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NORTON ROSE FULBRIGHT

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Response to Competition and Markets Authority Open Letter on the CMA's Licence Modification Appeal Rules and Guidance

1 Introduction

1.1 Norton Rose Fulbright LLP welcomes the opportunity to respond to the Competition and Markets Authority (**CMA**) open letter on the CMA's licence modification appeal rules and guidance, published on 7 December 2021 (**Open Letter**).

1.2 We act for clients in all of the regulated sectors where licence modifications are appealable to the CMA, including energy, aviation and water. In particular, our response is informed by our experience advising clients on energy price control appeals, including the RIIO-ED1 appeals, the SONI appeal, and the recent RIIO-T2 and GD2 appeals.

1.3 In compiling this response, we have been mindful of the statutory regimes in each of the relevant sectors and sought to limit our comments to changes which can be made within the existing framework.

2 Executive Summary

2.1 We welcome the CMA's call for views and recognition that its new functions to hear licence modification appeals in the water (non-price control matters) and air traffic services sectors present a timely opportunity not only to consider the new rules and guidance that the CMA should adopt for those functions, but also to consider whether there should be any changes to the rules and guidance in the other sectors where the CMA follows a similar process, namely energy and airports.

2.2 Indeed, the timing is particularly apt given the CMA's final determination of the RIIO-T2 and GD2 price control appeals in October 2021, which has been the first multi-appellant 'test' of the existing rules and guidance in the energy sector. In this regard, it is important to emphasise from the outset that the rules and guidance put in place for all sectors **–** but perhaps particularly the energy, water and airports sectors given industry structures and the underlying statutory frameworks – must be able to function effectively in the context of both single and multiparty appeals. In our view, this is best achieved by allowing the CMA to be flexible where necessary in order to manage appeals fairly, expeditiously and at proportionate cost.

2.3 Based on our experience of regulatory appeals and redeterminations across a number of sectors, our key comments and suggestions – focused on the seven areas highlighted by the CMA in the Open Letter as being of particular interest – are as follows:

(a) We encourage the CMA to include a section on **pre-appeal engagement** in the rules and guidance applicable to appeals in all sectors.

(b) In terms of the **process for serving of documents**, we encourage the CMA to continue to permit parties to serve electronic documents only, and to place the burden on the regulator to serve a copy of the Notice of Appeal on other parties.

(c) We would welcome further guidance from the CMA on what it means for **multiple, linked appeals** to be "*consolidated and heard together*" (or "*considered together*"); consider there is scope for greater use of (virtual) appeal management conferences; recommend that the CMA's rules and guidance ensure the prompt production and circulation to all parties of non-confidential versions of submissions; regard it as essential that the CMA allow parties to be heard individually as well as in 'joined' hearings; consider that confidentiality rings

should be used sparingly, with confidentiality addressed earlier in the appeal process – ideally at permission stage; and encourage continued use of the 'roundtable' approach to hearing economic evidence.

(d) With regard to the **submission of evidence**, we think it would be helpful for the CMA to put in place some clearer guidance on the content of the Notice of Appeal, Response and Reply. As there may be circumstances in which further submissions from parties are necessary and appropriate, we consider that flexibility in this regard should be retained.

(e) We would welcome clarification of the role of **interveners** and parties permitted to support the CMA even though not formally interveners. We consider that interveners and supporting parties should be held to an appropriate standard in terms of the evidence they submit, and the main parties should be given adequate opportunity to comment on the factual accuracy of their evidence.

(f) **Hearings** are essential to allow the CMA to thoroughly examine an appellant's case. Clarification hearings should be in-person and, if possible, combined with a site visit to help put the appeal in context; whilst joined hearings can be useful, parties must also be heard individually; this is also true for relief hearings if the nature of the relief is not agreed; and 'teach-ins' can be valuable – and virtual – but must not include disputed facts or stray into advocacy.

(g) The principle of '**costs** follow the outcome' is fair, proportionate, and an established and important tenet of the regulatory system. Further guidance on when the CMA will allow costs incurred prior to publication of the regulator's licence modification decision would be welcomed.

