Regulatory appeals rules and guidance: energy, water, airports and air traffic services

Response to consultation

27 October 2022

CMA165resp

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1. Introduction

1.1 On 11 July 2022, the Competition and Markets Authority (**CMA**) opened a consultation which ran until 9 August 2022.[1] We sought views on:

(a) proposed changes to the existing rules and guidance for energy licence modification appeals (CMA70 and CMA71) and airport licence condition appeals (CC19 and CC20); and

(b) proposed new rules and guidance for the CMA's new regulatory appeals functions, ie appointment modification appeals in water (relating to matters other than the periodic price review) and air traffic services licence modification appeals.

1.2 We refer to each set of rules and guidance put out to consultation (and listed in paragraph 1.1 above) as **consultation rules** and **consultation guidance** respectively. Collectively, we refer to them as the **consultation rules and guidance**.

1.3 We asked the following questions:

(a) Do you agree with our proposed approach of having regard to proposed amendments to 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?

(b) Do you have any comments on the draft amendments to the energy and airport licence appeal rules and guidance?

(c) 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?

1.4 The CMA received 13 responses[2] to the consultation. Non-confidential versions of these responses have been published on the updated consultation webpage. The CMA thanks all those who responded to the consultation.

1.5 The consultation sought views on the following areas:

i. Pre-appeal stage;

[1] The consultation followed the CMA's open letter published in December 2021.
[2] A full list of respondents is included in Section 3 below.

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

iii. Procedures for hearing multiple, linked, appeals;

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

v. Interveners;

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

vii. Cost process.

1.6 We consider each of these areas in turn in Section 2 below, along with additional points raised by respondents in relation to provisional determinations, as well as certain other comments.

1.7 Having considered the consultation responses, we have made amendments to the consultation rules and guidance. The amendments that we have made and the reasons for those amendments are explained in Section 2 below. We also set out our reasons for not implementing some of the changes requested by respondents. In addition, we have made some minor tidy-up and clarificatory drafting changes to the text of the consultation rules and guidance.

1.8 As a result, the CMA has now finalised and adopted rules and guidance for regulatory appeals in each of energy, airports, water and air traffic services (the **final rules** and **final guidance**, which are referred to collectively as the **final rules and guidance**).

2. Issues raised by respondents and our response

Pre-appeal stage

2.1 In the consultation, we proposed adding an indication of the steps that we would like prospective appellants to take at the pre-appeal stage to our guidance. This included strongly advising prospective appellants to provide the CMA with 'reasonable notice' that they may appeal a decision of the relevant regulator. We further explained in the guidance our expectation of what constitutes 'reasonable notice', as well as certain other related provisions.

2.2 In addition, we encouraged appellants to engage with their respective regulators at the pre-appeal stage, and to raise calculation errors or other non-contentious errors with their respective regulator prior to commencing an appeal.[3]

Summary of responses

2.3 Respondents generally accepted that there was merit in pre-appeal contacts and providing information to the CMA ahead of time. However, there were mixed responses on whether there should be any expectation for prospective appellants to engage with the CMA at the pre-appeal stage. There were also mixed responses as to whether calculation errors or other non-contentious errors could be raised with the relevant regulator prior to commencing an appeal.

2.4 Some respondents objected to the CMA setting a timeframe for what it considered to be 'reasonable notice' for pre-appeal contacts and expressed concern that the pre-appeal provisions could be unnecessarily burdensome for potential appellants.[4] Some respondents also expressed concern at the perceived level of detail envisaged in pre-appeal contacts.[5]

2.5 While some respondents supported the expectation that potential appellants engage with their respective regulators on calculation errors or other non-contentious errors, others expressed concern that this would not be possible in all circumstances.[6] One respondent queried how the CMA would deal with cases where an error of this kind had not been raised previously and became

[3] See paragraph 3.8 onwards of the Energy Guide and Water Guide and paragraph 3.11 onwards of the Airports Guide and Air Traffic Services Guide (consultation guidance).
[4] See responses from Freshfields and Scottish Power.
[5] See response from Linklaters and Scottish Power.
[6] See responses from Centrica, Norton Rose Fulbright and Northumbrian Water.

apparent during an appeal.[7] Another respondent queried the expected level of engagement with a regulator on these sorts of errors.[8] Another respondent suggested that this expectation was not balanced as between potential appellants and their respective regulators.[9]

The CMA's views

2.6 Based on the experience of previous appeals, we do not believe that the proposals in our consultation guidance on pre-appeal contacts are excessive or unduly onerous for potential appellants. These proposals do not affect the statutory rights of appellants. These contacts are intended to be high-level, not overly detailed, and are not expected to take up significant amounts of time. They do not need to be in writing: we consider that such contacts may be made informally – eg through a telephone call. As stated in our consultation guidance, the contacts do not bind potential appellants either to submit an appeal or to specific grounds of appeal.[10] The contacts can be made when an appeal is in contemplation which, by its nature, means that a potential appellant will not yet have made any final decision that it will bring an appeal. We made it clear in the consultation guidance that the contacts would be kept confidential.[11] The timings included in the consultation rules and guidance were expressed as indicative, given the use of "typically", and as such indicate that the CMA intends there to be a degree of flexibility as to how such contacts will operate in practice.[12]

2.7 Informal pre-appeal contacts assist both the CMA and potential appellants. On the one hand, they ensure that the CMA is aware of prospective appeals and that it receives a high-level indication of potential grounds of appeal, so that it can plan more effectively for anticipated appeals. On the other hand, potential appellants can obtain valuable guidance on logistical aspects such as the process for submitting the notice of appeal.

2.8 In this context, we note that all appellants in the Energy Licence Modification Appeals 2021 were able to engage with the CMA in some form of pre-appeal contact. This process functioned effectively and was helpful both to the CMA and potential appellants.

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[7] See response from Centrica.
[8] See response from Freshfields.
[9] See response from Linklaters.
[10] See paragraph 3.11 of the Energy Guide and Water Guide and paragraph 3.14 of the Airports Guide and Air Traffic Services Guide (consultation guidance).
[11] See paragraph 3.10 of the Energy Guide and Water Guide and paragraph 3.13 of the Airports Guide and Air Traffic Services Guide (consultation guidance).
[12] See paragraph 3.9 of the Energy Guide and Water Guide and paragraph 3.12 of the Airports Guide and Air Traffic Services Guide (consultation guidance).

2.9 For the reasons set out above, we do not accept respondents' concerns about the pre-appeal provisions set out in the consultation guidance and have therefore only made minor amendments to the final guidance to make it clear that the pre-appeal contacts need only be informal.

2.10 We appreciate that calculation errors or other non-contentious errors cannot always be resolved with the relevant regulator prior to an appeal. However, we consider that there is value in trying to do so in most cases, and on that basis, in the consultation, we set out an expectation that potential appellants should try to do this.[13] We accept that it may not always be possible to raise calculation errors or other non-contentious errors prior to commencing an appeal. We have therefore made amendments in the final guidance to clarify this.[14] We have also made amendments in the final guidance to make it clear that we expect co-operation in this respect both from potential appellants and their respective regulators.[15]

2.11 We are not in a position to provide generic guidance on how the CMA will deal with errors of this kind that only become apparent during an appeal process. The CMA will deal with such issues on a case-by-case basis with the parties to the appeal. Similarly, the CMA cannot provide detailed guidance on the expected level of engagement between a regulator and a potential appellant on these sorts of errors. The CMA merely expects both sides to act in good faith and to seek to resolve these sorts of errors to the extent possible before reaching the appeal stage.

