

Firmus Energy (Distribution) Limited v The Northern Ireland Authority for Utility Regulation: decision on permission to appeal

1. Under cover of a Notice of Appeal received by the Competition and Markets Authority (CMA) on 25 November 2016, Firmus Energy sought permission to bring an appeal under Article 14B(1) and (3) of The Gas (Northern Ireland) Order 1996 (as amended by The Gas and Electricity Licence Modification and Appeals Regulations (Northern Ireland) 2015) (the Order) against the decision of the Northern Ireland Authority for Utility Regulation (NIAUR) to modify the gas distribution licence of Firmus Energy ('the Decision') as one of the Northern Ireland gas distribution network operators (GDNs) to give effect to the GD17 price control determination.

Requirement for permission to appeal

2. Under Article 14B(3) of the Order, the CMA's permission is required before such an appeal may be brought.
3. I make this decision on permission to appeal in my capacity as an authorised member of the CMA (see Schedule 3A(1)(8) of the Order).
4. In making this decision I have had regard to Firmus Energy's Notice of Appeal, as well as to the submissions in response made by NIAUR on 12 December 2016, and to a further letter of 16 December 2016 from Firmus's solicitors, Freshfields Bruckhaus Deringer LLP.

Decision on permission

5. Firmus Energy's Notice of Appeal was received by the CMA within the period prescribed by Article 1(3) of Schedule 3A to the Order.
6. Under Article 14B(4) of the Order, the CMA may refuse permission to bring an appeal only on one of a number of specified grounds. The potentially relevant grounds in the present case are as follows:
 - (a) In relation to an appeal brought by a person falling within Article 14B(2)(b) of the Order, that the interests of the person are not materially affected by the decision.

- (b) In relation to any appeal, (i) that the appeal is brought for reasons that are trivial or vexatious, or (ii) that the appeal has no reasonable prospects of success.
7. Firmus Energy is one of the GDNs directly affected by the Decision, and therefore I am satisfied that the interests of Firmus Energy are materially affected by the decision.
 8. As to (b) (i), Firmus Energy's appeal states clearly the rationale for its grounds of appeal and I am satisfied that these are genuine disagreements as to the approach taken in the Decision. I therefore consider that Firmus Energy's appeal is not brought for reasons that are trivial or vexatious.
 9. As to (b) (ii), NIAUR has made submissions that the grounds of appeal have no reasonable prospect of success in generality, for example where they fail to take account of other interconnected findings in the price control,¹ or where they are not material on their own.² At this permission stage however I am not able to conclude that any of the specific grounds identified by Firmus Energy have no reasonable prospect of success for the reasons identified by NIAUR as general points. These issues will be determined as part of the appeal.
 10. NIAUR has submitted specific reasons that grounds 1A, 1C, 2 and 4 have no realistic prospect of success.
 11. I have reviewed the submissions made by NIAUR. I have concluded that Firmus should be granted permission to appeal on all grounds for the following reasons:
 - (a) Ground 1A: In its Notice of Appeal, Firmus Energy's challenge to NIAUR's benchmarking within Ground 1A states that there were errors in both the top down and bottom up assessments, and that NIAUR failed to identify the errors alleged within Grounds 1B to 1E in the bottom up assessment in part because it used an inappropriate benchmark by way of a sense check.³ I note that the inter-relationship between Ground 1A and the remainder of Ground 1 will need to be considered in dealing with Ground 1A. However, on the basis that it is to be considered alongside Grounds 1B to 1E, I do not find that that ground 1A has no reasonable prospect of success at this stage.
 - (b) Ground 1C: I do not consider that the prospect that the GIS issue will be addressed through the uncertainty mechanism means that this argument

¹ Paragraph 13 to 15 of NIAUR's submissions

² Paragraph 16 to 19 of NIAUR's submissions

³ Notice of Appeal, paragraph 4.7

has no reasonable prospect of success, and I further note that NIAUR has not yet reached a final view on the application of that mechanism. However, I understand that the issue remains under active consideration by NIAUR. Should the position change during the appeal process, so as to affect the materiality or practical relevance of this ground of appeal, the parties are asked to make the CMA aware of the position as soon as possible.

- (c) Ground 2: I consider that the issues raised by NIAUR, in particular in relation to the suggested connections between the findings challenged and other findings in the decision under appeal, are matters which require consideration as part of the appeal, rather than being sufficient to demonstrate no reasonable prospect of success at this stage.
- (d) Ground 4: I do not consider that Firmus Energy is precluded from raising these matters as part of an appeal. The matters raised in NIAUR's submission may be relevant to a consideration of Ground 4 within the appeal, but are not sufficient to demonstrate that there is no reasonable prospect of success.

12. I accordingly grant permission to Firmus Energy, to bring the appeal set out in its Notice of Appeal, pursuant to Article 1(13) of Schedule 3A to the Order.

Anne Lambert
Chair, CMA Panel
28 December 2016