2.4 Our more detailed comments and suggestions on these seven areas are set out in Section 3 below. In Section 4, we provide some concluding remarks focused on the specific features in water and air traffic services which might suggest the need for different rules and guidance compared to those that are in place for the energy and airports appeal functions.[1]

2.5 We are available to provide additional information in relation to this response, should this be helpful to the CMA.

3 Detailed comments and suggestions

3.1 We set out below our detailed comments and suggestions under each of the headings identified by the CMA as being of particular interest in the Open Letter.

Pre-appeal stage

We encourage the CMA to include a section on pre-appeal engagement in the rules and guidance applicable to appeals in all sectors.

3.2 The energy rules and guide[2] are currently silent on this point. However, the airports guide[3] does address the issue, making clear that the CMA (and the regulator) would welcome 'early warning' of an appeal. The airports guide does not stipulate how far in advance such 'early warning' should be given, and we think that is the right approach. However, we assume – particularly in cases

[1] For the avoidance of doubt, these views are informed by our experience of advising clients in those sectors, including on both the recent NATS En-route Limited (NERL) price determination and the Ofwat PR19 price determinations.

[2] Energy Licence Modification Appeals Rules (CMA70) and Energy Licence Modification Appeals Guide for Participants (CMA71).

[3] Airport Licence Condition Appeal Rules: Competition Commission Guide (CC20) (adopted by the CMA Board), at paragraph 21.

where there are likely to be multiple appellants – as much notice as possible is helpful, given the need for the CMA to allocate adequate staff resource.

3.3 In our experience, one of the key concerns about pre-appeal engagement for prospective appellants is the need to maintain confidentiality, not least because decisions to appeal are usually finely balanced and require Board approval. We therefore think that making clear the CMA is willing to engage in confidential discussions on an informal basis where an appeal is seriously contemplated (even in the absence of a formal decision to appeal having been taken) would be helpful.

3.4 In terms of the substance of any 'early warning' to the CMA:

(a) We note the CMA's previous indication that it would prefer 'early warning' to include the potential scope of the appeal, rather than be limited to notification of the potential existence of an appeal.[4] This preference could helpfully be included in the guidance for all sectors.

(b) We note the airports guide also suggests that it would be particularly helpful if the prospective appellant could disclose the names of any advisers they expect to employ so that the CMA can take steps to prepare for the possible appointment of members and allocation of staff to the case, including considering possible conflicts of interest.[5] This seems a sensible point to include in the guidance for all sectors to the extent this would assist the CMA in identifying potential additional resources to support the determination of an appeal.

3.5 For the avoidance of doubt, we would not support the introduction of formal pre-action correspondence with the regulator. This is because, in our experience, the issues in dispute are already clear as between the regulator and any prospective appellant before any decision is made, and the introduction of formal pre-action correspondence would unnecessarily increase costs and prejudice the ability of an appellant to meet the short statutory timescales for bringing an appeal.

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

We encourage the CMA to continue to permit parties to serve electronic documents only, and to place the burden on the regulator to serve a copy of the Notice of Appeal on other parties.

3.6 The energy[6] and airports[7] appeal regimes stipulate that an appellant must provide both electronic and hard copy documents, unless otherwise notified by the CMA. We welcome the CMA's recent practice of permitting parties to serve electronic documents only. We recognise that this decision was influenced by the restrictions of the Covid-19 pandemic, but would encourage the CMA to adopt this approach as a matter of course in future appeals due to the environmental impact of printing and delivering hard copies, as well as the significant burden involved in the process of preparing hard copy submissions. Alternatively, perhaps the CMA could accept electronic copies at the point of submission while reserving the right to later request hard copies of specific documents at the permission stage or once permission has been granted.

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4 CMA response to Ofgem letter on regulatory appeals (paragraph 12), published on 4 November 2019 (CMA response to Ofgem letter on regulatory appeals - GOV.UK (www.gov.uk)).
5 Ibid., paragraph 21.
6 Energy Licence Modification Appeals Rules (CMA70), Rule 23.
7 Ibid., paragraph 27.

3.7 We further note that there is currently an inconsistency between the energy (and water) regime and the airports (and air traffic services) regime in relation to serving a copy of the Notice of Appeal on other parties. This stems from differences in the underlying statutory framework.

