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Dear Sirs

Competition and Markets Authority (CMA) consultation on the Energy Licence Modification Appeals Rules (ELMA Rules) and Guide

The Northern Ireland Authority for Utility Regulation (the “Utility Regulator”) welcomes the opportunity to submit the following response in respect of the CMA’s consultation on the ELMA Rules and Guide.

Responding to the specific questions asked within the Consultation Document:

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

The Utility Regulator has no substantive comments to make in relation to the draft guide that is intended to assist participants involved in appeals.

We note the CMA’s view (which we consider is correct) that the CMA does not have the power to order costs against or for interveners. Effectively an intervener will bear their own costs but will not be exposed to the cost risks of their intervention even where it loses the argument and has potentially increased the costs of the parties and of the CMA itself. In present circumstances where the number of potential interveners is limited this is less of a problem but could become a large issue if the number of interventions increase.

There is one procedural point which we would like to draw to the attention of the CMA at this stage. As we interpret the draft timetable (Rule 10.2 – 10.8 New Rules) the parties would have 10 working days in which to make submissions on an application by a potential intervener for permission to intervene. However, half of this period falls during the period when the regulator will be drafting its defence to the appeal, and of necessity will be fully

engaged in that exercise. In practice, the UR would be unlikely to engage with the permission application until after its defence is filed. In practice, this means that the appellant will have 10 working days to make submissions, and the regulator may only have 5 working days. In any case in which there may be a number of applications to intervene, this is a large task within a short timescale, and disadvantages small regulators in particular.

What is your view on the CMA's proposed approach in Rule 10 of the draft Energy Licence Modification Appeals Rules, under which 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?

The Utility Regulator considers that the application of a material interest test to interventions by third parties has merit as a means to manage the number of interventions in appeals. Our expectation from any change to Rule 10 therefore is that it would clarify when an 'interested third party,' as defined by the statute, can intervene. However, the CMA's proposed changes go much further than this and introduce subtle changes in language to the rules which we consider will have the unintended consequence of increasing the number of potential interveners beyond that provided for by statute. Accordingly, we urge the CMA to reconsider the proposed changes to Rule 10. It would also be very helpful if any such changes proposed could be accompanied by an explanation that sets out what problems the current rules generate and how any proposed changes would remedy these issues.

The position under the Existing Rules

The current position is that '*an interested third party may make representations or observations*' (Rule 10.1 Existing Rules). An interested third party may thereafter be treated in all the ways that a party may – by being asked questions, invited to make submissions, asked to provide evidence, and required to attend hearings (Rule 14.5 Existing Rules).

For these purposes, an '*interested third party*' is defined as any person falling within Article 14B(2) (Rule 2.1(e) Existing Rules). This is to say, an interested third party is any party which would have been entitled to bring an appeal against the decision that has in fact been appealed by someone else.

The '*interested third party*' is therefore defined by reference to the statute. There are four types of body which may bring an appeal under Article 14B(2), and which are therefore treated as interested third parties under the Existing Rules –

- a) Any '*relevant licence holder*'. This means any person whose licence is being modified in accordance with the decision under challenge.

- b) Any other licence holder '*whose interests are materially affected by the decision*'. Note that this requires both that someone is a licence holder and that their interests are materially affected '*by the decision*'.
- c) An association representing a person falling within (a) or (b).
- d) The Consumer Council of Northern Ireland ("CCNI"), representing consumers whose interests are materially affected by the decision.

The CMA has stated that the reason it is proposing to amend Rule 10 is for the purposes of clarity but does not say why the current position is unclear or otherwise generates problems which need to be remedied. The Utility Regulator would therefore welcome more explanation from the CMA in that regard.

The position under the proposed New Rules

If our understanding is correct, the position under the New Rules would be different in at least two main respects.

