Response to CMA's open letter dated 7 December 2021 on the CMA's licence modification appeal rules and guidance

We consider that the regulatory regime is of paramount significance to the UK economy and the CMA's role is critical to providing appropriate and rigorous scrutiny of regulatory decisions. Having had numerous roles on the CMA's recent price control redeterminations in PR19 and RIIO2 price control appeals, we thank the CMA for the opportunity to respond to its open letter on the rules and guidance applicable to licence modification appeals.

We therefore set out below some observations on the topics raised in the CMA's open letter. We would of course be happy to discuss these issues with you in more detail.

1 Pre-appeal stage

(1) Some regulatory decisions which fall for review by the CMA are complex and life changing for licenced entities (e.g. a price control may affect the viability and investment incentives for the next price control cycle). Licenced entities have strict statutory deadlines in which to lodge appeals. During this time, licensees are under significant time, resource and governance pressures to decide whether to lodge an appeal and, if so, on what grounds, and prepare the relevant documentation. This strict timetable is designed to ensure the efficient running of the regulatory processes.

(2) As a result, we think there is limited scope during the pre-appeal phase to engage in extensive pre-action correspondence between appellants and the regulator. Licensees will have been engaged in extensive dialogue with the regulator during any consultation phase and parties will be incentivised to avoid a regulatory dispute if consensus can be reached. On this basis, we believe little would be gained by imposing any such requirements for pre-action correspondence in the context of regulatory appeals.

(3) In the context of price control appeals/referrals to the CMA, where these do not entail a full redetermination (e.g. in the energy sector), it is difficult for parties to identify interlinkages between different building blocks of the price control during this strict window. We would therefore suggest that the CMA guidance/rules provide for specific tackling of interlinkages, to the extent these arise, during the appeal phase itself rather than relying on the parties bringing these forward in their initial application or response to such application.

(4) We consider that it is helpful for parties considering an appeal to the CMA to be able to have a dialogue with the CMA about process and how they are likely to organise any appeal. In particular, to discuss the extent of documents that may need to be provided.

2 Process for serving of documents, including any changes to reflect developments in technology

(5) We would suggest that the CMA consider updating its guidance to provide more detail on the process for serving documents. The Secure File Transfer Protocol that is currently used is not very user-friendly and the requirement to upload all supporting annexes in a single zip folder is quite burdensome. When parties have to provide data books / stata files in support of economists' reports, the size of such files makes the zipping process particularly time-consuming.

(6) It would be helpful if the CMA could also use a different platform or alternatively allow parties to use a pre-approved file transfer platform. For example, parties used Intralinks VIA in the

RIIO-2 appeal to serve documents on GEMA and other appellants and this proved to be very speedy and effective. Use of a common platform to serve documents could also make the process more efficient.

3 Procedures for hearing multiple, linked, appeals

(7) We consider that the CMA's work in managing the number and breadth of appeals in the context of RIIO2 was admirable. The administration of confidentiality rings and inter partes correspondence was necessarily cumbersome but we consider that this was undertaken efficiently and consistent with the CMA's overriding objective.

(8) We recognise the efficiency in joining grounds of appeal and having joint hearings. But each appeal raises individual and distinct issues - therefore it is important to ensure that the rights of defence for each individual appellant are protected and preserved. We would therefore encourage the CMA to include clear statements in its guidance and rules about the role of clarificatory hearings and that such hearings would be individual even if some grounds of appeal have been joined. This worked well in the RIIO-2 appeals and we consider that it should be maintained as it gives each appellant the opportunity to present its case in front of the panel with direct one to one interaction with the decision-makers. We would also encourage some clarity about joint hearings and a signal from the CMA that it is not its default position to revert to joint grounds/hearings just because there are multiple appeals regarding the same licence modification/price control decision.

4 Management by the CMA of the submission of evidence, including any evidence beyond the notice of appeal, response and reply

(9) The CMA's guidance and rules are clear as to the requirements regarding submission of evidence. In particular, it is clear that evidence must be submitted in the format of witness statements (and the formal requirements of such witness evidence). It may nonetheless be helpful for the CMA to explain how it expects witness statements and expert reports to interact (or be clear that the rules on these materials are not prescriptive).

(10) Similarly, the CMA is clear that witness evidence must be accompanied by a Statement of Truth. However, given the complexity of matters in dispute in such appeals (and the breadth of a business that can be affected by the appeal), it can be difficult for one individual to attest to all aspects captured by a Notice of Appeal and take responsibility for all its content when this is drawn from expert reports from economists and other consultants. It may be helpful if the CMA's guidance recognised the broad scope of the appeal and the limitations in terms of scope of any Statement of Truth.

(11) As a separate matter, we note that the CMA's guidance is not prescriptive in terms of length/scope/management of major submissions. We believe this flexibility should be maintained as every appeal will be different in terms of scope, number of appeals, type of evidence etc. The precise management of different forms of evidence can therefore best be determined on a case-by-case basis by the panel constituted to hear the appeal.

5 Interveners

(12) We would not recommend any changes to the CMA's treatment of interveners and in particular support the CMA's view that interventions should not be duplicative of arguments made by the parties but should be permitted where the intervener can assist the CMA.

(13) We nonetheless consider that it may be helpful for the CMA to set out some parameters as to interventions between ongoing appeals. For instance, it would be useful to have some guidance from the CMA as to what considerations would be taken into account in these circumstances (i.e. when parties who are appealing the same decision on their own right could intervene, and on what basis, in each other's' appeals)

6 Role and number of hearings (clarification hearings, main hearings, and relief hearings) at different stages of the appeal.

(14) As set out above, we believe that the number and management of the hearings was undertaken successfully by the CMA in the context of RIIO2. In particular, we believe that the appellants considered the clarificatory hearings to be an important part of the process, allowing parties the opportunity to have their grounds of appeal (and defence) understood by the CMA at an early stage of its enquiry. This is likely to be particularly important in the context of multiple appeals on a common or joint issue, as this provides the CMA (and the companies) an opportunity to consider and highlight company specific differences or angles.

7 Cost process

(15) Given the RIIO2 cost process is ongoing, we do not make detailed submissions on the cost process itself. But we consider that given the tight timeframes for some of the appeals (with six months for energy, 12 months for water), dealing with costs at the end of the process is a sensible approach to ensure efforts on the CMA's and the parties' sides are focused on the substantive aspects of an appeal.