

Energy Licence Modification Appeals: Competition and Markets Authority Guide

27 October 2022

CMA71

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1. Introduction

- 1.1 This guide has been prepared to assist participants involved in licence modification appeals under the Gas Act 1986,¹ the Electricity Act 1989,² the Electricity (Northern Ireland) Order 1992³ and the Gas (Northern Ireland) Order 1996.⁴ It may be revised and supplemented from time to time and as the Competition and Markets Authority (CMA) gains experience of such appeals. Comments in this guide are not intended to bind the CMA in its consideration of particular cases.
- 1.2 The CMA has published procedural rules, the *Energy Licence Modification Appeals: Competition and Markets Authority Rules* (CMA70), to govern these appeals. This guide should be read in conjunction with the Acts⁵ and those Rules.
- 1.3 The procedural framework is designed to enable the CMA to conduct a satisfactory appeal process within the strict time frames set out in the Acts and the Orders. The framework is flexible and will be adapted in the interests of common sense and good practice as the CMA gains experience of handling appeals under it.
- 1.4 The Rules seek to ensure that the CMA has flexibility to manage appeals fairly, expeditiously and at proportionate cost, having regard to the interests of the parties to the appeal and interested third parties and the statutory time frames. This sentiment is reflected in the overriding objective which is set out in Rule 4. Those involved in appeals are required to assist the CMA in meeting this objective.
- 1.5 In every case, the CMA will look for a high degree of cooperation from participants and expects participants to present their submissions clearly.
- 1.6 This guide does not contain details of all the provisions of the Acts and the Rules relevant to appeals and is not intended to modify or constrain the full application of those provisions to particular cases.

¹ 1986 c44, as amended in particular by the Electricity and Gas (Internal Market) Regulations 2011 (SI 2011/2704).

² 1989 c29, as amended in particular by the Electricity and Gas (Internal Market) Regulations 2011 (SI 2011/2704).

³ SI 1992/231 (NI 1), as amended by the Gas and Electricity Licence Modification and Appeals Regulations (Northern Ireland) 2015 SI 2015/1 (NI).

⁴ SI 1996/275 (NI 2), as amended by the Gas and Electricity Licence Modification and Appeals Regulations (Northern Ireland) 2015 SI 2015/1 (NI)

⁵ See paragraph 1.7 for a definition of 'the Acts' in this guide.

1.7 In this guide:

'the Acts' means the Electricity Act 1989, the Gas Act 1986, the Electricity (Northern Ireland) Order 1992 or the Gas (Northern Ireland) Order 1996, as the case may be;

'Authority' means the decision-making Gas and Electricity Markets Authority – referred to as the Authority in the Rules and the Acts – which is supported by the Office of Gas and Electricity Markets, or the Northern Ireland Authority for Utility Regulation, as the case may be;

'the CA' means Citizens Advice or Citizens Advice Scotland, as the case may be;⁶

'the CCNI' means the General Consumer Council for Northern Ireland;⁷

'the CMA' means the Competition and Markets Authority;

'intervener' means any person given permission by the CMA under Rule 10 of the Rules to intervene in an appeal;

'participants' means the parties to an appeal and interveners;

'party' to an appeal means the appellant or the Authority;

'relevant licence holder' has the same meaning as in section 23(10) of the Gas Act 1986, section 11A(10) of the Electricity Act 1989, article 14(11) of the Electricity (Northern Ireland) Order 1992, and Article 14(11) of the Gas (Northern Ireland) Order 1996;

'the Rules' mean the Energy Licence Modification Appeals: Competition and Markets Authority Rules;

'the Schedule' means whichever of Schedule 4A to the Gas Act 1986, Schedule 5A to the Electricity Act 1989, Schedule 5A to the Electricity (Northern Ireland) Order 1992 or Schedule 3A of the Gas (Northern Ireland) Order 1996 that is relevant to the particular appeal;

'sensitive information' means information which is:

⁶ The CA may bring an appeal in the capacity of representing consumers whose interests are materially affected by the Authority's decision.

⁷ The CCNI may bring an appeal in the capacity of representing consumers whose interests are materially affected by the Authority's decision.

- (a) commercial information, the disclosure of which would or might significantly harm the legitimate business interests of an undertaking to which it relates; or
- (b) information relating to the private affairs of an individual, the disclosure of which would or might significantly harm the individual's interests.

2. Background

2.1 The Acts set out the process that the Authority must adopt in making modifications to licences for the supply and distribution of gas and electricity. They also set out the appeal mechanism in respect of licence modifications. An appeal against a decision of the Authority to amend the conditions of a licence may be made to the CMA by:

- (a) a relevant licence holder;
- (b) certain materially affected licence holders;
- (c) qualifying bodies and associations in the capacity of representing those licence holders; and
- (d) the CA and CCNI in the capacity of representing consumers whose interests are materially affected by the Authority's decision.

2.2 The CMA may allow appeals only to the extent that it is satisfied that the Authority's decision was wrong on one or more of the following grounds:

- (a) the Authority failed properly to have regard to, or give appropriate weight to, the matters to which the Authority must have regard in the carrying out of its principal objective and certain duties;
- (b) the decision was based, wholly or partly, on an error of fact;
- (c) the modifications fail to achieve, in whole or in part, the effect stated by the Authority in its decision;⁸
- (d) the decision was wrong in law.⁹

⁸ Under section 11A(7)(b) of the Electricity Act 1989, section 23(7)(b) of the Gas Act 1986 and Article 14(8)(b) of the Electricity (Northern Ireland) Order 1992 and Article 14(8)(b) of the Gas (Northern Ireland) Order 1996 the Authority is required to state the effect of the modifications in its decision.

⁹ See section 23D of the Gas Act 1986, section 11E of the Electricity Act 1989, Article 14D of the Electricity (Northern Ireland) Order 1992 and Article 14D of the Gas (Northern Ireland) Order 1996.

- 2.3 To the extent that the CMA does not allow the appeal, it must confirm the decision appealed against.¹⁰
- 2.4 If the CMA allows the appeal, it can do one or more of the following:
- (a) In relation to a price control decision:¹¹
- (i) quash the Authority's decision (to the extent that the appeal is allowed);
 - (ii) remit the matter back to the Authority for reconsideration and determination in accordance with any directions given by the CMA;
 - (iii) substitute its own decision for that of the Authority's decision (to the extent that the appeal is allowed) and give any directions to the Authority or any other party to the appeal.
- (b) in relation to any other decision:
- (i) quash the Authority's decision (to the extent that the appeal is allowed);
 - (ii) remit the matter back to the Authority for reconsideration and determination in accordance with any directions given by the CMA.
- 2.5 The CMA must publish an order containing its determination, with reasons.¹²
- 2.6 Key elements of the procedures for regulating appeals, including the time periods for appealing and completing them and provision relating to the payment of costs by the parties to the appeal, are set out in the Acts and the Schedule. The Schedule, however, also provides that the CMA may make rules of procedure regulating the conduct and disposal of these appeals.¹³
- 2.7 The CMA's appeal process may involve the parties to the appeal – the appellant(s) and the Authority – and any interveners (as defined in the Rules). In order to facilitate the conduct of the appeal the CMA will publish non-

¹⁰ See section 11E(5) of the Electricity Act 1989, section 23D(5) of the Gas Act 1986 and Article 14D(5) of the Electricity (Northern Ireland) Order 1992.

