

Appendix E: The 2017 CMA Guide on Energy Licence Modification Appeals.

The Guide was updated in October 2022. This October 2017 version of the Guide is the version that applies to the 2021 Energy Licence Modification Appeals.



Energy Licence Modification Appeals: Competition and Markets Authority Guide

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CMA71

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1. Introduction

- 1.1 This guide has been prepared to assist participants involved in licence modification appeals under the Gas Act 1986,¹⁹ the Electricity Act 1989,²⁰ the Electricity (Northern Ireland) Order 1992²¹ and the Gas (Northern Ireland) Order 1996.²² It may be revised and supplemented from time to time and as the Competition and Markets Authority (CMA) gains experience of such appeals. Comments in this guide are not intended to bind the CMA in its consideration of particular cases.
- 1.2 The CMA has published procedural rules, the *Energy Licence Modification Appeals: Competition and Markets Authority Rules* (CMA70), to govern these appeals. This guide should be read in conjunction with the Acts²³ and those Rules.
- 1.3 The procedural framework is designed to enable the CMA to conduct a satisfactory appeal process within the strict time frames set out in the Acts and the Order. The framework is flexible and will be adapted in the interests of common sense and good practice as the CMA gains experience of handling appeals under it.
- 1.4 The Rules seek to ensure that the CMA has flexibility to manage appeals fairly, expeditiously and at proportionate cost, having regard to the interests of the parties to the appeal and interested third parties and the statutory time frames. This sentiment is reflected in the overriding objective which is set out in Rule 4. Those involved in appeals are required to assist the CMA in meeting this objective.
- 1.5 In every case, the CMA will look for a high degree of cooperation from participants. The CMA expects appellants to be realistic in drafting their grounds of appeal and all participants to present their submissions clearly.
- 1.6 This guide does not contain details of all the provisions of the Acts and the Rules relevant to appeals and is not intended to modify or constrain the full application of those provisions to particular case.

¹⁹ 1986 c44, as amended in particular by the Electricity and Gas (Internal Market) Regulations 2011 (SI 2011/2704).

²⁰ 1989 c29, as amended in particular by the Electricity and Gas (Internal Market) Regulations 2011 (SI 2011/2704).

²¹ SI 1992/231 (NI 1), as amended by the Gas and Electricity Licence Modification and Appeals Regulations (Northern Ireland) 2015 SI 2015/1 (NI).

²² SI 1996/275 (NI 2), as amended by the Gas and Electricity Licence Modification and Appeals Regulations (Northern Ireland) 2015 SI 2015/1 (NI)

²³ See paragraph 1.7 for a definition of 'the Acts' in this guide.

1.7 In this guide:

‘the Acts’ means the Electricity Act 1989, the Gas Act 1986, the Electricity (Northern Ireland) Order 1992 or the Gas (Northern Ireland) Order 1996, as the case may be;

‘Authority’ means the decision-making Gas and Electricity Markets Authority – referred to as the Authority in the Rules and the Acts – which is supported by the Office of Gas and Electricity Markets, or the Northern Ireland Authority for Utility Regulation, as the case may be;

‘the CA’ means Citizens Advice or Citizens Advice Scotland, as the case may be;²⁴

‘the CCNI’ means the General Consumer Council for Northern Ireland;²⁵

‘the CMA’ means the Competition and Markets Authority;

‘intervener’ means any person given permission by the CMA under Rule 10 of the Rules to intervene in an appeal;

‘participants’ means the parties to an appeal and interveners;

‘relevant licence holder’ has the same meaning as in section 23(10) of the Gas Act 1986, section 11A(10) of the Electricity Act 1989, article 14(11) of the Electricity (Northern Ireland) Order 1992, and Article 14(11) of the Gas (Northern Ireland) Order 1996;

‘the Rules’ mean the *Energy Licence Modification Appeals: Competition and Markets Authority Rules*;

‘the Schedule’ means whichever of Schedule 4A to the Gas Act 1986, Schedule 5A to the Electricity Act 1989, Schedule 5A to the Electricity (Northern Ireland) Order 1992 or Schedule 3A of the Gas (Northern Ireland) Order 1996 that is relevant to the particular appeal;

‘sensitive information’ means information which is:

²⁴ The CA may bring an appeal in the capacity of representing consumers whose interests are materially affected by the Authority’s decision.

²⁵ The CCNI may bring an appeal in the capacity of representing consumers whose interests are materially affected by the Authority’s decision.

- (a) commercial information, the disclosure of which would or might significantly harm the legitimate business interests of an undertaking to which it relates; or
- (b) information relating to the private affairs of an individual, the disclosure of which would or might significantly harm the individual's interests.

2. Background

2.1 The Acts set out the process that the Authority must adopt in making modifications to licences for the supply and distribution of gas and electricity. They also set out the appeal mechanism in respect of licence modifications.²⁶ An appeal against a decision of the Authority to amend the conditions of a licence may be made to the CMA by:

- (a) a relevant licence holder;
- (b) certain materially affected licence holders;
- (c) qualifying bodies and associations in the capacity of representing those licence holders; and
- (d) the CA and CCNI in the capacity of representing consumers whose interests are materially affected by the Authority's decision.

