Scottish & Southern Electricity Networks

T2BP-DD-SHE-012

SHE Transmission

SHE Transmission response to Ofgem's Draft Determination consultation questions

Annex 1: Q&A on Pre-Action Correspondence and Post Appeal Review

Inveralmond House, 200 Dunkeld Road, Perth PH1 3AQ ssen.co.uk

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Core Document: Consultation Question Responses on Pre-Action Correspondence and Post Appeal Review

***Core Question 41**: Do you have any views on our proposal to include a statement of policy in Final Determinations that in appropriate circumstances, we will carry out a post appeals review and potentially revisit wider aspects of RIIO-2 in the event of a successful appeal to the CMA that had material knock on consequences for the price control settlement?*

1.1 Ofgem[1] is proposing to carry out post-appeal reviews "*where this would be of assistance in ensuring the overall coherence and consistency of the regulatory settlement*" and, following any successful CMA appeal, to make adjustments to wider aspects of the RIIO-2 price control where it considers it would be appropriate to do so (the ***Post Appeal Proposal***).[2]

1.2 SHE Transmission strongly disagrees with the Post Appeal Proposal. As set out in more detail below, the Post Appeal Proposal would risk undermining the purpose of the statutory appeals framework, which guarantees parties affected by licence modification decisions an ex-post right of appeal to an *independent* appeal body, with an expectation that the appeal process will result in finality and certainty. The relevant decision-maker is the CMA and Ofgem has no power to undermine or circumvent the appeal outcome decided by the CMA. Since the appeal process already empowers the CMA – as the independent decision-maker – to consider and rule on any interlinkages as part of its assessment of price control appeals there would be no legitimate purpose in Ofgem undertaking a "post-appeal review". Indeed, the only apparent outcome of such a review would appear to be that Ofgem would confer upon itself the right to have a "second bite of the cherry" in relation to points which it had unsuccessfully argued before the CMA (see section A).

1.3 Further, that a post-appeal adjustment by Ofgem is not permissible is demonstrated by the fact that this would open the door to yet a further chain of appeals, thereby circumventing the statutory deadlines for resolving any disputes relating to price control decisions (see section B). It is a core principle of the statutory appeal regime that the appeal decision of the CMA is the final word on the price control decision. It is not open to Ofgem to re-take aspects of its decision in this way and, if attempted, would necessarily be highly inefficient and would result in disproportionate costs for the affected parties (as well as for Ofgem).

1.4 As a practical matter and aside from the key concerns of principle raised in Sections A and B, the parameters of the Post Appeal Proposal are characterised by a high degree of uncertainty (despite concerns raised by respondents to the RIIO-2 sector specific consultation[3]), including in relation to:

[1] Ofgem and GEMA are for present purposes used synonymously.
[2] DD, paras. 11.31-11.33.
[3] Several respondents to the RIIO-2 sector specific consultation (including SSE) observed that details of Ofgem's post-appeals review proposal were unclear in their responses. See: https://www.ssen-transmission.co.uk/media/3329/riio-2-sector-specific-methodology-consultation-response_080519.pdf

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(a) the appeal outcomes that would trigger such a review (although we assume that its application would be broader than any issues on which the licence modification decision was remitted back to Ofgem with specific directions);

(b) the scope of such a review;

(c) the process for such a review and any adjustments to the price control; and

(d) precisely how Ofgem considers that such a review could be conducted in accordance with the CMA's final decision.

1.5 It is also unclear whether Ofgem is still considering the possibility of carrying out post-appeal reviews in relation to FDs concerning parties that had *not* appealed the decision and, if so, in what circumstances.[4]

1.6 The lack of clarity that Ofgem has to date provided in relation to the post-appeals review process is concerning.

1.7 Overall, the significant and detrimental impact that the Post Appeal Proposal would have on regulatory finality and certainty is highly troubling (see section C).

A. The Post Appeal Proposal risks undermining the statutory appeals framework

1.8 Ofgem argues in the DD that it could carry out post-appeal reviews without undermining the statutory appeals framework. This position is counter-intuitive as the proposal is not envisaged by the statutory regime. The only explanation offered in the DD is the statement that "[a] *review would be conducted in compliance with the final decision of the CMA on any appeal*."[5] It is unclear precisely how Ofgem intends to achieve this in practice. However, for the reasons set out below, any post-appeal adjustment to the price control by Ofgem that has not been specifically mandated by the CMA would, by definition, undermine affected parties' ex-post right of appeal to an independent body.