¹¹ Under section 11F(7) of Electricity Act 1989, section 23E(7) of Gas Act 1986 and Article 14E(7) of the Electricity (Northern Ireland) Order 1992/231 a decision is a price control decision, in relation to the modification of a condition of a licence, if the purpose of the condition is, in the CMA's opinion, to limit or to control the charges on, or the revenue of, the holder of the licence.

¹² Section 11H(1) of the Electricity Act 1989, section 23G of the Gas Act 1986, section 14G(1) of the Electricity (Northern Ireland) Order 1992, section 14G(1) of the Gas (Northern Ireland) Order 1996.

¹³ Paragraph 11 of the Schedule.

sensitive versions of certain submissions of the participants,¹⁴ as well as its decisions (as set out in Rule 12.1 and Rule 12.2). The CMA also reserves the right to publish non-sensitive versions of any other document (as set out in Rule 12.3).

3. General observations on appeals

Approach to appeals

- 3.1 The appeal must be clearly linked to the grounds of appeal set out in the Acts and summarised in paragraph 2.2.
- 3.2 The CMA will not consider afresh the licence modifications imposed by the Authority. The CMA's function is to hear an appeal and it will review the challenged decision for error on the grounds of appeal put forward by the appellant. The CMA will not allow an appeal merely because it would not have reached that decision had it been the Authority. The CMA may only allow an appeal where it is satisfied that the appellant has shown on the balance of probabilities that the Authority's decision was wrong on one or more of the grounds set out in the Acts.
- 3.3 In conducting the appeal, the CMA will have regard to the overriding objective set out in Rule 4. The overriding objective of the Rules is to enable the CMA to dispose of appeals fairly, efficiently and at proportionate cost within the time periods prescribed by the Acts. The CMA expects participants to assist it in meeting the overriding objective and to conduct themselves in a way that is consistent with this approach.
- 3.4 In determining the appeal the CMA must have regard, to the same extent as is required of the Authority, to the matters to which the Authority must have regard in the carrying out of its principal objective and certain duties.¹⁵
- 3.5 The CMA may have regard to any matter that the Authority was not able to have regard to in relation to the decision, which is the subject of the appeal, but must not have regard to any matter which the Authority would not have

¹⁴ By 'non-sensitive' versions, we refer to versions of documents with sensitive information (as defined above) redacted.

¹⁵ Section 11E(2) of the Electricity Act 1989, section 23D(2) of the Gas Act 1986, Article 14D(2) of the Electricity (Northern Ireland) Order and Article 14D(2) of the Gas (Northern Ireland) Order 1996.

been entitled to have regard to in reaching its decision had it had the opportunity to do so.¹⁶

- 3.6 The CMA will seek to narrow the issues and points in dispute during the course of the appeal. It may, for example, seek to do so at appeal management conferences and hearings, or through working papers shared with the parties.
- 3.7 The CMA places great importance on transparency between participants in appeals and expects as a starting point that participants will have access to all appeal materials (subject to any confidentiality requests). This is equally the case for non-core documentation, the disclosure of which is not covered in detail in the Rules or this guidance (for instance, additional submissions, correspondence (including pre-appeal correspondence), and any materials prepared for site visits, teach-ins and/or hearings). If any participant considers that it is not appropriate for other participants to have access to a particular document or material, it should make representations to the CMA explaining why it considers that to be the case.

Administrative matters

- 3.8 The CMA's staff team is led by an Appeal Director who is supported by project delivery staff and specialist staff. Once a notice of appeal is sent to the CMA, the CMA will write to the appellant and the Authority with the necessary contact details and publish these details on a designated page on the CMA's website. Participants in the appeal will have a specific contact in the project delivery team who will take enquiries and act as the main point of contact for the appeal.

Pre-appeal

- 3.9 Any prospective appellant is strongly advised to provide the CMA with reasonable notice that it may appeal a decision of the Authority prior to commencing an appeal under Rule 5. Such notice may be provided informally, for example, through telephone contact with the CMA.
- 3.10 'Reasonable notice' in this context would typically cover an initial contact with the CMA¹⁷ at the latest two weeks prior to submission of a notice of appeal to

¹⁶ Section 11E(3) of the Electricity Act 1989, section 23D(3) of the Gas Act 1986, Article 14D(3) of the Electricity (Northern Ireland) Order 1992 and Article 14D(3) of the Gas (Northern Ireland) Order 1996.

¹⁷ If a prospective appellant does not possess a named contact at the CMA, these initial contacts can be made to appeals@cma.gov.uk.

warn the CMA of the possibility of an appeal and to provide a high level indication of the likely grounds of that appeal, even if no final decision to appeal has been made. This would usually be supplemented by a further contact at least one week prior to submission to discuss logistical matters for submission of the significant amount of documentation that is contained in a notice of appeal.

- 3.11 These pre-appeal contacts will be treated as confidential between the prospective appellant and the CMA.
- 3.12 The pre-appeal contacts create no obligation on the prospective appellant to submit a notice of appeal, or to submit a notice of appeal on the basis of the same grounds that the prospective appellant may have indicated to the CMA. They are rather designed to ensure as smooth an appeal process as possible and to assist the CMA with its internal resource allocation, as well as to front-load any logistical issues in terms of the submission of documents. As such, these pre-appeal contacts are beneficial for both the CMA and prospective appellants.
- 3.13 The CMA would also encourage a prospective appellant to inform the Authority that it is considering bringing an appeal. A prospective appellant should tell the CMA in its pre-appeal contacts if it has also contacted the Authority or if it plans to do so.
- 3.14 Wherever possible, the CMA expects prospective appellants and the Authority to seek to resolve calculation errors or other non-contentious errors before reaching the appeal stage. This would cover the sort of errors that the prospective appellant and the Authority would reasonably expect could be corrected without argument. The appeal process should be reserved for substantive disagreements between the prospective appellant and the Authority.

Time frames

- 3.15 The Acts prescribe the time frames within which various steps in the appeal process must be completed.
- 3.16 The Acts require that applications for permission to appeal must be made within 20 working days, beginning with the first working day after the day on which the Authority's decision is published.¹⁸ An application for permission to appeal is made by submitting a 'notice of appeal' to the CMA. Appellants

¹⁸ Paragraph 1(3) of the Schedule.

should be aware that the notice must be submitted within this time and the CMA does not consider it has discretion to grant permission to appeal in respect of notices of appeal not submitted within the statutory deadline.

