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Dear [redacted],

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

We welcome the opportunity to respond to the CMA's open letter on licence modification appeal rules and guidance. This is a single combined response on behalf of National Grid Electricity Transmission plc (**NGET**) and National Grid Gas plc (**NGG**). As you know, NGET and NGG both appealed Ofgem's RIIO-T2 licence modification decisions to the CMA in 2021 and therefore have recent experience of the rules and guidance in practice.

This response focusses specifically on what changes to the existing rules and guidance we believe would be appropriate for energy appeals. We do not give a view on what would be appropriate in other sectors and note that there may be reasons why energy should be treated differently from other sectors, such as the potential for a large number of companies within the sector to either appeal or be actively involved in appeals (all but one of the affected energy companies appealed Ofgem's RIIO-T2 and GD2 decisions).

Robust and clear appeal rules and guidance are vital to well-functioning appeal regimes and so are in the interests of consumers, regulated companies and regulators. We are of the view that the current Energy Licence Modification Appeal Rules (**Rules**) and Energy Licence Modification Appeals Guide for Participants (**Guide**) are, on the whole, fit for purpose and appropriate. Given this, any material changes to the Rules and Guide need very careful thought. We would be particularly concerned if any major overhaul, or any change which seeks to remove the important procedural protections which are currently set out, was proposed.

Our comments below relate to focussed changes that could be made to clarify or improve the Rules and Guide. We set these out under the headings contained in the open letter, with comments in other areas at the end of this response.

1. Pre-appeal stage

1.1. We do not see it as necessary for the Rules and Guide to be amended to refer to the pre-appeal stage. However, we appreciate that in previous cases the CMA has been keen to understand whether potential appellants are contemplating an appeal (and the subject area) in order to assist with planning.

Given the limited timescale for the CMA to assemble an appeal team with appropriate expertise, we agree that such communications with the CMA are worthwhile. It may be helpful for this to be codified in the Guide, provided that any addition notes that such communications will remain confidential between the entity submitting them and the CMA.

1.2. We do not believe that it would be appropriate to make any additions in relation to pre-appeal communications between potential appellants and the regulator. In particular, we would not consider it to be appropriate to introduce any reference to pre-action correspondence (as Ofgem proposed in the RIIO-2 price control). This is unworkable because of the statutory regime - any application for permission to appeal must be brought only 20 working days after Ofgem's final decision, leaving insufficient time for a pre-action correspondence stage.

1.3. Whilst some engagement between potential appellants and the regulator before an appeal may be helpful, precisely what level of engagement is appropriate will depend on the circumstances. We do not believe that there is any need to refer to this in the Rules / Guide.

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

2.1. The Rules allow documents to be sent to parties using electronic communication but still require hard copy documents to be sent to the CMA. Whilst we accept that the CMA may in a particular case have a reason to require hard copies, in general we question whether this is necessary given current ways of working and whether the default position could be for documents to be sent to the CMA by electronic communication only.

2.2. The Rules also require an appellant to send a copy of its notice of appeal to all relevant licence holders. Given it is the regulator that will have been liaising with all licence holders throughout the licence modification process (and will already have appropriate contact details), we query whether this should be for the regulator to do rather than the appellant.

3. Procedures for hearing multiple, linked, appeals

3.1. The RIIO-T2 and GD2 appeals involved nine appellant companies, with four joined grounds including some grounds which were brought by all appellants. We appreciate that large numbers of appellants create a challenge for the CMA in terms of the administration of appeals.

3.2. The Rules and Guide make reference to the CMA consolidating appeals with appellants being able to make representations on any proposed consolidation. The CMA did so (in our view effectively) with NGET and NGG's grounds in the RIIO-T2 appeals.

3.3. At an early stage in the RIIO-T2 and GD2 appeals, the CMA considered whether more than one Group of decision-makers should be appointed. We suggest that this should be considered again in a similar situation and would benefit from being codified. The Guide could be amended to state that this will be considered where the CMA is required to determine multiple appeals at the same time.

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

4.1. There is clearly a balance to be struck between requiring as much evidence as possible to be provided by an appellant alongside its Notice of Appeal to support the smooth running of an appeal, and allowing appellants to reply properly to the response which is advanced by the regulator in any appeal. The Rules and Guide need to contain flexibility to allow the process to adapt to ensure fairness in any particular case.

4.2. Further, the CMA is empowered to take into account evidence which was not before the regulator in coming to a decision and there is the potential for new evidence to come to light which is relevant. This occurred in the RIIO-T2 and GD2 appeals, where the CMA allowed the parties to make submissions relating to the CMA's PR19 Final Determination (which was published after the appeals were filed).

4.3. We consider that the Rules on this already allow appropriate flexibility. However, we are of the view that it would be helpful for paragraph 3.6 of the Guide to be amended to make clear that the CMA will allow parties to provide further evidence where this is appropriate (for example where it was not possible to provide evidence on a matter at the start of the process).