3.8 More specifically:

(a) Under the statutory regime for energy appeals (and water (non-price control) appeals under the Environment Act 2021), the appellant is responsible for serving the Notice of Appeal (and other supporting documents) on the CMA and the regulator. The statute is then silent on the need to serve copies on other parties, but the energy rules nonetheless impose an additional burden on the appellant to send a non-confidential version of the Notice of Appeal to "*any relevant licence holders who are not parties to the appeal*" (and to send the CMA a list of such relevant licence holders).[8]

(b) By way of contrast, under the statutory regime for airports (and that for air traffic services under The Air Traffic Management and Unmanned Aircraft Act 2021), the applicant is required to send a copy of the application for permission to appeal to the regulator at the same time as serving it on the CMA[9], but it is then the regulator's obligation to publish the application and send copies of it to other parties with a "*qualifying interest*" etc.[10]

3.9 In our view, putting the burden on the regulator to notify other parties is a more proportionate approach (noting that it will already have the appropriate contact details). We therefore recommend the CMA adopt this approach in its rules for each of the regulated sectors.

Procedures for hearing multiple, linked, appeals

We would welcome further guidance from the CMA on what it means for multiple, linked appeals to be "*consolidated and heard together*" (or "*considered together*"); consider there is scope for greater use of (virtual) appeal management conferences; recommend that the CMA's rules and guidance ensure the prompt production and circulation to all parties of non-confidential versions of submissions; regard it as essential that the CMA allow parties to be heard individually as well as in 'joined' hearings; consider that confidentiality rings should be used sparingly, with confidentiality addressed earlier in the appeal process – ideally at permission stage; and encourage continued use of the 'roundtable' approach to hearing economic evidence.

3.10 There is currently a lack of clarity around what it means for appeals to be "*consolidated and heard together*" (or "*considered together*").[11] Further guidance from the CMA on this issue would be welcomed.

3.11 In terms of appeal management of multiple, linked appeals, we note this largely took the form of process notes in the RIIO-T2 and GD2 appeals – possibly because of the number of parties involved. We consider there is scope for greater use of (virtual) appeal management conferences in such cases in order to help "*narrow the issues and points in dispute*"[12] (including early discussion of interlinkages).

3.12 It is also vital in multiple, linked appeals that there are no delays in sharing information amongst parties – which can be a particular problem where confidentiality is claimed. With this in mind, we think it would be helpful if the CMA's rules and guidance in all sectors provided for non-confidential

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8 Ibid., Rule 5.7.
9 Civil Aviation Act 2012, Schedule 2, paragraph 1(3).
10 Civil Aviation Act 2012, Schedule 2, paragraph 1(4) and (5).
11 See, for example, the energy rules (Rule 14.2 and footnote 17).
12 Energy guide, paragraph 3.6.

versions of documents to be produced and circulated to parties at the same time as the confidential version is provided to the CMA in order to ensure the smooth running of the process.[13]

3.13 With regard to confidentiality rings, we note the complexity of and time involved in setting these up in a multiparty appeal process. To the extent required, it is important that confidentiality rings are put in place promptly and administered in a standardised, easily understood way. They should, however, be used as sparingly as possible, with confidentiality given detailed consideration much earlier in the appeal process than at present – ideally at permission stage.

3.14 Where there are multiple, linked appeals, it is clearly useful – and administratively efficient – to have 'joined' hearings. However, we think it essential that the CMA also allow parties to have their appeals heard individually. We comment further on the role and number of hearings at different stages of the appeal process below, including our thoughts on the most appropriate use of virtual hearings going forward.

3.15 We note that multiple, linked appeals tend to involve a significant number of economic (and other) advisers and a correspondingly large volume of overlapping technical evidence. This clearly presents challenges to the CMA – and to the parties – in terms of meeting the statutory timetable. In this regard, we thought the CMA's 'roundtable' approach to hearing economic evidence in the recent RIIO-T2 and GD2 appeals was sensible and efficient, and would encourage its use in the future.

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

It would be helpful for the CMA to put in place some clearer guidance on the content of the Notice of Appeal, Response and Reply. As there may be circumstances in which further submissions from parties are necessary and appropriate, we consider that flexibility in this regard should be retained.

