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Dear Sarah Cardell

Consultation on draft new Rules and Guide for water redetermination references

Ofwat welcomes the opportunity to comment on this consultation. As the economic regulator, our role is to enable companies to provide, and hold them accountable for, the best services for customers and the environment, now and in the future in line with our statutory duties under the Water Industry Act 1991 ("1991 Act").

We have already held early and positive engagement with your team on the PR24 methodology. We understand that this consultation is primarily codifying existing practices and set out our summary response below, with some specific technical points included in the Annex.

Summary of Response

This price review has come at a pivotal moment for the water sector. We see clearly how public confidence has been damaged by issues such as sewage spills from storm overflows and concerns about executive bonuses and excessive dividends, weak financial resilience and rising bills. The need for change is recognised by the UK and Welsh Governments, companies and regulators. The price review is a key element to delivering our strategy to transform the water sector.

There is a significant increase in investment in the 2024 price review, which is largely driven by the statutory planning processes, led by the UK and Welsh Governments, which are setting new requirements for companies to meet. The price review takes place with intense scrutiny of the sector, particularly from environmental NGOs. Both Ofwat and the Environment Agency have major enforcement actions in progress against wastewater companies and there has

been a range of litigation against both regulators and companies in recent years. There is likely to be strong interest in any redetermination references not just from the companies in the sector, but also from other stakeholders, including environmental NGOs.

We support the CMA's overriding objective to dispose of any redetermination references fairly, efficiently and at proportionate cost within the time periods prescribed in the 1991 Act. To enable this, we welcome the clarification of the requirements for the statement of case for the disputing company. We consider it is vital that any disputing company must set out the specified requirements in order for the CMA to be able to achieve its overriding objective and we encourage the CMA to make it clear in the rules that these are the minimum requirements for the disputing company. To support this the CMA should include in the guidance, that they expect disputing companies to identify all the issues they would like the CMA to consider in their statement of case.

To support the CMA disposing of references fairly, we encourage the CMA to consider how a greater balance of opportunity of being heard can be achieved if there are multiple disputing companies. Where there are multiple disputing companies, there is a risk that issues are repeated by each of the parties and their advisers, taking a disproportionate amount of time or opportunity of making the point to the CMA as opposed to the single opportunity available to the regulator. We encourage the CMA to consider how balance of opportunity of being heard can be achieved. One option may be that for cross cutting issues disputing companies are represented by one company or legal representative or expert witness. An alternative is that equal time is provided to Ofwat and disputing parties on cross cutting issues. These approaches would help ensure balance of voice between disputing companies and the Regulator.

Many stakeholders have an interest in the water sector. Given the continued interest and public scrutiny on the sector, we encourage the CMA to consider how it ensures that the voice of the customer is heard to support the CMA exercising its statutory duties in making the redetermination. For example in how it gives adequate consideration of the views of customers and their representative groups, including in its approach to third party submissions and hearings and consumer expertise in the CMA panel members.

We are pleased to see under appointment and conduct, confirmation that the CMA group must consist of at least three panel members, one of which must be a specialist utility panel member. We consider that it is important that where there are multiple disputing parties there is more than one panel member with expertise in utility regulation, at least one of whom has experience of working for a regulator. This will allow the panel to reflect a range of views and incorporate direct experience of regulation. We also recommend that the CMA panel members are rotated to help the CMA demonstrate that each reference is considered fairly on its merits and not unduly influenced (in reality or perception) by the outcome of past references.

We welcome confirmation that the stages of a reference may include holding case management conferences (Rule 7.2(b)). The importance of rigorous case management at this point and throughout the process is critical given timing is constrained. This is particularly in relation to disputing parties bringing new information in further submissions and the volume of information submitted. We also encourage the CMA to be clear in the rules or the guide on how it intends to manage the provision of new information in further submissions through the process. We note the experience from PR19 and the risk of new information being generated and new submissions made. For example, we would expect the focus for hearings and technical meetings to only be on the detail set out in the statement of case or working papers, which are shared with parties in advance. If new information is presented in hearings and technical meetings, we note the importance of there being an agreement with all parties on a sufficient time period in which to respond.

We welcome confirmation that the CMA may provide additional documents such as working papers (Rule 7.2(e)). Given the scale of PR24 we strongly encourage the greater use of working papers, including in advance of the provisional determination. They are a vital means of breaking down big issues into more focused engagement and to obtain the parties' input on the CMA's emerging thinking ahead of it crystalising into a provisional determination. This better supports the CMA carrying out adequate consultation on the provisional determination, a key element of fairness in the process. Similarly, we encourage the CMA to give adequate notice of and sufficient details in agendas on the topics to be covered for hearings or working groups so that parties' input at that point can be well considered, supporting the fairness and efficiency of the process. We note the guidance says that parties will normally be directed before the hearing as to the topics that the CMA wishes to cover, but the timing and detail of such notice can significantly influence the effectiveness of the working group or hearing.

