

Energy Licence Modification Appeals Rules and Guide

Response to consultation

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1. Introduction

- 1.1 The Competition and Markets Authority (CMA) on 24 July opened a four-week consultation on draft *Energy Licence Modification Appeals Rules* (the draft Rules) to be applied in licence modification appeals made to it under any of the Gas Act 1986,¹ the Electricity Act 1989,² the Electricity (Northern Ireland) Order 1992³ or the Gas (Northern Ireland) Order 1996 (the Acts).⁴ The CMA at the same time also consulted on a draft guide (the draft Guide) intended to assist participants involved in such appeals.

Background

- 1.2 The Acts set out the process that the Gas and Electricity Markets Authority (which is supported by the Office of Gas and Electricity Markets, or Ofgem) and the Northern Ireland Authority for Utility Regulation (NIAUR) (each of which will henceforth be referred to as the Authority, unless otherwise stated) must adopt in making modifications to licences for the supply and distribution of gas and electricity. They also set out the appeal mechanism in respect of licence modifications.⁵ An appeal against a decision of the Authority to amend the conditions of a licence may be made to the CMA by:

- (a) a relevant licence holder;
- (b) certain materially affected licence holders;
- (c) qualifying bodies and associations in the capacity of representing those licence holders; and
- (d) Citizens Advice, Citizens Advice Scotland and the General Consumer Council for Northern Ireland in the capacity of representing consumers whose interests are materially affected by the Authority's decision.

¹ 1986 c44, as amended in particular by the Electricity and Gas (Internal Market) Regulations 2011 (SI 2011/2704).

² 1989 c29, as amended in particular by the Electricity and Gas (Internal Market) Regulations 2011 (SI 2011/2704).

³ SI 1992/231 (NI 1), as amended by the Gas and Electricity Licence Modification and Appeals Regulations (Northern Ireland) 2015 SI 2015/1 (NI).

⁴ SI 1996/275(NI 2), as amended by the Gas and Electricity Licence Modification and Appeals Regulations (Northern Ireland) 2015 SI 2015/1 (NI).

⁵ The Acts implement the EU Third Energy Package of directives which require, among other things, that member states ensure that national regulatory authorities are able to take autonomous decisions in relation to specified regulatory tasks and ensure that suitable mechanisms exist at a national level under which a party affected by a decision of a regulatory authority has a suitable right of appeal to a body independent of the parties involved and of government. The Authority is designated as the regulatory authority for Great Britain for the purposes of the relevant directives.

- 1.3 The CMA may allow appeals only to the extent that it is satisfied that the Authority's decision was wrong on one or more of the following grounds:
- (a) That the Authority failed properly to have regard to, or give appropriate weight to, the matters to which the Authority must have regard, in the carrying out of its principal objective and certain duties.
 - (b) That the decision was based, wholly or partly, on an error of fact.
 - (c) That the modifications fail to achieve, in whole or in part, the effect stated by the Authority in its decision.⁶
 - (d) That the decision was wrong in law.⁷
- 1.4 Key elements of the procedures for regulating appeals, including the time periods for appealing and completing them and provision relating to the payment of costs by the parties to the appeal, are set out in the Acts. The Acts, however, also provide that the CMA may make rules of procedure regulating the conduct and disposal of these appeals.
- 1.5 The Competition Commission, the CMA's predecessor, adopted CC14 *Competition Commission Energy Licence Modification Appeals Rules* in September 2012, for the purpose of regulating the conduct and disposal of appeals under section 23B of the Gas Act 1986 and section 11C of the Electricity Act 1989, in respect of licence modification decisions made by Ofgem in Great Britain. At the same time, the Competition Commission adopted CC15 *Energy Licence Modification Appeals: Competition Commission Guide* to assist participants involved in such appeals.
- 1.6 The Competition Commission was abolished on 1 April 2014 and its functions, including that of determining energy licence modification appeals, vested in the CMA on that day. Both CC14 and CC15 were adopted unamended by the CMA board.
- 1.7 The EU Third Energy Package was implemented in Northern Ireland through various legislative changes, the latest of which came into operation on 6 February 2015.⁸ This legislation substantially aligned the Northern Ireland energy licence modification appeals regime with that of Great Britain,

⁶ Under section 11A(7)(b) of the Electricity Act 1989, section 23(7)(b) of the Gas Act 1986 and Article 14(8)(b) of the Electricity (Northern Ireland) Order 1992 and Article 14(8)(b) of the Gas (Northern Ireland) Order 1996 the Authority is required to state the effect of the modifications in its decision.

⁷ See section 23D of the Gas Act 1986, section 11E of the Electricity Act 1989, Article 14D of the Electricity (Northern Ireland) Order 1992 and Article 14D of the Gas (Northern Ireland) Order 1996.

⁸ Namely, the Gas and Electricity Licence Modification and Appeals Regulations (Northern Ireland) 2015 (SI 2015/1). The NIAUR is the designated regulatory authority for Northern Ireland.

including providing that energy licence modification decisions made by the NIAUR are appealable to the CMA.

- 1.8 In view of those developments, the CMA decided in 2015 to use CC14 – adapted as necessary to refer to the Northern Ireland legislation and decisions of the NIAUR – to govern the procedure for appeals against NIAUR energy licence modification decisions. The CMA did not make any substantive changes to CC14 for those purposes. This decision was taken following a public consultation.⁹
- 1.9 The CMA has determined three energy licence modification appeals to date.¹⁰

Scope and purpose of this consultation

- 1.10 In view of the experience that the CMA has gained of energy licence modification appeals, as well as the developments discussed in paragraphs 1.5 to 1.7 above, the CMA is proposing to update its existing rules for good order, and in the process is proposing to make one change to its existing rules in the light of experience conducting appeals (see in this regard, paragraph 1.11 below). We have also made some small administrative updates to the rules. We also propose to publish an updated guide intended to assist participants in such appeals.
- 1.11 The draft Rules and Guide among other things change references in CC14 and CC15 from the Competition Commission to the CMA and take into account the developments in Northern Ireland referred to in paragraph 1.7 above.
- 1.12 The draft Rules also proposed changes to how third parties may participate in energy licence modification appeals. The Acts do not make any explicit provision for third parties to be able to intervene or otherwise participate in energy licence modification appeals. The CMA nevertheless considers that third parties with a sufficient degree of interest in such appeals may be able to provide valuable assistance to the CMA.
- 1.13 Rule 10 of CC14 currently permits ‘an interested third party’ to make representations or observations to the CMA about the grounds on which the appeal is brought.¹¹ The experience gained by the CMA in energy licence modification appeals suggests that it is desirable to modify the approach

⁹ See [Energy licence modification appeals rules for Northern Ireland: consultation outcome](#).

