

Attn: Gavin Knott, Director  
Remedies Business and Financial Analysis  
CMA Competition & Markets Authority  
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By email to: [licenceappealsproject@cma.gov.uk](mailto:licenceappealsproject@cma.gov.uk)



31<sup>st</sup> January 2022

Dear Sirs

**Re: Open letter on the CMA's licence modification appeal rules and guidance dated 7 December 2021**

We write to respond to your open letter specifically with respect to the appeal regime to be adopted with respect to NERL's regulatory reviews by the CAA. As you will be aware, NERL has recently completed a full redetermination referral under the former regime overseen by the CMA. While we appreciate that no firm decision has yet been taken, we anticipate that the regime for NERL will be closely based on the current regime for airports operating under an economic licence, subject to any refinements the CMA determines are appropriate. As we have no direct experience of that appeals regime on which to base comments on the practicalities of the process, this letter is confined to brief comments on two areas where we feel greater clarification may be helpful taking into account the specific nature of NERL's Licence duties and its customer base:

1. Pre-appeal stage/Interveners

Our first comment is to highlight the diverse and international nature of our customer base and its relevance to the materiality of an application for appeal. While airports experience a similar diversity of nationality to NERL, our view is that the nature of airport slot scheduling and airline investment in scheduled routes will lead to a narrower group of customers, all of whom will have similar levels of economic interest in pricing or operational matters at an airport which is subject to a regulatory decision. By contrast, NERL's customer base includes some airlines that merely overfly UK airspace without landing, others that overfly and use the Oceanic service, others that have UK bases and make extensive use of all aspects of NERL's services. Within the latter group, some airlines which have UK operations concentrated on one or two airports will have economic interests focused on the operation of air traffic control in particular sectors, rather than across

the UK network as a whole. We also provide services to general aviation; both commercial and occasionally leisure private flights.

While we would anticipate that the cost and effort in preparing to lodge an appeal by a customer would to some extent self limit appeals by customers who have minimal economic interest in any specific aspect of the regulatory decision, it would appear that NERL's input would not be available to the CMA until NERL was invited and accepted intervener status rather than at the pre-appeal stage. While the CAA could draw upon NERL's knowledge in providing comments to the CMA on the nature and interest of any customer requesting permission to appeal, we would request that the CMA give consideration to amending the airport regime to provide NERL with an opportunity to comment directly to the CMA at pre-appeal stage. In certain scenarios (for example vexatious claims) this might provide for a streamlining of the appeal process with a saving of cost and effort all around.

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

A further distinction between the airports regime and the air traffic regime, highlighted during the recent redetermination process, is the extent to which there is overlap and interaction between the CAA's powers and duties as a safety regulator and its role as an economic regulator. Where a rare difference of opinion arises on operational matters such as for example safety or airspace policy, this has the potential to affect the outcome of economic regulatory reviews and yet the underlying difference of opinion on operational matters would not necessarily have been the subject of economic regulatory submissions. Moreover, that difference of opinion might not become transparent until the economic regulatory decision emerges. The potential for interaction between the regulator's decisions on economic and operational matters is heightened where, as in the NERL regime, the economic judgement is subject to a primary objective (safety in this case), and where the interests of users are diverse, hence requiring judgement about potential operational impacts on some versus all. Our review of the airports regime leaves it unclear as to the stage at which, and the extent to which, independent expert aviation opinion on any such dispute can be adduced in the appeals process. Such evidence would not necessarily fall into the class of evidence that was available to the CAA but not taken into account. Such evidence might be the basis for legal argument in establishing the grounds for appeal but, again, we would request that the CMA give consideration to amending the airport regime to clarify this aspect of the appeals process.

If you would like to discuss any of the content of this letter please do not hesitate to contact me.

Yours faithfully

Richard Churchill-Coleman  
NATS Legal Director