Lloyds Court
78 Grey Street
Newcastle Upon Tyne
NE1 6AF

The Regulatory Appeals Team
Competition and Markets Authority
Victoria House
37 Southampton Row
London
WC1B 4AD

6 October 2017

Dear Sirs

I write in respect of the Competition and Markets Authority ("CMA") consultation on "draft rules of procedure (the draft Energy Licence Modification Appeals Rules) to be applied in licence modification appeals made to [the Competition and Markets Authority] under any of the Gas Act 1986, the Electricity Act 1989, the Electricity (Northern Ireland) Order 19923 or the Gas (Northern Ireland) Order 1996 (the Acts)."

I am representing the views of Northern Powergrid (Northeast) Limited and Northern Powergrid (Yorkshire) plc (the "Licensees").

We realise this consultation closed on 29 August 2017. But as the CMA chose not to include it in its email alert service, we only stumbled across it on 5 October 2017. In respect of the only two price control appeals brought to date under the Electricity Act 1989, the Licensees were appellants in one and relevant licence holders in the other. We have, therefore, a unique perspective on how the procedures have been operated. And we have an interest in how they will be operated in the future.

We hope the CMA will overlook the lateness of this response and take our views into account before making any changes.

1. Do you have any comments on the draft Energy Licence Modification Appeals Rules and Guide?

The draft Energy Licence Modification Appeals: Competition and Markets Rules (the "Draft Rules") and the draft Energy Licence Modification Appeals: Competition and Markets Guide (the "Draft Guide") essentially codify the manner in which the Northern Powergrid and British Gas appeals were conducted in practice. Subject to the following points, we support that approach.

Relevant Licence Holders

The Draft Rules and the Draft Guide do not strike the right balance between efficient case management and affording relevant licence holders who are not parties to the appeal a fair hearing.

The relevant legislation creates a framework where the Authority takes a decision which may then be appealed against by various third parties. The outcome of such an appeal has a material, direct effect on a relevant licence holder's property rights. There should, therefore, be a presumption that relevant licence holders who are not parties to the appeal will be given the opportunity to make full representations and to take part in all aspects of the appeal.

The Draft Rules and the Draft Guide do not achieve this balance.

A. Rule 6.3 provides that "The CMA may hold a hearing to determine an application for permission to appeal, either of its own motion or on application. Where the CMA decides to hold a permission hearing the CMA will give notice to the parties to the appeal, and may give notice to any relevant licence holder and such other persons as it considers appropriate [emphasis added]".
B. Paragraph 3.26 of the Draft Guide provides that "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 Acts 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 are not parties to the appeal) [emphasis added]".
C. Rule 15.2 provides "the CMA may invite any relevant licence holders and applicants for permission to intervene to the appeal management conferences [emphasis added]".
D. Rule 19.2 provides that "When the CMA issues a provisional determination, it shall notify the parties to the appeal and interveners of that provisional determination on such terms and in such manner as the CMA considers appropriate".

Relevant licence holders are not the same as other potential interveners and relevant licence holders' receipt of submissions and notices, attendance at hearings and ability to make submissions should not be at the CMA's discretion. Relevant licence holders should, for example, be able to make submissions at the permission stage; this is important as it may lead to some appeals not proceeding which may otherwise have done, avoiding the need for unnecessary costs to be incurred at a later stage (costs which a relevant licence holder cannot recover).

Costs

Rule 21.4 provides that:

> *In deciding what order to make under Rule 21.2, the CMA Group will have regard to all the circumstances, including:*
>
> > *(a) the conduct of the parties, including:*
> >
> > > *(i) the extent to which each party has assisted the CMA to meet the overriding objective;*
> > >
> > > *(ii) whether it was reasonable for a party to raise, pursue or contest a particular issue;*
> > >
> > > *(iii) the manner in which a party has pursued its case or a particular aspect of its case;*

> *(b) whether a party has succeeded wholly or in part;*
>
> *(c) the proportionality of the costs claimed; and*
>
> *(d) whether the appeal is brought on behalf and/or for the benefit of consumers* [emphasis added].

We do not understand why (d) has been included. The CMA has neither highlighted this change in its consultation nor provided any rationale for the proposal.

As the CMA notes in paragraph 3.4 of the Draft Guide: "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". The Authority's principal objective is "to protect the interest of existing and future consumers in relation to electricity conveyed by distribution systems or transmission systems."

As the Licensees explained in paragraphs 3.21 of their Notice of Appeal:

> *In the context of price control regulation, the interests of consumers as end users of electricity will be protected by a regulatory settlement that ensures consumers receive a quality of service that meets their preferences (e.g. in relation to the number of supply interruptions), that the price of providing that service reflects the efficient costs (including the cost of capital) of providing that service, and that DNOs are able to recover reasonable revenues that enable them to make the necessary investments to provide the appropriate quality of service to consumers. Making investments is necessary to sustain DNOs' performance over the longer term, to the benefit of consumers.*

Any decision the CMA reaches must meet this test and so consumers are already protected.

If the reference to the "benefit of consumers" in the new limb (d) has the same meaning as it does in the Authority's principal objective, then (d) is redundant. It is already captured in (b) – as in deciding whether or not a party was successful, the CMA necessarily will have already taken into account the interests of consumers.

If, however, the reference to the "benefit of consumers" in the new limb (d) in Rule 21.4 has a different meaning – e.g., it means (i) any appeal for lower prices or (ii) any appeal brought by a consumer body – then this is wholly inappropriate.

Cost orders are an important way of ensuring that the licence modification and appeal process works fairly and efficiently. If the Authority takes a decision that is successfully overturned, it should pay the costs reasonably incurred by the party that had to bring an appeal in order to get an error corrected. If an appellant appeals a decision of the Authority and the original decision is upheld, the appellant should pay the Authority's reasonably incurred costs. Loading the dice on exposure to costs in favour of certain types or appeal or appellant will remove or diminish the discipline that should properly apply to all types of appeal and all types of appellant. If parliament had favoured this peculiarly biased approach then it would have reflected this position in the relevant legislation.

2. **What is your view on the CMA's proposed approach in Rule 10 of the draft Energy Licence Modification Appeals Rules, which is to provide that the CMA may take into account whether a third party is materially interested in the outcome of the appeal, when it is considering whether to allow that person to intervene in an energy licence modification appeal?**

We support the CMA's proposed approach provided it is applied in a manner which recognises that relevant licence holders will always meet the test for intervention and are not merely another category of third party.

Paragraph 4.12 to the draft Guide provides 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 support) to reduce duplication, or that they file joint submissions". The CMA should recognise that relevant licence holders' interests will never be perfectly aligned and that it will rarely be appropriate or practical to insist that they are restricted to a joint submission.

Yours faithfully

Tom France
General Counsel