Sustainability *first*

Smarter Regulation: Strengthening the economic regulation of the energy, water and telecoms sectors.

As regulated by Ofgem, Ofwat and Ofcom.

Sustainability First response to government consultation January 2024

Sustainability First are very happy to respond to this important consultation. We would be happy to discuss further.

We bring together senior expertise, across utilities, from former directors in government policy, economic regulators, and utility companies, and chairs of utility company customer groups. Our convening role has brought together industry, NGOs, regulators and governments. Our Fair for the Future and New Public Interest projects have influenced public and regulators policy for the past decade – we would draw particular attention to our paper 'implications for policy and regulation' and our work with Slaughter and May establishing the considerable legal freedoms under which the regulators operate, with the implication that what is most needed for change is political cover rather than new regulation.

Before addressing the specific questions in the consultation, we would like to make a number of wider points, particularly since in some ways the choice of questions in the consultation is quite unbalanced:

There is much more on Ofwat than Ofgem and Ofcom, despite the huge importance of those last two regulators.
there are many quite specific questions but much less on the challenges for economic regulation in a climate change and digitally disrupted world, or on the kind of utility sector we are looking regulators to help create.
there is very little on the needs of or engagement with current and future consumers (as opposed to those defined as vulnerable). We have specific expertise in this area and would be happy to discuss further.

We would start by more fully setting out the environment within which economic regulation will have to work over the next 25 years – to be fair Ofwat have started to do this with their scenarios for company long term delivery strategies but have yet fully to apply these to their wider methodology. Particular questions include:

How does climate change, and the need for utilities to continue to deliver reliance to weather and other shocks, impact on economic regulation.
What technological advances are we likely to see (e.g. machine learning, digital twins, local electricity storage) over the next 5-25 years, and how does this impact on both the investment we need enabled and regulated in utilities, but also on how regulators can move from black box econometrics to a far wider and more comprehensible interrogation of the data which already exists and is coming online?
How are dependencies between sectors likely to develop. In an increasingly digital world, what non digital 'redundancy' is required.

How far do we need to move towards adaptive planning and regulation, given the uncertainty about how both climate change and technology will develop, with greater flexibility and long-term investment decisions. What does this mean for the conventional 5 year 'price review'.

As mentioned above we also feel there is a need for a conversation about the type of companies we want economic regulators to promote. The current media and politics on sewer overflows throws into sharp relief the lack of this vision in the past. We have consistently argued that the particular nature of natural monopoly utilities providing essential services leads inexorably to the concept of public interest utilities: serving both the public and the shareholders.

We have also conducted a lot of work on the principles behind regulation in a sustainable world. Establishing clear government endorsed principles for economic regulation would, we argue, establish a more strategic framework than simply relying on statutory duties and strategic policy statements, though each of those have their place as well.

We can see many issues with the current approach to economic regulation which, perhaps inevitably establishes a 'parent child' relationship between regulator and regulatee – in turn reward a process-based compliance mentality, rather than an innovative outcome-based mind set and creates a technocratic and highly opaque set of price review settlements – disenfranchising the public and even many NGO stakeholders.

We would argue for:

Urgent exploration of what outcome-based regulation would look like and where it could most easily and effectively be applied. The Frontier Economics report on outcome-based regulation in water, for Wessex Water, would be a good starting point.
Learning from successful examples of deliberative approaches including citizens juries and negotiated settlements.
Consideration of the role which third party audit and assurance could play.
Some form of independent oversight of the transparency and presentation/communication of economic regulation
Behind all of this lies a debate on how to balance the need to enhance regulation given the poor performance of many utility companies, with the need to reward good compliance and help the poorer companies haul themselves up by the bootstraps. Concepts such as earned autonomy and citizen science come into play here.
Potentially requiring much better joint working on the setting of the cost of capital (which generates most of the 'heat' in the price reviews) between the economic regulators.

This plays into the fact that we have repeatedly urged that thought needs to be given to regulatory culture. A particular aspect here is the risk aversion we see in much regulation, in part due to the NAO/PAC. There is also an issue for government about appointment of regulator boards – for example Ofwat have no board members with wide environmental experience despite the fact that nearly all the £10bn proposed enhancement spend is justified by claimed environmental benefits.