Parties affected by a licence modification decision are entitled to an ex-post appeal to an independent decision-maker with an expectation that the appeal process will result in finality and certainty.

1.9 As Ofgem is aware, the current energy price control appeal regime is a consequence of legislative amendments made in Great Britain[6] and Northern Ireland[7] following the introduction of the EU Third Energy Package (the ***Third Package***). Directive 2009/72/EC (the

[4] RIIO-2 Sector Specific Methodology, para. 2.20.
[5] Draft Determination, para. 11.33.
[6] See Part 9 of the Electricity and Gas (Internal Markets) Regulations 2011 (No. 2704), which modified EA89.
[7] See Part 2 of the Gas and Electricity Licence Modification and Appeals Regulations (Northern Ireland) 2015(SR 2015 No. 1) which modified the Electricity Order.

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Electricity Directive), one of the two Third Package directives, requires that national regulatory authorities take autonomous decisions and are able to undertake their regulatory tasks independently and in an efficient and expeditious manner.[8] It also requires Member States to ensure that suitable mechanisms are in place, such that a party affected by the decision has a right of appeal to a body independent of the parties involved and government bodies.[9]

1.10 In line with the requirements of the Electricity Directive, the Electricity and Gas (Internal Markets) Regulations 2011 (the ***Regulations***) granted greater autonomy of decision-making to regulatory authorities, subject to the introduction of a clear and protected ex-post right of appeal for those affected.[10]

1.11 As papers from the 2010 Department of Energy and Climate Change (***DECC***) consultation (the ***Consultation***) show, the Government took the view that the ex-ante licence modification appeals process then in operation needed to be amended in order to comply with the Electricity Directive. The Government went on to conclude that "*the best way to implement these requirements, ensure a coherent and consistent regulatory regime, ensure robust regulation in the consumer interest and appropriate scrutiny of Ofgem's decisions, is to replace the current licence modification process with an ex-post right of appeal.*"[11]

1.12 This point is reiterated in the Explanatory Notes to the Regulations which note that the ex-post appeals process was considered a necessary pre-condition to Ofgem's power to make autonomous decisions.[12] This right is therefore central to the statutory regime and any proposal with the intention or effect of undermining this objective would be contrary to the intention of both EU and UK government institutions who put into effect these amendments.

The CMA is already empowered to consider interlinkages in its appeal determinations

1.13 Ofgem explains that it would use post-appeal reviews "*to consider whether it was necessary to adjust an element of the price control including allowances, outputs and incentives, that are linked to aspects of our decision that are overturned on appeal before the CMA.*"[13] However, save where the CMA has given specific directions for Ofgem to do so, such consideration would not be in accordance with Ofgem's powers. Furthermore, it would be neither necessary, nor appropriate, at the post-appeal stage.

(a) First, it is clear from the CMA's decisional practice and recent comments to Ofgem that the existing mechanism for appeal to the CMA already adequately caters for

[8] Electricity Directive, article 35(5)(a).
[9] Electricity Directive, article 37(17).
[10] Hansard, Lord Marland. Available at: https://hansard.parliament.uk/Lords/2011-10-17/debates/11101732000221/ElectricityAndGas(InternalMarkets)Regulations2011..
[11] Implementation of the EU Third Internal Energy Package, Government Response, DECC – Department of Energy and Climate Change, January 2010, para. 2.15.
[12] Explanatory Memorandum to the Electricity and Gas (Internal Markets) Regulations 2011, para. 4.14. See also: Implementation of the EU Third Internal Energy Package, Government Response, DECC – Department of Energy and Climate Change, January 2010, para. 2.15.
[13] Para. 11.32.

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potential "interlinkages" between matters raised on appeal and other aspects of the price control as part of the CMA's decision-making on price control appeals:

(i) For example, in the 2017 Firmus Energy Determination the CMA observed that "*In the ED1 Determinations, we recognised the risk of knock–on effects changing one aspect of a complex regulatory decision might have. The principle we adopted in those cases and we adopt here is to consider on a case–by–case basis any evidence submitted to the CMA regarding links between the parts of the decision which are challenged and parts which are not. However, based on submissions in this appeal, we concluded that changing the GIS costs would not have consequential effect on other parts of the UR's determination*"[14] (emphasis added).

