



Making a positive difference
for energy consumers

Competition and Markets Authority

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Consultation on Regulatory Appeals Rules and Guidance: Energy, Water, Airports and Air Traffic Services

Dear Sir/Madam,

Thank you for the opportunity to respond to the above consultation dated 12 July 2022.¹

We broadly support the proposed amendments to the energy licence modification appeals ('ELMA') rules and guidance and welcome the inclusion of some of the suggestions from our response of 31 January 2022² to the CMA's open letter of 7 December 2021.³ In Appendix 1, we set out a number of suggested additional improvements that could be made in order to better achieve the Overriding Objective of enabling the CMA to dispose of appeals fairly and efficiently and at proportionate cost within the time periods prescribed by the Acts.⁴

We hope the CMA finds these suggestions useful. We would be happy to discuss them in further detail if that would be helpful.

Kind regards,

✉

¹ [Regulatory appeals rules and guidance - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

² [Ofgem response to CMA consultation on appeals Rules and Guidance 31 Jan 2022.pdf \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

³ [Open letter: CMA's licence modification appeal rules and guidance \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

⁴ Rule 4.1

Appendix 1 Potential additional improvements to the ELMA rules and guidance

1. Overriding Objective

Rule 4.2⁵ could be broadened to include third parties, e.g. those invited by the CMA under Rule 14.4(e) to make representations.

2. Pre-appeal stage

- a. We welcome the CMA encouraging potential appellants to engage in pre-action correspondence with Ofgem (Guide §3.12), however, we invite the CMA to consider making this an explicit requirement which will be taken into account when considering costs, where appropriate. This would assist Ofgem to resource appropriately, allow issues to be narrowed and, in some cases, avoid appeals (or certain grounds of appeal) entirely.
- b. Similarly, the expectation in §3.13 of the Guide that potential appellants engage with Ofgem where the licence modification concerns manifest errors or other non-contentious errors could also be made an explicit requirement, which could be taken account when considering costs. This could avoid the need for appeals at all or at least narrow the points of dispute.

3. Signing statements of truth

It would be useful to specify that electronic signatures on statements of truth are permissible.

4. Submission of non-sensitive versions of documents

We note the proposed requirement for Ofgem to submit a non-sensitive version of its response at the same time as filing the response and a non-sensitive version of any supporting documentation by the end of the second working day following the date of submission of the sensitive version (Rule 9.5). We appreciate the need for timely submission of non-sensitive versions; however, it is difficult and time-consuming for Ofgem to identify what in the appellants' and other parties' materials is sensitive as those parties are best placed to do so. Therefore, it would greatly assist the process if the appellants, intervenors and third parties were required to submit a version of their materials with any sensitive information highlighted in colour (i.e. not redacted) so that it is easily identifiable. This would help facilitate the timely submission of non-sensitive versions of documents and thus avoid the need for extensions of time, and could also assist the CMA, who may wish to use information from appellants' and other parties' materials in its provisional and final determinations.

5. Sharing of teach-in and hearing materials

Any materials used in teach-ins and any hearings, e.g. slides, should be shared with all parties.

6. Costs

- a. We invite the CMA to state that failure to engage in pre-appeals correspondence with Ofgem will be taken into account when the CMA considers costs.
- b. Similarly, we would welcome the inclusion of an explicit statement that failure to engage with Ofgem where the licence modification concerns manifest errors or other non-contentious errors will be taken into account when the CMA considers costs.

Points from our 31 January 2022 response that we invite the CMA to consider reflecting in the Rules or Guide, where appropriate:

- a. Any pre-appeals correspondence with the CMA, e.g. on arrangements for the submission of documents, should be copied to potential appellants and to Ofgem.
- b. Any correspondence between the CMA and an appellant during an appeal should as a matter of routine be shared promptly with Ofgem, e.g. requests for information and responses thereto, clarificatory questions on an appellant's

⁵ "All parties to an appeal⁵ and any intervener must assist the CMA to further the overriding objective." Footnote 5 states that "[p]aragraph 13(2) of the Schedule provides that references to a party to an appeal are references to (a) the appellant; or (b) the Authority".

submissions.

- c. It would be helpful to have some standing guidance or general practice notes on the process that an appeal is likely to follow, including, for example: groupings (e.g. the CMA considered the possibility of two Panels in the RIIO-2 appeals), the possibility of joining appeals, and an indicative timetable.
- d. As much notice as possible should be provided to the parties, including details of what is to be covered, the format (e.g. opening and closing statements), materials (e.g. if slides are required), and running order.
- e. Where possible, teach-ins and clarification hearings should not coincide with Ofgem's deadline to file its response to the notices of appeal and its witness evidence.
- f. As a general rule, parties should not need to agree materials in advance.