BEFORE THE COMPETITION AND MARKETS AUTHORITY
IN THE MATTER OF AN APPEAL
UNDER SECTION 11C OF THE ELECTRICITY ACT 1989

B E T W E E N : -

BRITISH GAS TRADING LIMITED

Appellant

and

THE GAS AND ELECTRICITY MARKETS AUTHORITY

Respondent

ADDITIONAL SUBMISSIONS ON THE STATUTORY FRAMEWORK FILED JOINTLY BY EIGHT OF THE SLOW-TRACK DNOs AS INTERESTED THIRD PARTIES

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1. Ten DNOs (described as the Slow-Track DNOs) have signed Joint Submissions dated 22 April 2015. These Additional Submissions address the statutory framework for the appeal and are filed jointly on behalf of the following eight of the Slow-Track DNOs:

	Name	**Represented by**
(1)	Eastern Power Networks plc	CMS Cameron McKenna LLP
(2)	Electricity North West Limited	Norton Rose Fulbright LLP
(3)	London Power Networks plc	CMS Cameron McKenna LLP
(4)	Northern Powergrid (Northeast) Limited	Slaughter and May
(5)	Northern Powergrid (Yorkshire) plc	Slaughter and May
(6)	South Eastern Power Networks plc	CMS Cameron McKenna LLP
(7)	SP Distribution plc	Allen & Overy LLP / Shepherd & Wedderburn LLP
(8)	SP Manweb plc	

2. The same abbreviations are used herein as in the Joint Submissions.

3. Section 11E EA89 contains the grounds on which the CMA may allow an appeal brought under section 11C EA89 against a decision by the Authority to proceed with the modification of a condition of a licence authorising a person to distribute electricity.

4. The key provision is section 11E(4) EA89, which provides that:

> "*The CMA may allow the appeal only to the extent that it is satisfied that the decision appealed against was wrong on one or more of the following grounds—*
>
> *(a) that the Authority failed properly to have regard to any matter mentioned in subsection (2);*
>
> *(b) that the Authority failed to give the appropriate weight to any matter mentioned in subsection (2);*
>
> *(c) that the decision was based, wholly or partly, on an error of fact;*
>
> *(d) that the modifications fail to achieve, in whole or in part, the effect stated by the Authority by virtue of section 11A(7)(b);*
>
> *(e) that the decision was wrong in law.*"[1]

5. As no appeal under section 11C EA89 has been brought prior to the two separate appeals by BGT and Northern Powergrid, neither the CMA nor its predecessor (the CC) has had the opportunity to consider section 11E(4) EA89 directly, although some relevant guidance can be obtained from a review of decisions of the CC taken in exercise of its appellate functions under the Energy Code and the Communications Act 2003. In particular, in its decision of 10 July 2007 in *E.ON UK plc and GEMA and British Gas Trading Limited: Decision and Order of the Competition Commission* (*E.ON*), the CC was required to determine an Energy Code modification appeal under the Energy Act 2004.[2] In that decision, the CC considered the approach it was required to apply under a substantially identical statutory provision.[3]

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[1] Subsection (2) of section 11E EA89 refers to the matters to which the Authority must have regard: (a) in the carrying out of its principal objective under section 3A EA89 (i.e. to protect the interests of existing and future consumers); (b) in the performance of its duties under that section; and (c) in the performance of its duties under sections 3B and 3C EA89. With respect to the carrying out of its principal objective under section 3A EA89 (and the performance of its duties under that section), the Authority must have regard to a number of matters, including in particular the need to secure that all reasonable demands for electricity are met, the need to secure that licence holders can finance their relevant activities, the need to contribute to the achievement of sustainable development, the promotion of efficiency and economy on the part of licence holders, and the need to secure a diverse and viable long-term energy supply. In addition, the Authority, in performing these duties, must have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed (and any other principles which represent best regulatory practice). With respect to the performance of its duties under sections 3B and 3C EA89, the Authority must also have regard, where appropriate, to any guidance issued by the Secretary of State in relation to the attainment of social or environmental policies, and advice provided to the Authority concerning electricity safety issues. The relevant provisions of the EA89 are annexed at [SF1/1].

[2] [SF1/2] and [BG2/46].

[3] Section 175(4) of the Energy Act 2004 provided at the material time that: "*The Competition Commission may allow the appeal only if it is satisfied that the decision appealed against was wrong on one or more of the following grounds — (a) that GEMA failed properly to have regard to the matters mentioned in subsection (2); (b) that GEMA failed properly to have regard to the purposes for which the relevant condition has effect; (c)*

6. Furthermore, when consulting on the decision to amend the EA89 to introduce the current appeal provisions (as part of the implementation of the European Union Third Internal Energy Market Package), the Government indicated that its intention was that the grounds of appeal in energy licence modification cases should be similar to those applying to Energy Code modification appeals:

"*Respondents were generally in favour of an appeal on the merits, but some commented that the grounds proposed in the consultation documents were too narrow. Some respondents commented that the proposed grounds are effectively the same as those available in the industry code appeals regime and were the subject of some debate when the appeal process was first used. One respondent pointed out that in the case of E.ON UK Ltd v GEMA on Energy Code Modification UNC116 (CC 02/07), the Competition Commission took the view that the grounds for appeal enabled it to go beyond a narrower judicial review approach and to consider the merits of the case.* ***It is the Government's intention that the proposed grounds for appeal for licence modification decisions also enable the appeal body to take account of the merits of the case in a similar manner. The Government considers the Competition Commission's approach in relation to code modifications to be helpful in this regard.***"[4] [emphasis in original]

7. As such, the CC's approach in *E.ON* is treated as persuasive precedent in the discussion below of the correct approach to be applied in this appeal.

8. In *E.ON*, the CC considered that its role under section 175(4) of the Energy Act 2004 – to decide whether the Authority's decision was wrong on one or more of the specified grounds – meant that its task was different from judicial review:

"*Those grounds clearly differ from the judicial review grounds of illegality, irrationality or procedural impropriety. This is clear on the face of the legislation, and it is also consistent with the purpose of the section 173 [of the Energy Act 2004] jurisdiction, which is to subject GEMA to a greater level of accountability than would be the case in judicial review.*"[5]

9. The CC observed that:

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that GEMA failed to give the appropriate weight to one or more of those matters or purposes; (d) that the decision was based, wholly or partly, on an error of fact; (e) that the decision was wrong in law".

[4] Department of Energy and Climate Change, "*Implementation of the EU Third Internal Energy Package: Government Response*" (January 2010), para. 2.24 [SF1/3].

[5] *E.ON* [SF1/2], para. 5.3.

"*leaving to one side errors of law, it is not our role to substitute our judgment for that of GEMA simply on the basis that we would have taken a different view of the matter were we the energy regulator.*"[6]

10. The CC also noted that the scope of the Authority's discretion will depend on the aspect of the decision being considered:

"*This is not to say that every aspect of a code modification decision will be a matter for GEMA's discretion. There may be issues in respect of which it can more easily be said that GEMA's decision is wrong – for example, if GEMA has made an error of principle. The CC will therefore consider on a case by case, and issue by issue, basis whether GEMA's decision is wrong on one or more of the statutory grounds.*"[7]

11. The CC's observations on its appellate role in its decision in *Mobile Call Termination 1*[8], repeated in *Verizon UK Limited / Vodafone Limited v Office of Communications*[9], are also relevant. As the CC explains below, that decision also concerned an appeal on the merits (under section 192 of the Communications Act 2003):

"*Section 195(2) of the 2003 Act provides for an appeal on the merits. Section 192(6) shows that appeals can be brought on the basis of errors of fact or law or against the exercise of discretion. The Tribunal interpreted its role under a section 192 appeal as being one of a specialist court designed to be able to scrutinize the detail of regulatory decisions in a profound and rigorous manner. In our view, our role in determining the specified price control matters that have been referred to us is similar.*"[10]

12. On this basis, it is submitted that the CMA must therefore draw a distinction in the present appeal between:

    (1) on the one hand, deciding that a particular decision of the Authority is wrong on one (or more) of the statutory grounds – in which case the appeal must be allowed; and

    (2) on the other hand, deciding that the decision is one that the CMA might not have taken itself were it the regulator, but which is not wrong on one (or more) of the statutory grounds – in which case the CMA may not allow the appeal.

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[6] Ibid., para. 5.11.
[7] Ibid., paras. 5.12 - 5.13.
[8] CC determination: *Hutchison 3G UK Limited and BT v. Ofcom* (Cases 1083/3/3/07 and 1085/3/3/07) (16 January 2009), para. 1.30 [SF1/4].
[9] CC determination: *Verizon UK Limited / Vodafone Limited v. Office of Communications* (Case 1210/3/3/13) (12 December 2013), para. 1.23 [SF1/5].
[10] Ibid., para. 1.23.

13. Applying this distinction, it is clear that BGT has not limited its appeal to areas in which the Authority has exceeded any margin of regulatory discretion it may enjoy. All of the grounds of the appeal for which the CMA has granted permission concern matters of complex regulatory judgement where there is scope for decision-makers to hold different opinions without any being "*wrong*" (applying the test set out in section 11E EA89). It is evident that BGT disagrees with the Authority's approach on a number of points. However, nothing in its NOA discloses any basis for concluding that the Authority's decision is "*wrong*" on any of the statutory grounds set out in section 11E EA89.

Dated 22 April 2015

STATEMENT OF TRUTH

The eight Slow-Track DNOs believe that the facts stated in these Additional Submissions are true.

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For and on behalf of Eastern Power Networks plc, London Power Networks plc and South Eastern Power Networks plc

For and on behalf of Electricity North West Limited

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For and on behalf of Northern Powergrid (Northeast) Limited and Northern Powergrid (Yorkshire) plc

For and on behalf of SP Distribution plc and SP Manweb plc