(ii) The CMA reiterated this view even more recently in its response to Ofgem's open letter (the ***Response***), in which it stated: "*We confirm that, as stated in our guidance and in accordance with previous appeal determinations, the CMA will take interlinkages into account*"[15] (emphasis added), and that "[i]*t is correct that an appellant cannot "cherry pick" just one specific unfavourable component of a regulatory assessment, assumption and decision where that is not in practice a separable decision, and can only be considered alongside other linked decisions.*"[16]

(b) Secondly, in line with the decisional practice of the CMA, the burden of raising a defence based on knock-on effects lies with the regulator in the first instance.[17] As a matter of principle, Ofgem must raise any potential interlinkages in its submissions to the CMA on appeal. Having done so, it cannot be right that Ofgem is entitled to carry out a post-appeal review simply because it failed to convince the CMA of its position on appeal. If Ofgem does not raise any issue of interlinkages before the CMA, having had the opportunity to do so, it is likewise not open to Ofgem to seek to do so following the CMA's decision.

(c) Thirdly, in the event that the CMA considers that a licence modification decision requires reconsideration or redetermination in order to address the subject matter of the appeal and / or any interlinked issues, then it would already be able to address any such matter – and indeed is well equipped to do so – under its existing powers

[14] Para. 8.25. See also CMA SONI Determination, para. 13.3.
[15] Para. 13.
[16] Para. 16. See also: para. 2.23 of the Consultation, which provided that: "as price control decisions are essentially a package of balancing measures, there is the potential that upholding an appeal on a single element could have a knock-on effect on other elements of the package and upset the balance of the price control mechanism as a whole. The appeal body would therefore have discretion to consider additional elements or the whole package of the price control decision if the evidence submitted shows that reviewing individual elements is likely to upset the balance of the whole package" (emphasis added).
[17] CMA BGT ED1 Determination, para. 3.52; CMA NPg ED1 Determination, para. 3.51.

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under the Electricity Act 1989 (***EA89***) which enable it to do one or more of the following:

(i) quashing the decision;

(ii) remitting the matter back to Ofgem for reconsideration and determination in accordance with any directions given by the CMA; or

(iii) substituting the CMA's decision for that of Ofgem and giving directions to Ofgem or any other party to the appeal.[18]

(d) Therefore, contrary to the suggestion in the DD, there is no need to provide Ofgem with an additional right of review to consider interlinked issues in the price control after the appeal has concluded.[19] It is notable that Ofgem has offered no explanation in the DD or elsewhere as to why any concerns that it may have about the "*coherence and consistency*" of the price control should not be capable of being addressed by the CMA in the exercise of its broad statutory powers.

1.14 In these circumstances, it is hard to escape the conclusion that Ofgem's Post Appeal Proposal amounts to no more than an attempt (in no way endorsed by the CMA) to provide itself with an opportunity to have another bite at the cherry. It would plainly be inappropriate for Ofgem to seek to unwind or modify the intended effect of the CMA's decision in this way, particularly in circumstances where – as explained above – the CMA had already taken possible interlinkages into account.

1.15 Given that: (1) the UK Government's position that affected parties' right of appeal to an independent body requires the CMA to be the ultimate arbiter in any points of dispute; and (2) the CMA will consider any knock-on effects raised by Ofgem when determining the outcome of an appeal and can, where it considers it appropriate, remit a matter to Ofgem for reconsideration, any post-appeal adjustments to the RIIO-2 price control initiated by Ofgem would undermine affected parties' right to an ex-post appeal to an independent body.

<u>B. Post-appeal adjustments to the RIIO-2 price control initiated by Ofgem would open the door to a further chain of appeals</u>

1.16 The swift resolution of appeals against price controls is essential to provide Ofgem, transmission owners and consumers with finality and certainty. The importance of finally resolving price control appeals as swiftly as is reasonably possible is a core aspect of the overriding objective of the CMA's procedural rules for energy licence modification appeals,

[18] Section 11F, EA89.
[19] DD, para. 11.32.

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namely to "*enable the CMA to dispose of appeals fairly and efficiently and at proportionate cost within the time periods prescribed by the Acts*" (our emphases).