2.2 The CMA may allow appeals only to the extent that it is satisfied that the Authority's decision was wrong on one or more of the following grounds:

- (a) That the Authority failed properly to have regard to, or give appropriate weight to, the matters to which the Authority must have regard, in the carrying out of its principal objective and certain duties;
- (b) That the decision was based, wholly or partly, on an error of fact.
- (c) That the modifications fail to achieve, in whole or in part, the effect stated by the Authority in its decision.²⁷

²⁶ The Acts implement the EU Third Energy Package of directives which require, among other things, that member states ensure that national regulatory authorities are able to take autonomous decisions in relation to specified regulatory tasks and ensure that suitable mechanisms exist at a national level under which a party affected by a decision of a regulatory authority has a suitable right of appeal to a body independent of the parties involved and of government. The Authority is designated as the regulatory authority for Great Britain for the purposes of the relevant directives.

²⁷ Under section 11A(7)(b) of the Electricity Act 1989, section 23(7)(b) of the Gas Act 1986 and Article 14(8)(b) of the Electricity (Northern Ireland) Order 1992 and Article 14(8)(b) of the Gas (Northern Ireland) Order 1996 the Authority is required to state the effect of the modifications in its decision.

- (d) That the decision was wrong in law.²⁸
- 2.3 To the extent that the CMA does not allow the appeal, it must confirm the decision appealed against.²⁹
- 2.4 If the CMA allows the appeal, it can do one or more of the following:
- (a) In relation to a price control decision:³⁰
- (i) quash the Authority's decision (to the extent that the appeal is allowed);
 - (ii) remit the matter back to the Authority for reconsideration and determination in accordance with any directions given by the CMA;
 - (iii) substitute its own decision for that of the Authority's decision (to the extent that the appeal is allowed) and give any directions to the Authority or any other party to the appeal.
- (b) in relation to any other decision:
- (i) quash the Authority's decision (to the extent that the appeal is allowed);
 - (ii) remit the matter back to the Authority for reconsideration and determination in accordance with any directions given by the CMA.
- 2.5 Key elements of the procedures for regulating appeals, including the time periods for appealing and completing them and provision relating to the payment of costs by the parties to the appeal, are set out in the Acts. The Acts, however, also provide that the CMA may make rules of procedure regulating the conduct and disposal of these appeals.
- 2.6 The CMA's appeal process may involve the parties to the appeal – the appellant and the Authority – and any interveners (as defined in the Rules). In order to facilitate the conduct of the appeal the CMA may publish nonsensitive versions of the submissions of the participants, its decisions and its directions in regard to the conduct of the appeal on its website.¹³

²⁸ See section 23D of the Gas Act 1986, section 11E of the Electricity Act 1989, Article 14D of the Electricity (Northern Ireland) Order 1992 and Article 14D of the Gas (Northern Ireland) Order 1996.

²⁹ See section 11E(5) of the Electricity Act 1989, section 23D(5) of the Gas Act 1986 and Article 14D(5) of the Electricity (Northern Ireland) Order 1992.

³⁰ Under section 11F(7) of Electricity Act 1989, section 23E(7) of Gas Act 1986 and Article 14E(7) of the Electricity (Northern Ireland) Order 1992/231 a decision is a price control decision, in relation to the modification of a condition of a licence, if the purpose of the condition is, in the CMA's opinion, to limit or to control the charges on, or the revenue of, the holder of the licence. ¹³ In accordance with Rule 12.

2. General observations on appeals

Approach to appeals

- 3.1 The appeal must be clearly linked to the grounds of appeal set out in the Acts and summarised in paragraph 2.2.
- 3.2 The CMA will not consider afresh the licence modifications imposed by the Authority. The CMA's function is to hear an appeal and it will review the challenged decision for error on the grounds of appeal put forward by the appellant. The CMA will not allow an appeal merely because it would not have reached that decision had it been the regulator. The CMA may only allow an appeal where it is satisfied that the appellant has shown on the balance of probabilities that the Authority's decision was wrong on one or more of the grounds set out in the Acts.
- 3.3 In conducting the appeal the CMA will have regard to the overriding objective set out in Rule 4. The overriding objective of the Rules is to enable the CMA to dispose of appeals fairly and efficiently within the time periods prescribed by the Acts. The CMA expects participants to assist it in meeting the overriding objective and to conduct themselves in a way that is consistent with this approach.
- 3.4 In determining the appeal the CMA must have regard, to the same extent as is required of the Authority, to the matters to which the Authority must have regard in the carrying out of its principal objective and certain duties.³¹
- 3.5 The CMA may have regard to any matter that the Authority was not able to have regard to in relation to the decision which is the subject of the appeal, but must not have regard to any matter which the Authority would not have been entitled to have regard to in reaching its decision had it had the opportunity to do so.³²
- 3.6 The CMA expects participants to send all their evidence to the CMA at the beginning of the process. The CMA does not intend the provision of evidence by participants to be an iterative process. If the CMA requires supplementary evidence later in the appeal, it will make this request. The CMA will seek to narrow the issues and points in dispute during the course of the appeal. It

³¹ Section 11E(2) of the Electricity Act 1989, section 23D(2) of the Gas Act 1986, Article 14D(2) of the Electricity (Northern Ireland) Order and Article 14D(2) of the Gas (Northern Ireland) Order 1996.

³² Section 11E(3) of the Electricity Act 1989, section 23D(3) of the Gas Act 1986, Article 14D(3) of the Electricity (Northern Ireland) Order 1992 and Article 14D(3) of the Gas (Northern Ireland) Order 1996.

may, in particular, seek to do so at appeal management conferences and hearings.

Administrative matters

- 3.7 The CMA's staff team is led by an Appeal Director who is supported by an administrative team and professional advisers. Participants in the appeal will have a contact in the administrative team who will take enquiries and act as the main point of contact for the appeal. Once a notice of appeal is sent to the CMA, the CMA will write to these appellant/s and the Authority with the necessary contact details and publish these details on a designated page on the CMA's website.

