EXPLANATORY MEMORANDUM TO

THE ELECTRICITY AND GAS APPEALS (DESIGNATION AND EXCLUSION) ORDER 2014

2014 No. 1293

1. This explanatory memorandum has been prepared by the Department of Energy and Climate Change and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This Order consolidates three Orders (listed below) which concern appeals from decisions of the Gas and Electricity Markets Authority ("GEMA") to which section 173 of the Energy Act 2004 applies. As the Orders have been re-enacted, consequently they are revoked by this Order.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This Order makes reference to industry codes and agreements, and also to licence conditions. The Order makes clear in article 2(2) that the references at the time of drafting are to the versions of those documents current at the time of drafting. However by article 2(3), at the time of any appeal, the references are to the versions of the documents at the time of the decision being appealed. This is necessary because all of these documents are 'living documents', which may be modified over time, which is envisaged by the statutory framework. There is no specific statutory authority authorising references to future publications in the enabling power as referred to in paragraph 2.8.1 of Statutory Instrument Practice.

3.2 The statutory framework clearly anticipates that licence conditions, codes and agreements will change over time because they can be modified. See for example section 23 of the Gas Act 1986 and section 11A of the Electricity Act 1989, which set out GEMA's powers to make modifications to the conditions of licences. Since modified licence conditions are recognised on the face of statute, the reference in section 173(2)(a) of the Energy Act 2004 to documents which are provided for in licence conditions must contemplate the possibility of modification taking place over time, without requiring a new statutory instrument to be made. Also section 173(2)(c) of the 2004 Act specifically refers to the giving (or refusal) of consent by virtue of which a document has effect (or would have had effect) for the purposes of the licence with modifications or as reissued, and so the modification over time of the designated documents is anticipated.

3.3 The footnotes for the licence conditions give a weblink to consolidated versions of the licence conditions on the Ofgem electronic public register. This is the most user-friendly version of the licence conditions. To refer to the actual current licence conditions would involve weblinks to the original condition plus all the documents making modifications to that condition, which is too unwieldy for a footnote. The Explanatory Note to the Order explains how hard copies of licence conditions can be requested from Ofgem if required. Ofgem is the Office of Gas and Electricity Markets. GEMA is the governing body of Ofgem.

3.4 In relation to the designated documents, details are given in the Explanatory Note of weblinks to the documents, and how and from whom hard copies can be requested.

3.5 The Department does not consider that it is likely that an individual consumer will need to consult the designated documents. Although consumer organisations may bring appeals, they would only have standing if they represent persons whose interests are materially affected by the document in question. The designated documents generally deal with relationships between market participants, rather than directly affecting consumer interests, so it seems unlikely that individual consumers' interests will be directly affected. Therefore the persons most likely to wish to access the documents will not be individual consumers, but those within the industry or consumer groups with knowledge of the industry. Such persons will have both access to the internet, and will know that the designated documents and licence conditions change over time, and how to access the up to date versions.

4. Legislative Context

4.1 This Order consolidates, for the purposes of simplification of legislation and to harmonise procedures, the following Orders (and consequently revokes them):

1. The Electricity and Gas Appeals (Designation and Exclusion) Order 2005 (S.I. 2005/1646)
2. The Electricity and Gas Appeals (Designation and Exclusion) Order 2009 (S.I. 2009/648)
3. The Electricity and Gas Appeals (Designation and Exclusion) Order 2013 (S.I. 2013/2429).

5. Territorial Extent and Application

5.1 This instrument applies to Great Britain.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- What is being done and why

7.1 This Order is made as a result of the government's 'Red Tape Challenge' programme which sought the views of businesses and the public on the removal and reform of areas of regulation. DECC holds primary responsibility for the 'Red Tape Challenge Energy Theme' under which these revocations are being delivered. It was decided to consolidate the Orders relating to appeals from decisions by GEMA under section 173 of the Energy Act 2004 in order to simplify the legislation in this area.

7.2 The Orders being consolidated designated documents in relation to which certain decisions of GEMA may be appealed. From 1st April 2014 the body to which appeals are made is the Competition and Markets Authority ("the CMA"); previously it was the Competition Commission. The Orders also provided for the circumstances in which a decision is or may be excluded from the right of appeal. Firstly, where a specified condition relating to a decision in respect of a specific designated document arises. Secondly, where GEMA determines that the delay caused by the holding of an appeal is likely to have a material adverse effect on the availability of electricity or gas for meeting the reasonable demands of consumers in Great Britain.

7.3 Where GEMA determines that delay would be likely to have a material adverse effect on electricity or gas availability, it must bring its determination to the attention of persons likely to be interested. By the Order made in 2005, GEMA was required as soon as reasonably practicable after the determination to publish a notice stating the reasons for its having exercised its power to exclude, in such manner as it considered appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be interested. By contrast, by the Orders made in 2009 and 2013, GEMA was required to give notice of the determination in such manner as it considered appropriate for the purpose of bringing it to the attention of persons likely to be interested in it. It was decided to harmonise the procedures as it did not make sense for different procedures to apply in respect of the exclusion of appeals, depending on which Order had designated the document to which the excluded decision related. It was decided to harmonise on the basis of the procedure from the later two Orders, as it gave a degree of discretion to GEMA as how best to discharge its duty to notify those interested in the determination.

- Consolidation

7.5 This Order consolidates three Orders, listed above.

8. Consultation outcome

8.1 As part of the Red Tape Challenge, every few weeks regulation affecting a specific sector or industry (as well as that of general regulation that cuts across sectors) is published by the Cabinet Office online (at this web address: http://www.redtapechallenge.cabinetoffice.gov.uk/home/index/) for the public and stakeholders to suggest how they can be 'scrapped' or 'improved'. The department also ran an internal challenge process to identify measures which could be removed or reformed, which identified the Orders being consolidated.

8.2 The Secretary of State consulted GEMA and such other persons as he considered appropriate as required by section 173(6) of the Energy Act 2004. Given that this Order is a consolidation of existing orders rather than new policy, it was considered that the appropriate approach was to consult key stakeholders only.

8.3 The Department contacted GEMA, Industry Code Panels and representative organisations, namely Energy UK, Energy Networks ("the industry") by email, alerting them to the proposal to consolidate the orders. Initial comments were received and indicated that the majority of stakeholders did not object, in principle, to the consolidation exercise, but welcomed the opportunity to have sight of the draft and comment on it.

8.4 The Department consulted and worked with GEMA in relation to drafting the Order. The draft was shared with the industry for comments, but no substantive comments were received.

9. Guidance

9.1 No guidance has been produced concerning this instrument.

10. Impact

10.1 The impact on business, charities or voluntary bodies is nil.

10.2 The impact on the public sector is nil.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 There are no plans to monitor and review.

13. Contact

Sveva Sangalli at the Department of Energy and Climate Change Tel: 0300 068 6983 or email: sveva.sangalli@decc.gsi.gov.uk can answer any queries regarding the instrument.