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Sent by email to: licenceappealsproject@cma.gov.uk

Dear Gavin,

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

A. Introduction

Electricity North West is the Electricity Distribution Network Operator (DNO) covering the north west of England serving 5 million customers in 2.4 million premises, across a diverse range of locations, from urban Greater Manchester to rural parts of Cumbria, Lancashire and Cheshire.

We are currently engaged in Ofgem's RIIO-ED2 price control review, which will set our allowed revenues for the period 2023 – 2028. Having consulted with more than 18,000 customers and stakeholders to establish appropriate commitments and priorities, we submitted our final business plan to Ofgem in December 2021. Our plan proposes investment of over £1.8bn, realises net monetised benefits of £1.2bn plus a host of other non-monetised benefits and improves reliability and customers service.

The CMA's open letter was published at an opportune moment to reflect on the appeal rules and guidance that impact regulated sectors such as energy. It follows a series of licence modification appeals and redeterminations that raised a number of procedural issues, from managing concurrent appeals, conducting virtual hearings and considering the interplay between successive appeals and redeterminations that touched on common issues. Given our engagement in recent CMA regulatory appeals and redeterminations, we consider that we are well placed to provide insight on the processes involved.

In preparing these comments, we are mindful of the importance of an effective and efficient appeals process. The appeal process is a central tenet in the regulatory regime that is designed to protect the interests of existing and future consumers. It is paramount that the regime works effectively and efficiently, and is transparent and fair. It ensures that regulators deliver the outcomes that protect the interests of existing and future consumers by establishing a framework for the independent and transparent review of their decisions. This creates an incentive for regulators to ensure that their decisions are well founded and serve the interests of customers both in the short and long term and provides an opportunity for companies to challenge decisions which contain errors and are wrong. The regulatory appeals framework is also an important tool for ensuring that regulated companies can access illiquid long term capital at the lowest possible cost to enable them to deliver services in a way that best serves existing and future consumers. Potential investors take comfort from knowing that there is an effective appeal regime that does not exacerbate the riskiness of their investment.

For this reason – to enable companies to have access to cheaper capital, which reduces costs to customers – it is essential that the regulatory regime is both fair and seen to be fair. Moreover, this is critical in the early stages of meeting the Net Zero challenges where a lack of funding would result in delays to investment in infrastructure and, consequently, higher costs for consumers in the future.

The importance and the effectiveness of the appeal regime must not be understated. The appeals regime is an important "check and balance" that supports best practice in consultation procedure and decision making. Companies do not bring appeals lightly. If a licence modification decision is appealed, it follows careful consideration of the relevant decision by the company, taking account of the previous engagement and consultation with the regulator and the impact on the company and consumers. Despite the significant number of energy price control decisions that have been taken in the ten years since the Competition Commission (and subsequently the CMA) was given jurisdiction to hear these appeals, it is notable that the total number of appeals during the period is small.

However, we have seen a recent increase in the number of price controls being appealed to the CMA (i.e. NATS, PR19 and ELMA21). This is unusual but perhaps not unsurprising given the degree of uncertainty faced by regulated companies and significant changes introduced by regulators. The necessary investment to meet Net Zero targets results in a need for greater investment whilst affording less certainty over investment plans. This has resulted in reduced certainty in regulated allowances and has been coupled with significant methodological changes that have been proposed by the UK Regulators Networks' (UKRN) advisers and implemented by a number of regulators. The fact that licence modification decisions are not typically appealed but that there is an increased number of appeals at times of uncertainty and significant change is a sign that the regulatory system is functioning well.

Another more recent development has been for regulators to intervene in appeals outside of their own sectors. For example Ofgem intervened in the PR19 redetermination and Ofwat was closely involved in the recent ELMA21 appeals. This not only demonstrates the close working relationships between the regulators but also the likelihood that developments in one regulated sector will influence that in another sector. It also serves to emphasise the importance of the appeals regime in setting relevant regulatory precedent. Given this, we consider it is vital that there is a fair balance in the rights of regulators and regulated companies. Regulated companies should have the opportunity to share their views and engage with the CMA even where they are not subject to the licence modification that has been appealed where there is a clear interlinkage between the matters under dispute and those which affect the regulated company.