We think that the discussion in the paper, for example on duties, needs to say a lot more about the importance of and design of strategic policy statements. We note, with some frustration, that we are still awaiting the energy SPS. And we have criticised past SPSs for being almost entirely silent on how to draw trade-offs: something the discussion of duties is also silent on.

Finally, we do not think we can look at economic regulation in isolation. In water in particular many of the 'issues' we see arise from an excessively process-based approach from government and the Environment Agency.

Consultation questions

The government welcomes views on appropriate terms of reference, including scope, for such an infrastructure needs assessment, as well as views on who would be best placed to deliver this. The government welcomes any further views on the assessment.

We welcome the consideration of an infrastructure needs assessment. We would urge that it adopt a scenarios approach, thereby facilitating the 'adaptive planning' methodology developed, inter alia, for the water company long term delivery strategies. It should also explicitly consider the supply chain and utility company /regulator capability and capacity requirements the infrastructure will require for delivery.

The assessment should also we advise include approaches to capital maintenance – ensuring a level playing field between maintenance and new build – and demand reduction (energy and water efficiency). It will need to be informed by clear Government advice on acceptable standards of service – in terms of risk of significant supply interruptions.

We have identified a systemic lack of representation in economic regulation for the long term: with regulators, government and companies all having a tendency to support short term outcomes, notably bill reduction. An infrastructure needs assessor could play this role, or the National Infrastructure Commission (if not leading the infrastructure needs exercise itself) could be given a formal role.

We would urge join up with the adaptation subcommittee of the climate change committee, to ensure that the infrastructure needs assessment takes full account of resilience to climate change: the energy sector have been singled out as an area where this is well behind what is required. And join up will also be needed with the UK national risk assessment.

To what extent, in the standardisation of processes and procedures, is there greater scope for regulators to learn from each other?

Very considerable. We have argued elsewhere that the UK regulators network, while doing much that is good, is excessively constrained by the need to secure buy-in from all its members. An element of direction from government might also be appropriate.

There would be particular benefit in regulators adopting common approaches to cost of capital, resilience, shared customer service and consumer protection challenges, and to long-term adaptive approaches.

In addition, cross-sector regulators would benefit from undertaking an independent review of their own stakeholder engagement practices to identify best practice. There is much good practice engagement by regulators, but this is not consistently applied, nor shared within and across regulators. Such a best practice review would improve the quality, effectiveness, transparency and representativeness of UK regulators' engagement activity so as to improve current and future decision making, policy and delivery, and build public trust and legitimacy. We are happy to discuss the need for this simple initiative and the benefits of this activity further.

To ensure the outcome is fit for purpose, are there any other examples of regulatory best practice or efficiency that should be considered in addressing complexity?

We think that developments in machine learning, telemetry and digital twins could offer real efficiencies in regulatory practice and reduce dependence on 'black box' econometric approaches.

We also think that regulators could collectively and individually make much greater use of deliberative fora, such as citizen juries and negotiated agreements, and of third-party audit and assurance – e.g. through ISO accreditation. These could both help move away from the parent/child relationship

between regulator and companies, and significantly simplify price reviews and increase trust and transparency.

What challenges are faced at present when attempting to transfer water and how could these be mitigated?

We are not experts in this area, but there appears to be a need for improved protocols for DWI approval, and for more central oversight to ensure the equality of negotiating capital and capability between WASCs and WOCs and between initial abstractor and end supplier.

Does RAPID currently have the right scope? Should it be expanded? If so, please elaborate.

A prior question is what gaps there are in coordination and strategy across water. There seem to us to be three such gaps: national level oversight of water resources and waste-water pipelines together; bringing together water demand and supply at national level; and strategic thinking about scenarios, choices, technology and capability/capacity. The absence of a water catapult throws some of these issues into even stronger focus.

RAPID could expand to take some of these on – e.g. bringing together the water resource and wastewater pipelines. But we would advocate first conducting an exercise to see whether there are wider solutions, and any lessons from the Future System Operator.

If RAPID was to be expanded thought would need to be given about its transparency and legitimacy, and whether it has sufficient external challenge and commercial/corporate finance expertise. An independent RAPID steering group – making publicly available assurance statements - and/or direct assurance from a new national infrastructure assessor would seem relevant.

