nationalgrid

[redacted]

[redacted]

[redacted]
Legal Business Partner
National Grid
[redacted]

Policy & International
Competition & Markets Authority
The Cabot,
25 Cabot Square, London,
E14 402

By e-mail only to
licenceappealsproject@cma.gov.uk

9 August 2022

www.nationalgrid.com

[redacted]

Consultation on the CMA's licence modification appeal rules and guidance

We welcome the opportunity to respond to the CMA's consultation on amendments to the Energy Licence Modification Appeal Rules **(Rules)** and Energy Licence Modification Appeals Guide for Participants **(Guide).** This is a response on behalf of National Grid Electricity Transmission plc **(NGET)** and National Grid Gas pie **(NGG).** As you know, NGET and NGG appealed Ofgem's RIIO-T2 licence modification decisions to the CMA in 2021 and therefore has recent experience of the Rules and Guide in practice. This response follows our response to the CMA's open letter submitted in January 2022.

As the CMA is aware, in 2021 four electricity distribution network operators joined the National Grid group. These are Western Power Distribution (East Midlands) pie, Western Power Distribution (South Wales) pie, Western Power Distribution (South West) pie and Western Power Distribution (West Midlands) pie (together **WPD).** NGET and NGG have shared a draft of this response with WPD and WPD has confirmed that it supports the representations set out below.

This response focusses specifically on the proposed changes to the rules and guidance for energy appeals and so focuses on that aspect of 02 of the consultation. We do not give a view on what would be appropriate in other sectors.

The CMA appeals regime remains an important protection to ensure that licence condition modifications are robust and appropriately targeted in the interests of consumers. The Rules and Guide are key to ensuring the running of a well-functioning, pragmatic and fair appeals process within the statutory timescales.

We noted in response to the open letter that NGET and NGG consider the current Rules and Guide to be, on the whole, fit for purpose and appropriate. We noted that we would be concerned if any major overhaul was proposed. Given this, we welcome the approach taken in the consultation to focus on particular areas of the Rules and Guide and to retain the overall approach and structure.

We support a number of the clarifications and additions which are proposed. In particular:

- The provisions on pre-action engagement seem to us to strike the appropriate balance between seeking to ensure that the CMA is given appropriate notice of appeals, whilst acknowledging that companies'

positions may not be final. We agree with the position that appropriate engagement with the regulator should be encouraged, but that any requirement to do so would not be appropriate to include in the Rules or Guide given the limited statutory timescales for bringing appeals.

- We agree that it is helpful to provide a framework for the circulation of non-sensitive versions of submlssions.

- Requiring electronic copies of submissions as a default position appears to us to be a sensible approach.

- We welcome the addition to the Guide that it may be appropriate for supplementary evidence to be provided later in an appeal and setting out the expectations for this.

- Consistent with the CMA's position in previous appeals, we agree that it is helpful for the Guide to note the expectation that where the regulator wishes to rely on interlinkages as part of any response to the appeal, these should be detailed in its representations and observations statement. However, our understanding is that this does not change the expectation set out by the CMA in its letter to Ofgem dated 30 October 2019 that it expects regulators to explain any interlinkages, and the reasons for them, in their decision documentation.

We do have concerns with some of the proposed changes in the Rules and Guide; and detail some key points below:

1. Hearings

1.1. Para 16.4 of the proposed Rules states that the CMA will not necessarily cover all of the appellant's grounds of appeal at a hearing. Although NGET and NGG accept that there may be some instances where the CMA's determination of an appeal is not assisted by a hearing, in the majority of cases the hearing is likely to assist in ensuring that the relevant underpinning of the case and the arguments and evidence of the parties are fully understood.

1.2. For this reason we do not agree that this is an appropriate change. If the CMA considers that the coverage of grounds should be referred to, we request that it is stated that generally the starting point will be that the hearing will cover all of the appellant's grounds.

2. Provisional Determination

2.1. The current Rules provide that the CMA will normally issue a Provisional Determination for the parties to consider prior to its Final Determination. This is a common practice in regulatory determination processes and, so far as we are aware, has been adopted in all energy licence appeals to date.