This response focuses on the pre-appeals stage, submission of evidence, hearings and the role of interveners. These are areas where, if managed effectively, there is scope for efficient engagement with a wide range of stakeholders in a manner that will further the CMA's overriding objective to dispose of appeals fairly and efficiently and at proportionate cost within the time periods prescribed by the relevant Acts. This response does not comment on aspects of the regulatory appeals regime that are governed by statute as we understand those aspects to be out of scope of the CMA's open letter.

B. Pre-appeal stage

There is no requirement in the energy regime for companies to engage with the CMA ahead of bringing an appeal and the energy rules and guide are silent on this point. As set out below, we consider that there can be merits in pre-appeal engagement but do not consider that should be a formal requirement for parties to engage in this way. As such, we propose that any changes to the guide do not seek to encourage pre-engagement, but rather focus on the safeguards that will be put around such engagement in terms of balancing transparency and confidentiality.

In Ofgem's open letter to the CMA dated 30 October 2019, Ofgem stated that it strongly supported pre-appeal discussions as this could narrow the issues in dispute. Given the private nature of pre-appeal discussions, it is not publicly known the extent to which these discussions took place ahead of ELMA21 and the degree to which issues were narrowed down. It is clear, however, from companies' responses to the draft determinations that there were many more issues that could have been appealed, suggesting that this does take place to a degree and is effective at averting unnecessary appeals.

The CMA agreed with these advantages of pre-appeal discussions in its response to Ofgem dated 4 November 2019. It identified a further reason for pre-appeal engagement, which was that such engagement enabled the CMA to ensure it allocated the appropriate resources sufficiently early. This is essential given the time frame for energy licence modification appeals (six to seven months for price control decisions). Pre-appeal

engagement would support the CMA identifying the appropriate Group members and working team to hear appeals.

Pre-appeal engagement would also enable the CMA to identify external experts that are not already engaged by the regulator or potential appellants and ensure that its internal team is familiar with the likely areas of dispute (beyond those identified in responses to draft determinations). These steps would help the CMA to deploy necessary resources and knowledge, thereby enabling it to form an independent and robust view on whether the contested decision was properly made or whether, recognising the CMA's expertise, that decision was wrong.

To preserve the standing of the UK regulatory regime, however, it is important that parties (whether regulators or licensees) do not use pre-appeal engagements with the CMA to influence the CMA's approach to the issues in dispute. As such, we would advocate the CMA publishing minutes of pre-appeal meetings (with parties' identities redacted, as necessary, to preserve confidentiality). This would ensure that the CMA is not only fair in its dealings with parties but also that it is seen to be fair.

To the extent that parties do engage in pre-appeal discussions, the CMA guide may encourage them to actively seek to resolve areas of difference ahead of any appeal and evaluate whether an appeal is necessary. Leading on from this, there should be efficient processes to ensure appeals can be easily withdrawn, such NGN's withdrawal of a sub-ground in ELMA21.

C. Submission and publication of evidence

The current energy appeal rules provide for the CMA to request both hard copy and electronic submissions of documents. The challenges presented by Covid-19 restrictions have resulted in parties relying more on electronic submissions. We consider that that these changes should remain in place even as Government guidelines on working from home are relaxed. Submitting evidence electronically significantly reduces printing and paper usage. Further, given the limited time for filing an appeal upon receipt of a regulator's decision and the need for appellants to file all of the key evidence upfront, the default position should be that parties are required to submit documents electronically.

To the extent the CMA would later find it useful to have key documents available in hard copy format these could be provided separately after the permissions stage.

Further, we request that in the interests of transparency, the CMA publishes evidence submitted in the course of appeals (subject to confidentiality restrictions). There was a notable difference in the volume of submissions and arguments published between PR19 and ELMA21, possibly reflecting the differences between the redetermination and appeals regimes. However, given that appeals afford significant insight into a regulator's rationale for decisions, as well as the CMA's judgements, it is in the public interest that all relevant submissions and provisional decisions are published. We understand that it is standard practice for parties to be asked to provide non-confidential versions of submissions so this should not prove unduly burdensome.