What kind of role could regulators play to enhance the effectiveness of competition in large procurements and/or long-term design-build-operate contracts?

The current concern from some utility company owners about future calls on equity adds a further case for competition, where the competition model includes external finance. (We can see a case already for expanding commercial models in a targeted fashion to boost efficiency – both internal and in financing - and enhance innovation.)

There may be a case for some procurements or frameworks to be conducted centrally to maximise buying power - where the procurement is for 'widgets' (items with similar spec across companies). Both competition in large procurements and DBO contracts may require some changes to key elements of price reviews and regulator practice: e.g. in terms of incentive regimes and multi period settlements.

Do further opportunities exist to promote coordination and holistic approaches to issues in the water sector? If yes, please elaborate.

The absence of a water catapult is a significant barrier in this area, particularly given that UKWIR, the only alternative, is much smaller and more niche.

We can see significant merit in more information and engagement being pulled together across the sector/regulators. We and others have struggled to derive cross cutting information from the PR24 draft business plans on for example, the extent of nature based as opposed to concrete solutions. And there would be considerable merit in some sector wide pulling together of information from long-term

delivery strategies so as to enable collective engagement with the supply chain and infrastructure investors.

Our work with Slaughter and May identified that many utility companies are excessively cautious with regard to potential risks (which in many cases do not exist) under competition law. It would be desirable for economic regulators with the CMA, to give some reassurance in some cases. We note here that competition law did not appear to be a barrier to collaboration between companies during the COVID epidemic.

CHAPTER 2: COMPETITION

Should the government legislate to amend the test to allow more projects to be delivered under the Water Industry Act 1991 and SIPR? Please provide evidence.

We have no views on this topic to date. Taking a step back, a better understanding is needed as to where competition does and doesn't deliver the best outcomes for consumers and society.

Should the government amend the Water Industry Act 1991 and related regulations to extend the role of the DWI to also include regulated and non-regulated third-party providers?

We would support this suggestion, which would assist with the acceptability and ease of negotiation of some forms of water transfer. We would also urge a stronger DWI input on Inset appointees: the legislation probably allows this already but there are credible reports of a lower standard of water quality among Insets.

Should the government commence Chapter 28 of Part Ill of the Water Industry Act 1991 and make regulations under those provisions? This would enable the regulation of certain water supplies from third parties to water companies.

We would support this proposal.

Would the Planning Act 2008 definition of water NSIPs be updated? If your response is yes, what should the new definition be/include?

It probably should be reviewed, but it would be best to consider this in the light of the full range of projects identified under the new water company long-term delivery strategies.

Should the government amend Section 8 of the Water Industry Act, that currently requires Ofwat to undertake a full statutory consultation on all licensing applications, irrespective of the scale or nature of the new site being applied for by new appointees, to consider the scale or nature of applications being made?

We have no views on this issue.

What consultation timelines would be appropriate for smaller scale applications?

We have no views on this issue.

Do you agree that the government and Ofwat should look at ways of streamlining the NAV application process for variations of licences, including by removing the need to consult in certain circumstances?

We have no views on this issue.

Do you agree that the government should consider moving towards a national licencing regime for NAVs?

We have no views on this issue.

Do any other barriers exist to market entry in the water sector that the regulator or the government should explore removing?

There may be issues surrounding the complexity of arrangements for common carriage.

Do you agree that the ability to change the Wholesale Retail Code for uncontentious and non-substantive changes should be delegated from Ofwat?

We have no views on this issue.

Should the government amend or remove the consultation requirements in the Water Industry Act for Wholesale Retail Code changes?

We have no views on this issue.

Do you see any further ways market governance in the non-household retail market could be improved?

We remain unconvinced that business retail separation is delivering benefits for SMEs (and indeed Prof Martin Cave's report to government on retail competition had advised a 5000 litres a day limit below which the case for retail competition probably did not stack up). Generally, there needs to be a stronger focus across regulators on the needs of small businesses.

Do further opportunities exist to introduce greater competition for strategic investment into the water and energy sectors?

We think Ofwat should give this serious attention, particularly given pressures on existing company owners and the scale of future capital investment needs.

What alternative funding/competition delivery models could be considered?

We think this would merit an open conversation with the supply chain and investor communities.