1.17 The same considerations also underpin the statutory time limits for appellants to prepare and submit an appeal (20 working days) and for the CMA to determine such an appeal (six months from the date on which permission to appeal is granted).[20] In deciding upon these time limits, the Government observed that it had had regard to the need to provide an adequate balance between cost and the degree of scrutiny appropriate for price control appeal determinations.[21]

1.18 Ofgem's proposal would effectively undermine the overriding objective and circumvent the time limits set out in the EA89. As Ofgem will be aware, any post-appeal licence modification decision initiated by Ofgem would be subject to the statutory consultation period and, if implemented, would give rise to a new right of appeal for all parties affected by the new decision and would restart the statutory time limits, thereby prolonging the period of uncertainty that comes with an appeal for all stakeholders. As the CMA noted in the 2017 Firmus Energy Determination: "*It is undesirable that issues should be deferred when, as in the present case, they have been the subject of lengthy and detailed consideration by the regulator, and there has been sufficient opportunity for a thorough exchange of views between the regulator and the regulated company. Such an approach may lead to a potential proliferation of regulatory decisions (and related appeals) as well as fluctuations in regulated prices*."[22] The Post Appeal Proposal would also go against the long-established principle of finality of litigation, first established in the 1843 case of *Henderson v Henderson*[23] which provides that where a matter has been the subject of litigation and adjudication by a court, it was required of the parties that they "*bring forward their whole case*".[24]

1.19 In addition, for the reasons explained above, any such re-appeals would be a highly inefficient way to handle the issue of interlinkages and would unavoidably result in unnecessary and therefore wholly disproportionate costs for all parties involved – again in direct opposition to the CMA's overriding objective. Exacerbating these concerns is the fact that Ofgem's proposal does not contain a deadline for completing such reviews and nor does it suggest a limit on the number of times that Ofgem could carry out such a review. On that basis, the uncertainty caused by Ofgem's proposal would continue indefinitely and the process could repeat itself several times throughout the lifetime of the RIIO-2 price control.

[20] Para. 1(3) of Schedule 5A and Sections 11G(1)(a) of EA89. Exceptionally, the six-month deadline may be extended by up to one month but only where Ofgem is satisfied that there are "special reasons why the determination cannot be made within the specified period" (section 11G(3)(b) EA89).
[21] Consultation, paras. 2.34-2.35.
[22] Para. 4.91.
[23] (1843) 3 Hare 100. This aspect of the decision was cited with approval in Takhar v Gracefield Developments Limited [2019] UKSC 13, a 2019 Supreme Court case, para. 20.
[24] Page 115.

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C. The lack of clarity offered by Ofgem would further undermine the current price control appeals framework

1.20 As has been previously raised at the RIIO-2 sector specific methodology stage,[25] the lack of clarity in relation to how Ofgem considers the Post Appeal Proposal would operate in practice is itself problematic.

1.21 As noted above, a number of fundamental aspects of the proposal remain unclear, including which appeal outcomes would trigger such a review, what the scope of such a review would be, what the process for such reviews and any adjustments to the price control would be and whether Ofgem would be subject to any deadlines or limits on the number of times it could carry out such a review, and precisely how Ofgem considers that such a review could be conducted in accordance with the CMA's final decision. It is also unclear whether Ofgem is still considering the possibility of carrying out post-appeal reviews in relation to Final Determinations concerning parties that had not appealed the decision. The lack of clarity in relation to all of these points would further undermine the certainty and integrity of the current price control appeals regime.

1.22 The Post Appeal Proposal's lack of certainty contrasts with the position, already provided for in statute, where the CMA remits a matter back to Ofgem for reconsideration and determination in accordance with specific directions (see para 1.4(a) above). In this scenario, the only role of the regulator is to re-visit the specific aspects of the decision which have been referred to it by the CMA in full compliance with the CMA's directions. Ofgem cannot prejudge the CMA's decision on remedies in this way.

1.23 In summary, not only would the Post Appeal Proposal risk undermining the purpose of the statutory appeals framework, and the finality and certainty that parties are entitled to expect from the appeal process, but it would also give rise to the possibility of further appeals, thereby prolonging the period of uncertainty for all stakeholders. Notably, the CMA in no way endorsed Ofgem's justifications for the Post Appeal Proposal in the CMA's Response; to the contrary, it clarified that it was equipped to finally determine points of dispute having regard to interlinkages and would do so where it was appropriate for it to do so. For all of these reasons, Ofgem's Post Appeal Proposal should be altogether abandoned.

[25] RIIO-2 Sector Specific Methodology Decision, para. 2.19; RIIO-2 Sector Specific Methodology Consultation Response, p.39.