Time frames

- 3.8 The Acts prescribe the time frames within which various steps in the appeal process must be completed.
- 3.9 The Acts require that applications for permission to appeal must be made within 20 working days, beginning with the first working day after the day on which the Authority's decision is published.³³ Appellants should be aware that the application must be made within this time and the CMA cannot grant permission to appeal to late applications.
- 3.10 The Acts provide that the CMA will have four months (in non-price-control matters) and six months (in price control matters) to determine an appeal. This time frame starts from the day on which the CMA grants permission to appeal.³⁴ Where the CMA has received representations on the timing of the determination from a party to the appeal and is satisfied that there are special reasons, it may extend the period for its determination by one month.³⁵ If the CMA considers it necessary or appropriate to extend the period of a determination in this way, it will consult with the participants before doing so.

Administrative timetable

- 3.11 As soon as possible after granting permission to appeal the CMA will draw up an administrative timetable for the appeal in accordance with Rule 13. When drawing up the timetable the CMA will have regard to the views of the

³³ Paragraph 1(3) of the Schedule.

³⁴ Section 23F(1) of the Gas Act 1986, section 11G(1) of the Electricity Act 1989, Article 14F(1) of the Electricity (Northern Ireland) Order 1992 and Article 14F(1) of the Gas (Northern Ireland) Order 1996.

³⁵ See section 23F(3)-(4) of the Gas Act 1986, section 11G(3)-(4) of the Electricity Act 1989, Article 14F(3)-(4) of the Electricity (Northern Ireland) Order 1992 and Article 14F(3)-(4) of the Gas (Northern Ireland) Order 1996.

participants as well as the overriding objective set out in Rule 4. Once the timetable has been set, the CMA will aim to keep to it; participants should therefore check their availability on the notified dates at an early stage. The CMA will not normally consider that the unavailability of advisers or of legal representatives is a reason to depart from these dates.

- 3.12 In order to conduct an efficient process, the CMA expects that participants will treat the timetable as ‘hard’ deadlines. Should it become apparent to a participant that it will struggle to adhere to a deadline the CMA should be contacted as soon as possible.

Procedure and directions

- 3.13 Where necessary the CMA may give directions in relation to the conduct of the appeal under Rule 14. Participants may apply for directions or the CMA may of its own volition propose that a direction appears necessary in the circumstances. The CMA will usually give participants an opportunity to comment ahead of issuing a direction. Depending on the circumstances, applications for directions may be dealt with in writing or at an appeal management conference. However, the CMA will ordinarily consider that many procedural matters in an appeal (which include the examples provided in Rule 14.2) can be addressed through informal means, without it being necessary to give directions.
- 3.14 Where participants are applying for directions the CMA expects that they would have sought to agree the direction with the other participants in the appeal beforehand.
- 3.15 Rule 14 sets out a non-exhaustive list of matters upon which the CMA can give directions. Participants should be aware that the CMA will have regard to the overriding objective in managing the conduct of the appeal.
- 3.16 The CMA expects that participants will be able to cooperate promptly to produce bundles, chronologies, glossaries, issues lists and case memoranda where any or all of these are necessary.

Appeal management conferences

- 3.17 Appeal management conferences may be held under Rule 15. These are opportunities for the CMA to manage the appeal. The CMA will expect to invite the parties to the appeal to attend the initial appeal management conference. Where appeal management conferences take place after the deadline for application to intervene, the participants, including interveners,

will be invited. Active appeal management will be an important tool in ensuring that the CMA makes the right decision in the time allowed.

Permission stage

- 3.18 The Acts require that permission to appeal is obtained before an appeal can be brought.³⁶ Applications for permission to appeal are made when appellants send their notice of appeal in accordance with Rule 5, within the time frame set out in the Acts.³⁷ A copy of the notice of appeal must be sent to the Authority at the same time as the notice of appeal is sent to the CMA.³⁸
- 3.19 Once the Authority has received a copy of the notice of appeal it has ten working days,³⁹ beginning with the first working day after the day it receives the notice of appeal, to make submissions to the CMA on whether the CMA should grant permission to appeal. Where the Authority makes submissions, the CMA then has ten working days,⁴⁰ beginning with the first working day after the day it receives the Authority's submissions, in which to decide whether to grant permission to appeal. If the Authority does not make submissions on the permission to appeal, the CMA has 14 working days, beginning with the first working day after the day it receives the notice of appeal, in which to decide whether to grant permission to appeal.⁴¹
- 3.20 The CMA will normally make a decision on permission without a hearing.⁴² The CMA may decide to hold a hearing to determine an application for permission either of its own motion or on the application of the appellant, the Authority. Where it decides to hold a hearing the CMA will notify the appellant, the Authority and such other persons as it considers appropriate.⁴³
- 3.21 The CMA will consider whether the appellant has standing to bring the appeal and, where appropriate, the nature of any interests they claim to be materially affected. As noted above in paragraph 2.1, under the Acts appeals can only be brought by:

(a) a relevant licence holder;

³⁶ Section 23B(3) of the Gas Act 1986, section 11C(3) of the Electricity Act 1989, Article 14B(3) of the Electricity (Northern Ireland) Order 1992 and Article 14B(3) of the Gas (Northern Ireland) Order 1996.

³⁷ Twenty working days beginning with the first working day after the day on which the Authority's decision is published. Paragraph 1(3) of the Schedule.

³⁸ Paragraph 1(7) of the Schedule and Rule 5.6.

³⁹ Paragraph 3(2) of the Schedule.

