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Dear Gavin,

Response by Freshfields Bruckhaus Deringer (*Freshfields*) to the Competition and Market Authority's open letter on the CMA's licence modification appeal rules and guidance (*the Open Letter*)

1. Freshfields welcomes the opportunity to comment on the CMA's Energy Licence Modification Appeals rules and guidance (***CMA70*** and ***CMA71,*** together the ***Rules***) as requested in the Open Letter dated 7 December 2021. We are also grateful for the opportunity to discuss the Open Letter in a call on 14 January 2022. We have provided comments on each of the subject areas referred to in the Open Letter.

Pre-appeal stage

2. We consider the CMA should avoid being too prescriptive when putting rules in place, or providing further guidance, in regard to the pre-appeal stage. Regulatory decisions that can be appealed to the CMA have typically been preceded by consultation processes before the regulator and are unlikely to be materially changed once the regulator has decided to proceed with a licence modification. The question for the regulated companies at this point becomes whether, and if so on which points, it is advised to appeal to the CMA. The time window for considering the regulator's decisions and reasoning supporting the decision is short. Further, since the regulator will have already consulted on its draft decision, and reached a Final Determination there is limited benefit either to the parties or to the CMA in extensive pre-action correspondence. Listed companies may be limited in the amount of information that they can provide, in any event, until internal governance procedures have been followed, which would tend to occur towards the end of the short window to file an appeal on the basis of fully formed draft appeal documents. In those circumstances, potential appellants are unlikely to be in a position to engage in pre-action correspondence.

3. That said, our general practice would be to alert the CMA in advance of filing any notice of appeal on behalf of a regulated company and we consider that, where possible, this is good administrative practice.

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

4. As an administrative point, we agree that the CMA Rules would benefit from being amended to reflect that submissions need only be made in soft-copy digital format, removing the need for a hard-copy submission. This has worked well during the current pandemic and we believe this change could usefully be codified in any updated rules and guidance.

5. Additionally, as you are aware, the most recent energy appeals involved 8 appellants and required the exchange of substantial volumes of submissions and documents between the parties with each round of submissions. We would encourage the CMA to consider establishing a centralised portal for the submitting appeal documents and which can be accessed by the other parties (or those in relevant confidentiality rings, as appropriate). This would make the process for serving documents more efficient and assist in ensuring that confidentiality ring requirements and access rules are observed. While we have no concern that parties appearing before the CMA would not observe confidentiality restrictions, over the course of an appeal a number of different "rings" of parties and advisers can be established and technology may assist the administrative responsibilities of observing the different requirements.

Procedures for hearing multiple, linked appeals

6. We consider that the CMA's current rules and practices have afforded flexibility in case management so that related appeals on the same or similar issues can be heard together. We would encourage the CMA to retain this flexibility for future appeals.

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

7. The CMA's current rules and guidance provide it with flexibility to case manage appeals and evidence gathering in the manner it considers will meet the overriding objective. In particular, we acknowledge that there may be circumstances in which the CMA wishes to obtain further evidence from one or more parties on particular topics.

8. The CMA may wish to make clear that it is not normally appropriate for parties to file unsolicited submissions without permission outside those envisaged in the rules. Furthermore, where new evidence comes to light in the course of an appeal, in particular new evidence from the regulator which was not set out in the decision under appeal, it may be necessary for parties to adjust their positions in the light of that evidence. We believe that it should, however, not normally be necessary or appropriate for a regulator to change its position or pleadings during the course of an appeal.

9. The CMA's rules already provide flexibility for the fixing of page limits and other case management decisions to avoid unduly lengthy submissions or repetition. We do not believe that rigid rules on page limits are likely to provide sufficient flexibility to meet the requirements of every case. However, the CMA may wish to provide further guidance on the length of submissions and its practice to date in the management of submissions and evidence in appeals. The CMA could consider giving further guidance on this point.

10. The CMA may accordingly wish to consider providing further information on the circumstances in which it may either disregard unsolicited submissions and evidence and/or the cost consequences that may follow from overly lengthy or repetitious materials.

Interveners

11. The existing rules set out a clear test for interventions. Particularly, but not only, in multi-party appeals, we consider it is important that appeals are managed efficiently. We encourage the CMA to provide further guidance on the circumstances in which it will, and will not, consider the test of "materially interested in the outcome of the appeal" is likely to be met. For example, the circumstances relevant to an intervener such as Citizens' Advice, which has a statutory role appear to us to be very different to those of other sectoral regulators that are not subject to the appeal.

12. Furthermore, where the CMA refuses a party permission to intervene it seems to us that the CMA should be slow to introduce evidence from that party pursuant to Rule 14.4(e), particularly where the party concerned is likely to repeat the position of one of the parties. The CMA may wish to consider providing further guidance on the use of Rule 14.4(e) in those circumstances.

Role and number of hearings at different stages of the appeal

13. We encourage the CMA to consider each step of the process and whether it is necessary or useful in advancing the overriding objective having regard to the condensed timeline for the appeal process. In particular, we believe it is worth reflecting on whether clarification hearings, at the outset of the case, add significant value to the CMA or the parties in most cases. It appears possible to us that some of the objectives of the clarification hearings may be possible by means of requests for information (***RFIs***) and working papers to elicit or consult on areas which require additional information. This in turn could free up greater time for the main party hearings.

14. Additionally, we consider the CMA could consider greater use of main party hearings to afford all parties the ability to fully set out their respective cases and, crucially, to debate the key points of contention in more detail than has been typical in the past. One particular reflection from our recent experience is that where there is a legal issue (rather than economics) the overall time for a main hearing often appears especially short, particularly by comparison with the time that would likely be allotted by a court hearing argument on a similar legal issue. If the main party hearings were able to be scheduled over a longer period, this would also reduce the risk of the CMA having to organise "spill-over" hearings.