¹⁰ See press release (29 September 2015), [CMA publishes final determinations on electricity distribution appeals](#) and news story (26 June 2017), [CMA issues final determination in NI gas distribution appeal](#).

¹¹ See [CC14](#), Rule 10.1.

taken in Rule 10 of CC14 as to which third parties may participate in appeals and how they seek to do so.

- 1.14 in the draft Rules, the CMA proposes among other things that interveners should require permission to intervene in an appeal and that among other things, when considering whether to grant permission to intervene, the CMA may take into account whether the applicant is materially interested in the outcome of the appeal. In the CMA's view, this formulation is preferable to the approach taken under Rule 10 in CC14, while at the same time allowing interventions from a class of third parties best able to assist the CMA. The CMA particularly invited consultees to consider this proposed change.
- 1.15 The objective of this consultation was specifically to gather views on the proposed updated rules and their use in effectively implementing the regime set out in the Acts.
- 1.16 We asked consultees the following questions in the consultation:
- 1. Do you have any comments on the draft *Energy Licence Modification Appeals Rules and Guide*?**
 - 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?**
- 1.17 The consultation closed on 29 August 2017.
- 1.18 The CMA received 12 responses to the consultation. The respondents are listed in Chapter 3 and non-confidential versions of their responses are available on the consultation page on the CMA website.
- 1.19 This document summarises the key comments made by respondents and the CMA's response to them. It also gives the CMA's reasons where it has not made changes following respondents' comments.

2. Issues raised by the consultation and our response

- 2.1 As noted above at paragraph 1.18, the CMA received 12 responses to the consultation. Some respondents made specific drafting comments and suggestions on the draft Rules and Guide. Many of these suggestions have been taken into the final version of the Rules and Guide.
- 2.2 The CMA below discusses the respondent feedback on the two consultation questions set out in paragraph 1.16 above, and its response to that feedback.

Responses to Question 1

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

Costs

- 2.3 Some respondents commented on the CMA's approach to costs in the draft Rules and Guide. On the one hand, a respondent suggested that the CMA should take a more considered, nuanced approach to costs than that adopted in other fora such as the High Court and considered that in the draft Guide, the CMA proposed to give effective primacy to whether a party won or not, with costs following the cause. That respondent stated that the regulatory appeal proceedings which the CMA was considering did not relate to commercial litigation in the High Court (where such an approach to costs awards might, in the respondent's view, be more *de rigueur*) but suggested that the CMA was handling more complex regulatory litigation, where issues relating to the public interest and the interests of consumers were at stake and must be weighed up and assessed carefully.
- 2.4 On the other hand, two respondents expressed concerns with the provisions of draft Rule 21.4(d), querying its rationale and suggesting that it was inappropriate. One of these respondents noted that when determining an appeal the CMA must have regard to the relevant Authority's principal objective, which, the respondent observed, in relation to Ofgem's electricity functions, is 'to protect the interest of existing and future consumers in relation to electricity...' and suggested that if 'benefit of consumers' had the same meaning as the Authority's principal objective, then it was redundant, as it would already have been captured in Rule 21.1(b), as in deciding whether a party was successful, the CMA will already have taken into account the interests of consumers. The same respondent added that if the reference to 'the benefit of consumers' had a different meaning, such as if meant (i) any appeal for lower prices or (ii) any appeal brought by a consumer body, then it

was, in the respondent's view, wholly inappropriate. The respondent suggested that favouring certain types of appeal or appellant in terms of cost exposure would remove or diminish the costs discipline that should properly apply to all types of appeal and all types of appellant. In the respondent's view, if Parliament had favoured what the respondent considered to be such a peculiarly biased approach, then it would have reflected this position in the relevant legislation. Another respondent suggested that if the CMA wished to include this provision in the final version of the Rules, it should consult further on it, stating that the CMA's reasoning for including this provision in the draft Rules was not clear.

- 2.5 One respondent suggested that it would be appropriate for the Rules and Guidance to reflect the Competition Appeal Tribunal (CAT)'s decision in *British Telecommunications plc v Competition and Markets Authority* [CAT] 11, which dealt with an appeal to the CAT against a costs order made by the CMA under section 193A of the Communications Act 2003. In that decision, the CAT said that it would be good practice for the CMA to provide, at the relevant consultation stage, details of how it has calculated its total costs and the proportion of the costs to be paid pursuant to the order, provided that this can be done without imposing a disproportionate burden on the CMA.¹² The respondent noted the factors set out at paragraph 32 of the CAT's decision on the extent of disclosure that the CMA should give at the consultation stage before making a costs order under section 193A of the Communications Act 2003 and suggested that these could be readily incorporated into final version of the Guide. The same respondent also stated that it would welcome greater detail in the final version of the Guide as to how the CMA's costs are to be apportioned in cases where an appellant loses its appeal on some grounds and wins on others. That respondent also said that it would welcome a commitment in the final version of the Guide that the CMA will conduct a 'fair apportionment' exercise based on the best possible information about what costs were caused by each ground.
- 2.6 Some respondents addressed the comments of the CMA at paragraph 6.3 of the draft Guide that the CMA does not have the power to order costs against or for interveners. One respondent suggested that it was not clear whether the CMA may or may not issues costs orders against interveners. That respondent asked whether, even in the absence of an express power to so, it was a possibility for the CMA to make such costs order in respect of interveners. Another respondent suggested that there should be a reassurance in the Guide that the proportionate costs of interveners should be covered.

