NON-CONFIDENTIAL
9 August 2022

NORTON ROSE FULBRIGHT

NORTON ROSE FULBRIGHT LLP

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

1 Introduction

1.1 Norton Rose Fulbright LLP welcomes the opportunity to respond to the Competition and Markets Authority (**CMA**) consultation on 'Regulatory appeals rules and guidance: energy, water, airports, and air traffic services' published on 12 July 2022 (the **Consultation**).

1.2 As previously noted, we act for clients in all of the regulated sectors where licence modifications are appealable to the CMA, including energy, aviation and water. Our response is particularly informed by our experience advising clients on energy price control appeals, including the RIIO-ED1 appeals, the SONI appeal, and the recent RIIO-T2 and GD2 appeals.

1.3 We have been mindful of the differing statutory regimes in each of the relevant sectors in compiling this response.

2 Executive Summary

2.1 We welcome the CMA's process in relation to this matter, comprising: (a) its Open Letter dated 7 December 2021 seeking views on whether to make changes to the existing rules and guidance for energy and airport appeals and on the rules and guidance it should adopt for its new appeal functions in water and air traffic services (the **Open Letter**); and (b) the Consultation published on 12 July 2022. This two-stage process should ensure that the CMA's approach is well informed by stakeholder perspectives.

2.2 We are pleased that the CMA has taken on board many of the comments and suggestions in our response to the Open Letter dated 31 January 2022. In particular:

(a) **Pre-appeal engagement**: We consider that the CMA has achieved the right balance in terms of encouraging pre-appeal engagement without imposing formal requirements on prospective appellants which might be unnecessarily burdensome. However, we do not think the CMA should include reference in guidance to limitations on the types of error a prospective appellant may bring forward. We also note a disparity between the CMA's proposed approach to pre-appeal engagement and the more prescriptive approach put forward by individual regulators, which we consider to be unnecessary and unhelpful.

(b) **The process for serving of documents**: We agree with the CMA's proposed approach of specifying that electronic submissions must be provided, while keeping under review whether hard copies are also required.

(c) **Guidance on consolidating appeals**: We welcome the CMA's further views on consolidating appeals, in particular the recognition that it is important to preserve flexibility to join appeals, where appropriate, without limiting this discretion to specific circumstances in the rules or guidance. We agree that joining appeals can ensure they are conducted in a more administratively efficient way, particularly where appellants are challenging the same aspects of a regulator's decision and relying on common sources of evidence. We recognise the value of the CMA retaining discretion in the guidance whether to issue a combined decision applicable to all parties whose appeals have been heard together.

(d) **Submission of evidence**: We consider that the CMA has introduced some helpful clarifications in the rules and guidance on the information that parties must include in their submissions. We expect that, in the majority of cases, the relevance of the documentation

submitted in support of any appeal will be self-evident. However, we have no objection to the proposed amendment to the guidance asking parties to ensure this is clear.

(e) **Interveners**: We welcome the proposed changes to the rules concerning the information interveners must provide, and the additional guidance provided by the CMA on how it expects to decide applications to intervene. We agree with the CMA that it is important not to be too prescriptive and that the CMA should assess each application for intervention in light of all of the circumstances. However, we think the CMA's starting point for considering interventions in respect of appeals under the airports and air traffic services regimes should be slightly different than for other sectors because the applicable statutory regimes include specific legislative provisions on intervention.

(f) **Hearings**: We agree with the CMA that it is useful to retain flexibility as to the format of hearings. We are pleased to see the CMA endorse the value of clarification hearings, teach-ins and site visits in gathering information and enabling the CMA to better understand the context of an appeal. We consider it important for appellants to have the right to be heard individually by the CMA Panel.

(g) **Costs**: We understand the CMA's rationale for updating the costs rules to include reference to considering the 'chilling effect' of any order for *inter partes* costs against a regulator (although we consider that the relevant drafting should be amended to make clear that such effect cannot be assumed). Given the detailed consultation process leading up to any appealable decision, we think the arguments and evidence advanced by a prospective appellant will be well-trodden, and therefore find it difficult to envisage circumstances where a regulator could be deterred from acting because of the risk of being required to pay a (portion of a) successful appellant's costs in a CMA appeal. We therefore consider that the CMA's starting point should remain that costs should follow the event.

2.3 We note that the CMA also proposes to amend the provisions in the existing rules and guidance (and to introduce provisions in the new rules and guidance) regarding **provisional determinations**. While we recognise the burden it places on the CMA to draft a provisional determination at a sufficiently early point in the process to allow for consultation, we think that this is a vital part of the regulatory appeals process and – in the absence of this step – there will be a greater risk that the CMA's final determination is vitiated by error and will be subject to challenge. That would clearly not be a desirable outcome. We do, however, have some sympathy with the CMA's view that publishing a full provisional determination is not always necessary given, as the CMA explains, that it is performing a 'quasi-judicial' role.

