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By email: waterrulesandguide2024@cma.gov.uk

Dear Ms Moore,

Consultation on draft rules of procedure and guidance for water redetermination references

Water UK is the trade association for the UK's water industry and comprises all water and wastewater companies of England, Northern Ireland, Scotland and Wales.

Water UK highly values the important role that the Competition and Markets Authority (CMA) plays by providing an expert and independent redetermination of the merits of Ofwat's determination decisions.

Having reviewed the CMA's proposed Draft Rules, we consider there to be three issues that, if unaddressed, risk worsening the current arrangements:

- 1) **Approach to issuing provisional redeterminations:** Unlike the current rules, the Draft Rules (11.1) would allow the CMA not to issue a provisional determination ("The group shall normally issue a provisional determination stating its provisional conclusions"). Similarly, the draft guide says in paragraph 3.30 that, "(t)here may be cases where the CMA considers that it is not appropriate to issue a provisional determination. In such cases, the CMA will determine what alternative procedure is appropriate based on the circumstances of the case and in accordance with the overriding objective".

Our view: We do not consider it would be appropriate to dispense with the requirement to issue a provisional determination. Water redeterminations consider increasingly complicated matters which are too important to risk leaving to a single and final decision. Very large sums of money are involved and the public's interest in water is such there is likely to be considerable attention paid to any water redetermination. All parties, therefore, should have the opportunity to provide comments to the CMA before a final decision is made. Without such an opportunity, it is conceivable that errors may be made. The CMA would also benefit from comments on any proposed position or approach to be adopted by the CMA. This is not a theoretical concern. For example, at the redetermination at PR19, the CMA made significant changes to the permitted allowance for the total cost of debt between the Provision and Final Redeterminations.¹ We fully accept that an automatic provisional redetermination must involve more time and cost but we think the magnitude of the matters involved in a water

¹ See, for example, paragraph 88 [here](#).

redetermination are sufficient to keep the current rule as it is. In this instance, we feel the existing trade-offs have been fairly balanced.

- 2) **The timescales for responding to provisional redeterminations:** The current rules provide that the main party affected should have no fewer than 21 days to respond to the provisional determination. In the Draft Rules, 11.2 refers to the group notifying the main and third parties, “...on such terms and in such manner as the group considers appropriate”.

Our view: While recognising that the CMA would dispose of a redetermination “fairly, efficiently and at proportionate cost” (i.e. its overriding objective as set out in rule 4), the Draft Rules may create a risk to the main and the third parties that the CMA does not provide reasonable time in which to respond. This is especially important for the purpose of responding to a provisional determination and, therefore, should not be made discretionary.

- 3) **Scope of hearings:** Rule 9.7 of the Draft Rules (which is an addition to the current rules) states that, “(i)t is for the CMA to determine the form and structure of the hearing and the CMA will not necessarily cover all of the main parties’ arguments at a hearing.”

Our view: We cannot envisage a situation in which an argument posed by a main party would not warrant being covered by the CMA. At the very least, there should be a high threshold for determining that certain arguments are not being covered at a hearing.

In addition, we note that the Draft Rules appear only to apply to redetermination references from Ofwat in relation to water companies in England and Wales. It would be helpful to have greater clarity concerning any wider potential applicability. I raise this point given there are equivalent provisions under the Water Services etc. (Scotland) Act 2005 (Consequential Provisions and Modifications) Order 2005, which apply in Scotland, allowing the Water Industry Commissioner to make a reference to the CMA. As such, I would be most grateful if you could confirm whether the Draft Rules would extend to Scotland or if the CMA intends to consult separately on equivalent changes for Scotland.

Should you wish to discuss Water UK’s response, please do not hesitate contacting my colleague [X].

Yours sincerely,

[X]

David Henderson
Chief Executive Officer