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Draft CMA Energy Licence Modification Appeals Rules and Guide

SSE plc welcomes the opportunity to respond to the Competition and Market Authority's (CMA) consultation on the updated rules of procedure for Energy Licence Modification Appeals. Our experience gained during the RIIO-ED1 appeals in 2015 allows us to offer an insight on CMA's proposals to modify the appeals process.

We note that the amended Rules and Guide are, broadly, consistent with the 2012 Competition Commission versions¹. Therefore, we have restricted our comments to the material changes proposed. Our comments address:

- Changes to recognise the developments in Northern Ireland from the implementation of the EU Third Energy Package in 2015
- Proposed revisions to the rules governing the role of third parties in licence appeals

Amendments to recognise changes in legislation

For clarity we acknowledge the amendments made to include references to the Electricity (Northern Ireland) Order 1992 and Gas (Northern Ireland) Order 1996. As a technical update to the CMA Rules and Guide we have no concerns.

¹ <https://www.gov.uk/government/publications/energy-licence-modification-appeals-rules>
<https://www.gov.uk/government/publications/energy-licence-modification-appeals-for-participants>

The role of Interveners

SSE plc welcomes the clarity introduced by the proposed amendments to Rule 10. Our experience of the two RIIO-ED1 appeals considered by the CMA in 2015² is that a clear understanding of the scope for intervener participation is necessary and essential for an effective appeals process. During the British Gas Trading Limited appeal we believe that the contribution from all ten of the Distribution Network Operators (DNOs) affected by the appeal was invaluable to the CMA's final determination.

We recognise that the 2015 appeals would have been improved if the role of the interested third party DNOs had been clear from the outset of the process. The amendments contained within the CMA's draft Rules would appear to address some of these issues. We argued during the appeal process, and continue to believe, that energy price controls are naturally interrelated and therefore changes in one licensed area are likely to impact other licensees or price control activities. The proposed amendments to the Rules recognise that licensees that are able to demonstrate a consequential material impact on their business from current appeals can be afforded the opportunity to contribute to the CMA's deliberations.

During the 2015 RIIO-ED1 appeals the evidence provided, collectively by the DNOs and as individual DNO groups, was invaluable in providing the CMA with a wealth of information on which to base its determination. We consider that licensees, while acting as interveners, will naturally be able to provide an additional source of information over and above that which can be presented by the Authority or other third parties. As such we support the introduction of the second test, that an applicant intervention in the appeal will assist the CMA to determine the appeal.

We would encourage the CMA to consider its guidance on the timing of applications to intervene and the subsequent submissions by interveners. As currently drafted (Rules 10.2) applications to intervene are to be made after the CMA has granted permission to appeal. This would suggest that the period during which interveners can submit relevant evidence and arguments may be restricted to the period after the CMA grants permission to intervene. During previous appeals the deadline for submissions by interested third parties was aligned with the Authority's submission timetable, 15 working days after permission has been granted. This would potentially restrict intervener submissions to a 5 day window. This would not appear to be aligned with the second permission test (10.3(b)), to 'assist the CMA to determine the appeal'.

We would encourage the CMA to consider applications for permission to intervene prior to the end of the period during which permission to appeal is being considered. This would

² British Gas Trading Limited and Norther Powergrid, March 2015



permit the CMA access to relevant information from third parties on the merits of the appeal and would be more likely to permit interveners to participate in any appeal management conferences (Rules 15.1).

We are also encouraged that the CMA would wish to be notified of all potential applications for leave to intervene (Guide 4.11). This is an important and practical arrangement which we hope would permit a potential intervener access to the relevant appeal documentation in order to begin the process of preparing its submission.

Other issues

We recognise that this consultation concerns the updates to the Rules and Guide to align with changes in legislation and practical considerations on the role of third parties in appeals. Having participated in the RIIO-ED1 price control appeal determination, we believe there is merit in considering other amendments to the appeals process. We would be happy to discuss these with the CMA at the appropriate time.

Please do not hesitate to contact me if there are any questions arising from this response.

Yours sincerely,

Michael Ferguson
Head of Regulation