3.16 The energy guide makes clear that participants are expected "*to send all their evidence to the CMA at the beginning of the process. The CMA does not intend the provision of evidence by participants to be an iterative process. If the CMA requires supplementary evidence later in the appeal, it will make this request.*"[14] This is also reflected in the airports guide[15] and underlines the fact that the appeal process is intended to be 'front-loaded'.

3.17 In this regard, we think it would be helpful for the CMA to provide:

(a) a clearer checklist in terms of the required content for a Notice of Appeal (although we would recommend stopping short of producing a 'standard form' for completion which might unnecessarily constrain an appellant in presenting its case); and

(b) guidance on the content of the Response and the Reply (including that, in order to comply with the obligation to assist the CMA to further the overriding objective, the former should be clearly and directly responsive to the grounds of appeal pleaded by the appellant(s)).

3.18 We note that additional rigour around these core documents might help 'tighten' the process and reduce the number of Requests for Information (**RFIs**) subsequently required to be issued by the CMA.

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[13] See also paragraph 4.53 of the energy guide – and paragraph 77 of the airports guide – which state that the CMA "*discourages participants from making excessive or blanket confidentiality claims over submissions and may consider them to be inconsistent with the overriding objective*".

[14] Ibid., paragraph 3.6.

[15] Ibid., paragraph 53.

3.19 It is, however, important to recognise that there may be circumstances in which further submissions from parties – beyond these core documents – are necessary and appropriate. By way of example: the PR19 submissions in the RIIO-T2 and GD2 appeals were an essential additional stage given the timing of the CMA's Final Report on the PR19 Price Determinations; and further submissions might be required in order to correct factual inaccuracies in evidence put before the CMA. We therefore consider that flexibility in this regard should be retained.

3.20 More generally, we consider the point about not making unsolicited submissions to the CMA is well understood, but could be included in the rules and guidance across sectors for completeness.

Interveners

We would welcome clarification of the role of interveners and parties permitted to support the CMA even though not formally interveners. We consider that interveners and supporting parties should be held to an appropriate standard in terms of the evidence they submit, and the main parties should be given adequate opportunity to comment on the factual accuracy of their evidence.

3.21 We think it would be helpful for the CMA to clarify both the role of formal interveners and the role of parties that are permitted to support the CMA even though not formally interveners in the rules and guidance.

3.22 To the extent that any formal or supporting interventions are allowed by the CMA, we consider that:

(a) the relevant party should be held to an appropriate standard in terms of the evidence they submit; and

(b) the main parties should be given adequate opportunity to comment on the factual accuracy of the intervening or supporting party's evidence.

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

Hearings are essential to allow the CMA to thoroughly examine an appellant's case. Clarification hearings should be in-person and, if possible, combined with a site visit to help put the appeal in context; whilst joined hearings can be useful, parties must also be heard individually; this is also true for relief hearings if the nature of the relief is not agreed; and 'teach-ins' can be valuable – and virtual – but must not include disputed facts or stray into advocacy.

3.23 In the energy guide, the CMA states that it expects a large part of the evidence used in the appeal will be written evidence.[16] This is consistent with the 'front-loaded' process described above. However, we consider that hearings remain essential to allow the CMA to thoroughly examine an appellant's case.

3.24 Specifically:

(a) Clarification hearings are important at an early stage to ensure that the CMA fully understands each party's case. This is particularly so in multiple, linked appeals perhaps covering multiple issues. Ideally, clarification hearings should be in-person (rather than virtual) and, if possible, combined with a site visit to help put the appeal in context. Despite

[16] Ibid., paragraph 4.27.

best efforts, we did not consider that pre-recorded virtual site visits were as effective in the RIIO-T2 and GD2 appeals as in-person site visits had been in previous energy appeals.

(b) Main, substantive hearings are essential to enable the CMA to assess the merits of each party's case. Whilst joined hearings in multiple, linked appeals can be useful, the CMA must also allow parties to be heard individually. For this process to work effectively, clarity and planning as to the role of each hearing will be required (and, in this regard, we note that it is helpful to receive a list of topics or questions in advance of hearings to ensure that parties are well-prepared and field the necessary personnel, and to maximise efficiency).

(c) Relief hearings are important to ensure that any relief ordered works in practice and adequately achieves the CMA's objective. If the nature of the relief is clear, a joined hearing can be used to establish a timetable and principles for the regulator and licensee(s) to agree appropriate drafting. However, if the nature of the relief is not agreed, in multiple, linked appeals the CMA must allow parties to be heard individually.