- 3.17 The Acts provide that the CMA will have four months (in non-price-control matters) and six months (in price control matters) to determine an appeal. This time frame starts from the day on which the CMA grants permission to appeal.¹⁹ Where the CMA has received representations on the timing of the determination from a party to the appeal and is satisfied that there are special reasons, it may extend the period for its determination by one month.²⁰ If the CMA considers it necessary or appropriate to extend the period of a determination in this way, it will consult with the participants before doing so.

Administrative timetable

- 3.18 As soon as possible after granting permission to appeal, the CMA will draw up an administrative timetable for the appeal in accordance with Rule 13. When drawing up the timetable the CMA will have regard to the views of the participants as well as the overriding objective set out in Rule 4 and the circumstances of the case. Once the timetable has been set, the CMA will aim to keep to it; participants should therefore check their availability on the notified dates at an early stage. The CMA will not normally consider that the unavailability of advisers or of legal representatives is a reason to depart from these dates.
- 3.19 In order to conduct an efficient process, the CMA expects that participants will treat the timetable as 'hard' deadlines. Should it become apparent to a participant that it will struggle to adhere to a deadline, the CMA should be contacted as soon as possible.

Procedure

- 3.20 Rule 14 sets out a non-exhaustive list of matters upon which the CMA can give directions or make informal requests. Participants should be aware that the CMA will have regard to the overriding objective in managing the conduct of the appeal. The CMA will ordinarily address many procedural matters in an appeal (including the examples provided in Rule 14.2) through informal means, without it being necessary to give directions under Rule 14. However,

¹⁹ Section 23F(1) of the Gas Act 1986, section 11G(1) of the Electricity Act 1989, Article 14F(1) of the Electricity (Northern Ireland) Order 1992 and Article 14F(1) of the Gas (Northern Ireland) Order 1996.

²⁰ See section 23F(3)-(4) of the Gas Act 1986, section 11G(3)-(4) of the Electricity Act 1989, Article 14F(3)-(4) of the Electricity (Northern Ireland) Order 1992 and Article 14F(3)-(4) of the Gas (Northern Ireland) Order 1996.

where necessary the CMA will give directions in relation to the conduct of the appeal. Participants may apply for directions or the CMA may of its own volition propose a direction if it appears necessary in the circumstances. The CMA will usually give participants an opportunity to comment ahead of issuing a direction. Depending on the circumstances, applications for directions may be dealt with in writing or at an appeal management conference. Where participants are applying for directions, the CMA expects that they would have sought to agree the direction with the other participants in the appeal beforehand.

- 3.21 The CMA expects that participants will be able to cooperate promptly to produce bundles, chronologies, glossaries, issues lists and case memoranda where any or all of these are considered necessary by the CMA. Where it has not been possible for the participants to agree such documents, the CMA expects the participants to bring any such disagreements to the CMA's attention.
- 3.22 Where appropriate, the CMA will inform parties in advance of the procedure and practicalities for certain aspects of the appeal process such as any teach-ins and hearings. The CMA will typically prepare a series of process notes to assist parties to an appeal (including any interveners) with practical matters.

Appeal management conferences

- 3.23 Appeal management conferences may be held under Rule 15. These are opportunities for the CMA to manage the appeal. The CMA will invite the parties to the appeal and any intervener to attend the initial appeal management conference. The CMA may also invite any applicants or potential applicants for permission to intervene.
- 3.24 Active appeal management will be an important tool in ensuring that the CMA makes the right decision in the time allowed.

Permission stage

- 3.25 The Acts require that permission to appeal is obtained before an appeal can be brought.²¹ Applications for permission to appeal are made by submitting a

²¹ Section 23B(3) of the Gas Act 1986, section 11C(3) of the Electricity Act 1989, Article 14B(3) of the Electricity (Northern Ireland) Order 1992 and Article 14B(3) of the Gas (Northern Ireland) Order 1996.

notice of appeal in accordance with Rule 5, within the time frame set out in the Acts.²²

- 3.26 Rule 5.2 provides that a notice of appeal should comprise a main submission (which should include the items set out at Rule 5.2(a) and a bundle of supporting documentation (which should include the items set out at Rule 5.2(b)). Unless otherwise specified, where the Rules refer to the ‘notice of appeal’, they refer to all of the content required pursuant to Rule 5.2.
- 3.27 A copy of the Authority’s decision is required to be included as part of the bundle under Rule 5.2(b). The CMA is greatly assisted where parties indicate the specific parts of the decision subject to appeal including by reference to page numbers where relevant, and where they include copies of prior determinations by the Authority that are relevant to the appeal, with the relevant parts indicated.
- 3.28 A copy of the notice of appeal must be sent to the Authority at the same time as the notice of appeal is sent to the CMA.²³ The CMA would not typically expect the notice of appeal to contain sensitive information that cannot be shared with the Authority. An appellant should contact the CMA in the first instance if there are particular circumstances that may warrant the sharing of a redacted version of the notice of appeal with the Authority.
- 3.29 Once the Authority has received a copy of the notice of appeal it has ten working days,²⁴ beginning with the first working day after the day it receives the notice of appeal, to make representations or observations to the CMA on whether the CMA should grant permission to appeal. Where the Authority makes representations or observations, the CMA then has ten working days,²⁵ beginning with the first working day after the day it receives the Authority’s representations or observations, in which to decide whether to grant permission to appeal. If the Authority does not make representations or observations on whether permission to appeal should be granted based on the notice of appeal, the CMA has 14 working days, beginning with the first working day after the day it receives the notice of appeal, in which to decide whether to grant permission to appeal.²⁶

²² 20 working days beginning with the first working day after the day on which the Authority’s decision is published. Paragraph 1(3) of the Schedule.

²³ Paragraph 1(7) of the Schedule and Rule 5.5.

²⁴ Paragraph 3(2) of the Schedule.

²⁵ Paragraph 1(10)(a) of the Schedule.

²⁶ Paragraph 1(10)(b) of the Schedule.

- 3.30 The CMA will normally make a decision on permission without a hearing.²⁷ The CMA may decide to hold a hearing to determine whether permission should be granted either of its own motion or on the application of the appellant, or the Authority. Where it decides to hold a hearing the CMA will notify the appellant, the Authority and such other persons as it considers appropriate.²⁸ The CMA may also request additional information or representations from the appellant or Authority, copies of which may be sent to the appellant or Authority (as applicable) or such other persons as the CMA considers appropriate (subject to any confidentiality claims made by the appellant or the Authority at the time of submission).
- 3.31 The CMA will consider whether the appellant has standing to bring the appeal and, where appropriate, the nature of any interests they claim to be materially affected. As noted above in paragraph 2.1, under the Acts appeals can only be brought by:
- (a) a relevant licence holder;
 - (b) certain materially affected licence holders;
 - (c) qualifying bodies and associations in the capacity of representing those licence holders; and
 - (d) as appropriate, the CA or CCNI, in the capacity of representing consumers whose interests are materially affected by the Authority's decision.²⁹
- 3.32 The CMA may refuse permission to appeal on one of the following grounds:
- (a) the appellant does not have standing.
 - (b) the appeal is brought for reasons that are trivial or vexatious.
 - (c) the appeal has no reasonable prospect of success.³⁰
- 3.33 Rule 5.2(a) requires that appellants clearly set out as part of their main submission why they consider that they have standing to appeal. It is important that the CMA has sufficient detail to be able quickly to establish whether an appellant has standing. Where an appellant is claiming to be

²⁷ Rule 6.1.