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

2.12 We proposed in the consultation rules and guidance to specify that electronic submissions must be provided, with the possibility of the CMA requesting a hard copy if needed.

Summary of responses

2.13 Respondents generally supported our proposals regarding electronic submissions.

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[13] See paragraph 3.13 of the Energy Guide and Water Guide and paragraph 3.16 of the Airports Guide and Air Traffic Services Guide (consultation guidance).
[14] See paragraph 3.14 of the Energy Guide and Water Guide and paragraph 3.17 of the Airports Guide and Air Traffic Services Guide (final guidance).
[15] See paragraph 3.14 of the Energy Guide and Water Guide and paragraph 3.17 of the Airports Guide and Air Traffic Services Guide (final guidance).

2.14 One respondent raised concerns with the proposal in the consultation rules that any document sent to a person other than the CMA must be sent by email.[16] The respondent suggested that there should be a fallback position of post if, for instance, a party refused to provide an email address. Another respondent also encouraged the CMA to consider using an alternative platform for file sharing in future appeals.[17]

The CMA's views

2.15 We do not consider it necessary to include amendments in the final rules on this point. The relevant rule on communications with persons other than the CMA specifies that email should be used 'unless a person is notified otherwise by the CMA'.[18] The consultation rules therefore already have sufficient flexibility to deal with this concern. In practice, email has been used as the primary means of communication for all recent regulatory appeals.

2.16 The CMA will keep under review the most effective form of technology to be used when submitting documents electronically. We consider that the pre-appeal stage provides a useful forum to discuss logistical issues regarding the submission of documents in order to ensure a smooth process. The CMA would expect to communicate the appropriate format for file exchange during the pre-appeal stage.

Procedures for hearing multiple, (wholly or partially) linked, appeals

2.17 In our consultation, we recognised that the existing rules allow for the CMA to grant permission to appeal subject to conditions requiring appeals to be considered together with other appeals, where it considers that it is appropriate to do so. We therefore did not propose to depart from the substance of the existing rules and guidance. However, we proposed in the consultation guidance to clarify that the CMA may invite parties to make representations to the CMA where the CMA has made a proposal to join appeals. We also proposed additional clarifications on when the CMA may issue joined decisions.[19]

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[16] See response from Scottish Power. See Rule 22.4 of the Energy Rules, Water Rules, Airports Rules and Air Traffic Services Rules (consultation rules).
[17] See response from Linklaters.
[18] See Rule 22.4 of the Energy Rules, Water Rules, Airports Rules and Air Traffic Services Rules (consultation rules).
[19] See paragraph 4.30 onwards of the Energy Guide and Water Guide and paragraph 4.28 onwards of the Airports Guide and Air Traffic Services Guide (consultation guidance).

Summary of responses

2.18 Respondents broadly supported our approach in this area, subject to some specific points discussed below.

2.19 Some respondents sought assurance from the CMA that the provisions on joint hearings would not prevent individual appellants from being heard and/or noted generally the importance of individual oral submissions.[20] Some respondents also voiced concerns about one CMA Group having responsibility for multiple appeals and suggested the possibility of having more than one CMA Group involved in joined appeals.[21] One of these respondents also sought clarification on the CMA's allocation of responsibility for different grounds of appeal to different panel members and/or CMA staff, as well as the CMA's position on the attendance of panel members at hearings, teach-ins, and site visits.[22]

2.20 Another respondent encouraged the CMA to make any directions on joining of appeals at as early a stage as possible, including prior to the grant of permission to appeal. The same respondent also appeared to suggest that the CMA should consider all appeals relating to the same licence modification together. This respondent added that the CMA should reconsider the deadline it sets for the relevant regulator to respond where appeals are joined to facilitate a single response from the relevant regulator.[23]

2.21 One respondent sought clarification on the CMA's position on the submission of joint appeals (ie where multiple licensees collaborate and submit a single notice of appeal). The same respondent sought clarity on the CMA's approach to joining appeals within particular regimes (for instance, in energy, joining appeals under the Gas Act 1986 with appeals under the Electricity Act 1989).[24]

The CMA's views

2.22 We have noted respondents' concerns that individual appellants should have the opportunity to be heard in the event of joint hearings. We are mindful of this point and have made amendments in the final guidance to make it clear that the CMA will consider whether to allow appellants to be heard individually

[20] See response from Cadent, Electricity North West, Northumbrian Water and Norton Rose Fulbright.
[21] See response from Cadent, Ofgem and Linklaters.
[22] See response from Linklaters.
[23] See response from the Civil Aviation Authority.
[24] See response from Linklaters.

in appropriate circumstances.[25] However, as noted below, it is for the CMA to determine the form and structure of hearings.[26]

2.23 The CMA must determine what is appropriate in terms of the appointment of CMA Groups to manage appeals. This decision is taken in accordance with the relevant legislation that specifies that the CMA Group that determines an appeal must consist of three members.[27] It is also not appropriate for the CMA to comment on the allocation of responsibility for grounds in a hypothetical context, nor on its general position on the attendance of panel members at hearings, teach-ins, and site visits. We appreciate the importance of the allocation of responsibility and access to decision-makers, but the CMA will consider these points based on the circumstances of the individual case and in accordance with the overriding objective.

2.24 The CMA's approach is typically to consider the question of joining appeals at the permission stage. This reflects the approach in the applicable legislation, where the CMA's power to join appeals is listed as one example of a condition to which a grant of permission to appeal may be subject.[28] The CMA does not therefore consider it appropriate to issue directions relating to the joining of appeals prior to the grant of permission to appeal. However, the CMA is open to discussing the possibility of joining appeals or particular grounds of appeal during the pre-appeal and permission stages. We consider this another compelling reason for our strong advice that parties engage with the CMA at the pre-appeal and permission stages of the appeal process.

2.25 The CMA cannot commit to joining all appeals that relate to the same licence modification. While this may make sense in some cases, this is a judgement to be made by the CMA based on the circumstances of the particular appeals and in accordance with the overriding objective.

2.26 In relation to the relevant regulator's response in joined appeals, the CMA is keen to encourage fixed deadlines for applications in its final rules and guidance because of the timetabling challenges raised by regulatory appeals. As a result, we have not amended our final rules and guidance to flex the deadline set for the relevant regulator to respond where appeals are joined to

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[25] See paragraph 4.33 of the Energy Guide and Water Guide and paragraph 4.31 of the Airports Guide and Air Traffic Services Guide (final guidance).
[26] This is reflected in Rule 16.4 of the Energy Rules and Water Rules and Rule 14.4 of the Airports Rules and Air Traffic Services Rules (final rules).
[27] See Electricity Act 1989 and Electricity (Northern Ireland) Order 1992, Sch 5A, paragraph 4; Gas Act 1986, Sch 4A, paragraph 4; Gas (Northern Ireland) Order 1996, Sch 3A, paragraph 4; Water Industry Act 1991, Sch 2ZA, paragraph 4; Civil Aviation Act 2012, Sch 2, paragraph 17; Transport Act 2000, Sch A1, paragraph 11.
[28] See Electricity Act 1989 and Electricity (Northern Ireland) Order 1992, Sch 5A, paragraph 1(11); Gas Act 1986, Sch 4A, paragraph 1(11); Gas (Northern Ireland) Order 1996, Sch 3A, paragraph 1(11); Water Industry Act 1991, Sch 2ZA, paragraph 4; Civil Aviation Act 2012, Sch 2, paragraph 2(4); Transport Act 2000, Sch A1, paragraph 2(4).

facilitate a single response from the relevant regulator. However, the CMA retains a discretion in its final rules to allow for further submissions by the relevant regulator (or other parties to an appeal including interveners).[29] It may be appropriate to exercise this discretion where appeals are being considered together and the relevant regulator has not had time to reflect aspects of this in its response.