¹² See paragraph 31 of the CAT's decision.

- 2.7 Referring to draft Rule 8.3, a respondent asked that the CMA provide more details regarding whether the CMA and other party's costs orders may be made against an appellant who has been granted permission to withdraw their appeal.

CMA response

- 2.8 Having considered the various comments on inter partes costs, the CMA has decided not to include draft Rule 21(4)(d) in the final version of the Rules; on review, it considers that the final version of Rule 21.5 gives the CMA Group a broad discretion to have regard to all the circumstances in deciding what order to make, and these can include, in an appropriate case, adapting the general principle that costs follow the event where an appeal has been brought by a consumer body in the public interest for the benefit of consumers.
- 2.9 The CMA has clarified at paragraph 6.2 of the final version of Guide the principles to which it will have regard in making an apportionment of its own costs where an appellant loses on some grounds and wins on others.
- 2.10 The CMA notes the factors set out in the CAT's decision in *British Telecommunications plc v Competition and Markets Authority*, albeit that decision refers to a different regime, under which a reference is made to the CMA by the CAT in respect of price control matters in telecommunications appeals. Given the difference between the telecommunication appeal and energy licence modification appeals regimes (which include differing statutory provisions for recovery of the CMA's costs), the CMA does not consider it necessary or appropriate in the final version of the Guide to provide the level of detail about cost calculations in the Guide suggested by the respondent in question. Nevertheless, the CMA agrees that it is appropriate to clarify in the final versions of the Rules and Guide that it will be transparent when assessing the level of costs to awarded both to the CMA and for that matter, to other parties. Therefore, consistent with the approach taken in other regulatory appeals rules, the final versions of the Rules and Guide make it clear that prior to making any order for costs, the CMA will issue a provisional determination of costs, on which the parties can make representations to the CMA. The CMA in such provisional determinations will provide appropriate detail of how it has calculated the costs in question and the proportion of costs to be paid pursuant to the costs order.
- 2.11 With respect to interveners, the CMA considers it clear that it does not have the power to make an order requiring the payment of an intervener's cost or an order requiring that an intervener pay the costs of the CMA or another party and that the final Guide does not need to address this further.

2.12 The CMA has clarified in the final version of the Guide how it may make orders for costs in respect of withdrawn appeals and where it makes a summary determination allowing the appeal.

Suspension of decisions

2.13 Two respondents asked for more detail of the factors that the CMA will take into account when considering whether to grant an application for suspension of the Authority's decision. One of these respondents said that it would be useful in particular to include in the final version of the Rules or Guide an indicative list of what might constitute 'significant costs' for these purposes, such as 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.

2.14 One respondent suggested that the deadline for consideration of an application for suspension of a decision by the Authority does not align with the statutory timeline for implementation of licence modifications. In particular, that respondent observed that under the Acts, a licence modification can only take effect from a date not less than 56 days of the publication of the decision to proceed with the making of a licence modification. In contrast, the times by which an application for suspension of the decision, for the making of any representations or observations by the Authority on the suspension application and for the CMA to decide on the suspension application are all calculated by reference to working days.¹³ The respondent noted that this could be particularly problematic where there are intervening bank holidays. The respondent observed that in some cases this could mean that the relevant modifications already could have taken effect prior to the CMA's deadline for determining the suspension application. In view of this, the respondent suggested that the CMA should be mindful of the date of implementation of the relevant licence modifications when considering any relevant application for suspension of the Authority's decision.

CMA response

2.15 The CMA will decide suspension applications on a case-by-case basis, having regard to the evidence and the arguments made in the application. The CMA does not consider it appropriate or possible to provide an indicative list of what might constitute 'significant costs' for the purposes of suspension

¹³ Respectively, within 20 working days after the publication of the Authority's decision, ten working days after receipt of the suspension application and ten working days after receipt of the Authority's representations or observations or in any other case 14 working after receipt of the suspension application.

applications, as these will likely depend upon the circumstances of the case. However, the CMA has at paragraph 3.27 of the final version of Guide noted the evidence that the CMA will require in order to make a suspension direction and how the 'significant costs' consideration interacts with the balance of convenience test.

- 2.16 The CMA notes the observations about the timelines for implementation of licence modification decisions and for deciding upon suspension applications not being aligned. There is no duty on the CMA to decide suspension applications before the licence modifications come into effect: rather, the CMA must make its decision on whether to suspend the Authority's decision within the timeframe set out in the Acts.¹⁴ Nevertheless, the timing of implementation of a licence modification is a factor to which the CMA may have regard when considering the timelines for its decision on a suspension application.

Requests for additional guidance on process

- 2.17 Some respondents requested additional procedural guidance in the final version(s) of the Rules and/or Guide.
- 2.18 For example, one respondent asked for clarification under Rule 8 as to whether an appellant must send a copy of an application to withdraw the appeal to the Authority and to relevant licence holders.
- 2.19 The same respondent suggested that it would be helpful to add discussion of some of the statutory time limits discussed in the draft Guide – specifically the deadlines for seeking permission to appeal as well as those in which the CMA must determine the appeal and decide on applications for permission to appeal – to the relevant rules.
- 2.20 Another respondent requested additional procedural guidance in the final version of the Guide for the benefit of prospective applicants in the preparation of their submissions, such as the number of copies required and presentation requirements.
- 2.21 One respondent said that they would welcome inclusion in the final version of the Guide of more details or a further explanation of the 'modelling issues' referenced in paragraph 4.35 of the draft Guide.
- 2.22 The same respondent suggested, with reference to paragraph 4.41 of the draft Guide that disclosure of relevant material to 'other participants' in an

¹⁴ See paragraph 2(3) of the relevant Schedules to the Acts.

appeal should only occur following receipt by the CMA of consent from the relevant party who provided the information.