²⁸ Rule 6.3.

²⁹ Section 23B(2) of the Gas Act 1986, section 11C(2) of the Electricity Act 1989, Article 14B(2) of the Electricity (Northern Ireland) Order 1992 and Article 14B(2) of the Gas (Northern Ireland) Order 1996.

³⁰ Section 23B(4) of the Gas Act 1986, section 11C(4) of the Electricity Act 1989, Article 14B(4) of the Electricity (Northern Ireland) Order 1992 and Article 14B(4) of the Gas (Northern Ireland) Order 1996.

materially affected it should clearly and concisely set out the interest that is affected and how it is affected. Where an appellant is a body or association representing materially affected licence holders it should clearly evidence that the body or association has the authority to represent these licence holders.

- 3.34 The CMA may grant permission subject to conditions, which include conditions designed to expedite the consideration of the appeal, limit the matters to be considered on appeal and/or consider the appeal together with other appeals.³¹ Where the CMA is considering granting permission to appeal subject to conditions, it may inform the parties to the appeals and may invite them to make representations.
- 3.35 Although the CMA may allow the filing of further submissions and evidence either informally or by issuing a direction under Rule 14, the CMA will not allow this Rule to be used to circumvent the time limit by which a notice of appeal must be submitted.
- 3.36 The CMA considers that the scope of the permission stage is intended to be limited. The basis for granting or refusing permission to appeal is set out in the Acts³² and the time frame to determine permission to bring an appeal is strict. The CMA would therefore normally expect to deal with this stage without the involvement of interested third parties (including any relevant licence holders who have not applied for permission to appeal). However, Rule 6.3 does allow for a hearing, and notice to parties to the appeal and other persons where the CMA considers it appropriate.³³

Suspension of the Authority's decision

- 3.37 The Schedule allows the CMA, upon the appellant's application, to suspend the Authority's decision where the relevant licence holder, the licence holder or consumers whose interests are materially affected (as the case may be) would incur significant costs if the decision were to have effect before the determination of the appeal and the balance of convenience³⁴ does not otherwise require effect to be given to the decision pending that

³¹ Paragraph 1(11) of the Schedule.

³² Section 23B(4) of the Gas Act 1986, section 11C(4) of the Electricity Act 1989, Article 14B(4) of the Electricity (Northern Ireland) Order 1992 and Article 14B(4) of the Gas (Northern Ireland) Order 1996.

³³ The CMA does not expect the Authority's representations or observations on the application for permission to bring an appeal to be available to participants (other than the appellant – see paragraph 3(5) of the Schedule) prior to making its decision on the application. However, the CMA may publish a non-sensitive version of the Authority's representations or observations on its website (see Rule 12).

³⁴ In applying this test the CMA will consider the risk of damage to the licence holder, relevant licence holder (where they are not the appellant) and other materially affected persons if the decision were to be suspended.

determination.³⁵ Having regard to these factors, in order to make a direction suspending the Authority's decision, the CMA will require evidence from the appellant of the costs involved if the licence modification is not suspended and will consider whether such costs are likely to outweigh the public benefit of allowing the licence modification in question to operate, pending the determination of the appeal. The CMA will also take into account whether there may be an opportunity for appropriate adjustments to be made to the relevant licence condition, if any part of the appeal is successful.

- 3.38 An application to suspend the decision must be made at the same time as making the application for permission to appeal (ie it should be submitted as part of the notice of appeal to the CMA).³⁶ At the same time as sending the application for suspension to the CMA, the appellant must send a copy of this application to the Authority³⁷ and a non-sensitive version of the application to any relevant licence holders.³⁸
- 3.39 Rule 7 sets out the requirements for making applications for suspension and the process that the CMA will follow in considering the application. Subject to Rule 7, the CMA expects that the procedure for suspension applications will depend upon the nature of the issues to be considered and the CMA will set this out on a case-by-case basis.
- 3.40 In making an application for the suspension of the Authority's decision, the appellant should clearly set out why it believes that it would incur significant costs if the decision were to have effect before the determination of the appeal and why the balance of convenience favours the suspension of the decision.
- 3.41 Once the Authority has received a copy of the application for suspension, it has ten working days, beginning with the first working day after the day on which it receives the application, to make any submissions to the CMA about this application.³⁹ Any relevant licence holders must send any submissions in relation to suspension of the Authority's decision to the CMA within five working days, beginning with the first working day after the day on which it receives the notification of the application for suspension and must also send them at the same time to the Authority and the applicant for suspension.⁴⁰ Where the Authority does make submissions, the CMA then has ten working

³⁵ Paragraph 2(2) of the Schedule.

³⁶ Paragraph 2(2)(a) of the Schedule.

³⁷ Paragraph 2(4) of the Schedule.

³⁸ Rule 7.6.

³⁹ Paragraph 3(2) of the Schedule.

⁴⁰ See Rule 7.9.

days, beginning with the first working day after the day it receives the Authority's submissions, to take its decision.⁴¹ If the Authority does not make submissions, the CMA has 14 working days, beginning with the first working day after the day it receives the application for suspension, to take its decision.⁴²

- 3.42 The CMA may consider an application for suspension of the Authority's decision under appeal with or without a hearing. It will decide whether to hold any such hearing depending on the nature of the applications and whether it appears to the CMA that such a hearing is necessary. So far as possible and necessary any suspension hearing will be held at the same time as any hearing about whether to grant permission to appeal. Where the CMA decides to hold a hearing in relation to the suspension application, it will notify the appellant, the Authority, any relevant licence holders and any other person the CMA considers appropriate.⁴³ The CMA may also request additional information or representations from the appellant or Authority, copies of which may be sent to the appellant or Authority (as applicable) or such other persons as the CMA considers appropriate (subject to any confidentiality claims made by the appellant or the Authority at the time of submission).

4. Particular issues in appeals

Commencing an appeal

- 4.1 Appellants apply for permission to bring an appeal by sending a notice of appeal in accordance with paragraph 1 of the Schedule and with Rule 5.
- 4.2 To assist the appellant in complying with Rule 5.6 (sending a non-sensitive notice to any relevant licence holders), the CMA expects the Authority to append a list of the relevant licence holders to its decision. If necessary, if this list has not been provided, the appellant should contact the Authority.
- 4.3 The main submission required under Rule 5.2(a) should be set out in consecutively numbered paragraphs and be paginated. It should include cross-references to the relevant parts of the Authority's decision, the grounds of appeal and should highlight the significance of supporting documentation included in the bundle required under Rule 5.2(b) to particular grounds of appeal.