Do the existing concurrency powers and arrangements deter or address anti-- competitive behaviour in the regulated sectors? Please explain the reasons underpinning your response.

On balance we believe it makes sense for sector regulators to have concurrent competition law powers to complement their considerable powers under sector-specific legislation to promote competition and contestability.

As new challenges and economic change affects regulated sectors their respective sector regulators

should always be challenging themselves and considering how to open markets and enable competition, entry and contestability throughout supply chains. There is a case for more strategic consideration of how sector-specific and general competition law powers can be harnessed together to enable dynamic market forces to shape markets and competition. There may be a case for considering how concurrency arrangements between sector regulators and the CMA could be improved to enable this.
[There is a real question as to the extent of overt anti-competitive behaviour/ whether fundamentally new areas of competition actually exist. It so probably more productive to look at options such as DPC/Infrastructure provider and for more strategic procurement.]

CHAPTER 3: SUPPORTING CONSUMERS

What are your views on the creation of a single, multi-sector Priority Services Register?

For clarification, in the energy and water sectors, the PSR is intended to provide not just support to customers who are vulnerable during supply interruptions but help to those with additional communication, access and safety needs. Those needs can be permanent or transient e.g. being pregnant, having young children, mental health problems. The information can support any point of contact the customer has with the utility company during any customer journey e.g. during a home visit, paying a bill, seeking advice, making a complaint etc.

In principle, we fully support a single, multi-sector Priority Services Register. There are clear benefits to consumers to only have to 'tell an organisation once' of their additional needs. This however has to be accompanied by a clear process by which customers can see who has access to their data and how it is used (e.g. an annual statement of sharing, ability to easily opt out/right to be forgotten, clear statement about how their information will and won't be used i.e. to provide additional services not for marketing or profiling), with companies regularly validating data/self-validation routes, to ensure information is up to date and therefore still useful.

As noted, there are already arrangements in place to share agreed common needs codes across energy and water sectors. These arrangements have taken more than a decade to set up, so any commitment to deliver a common cross-sector PSR needs to be accompanied by a clear road map and timeline for delivery. History teaches us that government will need to drive this if it is to have any chance of success. It should be noted that a number of companies have committed to set up this kind of cross-sector 'tell me once approach' in the past as part of their vulnerability strategies and innovation proposals (funded by taxpayer and customer money), so we'd urge government to learn from these.

What are the best data sources of vulnerability that the PSR should use? Who should be able to input data?

This is a complex area with a huge and growing number of potential data sources within local government, national government, social housing, the health sector, and utilities that could be used. We suggest that government start with agreeing clear common aims for any cross sector PSR e.g. ensuring equal access to services and information, and helping customers be and feel safe. Any review should start with an outcomes focus. That is: understand the barriers to accessing utility services today

and likely challenges in the future and the current and future likely safety risks, and then work from there. It is not realistic to do justice to this area with these three questions here. We suggest this forms part of a wider review of the PSR.

A number of water companies such as South East Water have established effective data matching arrangements with local governments, enabling customers in financial difficulties to be auto enrolled onto their water social tariff, which provides a discount on bills. This is a really effective way to get support directly to customers without the barriers associated with people having to sign up for help or raising awareness. However, legislation does not appear to facilitate the equivalent sharing of non-financial vulnerability data. One of the reasons for this is because being on the PSR in practice does not guarantee a customer will receive any particular support or service.

Regulators should monitor and publish clear information on the type of additional services companies offer, the number of different services provided in practice by needs code, alongside wider customer satisfaction scores. Ofgem already requires the provision of this kind of information for energy suppliers as part of its social monitoring reporting. This is to provide a) greater transparency on the service provided in practice b) helps companies better understand the effectiveness of different service provision c) can be used to identify where new services or improvements may be needed or better promotion of a particular service may be required d) helps identify if there are weaknesses in referrals by frontline advisors so further training may be required. The PSR is an important tool but being on the PSR is no guarantee of the receipt of high-quality service and this needs to be addressed. Transparency across all companies is important to ensure a consistent minimum baseline service rather than a postcode lottery of support for consumers.