2.4 Finally, we note that the CMA has proposed a number of **other changes** which include improving drafting and providing further details as to the handling of procedural matters. We consider these changes to be sensible and welcome the additional transparency.

2.5 Our more detailed comments and suggestions on these areas are set out in Section 3 below. In Section 4, we provide some brief concluding remarks which emphasise the importance of the CMA taking into account relevant sectoral differences when exercising its discretion under the various appeal regimes. We are available to provide additional information in relation to this response, should this be helpful to the CMA.

3 Detailed comments and suggestions

3.1 We set out below our detailed comments and suggestions in response to the Consultation.

Pre-appeal stage

We welcome the pragmatic approach that the CMA has adopted in respect of pre-appeal engagement in the rules and guidance applicable to appeals in all sectors. However, we

consider that the CMA should remove the statement in guidance that the appeal process be reserved for 'substantive disagreements' because there is no such limitation in the statute and it ignores the limited opportunities available to correct 'calculation' or 'non-contentious' errors between the final decision and the licence modification decision.

3.2 We recognise that pre-appeal engagement is a topic upon which the CMA has received differing views in response to the Open Letter, notably as regards whether the CMA should maintain the existing flexible approach or to move towards a more formal 'pre-action' process. We consider that the CMA has achieved the **right balance** in encouraging pre-appeal engagement without imposing more formal requirements.

3.3 The CMA has rightly highlighted the **benefits** of pre-engagement in enabling the CMA to plan its internal resources and front-load any logistical issues in terms of the submission process in advance of the statutory filing deadline. Our experience from the RIIO-GD2/T2 appeals suggests that it is vital for the CMA to have notice of the prospect of multiple appeals against a single regulatory decision given the internal resource implications. Moreover, we can see clear benefits for the CMA where parties explain which aspects of the regulator's decision they plan to appeal, as this allows the CMA to start considering how appeals might be consolidated and heard together. It is helpful, in this regard, that the CMA has acknowledged in the guidance the ability for parties which might be strongly contemplating an appeal, but have yet to make a final decision to do so, to make initial contact with the CMA on a **confidential** basis[1].

3.4 We agree with the CMA's proposal that giving 'reasonable notice' of an intention to appeal should be interpreted as meaning "*at the latest two weeks prior to submission of a notice of appeal*".[2] In our experience, companies will have a firm 'minded-to' position whether or not to appeal by this stage, and it should not prove unduly burdensome to arrange a short confidential call with the CMA to share this information.

3.5 We understand that the CMA has good intentions in encouraging appellants not only to inform the regulator where an appeal is being contemplated but also to seek to resolve 'manifest errors' with the regulator prior to commencing an appeal[3]. In our experience, regulated companies (and indeed other stakeholders whose interests are materially affected by the decision) **work extremely hard to avoid appeals** by clearly communicating errors during the consultation process and at the final decision stage. However, the window of opportunity for the regulator to correct errors made in its final decision before it proceeds to implement these in a licence modification decision (the publication of which triggers the appeal timetable) is typically **very narrow**. Once the regulator has published the licence modification decision the **only recourse** available to companies to correct such errors is to appeal to the CMA (and there is otherwise no incentive on regulators to correct their mistakes). We therefore consider that the CMA's proposed inclusion of the statement that "*the appeal process should be reserved for substantive disagreements between the prospective appellant and the Authority*"[4] – while only contained in guidance (recognising that there is no equivalent restriction imposed in the statute) – is unhelpful and should be removed.

3.6 We further note that there is a disparity or 'disconnect' between the CMA's approach to pre-appeal engagement and the very prescriptive approach adopted by individual sector regulators. For example, in Ofgem's RIIO-ED2 Draft Determinations published on 29 June 2022[5], it states:

> "…*we expect any prospective appellant to send pre-action correspondence at a sufficiently early stage, between the publication of Final Determinations and ahead of the deadline for*

---

1 See, for example, new paragraph 3.10 of the draft Energy Licence Modification Appeals Guide.
2 See, for example, new paragraph 3.9 of the draft Energy Licence Modification Appeals Guide.
3 See, for example, new paragraphs 3.12 and 3.13 of the draft Energy Licence Modification Appeals Guide.
4 See, for example, new paragraph 3.13 of the draft Energy Licence Modification Appeals Guide.
5 See Ofgem, RIIO-ED2 Draft Determinations Overview, at paragraph 11.45.

filing appeals. We would expect to receive this correspondence in the period between early December 2022 to early February 2023 - after the publication of Final Determinations and before we are due to publish a decision on the corresponding RIIO-ED2 licence conditions. We expect potential appellants to come forward to clearly explain their intention to appeal, the element(s) of the RIIO-ED2 price control that they intend to appeal, the scope of that appeal including, in sufficient detail, the alleged errors, and why that particular component of the price control is wrong having regard to interlinked aspects of the decision. … We will draw the CMA's attention to the conduct of any licensee who fails to meaningfully engage with us in any subsequent appeal they may bring."