2.27 The CMA will consider requests for the submission of joint appeals (ie where multiple licensees collaborate and submit a single notice of appeal) and will also consider joining appeals across different sets of legislation, for example, where they raise the same grounds of appeal. The CMA has broad discretion regarding the management of appeals and the fact that it may join or consolidate appeals of its own motion and will also consider such requests from parties to an appeal.

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

2.28 We proposed in the consultation guidance that participants should not submit supplementary submissions or provide supplementary evidence without having received a request or direction from the CMA to do so.[30] The consultation rules recognised that the CMA reserves the right to reject unsolicited submissions or the provision of supplementary evidence in certain circumstances to ensure that appeals are carried out efficiently.[31] We also included provisions on lengthy supporting documents and on the form and length of submissions.[32]

2.29 We proposed in the consultation rules and guidance to clarify the deadlines for submission of non-sensitive versions of various appeal documents.[33] We also proposed to set out more clearly the information that parties should include in their submissions,[34] and we proposed to amend the guidance to ask parties to make clear the relevance of the documentation submitted in support of the appeal and to ensure that it relates to the relevant grounds of

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[29] This is reflected in Rule 14.5 of the Energy Rules and Water Rules and Rule 12.5 of the Airports Rules and Air Traffic Services Rules (final rules).
[30] See paragraph 4.24 of the Energy Guide and Water Guide and paragraph 4.22 of the Airports Guide and Air Traffic Services Guide (consultation guidance).
[31] See Rule 14.5 of the Energy Rules and Water Rules and Rule 12.5 of the Airports Rules and Air Traffic Services Rules (consultation rules).
[32] See paragraph 4.28 of the Energy Guide and Water Guide and paragraph 4.26 of the Airports Guide and Air Traffic Services Guide (consultation guidance).
[33] See for instance, Rule 5.4 in the Energy Rules and Water Rules and Rule 5.5 in the Airports Rules and Air Traffic Services Rules (consultation rules).
[34] See for instance, Rule 5.2 in the Energy Rules, Water Rules, Airports Rules and Air Traffic Services Rules (consultation rules).

appeal.[35] We deleted the rule in the existing rules on written evidence. We also provided for more detail on the role of expert evidence.

Summary of responses

2.30 Respondents broadly understood the rationale for our approach to the submission of evidence, though some respondents raised specific concerns and/or suggestions as explained further below.

2.31 One respondent expressed concern at the 'checklist' of items required for the various applications envisaged by the consultation rules (eg notice of appeal, application for suspension), suggesting that these added onerous requirements for parties to an appeal.[36] The same respondent considered that the notification requirements for 'any relevant licence holders' in Energy Rules 5.6 and 7.6 (consultation rules) were overly onerous.

2.32 Another respondent suggested that parties should highlight documents for confidential information instead of redacting them when submitting non-sensitive versions of documents. This respondent said that this would help parties easily identify confidential information from other parties they wish to refer to in their own submissions.[37]

2.33 Another respondent disagreed with the consultation rules requiring a bundle of supporting documentation to accompany certain applications (including as part of the application for permission to appeal).[38] The same respondent queried the CMA's approach to cross-referencing to documents provided with earlier submissions, as well as suggesting the possibility of a central repository of documents and reference system for improved efficiency.[39]

2.34 One respondent queried our approach to applications for suspension in the energy consultation rules and guidance, and whether they properly reflected the legislative intention of these applications needing to be submitted at the same time as the notice of appeal.[40]

2.35 One respondent stressed the need to ensure fairness and equality of representation when the CMA is seeking to discourage unsolicited submissions. In particular, this respondent wanted to ensure a right of

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[35] See for instance, Rule 5.2(a)(iv) in the Energy Rules, Water Rules, Airports Rules and Air Traffic Services Rules (consultation rules).
[36] See response from Scottish Power.
[37] See response from Ofgem.
[38] See response from Linklaters.
[39] See response from Linklaters.
[40] See response from Linklaters.

response where an additional submission is permitted.[41] Another respondent requested on the subject of unsolicited submissions that the CMA make it clear that its rules and guidance apply equally to appellants, interveners and the relevant regulator.[42]

2.36 One respondent commented on the CMA's approach to disregarding lengthy supporting documents where no explanation is given of a document's relevance. This respondent suggested that the CMA's starting position should be to require parties to re-submit documents with more comprehensive referencing and explanation included where points are unclear rather than to disregard them entirely.[43] Another respondent queried whether the CMA should add a corresponding requirement to explain the relevance of appended documents for the relevant regulator in the proposed rules. The same respondent also queried if the relevant regulator should be subject to the same requirement in its response as appellants are at the permission stage in the Energy Rules and Water Rules to identify matters relied on which the relevant regulator was unable to have regard in reaching its decision, and whether they are matters to which the relevant regulator would have been entitled to have regard in reaching its decision had it had the opportunity of doing so.[44]

2.37 One respondent asked for CMA clarification on when it would require a witness statement or expert report as opposed to submissions that are not verified by a statement of truth.[45] Another respondent requested that the CMA accepted electronic signatures for statements of truth.[46]

2.38 One respondent sought clarification on the likelihood of page limits being imposed,[47] with another respondent cautioning against strict page limits to preserve flexibility.[48]

2.39 Another respondent noted that the CMA had changed its guidance so that internet links to supporting documents should not be provided.[49] A further respondent also queried the CMA's position on internet links,[50] with another

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[41] See response from Cadent.
[42] See response form Freshfields.
[43] See response from Norton Rose Fulbright.
[44] See response from Linklaters. See in this regard, Rule 5.2(a)(v) of the Energy Rules and Water Rules (consultation rules).
[45] See response from Linklaters.
[46] See response from Ofgem.
[47] See response from the Civil Aviation Authority.
[48] See response from Northumbrian Water.
[49] See response from National Grid.
[50] See response from Norton Rose Fulbright.

respondent querying when extracts of documents should be provided, as opposed to full version of documents.[51]

The CMA's views

2.40 In setting out a 'checklist' of items, we do not consider that we have added additional burdens on parties to an appeal. We have simply codified more clearly what we expect to receive in cases. As such, we do not propose to amend our approach as we think it is helpful for all parties to an appeal to have the requirements for various applications clearly set out.

2.41 We understand that the requirement to share the notice of appeal and an application for suspension with relevant licence holders in energy (and with any company holding an appointment in water) may pose challenges for appellants. This is why we included in our consultation guidance an onus on the relevant regulator to assist with identifying these entities.[52] We consider it appropriate to retain the relevant rules and have not amended the final rules and guidance in this respect.

