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Competition & Markets Authority
The Cabot
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9 August 2022

Dear Sir or Madam,

REGULATORY APPEALS RULES AND GUIDANCE: ENERGY, WATER, AIRPORTS & AIR TRAFFIC SERVICES

We welcome the opportunity to respond to the CMA's consultation on licence modification appeals rules and guidance. Our comments in this response are confined to the energy licence modification appeals rules and guidance.

We have set out comments on specific details of the text of the draft energy rules and guidance documents in the annex to this response and would highlight the following key points.

Determining cost orders

In paragraph 2.37 of the consultation the CMA states "*The CMA does not consider that Flynn Pharma displaces the Court of Appeal judgment in British Telecommunications PLC v The Office of Communications".* We do not consider this statement to be a complete reflection of the current state of the law as the Court of Appeal's decision in *BT v. Ofcom* must now, as a matter of law, be read in light of the Supreme Court's judgment in *Flynn Pharma v CMA* and with reference to the interpretation and qualifications provided by the Supreme Court. Specifically, we note the Supreme Court held in that case that "*there is no generally applicable principle that all public bodies should enjoy a protected status as parties to litigation where they lose a case which they have brought or defended in the exercise of their public functions in the public interest*." (Para. 97). The Supreme Court therefore held the starting point is not to make no order for costs against a regulator.

The CMA appears to recognise this at the same paragraph 2.37, but this does not seem to have been translated into the CMA's amendments to the Guidance and Rules. Instead, the proposed amendments to the Guidance suggest that the CMA will always follow the principles in *BT v Ofgem* which is not in accordance with the interpretation and qualifications provided by the Supreme Court in *Flynn Pharma.*

We would also note that the Supreme Court held that "*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 exist.*" (Para. 98). It will therefore be important for the relevant Authority to present evidence of the "real risk" of a chilling effect that may exist in each particular case. This cannot be assumed to exist by the CMA, and even if such an effect was demonstrated, it must only be one among a range of factors to be taken into account by the CMA on a case-by-case basis.

Pre-appeal process

Paragraph 3.8 of the Guidance now provides a pre-appeal process, such that *"any prospective appellant is strongly advised to provide the CMA with reasonable notice that it may appeal a decision of the Authority prior to commencing an appeal under Rule 5."* Reasonable notice is described in paragraph 3.9 as *"at the latest two weeks prior to submission of a notice of appeal to warn the CMA of the possibility of an appeal"* and is to include *"a high-level indication of the likely grounds of that appeal"*. To impose this new notification requirement in addition to the 20 Working Day time limit to make an application for permission to appeal is excessive and it is likely that prospective appellants will struggle to comply with this new requirement. Furthermore, the additional requirements for the notice of appeal set out in Rule 5.2 are unduly onerous, particularly given the short time period of 20 Working Days from the date of the relevant decision which the appeal must be brought within.

Please do not hesitate to contact me if you would like to discuss our response or my colleague ✂ (✂).

Yours sincerely,

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Annex 1

DRAFT REGULATORY APPEALS RULES AND GUIDANCE: ENERGY, WATER, AIRPORTS & AIR TRAFFIC SERVICES - SCOTTISHPOWER COMMENTS

Energy Licence Modification Appeals: Competition & Market Authority Rules (CMA 70)

Rule 5.2 (Notice of Appeal)

We consider the additional requirements for the notice of appeal to be unduly onerous given the 20 Working Day limit within which an appeal of a relevant decision must be brought.

Rules 5.6 & 7.6

The notification requirements for "any relevant licence holders" in terms of Rule 5.6 and Rule 7.6 are cumbersome and onerous, particularly given the number of generation and energy supply licence holders.

Rule 7 (Suspension)

A significant amount of detail has been included on the requirements to apply for a suspension. This detail did not previously feature and the policy reasons behind this change have not been explained in the consultation document. The process for applying for a suspension of the Authority's decision now seems extremely onerous and, even if this additional information is required, it will be impracticable for appellants to provide this at the same time as the application for permission to appeal, ie during the initial 20 Working Day period.

Rule 14.2(j)

This rule provides that the CMA can give a direction around the disclosure or the production of documents or classes of documents. The addition proposed by the CMA notes "including estimates, forecasts, returns or other information". It is not clear to us what category of information the CMA would be seeking here, and we suggest that the CMA clarify this point.

Rule 18.1 (Provisional Determination)

As presently drafted, this rule provides that the CMA "**may**" issue a PD whereas the previous Rules provided that the CMA "**will normally**" issue a PD. Our experience is that the issuing of a PD is extremely helpful and, in particular, in complex/price control appeals, the publication of a PD and the opportunity for parties to comment on it is an important feature in preventing errors in the Final Determination. We therefore suggest that this wording in the Rules should remain unchanged and that the default position should be that the CMA will normally issue a PD.

Rule 20

The CMA is proposing to amend Rule 20 firstly to state that the CMA Group "may" (as opposed to "will") have regard to all the circumstances when deciding what inter party costs order to make. We consider this to be an inappropriate amendment as we consider the CMA must have regard to all the circumstances when making a decision about interparty costs.

Rule 22.4 (Filing)

The rules have been amended such that any document which is required to be sent to a person other than the CMA must be sent by email. Although we are broadly supportive of this approach, it does raise practical issues about which email address to use and there may be circumstances where it proves impossible to obtain an email address, for example, if an organisation refuses to provide one. We therefore suggest a fallback position is included such that postal service is permitted in those limited circumstances where email service is not possible.

Energy Licence Modification Appeals: Competition & Market Authority Guide (CMA 71)

Paragraph 3.9

We consider the provision of reasonable notice of a potential appeal "*at the latest two weeks prior to submission of a notice of appeal*" is far too onerous in the context of the 20 working day limit for appellants to submit an application for permission to appeal a relevant decision, and it is likely that prospective appellants will struggle to comply with this new requirement.

Paragraph 6.4

The CMA is proposing to delete the sentence "*The CMA will normally order an unsuccessful party to pay the costs of the successful party to the appeal, but may make a different order (for example, where it considers that an appeal has been brought by a consumer body in the public interest).*" The CMA is also proposing to add in "*In addition, the CMA considers that the principles as set out in BT v Ofcom apply where a regulator is carrying out its regulatory functions and that this is relevant in considering what costs order, if any, to make in relation to inter partes costs noting that an inter partes order is discretionary.*"

The CMA therefore appears to be amending its current starting position that costs should follow success and instead considers the principles set out in *BT v Ofcom* apply. However, as we have noted in the cover letter, the *BT v Ofcom* case must now, as a matter of law, be read in light of the Supreme Court's judgment in *Flynn Pharma v. CMA* as the Supreme Court held in that case that "*there is no generally applicable principle that all public bodies should enjoy a protected status as parties to litigation where they lose a case which they have brought or defended in the exercise of their public functions in the public interest*." (Para. 97).

It is therefore not clear what "principles" from *BT v Ofcom* the CMA consider should apply since the Supreme Court has now held that the starting point is not to make no order for costs against a regulator.

ScottishPower
August 2022