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***Core Question 42**: Do you have any views on the proposed pre-action correspondence, including on the proposed timing for sending such to Ofgem?*

1.1 Ofgem proposes in the DD an expectation that potential appellants "come forward to clearly explain their intention to appeal, the element(s) of the RIIO-2 price control that they intend to appeal, the scope of that appeal including, in sufficient detail, the alleged errors, and why that particular component(s) of the price control is wrong having regard to interlinked aspects of the decision" (the ***Pre-Action Proposal***).[26] Ofgem requests this information in the period after the publication of the FDs (from early December) and before its licence modification decision (from early February) (the ***Proposed Window***).[27]

1.2 As a preliminary point, SHE Transmission notes that in respect of any appeal of Ofgem's licence modification decision following the FD Ofgem would be the defendant. The process for appealing Ofgem's decisions is set out by statute and in the relevant appeal rules and related guidance made by the Competition and Markets Authority (***CMA***) pursuant to its statutory role as the appeal body. Decisions as to the appropriate process to be followed in relation to appeals and the process leading up to any appeals are for the CMA and not for one of the parties.

1.3 One of the fundamental principles of fairness of the appeal process is that of equality of arms between parties. Ofgem is not, and cannot be seen to be, in any privileged position over that of an appealing licensee in the appeal process. In that context, it is not within Ofgem's power to seek to add any gloss or additional requirements to those of the statutory framework and the CMA's appeal rules. There are already serious concerns about the manner in which Ofgem has sought to correspond with the management of the CMA (which itself has no power to take decisions regarding individual appeals as this is a matter reserved to the panel established for the purpose of hearing the appeal) in respect of any future appeals. SHE Transmission reserves its rights in that regard. Any attempt by Ofgem in the context of the FD, as a potential defendant to litigation, to seek to curtail or to add to the process set out in the statute or the CMA rules in relation to an appeal of its own decision would be ultra vires and manifestly unfair.

1.4 In addition to this overarching point of principle, it is inappropriate for Ofgem to seek to request privileged, and in the case of SHE Transmission likely market sensitive, information regarding its likely stance on potential litigation during the period in question. Given that any decision to appeal, and if so on which basis, would self-evidently only be taken after detailed and careful consideration having taken detailed legal advice and following an appropriate governance process, Ofgem's proposal is also wholly impractical. Furthermore, providing Ofgem with the information it seeks at the time it is being sought, even if available (which it is unlikely to be) would not address the purported aim of assisting with case management (see section A below). Case management issues relate to the process before the CMA and are therefore for the CMA to manage.

[26] DD, para. 11.36.
[27] DD, para. 11.36.

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1.5 Additionally, for the reasons set out in section B below, the Pre-Action Proposal is ill-suited to the electricity price control appeals process which differs from traditional litigation in which the principal aim of pre-action conduct and correspondence is to allow the parties fully to understand one another's positions in an effort to avoid or limit expensive and time consuming court proceedings, by narrowing the issues in dispute or enabling possible settlement. By contrast, Ofgem's FD is necessarily, and as indicated by the word "final" in its title, a definitive statement of Ofgem's position on material issues under consideration in its price control decision-making. Potential appellants are subject to a strict and intensive statutory timetable in which consultation opportunities are prescribed by statute, culminating in the FD (followed by the licence modification decision to implement the FD). Ofgem could suffer no realistic prejudice if appellants follow the procedure set out in statute and the CMA's rules without any additional gloss by Ofgem. Should it be necessary to take the full period of time prescribed by statute to decide whether, and if so, on what basis SHE Transmission should appeal Ofgem's decision giving effect to the FD, Ofgem will have a full opportunity to present its response to the appeal before the CMA. The CMA's procedure already provides a full opportunity for Ofgem to be heard and appropriate time periods for Ofgem to prepare its representations.

1.6 It is notable that Ofgem has offered no justification for seeking to curtail a potential appellant's statutory rights in this way.

1.7 In any event, and in accordance with the CMA's appeal rules, SHE Transmission is already incentivised to seek to further the overriding objective to dispose of appeals fairly, proportionately and efficiently. SHE Transmission would therefore seek to conduct any appeal as far as possible in a way that avoided the potential concerns raised by the CMA in its response to Ofgem's open letter (the ***Response***).

1.8 Since it is outside Ofgem's powers, is manifestly unfair and serves no practical purpose, Ofgem must not proceed with the Pre-Action Proposal. Should Ofgem nevertheless proceed with the Pre-Action Proposal, SHE Transmission reserves its position entirely in that regard in any potential future appeal before the CMA.