2.42 We agree that highlighting confidential information may be useful to parties when non-sensitive versions of documents are submitted. However, we think that redacted versions should also be provided where the document is one that will then be published. We have proposed some amendments to our guidance to reflect this.[53]

2.43 Based on the CMA's prior experience, we would expect parties to include supporting documentation with various applications including the application for permission to appeal. We therefore consider it is helpful to codify this by requiring a bundle of supporting documentation. As set out in the consultation guidance across all of the regimes, the CMA expects participants to send 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.[54] We consider that codifying a requirement for a bundle of supporting documentation, at the permission to appeal stage, is helpful in achieving this aim. We therefore have decided not to amend the provisions on bundles in the final rules and guidance. While a bundle of supporting documentation

[51] See response from Linklaters.
[52] See paragraph 4.2 of the Energy Guide and Water Guide (consultation guidance).
[53] See paragraph 4.55 of the Energy Guide and Water Guide and paragraph 4.51 of the Airports Guide and Air Traffic Services Guide (final guidance).
[54] See paragraph 4.23 of the Energy Guide and Water Guide and paragraph 4.21 of the Airports Guide and Air Traffic Services Guide (consultation guidance).

must be included as part of the notice of appeal, the volume of supporting evidence and documents to be provided is a matter for the appellant.[55]

2.44 We are open to parties cross-referring to documents previously submitted to the CMA during an appeal process. However, the CMA's position is that the notice of appeal should be standalone and not cross-refer to material not provided within the notice of appeal itself (ie either in the main submission or the bundle of supporting documentation). We would expect that the relevant regulator's response and any third party's application to intervene similarly to be self-contained (accepting, of course, that these applications may refer to appeal documents submitted by other parties). As such, those 'core' submissions should contain the majority of the evidence to which parties may wish to refer. We do not consider it necessary to amend our final rules and guidance on this point.

2.45 We accept one respondent's point on applications for suspension and have sought to clarify the position in the final Energy Rules and Guidance and Water Rules and Guidance.[56] We had always intended for applications for suspension in Energy to be submitted alongside the notice of appeal (in line with the relevant legislation that requires applications for suspension to be made at the same time as applications for permission to appeal).[57] We have therefore made these changes. While the same point also applies to the Water Rules and Guidance and we have accordingly made the same changes to the Water Rules and Guidance,[58] it does not apply to the Airports Rules and Guidance or the Air Traffic Services Rules and Guidance, where the underlying legislation does not impose the same restrictions on applications for suspension.[59]

2.46 In response to the various comments on unsolicited submissions, the CMA notes that the consultation rules for all the regimes that were the subject of the consultation allow for parties to apply to the CMA to make further submissions or to provide supplementary evidence.[60] Where this permission is granted, the appellant, the relevant regulator or any intervener (as the case may be) also has the right to apply to make a submission in response, or any

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[55] See Rule 5.2(b) of the Energy Rules, Water Rules, Airports Rules and Air Traffic Services Rules (consultation rules).
[56] See Rule 7 of the Energy Rules and Water Rules and paragraph 3.37 onwards of the Energy Guide and Water Guide (final rules and guidance).
[57] See Electricity Act 1989 and Electricity (Northern Ireland) Order 1992, Sch 5A, paragraph 2(2); Gas Act 1986, Sch 4A, paragraph 2(2); Gas (Northern Ireland) Order 1996, Sch 3A, paragraph 2(2); Water Industry Act 1991, Sch 2ZA, paragraph 2(3).
[58] See Rule 7 of the Water Rules and paragraph 3.37 onwards of the Water Guide (final rules and guidance).
[59] See Civil Aviation Act 2012, Sch 2, Part 4 and Transport Act 2000, Sch A1, Part 3.
[60] See Rule 14.5 of the Energy Rules and Water Rules, and 12.5 of the Airports Rules and Air Traffic Services Rules (consultation rules).

other submission. As explained under the relevant Rule, this submission needs to be reasoned and the CMA will decide whether to grant permission based on the circumstances of the case and in accordance with the overriding objective. There is no automatic right of reply to a supplementary submission that has been permitted by the CMA.

2.47 The new provisions on unsolicited submissions provide greater clarity on our approach in this area. We wanted to make it clearer that the CMA can reject additional submissions that are made without the CMA's permission.

2.48 The provisions on unsolicited submissions are stated to apply to the parties to the appeal and any interveners in the Energy Rules and Water Rules, and to 'participants' in the Energy Guidance and Water Guidance.[61] 'Participants' is defined as 'parties to an appeal and interveners'.[62] In the Airports Rules, Air Traffic Services Rules, Airports Guidance and Air Traffic Guidance, the equivalent provisions are stated to apply to 'parties'.[63] 'Party' is defined both in the relevant legislation and on the face of the guidance as the CAA, the appellant and interveners. As such, the provisions on unsolicited submissions apply equally to the appellant, the relevant regulator and any intervener across the proposed rules and guidance in all regimes. The slight drafting differences reflect the fact that 'party' is defined slightly differently in the energy and water legislation, as opposed to the airports and air traffic services legislation.[64] We therefore consider that it is already clear that these provisions apply to appellants, the relevant regulator and any interveners. We do not accept any suggestion that other provisions of the proposed rules and guidance are unequal as between appellants and the relevant authority, as one respondent appeared to suggest.

2.49 The CMA has drafted the guidance on lengthy supporting documentation such that the CMA 'reserves the right' to disregard these documents.[65] We therefore do not propose to amend our guidance on this point as there is sufficient flexibility for the CMA to have regard to a document if a party

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[61] See Rule 14.5 of the Energy Rules and Water Rules and paragraph 4.24 of the Energy Guide and Water Guide (consultation rules and guidance).
[62] See paragraph 1.7 of the Energy Guide and Water Guide (consultation guidance).
[63] See Rule 12.5 of the Airports Rules and Air Traffic Services Rules and paragraph 4.22 of the Airports Guide and Air Traffic Services Guide (consultation rules and guidance).
[64] See Electricity Act 1989, Sch 5A, paragraph 13(2); Electricity (Northern Ireland) Order 1992, Sch 5A, paragraph 13(2); Gas Act 1986, Sch 4A, paragraph 13(2); Gas (Northern Ireland) Order 1996, Sch 3A, paragraph 13(2); Water Industry Act 1991, Sch 2ZA, paragraph 13(2); Civil Aviation Act 2012, Sch 2, paragraph 35(3). Schedule A1 of the Transport Act does not define 'party' in the equivalent interpretation section of the Schedule. However, it does suggest that 'party' may include interveners in paragraph 24(8) relating to costs. We therefore consider it appropriate to adopt the same definition of 'party' as is used in the airports legislation (and our airports rules and guidance) for consistency between the two regimes that are otherwise very similar in terms of legislative provisions.
[65] See paragraph 4.28 of the Energy Guide and Water Guide and paragraph 4.26 of the Airports Guide and Air Traffic Services Guide (consultation guidance).

explains its relevance at a later date having previously failed to do so. The CMA will have regard to the circumstances of the case and the overriding objective when taking these decisions.

2.50 The CMA is unable to confirm pre-emptively the circumstances in which it would require witness statements or expert reports as opposed to submissions that are not verified by a statement of truth. However, the CMA will be open to discussing these matters as they arise in the course of appeals. The CMA is willing to accept electronic signatures in situations where signatures are envisaged under the rules or guidance (including for statements of truth). We have amended each set of guidance to clarify this in a footnote.[66]

2.51 We are unable to comment at this stage on the likelihood of page limits being imposed for submissions. The CMA will make this judgement based on the circumstances of the case and in accordance with the overriding objective. The CMA considers it useful to retain the discretion (but not the obligation) to impose page limits. This increases the CMA's flexibility, rather than reducing it as one respondent suggested.

2.52 The consultation guidance across all the regimes states that 'Parties should attach documents or extracts of documents to the relevant submission and should not only provide internet links to the relevant content' (emphasis added).[67] As such, our consultation guidance does not state that internet links should not be provided, merely that they should not only be provided. The whole thrust of this part of the guidance is to request that parties clearly explain the relevance of particular documents. This aims to avoid overly burdening the CMA with content that may not be relevant. The guidance should be read as requesting that parties provide extracts of documents that are relevant, having explained the relevance of the extracts. Where all of the document is relevant, this should be clearly explained to the CMA and the document should then be provided in full (either in a bundle or as an exhibit, as appropriate). The CMA is content for internet links also to be included where useful. However, we note in this regard that there are risks associated with relying on internet links alone since the content on webpages may be subject to change.

