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9 August 2022

Dear Adam,

RE Water Appointment modification appeals relating to matters other than the periodic price review (Water Rules and Water Guidance)

Thames Water welcomes the opportunity to respond to the “Water Appointment modification appeals relating to matters other than the periodic price review.” Appeals are a vital part of the independent regulatory model originally designed for a more minimal level of regulatory oversight. However, as times have changed, there are now more regulatory interventions that were simply not envisaged in the late 1980s when the regulatory norms and model were created. It is likely that there may be more appeals if this trend continues, in cases where water companies are asked to do things outside of the original regulatory remit or the expectations of investors. Also, the nature of the grounds of appeal could change in cases where there is general agreement surrounding policy intent, appeals could be made based on poor regulatory design and implementation risk.

As a regulated company we do not support a general doctrine of “regulatory infallibility.” Regulators can and do make mistakes as has been identified in the long running political debate and subsequent NAO report on the regulation of the retail energy market. We note much of the retail framework was developed using licence change. Equally we do not support vexatious appeals. We therefore welcome robust guidance that effectively prevents the two scenarios mentioned above. In our view the document should encourage careful consideration of the issues by the appellant before launching appeal.

For Thames Water, the real value of the document is its impact on the more marginal and not on what the appellant might see as a more straightforward case. Our response is therefore written from the perspective of what a good guide should look like from a “user” perspective to “assist participants” in their decision making. From this viewpoint there are four ingredients for a successful guide:

1. Help us to understand what a quality appeals submission looks like including:
 - a. Advice we can successfully use to build our case.
 - b. The types of appeal that will be automatically rejected (i.e., Section 12D (4))
 - c. Administrative style (e.g., administrative, cooperative, or adversarial etc)
2. Receive some tactical advice where possible, particularly on what not to do

3. Provide a good idea of the key deliverables and their timings
4. It should be as comprehensive as possible

Finally, we would like to conclude by saying that there is no evidence in our view, to suggest that water companies launch deliberately vexatious appeals. In deciding to appeal or not the costs are also a relevant factor in preventing appeals especially if they are more likely to be in the millions than the hundreds of thousands if the appeal fails and costs are awarded against the appellant. Reputational issues will also have a significant impact in deciding whether to launch an appeal or not.

We welcome further discussion on this consultation. If you have any queries on the response, please do not hesitate to contact me at ✂.

Yours sincerely,

✂

Annex

In this Annex we provide comments on each of the questions raised in the consultation.

1. Do you agree with our proposed approach of having regard to proposed amendments to the energy licence modification appeals rules in making amendments to the airport licence appeals rules and guidance, and in the draft rules and guidance that we are proposing for our new water and air traffic services appeal regimes?

We agree with the proposed approach. The guidance is written at the right level for regulated companies owning physical assets but perhaps less so for competition experts. This document helps us to understand what is required. We particularly like the advice that is slightly more strategic in nature and helps the setting of expectations (e.g., 3.8 p6; 3.12 p7) as well as the more usual check list approach which of course is also welcome (e.g., 3.15 p7). This makes a positive development in the design of regulatory guidance. A further improvement would be to signpost some actual decisions that are in the public domain or provide hypothetical case studies? This would further improve the guidance.

2. Do you have any comments on the draft amendments to the energy and airport licence appeal rules and guidance?

We have no comments on question 2.

3. Do you have any comments on the new draft rules and guidance for water appeals (other than for periodic price reviews) and air traffic services?

Comments on the draft guidance are in the table below:

Section	Comment
3.8 Pre appeal	The pre appeal explanation of reasonable notice is good. It would be strengthened by sign posting what factors would alter the mix between the pre appraisal meetings agenda's: grounds of appeal vs scheduling
3.14 Timeframes	Timeframes are simple to follow.
3.17 Administrative timetable	Again, administrative timetable is clear.
3.19 Appeal	Useful information
3.23 Permission Stage	Explains the process well
3.35 Suspension of the Authorities decision	May want to have a separate section on the application for suspension in the guidance?
4.1 Commencing an appeal	Useful information
4.13 Interveners	Could the language be simplified further?
4.23 Written Submissions and other documentation	We would like a little more guidance on the level of assumed knowledge of the documentation.
4.29 Appeal Management	The appeals process should be essentially administrative in nature and the request for "focused arguments" is reasonable. However, there could be a little more guidance here as exactly what focused means. For example, an operational detail could be important or be evidence of a lack of focus?
4.35 Witness statements	The lists in 4.36 and 4.37 provide a very useful checklist
4.32 Hearings	It would be nice to have a bit more detail on the sorts of questions the appellant may get asked, does it go further than clarification questions especially 4.48 p23
5 Provisional determination	It would be interested to know the status of the determination in the Guidance
6 Costs	Clearly set out.