⁴⁰ Paragraph 1(10)(a) of the Schedule.

⁴¹ Paragraph 1(10)(b) of the Schedule.

⁴² Rule 6.1.

⁴³ Rule 6.3.

- (b) certain materially affected licence holders;
- (c) qualifying bodies and associations in the capacity of representing those licence holders; and
- (d) as appropriate, the CA or CCNI, in the capacity of representing consumers whose interests are materially affected by the Authority's decision.⁴⁴

3.22 The CMA may refuse permission to appeal on one of the following grounds:

- (a) The appellant does not have standing.
- (b) That the appeal is brought for reasons that are trivial or vexatious.
- (c) That the appeal has no reasonable prospect of success.⁴⁵

3.23 Rule 5.2 requires that appellants clearly set out why they consider that they have standing to appeal in their notice of appeal. It is important that the CMA has sufficient detail to be able quickly to establish whether an appellant has standing. Where an appellant is claiming to be materially affected it should clearly and concisely set out the interest that is affected and how it is affected. Where an appellant is a body or association representing materially affected licence holders it should be clear that the body or association has the authority to represent these licence holders.

3.24 The CMA may grant permission subject to conditions, which include conditions designed to expedite the consideration of the appeal, limit the matters to be considered on appeal and consolidate the appeal with other appeals.⁴⁶

3.25 Although the CMA may allow the filing of further submissions and evidence by issuing a direction under Rule 14, the CMA will not allow this Rule to be used to circumvent the time limit by which an application for permission to appeal must be made.

3.26 The CMA considers that the scope of the permission stage is intended to be limited. The basis for granting or refusing permission to appeal is set out in the Acts⁴⁷ and the time frame to determine permission to bring an appeal is

⁴⁴ Section 23B(2) of the Gas Act 1986, section 11C(2) of the Electricity Act 1989, Article 14B(2) of the Electricity (Northern Ireland) Order 1992 and Article 14B(2) of the Gas (Northern Ireland) Order 1996.

⁴⁵ Section 23B(4) of the Gas Act 1986, section 11C(4) of the Electricity Act 1989, Article 14B(4) of the Electricity (Northern Ireland) Order 1992 and Article 14B(4) of the Gas (Northern Ireland) Order 1996.

⁴⁶ Paragraph 1(11) of the Schedule.

⁴⁷ Section 23B(4) of the Gas Act 1986, section 11C(4) of the Electricity Act 1989, Article 14B(4) of the Electricity (Northern Ireland) Order 1992 and Article 14B(4) of the Gas (Northern Ireland) Order 1996.

strict. The CMA would therefore normally expect to deal with this stage without the involvement of interested third parties (including any relevant licence holders who are not parties to the appeal). However, Rule 6.3 does allow for a hearing, and notice to parties to the appeal and other persons where the CMA considers it appropriate.⁴⁸

Suspension of the Authority's decision

- 3.27 The Schedule allows the CMA, upon the appellant's application, to suspend the Authority's decision where the relevant licence holder, the licence holder or consumers whose interests are materially affected (as the case may be) would incur significant costs if the decision were to have effect before the determination of the appeal and the balance of convenience⁴⁹ does not otherwise require effect to be given to the decision pending that determination.⁵⁰ Having regard to these factors, in order to make a direction suspending the Authority's decision, the CMA will require evidence from the appellant of the costs involved if the licence modification is not suspended and will consider whether such costs are likely to outweigh the public benefit of allowing the licence modification in question to operate, pending the determination of the appeal. The CMA will also take into account whether there may be an opportunity for appropriate adjustments to be made to the relevant licence condition, if any part of the appeal is successful.
- 3.28 An application to suspend the decision must be made at the same time as making the application for permission to appeal (ie with the sending of the notice of appeal to the CMA).⁵¹ At the same time as sending the application for suspension to the CMA, the appellant must send a copy of this application to the Authority⁵² and a non-sensitive version of the application to any relevant licence holders who are not parties to the appeal.³⁶
- 3.29 Rule 7 sets out the requirements for making applications for suspension and the process that the CMA will follow in considering the application. Subject to Rule 7, the CMA expects that the procedure for suspension applications will

⁴⁸ The CMA does not expect the Authority's submissions on the application for permission to bring an appeal to be available to participants (other than the appellant – see paragraph 3(5) of the Schedule) prior to making its decision on the application. However, the CMA may publish a non-sensitive version of the Authority's submission on its website (see Rule 12).

⁴⁹ In applying this test the CMA will consider the risk of damage to the licence holder, relevant licence holder (where they are not the appellant) and other materially affected persons if the decision were to be suspended.

⁵⁰ Paragraph 2(2) of the Schedule.

⁵¹ Paragraph 2(2)(a) of the Schedule.

⁵² Paragraph 2(4) of the Schedule. ³⁶

Rule 7.4.

depend upon the nature of the issues to be considered and the CMA will set this out on a case-by-case basis.