A. It is not within Ofgem's power, or otherwise appropriate for Ofgem to seek to curtail the rights of potential appellants under the statutory appeal regime or to request sensitive and/or legally privileged information in respect of appeals

1.9 As a matter of both EU and UK law, parties affected by a licence modification decision have a right of appeal to an independent body which, in the UK, is the CMA.[28]

[28] See Article 37(17) of Directive 2009/72/EC (the Electricity Directive) and section 11C of the Electricity Act 1989 (as amended). In the UK, this right of appeal has been expressed as a precondition to GEMA being able to make autonomous decisions, see Explanatory Memorandum to the Electricity and Gas (Internal Markets) Regulations 2011, para. 4.14. See also: Hansard, Lord Marland. Available at: https://hansard.parliament.uk/Lords/2011-10-17/debates/11101732000221/ElectricityAndGas(InternalMarkets)Regulations2011.

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1.10 The procedure for appeals against licence modification decisions is primarily governed by Schedule 5A of the Electricity Act 1989 (as amended) (***EA89***). As the independent body responsible for hearing such appeals, the CMA is statutorily empowered to supplement the provisions of Schedule 5A with additional rules of procedure regulating the conduct of appeals,[29] and has done so through the publication of the Appeal Rules. The Appeal Rules provide that their overriding objective is "*to enable the CMA to dispose of appeals fairly and efficiently and at a proportionate cost*" within the statutory time periods.[30]

1.11 Ofgem[31] does not have any statutory role under the EA89 (or elsewhere) to amend or supplement the CMA's rules of procedure or otherwise amend or gloss the process set out by statute and the CMA. The purpose of establishing the appeal regime was to ensure that Ofgem's decisions could be reviewed independently and fairly, and any attempt by Ofgem to curtail a potential appellant's statutory rights would self-evidently compromise the appeals regime and would be inherently unfair. In particular, it is not within Ofgem's power to request the type of information in its Pre-Action Proposal before the period for commencing an appeal has expired. For Ofgem to insist on having such information sooner would undermine the statutory protection given to potential appellants by Parliament. Moreover, such information would likely be protected by legal privilege and, in the case of SHE Transmission, would also likely be market sensitive. This is important because there could be significant legal risks for SHE Transmission were it to inform Ofgem of its detailed intentions ahead of the market. Any decision to inform the market of its intentions would, self-evidently, only be made at a later stage, once SHE Transmission's decision had been fully considered following detailed legal advice and an appropriate governance process.

1.12 While, therefore, the CMA made a general and uncontroversial statement in its Response that active engagement at the pre-appeal stage is likely to be beneficial for all parties – subject to the proviso that it cannot bind any ultimate decision to appeal[32] – as would be expected, the CMA did not suggest that Ofgem should seek to impose a more prescriptive framework for pre-action correspondence upon potential appellants. Instead, the CMA reiterated the steps that it might expect an appellant to take during the pre-action stage, which as detailed in Section C below are far less onerous and far more qualified than the steps being proposed by Ofgem. The CMA also noted that appellants may have good reason not to follow all of those (more qualified) steps.

1.13 Ofgem implies that the Pre-Action Proposal is to address possible case management issues regarding multiple appeals.[33] However, it is unclear why Ofgem needs to be the recipient of this type of information given that case management falls within the remit of the CMA, not Ofgem. It is also unclear how the Pre-Action Proposal would in any way help address case

[29] Electricity Act 1989, Schedule 5A, para. 11.
[30] Appeal Rules (CMA70), para. 4.1. See also Appeal Guidance (CMA71).
[31] Ofgem and GEMA are for present purposes used synonymously.
[32] CMA Letter from Andrea Gomes da Silva to Jonathan Brearley, CMA Response: clarification of our position on Energy Licence Modification Appeals, 30 October 2019, page 4.
[33] At DD, para. 11.34 Ofgem refers to submissions made by some respondents to the SSMC who "raised concerns about case management given the risk of multiple appeals to the RIIO-2 price control licence modifications", and suggested airing matters in dispute in pre-appeal discussions.

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management, since this would be a matter for potential appellants to coordinate amongst themselves. If the CMA wished to introduce a more prescriptive framework for pre-action correspondence, that would be a matter for it (following appropriate consultation). However, for the reasons set out below, such a framework would be wholly inappropriate in the context of electricity price control appeals process and, tellingly, the CMA has to date not sought to do so.

