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By email: licenceappealsproject@cma.gov.uk

Cadent
Your Gas Network

Dear Gavin,

Response to consultation on Regulatory appeals rules and guidance: energy, water, airports and air traffic services

Cadent owns and manages four of the eight gas distribution networks in the UK. Our pipes carry gas to 11 million homes, schools, hospitals and businesses in the North West of England, the West Midlands, the East of England (including the East Midlands and East Anglia) and North London. In total, our pipes stretch over 80,000 miles.

Our response is focussed on proposed changes to the Energy Licence Modification Appeals: Competition and Markets Authorities Rules (CM70) (**Energy Rules**) and the Energy Licence Modification Appeals: Competition and Markets Authorities Guide (CM71) (**Energy Guide**). Our response is not confidential and draws upon our experience of the Energy Rules and Energy Guide during our recent appeal of the RIIO-GD2 price control licence modifications to the CMA.

One overarching point we would like to make following our experience of the recent RIIO-2 appeals is that it can be extremely challenging for one Group of decision-makers to fully consider all relevant information where there are multiple appeals, and multiple grounds of appeal. At an early stage in the recent energy appeals, the CMA considered whether more than one Group of decision-makers should be appointed. We suggest that the possibility, and the need in some situations, to have more than one Group of decision makers for multiple appeals is considered again as part of this review or more generally.

Energy Guide

Pre-appeal

We appreciate the logistical and resourcing issues that an appeal, particularly multiple appeals, may cause for the CMA and understand the encouragement to notify the CMA in advance. We welcome the flexibility of the proposed notification, which recognises that decisions on these issues are often made close to the deadline as a result of the general timing of the price control process. We also welcome the fact that any such notification will be confidential as between the potential appellant and the CMA.

As regards pre-action correspondence with the Authority, we agree that this should not be mandatory or take a mandatory form. The nature of the price control process means that there will be regular dialogue between the Authority and any potential appellants, and the grounds of any potential appeal are likely to be known by the Authority before any Notice of Appeal is filed.

Interveners and third-party guidance

We acknowledge that the outcome of price control appeals may have an impact on people beyond the appellant(s) and that, in some circumstances, it may assist the CMA to receive evidence and hear from these affected parties. Where interveners and third parties are permitted by the CMA to provide evidence during an appeal and where that evidence may be relied upon by the CMA as part of their final determination, it is important that such evidence is robust and of an appropriate standard and that the main parties to the appeal are given adequate opportunity to comment on the factual accuracy of any third-party evidence.

Written submissions

We understand the CMA's desire to control unsolicited submissions in appeals and to control the length of submissions, particularly in multiple appeals. One key point that the CMA will no doubt have in mind is the need to ensure fairness and equality of representation. Wherever any additional submissions are permitted by the CMA, consideration will need to be given to a right of response for the other party/parties to the appeal.

Considering appeals together

We understand that a large number of appeals and a large number of grounds of appeal can create difficulty for the CMA. We agree that it may be appropriate to hear some appeals together, in whole or in part, but it remains critical that each appellant also has the opportunity to make individual representations.

As mentioned above, it can be extremely challenging for three people to manage multiple appeals in a way that ensures that all information has been considered fully, particularly in energy appeals where there is a strict (and short) statutory time limit before the final determination must be given. We suggest that the possibility of having more than one Group of decision makers when there are multiple appeals is considered again, and that the need to consider this point is included in the Energy Guide.

Hearings

The use of clarificatory hearings in the energy appeals was effective and we welcome specific reference to them in the Energy Guide.

Inter-partes costs

The principle that costs follow the outcome of an appeal is fair, proportionate, and an established and important part of all energy appeals. It is unclear why the new Energy Guide has removed this default position for costs.

