#### *Matters to be considered on appeal*

5.—(1) The group with the function of determining an appeal, if it thinks it necessary to do so for the purpose of securing the determination of the appeal within the period provided for by section 11G<sup>(5)</sup>, may disregard—

- (a) any or all matters raised by an appellant that were not raised by that appellant at the time of the relevant application; and
- (b) any or all matters raised by the Authority that were not contained in representations or observations made for the purposes of the appeal in accordance with paragraph 3.

(2) In this paragraph “relevant application” means an application under paragraph 1 or 2.

#### *Production of documents etc.*

6.—(1) For the purposes of this Schedule, the Commission may, by notice, require—

- (a) a person to produce to the Commission the documents specified or otherwise identified in the notice;
- (b) any person who carries on a business to supply to the Commission such estimates, forecasts, returns or other information as may be specified or described in the notice in relation to that business.

(2) The power to require the production of a document, or the supply of any estimate, forecast, return or other information, is a power to require its production or, as the case may be, supply—

- (a) at the time and place specified in the notice; and
- (b) in a legible form.

(3) No person is to be compelled under this paragraph to produce a document or supply an estimate, forecast, return or other information that the person could not be compelled to produce in civil proceedings in the High Court or Court of Session.

(4) The Commission may take copies of a document produced or an estimate, forecast, return or other information supplied to it under this paragraph.

(5) A notice for the purposes of this paragraph—

- (a) may be issued on the Commission’s behalf by any member of the Commission or by its secretary;
- (b) must include information about the possible consequences of not complying with the notice (as set out in paragraph 10).

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(4) 2000 c. 27. Section 104 was amended by sections 53(1)(a), (b) and 101(2) of, and Part 2 of Schedule 9 to, the Water Act 2003 (c. 37); and by article 11 of, and paragraph 4(a) and (b) of the Schedule to, S.I. 2005/3172.

(5) Section 11G is inserted by regulation 43(8) of these Regulations.

### *Oral hearings*

7.—(1) For the purposes of this Schedule an oral hearing may be held, and evidence may be taken on oath—

- (a) by a person considering an application for permission to bring an appeal under paragraph 1;
- (b) by a person considering an application for a direction under paragraph 2; or
- (c) by a group with the function of determining an appeal;

and, for that purpose, such a person or group may administer oaths.

(2) The Commission may, by notice, require a person—

- (a) to attend at a time and place specified in the notice; and
- (b) at that time and place, to give evidence to a person or group mentioned in sub-paragraph (1).

(3) At any oral hearing the person or group conducting the hearing may require—

- (a) the appellant, or the Authority, if present at the hearing to give evidence or to make representations or observations; or
- (b) a person attending the hearing as a representative of the appellant or of the Authority to make representations or observations.

(4) A person who gives oral evidence at the hearing may be cross-examined by or on behalf of any party to the appeal.

(5) If the appellant, the Authority, or the appellant's or Authority's representative is not present at a hearing—

- (a) the Commission is not required to give notice to that person under sub-paragraph (2); and
- (b) the person or group conducting the hearing may determine the application or appeal without hearing that person's evidence, representations or observations.

(6) No person is to be compelled under this paragraph to give evidence which that person could not be compelled to give in civil proceedings in the High Court or Court of Session.

(7) Where a person is required under this paragraph to attend at a place more than 10 miles from that person's place of residence, the Commission must pay that person the necessary expenses of attendance.

(8) A notice for the purposes of this paragraph may be issued on the Commission's behalf by any member of the Commission or by its secretary.

### *Written statements*

8.—(1) The Commission may, by notice, require a person to produce a written statement with respect to a matter specified in the notice to—

- (a) a person who is considering, or is to consider, an application for a direction under paragraph 2; or
- (b) a group with the function of determining an appeal.

(2) The power to require the production of a written statement includes power—

- (a) to specify the time and place at which it is to be produced; and
- (b) to require it to be verified by a statement of truth;

and a statement required to be so verified must be disregarded unless it is so verified.

(3) No person is to be compelled under this paragraph to produce a written statement with respect to any matter about which that person could not be compelled to give evidence in civil proceedings in the High Court or Court of Session.

(4) A notice for the purposes of this paragraph may be issued on the Commission's behalf by any member of the Commission or by its secretary.

#### *Expert advice*

9. Where permission to bring an appeal is granted under paragraph 1 the Commission may commission expert advice with respect to any matter raised by a party to that appeal.