- 2.23 Another respondent stated that it would be helpful for the final version of the Guide to state that the permission to appeal stage was largely procedural rather than substantive and that its purpose was to prevent appeals not meeting certain base criteria from proceeding. The respondent asserted that the only extent to which it was appropriate for the CMA to consider substantive questions at the permission stage was where there was no reasonable chance of the appeal succeeding, which was a very low threshold.
- 2.24 One respondent suggested that the Draft Rules and Guide did not strike the right balance between efficient case management and affording relevant licence holders who are not parties to the appeal a fair hearing. That respondent stated that the outcome of an energy licence modification appeal has a material, direct effect on a relevant licence holder's property rights. In that respondent's view, there should 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. According to the respondent, non-appellant relevant licence holders should, for example, be able to make submissions at the permission stage, which in their view, among other things might lead to some appeals not proceeding which otherwise might have done, avoiding the need for costs being incurred at a later stage.
- 2.25 One respondent suggested that the CMA should take the opportunity to extend the role of the CMA Procedural Officer (PO) to cover energy licence modification appeals. That respondent considered that it would be in the interests of procedural fairness and transparency to permit parties in such appeals to have recourse to the PO in appropriate circumstances.

CMA response

- 2.26 The CMA has clarified in the final version of Rule 8 that applications for withdrawal – as well as applications by the Authority for summary determination allowing the appeal – must be sent to the other parties to the appeal as well as to any relevant licence holders.
- 2.27 The CMA notes that draft Rules 5, 6 and 9 already discuss the relevant statutory time periods in their footnotes and in view of this, does not consider it necessary to include time references in the body of the final version of the Rules, since parties reading the final versions of the Rules and the Guide will be aware of these timeframes. Moreover, since the draft Guide already referenced the time periods within which the CMA must determine appeals,

the CMA does not consider that it adds value for the final version of the Rules also to include references to these.

- 2.28 With respect to discussion of presentation of an application for permission to appeal, the CMA points out that presentational requirements are discussed at paragraph 4.3 of the draft Guide and it also notes that those for witness statements are discussed at paragraph 4.20 of the draft Guide. The CMA does not consider it necessary to be any more prescriptive with respect to the presentation requirements of applications for permission to appeal. Parties need only provide the CMA with one copy of their application for permission to appeal and the accompanying evidence.
- 2.29 The CMA has clarified at paragraph 4.42 of the final version of the Guide that the CMA staff may hold meetings with the Authority or others to discuss issues concerning any economic models relevant to the appeal.
- 2.30 The CMA does not consider it appropriate to provide that disclosure to any participant in the appeal should be made contingent on obtaining the consent of the information provider. There are clear statutory gateways under which the CMA has the discretion to disclose information and the CMA may consider it necessary or appropriate to exercise such discretion in order to secure fairness and assist it to perform its appeal functions effectively. The CMA notes the draft Guide makes it clear (see for example paragraphs 4.39 to 4.43 and 4.45 of the draft Guide) that it takes the protection of sensitive information very seriously and that it may make disclosure subject to any redactions it considers appropriate to safeguard confidentiality concerns.
- 2.31 The CMA does not consider it appropriate for the final version of the Guide to suggest that the permission stage is merely procedural, even if the permission threshold is low. In the CMA's view, stating that the permission stage is merely procedural risks understating its importance. For that matter, the CMA has included some text in the final version of the Guide indicating that when considering whether an appeal has a reasonable prospect of success, the CMA may take into consideration whether there are material issues of fact or law relevant to the Authority's decision that are genuinely in dispute, as well as whether the proposed appeal is unwinnable as a matter of law. The final version of the Guide states that permission to appeal will ordinarily be granted where the Notice of Appeal raises issues of fact or law that require further consideration by the CMA in an appeal. The final version of the Guide also provides that in exceptional cases, it might be clear at the permission stage that any error or law alleged by the appellant, even if established to the requisite standard, could not constitute a material error by the Authority and therefore would have no reasonable prospect of success. Furthermore, the final version of the Guide states that the CMA considers that a ground of

appeal that merely constitutes a general complaint as to alleged procedural defects of the Authority in making its decision is unlikely to have a reasonable prospect of success.

- 2.32 The CMA notes the respondent's comment about the interests of non-appellant relevant licence holders but does not consider it necessary or appropriate for there to be a presumption in the final versions of the Rules and Guide that non-appellant relevant licence holders be given the opportunity to make full representations and to take part in all aspects of the appeal. The CMA considers that the final version of the Rules strikes the right balance with respect to the involvement of non-appellant relevant licence holders in the appeal. For example, Rule 7.6 of the final version of the Rules allows relevant licence holders to make representations on suspension applications. Furthermore, non-appellant relevant licence holders who wish to participate in an appeal may apply for permission to intervene under Rule 10. Indeed, as noted below at paragraph 2.47, the final version of the Guide states that the CMA will normally regard as being materially interested in the outcome of the appeal (which is one of the factors to which the CMA will take into account when deciding upon an intervention application: see Rule 10.3) any person, qualifying body or association, or consumer body who could themselves have appealed to the CMA against the appealed decision but who is not an appellant against that decision. This by definition will include non-appellant relevant licence holders.
- 2.33 The CMA has also added a provision to the final version of the Rules stating that the CMA may at any time invite representations from any person whom it appears to the CMA may be affected by the outcome of the appeal (see Rule 14.4(e)). Moreover, so that the CMA can ensure that any relevant licence holders have been notified of an appeal, the CMA has added a provision to the final version of Rule 5.7 to require the appellant to send the CMA list of the relevant licence holders whom it has sent the non-confidential version of its notice of appeal. The CMA does not propose to extend the PO's role to the CMA's regulatory appeal functions. The role of the CMA Group in a regulatory appeal is very different to the roles of CMA Groups under the Enterprise Act 2002 or a Case Decision Group under the Competition Act 1998.

Responses to 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?