- 3.30 In making an application for the suspension of the Authority's decision the appellant should clearly set out why it believes that it would incur significant costs if the decision were to have effect before the determination of the appeal and why the balance of convenience favours the suspension of the decision.
- 3.31 Once the Authority has received a copy of the application for suspension, it has ten working days, beginning with the first working day after the day on which it receives the application, to make any submissions to the CMA about this application.⁵³ Any relevant licence holders, who are not parties to the appeal, must send any submissions in relation to suspension of the Authority's decision to the CMA within five working days, beginning with the first working day after the day on which it receives the notification of the application for suspension.⁵⁴ Where the Authority does make submissions, the CMA then has ten working days, beginning with the first working day after the day it receives the Authority's submissions, to take its decision.⁵⁵ If the Authority does not make submissions, the CMA has 14 working days, beginning with the first working day after the day it receives the application for suspension, to take its decision.⁴⁰
- 3.32 The CMA may consider an application for suspension of the Authority's decision under appeal with or without a hearing. It will decide whether to hold any such hearing depending on the nature of the applications and whether it appears to the CMA that such a hearing is necessary. So far as possible and necessary any suspension hearing will be held at the same time as any hearing about the application for permission. Where the CMA decides to hold a hearing in relation to the suspension application, it will notify the appellant, the Authority, any relevant licence holders who are not parties to the appeal and any other person the CMA considers appropriate.⁴¹

⁵³ Paragraph 3(2) of the Schedule.

⁵⁴ See Rule 7.6.

⁵⁵ Paragraph 2(3)(a) of the Schedule. ⁴⁰

Paragraph 2(3)(b) of the Schedule. ⁴¹

See Rule 7.7.

4. Particular issues in appeals

Commencing an appeal

- 4.1 Appellants apply for permission to bring an appeal by sending a notice of appeal in accordance with paragraph 1 of the Schedule and with Rule 5.
- 4.2 To assist the appellant in complying with Rule 5.7 (sending a non-sensitive notice to any relevant licence holders who are not parties to the appeal), the CMA expects the Authority to append a list of the relevant licence holders to its decision.
- 4.3 The notice of appeal should be set out in consecutively numbered paragraphs and be paginated. It should include cross-references to the relevant parts of the Authority's decision, the grounds of appeal etc.
- 4.4 Unless notified otherwise by the CMA, documents must be sent to the CMA both by email and in hard copy (by first class post or delivered personally).
- 4.5 The CMA has no power to extend the period of time within which an application for permission is to be made. The CMA will, by prior arrangement, accept delivery of an application for permission at any time up to midnight on the last day in which it can be made. An appellant wishing to deliver documents to the CMA outside normal office hours (after 6pm or before 8.30am) should liaise with the CMA in advance to ensure delivery.

The Authority's submissions

- 4.6 If the Authority wishes to make submissions on an application for permission to appeal, on an application for suspension of its decision or in relation to the reasons for its decision and/or any of the grounds of appeal, it must submit a response under the relevant Rule.⁵⁶ The Authority must send a copy of any such submissions to the appellant.⁴³
- 4.7 Where the CMA has granted permission to appeal, the Authority may make submissions to the CMA about its reasons for the decision against which the appeal is being brought and/or any grounds of appeal on which that appeal is being brought against that decision. The Authority has 15 working days

⁵⁶ Rule 6.2 in respect of applications for permission to appeal, Rule 7.5 in respect of suspension applications and Rule 9.1 in respect of its reasons for its decision and/or in respect of any of the grounds of appeal. ⁴³ Paragraph 3(5) of the Schedule.

beginning with the first working day after the day on which permission to bring the appeal was granted to make such submissions.⁵⁷

- 4.8 The Authority's submissions should contain a statement identifying the facts and reasons why it believes the appeal should not succeed and/or why it believes the relief sought should not be allowed and include any written evidence it wishes to adduce in support of its response. The Authority should also provide a non-sensitive version of the statement in response and any written evidence adduced in support of that response that is suitable for publication on the CMA's website.⁵⁸

Withdrawal of appeals and summary determinations allowing an appeal

- 4.9 Where the CMA grants permission to an appellant to withdraw its appeal, pursuant to an application made under Rule 8.1, it will make the appropriate determination, having regard to all the circumstances. It will make an order for its own costs that reflects the nature of the determination, in accordance with Rule 21.2 and paragraph 12 of the Schedule.⁵⁹ The CMA in such circumstances may also make an order for payment of inter partes costs under Rule 21.3, having regard to the factors set out in Rule 21.5.⁶⁰
- 4.10 Where the CMA makes a summary determination allowing the appeal, pursuant to an application under Rule 8.2, it will make an order against the Authority requiring the payment to the CMA of the costs incurred by the CMA in connection with appeal.⁶¹ In such circumstances, the CMA may also require the Authority to pay the costs that the appellant has reasonably incurred in connection with the appeal.⁶²
- 4.11 Any costs of the CMA relating to a withdrawn application for suspension of the Authority's decision will be taken into account when, having determined the appeal, the CMA makes an order for recovery of its own costs incurred in connection with the appeal. The CMA may require the appellant to pay the Authority's costs reasonably incurred in connection with a withdrawn application for suspension, even where the appeal is successful.

⁵⁷ Paragraph 3(4) of the Schedule.

⁵⁸ Rule 9.3 and Rule 9.4.

⁵⁹ See paragraph 12(1) and 12(2) of the Schedule.

⁶⁰ And see paragraph 12(3) of the Schedule.

⁶¹ See footnote 46 above.

⁶² See footnote 47 above.

- 4.12 All such orders for costs will be made in accordance with the process set out in Rule 21. Paragraphs 6.1 and following below discuss orders for costs in more detail.