#### *Defaults in relation to evidence*

10.—(1) If a person (“the defaulter”)—

- (a) fails to comply with a notice issued or other requirement imposed under paragraph 6, 7 or 8;
- (b) in complying with a notice under paragraph 8, makes a statement that is false in any material particular; or
- (c) in providing information verified in accordance with a statement of truth required by appeal rules, provides information that is false in a material particular,

a member of the Commission may certify the failure, or the fact that such a false statement has been made or such false information has been given, to the High Court or the Court of Session.

(2) The High Court or Court of Session may inquire into a matter certified to it under this paragraph; and if, after having heard—

- (a) any witness against or on behalf of the defaulter; and
- (b) any statement in the defaulter's defence,

it is satisfied that the defaulter did, without reasonable excuse, fail to comply with the notice or other requirement, or made the false statement, or gave the false information, that court may punish that defaulter as if the person had been guilty of contempt of court.

(3) Where the High Court or Court of Session has power under this paragraph to punish a body corporate for contempt of court, it may so punish any director or other officer of that body (either instead of or as well as punishing the body).

(4) A person who wilfully alters, suppresses or destroys a document that that person has been required to produce under paragraph 6 is guilty of an offence and shall be liable—

- (a) on summary conviction, to—
  - (i) in England and Wales, a fine not exceeding the statutory maximum, and
  - (ii) in Scotland, a fine not exceeding £5,000;
- (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.

#### *Appeal rules*

11.—(1) The Commission may make rules of procedure regulating the conduct and disposal of appeals under section 11C.

(2) Those rules may include provision supplementing the provisions of this Schedule in relation to any application, notice, hearing, power or requirement for which this Schedule provides; and that provision may, in particular, impose time limits or other restrictions on—

- (a) the taking of evidence at an oral hearing; or
- (b) the making of representations or observations at such a hearing.

(3) The Commission must publish rules made under this paragraph in such manner as it considers appropriate for the purpose of bringing them to the attention of those likely to be affected by them.

(4) Before making rules under this paragraph, the Commission must consult such persons as it considers appropriate.

(5) Rules under this paragraph may make different provision for different cases.

### *Costs*

**12.—**(1) A group that determines an appeal must make an order requiring the payment to the Commission of the costs incurred by the Commission in connection with the appeal.

(2) An order under sub-paragraph (1) must require those costs to be paid—

- (a) where the appeal is allowed in full, by the Authority;
- (b) where the appeal is dismissed in full, by the appellant; or
- (c) where the appeal is partially allowed, by one or more parties in such proportions as the Commission considers appropriate in all the circumstances.

(3) The group that determines an appeal may also make such order as it thinks fit for requiring a party to the appeal to make payments to another party in respect of costs reasonably incurred by that other party in connection with the appeal.

(4) A person who is required by an order under this paragraph to pay a sum to another person must comply with the order before the end of the period of 28 days beginning with the day after the making of the order.

(5) Sums required to be paid by an order under this paragraph but not paid within the period mentioned in sub-paragraph (4) shall bear interest at such rate as may be determined in accordance with provision contained in the order.

(6) Any costs payable by virtue of an order under this paragraph and any interest that has not been paid may be recovered as a civil debt by the person in whose favour that order is made.

### *Interpretation of Schedule*

**13.—**(1) In this Schedule—

“appeal” means an appeal under section 11C;

“appeal rules” means rules of procedure under paragraph 11;

“authorised member of the Commission”, in relation to a power exercisable in connection with an appeal, means—

- (a) the Chairman;
- (b) a member of the Commission authorised by the Chairman to exercise that power; or
- (c) the chair of the group which has, or (if permission is granted) will have, the function of determining the appeal;

“the Chairman” means the Chairman of the Commission;

“the Commission” means the Competition Commission;

**Draft Legislation:** This is a draft item of legislation. This draft has since been made as a UK Statutory Instrument: *The Electricity and Gas (Internal Markets) Regulations 2011* No. 2704

a “group” means a group selected in accordance with paragraph 4;

“statement of truth”, in relation to the production of a statement or provision of information by a person, means a statement that the person believes the facts stated in the statement or information to be true;

“working day” means any day other than—

- (a) Saturday or Sunday;
- (b) Christmas Day or Good Friday;
- (c) a day which is a bank holiday in England and Wales or Scotland under the Banking and Financial Dealings Act 1971<sup>(6)</sup>.

(2) References in this Schedule to a party to an appeal are references to—

- (a) the appellant; or
- (b) the Authority.”

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<sup>(6)</sup> 1971 c. 80.