2.34 Respondents to this question offered mixed views. Some respondents supported the CMA's proposals for a modification to Rule 10, while others objected, sometimes on differing grounds. These objections, other key points and comments on draft Rule 10 are discussed below.

Interventions under Rule 10 – concerns with standing

2.35 A number of respondents observed that under Rule 10 of the existing rules an 'interested third party' did not need the CMA's permission to make representations or observations to the CMA in respect of the Authority's decision.¹⁵ They noted further that an 'interested third party' for these purposes essentially included anyone who could have brought an appeal in respect of the Authority's decision but was not an appellant.

2.36 Bearing this in mind, some respondents suggested that the CMA's proposed approach in draft Rule 10 could in their view wrongly exclude third parties who should be able to intervene in an energy licence modification appeal. Some respondents therefore suggested that the final version of the Rules should include a presumption that any 'relevant licence holder' as defined in the Acts¹⁶ or licensees whose own licence conditions are the subject of an appeal, should be presumed to have a material interest in the outcome of the appeal and that their intervention will assist the CMA. Another respondent suggested that instead of an application having to be made for permission to intervene, any party identified in the applicant's case as materially affected should be automatically entitled to participate in the appeal.

2.37 In a similar vein, another respondent stated that it did not object to the CMA under Rule 10 taking into account factors such as whether applicant for permission to intervene was materially interested in the outcome of the appeal and whether the nature and extent of the intervention sought was proportionate to the matters to be determined.¹⁷ It nevertheless objected to the CMA taking into account under draft Rule 10 whether the applicant's intervention would assist the CMA to determine the appeal.¹⁸ In that respondent's view, this proposed approach would be likely to cause practical and substantive problems. The respondent suggested that the CMA's proposed approach under draft Rule 10.3(b) would be contrary to the accepted practice and jurisprudence of the Competition Appeal Tribunal (CAT) with respect to third party interventions. Unlike the factors set out at (a)

¹⁵ See Rule 10.1 of CC14 *Competition Commission Energy Licence Modification Appeals Rules*.

¹⁶ See section 23(10) of the Gas Act 1986, section 11C(2) of the Electricity Act 1989, Article 14(11) of Electricity (Northern Ireland) Order 1992 and Article 14(11) of the Gas (Northern Ireland) Order 1996.

¹⁷ See draft Rule 10.3(a) and (c).

¹⁸ See draft Rule 10.3(b).

and (c) of draft Rule 10.3, the respondent argued, the CMA's proposed formulation at draft Rule 10.3(b) called for subjective judgment on part of the CMA and was also, in the respondent's view, too wide, affording the CMA the opportunity to deny an intervention purely on the basis that it was procedurally inconvenient. The same respondent suggested that it would generally be premature for the CMA to decide that it did not want to hear something, which, by definition, has not yet been said. That respondent therefore proposed that the CMA should follow the approach that the respondent said is used by the CAT with respect to third party interventions, meaning that the CMA should permit parties materially interested in the outcome of the proceedings to intervene, as long as they would not merely duplicate what is said by others.

2.38 In contrast, some respondents suggested that the CMA's proposal to move away from the 'interested third parties' formulation under the existing Rules to the 'materially interested in the outcome of the appeal' one proposed in draft Rule 10.3 risked resulting in large numbers of applications for intervention. Some respondents suggested that such applications were more likely to come from well-resourced industry representatives. In their view, this risked creating an imbalance between consumers and industry.

2.39 One respondent observed that the 'materially interested in the outcome of the appeal' formulation meant, in contrast to the current 'interested third parties' formulation under Rule 10 of CC14, that there was no requirement to be a licence holder, or any other entry criterion that required the person to be regulated. The respondent suggested that the ability to intervene under the proposed formulation was potentially open to any person. That respondent also suggested that the qualifier 'materially' attaches to the interest of the potential intervener, rather than to any effects that person would suffer and stated that a person may be materially interested in something even if they are not directly affected by it. The same respondent also asserted that under the proposed formulation in draft Rule 10.3, the thing in which the prospective intervener must be materially interested is not the licence modification decision of the Authority, but the CMA's determination of the appeal. That respondent suggested that a person might not be interested in the particular decision under the appeal, but nonetheless might be very interested in the potential outcome of the appeal, because of any precedent it might set for the future. It considered that the further test of 'assist the CMA' set out in draft Rule 10.3 was an insufficient safeguard, beyond highlighting that the CMA was not bound to grant permission to anyone in particular. In the view of that respondent, there was no clarity as to how the CMA would exercise that discretion and instead, the CMA was bound to exercise its discretion on a case by case basis and in an entirely fact sensitive way. The respondent considered that the practical effect of the proposed formulation in draft Rule

10.3 was to open the field of intervention to a much wider range of bodies: it was suggested that in an appeal concerning financeability in a network price control, any network company could argue that it had an interest in the CMA's findings on the subject of financeability, both generally and on several of the grounds of appeal in particular. For that matter, in the respondent's view, businesses in different sectors (such as gas networks, in the case of an electricity network price control appeal) might argue that they are materially interested in the outcome of the appeal and potentially that even banks and equity investors might have an interest in the outcome of an appeal. The respondent concluded that there was a real risk that draft Rule 10 as proposed would increase the number of interveners who were supporting the appellant against the regulator, resulting in an asymmetric appeals process in favour of the appellant.

- 2.40 Another respondent offered similar views, noting that in replacing the definition of 'interested third parties' with the approach proposed in draft Rule 10, the requirement to be a party referred to in section 23B(2) of the Gas Act 1986 or section 11C(2) of the Electricity Act 1989 had been lost. That respondent suggested that the proposed change had the potential substantially to increase the range of parties potentially able to intervene and seemed contrary to the CMA's policy intention of wishing to ensure that interveners will assist them in determining the appeal.
- 2.41 One respondent noted that the overriding objective in Rule 4 of the Draft Rules now included consideration of proportionate cost. Referring to the second factor in draft Rule 10.3 in respect of interventions (under which, when determining whether to grant permission to intervene, the CMA will among other things take into consideration whether the applicant's intervention in the appeal will assist the CMA to determine the appeal), that respondent suggested that in considering whether to grant permission to intervene, the CMA should not be constrained by cost concerns.