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[66] See footnote 56 of the Energy Guide, footnote 57 of the Water Guide, footnote 56 of the Airports Guide and footnote 59 of the Air Traffic Services Guide (final guidance).
[67] See paragraph 4.28 of the Energy Guidance and Water Guidance, and paragraph 4.26 of the Airports Guidance and Air Traffic Guidance (consultation guidance).

Interveners

2.53 In the consultation, we proposed that it was appropriate to update aspects of the existing rules and guidance on intervention in light of the experience the CMA had gained in handling applications to intervene from a wide variety of potential interveners.[68]

2.54 We proposed to retain broadly the same overall approach as stated in the existing rules,[69] but with some proposed amendments to the rules and guidance designed to provide applicants with clarification on how the CMA expects to decide applications to intervene,[70] as well as further detail on what needs to be included in applications to intervene,[71] and a provision for the CMA to accept late applications to intervene in certain circumstances.[72]

Summary of responses

2.55 Respondents broadly supported our approach in this area, subject to some specific points discussed below.

2.56 One respondent raised concerns about the quality of evidence provided by interveners and third parties and the importance of main parties having adequate opportunity to comment on the factual accuracy of any third party evidence.[73]

2.57 Another respondent stressed the need to take into account the legislative and industry differences between the regimes when considering interventions. This respondent suggested that in airports there should be a starting point that airlines operating from a monopoly infrastructure provider should be allowed to intervene in a case involving that provider.[74] Another respondent noted with regards to the airports regime that several airlines would likely be involved as interveners and appellants, with likely overlap between their

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[68] The CMA has less flexibility to change the rules and guidance associated with the intervention regime in airport charges and air traffic services as it is based on the relevant legislation. However, we in our consultation, we proposed to incorporate a similar approach to interventions in the airport charges and air traffic services regimes where it was appropriate to do so.
[69] See Rule 10 in the Energy Rules, Rule 10 in the Water Rules, Rule 8 in the Airports Rules and Rule 8 in the Air Traffic Services Rules (consultation rules).
[70] See paragraphs 4.15 – 4.18 in the Energy Guidance, paragraphs 4.15 – 4.18 in the Water Guidance, paragraphs 4.16 – 4.18 of the Airports Guidance and paragraphs 4.16 – 4.18 of the Air Traffic Services Guidance (consultation guidance).
[71] See Rule 10.5 of the Energy Rules. Rule 10.5 of the Water Rules, Rule 8.3 of the Airports Rules and Rule 8.3 of the Air Traffic Services Rules (consultation rules).
[72] See Rule 10.4 of the Energy Rules and Rule 10.4 of the Water Rules, Rule 8.2 of the Airports Rules and Rule 8.2 of the Air Traffic Services Rules (consultation rules).
[73] See response from Cadent.
[74] See response from Norton Rose Fulbright. We note that Linklaters also made a general comment about the need to take into account different nature of the relevant sectors in the appeal process.

cases. This respondent noted that it would welcome any steps taken to ensure that these cases are efficiently dealt with during the appeal.[75]

2.58 Another respondent raised concerns around interveners receiving early access to information and also suggested that the deadline for intervention should come after having had the chance to review the relevant regulator's response. The same respondent also suggested that the CMA should provide guidance on the circumstances in which it would expect to extend the deadline for submission of an application to intervene. The same respondent also queried the difference between a third party and an intervener in appeals.[76]

The CMA's views

2.59 The CMA acknowledges that it is desirable that interveners and third parties should submit high quality evidence. However, as noted above, there is no automatic 'right of reply'. Parties wishing to make additional submissions should seek permission from the CMA prior to doing so.[77]

2.60 The CMA also acknowledges that some sector regimes contain legislative provisions on interventions and others do not.[78] This was already reflected in our consultation rules and guidance, where the Energy Rules and Guidance and Water Rules and Guidance differ from the Airports Rules and Guidance and Air Traffic Services Rules and Guidance. However, where it has been possible to align the rules and guidance we have done so as we consider this to be helpful for both the CMA and appeal participants. We do not consider it appropriate to adopt a starting point in any regimes as to which intervention applications will and will not be accepted. These decisions should be taken in accordance with the rules and guidance on a case-by-case basis.

2.61 We consider that our consultation guidance provided for sufficient flexibility to deal with interveners making similar arguments. For instance, the consultation guidance states that 'the CMA may of its own motion issue any directions it considers fit to interveners, including where practicable and appropriate that two or more interveners liaise with each other (and/or the party whom they

[75] See response from Heathrow.
[76] See response from Centrica.
[77] See paragraph 4.24 of the Energy Guide and Water Guide and paragraph 4.22 of the Airports Guide and Air Traffic Services Guide (final guidance).
[78] See, for instance, Civil Aviation Act 2012, Sch 2, Part 2 and Transport Act 2000, Sch A1, Part 2. There is no equivalent provision in the legislation covering Water and Energy.

support) to reduce duplication, or that they file joint submissions'.[79] We have therefore not amended our guidance in response to this point.

2.62 We explained in our consultation guidance that we expect the provision of evidence to take place at the beginning of the process where possible and that it should not be an iterative process.[80] We do not consider it appropriate to pre-emptively provide guidance identifying the circumstances in which the CMA may extend the deadline for an application to intervene but notes that it has the flexibility to do this where it is justified. Such a decision will be taken on a case-by-case basis and in accordance with the overriding objective. The CMA is subject to timing constraints in regulatory appeals, and as a result does not intend to change the deadline for submission of an application to intervene in those regimes where it is not constrained by legislation in this respect.[81] We note that where an intervener has been granted permission to intervene and subsequently considers a need to make submissions on other points, it may apply to the CMA for permission to do so.

2.63 We explained in our consultation guidance that interveners have a status not afforded to third parties in appeals.[82] This status can only be granted by the CMA. References to third parties in the consultation rules and guidance merely reflect the CMA's inherent discretion to receive submissions from third parties as appropriate based on the circumstances of the case and in accordance with the overriding objective.[83] We therefore do not consider that any further clarification is necessary in the guidance.

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

2.64 We proposed in the consultation guidance to reflect that the CMA may hold hearings virtually, in person or on a hybrid basis, depending on what would be more consistent with the overriding objective.[84]

2.65 We also made explicit in the consultation guidance that the CMA may use clarification hearings and other supplementary tools to focus on narrow areas

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[79] See paragraph 4.21 of the Energy Guidance and Water Guidance and paragraph 4.19 of the Airports Guidance and Air Traffic Services Guidance (consultation guidance).
[80] See paragraph 4.23 of the Energy Guide and Water Guide and paragraph 4.21 of the Airports Guide and Air Traffic Services Guide (consultation guidance).
[81] See, for instance, Civil Aviation Act 2012, Sch 2, Part 2 and Transport Act 2000, Sch A1, Part 2. There is no equivalent provision in the legislation covering Water and Energy.
[82] See paragraph 4.11 of the Airports Guidance, 4.11 of the Air Traffic Services Guidance, paragraph 4.13 of the Energy Guidance, and paragraph 4.13 of the Water Guidance (consultation guidance).
[83] See Rule 14.4(e) of the Energy Rules and Water Rules and Rule 12.4(e) of the Airports Rules and Air Traffic Services Rules (consultation rules).
[84] See paragraph 4.42 of the Energy Guidance, paragraph 4.42 of the Water Guidance, paragraph 4.40 in the Airports Guidance and paragraph 4.40 of the Air Traffic Services Guidance (consultation guidance).