Some companies' services have not been updated for years despite technological advances and changing needs. We'd like regulators to do more to encourage and require companies to innovate more around service provision to better meet changing and future vulnerable customer requirements. There are notable gaps around home visits and supporting resilience. Regulators should carry out mystery shopping of the accessibility of supplier's services by customers with additional needs and compare the cross-sector results. Also compare customer satisfaction scores of PSR customers across sectors.

1. What vulnerabilities and services should the PSR cater for?

We think as a minimum the aim of the PSR should be to help ensure that all consumers are able to access a utility company's core services and information (equal access) regardless of their situation, circumstances, physical additional needs and that utility companies should take action when carrying out their activities so that customers feel and are safe, especially when things go wrong e.g. during a supply interruption, floods, when carrying out road works. It should cover any customer touch point with the company. This should be the starting point when answering this question about what vulnerabilities should be included and service provision.

That said, Sustainability First's 'Energy for All Innovate for All' report includes good practice guides and cross-sector examples of a wide range of effective services provided by different companies to customers in vulnerable situations. We'd love to see many of these adopted more widely and consistently.

If the PSR is to be expanded to other sectors now might be the time to review the overall effectiveness and operation of the system and how it might be improved and future proofed. Any system adopted should be flexible to respond to changing circumstances e.g. during Covid, many companies introduced a new 'shielding' vulnerability needs code which some have retained. At present the PSR focusses on recording a customer's individual condition or circumstances, but it would be worth exploring if a parallel focus on 'service need' might be more effective.

Potential future codes worth exploring include:

- For those who are 'living alone' or in 'isolated areas' with no neighbours (an AgeUK recommendation). This would be valuable given the additional risks to those without household support, the growing number of single-person households and societal trends towards more dispersed families and childless older people. This is especially important during supply interruptions though the sensitivity of this data needs careful consideration.
- An 'at risk in hot weather' or (to complement an 'at risk of cold weather'/financial vulnerability) code. At-risk groups for heat include older people, the very young and people with pre-existing medical conditions as well as those whose health, housing or economic circumstances put them at greater risk of harm from very hot weather. In future it will be important to prioritise not just those at risk from cold homes but those at risk from hot homes during heat waves and droughts.
- A 'digitally excluded' needs code to identify those customers who may lack the skills, money, devices or connectivity to engage fully with digital/online services and the smart energy transition. Despite increasing online participation, digital exclusion and digital poverty are likely to remain a significant issue, including longer-term for certain households, resulting potentially in barriers to accessing services and safety risks.
- An 'at risk from flooding' PSR needs code. Climate change is increasing the frequency and intensity of extreme events and, consequently, flooding in urban and peri-urban areas. Flooding can have a knock-on effect on lighting and heat in people's homes with associated safety risks. Customers often want to know if their water is safe to drink following a flood. The National Adaptation Programme (NAP) is the government's long-term strategy to address the risks (and opportunities) of climate change. One of its key objectives is 'to minimise the impacts of climate change on vulnerable groups in society by strengthening their resilience to better prepare for, respond to and recover from future

climate risk' and recognises the threat posed to people by floods and storms. This would be consistent with that aim.

- There is merit in exploring whether there should be a financial vulnerability needs code given the relationship between financial and non-financial vulnerability. For example, Ofwat and CCW's research into supply interruptions found that many of the adaptive behaviours people off-supply used to keep themselves safe required money e.g. buying bottled water, driving to a water station to pick up water, using a local gym to shower, going to a hotel to live for a few days. If you have no money and no car these are not options open to you. This kind of information would help to identify higher-risk priority groups within the PSR. CCW's independent Affordability Review for Defra and the Welsh Government argues that sharing financial vulnerability data between organisations could also help utility suppliers take a collective approach to helping customers who need it, reduce the administrative burden on the customer and streamline signposting between organisations. Notwithstanding the challenges of data-sharing to date, the review recommends that a data sharing framework is designed to provide organisations with shared access to essential data about customers' vulnerability. SF suggests this could be developed into a 'Club', to which people are members rather than a Register (the language of which is arguably unhelpful). The Club could provide access to support services, advice, energy efficiency audits, leak checks, interventions, benefits maximisation etc.