CMA response

- 2.42 The CMA notes that unlike under some of its other regulatory appeal functions,¹⁹ there are no statutory provisions under the Acts for third party involvement in energy licence modification appeals. However, the CMA considers that notwithstanding such statutory provisions, it has the discretion

¹⁹ Consider for example, Regulation 7 of the Water Industry Designated Codes (Appeals to the Competition and Markets Authority) Regulations 2017 (SI 2017/477) and paragraph 4 of Schedule 2 to the Civil Aviation Act 2012.

to permit and regulate third party involvement in those appeals in any procedural rules it may make under the Acts.

- 2.43 The CMA's proposed approach in draft Rule 10 to third party involvement reflects the experience it has gained in energy licence modification appeals. In the CMA's view, on the one hand, the existing formulation in Rule 10 of CC14 excludes third parties who could potentially assist the CMA in making an appeal determination. On the other hand, the existing formulation lacks any other 'filter' and means in effect that any party who could have appealed the Authority's decision has the automatic ability to make representations or observations to the CMA about the grounds on which the appeal is being brought. The lack of any additional filter risks in some cases allowing observations or representations that are duplicative of others.
- 2.44 In view of the above, the CMA considers it appropriate slightly to widen the class of potential third parties who may intervene, while at the same time seeking to ensure that interveners will assist the CMA in its appeal determination and that their involvement does not jeopardise achievement of the overriding objective set out in draft Rule 4.1. The CMA does not consider it controversial that interveners should be required to seek the CMA's permission in order to be able to intervene in an appeal, rather than allowing automatic rights of intervention to certain parties. The CMA's other regulatory appeal functions that make statutory provision for third party intervention explicitly require interveners to obtain the CMA's permission to intervene.²⁰ Moreover, the CAT, requires that interveners must obtain the CAT's permission to intervene in its proceedings – whether to grant such permission is at CAT's discretion.²¹ Similarly, in respect of judicial review proceedings in England and Wales, Rule 54.17 of the Civil Procedure Rules (CPRs) allows any person *to apply for permission* to file evidence or make representations at the hearing.
- 2.45 The CMA also considers it appropriate, among other things in the interests of justice and ensuring proportionate and timely disposition of the proceedings, for there to be 'filtering factors' to which it may have regard when deciding whether to grant permission to intervene in an energy licence modification appeal. The first of these which the CMA considers appropriate is that the CMA may take into account whether a potential applicant is materially interested in the outcome of the appeal. The CMA considers that while this indeed potentially admits a broader scope of persons than the 'interested third party' formulation under Rule 10 of CC14, it still limits potential intervention to

²⁰ Ibid.

²¹ See Rule 16 of the Competition Appeal Tribunal Rule 2015 (SI 2015/1648).

a reasonably closed class of persons. Moreover, the CMA considers that it is appropriate to consider in this context the impact of the CMA's determination, rather than the decision itself, since the CMA wishes to hear from those who may be affected by the determination. The CMA does not consider that this consideration will lead to an undue increase in the number of interveners, especially in view of the factors set out in (b) and (c) of draft Rule 10.3 and upon which it has provided further guidance in the final version of the Guide.

2.46 The CMA nevertheless agrees that it is appropriate to clarify the approach it will ordinarily take to assessment of 'materially interested in the outcome of the appeal' for the purposes of draft Rule 10. It has therefore added text to the final version of the Guide to make it clear that it will normally regard anyone who could have appealed the Authority's decision to the CMA as being materially interested in the outcome of the appeal. The CMA has also added text to the Guide noting the CMA expects that a party 'materially interested in the outcome of the appeal' should ordinarily be able to demonstrate to the CMA's satisfaction that the CMA's appeal determination may have a significant direct effect on that person's business or activities (or in the case of a representative association, those persons whom the association represents). Mere 'interest' in the outcome will not generally suffice for these purposes. The more remote the impact of the outcome of the appeal on the prospective intervener, the less likely it is that the CMA may regard that person as being 'materially interested in the outcome of the appeal.' In this regard, the CMA has provided some examples in the final version of the Guide of where a person might not be materially interested in the outcome of the appeal.

2.47 The CMA remains of the view that it is appropriate and indeed important to take into consideration whether a potential intervener can assist the CMA to determine the appeal. In reaching this view, the CMA considers that when deciding whether to permit a party with sufficient interest to intervene in its proceedings, the CAT may take into account whether the intervention will assist the CAT in its determination of the appeal: *Barclays v CC (permission to intervene)* [2009] CAT 15 at paragraphs 6–7 and 9. Moreover, the CMA has also had regard to the remarks of Lord Woolf in *R. v Re: Northern Ireland Human Rights Commission* [2002] UKHL 25 where at paragraph 32 he observed in relation to judicial review proceedings (emphasis added):

The practice of allowing third persons to intervene in proceedings brought by and against other persons which do not directly involve the person seeking to intervene has become more common in recent years but it is still a relatively rare event. The intervention is always subject to the control of the court and whether the third person is allowed by the court to intervene is

usually dependent upon the court's judgment as to whether the interests of justice will be promoted by allowing the intervention. *Frequently the answer will depend upon whether the intervention will assist the court itself to perform the role upon which it is engaged. The court has always to balance the benefits which are to be derived from the intervention as against the inconvenience, delay and expense which an intervention by a third person can cause to the existing parties.*

2.48 However, having regard to the various comments made by respondents on draft Rule 10.3, the CMA has added text to the final version of the Guide to provide greater clarity as to some of the factors that the CMA will take into account when deciding whether a prospective intervener can assist the CMA to determine the appeal. For example, the CMA does not consider that it will be of assistance to permit an intervention that risks creating a proliferation of documents or evidence, and/or an intervention that would be duplicative of the evidence or the submissions already made by the principal parties to the appeal or another intervener. In contrast, the CMA would ordinarily regard an intervention as being of assistance where in the CMA's view it is likely to add something to the proceedings (either in terms of argument or evidence) over and above what the principal parties have already provided.