Third party involvement

- 4.13 Although the Acts do not set up a formal framework for intervention in appeals, the CMA recognises that certain third parties should be afforded the opportunity to submit representations or observations in respect of the grounds of appeal as appropriate. Rule 10 sets out the requirements for seeking permission to intervene in an appeal.
- 4.14 In considering whether to give permission to intervene under Rule 10, the CMA will take account of all the circumstances, including:
- (a) whether the applicant is materially interested in outcome of the appeal;
 - (b) whether the applicant's intervention in the appeal will assist the CMA to determine the appeal; and
 - (c) whether the nature and extent of the intervention sought is proportionate to the matters to be determined.
- 4.15 The CMA will normally regard as being materially interested in the outcome of the appeal any person, qualifying body or association, or consumer body who could themselves have appealed to the CMA against the appealed decision but who is not an appellant against that decision. With regard to other persons, the CMA will have regard to whether the outcome of the appeal will have a direct and material impact on that person (or in the case of a representative organisation, those whom the organisation represents). For example, the CMA is unlikely to regard persons or organisations in Great Britain who lack a direct interest in the energy sector in Northern Ireland as being materially interested in the outcome of an appeal involving licences in Northern Ireland, and vice versa.
- 4.16 The CMA would not regard interventions duplicative of the arguments of the parties to the appeal or an intervener as assisting it to determine the appeal. The CMA is likely to take a similar view where permitting an intervention risks creating a proliferation of documents or evidence or otherwise risks having an adverse effect on the CMA's ability to determine the appeal in accordance with the overriding objective (see Rule 4.1). On the other hand, the CMA may regard as being of assistance in its determination of the appeal an intervention that adds something material over and above the arguments or

evidence already submitted by the parties to the appeal or by other interveners.

- 4.17 When considering whether the nature and extent of any intervention sought is proportionate to the matters to be determined in the appeal, the CMA may take into consideration the value of the licensee's business to which the licence modification relates and the potential added cost to the parties and the CMA of dealing with such intervention(s), as well as any other relevant matters.
- 4.18 The application should indicate the degree of involvement in the appeal that the applicant would wish to have, if it was granted permission to intervene, such as whether it would wish to have no further involvement beyond the submissions made in its application or whether it would wish to attend hearings and to make its own oral representations to the CMA.
- 4.19 Any person considering whether to make an application for leave to intervene will assist the CMA by advising it at the earliest opportunity that it is considering whether to do so. The CMA encourages persons who are minded to support one party to liaise with that party (and with each other, as the case may be) in order to reduce cost, delay and duplication as far as possible.
- 4.20 Where the CMA has granted permission to appeal, the CMA may grant permission to intervene to a person materially interested in the outcome of the appeal, in accordance with Rule 10. The CMA may of its own motion issue any directions it considers fit to interveners, including where practicable and appropriate that two or more interveners liaise with each other (and/or the party whom they support) to reduce duplication, or that they file joint submissions.
- 4.21 In addition to the above, the CMA at any time may of its own motion invite representations from any person whom it appears to the CMA may be affected by the outcome of the appeal.⁶³

Other documentation

- 4.22 The CMA expects the parties to provide it with a coherent and readily comprehensible explanation of the technical issues relevant to the appeal. As part of this explanation, the CMA should, if necessary, be provided with a glossary of technical terms. The purpose of the glossary of technical terms is to provide the CMA and the parties with a single reference point. The glossary should therefore be agreed between the parties if possible, and should as far

⁶³ See Rule 14.4(e).

as possible be consistent with the usage of technical terms by the Authority and others prior to the Authority's decision. Where there is a disagreement between the parties to the appeal about the use of a term, that disagreement should be stated and the competing understandings set out concisely.

- 4.23 The CMA will also find it helpful to see a chronology of the modification proposal from its inception to the Authority's decision. The purpose of the chronology is to provide the CMA and the participants with a single reference point from which to understand the development of the licence modification proposal up to the point at which the Authority published its decision. The chronology should be uncontroversial and should be agreed if possible. Where there is disagreement between the parties to the appeal about an event or description of it, that disagreement should be stated and the competing versions concisely set out.

Appeal management

- 4.24 All appeals will be subject to active appeal management by the CMA. The CMA does not require the parties to be legally represented at the appeal management conferences and hearings. The CMA does, however, want focused arguments from the participants.

Consolidation of appeals

- 4.25 The Acts provide that the CMA may grant permission to bring an appeal subject to conditions which may include conditions requiring that the appeal be considered together with other appeals.⁶⁴ The Rules include provision for directions being made by the CMA relating to consolidation of appeals.
- 4.26 Individual appellants and the Authority will be given the opportunity to state their case before the CMA makes any decision to consolidate their appeals.

Witness statements

- 4.27 The CMA expects that a large part of the evidence used in the appeal will be written evidence.

⁶⁴ Paragraph 1(11)(c) of the Schedule.

- 4.28 Subject to the direction of the CMA, written evidence must be in the form of a witness statement. A witness statement must be verified by a statement of truth,⁶⁵ signed by the witness.
- 4.29 Witness statements should:
- (a) be headed with the title of the appeal;
 - (b) be clearly marked at the top right-hand corner with the name of the party on whose behalf the witness statement is made, the initials and surname of the witness, the number of the statement in relation to that witness, the identifying initials and number of each exhibit referred to and the date the statement was made;
 - (c) state the full name of the witness;
 - (d) state their place of residence or, if the statement is made in a professional, business or other occupational capacity, the address at which they work and the position held and the name of the firm or employer;
 - (e) state the occupation of the witness;
 - (f) state the relationship of the witness to the party on whose behalf the evidence is given; and
 - (g) be paginated.
- 4.30 In a witness statement, the witness must indicate which of the statements are made from their own knowledge and which are matters of information or belief. In relation to matter of information or belief, the witness should state the source of that information or belief.
- 4.31 A witness statement should be as concise as the circumstances allow. It should not contain long quotations from documents. Documents used in conjunction with a witness statement should be verified and identified by the witness and placed in an exhibit separate from the witness statement. The location of the document in the exhibit should be set out in the witness statement.