⁴¹ Paragraph 2(3)(a) of the Schedule.

⁴² Paragraph 2(3)(b) of the Schedule.

⁴³ See Rule 7.11.

- 4.4 Unless notified otherwise by the CMA, documents must be sent to the CMA by email. The CMA may request hard copies if it considers it necessary based on the circumstances of the case.⁴⁴
- 4.5 The CMA has no power to extend the period of time within which a notice of appeal must be submitted.

The Authority's representations or observations

- 4.6 If the Authority wishes to make representations or observations on whether permission to appeal should be granted, on an application for suspension of its decision or in relation to the reasons for its decision and/or any of the grounds of appeal, it must submit those representations or observations under the relevant Rule.⁴⁵ The Authority must send a copy of any such representations or observations to the appellant within the deadline for the Authority to make the submission to the CMA under the relevant Rule.⁴⁶
- 4.7 Where the CMA has granted permission to appeal, the Authority may send a response to the CMA setting out its representations or observations about its reasons for the decision against which the appeal is being brought and/or any grounds of appeal on which that appeal is being brought against that decision. The Authority has 15 working days beginning with the first working day after the day on which permission to bring the appeal was granted to make such representations or observations.⁴⁷ The Authority's representations or observations should contain a statement identifying the facts and reasons why it believes the appeal should not succeed and/or why it believes the relief sought should not be allowed and include any evidence in the form of witness statements, expert reports or documents it wishes to adduce in support of its statement. Where the Authority wishes to rely on interlinkages with other parts of its decision, it should include a description of these interlinkages in its statement.
- 4.8 The Authority should also at the same time provide a non-sensitive version of the statement in response, both to the appellant and to the CMA. A non-

⁴⁴ Where the CMA has requested hard copies, it will, by prior arrangement, accept delivery of documents at any time up to midnight on the last day on which delivery can be made. Appellants that need to deliver documents to the CMA outside normal office hours (after 6pm or before 8.30am) should liaise with the CMA in advance to ensure delivery.

⁴⁵ Rule 6.2 in respect of permission to appeal, Rule 7.8 in respect of suspension applications and Rule 9.1 in respect of its reasons for its decision and/or in respect of any of the grounds of appeal.

⁴⁶ Paragraph 3(5) of the Schedule.

⁴⁷ Paragraph 3(4) of the Schedule.

sensitive version of any witness statements, expert reports or documents adduced in support of that statement should follow as soon as reasonably practicable but at the very latest by the end of the second working day following the date on which the sensitive versions were submitted to the CMA (unless the CMA agrees to an extended deadline where necessary based on the circumstances of the case).⁴⁸ The CMA will publish on its website a non-sensitive version of the statement filed in response under Rule 9.2(a) as soon as reasonably practicable following receipt.

Withdrawal of appeals and summary determinations allowing an appeal

- 4.9 Where the CMA grants permission to an appellant to withdraw its appeal, pursuant to an application made under Rule 8.1, it will make the appropriate determination, having regard to all the circumstances. It will make an order for its own costs that reflects the nature of the determination, in accordance with Rule 20.1 and paragraph 12 of the Schedule.⁴⁹ The CMA in such circumstances may also make an order for payment of inter partes costs under Rule 20.3, having regard to the factors set out in Rule 20.5.⁵⁰
- 4.10 Where the CMA makes a summary determination allowing the appeal, pursuant to an application under Rule 8.2, it will make an order against the Authority requiring the payment to the CMA of the costs incurred by the CMA in connection with the appeal.⁵¹ In such circumstances, the CMA may also require the Authority to pay the costs that the appellant has reasonably incurred in connection with the appeal.⁵²
- 4.11 Any costs of the CMA relating to a withdrawn application for suspension of the Authority's decision will be taken into account when, having determined the appeal, the CMA makes an order for recovery of its own costs incurred in connection with the appeal. The CMA may require the appellant to pay the Authority's costs reasonably incurred in connection with a withdrawn application for suspension, even where the appeal is successful.
- 4.12 All such orders for costs will be made in accordance with the process set out in Rule 20. Paragraph 6 below discusses orders for costs in more detail.

⁴⁸ Rule 9.4.

⁴⁹ See paragraph 12(1) and 12(2) of the Schedule.

⁵⁰ See paragraph 12(3) of the Schedule.

⁵¹ See footnote 49 above.

⁵² See footnote 50 above.

Interveners and other third party involvement

- 4.13 Although the Acts do not set up a formal framework for intervention in appeals, the CMA recognises that certain third parties should be granted permission to intervene in an appeal. Interveners typically play a greater role than other third parties in an appeal. For instance, interveners may be permitted to:
- (a) attend hearings at the CMA's discretion; and
 - (b) comment on any provisional determination, in relation to the grounds on which permission to intervene has been granted.
- 4.14 Rule 10 sets out the requirements for seeking permission to intervene in an appeal.
- 4.15 In considering whether to grant permission to intervene under Rule 10.2, the CMA will take account of all the circumstances, including:
- (a) whether the applicant is materially interested in the outcome of the appeal;
 - (b) whether the applicant's intervention in the appeal will assist the CMA to determine the appeal; and
 - (c) whether granting permission to intervene would be proportionate in the circumstances.
- 4.16 The CMA will normally regard as being materially interested in the outcome of the appeal any person, qualifying body or association, or consumer body who could themselves have appealed to the CMA against the appealed decision but who is not an appellant against that decision. With regard to other persons, the CMA will have regard to whether the outcome of the appeal will have a direct and material impact on that person (or in the case of a representative organisation, those whom the organisation represents). For example, the CMA is unlikely to regard persons or organisations in Great Britain who lack a direct interest in the energy sector in Northern Ireland as being materially interested in the outcome of an appeal involving licences in Northern Ireland, and vice versa.
- 4.17 The CMA would not regard interventions duplicative of the arguments of the parties to the appeal or an intervener as assisting it to determine the appeal. On the other hand, the CMA may regard as being of assistance in its determination of the appeal an intervention that adds something material over and above the arguments or evidence already submitted by the parties to the

appeal or by other interveners. The CMA would also 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.⁵³ The CMA is likely to take a similar view where permitting an intervention risks creating a proliferation of documents or evidence or otherwise risks having an adverse effect on the CMA's ability to determine the appeal in accordance with the overriding objective (see Rule 4.1).

