



Making a positive difference  
for energy consumers

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**Open letter to industry on the CMA's licence modification appeal rules and guidance**

Dear Sir/Madam,

Thank you for the opportunity to respond to the above open letter consultation dated 7 December 2021.

In Appendix 1, we set out a number of suggestions from our experience of energy licence modification appeals ('ELMA') on potential improvements to the ELMA rules and guidance that could be made in order to better achieve the objective of ensuring that the CMA can manage appeals fairly, expeditiously and at proportionate cost, having regard to the interests of the parties to the appeal, interested third parties and the need to make decisions within statutory timeframes.

We hope the CMA finds these suggestions useful. We would be happy to discuss them in further detail if that would be helpful.

Kind regards,

Declan Tomany  
**Deputy Director**  
**Office of the General Counsel**

## Appendix 1

### Potential improvements to the ELMA rules and guidance

#### 1. Pre-appeal stage

- a. Potential appellants should, if the timetable permits, engage in pre-action correspondence with Ofgem; failure to do so could be taken into account when the CMA considers costs.
- b. Any pre-appeals correspondence with the CMA, e.g. on arrangements for the submission of documents, should be copied to potential appellants and to Ofgem.

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

- a. Service by all parties, including the CMA, should be electronic.

#### 3. Procedures for hearing multiple, linked, appeals

- a. Noting that adaptations may be necessary for a live appeal, it may be helpful to have some standing guidance or general practice notes on the process that an appeal is likely to follow, including, for example: groupings (e.g. the CMA considered the possibility of two Panels in the RIIO-2 appeals), the possibility of joining appeals, and an indicative timetable.

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

- a. Any correspondence between the CMA and an appellant should as a matter of routine be shared promptly with Ofgem - e.g. requests for information and responses thereto, clarificatory questions on an appellant's submissions.

#### 5. Interveners

- a. We support the approach the CMA took to interveners in the RIIO-2 appeals under Rule 10, including reliance on Rule 14(4)(e) to permit representations by third parties with an interest. This was proportionate given the number of appellants and issues appealed.

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

- a. As much notice as possible should be provided to the parties, including details of what is to be covered, the format (e.g. opening and closing statements), materials (e.g. if slides are required), and running order.
- b. Where possible, teach-ins and clarification hearings should not coincide with Ofgem's deadline to file its response to the notices of appeal and its witness evidence.
- c. Parties should not need to agree materials in advance as this tends to be difficult to achieve in practice.

#### 7. Costs process

- a. We support dealing with costs post Final Determinations, as was done in the RIIO-2 appeals.
- b. The rules and guidance may need to be amended to reflect recent case law:
  - i. *British Telecommunications Plc v Office of Communications* [2018] EWCA Civ 2542, [2019] Bus LR 592
  - ii. *Flynn Pharma* [2020] EWCA Civ 617, [2020] Costs LR 695

#### Other improvements:

- We suggest proportionate page limits on any supplementary submissions, which should also apply to any appendices.
- We invite the CMA to consider if any of the matters raised in our open letter exchange could helpfully be reflected in rules and guidance or in standing guidance / general practice notes: [Open letter to the Competition and Markets Authority \(CMA\) on price control appeals | Ofgem](#)