3.25 In addition to the above, we think there is also a valuable role for 'teach-ins' from the parties (with the regulator and appellant companies working collaboratively together to devise appropriate content) at the beginning of the appeal process to explain key sector-specific issues to the CMA. In our view, these 'teach-ins' need not be in person, and should generally be held virtually to maximise reach and efficiency. We recommend that the rules and guidance make clear that the content of 'teach-ins' must not include disputed facts or stray into advocacy (which would be inconsistent with assisting the CMA to further the overriding objective).

Cost process

The principle of 'costs follow the outcome' is fair, proportionate, and an established and important tenet of the regulatory system. Further guidance on when the CMA will allow costs incurred prior to publication of the regulator's licence modification decision would be welcomed.

3.26 Both the energy rules and the airports rules[17] provide that, in deciding what costs order to make, the CMA will consider the conduct of the parties, whether a party has succeeded in whole or in part, and the proportionality of the costs claimed. This seems appropriate, and a fair approach to determining costs. We note in particular that the rules recognise the importance of the outcome of an appeal when assessing costs. In our view, the principle of 'costs follow the outcome' is an established and important tenet of the regulatory system. An appealing party will take the risk of an adverse costs order if it loses an appeal but may recover its costs if its appeal is upheld.

3.27 We further note that both the energy guide and the airports guide[18] state that the CMA will not normally allow any amount in respect of costs incurred before the regulator first published its decision. In practice, however, prospective appellants need to do considerable work in advance of such decision. This is because:

(a) the issues in dispute are generally clear as between the regulator and any prospective appellant before a licence modification decision is made (see paragraph 3.5 above);

(b) decisions to appeal are usually finely balanced and require Board approval (see paragraph 3.3. above); and

(c) the statutory timescales within which to file a 'front-loaded' Notice of Appeal are very short.

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17 Energy rules (Rule 21.5) and airports rules (Rule 12.3).
18 Energy guide (paragraph 6.6) and airports guide (paragraph 81).

3.28 In the past, the CMA has allowed costs incurred prior to publication of the regulator's licence modification decision where those costs were incurred after the regulator's final determination of substantive issues relevant to the licence modification decision and they aided the Appeal Group's decision.[19] Further guidance on this issue – providing greater certainty to parties that reasonable costs may be recoverable even if incurred prior to the licence modification decision under appeal – would be welcomed.

4 Concluding remarks

4.1 Whilst – as our comments and suggestions in Section 3 above show – we favour consistency across sectors where possible, this should not be taken to mean that we endorse a 'one size fits all' approach to the CMA's rules and guidance across the board.

4.2 On the contrary, we:

(a) note that there are sector-specific differences between the existing energy and airports appeal regimes which should clearly be retained;

(b) do not consider that the energy and water sectors or the airports and air traffic services sectors are sufficiently similar to each other to suggest that replica rules and guidance would be appropriate – each sector should be considered on its own terms; and

(c) observe that there are specific features in water and air traffic services which should be reflected or which merit, at the least, flexibility in the rules and guidance to allow the CMA to adapt the appeal process as necessary.

4.3 With regard to the latter, we note for example:

(a) The water and sewerage sector has a significant number of licensees which vary in terms of size, scope (WaSCs, WoCs etc.) and geography. The statutory appeal framework is limited to non-price control matters (with current key issues including board leadership, transparency, governance and financial resilience) and there appears to be a high likelihood of multiple, linked appeals.

(b) The air traffic services sector has one major UK licensee, NATS En-route Limited (NERL), and a statutory framework which limits interventions to those who would be entitled to appeal themselves (which, combined, serve to create a different appeal dynamic). Price control matters are included in the statutory appeal framework in the air traffic services sector, with Covid-19 recovery a current key issue.

4.4 We would therefore encourage the CMA to develop, consult on and ultimately adopt rules and guidance which take into account relevant sectoral differences and allow it to be flexible where necessary in order to manage appeals fairly, expeditiously and at proportionate cost.

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[19] See, for example, CMA, *SONI Limited* v *Northern Ireland Utility Authority for Utility Regulation, Determination on costs*, 1 February 2018, at paragraph 71.