

11 October 2017

Steven Preece
The Regulatory Appeals Team
Competition and Markets Authority
Victoria House
37 Southampton Row
London
WC1B 4AD
Email: steven.preece@cma.gsi.gov.uk

Dear Mr Preece,

A consultation on updated rules of procedure to be applied in licence modification appeals made to the CMA and a guide for participants.

Between 24 July 2017 and 29 August 2017 the Competition and Markets Authority (“CMA”) consulted on updated rules of procedure to be applied in licence modification appeals made to the CMA and a guide for participants.

The Energy Network Association (“ENA”) represents a significant proportion of those companies that might be relevant licence holders or appellants in respect of an appeal which would be governed by these new rules and guidance.

Whilst some of the ENA’s members were aware of the publication of this consultation, as the CMA did not (i) write to the relevant licence holders directly, (ii) write to the ENA or (iii) include the publication of the consultation in its “announcements” email alert, a number of our members were unaware of the proposed changes. Furthermore, those members who were aware of the consultation more generally were not necessarily aware of the change the CMA proposed to Rule 21.4 on costs.

Draft 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].*

The addition of 21.4(d) is a material change and the CMA has neither highlighted this in its consultation nor provided any rationale for the proposal.

ENA therefore suggests the CMA should either remove limb (d) when it amends the rules and guidance or further consult on this proposal, explaining why the change is being suggested and giving relevant licence holders the opportunity to respond.

Yours sincerely

David Smith
Chief Executive