Paragraph 6.4 of the proposed new Energy Guide states that:"**…**the CMA considers that the principles as set out in BT v Ofcom apply where a regulator is carrying out its regulatory functions and that this is relevant in considering what costs order, if any, to make…". We presume that this is a reference to the Court of Appeal's comments in paragraph 83 of its judgement in BT v Ofcom (BT v Ofcom (Business Connectivity) [2018] EWCA Civ 2542; [2019] Bus LR 592) (**BT v Ofcom**)), which states: *'if Ofcom has acted purely in its regulatory capacity in prosecuting or resisting a claim before the CAT and its actions are reasonable and in the public interest, it is hard to see why one would start with a predisposition to award costs against it, even if it were unsuccessful'.* If this

presumption is correct then this reference plainly cannot be included in the Energy Guide as the principle was expressly considered and firmly rejected by the Supreme Court in the recent decision in Flynn Pharma *v. CMA* [2022] 1 WLR 2972 (***Flynn Pharma SC)***.

In Flynn Pharma SC, the Supreme Court held that:

"*…there is no generally applicable principle that all public bodies should enjoy a protected status as parties to litigation where they lose a case which they have brought or defended in the exercise of their public functions in the public interest". (para.97)*

I do not agree that the judgment of the Court of Appeal is authority for the proposition that in all cases where the party to an appeal before the CAT is a public body, there must be a presumption or starting point that no order for costs should be made against that body." (para. 103)

The principle from BT v Ofcom that regulators enjoy a protected status and should not, at least as a default position, have costs orders made against them, is clearly not good law and cannot be referred to or relied upon in the Energy Guide or Energy Rules. If, which is unclear, the CMA is referring in paragraph 6.4 of the Energy Guide to considering whether there would be a "chilling effect" on the Authority by imposing a costs order, this should be made clear and the limits of this consideration should also be made clear. Further comments on the reference to the "chilling effect" of costs orders on the Authority are set out in the costs paragraph of the Energy Rules section below.

Energy Rules

Many of the comments raised above in relation to the Energy Guide apply equally to the corresponding section of the Energy Rules so we have not repeated them here.

Costs

Paragraph 20.5(d) of the proposed Energy Rules states that, when deciding whether to make an inter-partes costs order, the CMA Group may have regard to all of the circumstances including but not limited to "…chilling effects of a costs order on the Authority". While we agree that considering whether there would, in fact, be a chilling effect on the Authority is one thing to take into consideration, it is important that this one factor is clearly set in context and the limits of this consideration are clear, transparent, and understood by all parties.

The Supreme Court clearly set out the limits of considering any "chilling effect" in Flynn Pharma SC, where it stated:

"*The Court of Appeal in* BT v Ofcom (Business Connectivity) *did not, as the CMA contends, take the incremental step of cementing a starting point of no order as to costs for every public body by requiring a court or tribunal to assume that there will be a chilling effect on its future conduct and making that the overriding factor in the exercise of the statutory unfettered discretion." (para. 104)*

"Whether there is a real risk of such a chilling effect depends on the facts and circumstances of the public body in question and the nature of the decision which it is defending - it cannot be assumed to exist" (para. 98)

It should be made clear in the Energy Rules and/or Energy Guidance that:

1. Any chilling effect of a costs order on the Authority must not be assumed and the burden of proof is on the Authority to prove that there will, in fact, be a chilling effect; and

2. Any demonstrable chilling effect is just one consideration to take into account when considering an inter-partes costs order – it is not an overriding factor.

To ensure a balanced consideration of any inter-partes costs award, the Energy Rules or Energy Guidance should also provide for consideration of the benefits of an adverse costs order on encouraging better decision making by the Authority. In Flynn Pharma SC, the Supreme Court observed that, far from focusing on any chilling effect: "*The High Court has regarded the prospect of an adverse costs order as beneficial on the basis that it will encourage better decision-making within Government, a more realistic appraisal by the respondent Department of the merits of defending any particular application and the efficient and proportionate conduct of proceedings.*" (para. 133)

It is worth noting that, in the energy sector, it appears unlikely that the Authority will be able to clearly demonstrate a "chilling effect" as a result of the way that it is funded. Ofgem recovers its costs through licence fees charged to gas transportation, electricity transmission and electricity distribution licensees, with adjustments for any actual under or overspend. The costs of any appeal would not therefore cause GEMA to have to cut back on other regulatory activities.

Please get in touch if you would like us to expand on any of the points made in this consultation response.

Yours sincerely,