2.49 The CMA disagrees with the assertion that it is inappropriate to take into account cost concerns (by reference to the overriding objective in draft Rule 4) when considering the proportionality of a proposed intervention. In this regard, the CMA notes that Turner J in *R (on the application of) BAT UK Ltd v Secretary of State for Health* [2014] EWHC 3515, when considering a third party's application to be heard in judicial review proceedings under CPR 54.17, said at para 18:

Furthermore, by the operation of CPR 1.2, I am mandated to give effect to the overriding objective in exercising any power given to the court by the Rules. I must, therefore, take into account the need to deal with this application justly and with proportionate cost with specific reference to the factors listed in CPR 1.1(2).

2.50 For that matter, the CMA has clarified in the final version of the Guide that it may take into account the overall value of the licensee's business to which the licence modification relates and the potential added cost to the parties and the CMA of dealing with an intervention, when deciding whether the nature and extent of any intervention(s) sought is (are) proportionate to the matters to be determined in the appeal.

Procedural issues relating to intervention – timing

- 2.51 Draft Rule 10.2 proposed that applications for permission to intervene must be made before the end of ten working days after the day on which the decision granting permission to appeal is published on the CMA's website. Under draft Rule 10.7, parties to the appeal would have until the end of five working days after the day on which the Authority makes its representations and observations in relation to the decision under appeal and the ground of the appeal.
- 2.52 A number of respondents expressed concerns about these proposed timeframes. Some considered that the ten working day timeframe for potential interveners to seek permission was too tight and one respondent suggested that it should be extended to 20 working days. That respondent considered that it may not be reasonable to expect a third party with limited resources to review, seek assistance if necessary and prepare their intervention within ten working days. Another observed that under the timeframes proposed in draft Rule 10, it was possible that a potential intervener would not be able to have seen the Authority's representations on the appeal. The respondent said that the timescales would therefore need to be amended if interveners or potential interveners should have access to the Authority's response before submitting the case for intervention. Another respondent noted that this timing contrasted with the timeframe for the filing of 'interested third party' representations under Rule 10.1 in CC14, which must be sent to the CMA within 15 working days beginning with the first working day after the day on which permission to bring the appeal was granted. This is the same period within which the Authority must make its representation or observations to the CMA. The same respondent encouraged the CMA to consider applications for permission to intervene prior to the end of the period during which permission to appeal was being considered. The respondent noted that this would permit the CMA to access relevant information from third parties on the merits of the appeal and would be more likely to permit interveners to participate in any case management conferences.
- 2.53 Some other respondents expressed concerns that the proposed approach in draft Rule 10.7 for parties' replies to intervention application could create complications, such as if the Authority did not make any representations or observations under Rule 9. Another respondent considered that the five working day timeframe for the Authority to prepare its representations on an intervention application was too brief a period in which undertake such a potentially large task.

- 2.54 One respondent suggested that the CMA in the final version of the Rules or Guide should set out a time period within which the CMA is required to make a decision on whether to grant permission to intervene.

CMA response

- 2.55 The CMA notes that deadlines for seeking permission to intervene and for making replies to intervention must be kept comparatively strict, given the rigorous timeframes for determination of appeals. Moreover, the fact that Parliament did not explicitly provide for third party involvement in energy licence modification appeals suggests that their role must be regarded as ancillary to those of the parties.²²
- 2.56 Furthermore, the CMA notes that the statutory timeframes for intervention under its other regulatory appeal functions are quite strict. For example, in respect of airport licence modification appeals under the Civil Aviation Act 2012, potential interveners must make their application for permission to intervene to the CMA before the end of *one week* beginning with the day on which the CMA publishes its decision to grant permission to appeal or within any longer period that the CMA may allow.²³ And under Regulation 7(1) of the Water Industry Codes (Appeals to the Competition and Markets Authority Regulations 2017²⁴ a potential intervener must give notice of its request for permission to intervene within 20 working days after the making of an application for permission to appeal, or within any longer period that the CMA may allow.
- 2.57 The CMA nevertheless considers that it is reasonable to allow interveners a slightly longer period in which to prepare their applications for interventions than provided for in the draft Rules, in particular since the CMA has clarified in the final version of the Guide its expectation that applicants for permission to intervene should make their arguments and provide supporting evidence as part of their application (see below).
- 2.58 The CMA therefore considers it appropriate in the final version of the Guide to increase the deadline for applications for permission to intervene to 15 working days following the day on which the decision granting permission to appeal is published on the CMA's website. This is a reasonable period, similar to the one applicable under Rule 10.1 of CC14, save that time under that rule began to run from the day after the CMA made the decision for permission to

²² And consider the observations of the CAT regarding the role of interveners in its proceedings at paragraph 4.104 of the CAT's 2015 *Guide to Proceedings*.

²³ See Paragraph 4(2) of Schedule 2 of the Civil Aviation Act 2012.

²⁴ See footnote 19 above.

appeal. The CMA does not consider it helpful for time to begin to run from the day that the CMA grants permission to appeal, since third parties may not be aware of the decision until it appears on the CMA website. The CMA furthermore does not consider it appropriate that time for seeking permission to intervene should run from the date of the application for permission to appeal. While time for interventions in water code appeals begins to run from after the day of the making of the applications for permission to appeal,²⁵ the CMA notes that such appeals must be determined within a very short timetable,²⁶ which tends to necessitate such an approach. The CMA considers that in respect of energy licence modification appeals, potential interveners should not need to consider preparing an application for permission to intervene until it is clear that the CMA will in fact be considering the appeal.