From the consultation it appears that the focus of the draft rules is only on references requiring redeterminations of price controls where Ofwat has made the original price control determination. We therefore suggest that the CMA should consider (and make explicit) whether the proposed rules are intended to apply to all references under section 12 of the 1991 Act. The PR24 team will be happy to continue to work with your teams further on these points if that would assist your consultation.

Yours sincerely

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David Black
Chief Executive

Annex

As noted it is important to note that the conditions of relevant undertaker's appointments also provide for references to be made to the CMA under that section where:

- Ofwat has failed to make a price control determination by the relevant deadline (for example, the current effect of Condition B is that if Ofwat does not make final determinations for the period beginning on 1 April 2025 by 31 December 2024 then each company will have one month to ask Ofwat to refer the questions as to what price controls should be set to the CMA for its determination); or

- specified non-price control decisions are disputed (for example, Condition F provides that where Ofwat revises Regulatory Accounting Guidelines, each company has one month to ask Ofwat to refer to the CMA, unless Ofwat withdraws the decision to make the revision, the question of whether the revision is appropriate).

We therefore suggest that the CMA should consider (and make explicit) whether the proposed rules are intended to apply to all references under section 12 of the 1991 Act. It would make sense for specific rules to apply to all references under section 12, but if that is not the case then it should be clear which references would instead be subject to the general rules for special reference groups in CMA17.

The following are drafting points where we propose changes to the respective rules.

Draft water redetermination reference rules (CMA204con)

Rule	Comment
5.5	Rule 5.5 says that the reference group "shall exercise its own discretion as to how to appropriately balance the relevant statutory duties", but "balance" is not a term used in section 2 of the 1991 Act. It would be clearer if the rule mirrored the wording of section 2 and said that the group shall exercise its own discretion as to "how to carry out the CMA's function(s) in the manner it considers is best calculated to meet the relevant statutory objectives" (or, if preferred, "relevant statutory duties").
12.3	Should the cross-reference be to Rule 12.2 instead of Rule 12.1? Rule 12.2 is the equivalent of Rule 14.1, to which the equivalent reference is made in CMA17, but there is no equivalent to Rule 12.1 in CMA17.
13.2	Rule 13.2 says that the group "may" have regard to "(a) the extent to which the determination is likely to support the disputing company's (rather than the Authority's) claims", but section 12(3A) of the 1991 Act says that the CMA "shall" have regard to that point.

Draft water redetermination reference guide (CMA205con)

Para.	Comment
2.4	We have identified some inconsistencies in the description of the "primary duties" In particular: • The section 2 duties do not apply to all the powers and duties of the Authority (only those conferred or imposed by virtue of the provisions listed in section 2(6) of the 1991 Act). • The "licence duty" (section 2(2A)(d) of the 1991 Act) does not refer to companies holding appointments as water undertakers and/or sewerage undertaker. It instead refers to the holders of water supply licences and sewerage licences. Such licences currently mainly authorise the holders to retail water and sewerage services to business customers, although water supply licences may also authorise the holder to introduce water into a water undertaker's supply system to supply their own customers in certain circumstances. We suggest the following alternative text: "The primary duties set out in section 2(2A) of the Act require the Authority to perform *the specified* powers and duties in the manner in which it considers is best calculated: (a) to further the consumer objective, which is to protect the interests of consumers, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the provision of water and sewerage services (consumer objective); (b) to secure that the functions of a water undertaker and a sewerage undertaker are properly carried out as respects every area of England and Wales (functions duty); (c) to secure that *appointed companies are* able (in particular, by securing reasonable returns on *their* capital) to finance the proper carrying out of those functions (financing duty); (d) to secure that the activities authorised by the *licence of a water supply licensee or sewerage licensee (retailers in the business retail market)* and any statutory functions *imposed on it in consequence of the licence* are properly carried out; and (e) to further the 'resilience objective'."
2.7	While we appreciate that the guide is summarising the legal position, we note that it could be misleading to state that "the Authority must act in accordance with [the Secretary of State's SPS] when it is carrying out its functions in England". The statements of strategic priorities and objectives (commonly known as strategic policy statements) published by the Secretary of State and the Welsh Ministers do not currently apply in relation to England and Wales respectively and do not apply to all of the Authority's functions. They apply to the Authority when carrying out the functions conferred or imposed by virtue of the provisions listed in section 2(6) of the 1991 Act "so far as they relate to appointment areas wholly or mainly in England" (section 2A(9) of the 1991 Act) or "so far as they relate to appointment areas wholly or mainly in Wales (section 2B(9) of the 1991 Act).

7.9 and 7.13	These paragraphs should refer to "the Secretary of State *or the Welsh Ministers*" (instead of "the Secretary of State"). An appointed company whose area as a water undertaker or sewerage undertaker is wholly or mainly in Wales is required to pay licence fees (including any CMA fee) to the Welsh Ministers. The relevant functions of the Secretary of State under sections 11 and 12 of the 1991 Act have been transferred to the Welsh Ministers in relation to any water or sewerage undertaker whose area is wholly or mainly in Wales (see the National Assembly for Wales (Transfer of Functions) Order 1999 (SI 1999/672) and paragraph 30 of Schedule 11 to the Government of Wales Act 2006).