of appeals which require further explanation, while the main hearings are more likely to be the forum for parties to present their main arguments.[85]

2.66 We also proposed in the consultation guidance the option of issuing a 'working paper' to parties which provides the CMA's understanding of the issues subject to appeal.[86]

Summary of responses

2.67 Respondents broadly supported our approach in this area, subject to some specific points discussed below.

2.68 One respondent stated its expectation that the CMA will actively take into account the views of parties to an appeal (including interveners) when considering whether hearings or other means such as written submissions are the best means of case management in the circumstances.[87] Another respondent requested that as much notice of hearings as possible should be provided to the parties to an appeal, including details of what is to be covered, the format (eg opening and closing statements), materials (eg if slides are required), and running order. The same respondent suggested that any materials used in teach-ins and any hearings (eg slides) should be shared with all parties to an appeal.[88]

2.69 Some respondents expressed concern as to whether all grounds of appeal would be covered in hearings.[89] Another respondent encouraged the CMA to allot greater time to main party hearings.[90]

2.70 Another respondent noted it would be helpful to include more detail on the sorts of question that an appellant may be asked at hearings. The same respondent appeared also to ask about the difference between clarification hearings and main hearings.[91] Another respondent requested that the CMA make it clear that both factual and expert witnesses can be cross-examined.[92]

2.71 One respondent sought clarity that meetings or hearings may be in person or virtually, or a mixture of in-person and virtual as appropriate. Another

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[85] See paragraph 4.44 of the Energy Guidance, paragraph 4.44 of the Water Guidance, paragraph 4.42 of the Airports Guidance and paragraph 4.42 of the Air Traffic Services Guidance (consultation guidance).
[86] See paragraph 3.6 and 4.44 of the Energy Guidance, paragraph 3.6 and 4.44 of the Water Guidance, paragraph 3.9 and 4.42 of the Airports Guidance and paragraphs 3.9 and 4.42 of the Air Traffic Services Guidance (consultation guidance).
[87] See response from Centrica.
[88] See response from Ofgem.
[89] See response from Electricity North West, National Grid, Norton Rose Fulbright
[90] See response from Freshfields.
[91] See response from Thames Water.
[92] See response from Linklaters.

respondent noted the benefits of in-person hearings.[93] One respondent appeared to raise concerns about parties overrunning time limits set for oral submissions at hearings or straying from pre-agreed topics (and suggested there be cost consequences for doing this – addressed in the costs section below).[94]

2.72 One respondent sought clarification on the circumstances in which teach-ins and site visits might be requested instead of regular hearings.[95]

The CMA's views

2.73 As stated in the consultation rules, it is for the CMA to determine the procedure for hearings, including their structure, form and proposed content.[96] However, the CMA will inform parties in advance of the procedure and practicalities for any teach-ins and hearings as appropriate, including whether for any aspects it may be appropriate for joined appellants to present one oral submission. Our past practice has also been to draft a series of process notes to assist parties to an appeal (including any interveners) in this respect. We have clarified these points in our guidance.[97] The CMA will consider the interplay between hearings and written submissions and decide on the procedure to be taken in the circumstances of the individual case and in accordance with the overriding objective.

2.74 The CMA places great importance on transparency as between parties to an appeal (including any interveners). We are therefore happy to include an addition in our final guidance to emphasise this point both in relation to hearings and teach-ins and more generally.[98]

2.75 The CMA cannot commit to covering all grounds of an appeal and arguments at hearings. This reflects timing constraints and the need to make sure that appeals proceed in accordance with the overriding objective. It is inherent in

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[93] See response from Norton Rose Fulbright.
[94] See response from the Civil Aviation Authority.
[95] See response from Linklaters.
[96] This is reflected in Rule 16.4 of the Energy Rules and Water Rules and Rule 14.4 of the Airports Rules and Air Traffic Services Rules (consultation rules).
[97] See paragraph 3.22 of the Energy Guide and Water Guide, paragraph 3.31 of the Airports Guide and paragraph 3.30 of the Air Traffic Services Guide (final guidance).
[98] We note that Ofgem also emphasised the need for transparency in other areas such as pre-appeal contacts and general appeal correspondence. We were equally happy to reflect this in the final guidance. See paragraph 3.7 of the Energy Guide and Water Guide and paragraph 3.10 of the Airports Guide and Air Traffic Services Guide (final guidance). We have also made some further amendments to Rule 7.9 of the Energy Rules and Water Rules (final rules) to provide further transparency for submissions received from relevant licence holders or appointment holders respectively. We have also made amendments to Rule 9.5 of the Energy Rules and Water Rules and Rule 11.5 of the Airports Rules and Air Traffic Services Rules (final rules) to clarify the requirements for the relevant regulator to share a non-sensitive version of its response and to Rule 10.9 of the Energy Rules and Water Rules (final rules) to clarify the requirements for applicants to intervene to share a non-sensitive version of their application.

the nature of the regimes and the degree of discretion granted to the CMA in relation to the conduct of appeals that this will require an element of judgment on a case-by-case basis. However, it remains open to parties to ask the CMA for further opportunities to make submissions on particular points that they consider should be examined further or that the CMA may have misunderstood. Similarly, we do not consider it appropriate at this stage to identify the sorts of questions that will be covered at hearings. Clarification hearings would typically take place earlier in proceedings than main hearings and are designed to build the CMA's understanding of particular issues. The main hearings are an opportunity for parties to put forward their arguments (subject to pre-agreed instructions from the CMA) and for the CMA to test the arguments of the parties to an appeal in more depth. The CMA will decide how much time to dedicate to main hearings based on the circumstances of the case and in accordance with the overriding objective as part of its broad discretion on timetabling procedural aspects of appeals.

2.76 Our intention has always been that the power to cross-examine applies to a person who gives oral evidence at a hearing. This is in line with the legislative framework across all of the regimes in question.[99] We have amended our rules to make this clear. We consider that the power to cross-examine would on this basis apply to expert witnesses as well as factual witnesses.

2.77 The CMA's consultation guidance already made it clear that the CMA will consider whether hearings can be held in-person, virtually or on a hybrid basis.[100] We think this discretion is appropriate and therefore do not propose to amend our guidance on this point.

2.78 We cannot provide guidance at this stage on when teach-ins or site visits may be requested. This will be a decision for the CMA group taken on a case-by-case basis in accordance with the overriding objective.

Cost process

2.79 We made some proposals in the consultation rules and guidance on costs. These proposals were designed to reflect the Supreme Court's judgment in *Flynn Pharma*,[101] including its discussion of the principles set out in *BT v Ofcom*.[102] In particular, we proposed that the consultation rules include an assessment of potential chilling effects on a regulator as one of the

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[99] See, for instance, Electricity Act 1989, Sch 5A, paragraph 7(4).
[100] See paragraph 4.42 of the Energy Guidance and Water Guidance and paragraph 4.40 of the Airports Guidance and Air Traffic Services Guidance (consultation guidance).
[101] *Competition and Markets Authority (Respondent)* v *Flynn Pharma Ltd* [2022] UKSC 14.
[102] *British Telecommunications PLC v The Office of Communications* [2018] EWCA Civ 2542.

circumstances that the CMA may take into account when deciding what order to make for inter partes costs.[103] We also made some proposals in the consultation guidance to provide further clarification in this respect.[104]

Summary of responses

2.80 We generally received mixed responses in this area, with several respondents raising concerns with our approach.

2.81 Some respondents sought clarification on the CMA's position on the principles set out in *BT v Ofcom* in light of the judgment in *Flynn Pharma*, raising concerns with the approach taken in the consultation guidance.[105]

