

**Norton Rose Fulbright LLP****Response to the Competition and Markets Authority consultation on draft Energy Licence Modification Appeals Rules and Guide****1 Introduction**

- 1.1 Norton Rose Fulbright LLP welcomes the opportunity to respond to the Competition and Markets Authority (**CMA**) consultation on updates to its existing energy licence modification appeal rules (**CC14**) and guide (**CC15**), which apply in licence modification appeals made to the CMA under any of the Gas Act 1986, the Electricity Act 1989, the Electricity (Northern Ireland) Order 1992, or the Gas (Northern Ireland) Order 1996 (the **Acts**).
- 1.2 Overall, we support the CMA's proposal to update the existing rules. We also support retention of the existing flexibility of the regime, which enables the CMA to adopt a pragmatic approach in determining energy licence modification appeals. This is important given the relatively short statutory timeframe (6 months, extendable only by a further month) within which the appointed panel Group is required to determine an appeal.
- 1.3 This response is structured as follows:
- (a) Comments on the new framework for third party interveners;
  - (b) Statutory time limits and interaction with the Rules and Guide;
  - (c) Guidance on applications for suspension of a decision; and
  - (d) General comments on process.
- 1.4 We would be happy to participate in any further consultation or engagement on this subject and are available to provide additional information in relation to these submissions, should this be helpful to the CMA.

**2 Rule 10: new framework for interveners**

- 2.1 The CMA is consulting on amendments to Rule 10, which provide that the CMA may take into account whether a third party is materially interested in the outcome of an appeal when considering whether to allow that person to intervene in an energy licence modification appeal.
- 2.2 Third parties have previously made useful contributions to energy licence modification appeals and we welcome the proposal to provide greater clarity on the applicable framework. However, we would caution against taking an unduly restrictive approach to granting permission to intervene in an ongoing appeal.

**(a) Existing framework**

- 2.3 Rule 10 previously stated that “[w]here the CC has granted permission to appeal, an interested third party may make representations or observations to the CC about the grounds on which the appeal is being brought”.<sup>1</sup> An “interested third party” is currently defined in CC14 as “...any person, qualifying body or association referred to in section 11C(2) of the Electricity Act 1989 or section 23B(2) of the Gas Act 1986...who is not an appellant”.<sup>2</sup>
- 2.4 The Acts refer to the following parties:
- (a) a relevant licence holder;
  - (b) certain licence holders whose interests are materially affected by the decision;
  - (c) qualifying bodies and associations in the capacity of representing those licence holders; and
  - (d) the Consumer Association and the General Consumer Council for Northern Ireland in the capacity of representing consumers whose interests are materially affected by the Authority’s decision.
- 2.5 As noted by the CMA in its consultation paper, the Acts are silent on the framework for third party intervention and/or participation. CC14 and CC15 did not previously set out a requirement that third parties obtain permission before intervening in an appeal.

**(b) Proposed updates to framework**

- 2.6 The CMA’s proposed amendments to Rule 10 would introduce a requirement that interested third parties seek permission to intervene. In considering whether to grant permission, the CMA will take account of all of the circumstances including:<sup>3</sup>
- (a) whether the applicant is materially interested in the outcome of the appeal;
  - (b) whether the applicant’s intervention will assist the CMA; and
  - (c) whether the nature and extent of the intervention sought is proportionate to the matters to be determined.
- 2.7 The first limb of the proposed test does not substantively amend the existing regime. As explained above, CC14 previously defined “interested third parties” by reference to the list set out at paragraph 2.4 above. This definition effectively incorporated a materiality threshold, for example in respect of other licence holders (“certain licence holders whose interests are materially affected

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<sup>1</sup> Rule 10.1, CC14

<sup>2</sup> While not explicitly referenced in CC14, the applicable provisions under the Electricity (Northern Ireland) Order 1992 and the Gas (Northern Ireland) Order 1996 are in each case Article 14B(2).

<sup>3</sup> Rule 10.3, Draft Rules

*by the decision*). In this respect, “materially affected by the decision” would appear to equate to “materially interested in the outcome of the appeal”, although we would suggest the CMA clarify this point if it believes otherwise. The effect of this requirement therefore appears to be to merely formalise what is in CC14 by incorporation in the proposed test for permission to intervene.

