

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

29 August 2017

Dear Regulatory Appeals Team,

ENERGY LICENCE MODIFICATION APPEALS RULES AND GUIDE

ScottishPower is pleased to respond to the CMA's consultation on its proposed revisions to the Energy Licence Modification Appeals Rules and Guide.

We have set out our comments on the draft rules and guide in Annex 1 attached. Our key points are:

- There should be acknowledgement in the guide of the special status of licensees whose own licence conditions are the subject of an appeal; there should be a presumption that such licensees have a material interest in the outcome of the appeal and that their intervention will assist the CMA to determine it.
- The rules and guide should specify whether there is a deadline for interveners to make substantive submissions in addition to their application to appeal.
- The rules and guide should provide greater clarity around the nature of an intervener's participation in an appeal (eg about their entitlement to receive copies of correspondence from the CMA to the parties to the appeal).

If you have any questions on our response, please do not hesitate to contact me.

Yours sincerely,

Rupert Steele
Director of Regulation

**ENERGY LICENCE MODIFICATION APPEALS RULES AND GUIDE CONSULTATION –
SCOTTISHPOWER RESPONSE**

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

We broadly welcome the key changes to the CMA's *Energy Licence Modification Appeal Rules and Guide* in relation to third party involvement.

In particular we welcome the recognition that interveners should attend the Appeal Management Conferences (Rule 15.1) and that the CMA has the express right to invite interveners (in addition to parties to the appeal) to make written or oral submissions on aspects of the appeal (Rule 14.4). We also welcome the CMA's recognition in its guidance (para 4.28) that interveners may attend appellant and authority hearings as observers. Of course, confidentiality issues may sometimes affect or limit this.

However, we have a number of suggestions as to possible amendments to the draft rules and guidance.

Timing of substantive submissions by intervener

The draft rules set a deadline for applying for permission to intervene (Rule 10.2), and specify that the application must contain a concise statement identifying the facts and reasons for making the request (Rule 10.4). However, it is unclear from the rules whether a third party intervener needs to make substantive submissions at the time it applies to intervene. If this is required, the rules should more clearly state this. However we would suggest that the deadline for substantive submissions should be later than the deadline for applying, given that the deadline in Rule 10.2 is already extremely tight.

Presumption that directly affected licensees should be allowed to intervene

The draft guide (para 4.10) says the CMA recognises that third parties with a material interest in the outcome should be afforded the opportunity to submit views/respond to the ground of appeal. We suggest that the special position of the licensee whose licence is subject to the appeal is recognised on the basis that such licensees will have a clear interest in the outcome of the appeal. They are most obviously and directly affected by the outcome of the appeal and the appeal could have a direct impact on their revenues/obligations etc.

We would therefore suggest that the guide should acknowledge this special status, and state that there will be a presumption that such licensees have a material interest in the outcome of the appeal and that their intervention will assist the CMA to determine it.

Nature of intervener's participation in appeal

We suggest it is clarified that (subject to confidentiality) interveners will be able to attend, and participate in, hearings. This is in the interests of justice.

The draft guide (para 4.12) says 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. We broadly support this principle, but it should be clarified

that this only applies in so far as interests are aligned and should not prevent interveners from being able to make their own individual submissions.

We suggest it is clarified in the Guide that (subject to confidentiality) interveners should be included in all correspondence from the CMA to the parties to the appeal, other than correspondence in relation to purely administrative detail. Put-backs would normally be private to the party or intervener in question.

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?

As noted above, we agree that the CMA should be able to take into account whether a third party is materially interested in the outcome of the appeal in deciding whether to allow it to intervene. However, in cases where the application is made by the licensee who is directly affected by the licence modification being appealed, we believe there should be a presumption that the material interest and assistance tests (Rule 10.3 (a) and (b)) are satisfied.