2.82 In particular, some respondents expressed concern with, or sought clarification of, the inclusion of chilling effects as a relevant circumstance to take into account, noting in particular that chilling effects must not be assumed to exist in light of *Flynn Pharma*.[106] Two respondents objected to the inclusion of chilling effects as a relevant factor altogether.[107] Some respondents also noted general concerns about a lack of evidence or how realistic it could be that a regulator could demonstrate chilling effects and/or that in certain sectors the relevant regulator may not be able to demonstrate a chilling effect due to its funding arrangements.[108] One respondent also suggested that the CMA consider the benefits of an adverse costs order against a regulator in encouraging better decision-making in light of *Flynn Pharma*.[109] Two respondents out of those who made submissions on chilling effects did not object to the CMA's approach.[110]

2.83 Some respondents queried why the CMA's consultation rules stated that the CMA 'may' have regard to all the circumstances listed for inter partes costs instead of 'will' have regard (as was the case in the existing rules and guidance).[111]

2.84 Several respondents opposed the removal of a sentence in the existing guidance that stated that the CMA will normally order an unsuccessful party to

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[103] See Rule 20.5 in the Energy Rules, Rule 20.5 in the Water Rules, Rule 19.5 in the Airports Rules and Rule 19.5 in the Air Traffic Services Rules (consultation rules).
[104] See paragraph 6.4 in the Energy Guidance, paragraph 6.4 in the Water Guidance, paragraph 6.4 in the Airports Guidance and paragraph 6.4 in the Air Traffic Services Guidance (consultation guidance).
[105] See responses from Cadent, Freshfields, Linklaters, National Grid and Scottish Power.
[106] See responses from the CAA, Cadent, Electricity North West, National Grid, Norton Rose Fulbright and Scottish Power.
[107] See responses from Freshfields and National Grid.
[108] See responses from Cadent, Freshfields, National Grid and Norton Rose Fulbright.
[109] See response from Cadent.
[110] See responses from Linklaters and Northumbrian Water.
[111] See response from National Grid and Scottish Power.

pay the costs of the successful party to the appeal. These respondents claimed that the starting point should be that costs follow the event either on fairness grounds or because this reflects legislative intent and the judgment in *Flynn Pharma*.[112]

2.85 Several respondents made submissions regarding the non-exhaustive list of circumstances that the CMA may consider when deciding what order to make for inter partes costs that are included in the consultation rules. Some respondents suggested that we should include further specific circumstances relating to the conduct of the parties such as a failure to engage in pre-appeal contacts, a failure to raise manifest or non-contentious errors, a failure to properly engage with the regulator prior to commencing an appeal, consistency of arguments and use of unsolicited submissions during an appeal, overrunning any time limit set for oral submissions at a hearing or covering non-authorised topics at a hearing, as well as general compliance with CMA rules and any CMA directions.[113]

The CMA's views

2.86 We have made amendments in the final guidance to provide further clarity on our approach to the *Flynn Pharma* judgment and the principles set out in *BT v Ofcom*. In line with *Flynn Pharma*, 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. Both *Flynn Pharma* and *BT v Ofcom* endorse the principles set out in the *Booth* line of judgments, described at paragraph 97 of *Flynn Pharma*. Those principles are that where a public body is unsuccessful in proceedings, an important factor that a court or tribunal exercising an apparently unfettered discretion should take into account is the risk that there will be a chilling effect on the conduct of the public body, if costs orders are routinely made against it in those kinds of proceedings, even where the body has acted reasonably in bringing or defending the application.[114] We have made a further update in the final guidance to set out this position more clearly.

2.87 We have amended the final rules to clarify that the CMA will not assume that chilling effects on a regulator exist. The CMA will consider the question of chilling effects on a case-by-case basis and does not consider it appropriate to consider at this stage whether certain regulators would have the ability to

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[112] See responses of Cadent, Freshfields, Heathrow Airport, National Grid, Linklaters, Norton Rose Fulbright and Scottish Power.
[113] See responses of the CAA, Linklaters and Ofgem.
[114] See paragraph 97 of the judgment in *Flynn Pharma.*

demonstrate chilling effects. In light of the judgment in *Flynn Pharma*, we do not accept the contention made by two respondents that it is wrong to include chilling effects as a relevant factor altogether.

2.88 We consider that it is appropriate to change 'will have regard' to 'may have regard to all the circumstances' as it better reflects the CMA's inherent discretion when deciding the question of inter partes costs. This reflects the legislative intent for inter partes costs across all the regimes subject to this consultation. All of the relevant legislation gives the CMA a broad discretion to make whatever order it thinks fit for requiring a party to the appeal to make payments to another party in respect of costs reasonably incurred by the other party in connection with the appeal.[115] This can be contrasted with the position on recovery of the CMA's costs in conducting regulatory appeals, where the legislation sets out a clear intent of what should happen depending on the outcome of the appeal.[116] This distinction did not appear to be fully understood by all respondents.

2.89 We removed the sentence in the existing guidance on costs following the event to properly reflect the CMA's discretion on inter partes costs that is included in the relevant legislation (see above). In light of this and *Flynn Pharma*, we think that the appropriate starting point for costs should be assessed on a case-by-case basis by the CMA when considering an appeal. *Flynn Pharma* highlighted that it is for specialist appeal bodies to determine the appropriate starting point for costs, not that the starting point should be that costs follow the event.[117] We therefore do not accept the suggestion of certain respondents that *Flynn Pharma* is authority for the proposition that costs should always follow the event in the CMA's regulatory appeals functions.

2.90 We do not consider it necessary to supplement the list of circumstances nor do we consider it appropriate to specify the precise conduct that the CMA may take into account when determining inter partes costs. The list of circumstances is not presented as exhaustive. In particular, the drafting relating to conduct is designed to highlight the CMA's discretion to take into

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[115] See Electricity Act 1989, Sch 5A, paragraph 12(3); Electricity (Northern Ireland) Order 1992, Sch 5A, paragraph 12(3); Gas Act 1986, Sch 4A, paragraph 12(3); Gas (Northern Ireland) Order 1996, Sch 3A, paragraph 12(3); Water Industry Act 1991, Sch 2ZA, paragraph 12(3), Civil Aviation Act 2012, Sch 2, paragraph 32(5) and Transport Act 2000, Schedule A1, paragraph 24(5).
[116] See Electricity Act 1989, Sch 5A, paragraph 12(2); Electricity (Northern Ireland) Order 1992, Sch 5A, paragraph 12(2); Gas Act 1986, Sch 4A, paragraph 12(2); Gas (Northern Ireland) Order 1996, Sch 3A, paragraph 12(2); Water Industry Act 1991, Sch 2ZA, paragraph 12(2), Civil Aviation Act 2012, Sch 2, paragraph 32(3) and Transport Act 2000, Schedule A1, paragraph 24(3).
[117] See paragraphs 42 and 98 of the judgment in *Flynn Pharma.*

account a variety of factors. We do not consider it appropriate or helpful to go into the level of detail proposed by several respondents in this respect.

Provisional determination

2.91 The consultation rules were drafted to make it clear that the CMA may issue a provisional determination, depending on the circumstances of the case. This was a departure from the existing rules and guidance which had indicated that a provisional determination would normally be issued. The consultation rules and guidance recognised that it would not be appropriate to publish a provisional determination in all appeals.

2.92 We proposed in the consultation rules and guidance to recognise that we may in certain circumstances publish a summary of the provisional determination. We also clarified that where the CMA is considering appeals or parts of appeals together, it may elect to make a single provisional determination in relation to two or more appeals in part or in their entirety.[118]

Summary of responses

2.93 Respondents broadly appreciated the rationale for our approach in this area, but some respondents raised concerns with our approach.