D. Hearings

There is significant value for both parties engaged in an appeal and for the CMA when parties are able to present their arguments directly to the decision-makers (i.e. the CMA Panel or Group) in hearings. As such, we support a process that enables frequent opportunities for the parties to present their arguments orally and have those arguments tested by the decision makers.

From the outset of the process, it is important that teach-ins on the regulatory regime and clarification hearings are held at an early stage in an appeal to ensure that the CMA fully understands each party's case. This is particularly the case in appeals covering multiple issues or that are wide-ranging in scope. The teach-ins can provide a valuable opportunity to deliver efficiencies in the process if the parties are encouraged to coordinate the teach-ins between them, agree non-disputed facts and core bundles of documents. Additionally, if these hearings are held sufficiently early, they could also function as a case management hearing and enable the CMA to structure its Panels or Groups in a way that their workload is balanced, subject of course to any statutory constraints.

We understand that the CMA has in the past conducted site visits so as to better understand an appellant's business. We consider that combining clarification hearings with on-site visits in the early stages of an appeal would be an effective and efficient use of the CMA's time and resources.

Substantive hearings are essential to enable the CMA to assess the merits of each party's case. They provide a valuable opportunity for the CMA to properly scrutinise the regulator's decisions and the appellant's arguments, allowing the CMA to understand the proper weight that should be placed on oral and expert evidence. It is particularly helpful to receive questions in advance – or at a minimum a list of topics – to ensure parties are well-prepared and the time spent in hearings is used efficiently.

In cases where there are multiple parties, while it is useful – and indeed efficient – to have 'joint' hearings, we consider that the CMA should always allow parties an opportunity to be heard individually. It may be the case that appellants have different reasons for opposing a regulatory decision or alternative approaches to remedying an error. In these circumstances, it is important that each appellant's arguments are properly evaluated rather than focusing solely on common positions.

E. Interveners

As mentioned above, the role of interveners in appeals is important given that decisions of regulators affect the regulated companies that are subject to those decisions. They also have wider ramifications across industries. The UKRN was established so that regulators, such as Ofgem, Ofwat and the CAA, could collaborate and share learnings. Therefore it is not surprising that they jointly appoint consultants and adopt similar positions. Although each regulator consults on each decision, the degree of embedded analysis that results from collaboration between regulators should not be underestimated. This approach can produce efficiencies for the regulators but it also demonstrates the importance of companies being able to intervene where regulatory decisions are not addressed to that company but use a methodology that may subsequently be applied to it.

The role of other sector regulators as interveners was clearly recognised in the NATS, PR19 and ELMA21 appeals and redeterminations. In ELMA21, ENWL also applied for permission to intervene. Despite the CMA acknowledging that ENWL "may have an interest in the outcome", it concluded that ENWL's interest was not sufficiently material as in the CMA's view it was not directly affected by the CMA's decision. It is, however, reasonable to expect that Ofgem will place significant weight on the CMA's final determination on the RIIO-2 appeals for transmission and gas distribution when in the following months it considers similar points in the RIIO-ED2 price control.

In the ELMA21 appeal, ENWL did not get the opportunity to comment on submissions by Ofgem (which would inevitably affect ENWL) or the Provisional Determination, and indeed did not see much of the underlying evidence put forward by Ofgem (including witness statements which were frequently referred to). Given the significant potential impact of the Final Determination on Ofgem's approach to upcoming regulatory decisions, which will directly affect ENWL, this resulted in ENWL being a bystander in relation to decisions that are critical to its operations and financeability.

It is therefore unclear what threshold ENWL would have been required to pass in order to be granted permission to intervene in ELMA21. Consequently, we consider that greater balance between the roles of regulators and regulated companies is merited. ENWL would welcome changes to the Rules and Guide that provide greater clarity on the criteria for intervention, the role of interveners and the role of parties that can support the CMA even if they are not interveners. These changes should recognise the material impact of appeals on indirectly affected businesses. There is an interconnected regulatory ecosystem where different sector regulators may adopt common practices and individual regulators are likely to consider the outcome of an appeal when making future determinations.

Please contact me should you wish to discuss this response further.

Yours Sincerely

Paul Auckland

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Paul Auckland
Head of Economic Regulation