- 4.18 When considering whether granting permission to appeal would be proportionate, the CMA may take into consideration any relevant matter, including the scope of the intervention in terms of grounds of appeal covered and arguments raised, the value of the licensee's business to which the licence modification relates, as well as the potential added cost to the parties and the CMA of dealing with such intervention(s). The CMA may also consider whether an alternative means of third party involvement is more appropriate in the circumstances, such as requesting an applicant to re-submit its evidence under Rule 14.4(e). The CMA may, on the basis of proportionality concerns, also elect to limit an intervention to particular grounds of appeal.
- 4.19 The application should indicate the degree of involvement in the appeal that the applicant would wish to have, if it was granted permission to intervene, such as whether it would wish to have no further involvement beyond the submissions made in its application or whether it would wish to attend hearings and to make its own oral representations to the CMA.
- 4.20 Any person considering whether to make an application for leave to intervene will assist the CMA by advising it at the earliest opportunity that it is considering whether to do so. The CMA encourages persons who are minded to support one party to liaise with that party (and with each other, as the case may be) in order to reduce cost, delay and duplication as far as possible.
- 4.21 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 support) to reduce duplication, or that they file joint submissions.

⁵³ Section 23D(3) of the Gas Act 1986, section 11E(3) of the Electricity Act 1989, Article 14D(3) of the Electricity (Northern Ireland) Order 1992 and Article 14D(3) of the Gas (Northern Ireland) Order 1996.

- 4.22 In addition to the above, the CMA at any time may of its own motion invite representations from any person whom it appears to the CMA may be affected by the outcome of the appeal pursuant to Rule 14.4(e).

Written submissions and other documentation

- 4.23 The CMA expects participants 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, whether by formal directions under Rule 14 or through informal means. If participants consider that there are good reasons why it is appropriate to make submissions or provide supplementary evidence later in the appeal, they can apply for directions under Rule 14 to make such submissions or provide such supplementary evidence. The application should include an explanation as to why it is appropriate for them to make the submissions or provide supplementary evidence and why it was not possible to do so earlier in the appeal process.
- 4.24 Participants should not submit supplementary submissions or provide supplementary evidence without a request or direction from the CMA to do so. The CMA reserves the right to reject unsolicited submissions. Parties are reminded that the conduct of the parties is taken into account for the purposes of cost orders under Rule 20.
- 4.25 Participants must also comply with any page limits set by the CMA in relation to written submissions.
- 4.26 The CMA expects the parties to provide it with a coherent and readily comprehensible explanation of the technical issues relevant to the appeal. As part of this explanation, the CMA should, if necessary, be provided with a glossary of technical terms. The purpose of the glossary of technical terms is to provide the CMA and the parties with a single reference point. As a result, in addition to any glossary that the parties choose to include in their submissions, the CMA will expect them to agree a glossary between them shortly after permission to appeal is granted, and should as far as possible be consistent with the usage of technical terms by the Authority and others prior to the Authority's decision. Where there is a disagreement between the parties to the appeal about the use of a term, that disagreement should be stated and the competing understandings set out concisely.
- 4.27 The CMA will also find it helpful to see a chronology of the modification proposal from its inception to the Authority's decision. The purpose of the chronology is to provide the CMA and the participants with a single reference

point from which to understand the development of the licence modification proposal up to the point at which the Authority published its decision. The chronology should be uncontroversial and should be agreed if possible. Where there is disagreement between the parties to the appeal about an event or description of it, that disagreement should be stated and the competing versions set out concisely.

- 4.28 Where participants seek to rely on and attach supporting documentation at any stage of the appeal, participants should take care to explain clearly the relevance of the document, including pointing the CMA to relevant extracts of the document that relate to specific grounds of appeal or arguments advanced. The CMA reserves the right to disregard lengthy supporting documents submitted with no explanation given or where the participants have not cited specific references in their submissions. Participants should attach documents or extracts of documents to the relevant submission and should not only provide internet links to the relevant content.

Appeal management

- 4.29 All appeals will be subject to active appeal management by the CMA. The CMA does not require the parties to be legally represented at the appeal management conferences and hearings. The CMA does, however, want focused arguments from the participants.

Considering appeals together

- 4.30 The Acts provide that the CMA may grant permission to bring an appeal subject to conditions which may include conditions requiring that the appeal be considered together with other appeals.⁵⁴ The Rules include provision for directions being made by the CMA relating to considering appeals or parts of appeals together.
- 4.31 Individual appellants and the Authority will be invited to make representations before the CMA makes any decision to consider appeals together in whole or in part. Once appeals are consolidated in whole or in part, the CMA will work with the parties on administrative matters needed to ensure the appeals considered together proceed in accordance with the overriding objective in Rule 4. The CMA will aim to make clear early in the appeal process the process it intends to follow to facilitate considering appeals together, taking into account the specific circumstances of the case.

⁵⁴ Paragraph 1(11)(c) of the Schedule.

- 4.32 This process may include measures such as confidentiality rings and encouraging joint representations or responses to questions on particular issues by joined appellants where this is appropriate and proportionate in the circumstances. It may in some circumstances also be appropriate for the parties to appoint a primary spokesperson.
- 4.33 The CMA may also take appropriate measures to facilitate joint hearings and may require parties to make joint submissions in respect of particular grounds of appeal, where it is appropriate to do so. The CMA will take into account confidentiality concerns between joined parties to appeals when making these arrangements (for instance, by limiting attendance to parties' professional advisers where necessary). Notwithstanding this, the CMA will consider whether it is appropriate to hear an appellant individually in addition to joint hearings. The CMA will decide on this based on the circumstances of the case and in accordance with the overriding objective.
- 4.34 The CMA will typically produce one final decision in relation to appeals dealt with together, or, in the case of appeals considered together only in part, one final decision in relation to the parts of the respective appeals considered together. Where circumstances justify a different approach, the CMA will produce separate decisions even where appeals are consolidated in whole or in part.

Witness statements and expert reports

- 4.35 A witness statement or expert report must be verified by a statement of truth,⁵⁵ signed by the witness or expert.⁵⁶
- 4.36 Witness statements and expert reports should:
- (a) be headed with the title of the appeal;
 - (b) be clearly marked at the top right-hand corner with the name of the party on whose behalf the witness statement or expert report is made, the initials and surname of the witness or expert, the number of the statement

⁵⁵ Paragraph 13(1) of the Schedule provides that a 'statement of truth' in relation to the production of a statement or provision of information by a person, means a statement that the person believes the facts stated in the statement or information to be true. In the case of expert evidence, the expert may wish to supplement this basic statement along the lines of the standard statement of truth for experts included in CPR Practice Direction 35, paragraph 3.3 to cover the opinion element of their report. The CMA is content with this approach provided that the statement includes at some point a confirmation of the expert's belief in the truthfulness of factual statements made by the expert in their report.