B. The Pre-Action Proposal serves no useful purpose in the context of an energy price control appeal

1.14 As the Practice Direction on pre-action conduct and protocols in general civil litigation (the ***Practice Direction***) and the Pre-Action Protocol for judicial review (the ***Protocol***) make clear, the objectives of pre-action conduct are to help the parties to a dispute to understand one another's position and make decisions on how to proceed, to encourage the parties to a dispute to settle the issues without the need for proceedings or, where no settlement is reached, to at least support the efficient management of the proceedings and reduce the costs of resolving the dispute.[34] Notably, while the Practice Direction goes on to provide that before commencing proceedings, both parties should – to the extent that it is proportionate to do so – exchange correspondence and information in furtherance of those objectives,[35] the only kind of pre-action correspondence envisaged in the Protocol is information requests from the Claimant to the Defendant.[36]

1.15 In the specific context of an electricity price control appeal, a prescriptive protocol for pre-action correspondence would not further any of the objectives of pre-action conduct, or the CMA's overriding objective:

(a) Firstly, the statutory price control process has been designed already to provide Ofgem with detailed information regarding companies' positions on issues in the price control – indeed, vast quantities of information are exchanged throughout the process. Therefore, Ofgem will already have a good understanding of potential appellants' likely points of appeal and arguments in support of them in view of the formal and informal submissions made during the price control review process, including the responses to the DDs.

(b) Secondly, the price control appeals regime already contains provisions designed to encourage pre-action correspondence between the appellants and Ofgem to the extent this is possible, appropriate and would further the overriding objective. As the CMA noted in its Response, it has the discretion to make an order in respect of inter-partes costs,[37] and when considering whether to do so will have regard to "*all the circumstances, including … the extent to which each party has assisted the CMA to meet its overriding objective*[38] … [and] *the manner in which a party has pursued its*

[34] Practice Direction, para. 3.
[35] Ibid, para. 6.
[36] Protocol, para. 13.
[37] See EA89, Schedule 5A, para. 12(3).
[38] See Rule 21.5 of the Rules.

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case or a particular aspect of the case". Licensees are acutely aware of these powers and therefore are already incentivised to conduct themselves in a way to facilitate the CMA's overriding objective.

(c) Thirdly, the Pre-Action Proposal would be unlikely to serve any useful purpose in terms of settlement or avoidance of litigation. Ofgem has requested that the pre-action correspondence is provided between the RIIO-2 FDs and the licence modification decision to implement the FDs i.e. the Proposed Window. However, the primary purpose of the licence modification decision will be to give effect to the RIIO-2 FDs. Further issues between licensees and Ofgem are raised as part of the statutory consultation process which Ofgem is required to undertake before taking the licence modification decision. SHE Transmission has written separately to Ofgem regarding its significant concerns relating to Ofgem's proposals to curtail this statutory consultation as a result of the effects of COVID-19. It is wholly inconsistent for Ofgem to seek to curtail the statutory process for further submissions to be made to Ofgem regarding the FD while at the same time imposing additional obligations on licensees to provide information on matters which are unlikely to have been fully considered at that point (such as intention to appeal).

(d) Fourthly, Ofgem is not proposing that it would respond to any pre-action correspondence from potential appellants in order to narrow the issues between the parties (for example by changing the FD). In practice, SHE Transmission believes that Ofgem is unlikely to have time to do so – particularly since, as a practical point, it is unlikely that potential appellants would be in a position to send pre-action correspondence containing the information described in the Pre-Action Proposal until, at best, very late on in the Proposed Window, if at all (see para 1.19(a) below).

1.16 Overall, it is evident that the Pre-Action Proposal will fail to materially further the objectives of traditional pre-action correspondence or the CMA's overriding objective; instead, it will place a disproportionate burden on potential appellants and put them at an unfair disadvantage in the subsequent appeals process.

C. The Pre-Action Proposal would place a disproportionate burden on appellants and give Ofgem an unfair advantage

1.17 As referred to above, the CMA indicated in its Response that in its view active engagement between the parties during the pre-action stage (i.e. up to the date on which the notice of appeal is filed) was beneficial and that it wished to "encourage" pre-action conduct "as good practice". To this end, the CMA recommended that potential appellants notify the CMA of their intention to appeal and "ideally" the potential scope of any appeal and noted that there could be costs consequences for appellants who acted in a way which, without good reason, makes case management more difficult.