3.7 There is clearly a significant difference between (a) the CMA encouraging prospective appellants to inform the regulator at pre-appeal stage that they are considering bringing an appeal, and (b) the detailed set of requirements set out by Ofgem above. As noted above and previously[6] – and based on our experience of these matters – the issues in dispute are already clear as between the regulator and a prospective appellant before any decision is made, so repackaging them in the manner suggested by Ofgem is unnecessary and would simply increase costs and prejudice the ability of an appellant to meet the tight statutory timescales for bringing an appeal.

3.8 We would welcome any further clarification the CMA is able to provide in this regard.

Process for serving of documents, including any changes to reflect developments in technology

We agree with the CMA's proposed approach of specifying that electronic submissions must be provided, while keeping under review whether hard copies are also required.

3.9 We fully endorse the CMA's proposed approach of requiring submission of electronic documents. We consider this is reasonable and pragmatic and will significantly reduce the burden on parties in submitting appeal documentation.

3.10 We also welcome the CMA's commitment to keep under the review the most effective form of technology to be used when submitting documents electronically. In our experience, the process of submitting documents to the CMA has largely worked seamlessly, with the CMA's recent practice in the RIIO-GD2/T2 appeals of allowing parties to upload 'test' documents to a secure-file-transfer-platform proving particularly helpful.

3.11 We note that the CMA makes no mention in the Consultation of our suggestion that the burden should be placed on the regulator to serve a non-confidential copy of the Notice of Appeal on other parties.[7] We continue to consider this to be a sensible and proportionate approach as the regulator will already have the appropriate contact details and will immediately know which 'relevant licence holders' are affected.

Procedures for hearing multiple, linked, appeals

We agree with the CMA's proposed approach of preserving flexibility to join appeals, where appropriate to do so, without limiting this discretion to specific circumstances. In particular, we welcome the opportunity for parties to make representations where the CMA proposes to consider appeals together, and we find the additional guidance on how the CMA will work together with parties on administrative matters helpful. However, we are concerned to ensure that parties retain the opportunity to be heard individually where

---

6 Response to the Open Letter, paragraph 3.5. We further note that this view was shared by a number of respondents to the Open Letter.

7 Response to the Open Letter, paragraphs 3.7 to 3.9.

there are multiple linked appeals. We consider it sensible for the CMA to retain discretion to issue a combined decision in circumstances where appeals have been heard together.

3.12 We endorse the CMA's approach of wanting to preserve the flexibility to join appeals, where appropriate to do so, without limiting this discretion to specific circumstances in the rules or guidance.

3.13 We welcome the CMA's clarification in guidance that, in circumstances where the CMA proposes to consider appeals together, parties may be invited to make representations on that approach. We consider this to be particularly important as it will not necessarily be the case that parties have structured their grounds of appeal in the same way (meaning that dividing topics may not be straightforward) or that appeals on similar topics should be heard together (e.g. if the main concern raised by an appellant is the specific impact of the decision on the individual licensee).

3.14 The proposed additions to the guidance which set out how the CMA will work with parties on administrative matters where there are joined appeals seem sensible. In particular, the use of confidentiality rings has typically worked well to take into account confidentiality concerns.

3.15 We comment on hearings below but note here that we consider it important that parties retain the right to be heard on an individual basis.

3.16 We think it is sensible for the CMA to retain flexibility as to whether to issue individual decisions or a single combined decision in circumstances where it has heard joined appeals.

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

We consider that the CMA has introduced some helpful clarifications in the rules and guidance on the information parties should include in their submissions. We think further amendments should be made to the guidance to recognise the possibility for parties to provide additional referencing or information upon request.

3.17 We find the proposed amendments and drafting dealing with supporting documentation to be helpful, e.g. in clarifying that appellants may append documents or extracts of documents in support of their appeal[8]. In particular, emphasising that extracts of documents may be provided may help reduce the overall volume of documents submitted. We are less clear as to the rationale for the CMA's proposal that parties should not be allowed to provide internet links to relevant content.[9] We had previously understood that adding links to documents was acceptable provided they enable the CMA to access documents directly (and do not, for example, link to content that is behind a 'paywall' or where access is limited to subscribers).