⁵⁶ The CMA will accept electronic signatures in witness statements and statements of truth and in all other situations where signatures are envisaged under the Rules or in this Guide.

or report in relation to that witness or expert, the identifying initials and number of each exhibit referred to and the date the statement or report was made;

- (c) state the full name of the witness or expert;
- (d) state their place of residence or, if the statement or report is made in a professional, business or other occupational capacity, the address at which they work and the position held and the name of the firm or employer;
- (e) state the occupation of the witness or expert (and, in the case of experts, state the expert's qualifications);
- (f) state the relationship of the witness or expert to the party on whose behalf the evidence is given; and
- (g) be in numbered paragraphs and paginated.

- 4.37 In a witness statement or expert report, the witness or expert must indicate which of the statements are made from their own knowledge and which are matters of information or belief. In relation to matters of information or belief, the witness or expert should state the source of that information or belief (including, in the case of experts, details of any literature or other material relied on in making the report).
- 4.38 In the case of experts, where there is a range of opinion on a matter dealt with in the report, the expert should summarise the range of opinion and give reasons for their own opinion. The expert should also detail any qualifications to which their opinions are subject.
- 4.39 A witness statement or expert report should be as concise as the circumstances allow and should only contain content that is relevant to appellant's grounds of appeal. It should not contain long quotations from documents. Documents used in conjunction with a witness statement or expert report should be verified and identified by the witness or expert and placed in an exhibit separate from the witness statement or expert report. The location of the document in the exhibit should be set out in the witness statement or expert report.
- 4.40 Where the witness or expert refers in a witness statement to correspondence, the letters should be collected together and exhibited in chronological order with the earliest at the top.

- 4.41 Where an exhibit contains more than one document, the front page should list the documents contained in the exhibit and should give the date of each document. The exhibit should be paginated.

Hearings

- 4.42 The CMA will not normally conduct hearings in public. The CMA will consider whether hearings should be held in person, virtually or on a hybrid basis in accordance with the overriding objective in Rule 4.
- 4.43 The CMA may conduct separate hearings with the appellant and the Authority which the appellant or Authority (as applicable), as well as any interveners, may attend as observers.
- 4.44 In order to obtain clarification on aspects of the parties' appeals, the CMA may hold clarification hearings in advance of the main hearing or may request written clarifications (whether in response to CMA working papers or otherwise), as appropriate to further the overriding objective in Rule 4. These hearings and/or written clarifications are primarily designed to allow the Group⁵⁷ to ask questions about a case. The CMA may decide to use these hearings and/or written clarifications to focus on narrow areas of appeals that require clarifications.
- 4.45 Interveners may request a hearing. The CMA will consider any such request and the reasons for the request and decide whether to invite the intervener to a stand-alone hearing or to all or part of any hearing with the appellant and the Authority. The CMA may of its own initiative invite interveners to attend any hearing.
- 4.46 Hearings will normally be held with the Group, although CMA staff will also participate. The CMA will determine the appropriate structure and substance to be covered in the hearings. Subject to the CMA's direction on the topics to be covered, the hearings are an opportunity for the parties to make oral submissions to the Group and members of the CMA staff advising them. However, they are also an opportunity for the Group to ask such questions as it considers necessary in order to make the necessary findings in its determination. Although the Acts and the Rules make provision for cross-examination, the CMA expects that this provision will be used very rarely.

⁵⁷ This is a group of the CMA's members, formed for the purpose of carrying out the CMA's functions. See paragraph 4 of the Schedule.

- 4.47 Hearings are formal and will normally be led by the chair of the Group or by such other member of the CMA as appropriate.
- 4.48 Participants will normally be directed before the hearing as to the matters on which the CMA wishes to hear submissions and the length of time they will be allowed to make submissions. The CMA will indicate the order in which it wishes to hear the participants. Participants may be represented by more than one person and the CMA will be sympathetic to such arrangements to facilitate the clear presentation of technical issues and ensure that the person with the requisite level of expertise and knowledge is available to answer the Group's questions. At hearings, participants may present their submissions using, for example, a PowerPoint presentation, if they consider that would assist the CMA. Participants who wish to employ technology during their submissions should make prior arrangements with the CMA. An electronic copy of any presentation or exhibits used by the parties must be provided to the CMA.
- 4.49 Verbatim transcripts are taken of hearings. Transcripts will be sent to the relevant party after the hearing to check its accuracy and to enable the party to identify any sensitive material. The CMA may request the relevant party to verify by a statement of truth the transcript of the statements made by it (or on its behalf) at the hearing. The CMA may share a non-sensitive version of the transcript with such other persons as it considers appropriate based on the circumstances of the case.

Staff meetings

- 4.50 The CMA may conduct meetings or make phone calls to clarify specific facts; for example, CMA staff may hold meetings with the Authority or other participants to discuss issues concerning any economic models relevant to the appeal. A transcript or note will normally be taken but where practical other participants may be invited to send observers.

Confidentiality and Freedom of Information

- 4.51 The Acts make provision for the exclusion from the published version of the CMA determination of:
- (a) commercial information, the disclosure of which would, or might in the CMA's opinion, significantly harm the legitimate business interests of an undertaking to which it relates; or

- (b) information relating to the private affairs of an individual, the disclosure of which would, or might in the CMA's opinion, significantly harm the individual's interests.
- 4.52 Provision for the protection of sensitive information (as defined in the Rules) is also included in the Rules (see, for example, Rule 11).
- 4.53 Participants' attention is also drawn to section 105 of the Utilities Act 2000 which contains general restrictions on the disclosure by the CMA of certain information obtained under or by virtue of the provisions of the relevant parts of the Electricity Act 1989 and the Gas Act 1986 which relate to the affairs of any individual or to any particular business. Section 105 makes certain exceptions to those restrictions, including provision permitting disclosures made with consent of the individual or the person for the time being carrying on the business (section 105(2)) or made for the purpose of facilitating the performance of the functions of the CMA, the Authority or other specified persons (section 105(3)(a) and 105(4) of the Utilities Act 2000). Article 63 of the Energy (Northern Ireland) Order 2003⁵⁸ makes similar provision in relation to information obtained by the CMA under Part II of each of the Electricity (Northern Ireland) Order 1992 and the Gas (Northern Ireland) Order 1996, which includes the CMA's regulatory appeals function under those orders.
- 4.54 The CMA considers that in most cases, section 105 of the Utilities Act 2000 or Article 63 of the Energy (Northern Ireland) Order 2003, as the case may be, will enable the CMA to disclose to the parties or potential parties to the appeal any submissions received from another party in the proceedings, subject to any redactions it considers appropriate to safeguard any confidentiality concerns.
- 4.55 Where non-sensitive versions of submissions and evidence are submitted to the CMA, the party filing the information is taken to have consented to the disclosure of that non-sensitive version. When submitting non-sensitive versions of documents, a version that highlights confidential information should always be provided. Where a document will be published, a version with the confidential information redacted should also be provided.
- 4.56 Where it can do so while protecting confidentiality, in order to secure fairness and assist it to perform its functions effectively, the CMA may disclose relevant material provided by or to participants, other than communications of

⁵⁸ SI 2003/419 (NI 6).

a purely administrative nature, and transcripts of hearings to other participants.