⁶⁵ Paragraph 13(1) of the Schedule provides that a 'statement of truth' in relation to the production of a statement or provision of information by a person, means a statement that the person believes the facts stated in the statement or information to be true.

- 4.32 Where the witness refers in a witness statement to correspondence, the letters should be collected together and exhibited in chronological order with the earliest at the top.
- 4.33 Photocopies may be used instead of original documents provided that the originals are available for inspection by the CMA if necessary,
- 4.34 Where an exhibit contains more than one document, the front page should list the documents contained in the exhibit and should give the date of each document. The exhibit should be paginated.
- 4.35 Witness statements and exhibits should be fully legible. Witness statements should be printed on one side of the paper only and should be divided into numbered paragraphs.

Hearings

- 4.36 The CMA will not normally conduct hearings in public.
- 4.37 The CMA may conduct separate hearings with the appellant and the Authority which interveners may attend as observers.
- 4.38 Where the CMA decides to hold a hearing on the substance of the appeal (the main hearing), the date of the main hearing will normally be stated in the administrative timetable, which will be published on the CMA's website. The CMA may also hold clarification hearings in advance of the main hearing.
- 4.39 Intervenors may request a hearing. The CMA will consider any such request and the reasons for the request and decide whether to invite the intervener to a stand-alone hearing or to all or part of any hearing with the appellant and the Authority. The CMA may of its own initiative invite interveners to attend any hearing.
- 4.40 Hearings will normally be held with the Group⁶⁶ although CMA staff will also participate. The hearings are an opportunity for the parties to make oral submissions to the Group and members of the CMA staff advising them. However, they are also an opportunity for the Group to ask such questions as it considers necessary in order to make the necessary findings in its determination. Although the Acts and the Rules make provision for cross-examination, the CMA expects that this power will be used very rarely.

⁶⁶ This is a group of the CMA's members, formed for the purpose of carrying out the CMA's functions. See paragraph 4 of the Schedule.

- 4.41 Hearings are formal and will normally be led by the chair of the Group or by such other member of the CMA as appropriate.
- 4.42 Participants will normally be directed before the hearing as to the matters on which the CMA wishes to hear submissions and the length of time they will be allowed to make submissions. The CMA will indicate the order in which it wishes to hear the participants. Participants may be represented by more than one person and the CMA will be sympathetic to such arrangements to facilitate the clear presentation of technical issues and ensure that the person with the requisite level of expertise and knowledge is available to answer the Group's questions. At hearings participants may present their submissions using, for example, a PowerPoint presentation, if they consider that would assist the CMA. Participants who wish to employ technology during their submissions should make prior arrangements with the CMA.
- 4.43 Verbatim transcripts are taken of hearings. Transcripts will be sent to the relevant party after the hearing to check its accuracy and to enable the party to identify any sensitive material. The CMA may request the relevant party to verify by a statement of truth the transcript of the statements made by it (or on its behalf) at the hearing.

Staff meetings

- 4.44 The CMA may conduct meetings or make phone calls to clarify specific facts; for example, CMA staff may hold meetings with the Authority or other participants to discuss issues concerning any economic models relevant to the appeal. A transcript will normally be taken but where practical other participants may be invited to send observers.

Confidentiality and Freedom of Information

- 4.45 The Acts make provision for the exclusion from the published version of the CMA determination of:
- (a) commercial information, the disclosure of which would, or might in the CMA's opinion, significantly harm the legitimate business interests of an undertaking to which it relates; or
 - (b) information relating to the private affairs of an individual, the disclosure of which would, or might in the CMA's opinion, significantly harm the individual's interests.

- 4.46 Provision for the protection of sensitive information (as defined in the Rules) is also included in the Rules (see, for example, Rule 11).
- 4.47 Participants' attention is also drawn to section 105 of the Utilities Act 2000 which contains general restrictions on the disclosure by the CMA of certain information obtained under or by virtue of the provisions of the relevant parts of the Electricity Act 1989 and the Gas Act 1986 which relate to the affairs of any individual or to any particular business. Section 105 makes certain exceptions to those restrictions, including provision permitting disclosures made with consent of the individual or the person for the time being carrying on the business (section 105(2)) or made for the purpose of facilitating the performance of the functions of the CMA, the Authority or other specified persons (section 105(3)(a) and 105(4) of the Utilities Act 2000). Article 63 of the Energy (Northern Ireland) Order 2003⁶⁷ makes similar provision in relation to information obtained by the CMA under Part II of each of the Electricity (Northern Ireland) Order 1992 and the Gas (Northern Ireland) Order 1996, which includes the CMA's regulatory appeals function under those orders.
- 4.48 The CMA considers that in most cases, section 105 of the Utilities Act 2000 or Article 63 of the Energy (Northern Ireland) Order 2003, as the case may be, will enable the CMA to disclose to the parties or potential parties to the appeal any submissions received from another party in the proceedings, subject to any redactions it considers appropriate to safeguard any confidentiality concerns.
- 4.49 Where non-sensitive versions of submissions and evidence are submitted to the CMA, the party filing the information is taken to have consented to the disclosure of that non-sensitive version.
- 4.50 Where it can do so while protecting confidentiality, in order to secure fairness and assist it to perform its functions effectively, the CMA may disclose relevant material provided by or to participants, other than communications of a purely administrative nature, and transcripts of hearings to other participants.
- 4.51 The CMA may propose that disclosure of certain information should be made solely within a 'confidentiality ring', normally comprising the participants' named legal representatives and, possibly, other external advisers or experts such as accountants and economists, subject to appropriate confidentiality undertakings, rather than to the participants themselves. The CMA will seek views from the participants as to whether a confidentiality ring is necessary.

