

Competition and Markets Authority ('CMA')

The Cabot

25 Cabot Square

London

E14 4QZ

09 August 2022

By email [to: licenceappealsproject@cma.gov.uk](mailto:licenceappealsproject@cma.gov.uk)

Dear Sir/Madam,

CMA consultation on regulatory appeal rules and guidance

We welcome the opportunity to respond to the CMA's consultation on draft changes to existing licence modification appeals rules and guidance, and draft new rules and guidance for the CMA's new regulatory appeals functions. This response provides our views on the draft amendments to the existing energy licence modification appeal rules and guidance.¹

We note the proposed amendments actively consider the responses to the CMA's previous Open Letter², to which we also submitted views. Overall, we consider that the proposed amendments broaden the CMA's discretion to manage and dispose of appeals in accordance with its overriding objective. That is fairly, efficiently and at proportionate cost within the time periods prescribed by legislation.

¹ Energy Licence Modification Appeals: Competition and Markets Authority Rules (CMA70con) 12 July 2022. Energy Licence Modification Appeals: Competition and Markets Authority Guide (CMA71con) 12 July 2022.

² Open letter to industry on the CMA's licence modification appeal rules and guidance 07 December 2021.

Pre-appeal

In respect of the CMA's proposals that prospective appellants are expected to raise non-contentious errors such as calculation errors with the Gas and Electricity Markets Authority ('the Authority') prior to commencing an appeal.³ We agree with the CMA that errors that a prospective appellant would reasonably expect the Authority may be in a position to correct without argument should not be the subject of an appeal where possible. However, there may be reasons why it is not possible to resolve such an issue prior to the close of the appeal window. For example, the error not reasonably becoming apparent at an early stage. Where such an issue is the subject of an appeal, we request clarification from the CMA regarding how it intends to conduct case management with a view to the parties resolving the matter as quickly as possible.

Interveners

In our response to the CMA's Open Letter, we highlighted the importance of interveners having appropriately early access to information that may assist them better understand the issues in the round, therefore enabling them to submit evidence best able to assist the CMA in disposing of the appeal. This is as a consequence of our participation as an intervener in the RII0-2 Energy Licence Modification Appeal, where the deadline under the administrative timetable for an application to intervene was the same as the deadline for the Authority's response. We are of the view that it would be better for the CMA's overriding objective and the appeal overall if interveners could submit a full application to intervene after they have had the opportunity to review the Authority's response.

We note the proposed changes to the energy rules include the ability for the CMA in appropriate circumstances to accept the whole or part of an application for permission to intervene after the expiry of the deadline set.⁴ Also, parties to the appeal or interveners can apply to the CMA for permission to make further submissions or provide supplementary evidence.⁵ In both cases, the CMA should provide guidance that outlines the circumstances where they would expect to grant permission to intervene after the deadline, or permission to submit further evidence. For example, where information that may be material to a submission and the appeal overall is not yet accessible. Nonetheless we are of the view that it would better further the overriding objective if the CMA clarified its guidance to specifically set an expectation that prospective parties and interveners share non-sensitive information at the earliest and most appropriate opportunity. This would enable prospective parties and interveners to understand the issues in dispute and would ultimately support the efficient case management of an appeal going forward.

Third-party involvement

Regarding the proposed rules and guidance on intervener and third-party involvement, we request further clarity as to the role a third-party may play within an appeal as opposed to an

³ Paragraph 3.13 of the Energy Licence Modification Appeals: Competition and Markets Authority Guide (CMA71con) 12 July 2022.

⁴ Rule 10.4 of the Energy Licence Modification Appeals: Competition and Markets Authority Rules (CMA70con) 12 July 2022.

⁵ Rule 14.5 of the Energy Licence Modification Appeals: Competition and Markets Authority Rules (CMA70con) 12 July 2022.

intervener.⁶ Further clarification, including defining the role of intervener and third party respectively, may assist potential applicants determine the role they wish to play and apply accordingly.

Hearings

We support the proposed changes which facilitate the greater use of technology to encourage modern ways of working and improve the efficient and fair handling of appeals. Specifically, the inclusion in the energy guidance that the CMA will consider whether hearings should be held virtually or on a hybrid basis. We anticipate that the CMA will actively take into account the views of parties and interveners when considering whether hearings or other means such as written submissions are the best means of case management in the circumstances. Also, regarding filing documents, we agree the default position should be that documents are filed electronically unless notified otherwise.

We would be very happy to discuss any of the above with you if that would be helpful.

Yours faithfully,

✂

⁶ Although we note that under Rule 14.4(e) of the draft energy licence modification appeal rules, the CMA may invite any person, presumably including third parties, to provide representations if such third-party may be affected by the outcome of the appeal.