First, the Existing Rules provide that interested third parties are automatically entitled to make representations in an appeal. Under the New Rules, '*interveners*' would need permission and would be required to follow an additional process in order to get it. We have no objection in principle to the requirement for permission provided that only an 'interested third party' as defined by statute may apply.

We consider that this should have no practical effect on the ability of the CCNI to make representations in an appeal unless (exceptionally) the licence modification being appealed has no (or a negligible) effect on consumers.

Second, the New Rules would appear to considerably expand the category of those who may (with permission) intervene. The principal tests are whether the potential intervener is '*materially interested in the outcome of the appeal*' and whether the intervention '*will assist the CMA*' (Rule 10.3(a) and (b) New Rules).

Under the existing rules a person wanting to bring an appeal must be a licence holder '*whose interests are materially affected by the decision*'. The three key elements of this are that: (i) it is limited to regulated companies, (ii) their interests must be materially affected, (iii) the thing that gives rise to this material effect on their interests must be 'the decision' (i.e. the licence modification). The effect of this is quite limiting as to who can make an intervention. This is deliberately so in order to reflect the statutory test for right to bring an appeal.

The test of being '*materially interested in the outcome of the appeal*' sounds very similar, but is fundamentally different in the following respects –

- i. There is no requirement to be a licence holder, or any other entry criterion which requires the person to be regulated. This means that the ability to intervene is potentially open to any person.

- ii. The qualifier ‘materially’ attaches to the interest of the potential intervener rather than to any effects which that person will suffer. A person may be materially interested in something even if they are not directly affected by it.
- iii. The thing in which the person must be materially interested is not the decision of a regulator (to modify the licence) but the decision of the CMA (the outcome of the appeal). A person may not be interested in the particular decision under appeal, but may nonetheless be very interested in the potential outcome of the appeal because of the precedent it sets for the future.

The further test of whether the intervention will ‘assist the CMA’ appears an insufficient safeguard, beyond highlighting that the CMA is not bound to grant permission to anyone in particular. There is no clarity as to how the CMA will exercise that discretion – indeed it is bound to be exercised on a case-by-case basis and to be entirely fact sensitive. In this respect the CMA’s proposals are significantly less clear than the existing rules.

The practical effect of the proposed New Rules

For the reasons explained above we consider that the practical effect of the proposed New Rules is to open up the field of intervention to a much wider range of bodies.

Most obviously, in the case of a network price control, it might be expected that other network owners/operators would pass the test of having a material interest in the outcome of the appeal. For example, in an appeal concerning financeability, it would be open to any network company to argue that it has an interest in the CMA’s findings on the subject of financeability generally, and on several of the grounds of appeal in particular. Nor is this necessarily limited by sector. CMA determinations are of relevance across sectors. A gas network company might be just as interested in the outcome of an electricity appeal as another electricity operator.

Non-regulated third parties such as banks and equity investors may also have an interest in the outcome of an appeal.

It should be noted that none of these bodies would be an interested third party under the Existing Rules, because none of them is a licence holder directly affected by the decision to modify the licence of the appellant.

In practice, therefore, the Utility Regulator might reasonably expect that the proposed New Rules would give rise to more interventions and not less.

Furthermore it seems likely that the vast majority of these will be motivated and well-funded companies whose interest will be to argue against a regulator. We also note that the effect of the proposed new rules is that CCNI will lose its automatic right of intervention, while other consumer bodies might obtain a right of intervention they did not previously have.

Consequently, we conclude that there is a real risk (particularly in relation to appeals from regulated companies in Northern Ireland) that the effect of the proposed new rules will be

to increase the number of interveners who are supporting the appellant against the regulator. This would result in an asymmetric appeals process in favour of the appellant. We would welcome the CMA's thoughts on this point as we do not believe this can be the CMA's intention.

We hope the points made in this response are helpful to the CMA in considering changes to Rule 10. If anything above is unclear or if we can be of any further assistance in any way please do get in touch.

Yours faithfully

Donald Henry

Director of Corporate Affairs