

CMA

By email to licenceappealsproject@cma.gov.uk

Email: ✕

Date: 9 August 2022

Dear CMA,

Response to “Consultation on draft amendments to existing rules and guidance in energy and airports appeals and new rules and guidance in water and air traffic services appeals”

We are grateful for the opportunity to respond to this consultation. In this letter we set out our response to the proposed rules and guidance for Water and do not comment on the rules for the other sectors.

Question 1: Do you agree with our proposed approach of having regard to proposed amendments to the energy licence modification appeals rules in making amendments to the airport licence appeals rules and guidance, and in the draft rules and guidance that we are proposing for our new water and air traffic services appeal regimes?

Overall we are generally supportive of the CMA’s approach to build on the energy licence rules and guidance and in doing so updating them to reflect

- external developments (e.g. technological developments relating to submissions and judgments relating to costs);
- learnings from the Energy Licence Modification Appeals 2021 (ELMA); and
- differences in legislation between the water and energy sectors.

Having a consistent set of rules and guidance across sectors where possible will be helpful for all participants in understanding how the rules will be interpreted. It will also allow parallels and precedents to be drawn where relevant which will be helpful in ensuring an efficient appeals process.

There are some areas where we provide comment below in response to question 3 on specific areas of the rules and guidance. These primarily relate the areas where the CMA has made updates to the energy rules and guidance and transposed these into the proposed water equivalents.

Question 2: Do you have any comments on the draft amendments to the energy and airport licence appeal rules and guidance?

We do not comment on these amendments as they are not applicable to Northumbrian Water.

Question 3: Do you have any comments on the new draft rules and guidance for water appeals (other than for periodic price reviews) and air traffic services?

We provide comment on the new draft rules and guidance for water appeals below.

Pre-appeal stage

We agree with the CMA that there should not be a formal requirement for prospective appellants to inform the regulator whether they are considering an appeal due to the tight timeframes involved and because there would be little to be gained from doing so.

We agree that providing the CMA with notice of a potential appeal is helpful to the process and where possible prospective appellants should inform the CMA. However, this might not always be possible where the appeal decision is not clear cut or is doubtful and might change nearer the appeal deadline. Appellants should therefore be encouraged to provide notice when there is a likelihood of appeal but should not be prevented from appealing if such notice is not given.

Process for serving documents

We agree that electronic submission of documents should be required and that hard copies should only be provided if specifically requested by the CMA. Hard copies should only be required as a follow up after the electronic submission.

Procedures for hearing multiple and linked appeals

We are supportive of the approach taken in ELMA to combining common grounds of appeal. Joint hearings can be procedurally efficient for going through common areas where appellants have a common position. However, as the CMA acknowledges, it is critical that individual appellants have the opportunity to be heard individually so that each party's views can be taken into account.

Management by the CMA of the submission of evidence, including any evidence beyond the notice of appeal, response by the regulator, and the appellants' reply

The clarification provided in Rule 5.2 is helpful to show what is expected in a notice of appeal and how documents should be structured. This is an improvement from the current energy rules.

We would caution against strict page limits on submissions as flexibility is required to meet the needs of each appeal's circumstances.

Interveners, and role and number of hearings

We have no comments on these areas.

Cost process

We support the inclusion of having regard to “chilling effects” of a cost order on the Authority in line with the judgment made by the Supreme Court in May 2022 (CMA vs Flynn Pharma Ltd). It is important that there is symmetry in the process so that both appellants and the regulator have the appropriate incentives to ensure a good outcome, in line with the objectives set out in legislation, is reached on any matter.

Provisional determination

We support the issuing of provisional determinations where the circumstances warrant this. We consider such provisional determinations are likely to be most beneficial in cases where there is a high level of complexity and where novel issues are being raised.

We would be happy to discuss any of these issues with you in more detail.

Yours sincerely,

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