- 2.59 The CMA has also in the final version of Rule 10.7 adjusted the proposed approach in respect of representations of the parties on an application for permission to intervene. The rule now provides that the CMA may give directions to the parties as to the making of representation or observations on the application for permission to intervene, either of its own motion or on the application of a party. This will ensure that such applications can be considered expeditiously by the CMA and allow the CMA to control the volume and extent of statements of case, while also reducing the risk that the Authority would need to be preparing representations on the intervention application at the same time as it is working on its response under Rule 9. It also avoids any complications that might arise if the Authority does not make a response under Rule 9.
- 2.60 The CMA does not consider it appropriate to provide in the appeal timeframe a period in which potential interveners can consider any representations or observations made by the Authority under Rule 9. Among other things, this risks delaying the proceedings and furthermore is not necessary, since interveners have an ancillary role in an appeal.
- 2.61 While the CMA promptly will make a decision on whether to grant permission to intervene, bearing in mind both the overruling objective in draft Rule 4 and the timeframes for determination of the appeal under the Acts, it does not consider it necessary to specify in the final versions of the Rules or Guide a period within which it must make a decision on such application. The time necessary to make such a decision is likely to depend upon the circumstances. The CMA notes that under its regulatory appeal functions that

²⁵ See Regulation 7(1) of the Water Industry Designated Codes (Appeals to the Competition and Markets Authority) Regulation 2017 cited at footnote 20 above.

²⁶ See Regulation 11(1), *ibid.*

make statutory provision for third party interventions, there are no statutory timeframes in which it must decide on applications to intervene.²⁷

Other procedural issues relating to intervention

- 2.62 Some respondents commented on other procedural issues relating to interventions under draft Rule 10. For example, several asked for greater clarification as to whether the prospective intervener was expected to make detailed or substantive submissions on the appeal when it made its application for permission. Such respondents suggested that if there was an expectation that such submissions were to be made at the application stage, then more time should be allowed for the preparation of the application or that the deadline for the making of substantive submissions should be later than the application deadline, given that the deadline in draft Rule 10.2 was in their view already tight.
- 2.63 One respondent noted that appellants had to verify the information contained in a notice of appeal by a statement of truth and that there should be a similar requirement with respect to applications for permission to intervene.
- 2.64 Some respondents asked for the final versions of the Rules and Guide explicitly to allow for a more active role for interveners in an appeal. This would include clarifying that (subject to confidentiality considerations) interveners are able to attend and/or participate in all hearings, and that interveners (again, subject to confidentiality considerations) are included in all correspondence between the CMA and the parties, other than that of an administrative nature. One respondent considered that there should be a wider discretion to hold an oral hearing to decide on applications for permission to appeal and for permission to intervene and that the qualification of written submissions being the usual method by which such applications were made, and representations or observations on them submitted, should be removed.
- 2.65 Another respondent suggested that it was unclear whether interested third parties who wished to submit views and/or respond to the grounds of appeal would in all circumstances need to formally to apply for permission to intervene. That respondent asked whether it would be open to interested third parties simply to submit representations or observations but otherwise take a passive role in the appeal.

²⁷ Consider Regulation 7 of the Water Industry Designated Codes (Appeals to the Competition and Markets Authority) Regulation 2017 cited at footnote 20 above paragraph 5 of Schedule 5 of the Civil Aviation Act 2012.

- 2.66 Commenting on paragraph 4.12 of the draft Guide, one respondent suggested that the CMA should recognise that relevant licence holders' interests will never be fully aligned and suggested that it will rarely be appropriate or practical to insist that they are restricted to a joint submission.

CMA's response

- 2.67 The CMA has clarified in the final version of the Guide that the applicant for permission to intervene should include representations and observations on the Authority's decision and indicate whether it supports or opposes the appeal and must include evidence in support of their arguments, all of which must be verified by a statement of truth. The CMA considers that the 15 working day period in which to provide these materials is fair and reasonable (see paragraph 2.53 above), given that that the Authority itself has 15 working days following the day of the granting of permission to appeal within which to provide its observations on the substance of the appeal. It notes for that matter that appellants themselves only have 20 working days after the day on which the Authority's decision is made in which to appeal. It would be disproportionate to allow potential interveners, who even if granted permission to intervene would only have an ancillary role in the appeal, as much time to prepare their application as an appellant.
- 2.68 With respect to requests for increased opportunities for interveners to become involved in appeals, the CMA considers that the approach set out in the draft Rules and Guide struck the appropriate balance and ensured that the role of interveners is proportionate. For that matter, the CMA already explicitly stated in the draft Guide that interveners may participate in hearings as observers, that interveners may themselves request a hearing and that the CMA may invite interveners to attend any hearing.²⁸ The CMA does not consider that it will be appropriate or necessary for interveners to be copied into all appeal correspondence as a matter of course, but it may require that this be done where it will assist the fair, expeditious and proportionate determination of the appeal. Moreover, the CMA does not consider that holding hearings as a matter of course in respect of applications for permission to appeal is necessary or proportionate.
- 2.69 Without prejudice to the CMA's discretion itself to seek evidence or views from persons other than those participating in an appeal, the CMA does not consider it appropriate for there to be third party involvement in appeals without that third party having been granted permission to intervene in the proceedings. That said, the CMA does not consider that every intervener

²⁸ See paragraphs 4.28 and 4.30 of draft Guide.

need take an active role in an appeal beyond their written submissions. It has therefore added text to the final version of the Guide stating that intervention applicants should indicate whether they wish to take an active role in the appeal – such as attending hearings or requesting permission for their own hearing – if they are granted permission to intervene, or whether they wish their potential involvement in the appeal to be limited to their written submissions.

- 2.70 The CMA accepts that relevant licence holders' interests may not be perfectly aligned. Whether the CMA will require a joint submission from interveners will depend upon the circumstances of the case and in doing so, the CMA will have regard among other things to the overriding objective in Rule 4.1.

3. List of respondents

- Centrica
- The Energy Networks Association
- The General Consumer Council for Northern Ireland
- GNI (UK) Ltd
- The Law Society of Scotland
- Northern PowerGrid
- Norton Rose Fulbright
- Northern Ireland Authority for Utility Regulation
- Ofgem
- Scottish Power
- SSE
- UK Power Networks