1.18 SHE Transmission is sympathetic to the CMA's desire to encourage good case management and has no intention of making case management more difficult. However, SHE Transmission's ability to set out its decision on its intention to appeal and/or the contents of any appeal, will be subject to significant practical limitations and will need to be balanced against other

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considerations, such as the appropriate governance for such an important decision and the potential disclosure of market sensitive information.

1.19 In any case, Ofgem's Pre-Action Proposal is far more prescriptive than the CMA's carefully drafted Response and goes far further in terms of the information it is proposing be disclosed. In particular, Ofgem is proposing that pre-action correspondence include the intention of and (as a matter of course) the scope of the appeal, including "in sufficient detail" the alleged errors and why that particular component(s) of the price control is wrong having regard to interlinked aspects of the decision.[39] Even if pre-action correspondence of any nature is appropriate and practicable this level of detail would go significantly beyond what could reasonably be expected of any potential appellant and would be[40] disproportionate.

(a) First, the EA89 grants appellants 20 working days after the licence modification decision to bring an appeal and it is therefore licensees' right to use that full time period to evaluate its potential appeal, which grounds of appeal it will maintain and to take advice from its legal advisers for that purpose.[41]

(b) Second, as a practical matter, price control decisions are fundamental to regulated businesses and, accordingly, decisions on whether, and the grounds on which, to appeal can only be made following an in-depth review of the FDs and will typically involve extensive consideration by senior management and will require appropriate governance. Even once a potential appellant has decided that it intends to appeal a price control decision and the broad scope of that appeal, decisions on which errors to appeal against (and which to accept) and the basis on which to challenge these errors still require extremely detailed consideration. In contrast to the pre-action period in a typical commercial dispute, price controls are already subject to very tight statutory deadlines. The time-limit provided by the statute will likely already be very challenging for making such an important decision and companies should not be obliged to provide further information at an even shorter deadline.

(c) Thirdly, contrary to the impression given in the DD,[42] the CMA's Response does not suggest that appellants should address interlinkages in pre-action correspondence. In line with the decisional practice of the CMA, the burden of raising a defence based on any interlinkages is with the regulator in the first instance.[43] Ofgem's suggestion in the DD that appellants disprove the possibility of negative effects is illogical and not part of the statutory process for appeals or of the grounds on which the CMA can consider an appeal.

[39] DD, para. 11.36.
[40] CMA Response, para. 12-13.
[41] EA89, Schedule 5A, para. 1(3).
[42] Draft Determination, para. 11.35.
[43] CMA BGT ED1 Determination, para. 3.52; CMA NPg ED1 Determination, para. 3.51.

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1.20 In addition, the Pre-Action Proposal would, in direct contradiction of the CMA's overriding objective, place potential appellants at an unfair disadvantage vis-à-vis Ofgem, and would be in clear conflict with the principle of equality of arms.

(a) First, as noted above at para 1.15(c), Ofgem is proposing that the pre-action correspondence be a "one way" transaction. Accordingly, potential appellants will derive no benefits from complying with the Pre-Action Proposal (to the extent that it goes beyond the CMA's current expectations in relation to pre-action conduct). In light of the significant amounts of missing information from Ofgem at the time of publishing the DD,[44] combined with the extensive amount of information provided by the licensees to Ofgem throughout the price control process, this request seems all the more unnecessary and one-sided.

(b) Second, to the extent that Ofgem is proposing any kind of penalty or consequence for failure to comply with its prescriptive pre-action framework, this is clearly unacceptable. Licensees cannot be subjected to pressure to conform to a procedure which provides less than their statutory allocation for formulating their grounds of appeal. Nor should Ofgem seek to use the licence modification process to seek to give itself an effective extension to its own statutory period granted to it to respond to the Notice of Appeal.

1.21 To conclude, while SHE Transmission agrees with the CMA's general statement that active engagement at the pre-appeal stage can be beneficial, it is wholly inappropriate for Ofgem to seek to determine prescriptive pre-action conduct protocols for potential appellants on top of the existing statutory framework, which has the effect of curtailing the protections for which Parliament has provided. The Pre-Action Proposal is ultra vires, serves no legitimate purpose and is manifestly unfair to licensees. Ofgem cannot proceed with the Pre-Action Proposal in these circumstances.

[44] Letter from Michael Ferguson (Head of Regulation, SSEN Transmission) to Ofgem dated 17 July 2020.

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