2.2. Given the complexity of issues that are raised in the majority of energy appeals, a Provisional Determination is a further important procedural step in ensuring that the CMA has understood the relevant background, arguments and evidence. It supports robust decision-making.

2.3. We consider that the current Rules are appropriate and do not see any clear basis for the change proposed at para 18.1 of the Rules. We note that the current Rules already acknowledges that there may some cases where it is not appropriate to issue a Provisional Determination (although, for the reasons set out above, we consider that this will be unusual).

3. Costs principles

3.1. The proposed changes to para 6.2 of the Guide remove the language that the *"starting poinf'* on CMA costs is that costs should follow the outcome of the appeal, albeit still stating that this is the principle that will ordinarily be followed. We do not agree that this is an appropriate change. It is not clear how the CMA will ordinarily follow the principle that costs should follow the outcome of the appeal if this is not the starting point for its consideration (which may be departed from based on considerations in a particular case).

3.2. A similar change is proposed to para 6.4 of the Guide for inter parties costs and again we do not agree

that this is appropriate. NGET and NGG consider that the correct starting point in principle should be costs following the outcome of the appeal. This is the starting point which is most fair between the parties. It should also be noted that CMA appeals are the statutory appeal mechanism which replace judicial review for challenges to licence modification decisions and this principle is also the starting point which is applied in judicial review proceedings.

3.3. We also note the proposed addition in para 20.5 of the Rules of the reference to the consideration of a *"chilling effecf'* on the regulator as being a relevant consideration in the determination of inter partes costs.

3.4. The current Rules set out a non-exhaustive list of considerations to which the CMA will have regard - there is nothing to stop the CMA considering other issues in any particular case as appropriate. The question then is whether the possibility of a chilling effect on the regulator makes it appropriate to list alongside the other considerations (namely conduct, success and proportionality of costs). In NGET and NGG's view, there is no clear justification for this addition to the list of issues, which are clearly important and are likely to need to be considered when determining cost orders in every appeal.

3.5. As noted by the Supreme Court in the recent case of *Competition and Markets Authority v Flynn Pharma Ltd and another* [2022] UKSC 14 §98 *"Whether 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 exisf'.* We are aware of no evidence to date to suggest that the risk of adverse cost orders from energy appeals have created such a chilling effect in the way that Ofgem makes licence condition modification decisions.

3.6. Moreover, Ofgem makes regulatory decisions across a broad range of matters in the energy sector. Where there is no specific appeal mechanism, as there is for licence condition modification decisions, any stakeholder wishing to challenge the decision must apply for judicial review where, as noted above, the starting point is that costs follow the outcome. We do not consider that energy appeals should be treated differently.

3.7. We understand that the change to para 6.4 of the Guide to refer to the principles set out in *BT v Ofcom* [2018] EWCA Civ 2542 is intended to make the same point (although the change is not clear). For the same reasons we do not agree that this change should be made.

3.8. Finally, we note that it is proposed to change para 20.5 of the Rules to state that the CMA group *"may",* rather than *"wilf'* have regard to all the circumstances. It does not appear to us to be appropriate for the CMA Group to choose whether or not to have regard to all the relevant circumstances and we request that this change is not made.

4. Expert opinion

4.1. Although we do not object to the new para 4.38 of the Guide, we request that it is made clear that it is only where there is a range of established expert opinion that this should be summarised.

5. Other comments

5.1. We note, and agree with, the statement in the Guide that the CMA will often look to deal with procedural issues informally, rather than imposing a direction. However, in para 14.2 of the Rules the addition of *"such notice"* in line 2 does not appear to us to be clear. It may be that this is simply referring to the CMA specifying such other matters as it considers necessary. It would be helpful if this could be clarified.

5.2. Para 4.28 of the Guide includes a change to state that internet links should not be used. We note that in some circumstances it is helpful to refer the CMA to publicly accessible and uncontentious documents which may provide relevant background or context, particularly on industry matters that the CMA team working on an appeal may be unfamiliar with. It appears to us that there are cases where it is most appropriate to provide a link rather than provide all of these documents and we note this for the CMA's consideration.

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

Yours sincerely,

[redacted]

Legal Business Partner, National Grid