3.18 We expect that, in the majority of cases, the relevance of the documentation submitted in support of any appeal will be self-evident. However, we have no objection to the CMA's proposed amendment to the guidance asking parties to ensure this is clear.[10]

3.19 We have sympathy with the CMA reserving the right to disregard lengthy supporting documents "*submitted with no explanation given or where parties have not cited specific references in their submissions*"[11] given the large volume of documents submitted in recent appeals. We suspect that, in many cases, the lack of comprehensive referencing may be a result of the very tight statutory deadlines for submission of appeal documentation and suggest that the CMA's starting position should be to require parties to re-submit documents with more comprehensive

---

8 See, for example, new paragraph 5.3(b) of the draft Energy Licence Modification Appeal Rules.
9 See, for example, new paragraph 4.28 of the draft Energy Licence Modification Guide.
10 See, for example, new paragraph 4.28 of the draft Energy Licence Modification Guide.
11 Consultation, paragraph 2.24 and, for example, new paragraph 4.28 of the draft Energy Licence Modification Guide.

referencing and explanation included where points are unclear rather than to disregard them entirely. For example, the energy guide makes clear that participants are expected "*to send all their evidence to the CMA at the beginning of the process. The CMA does not intend the provision of evidence by participants to be an iterative process. If the CMA requires supplementary evidence later in the appeal, it will make this request*."[12] This is also reflected in the airports guide and underlines the fact that the appeal process is generally intended to be 'front-loaded'.

Interveners

We welcome the proposed changes to the rules concerning the information interveners must provide and the additional guidance provided by the CMA on how it expects to decide applications to intervene. We agree with the CMA that it is important not to be too prescriptive and that the CMA should assess each application for intervention in light of all of the circumstances. However, we think that the starting point for appeals under the airports and air traffic services regimes should be different given the corresponding statutory regimes do include specific legislative provisions on intervention.

3.20 We agree with the CMA that there is often a wide spectrum of interested parties in appeals and, as a consequence, it is important for the CMA to retain a degree of flexibility.

3.21 The CMA is right to retain emphasis on the potential benefits of intervention, e.g. where it considers the intervention will add "*something material over and above the arguments or evidence already submitted by the parties to the appeal or by other interveners*".[13] We also agree that the CMA is sensible to include guidance that it would not regard interventions as assisting it to determine the appeal "*where interventions are principally concerned with matters to which the CMA must not have regard when determining the appeal under the Acts*".[14]

3.22 We note the CMA emphasises that it has discretion to allow parties not given formal permission to intervene to later submit relevant evidence using alternative mechanisms and for this to be properly considered by the CMA[15]. We agree that there may be cases where the CMA should exercise its discretion accordingly.

3.23 Generally, we agree with the CMA that it should not be too prescriptive when it comes to formalising rules for intervention and that intervention should be assessed on a case by case basis. However, in our view the CMA's starting point for considering interventions in respect of appeals under the airports and air traffic services regimes should be slightly different than for other sectors because the applicable statutory regimes include specific legislative provisions on intervention. For example, in the case of an airports appeal, if the appellant was the monopoly infrastructure provider and the prospective interveners were airlines operating services from that airport we consider that the CMA's starting point should be to permit such interventions and for interveners to play a material role in the appeal. This is because – in the same way that, for example, consumer representative bodies such as Citizens Advice have played an important role in previous energy appeals in advocating the customer perspective – the airlines are, because of the constraints of the statutory regime, the only parties able to intervene formally to advocate directly on behalf of customers.

Role and number of hearings (clarification hearings, main hearings and relief hearings) at different stages of the appeal

We agree with the CMA that it is useful to retain flexibility as to the format of hearings. We are pleased to see the CMA endorse the value of clarification hearings, teach-ins and site

---

12 New paragraph 4.23 of the draft Energy Licence Modification Guide.
13 See, for example, paragraph 4.17 of the draft Energy Licence Modification Guide.
14 Ibid.
15 Consultation, paragraph 2.33.

visits to assist in gathering information and enabling the CMA to better understand the context for any appeal. We consider it important for appellants to have the right to be heard individually by the CMA Panel.

3.24 We agree with the CMA that it is useful to retain flexibility as to the format of hearings. While virtual hearings offer benefits, in terms of allowing multiple parties to attend, and worked relatively well during the RIIO-GD2/T2 appeals, there is generally more to be gained from conducting hearings in person both for the CMA and the parties.