- 4.57 The CMA may propose that disclosure of certain information should be made solely within a 'confidentiality ring', normally comprising the participants' named legal representatives and, possibly, other external advisers or experts such as accountants and economists, subject to appropriate confidentiality undertakings, rather than to the participants themselves. The CMA will seek views from the participants as to whether a confidentiality ring is necessary. Where some grounds of appeal have been joined, it may be appropriate to establish multiple confidentiality rings.
- 4.58 Exceptionally, claims may be made that certain information is of such sensitivity that it should not be disclosed within the confidentiality ring.
- 4.59 Rule 14 sets out a non-exhaustive list of matters upon which the CMA can give directions. Under this rule the CMA can give directions about the handling of sensitive information. If a participant has concerns about providing sensitive information to another participant, it can provide the proposed version of the document to the CMA and ask it to provide directions on the proposed excisions (Rule 11). The CMA respects the importance of protecting sensitive information. However, it also discourages participants from making excessive or blanket confidentiality claims over submissions and may consider them to be inconsistent with the overriding objective.
- 4.60 The CMA may receive requests from third parties for information which it holds in connection with appeals. The CMA notes that by virtue of paragraph 1ZA of Schedule 1 to the Freedom of Information Act 2000, the general right of access to information held by a public authority does not extend to information held by the CMA as a tribunal.

5. Provisional determination

- 5.1 The CMA will normally issue a provisional determination stating its provisional conclusions which will be notified to the parties to the appeal, as well as to any interveners. However, there may be cases where the CMA considers that it is not appropriate to issue a provisional determination. In such cases, the CMA will determine what alternative procedure is appropriate based on the circumstances of the case and in accordance with the overriding objective. The purpose of a provisional determination is to allow parties to comment on the CMA's reasoning and accuracy of arguments. It may also establish a context for any necessary consideration of remedies.

- 5.2 If issued, the provisional determination will be notified to the parties, as well as to any interveners. The CMA does not generally expect to publish its provisional determination and, where it does, it will consider the extent to which any information contained within it will remain subject to the controls in section 105 of the Utilities Act 2000 or Article 63 of the Energy (Northern Ireland) Order 2003, as the case may be. Parties are also reminded that the contents of the provisional determination may be price-sensitive information whose disclosure is prohibited under the Criminal Justice Act 1993 or relevant Financial Conduct Authority Rules.
- 5.3 The CMA may publish a summary of the provisional determination where considered appropriate based on the circumstances of the case.

6. Costs

The CMA's costs

- 6.1 Under the Acts, the CMA is required to make an order requiring the payment of its own costs incurred in connection with the appeal.⁵⁹ Such an order must require those costs to be paid:
- (a) where the appeal is allowed in full, by the Authority;
 - (b) where the appeal is dismissed in full, by the appellant; or
 - (c) where the appeal is partially allowed, by one or more parties in such proportions as the CMA considers appropriate in all the circumstances.
- 6.2 When considering the appropriate proportions of the CMA's costs to be paid by one or more of the parties where an appeal is partially allowed, the CMA will ordinarily follow the principle that costs follow the outcome of the appeal. This means that the Authority should normally pay the proportion of the CMA's costs incurred in connection with any appeal grounds allowed, and that the appellant should normally pay the proportion of the CMA's costs incurred in connection with the dismissed appeal grounds. The CMA will, however, also consider whether for each ground there are any good reasons to depart from this approach. The CMA might, for example, consider that good reasons exist for these purposes where a relevant ground of appeal is dismissed, but the CMA considers the ground of appeal was reasonably made in view of a relevant error made by the Authority in its decision and that error had a material impact on the time and expense of the CMA in addressing the ground

⁵⁹ Paragraph 12(1) of the Schedule.

of appeal to which it relates. In such a situation, the CMA might consider it appropriate for the Authority to pay the proportion of the CMA's costs incurred in connection with the relevant ground of appeal, notwithstanding that the ground of appeal was dismissed. This is likely to depend upon the magnitude of the error and whether the Authority had a reasonable opportunity to correct it prior to making its decision and whether the appellant could have reasonably raised the error with the Authority prior to initiating an appeal.

- 6.3 Before making any order for payment of its own costs, the CMA will provide the parties with a provisional determination on the CMA's costs and a draft of the costs order and give them a reasonable opportunity to make representations on each.

Inter partes costs

- 6.4 The CMA has discretion to make an order requiring a party to the appeal (appellant or the Authority) to make payments to another party in respect of costs reasonably incurred by the other party in connection with the appeal.⁶⁰ The CMA may have regard to all the circumstances, including (as set out in Rule 20.5) the conduct of the parties, a party's degree of success and the reasonableness and proportionality of the costs claimed.⁶¹ In addition, the CMA considers that the principles as set out in *BT v Ofcom*⁶² apply where a regulator is carrying out its regulatory functions and that this is relevant in considering what costs order, if any, to make in relation to inter partes costs noting that an inter partes order is discretionary. Those principles are taken from the *Booth* line of judgments endorsed in both *BT v Ofcom* and *Flynn Pharma*, described at paragraph 97 of *Flynn Pharma* and set out at paragraph 29 of *BT v Ofcom* extracting the statement by Bingham LJ in *Bradford MDC v Booth*.⁶³ The CMA does not have the power to order costs against or for interveners.
- 6.5 Before making any order for costs under Rule 20.3, the CMA will provide the parties with a provisional determination on costs and a draft of the costs order and give them a reasonable opportunity to make representations on each.
- 6.6 Where the CMA makes an order for costs in favour of one or more of the parties to the appeal under Rule 20.3, the costs recoverable may include all those fees, charges, disbursements, expenses and remuneration incurred by

⁶⁰ Paragraph 12(3) of the Schedule.

⁶¹ The proportionality of the costs claimed will be assessed having regard to the matters in issue.

⁶² *British Telecommunications plc v Office of Communications* [2018] EWCA Civ 2542.

⁶³ *Bradford MDC v Booth* [2000] 164 JP 485.

a party in the preparation and conduct of the appeal. However, the CMA will not normally allow any amount in respect of costs incurred before the Authority first published its decision.

- 6.7 Any party to the appeal seeking an award of costs in its favour should file a statement of costs when invited by the CMA, which should be disclosed to any party to the appeal who may become liable to pay those costs.
- 6.8 Each statement of costs should include detailed information about the costs (including categories such as solicitors' costs, counsel fees, experts' costs and any other disbursements) reasonably incurred by the party to the appeal in connection with the appeal. The CMA will normally expect the amounts for each category of costs to be broken down by reference to the number of hours claimed, hourly rate, position of the fee earner and the nature of the work performed.
- 6.9 Each statement of costs should be signed by the party to the appeal or, where applicable, its legal representative.
- 6.10 The CMA will normally publish non-confidential versions of any final determination on both the CMA's costs and inter partes costs on its website.