SSEN Distribution Response to RIIO ED2 - Draft Determination

Overview Document, 11. RIIO-ED2 in the round, post appeals review and pre-action correspondence

Question ID	Q10.
Question	Do you have any views on the proposed scope of the FDQ process and pre-action correspondence, including on the proposed timing for sending such to Ofgem?

Response

Pre-action correspondence

1. Ofgem proposes in the DD an expectation that potential appellants "*give us advance notice of any appeal they are proposing to bring in pre-action correspondence at a sufficiently early stage after the publication of Final Determinations and ahead of the deadline for making an application for permission to appeal*"[1] (the ***Proposed Window***). In particular, Ofgem states the correspondence should explain the intention to appeal, and the elements of the RIIO-ED2 price control that they plan to appeal and why, further this should include the scope of any such appeal in sufficient detail, including the alleged errors, and why that particular component of the price control is wrong having regard to any interlinked aspects of the decision and by reference to the price control in the round (the ***Pre-Action Proposal***).
2. As a preliminary point, SSEN-D 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.
3. As Ofgem will be aware, the CMA is currently conducting a consultation to update the Energy Appeal Rules and Guidance (the ***CMA Consultation***).[2] Specifically, the CMA notes that they do "*not consider it appropriate for the CMA's rules to include a formal requirement to contact the relevant regulator. However, … the CMA encourages prospective appellants to inform their respective regulator that they are considering bringing an appeal at pre-appeal stage*".[3] Ofgem's pre-action correspondence proposals in the DD go well above that considered to be appropriate by the CMA.
4. **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.** SSEN-D 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.
5. In addition to this overarching point of principle, it is inappropriate for Ofgem to seek to request privileged, and in the case of SSEN-D 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.

6. 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 SSEN-D 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.
7. It is notable that Ofgem has offered no justification for seeking to curtail a potential appellant's statutory rights in this way.
8. In any event, and in accordance with the CMA's appeal rules, SSEN-D is already incentivised to seek to further the overriding objective to dispose of appeals fairly, proportionately and efficiently.
9. 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, SSEN-D 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

10. As a matter of 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.[4]
11. 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,[5] 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.[6]
12. Ofgem[7] 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 SSEN-D, would also likely be market sensitive. This is important because there could be significant legal risks for SSEN-D 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 SSEN-D's decision had been fully considered following detailed legal advice and an appropriate governance process.

13. While, the CMA made a general statement that pre-action correspondence with the regulator could help to ensure effective management of the appeal,[8] the CMA did not suggest that Ofgem should seek to impose a more prescriptive framework for pre-action correspondence, and as noted in paragraph 3 above, the CMA did not consider it appropriate to include a formal requirement to contact the relevant regulator.

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

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.[9] 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,[10] the only kind of pre-action correspondence envisaged in the Protocol is information requests from the Claimant to the Defendant.[11]
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) First, 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. 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-ED2 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. 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).

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

17. As referred to above, the CMA indicated in the CMA Consultation that in its view informing the regulator of a prospective appeal could help with effective management of the appeal. To this end, the CMA strongly advises that potential appellants notify the CMA of their intention to appeal and an indication of the "likely grounds of that appeal".[12]

18. SSEN-D is sympathetic to the CMA's desire to encourage good case management and has no intention of making case management more difficult. However, SSEN-D'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 considerations, such as the appropriate governance for such an important decision and the potential disclosure of market sensitive information.

19. In any case, Ofgem's Pre-Action Proposal is far more prescriptive than the CMA's Consultation 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.[13] 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 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.[14]

(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,[15] the CMA's Consultation 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.[16]

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 1.16(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 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.

21. To conclude, while SSEN-D agrees with the CMA's general sentiment 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.

FDQ Process

22. Ofgem expects any prospective appellant to use the FDQ process to signal any aspect of the Final Determinations that contain errors, particularly material methodological errors, so that Ofgem can seek to consider and "*potentially resolve*" any issues before directing the licence modifications.

23. While SSEN-D agrees that calculation errors or other non-contentious errors should be resolved outside of the CMA appeal process, Ofgem should appreciate that there will be instances in which Ofgem and the licensee cannot agree that an error is non-contentious, or otherwise capable of correction without argument. SSEN-D also considers that by the Final Determinations, it will have consulted or made representations on Ofgem's draft licence modification in advance of the Final Determinations being published. As such, it is therefore likely to have already addressed such errors and brought them to Ofgem's attention for correction, such that any errors that arise in the

published decision are more likely to be those that remain contentious and as such, are appropriate for appeal if SSEN-D deems the errors to be of such significance.

24. As already noted in the pre-action correspondence section, licensees are already under significant time and resource pressure during the Proposed Window and adding a further process to notify Ofgem of any errors will only seek to add to this pressure.

Post Appeal Reviews

25. Ofgem[17] proposes to conduct post-appeal reviews and following any successful CMA appeal, to make adjustments to wider aspects of the RIIO-ED2 price control where it considers it would be appropriate to do so (the ***Post Appeal Proposal***).[18]

26. SSEN-D 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.

27. 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. 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).

28. The parameters of the Post Appeal Proposal are characterised by a high degree of uncertainty including in relation to:
    (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.

