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Sent by email to: licenceappealsproject@cma.gov.uk

Dear CMA Team,

Response to open letter on the Regulatory appeals rules and guidance: energy, water, airports and air traffic services guidance dated 12 July 2022

A. Introduction

Electricity North West is the Electricity Distribution Network Operator (DNO) covering the north west of England serving 5 million customers in 2.4 million premises, across a diverse range of locations, from urban Greater Manchester to rural parts of Cumbria, Lancashire and Cheshire.

We are currently engaged in Ofgem's RIIO-ED2 price control review, which will set our allowed revenues for the period 2023 – 2028. Having consulted with more than 18,000 customers and stakeholders to establish appropriate commitments and priorities, we submitted our final business plan to Ofgem in December 2021. Ofgem recently, on 28 June 2022, published Draft Determinations for our RIIO-ED2 price control.

We set out the importance of an effective and efficient appeals process in our earlier response to this consultation process, so have not repeated those elements here. We have proposed at this stage a limited number of what we see as key points for further CMA consideration.

B. Input to proposed changes

We note that the CMA has not revised the position in the existing Rules that provisional determinations will not normally be published on the CMA's website, but has said that a summary may be published "where appropriate" (Rule 18.3). As previously explained, CMA appeal determinations in one sector may have direct read-across into other sectors. While publication of a summary is preferable to no transparency at all on the CMA's decision-making process for interested third parties, given the complexity of matters typically appealed to the CMA, a summary will generally be inadequate for this purpose. For this reason, the CMA should commit to publishing any provisional determinations in full.

The CMA's proposed Rules note that the CMA may make provision for joint hearings (Rule 14.2(c)), and that the CMA "will not necessarily cover all of the appellant's grounds of appeal at a hearing" (Rule 16.4). We accept that a strict rule requiring all grounds of appeal to be covered at oral hearings in all circumstances may not be appropriate. However, we would expect the CMA would generally want to ask questions or invite comments on all grounds of appeal in oral hearings so as to ensure that the arguments and supporting evidence are fully understood. Moreover, it is important in multi-appellant appeals to avoid a situation



whereby appellant(s) with individual grounds of appeal are prejudiced by oral hearings being devoted entirely to common grounds of appeal. It would therefore be helpful for the revised Guidance to make clear that, in such circumstances, it may be more appropriate for individual grounds of appeal to be considered in individual hearings. The CMA's consultation document states that the CMA will consider "whether it is appropriate to hear individual appellants individually in addition to joint hearings", but this wording is not reflected in either the draft Rules or Guidance.

The CMA's proposed Rules add "chilling effects of a costs order on the Authority" to the factors to be considered when making an inter parties costs order (Rule 20.5(d)). The Supreme Court's judgment in Pfizer and Flynn Pharma v CMA noted: "[w]hether there is a real risk of such a chilling effect depends on the facts and circumstances of the public body in question and the nature of the decision which it is defending - it cannot be assumed to exist". The CMA should therefore amend the wording of Rule 20.5(d) to ensure there is no such presumption, i.e.: "whether any chilling effects would result from a costs order on the Authority".

Please contact me should you wish to discuss this response further.

Yours Sincerely