- 2.8 Under the newly proposed second limb, the CMA seeks to afford itself broad discretion to determine whether it considers an applicant’s intervention will be of assistance. Given the short time frames for determining such appeals, the CMA may for fear of delaying the timetable be cautious in accepting lengthy third-party submissions that would require detailed consideration by the appointed Group and, in the interests of due process, require opportunity for comment by the main parties to the appeal. It is therefore appropriate that third parties are subject to appropriate page limits and deadlines for submissions. Third parties can, however, provide additional information and clarity where issues are in dispute, in particular when they are themselves the licence holder subject to the price control decision and licence modifications, or the holder of an equivalent licence. The CMA should therefore start from the presumption that the applicant will add value to the process but make a clear distinction on the extent of the opportunity given for involvement, depending on whether the intervener is a relevant licence holder or otherwise.
- 2.9 We are also concerned that the proposed three-limb test could narrow the instances in which interested third parties can intervene in an ongoing appeal. In particular, it is unclear what is meant by “proportionate” in this context – e.g. whether this is to be determined by reference to the applicant’s interest in the outcome of the appeal or to that of the appellant. In this regard, we note that the CMA has proposed updating the overriding objective in respect of energy licence modification appeals<sup>4</sup> to include consideration of proportionate cost – however we submit that, in considering whether to grant permission to a third party to intervene in the appeal, the CMA should not be constrained by costs concerns. Interested third parties may seek to intervene because it is their price control that is the subject of the appeal, or on important considerations of principle or issues whereby the CMA’s decision has wider implications or “knock-on” effects.
- 2.10 Overall, in exercising its power under Rule 10, the CMA should be careful to avoid unduly restricting the ability of interested third parties to intervene but should take an approach that provides for greater involvement for interveners in circumstances where a modification decision in respect of their licence is subject to an appeal by a third party. It would be helpful if the CMA could expand upon the circumstances in which it might decline to grant permission to a third party to intervene.
- 2.11 In addition, it is currently unclear whether interested third parties who wish to submit views and/or respond to the grounds of appeal will in all circumstances be required to formally apply for leave to intervene (and whether the term “intervene” envisages active involvement in the ongoing appeal), or whether it

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<sup>4</sup> Rule 4, Draft Rules

will be open to interested third parties simply to submit representations and observations (i.e. a more passive role which is likely to incur fewer costs). It would be helpful if the CMA could clarify this point in the guidance.

### **3 Statutory time limits**

- 3.1 We welcome the removal of the indicative appeal process timeline at page 8 of CC15. The lack of differentiation between working days and non-working days previously confused the interaction of the appeal regime with the timeline for implementation of the licence modifications which are subject of the appeal.
- 3.2 In particular, we note that the timeline failed to accurately represent the statutory requirement that licence modifications can only take effect from the date which is not less than 56 days from publication of the relevant decision, representing these as 56 working days.<sup>5</sup>
- 3.3 The CMA should also note that, pursuant to the Acts, the timeline for consideration of an application for suspension of a decision under Rule 7 does not align with the statutory timeline for implementation of licence modifications. In particular, the former concerns working days while the latter does not. This is particularly problematic where, for instance, there are intervening bank holidays – which could mean that the relevant modifications have already taken effect prior to the CMA’s deadline for determining the application for suspension.<sup>6</sup>
- 3.4 Given the practical difficulties which could result from this scenario, the CMA should be mindful in its consideration of such applications of how the statutory deadline for reaching a decision on an application for suspension interacts with the implementation of the relevant licence modifications.

### **4 Guidance on application for suspension of a decision**

- 4.1 Where the appellant also makes an application for suspension of the decision which is subject of the appeal, the Acts require the CMA to consider whether 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 convenience does not otherwise require effect to be given to the decision pending that determination. CC15 does not go beyond the language set out in the Acts.
- 4.2 As the existing guidance is currently very limited in this regard, it would be helpful if the CMA could expand on paragraph 3.27 of the draft guide to explain what approach it takes to determining applications for suspension. In particular, it would be useful to include an indicative list of what might constitute

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<sup>5</sup> Section 11A(9) Electricity Act 1989; section 23(9) Gas Act 1986; Article 14(10) Gas (Northern Ireland) Order 1996; Article 14(10) Electricity (Northern Ireland) Order 1992.

<sup>6</sup> For instance, in the appeal by SONI against a decision by the Northern Ireland Authority for Utility Regulation to modify the conditions of SONI’s licence, the statutory deadline for the CMA’s decision on the application for suspension was 15 May 2017, while the licence modifications which were subject to appeal came into effect on 9 May 2017.

“significant costs” in these circumstances, for example in relation to a price control decision over and above the usual costs associated with implementing tariff adjustments for the period up to determination of the appeal.

## **5 General comments on process**

- 5.1 Whilst we welcome the retention of the existing procedural flexibility in the draft Rules and Guide, there are a number of issues in respect of which some additional procedural guidance would be useful for prospective appellants in the preparation of their submissions – for example, number of copies required, presentational requirements, etc. It would be helpful if the CMA could cover these details in the guidance.
- 5.2 We also consider that it would be useful to take the opportunity to expand the role of the CMA Procedural Officer to energy licence modification appeals. Unlike the Competition Act 1998, the Acts do not make specific provision for procedural complaints – however, as the CMA Board retains a residual discretion under the Acts to make rules of procedure regulating the conduct and disposal of appeals,<sup>7</sup> we consider that it would be in the interests of procedural fairness and transparency to permit parties to have recourse to the independent Procedural Officer in appropriate circumstances.

**Mark Simpson / Susanna Rogers / Nuala Canavan**  
**29 August 2017**

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<sup>7</sup> Schedule 5A paragraph 11 Electricity Act 1989; Schedule 4A paragraph 11 Gas Act 1986; Schedule 3A paragraph 11 Gas (Northern Ireland) Order 1996; Schedule 5A paragraph 11 Electricity (Northern Ireland) Order 1992.