⁶⁷ SI 2003/419 (NI 6).

- 4.52 Exceptionally, claims may be made that certain information is of such sensitivity that it should not be disclosed within the confidentiality ring.
- 4.53 Rule 14 sets out a non-exhaustive list of matters upon which the CMA can give directions. Under this rule the CMA can give directions about the handling of sensitive information. If a participant has concerns about providing sensitive information to another participant, it can provide the proposed version of the document to the CMA and ask it to provide directions on the proposed excisions (Rule 11). The CMA respects the importance of protecting sensitive information. However, it also discourages participants from making excessive or blanket confidentiality claims over submissions and may consider them to be inconsistent with the overriding objective.
- 4.54 The CMA may receive requests from third parties for information which it holds in connection with appeals. The CMA notes that by virtue of paragraph 1ZA of Schedule 1 to the Freedom of Information Act 2000, the general right of access to information held by a public authority does not extend to information held by the CMA as a tribunal.

5. Provisional determination

- 5.1 The CMA will normally issue a provisional determination stating its provisional conclusions which will be notified to the parties to the appeal, including interveners. The purpose of a provisional determination is to allow parties to comment on the CMA's reasoning and accuracy of arguments. It may also establish a context for any necessary consideration of remedies.
- 5.2 The provisional determination will be notified to the parties, including interveners. The CMA does not generally expect to publish its provisional determination and, unless it does, information contained within it will remain subject to the controls in section 105 of the Utilities Act 2000 or Article 63 of the Energy (Northern Ireland) Order 2003, as the case may be. Parties are also reminded that the contents of the provisional determination may be pricesensitive information whose disclosure is prohibited under the Criminal Justice Act 1993 or relevant Financial Conduct Authority Rules.

6. Costs

The CMA's costs

- 6.1 Under the Acts, the CMA is required to make an order requiring the payment of its own costs incurred in connection with the appeal.⁶⁸ Such an order must require those costs to be paid:
- (a) where the appeal is allowed in full, by the Authority;
 - (b) where the appeal is dismissed in full, by the appellant; or
 - (c) where the appeal is partially allowed, by one or more parties in such proportions as the CMA considers appropriate in all the circumstances.
- 6.2 When considering the appropriate proportions of the CMA's costs to be paid by one or more of the parties where an appeal is partially allowed, the CMA's starting point will ordinarily be the principle that costs follow the outcome of the appeal. This means that the Authority should normally pay the proportion of the CMA's costs incurred in connection with any appeal grounds allowed, and that the appellant should normally pay the proportion of the CMA's costs incurred in connection with the dismissed appeal grounds. The CMA will, however, also consider whether for each ground there are any good reasons to depart from this approach. The CMA might, for example, consider that good reasons exist for these purposes where a relevant ground of appeal is dismissed, but the CMA considers the ground of appeal was reasonably made in view of a relevant error made by the Authority in its decision **and** that error had a material impact on the time and expense of the CMA in addressing the ground of appeal to which it relates. In such a situation, the CMA might consider it appropriate for the Authority to pay the proportion of the CMA's costs incurred in connection with the relevant ground of appeal, notwithstanding that the ground of appeal was dismissed. This is likely to depend upon the magnitude of the error and whether the Authority had a reasonable opportunity to correct it prior to making its decision.
- 6.3 Before making any order for payment of its own costs, the CMA will provide the parties with a provisional determination on the CMA's costs and a draft of the costs order and give them a reasonable opportunity to make representations on each. The CMA will normally publish non-confidential versions of any final determination on costs on its website.

⁶⁸ Paragraph 12(1) of the Schedule.

Inter partes costs

- 6.4 The CMA has discretion to make an order requiring a party to the appeal (appellant or the Authority) to make payments to another party in respect of costs reasonably incurred by the other party in connection with the appeal.⁶⁹ 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 will have regard to all the circumstances, including (as set out in Rule 21.5) the conduct of the parties, a party's degree of success and the proportionality of the costs claimed.⁷⁰ The CMA does not have the power to order costs against or for interveners.
- 6.5 Before making any order for costs under Rule 21.3, the CMA will provide the parties with a provisional determination on costs and a draft of the costs order and give them a reasonable opportunity to make representations on each. The CMA will normally publish non-confidential versions of any final determination on costs on its website.
- 6.6 Where the CMA makes an order for costs in favour of one or more of the parties to the appeal under Rule 21.3, the costs recoverable may include all those fees, charges, disbursements, expenses and remuneration incurred by a party in the preparation and conduct of the appeal. However, the CMA will not normally allow any amount in respect of costs incurred before the Authority first published its decision.
- 6.7 Any party to the appeal seeking an award of costs in its favour should file a statement of costs when invited by the CMA, which should be disclosed to any party to the appeal who may become liable to pay those costs.
- 6.8 Each statement of costs should include detailed information about the costs (including categories such as solicitors' costs, counsel fees, experts' costs and any other disbursements) reasonably incurred by the party to the appeal in connection with the appeal. The CMA will normally expect the amounts for each category of costs to be broken down by reference to the number of hours claimed, hourly rate, position of the fee earner and the nature of the work performed.
- 6.9 Each statement of costs should be signed by the party to the appeal or, where applicable, its legal representative.

⁶⁹ Paragraph 12(3) of the Schedule.

⁷⁰ The proportionality of the costs claimed will be assessed having regard to the matters in issue.