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

30. Overall, the significant and detrimental impact that the Post Appeal Proposal would have on regulatory finality and certainty is highly troubling.

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

31. Ofgem maintains in the SSMD that the post appeals review is not intended to undermine the current appeals framework or regulatory confidence. This position continues to be counter-intuitive as the proposal is not envisaged by the statutory regime. For the reasons set out below, any post-appeal adjustment to the price control by Ofgem that has not been specifically mandated or directed 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.

32. As Ofgem is aware, the current energy price control appeal regime is a consequence of legislative amendments made in Great Britain[19] and Northern Ireland[20] following the introduction of the EU Third Energy Package (the ***Third Package***). Directive 2009/72/EC (the ***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.[21] 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.[22]

33. 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.[23]

34. 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."*[24]

35. 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.[25] 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.

36. Ofgem explains that it would use post-appeal reviews "*where the element of the price control that is successfully appealed is interlinked to other elements of the price control and the outcome of the appeal has a material impact on these other elements*".[26] 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 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"*[27] (emphasis added).

(ii) Further, in the 2021 RIIO-T2 Final Determination the CMA considered possible interlinkages in its decision regarding the Outperformance Wedge and Relief generally:

(A) "*We note that in its response to the appellants' notices of appeal, GEMA explicitly identified its assessment of the allowed return on equity as having involved three separate steps, with its assessment of the outperformance wedge then treated as a distinct part of its approach to determining the allowed return on equity for RIIO-2.343 GEMA said that its methodology allowed issues to be tackled separately,344 and we note that – consistent with this – its decision to apply an outperformance wedge relied on reasoning, and an evidence base, that differs substantively from that which underpinned the other parts of its allowed return assessments that were appealed under Joined Ground A.345 We do not consider our finding in relation to the outperformance wedge (Joined Ground B) to have any knock-on implications for our assessment of the other steps GEMA used to determine an appropriate allowed return on equity, submissions in relation to which were considered in our assessment of Joined Ground A*."[28]

(B) "*Where in our final determination we find that GEMA made errors, we will decide which of the approaches outlined in paragraph 17.2 above to apply depending on a number of considerations, including: […] (c) the existence of interlinkages between any remedy and other parts of the price control framework that are not subject to these appeals, which will affect the feasibility of a remedy to effectively address the error identified without wider consequences …*"[29]

(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.[30] 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.

37. 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.

38. 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.

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

39. The swift resolution of appeals against price controls is essential to provide Ofgem, distribution 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, 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 emphasis).

40. 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).[31] 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.[32]

41. **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*."[33] 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*[34] 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*".[35]

42. 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.

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

43. **The lack of clarity in relation to how Ofgem considers the Post Appeal Proposal would operate in practice is itself problematic.**

44. As noted above, a number of fundamental aspects of the proposal remain unclear, including what the scope of 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. 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.

45. 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. 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.

46. 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.

[1] DD Table 17
[2] Regulatory appeals rules and guidance - GOV.UK (www.gov.uk)
[3] Para 2.10 Regulatory appeals rules and guidance: Consultation (publishing.service.gov.uk)
[4] The 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.
[5] Electricity Act 1989, Schedule 5A, para. 11.
[6] Appeal Rules (CMA70), para. 4.1. See also Appeal Guidance (CMA71).
[7] Ofgem and GEMA are for present purposes used synonymously.
[8] Regulatory appeals rules and guidance: energy, water, airports and air traffic services consultation, CMA165con para. 2.10 Regulatory appeals rules and guidance: Consultation.
[9] Practice Direction, para. 3.
[10] Ibid, para. 6.
[11] Protocol, para. 13.
[12] Energy Licence Modification Appeals: CMA Guide Consultation, CMA71con para. 3.9 Energy licence modification appeals: Guide (publishing.service.gov.uk)
[13] DD, para. 11.45.
[14] EA89, Schedule 5A, para. 1(3).
[15] Draft Determination, para. 11.45.
[16] CMA BGT ED1 Determination, para. 3.52; CMA NPg ED1 Determination, para. 3.51.
[17] Ofgem and GEMA are for present purposes used synonymously.
[18] DD, paras. 11.37-11.46.
[19] See Part 9 of the Electricity and Gas (Internal Markets) Regulations 2011 (No. 2704), which modified EA89.

[20] 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.
[21] Electricity Directive, article 35(5)(a).
[22] Electricity Directive, article 37(17).
[23] Hansard, Lord Marland. Available at: https://hansard.parliament.uk/Lords/2011-10-17/debates/11101732000221/ElectricityAndGas(InternalMarkets)Regulations2011..
[24] Implementation of the EU Third Internal Energy Package, Government Response, DECC – Department of Energy and Climate Change, January 2010, para. 2.15.
[25] 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.
[26] Ofgem ED2 DD, para. 11.39.
[27] Para. 8.25. See also CMA SONI Determination, para. 13.3.
[28] Energy Licence Modification Appeals Final Determination, para. 6.187.
[29] ELMA FD, para. 17.5(c).
[30] CMA BGT ED1 Determination, para. 3.52; CMA NPg ED1 Determination, para. 3.51.
[31] 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).
[32] Consultation, paras. 2.34-2.35.
[33] Para. 4.91.
[34] (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.
[35] Page 115.