5. Interveners

5.1. One of the key differences between the appeal regime in the energy sector and the redetermination regimes in existence in other sectors is that in the former third party involvement in appeals is limited whereas redeterminations generally include public consultation.

5.2. We appreciate that whether it is appropriate to allow third parties to intervene or otherwise participate in an appeal is highly fact specific and the Rules and Guide do provide appropriate flexibility. We note that in the RIIO-T2 and GD2 appeals, two participants were not permitted to intervene, but were permitted both to make detailed written submissions and, in one case, have a hearing. We are firmly of the view that it is important that the CMA does not blur the lines between permitted interveners and other participants in energy appeals and that the involvement of any third party is kept proportionate.

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

6.1. The RIIO-T2 and GD2 appeals included teach-in sessions, clarification hearings, main and individual hearings and finally relief hearings (in addition to case management meetings). In our view all of these sessions were beneficial in allowing parties to explain the background and present their case and enabling the CMA to reach its determination. It would be helpful for the possibility of these hearings to be noted briefly in the Guide.

6.2. In cases where there are multiple appellants, the opportunity for each appellant to have an individual hearing is important to ensure that its specific case can be presented. We would be strongly against any proposal that a joined hearing will be sufficient. We note that, as was the case in the RIIO-T2 and GD2 appeals, the CMA can always shorten hearing times if there are limited matters to discuss. In those appeals the only hearing we saw as unnecessary was the hearing given to a participant which was not permitted to intervene (see above).

6.3. All sessions in the RIIO-T2 and GD2 appeals were held virtually. This worked well in allowing the process to accommodate a large number of parties. Although the original driver may have been the pandemic, holding hearings virtually where there are a large number of parties in the future would, in our view, be preferable to allowing only a very limited number of representatives from each party to attend.

6.4. However, following the easing of the pandemic, we suggest that in future processes consideration is still be given to holding both site visits (which can be of value to the process) and in person key hearings where there are only a small number of parties. In contrast, it appears to us that sessions such as case management meetings can be held virtually in future appeals.

7. Cost process

7.1. The costs process in the RIIO-T2 and GD2 appeals is currently ongoing and so we do not comment on that process here.

8. Other comments

8.1. We have the following comments to make on other focussed changes we would suggest to the Rules and Guide.

Publication of Provisional Determination outcome

8.2. Paragraph 19.3 of the Rules provides that the CMA will not normally publish the CMA's provisional

determination. In the RIIO-T2 and GD2 appeals the CMA agreed that a summary of the provisional determination should be published. This was on the basis that the provisional determination was likely to contain price sensitive information which, if not published, would need to have been provided to the market by certain of the appellants [redacted]. We request that the Rules are amended to note that a summary of the provisional determination will be published in appropriate cases, such as where disclosure is likely to be required by market rules.

Sensitive information

8.3. The handling of information claimed to be sensitive was one aspect which had a negative impact on the RIIO-T2 and GD2 appeals process. In our view, claims of sensitivity of information should only be made where justified and confidentiality rings (used to manage sensitive information) should be used sparingly. This is both to aid efficiency and fairness of the process and also to limit the extent to which parties are forced to use external advisers. For example we do not see that confidentiality rings should be used to dictate attendees to whole hearings, as was done in the RIIO-T2 and GD2 appeals. Rather any hearings should be run such that sensitive information is covered only at specific points where suitable arrangements to preserve confidentiality of that information can be made.

8.4. The only change that we would suggest to the Rules is an amendment to make clear that, where a party is required to provide sensitive and non-sensitive versions of documents, these must both be provided within any relevant timescales. In the RIIO-T2 and GD2 appeals it was not helpful for sensitive versions to be provided by a deadline, with non-sensitive versions only being provided some time afterwards.

Interlinkages

8.5. The issue of links between parts of a price control which are appealed and parts which are not has been discussed at length in previous appeals. As set out in the CMA's letter to Ofgem dated 30 October 2019[1], it is for the regulator to explain any interlinkage which it considers may be relevant in response to an appeal. It would be helpful for paragraph 4.8 of the Guide to be updated to make this clear.

Duplication between the Rules and the Guide

8.6. We note that there are a number of places where explanations in the Guide simply duplicate material in the Rules. For example paragraph 2.4 of the Guide sets out the CMA's powers on allowing an appeal, but these are also set out at paragraphs 20.1 to 20.2 of the Rules. If the documents are being amended, it would be helpful for the CMA to consider whether any duplication could be removed to make the documents more concise when read together.

For any queries in relation to this response please contact [redacted] or [redacted].

Yours sincerely,

[redacted]
UK General Counsel, National Grid

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/844218/CMA_Response.pdf