3.25 We are pleased to see the CMA endorse the value of clarification hearings, teach-ins and site visits in terms of gathering information and enabling the CMA to better understand the context for an appeal. We can also see the merits in including an option in guidance of issuing working papers setting out the CMA's understanding of particular issues. However, we consider that hearings remain essential to allow the CMA to thoroughly examine an appellant's case.

3.26 We consider it vital that the CMA preserves rights for individual parties to be heard individually. In our experience, one of the reasons why joint hearings can be so effective is because parties know that they will have their opportunity to make 'company-specific' points in an individual hearing. This means companies are prepared to appoint a single representative to deal with key points on a certain topic during the joint hearing and to reserve points of difference for their individual hearing. If companies were to be denied their own hearing, we think the process of agreeing the 'key points' would become very difficult and there is a risk that joint hearings become a series of individual hearings 'stitched together' because parties are not prepared to lose out on the vital opportunity to have their case heard. It would also become far harder to deal with confidential information, even with confidentiality rings in place.

3.27 The CMA's proposed rules suggest that the CMA *"will not necessarily cover all of the appellant's grounds of appeal at a hearing".* [16] We would expect the CMA would generally want to ask questions or invite comments on all grounds of appeal in hearings so as to ensure that the arguments and supporting evidence are fully understood. Otherwise, the risk is that the CMA has proceeded on the basis of a misunderstanding which is not picked up until a later stage and is consequently more complicated to unravel and address.

Cost process

The principle of 'costs follow the outcome' remains a fair and proportionate approach, and an established and important tenet of the regulatory appeals system.

3.28 We understand the CMA's rationale for updating the costs rules to include reference to considering the 'chilling effect' of any order for *inter partes* costs against a regulator[17]. However, we consider that the relevant drafting should be amended to make clear that such effect cannot be assumed, e.g. *"whether any chilling effects would result from a costs order on the Authority"*.

3.29 Given the detailed consultation process leading up to any appealable decision, we think the arguments and evidence advanced by a prospective appellant will be well-trodden. We therefore find it difficult to envisage circumstances where a regulator could be deterred from acting because of the risk of being required to pay a (portion of a) successful appellant's costs in a CMA appeal.

3.30 We therefore consider that the CMA's starting point should remain that costs follow the event. This is a fair and proportionate approach and an established and important tenet of the regulatory appeals system.

---

[16] See, for example, new Rule 16.4 of the Energy Licence Modification Appeal Rules.
[17] Consultation, paragraph 2.38.

Provisional determinations

We consider it important that the CMA issue a provisional determination as a matter of good practice. We agree with the CMA that it is not always necessary to publish the provisional determination given the CMA's quasi-judicial role and that a summary may suffice.

3.31 The CMA proposes to amend the provisions in the existing rules and guidance (and to introduce provisions in the new rules and guidance) regarding **provisional determinations**.[18] It is not clear to us whether the reference to 'issuing' the provisional determination refers to publishing the provisional determination or whether in fact to issue one at all.

3.32 Having advised parties in the RIIO-ED1 appeals, SONI appeal, NATS redetermination, PR19 redetermination and RIIO-GD2/T2 appeals, we cannot envisage any circumstances where it would not be appropriate for the CMA to issue a provisional determination to the parties for comment. In each of these cases, the provisional determination allowed the parties to understand the CMA's evolving thinking and to clarify any areas where the parties' evidence had been potentially misinterpreted or misunderstood. While we recognise the burden it places on the CMA to draft a provisional determination at a sufficiently early point in the process to allow for consultation we think that this is a vital part of the regulatory appeals process and – in the absence of this step – there will be a greater risk that the CMA's final determination is vitiated by error and subject to challenge. That would clearly not be a desirable outcome.

3.33 We do, however, have some sympathy with the CMA's view that publishing a full provisional determination is not always necessary given, as the CMA explains, it is performing a 'quasi-judicial' role.

4 Concluding remarks

4.1 Whilst – as we hope the above shows – we favour consistency across sectors where possible, this should not be taken to mean that we endorse a 'one size fits all' approach to the CMA's rules and guidance across the board. In particular, and as referenced in paragraph 3.23 above, it is important that the specific statutory framework, which differs across sectors, is always taken into account.

4.2 We do not repeat our comments in response to the Open Letter here[19], but ask that the CMA keep them in mind when finalising its position. We consider it important that, when exercising its broad discretion under the rules and guidance in future appeals, the CMA have regard to sector-specific circumstances and ensure that relevant sectoral differences are properly taken into account.

✂
9 August 2022

[18] Consultation, paragraph 2.41.
[19] Response to the Open Letter, Section 4.