2.94 Some respondents objected to the CMA's proposal in the consultation rules that the CMA 'may' issue a provisional determination depending on the circumstances of the case.[119] These respondents generally noted the importance of provisional determinations and stated that they are helpful and support robust decision-making. Another noted that the guidance be amended to state that the CMA will provide parties with reasons where it decides not to issue a provisional determination.[120]

2.95 Another respondent requested that the CMA commit to publishing any provisional determinations in full due to potential read-across into other sectors.[121]

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[118] See Rule 18 of the Energy Rules and Water Rules and Rule 16 of the Airports Rules and Air Traffic Services Rules (consultation rules) and Section 5 of the Energy Guide, Water Guide, Airports Guide and Air Traffic Services Guide (consultation guidance).
[119] See responses from National Grid, Norton Rose Fulbright and Scottish Power
[120] See response from Linklaters.
[121] See response from Electricity North West.

The CMA's views

2.96 Our intention in the consultation rules was not to change our position on provisional determinations, but to clarify that there are certain cases in which issuing provisional determinations may not be appropriate. In light of this, we have decided to revert to the wording used in the existing rules across all regimes in the final rules. We have, however, included some clarificatory language to the final rules and guidance to accurately reflect our position on provisional determinations and to make it clear that, where we do not issue a provisional determination, we will consider what alternative procedure is appropriate in light of the circumstances of the case and in accordance with the overriding objective.[122] We do not consider it appropriate to commit to providing reasons where the CMA exercises its discretion not to issue a provisional determination. However, the CMA will keep parties informed of procedural aspects of appeals including the decision whether to issue a provisional determination.

2.97 We do not consider it appropriate to commit to publishing provisional determinations in full. Interested parties may have access to a summary where appropriate and will further be able to review the CMA's final determination once published. Parties should in any case exercise caution when seeking to read across to other sectors based on the CMA's provisional decisions.

Other comments

Summary of responses

2.98 One respondent suggested that the CMA broaden the overriding objective to include an obligation on third parties to assist the CMA.[123] Another respondent suggested that the CMA refer to the statutory duties of the relevant regulators in the overriding objective that the CMA is obliged to take into account[124] when determining an appeal. The same respondent also queried whether the reference to 'fairly' in the overriding objective should be replaced by 'in the interests of justice'.[125]

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[122] See Rule 18 of the Energy Rules and Water Rules, Rule 16 of the Airports Rules and Air Traffic Services Rules and section 5 of the Energy Guide, Water Guide, Airports Guide and Air Traffic Services Guide (final rules and guidance).
[123] See response from Ofgem.
[124] See Electricity Act 1989, section 11E(2); Electricity (Northern Ireland) Order 1992, section 14D(2); Gas Act 1986 23D(2); Gas (Northern Ireland) Order 1996, section 14D(2); Water Industry Act 1991, section 12F(2); Civil Aviation Act 2012, section 30(2); Transport Act 2000, section 19F(2).
[125] See response from the Civil Aviation Authority.

2.99 One respondent queried the addition of 'such notice' into Rule 14.2 of the Energy Rules (consultation rules).[126] Another respondent requested that the CMA clarify the meaning of 'including estimates, forecasts, returns or other information' included in the consultation rules.[127]

2.100 One respondent queried the CMA's approach to the wording of statements of truth, particularly with regard to expert evidence.[128]

2.101 The same respondent supported the CMA's suggestion for parties to provide an agreed glossary and chronology,[129] but noted that agreeing the form and content of such documents in an adversarial context may be challenging and may ultimately not be possible.[130]

The CMA's views

2.102 We do not consider it appropriate for the guidance to place a requirement on those who are not granted intervener status to assist the CMA in meeting the overriding objective. We have therefore not amended the final rules and guidance in this respect. We do not consider it necessary to refer to the statutory duties of the relevant regulators in the overriding objective as the CMA's obligation to take these into account when determining appeals is already clear in the relevant legislation.[131] We consider that 'fairly' is sufficiently clear and does not warrant any amendment.

2.103 The addition of 'such notice' into Rule 14.2 of the Energy Rules (consultation rules) was designed to reflect the fact that the CMA may not always request the indicative items listed in Rule 14.2 via directions, but may elect to do so informally. However, we recognise that this language may not have been clear so we have amended the text in the final guidance accordingly.

2.104 Under the relevant legislation, the CMA's power is to require certain documents to be verified by a 'statement of truth'. Statement of truth is then defined in the relevant legislation as 'in relation to the production of a statement or provision of Information by a person, means a statement that the

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[126] See response from National Grid.
[127] See response from Scottish Power. See Rule 14.2(j) of the Energy Rules and Water Rules and Rule 12.2(j) of the Airports Rules and Air Traffic Services Rules (consultation rules).
[128] See response from Linklaters.
[129] See paragraph 3.20 and 4.26 of the Energy Guide and Water Guide, paragraph 3.29 and 4.24 of the Airports Guide and paragraph 3.28 and 4.24 of the Air Traffic Services Guide (consultation guidance).
[130] See response from Linklaters.
[131] See Electricity Act 1989, section 11E(2); Electricity (Northern Ireland) Order 1992, section 14D(2); Gas Act 1986 23D(2); Gas (Northern Ireland) Order 1996, section 14D(2); Water Industry Act 1991, section 12F(2); Civil Aviation Act 2012, section 30(2); Transport Act 2000, section 19F(2).

person believes the facts stated in the statement or information to be true'.[132] We appreciate that a statement of truth as defined in the legislation may not be appropriate in the case of expert evidence where an element of opinion is involved (for example CPR PD 35, paragraph 3.3 acknowledges this by providing specific wording for expert statements of truth). We have clarified in the final guidance that it remains open to experts to supplement a statement of truth as appropriate provided that the statement contains a confirmation of the expert's belief in the truthfulness of any factual statements they make in their report.[133]

2.105 We accept and understand that it may not always be possible to agree documents such as glossaries and chronologies in an adversarial context. However, we expect parties to bring any disagreements to the CMA's attention as this information is also helpful for the CMA when determining appeals.[134]

[132] See Electricity Act 1989, Sch 5A, paragraph 13(1); Electricity (Northern Ireland) Order 1992, Sch 5A, paragraph 13(1); Gas Act 1986, Sch 4A, paragraph 13(1); Gas (Northern Ireland) Order 1996, Sch 3A, paragraph 13(1), Water Industry Act 1991, Schedule 2ZA, paragraph 13(1); Civil Aviation Act 2012, Sch 2, paragraph 35(1); Transport Act 2000, Sch A1, paragraph 27(1).
[133] See footnote 55 of the Energy Guide, footnote 56 of the Water Guide and footnote 55 of the Airports Guide and footnote 58 of the Air Traffic Services Guide (final guidance).
[134] See paragraph 3.21 of the Energy Guide and Water Guide, paragraph 3.30 of the Airports Guide and paragraph 3.29 of the Air Traffic Services Guide (final guidance).

3. List of respondents

1. Cadent Gas Limited
2. Centrica plc
3. Civil Aviation Authority
4. Electricity North West Limited
5. Freshfields Bruckhaus Deringer LLP
6. Heathrow Airport Limited
7. Linklaters LLP
8. National Grid Electricity Transmission plc, National Grid Gas plc (joint submission)
9. Northumbrian Water Limited
10. Norton Rose Fulbright LLP
11. Ofgem
12. Scottish Power Limited
13. Thames Water Utilities Limited