Given the large and rapidly growing number of potentially vulnerable households, government should before making any changes to the PSR first mandate inclusively designed services and have inclusive design as a minimum service requirement across all sectors. By that we mean require companies to design mainstream products and/or services that are accessible to, and usable by, as many people as reasonably possible without the need for special adaptation or specialised design. This would remove the need for some PSR services for millions of customers, help keep costs down and likely improve customer experience generally. Specialist tailored services can then be offered over and above this to those that still need them. There's a patchwork approach to inclusive design currently.

2. How can existing affordability support be better communicated to increase customer awareness?

We broadly support Proposal 8 that UKRN convene work with regulators, industry and government to ensure greater consistency in how affordability support and bill changes are communicated, within and across sectors, looking at both household and business customers. Though please not another leaflet or website page!

There's a lot of good practice that has been developed on identifying vulnerability and raising awareness of affordability support available to domestic customers in particular, which would benefit from being socialised more widely and consistently. Sustainability First's Project Inspire Energy for All, Innovate for All report includes cross-sector examples of affordability support and a best practice guide and recommendations for regulators and government.

We'd suggest however that UKRN:

- Ensure communication activity focuses on 'prevention' not just support available after people fall into debt. e.g. promotes budgeting tools such as flexible payment options, payment alerts,

near real-time usage/costs where available, and payment breaks.

- Consider how it can facilitate the coordination of data matching approaches e.g. with water, energy and telecoms companies around social tariffs – so as to reduce the workload on local authorities and other bodies.
- Identify and crack down on supplier practices that cause affordability problems. In particular, strengthening consumer protections on unfair back-billing practices across all sectors that can push customers into debt - Time to end the cruelty of back-billing and sort out smart meters (sustainabilityfirst.org.uk).

As highlighted above, data matching or sharing, including with local authorities, is a way to ensure financial support reaches many people that need it. However, it is still important to promote wider help available especially for those who sit outside of the benefits system (on which a lot of data matching relies) including the growing number of 'working poor' in financial difficulty.

3. What are the benefits and risks of giving Ofwat the power to allocate a water retailer if the incumbent retailer becomes insolvent?

It would be worthwhile examining whether within sector solutions for insolvency – e.g. in social housing – have delivered for customers.

CHAPTER 4: DUTIES AND FUNCTIONS

4. What would be a suitable timeframe in which to conduct a review of these regulators' duties?

Probably best after the election!

5. What is an effective remit for economic regulators? How can regulators improve delivery of both economic and non-economic functions?

There is a strong argument for starting from the known market failures in monopoly or near monopoly utilities – excessive pricing, underinvestment in long term innovation/r and d; and lower efficiency, coupled with the major externalities and public goods.

There is then a question as to how addressing these market failures etc. is best achieved through economic regulation, as opposed to legislation (e.g. the ban on water disconnection), other regulators (e.g. HSE) etc.

6. The government's provisional view is that regulators' economic core duties are: Fostering economic growth; Ensuring effective competition; Delivering Net Zero and protecting the environment; Protecting consumers. Are these the correct set of core economic duties regulators should be focused on? If not, what should regulator duties be focused on?

It is essential in our view that regulators retain/are given, a duty on resilience – in particular to natural events/climate change. We note here that the last national climate change risk assessment singled energy out as an area which is significantly under prepared. The importance of continuity of utility supply to economic activity and individual health and wellbeing cannot be overestimated.

A resilience duty is also important given the increasingly interconnected issues across sectors: for example, the risk of digital and power outages to feed off each other and impact across utility systems; and in the cross sectoral impact of flooding.

7. What are key benefits of this approach? What might any risks or unintended consequences be?

Changing duties has, in our experience, quite a long lead time to change in regulatory cultures. For example, we would argue it has taken 5 years or more for Ofwat to fully take on board their new resilience duty. The other issue in our experience is that any particular duty is accompanied by other things which are not duties – this can lead to an excessive perception that these other things are not important.

More fundamentally, we don't see new regulator duties as necessary in order to allow regulators to do things. Our work with Slaughter and May found that regulators have pretty much all the powers they might need. But regulator duties are more important as a signal of political will/cover, but in this they need to be set alongside further development of strategic policy statements to economic regulators, which we think is essential: in part to give some meaningful guidance on tradeoffs.

CHAPTER 5: APPEALS

8. The government welcomes your views on enabling the CMA to have the additional flexibility to appoint larger groups to hear non-price control water appeals and energy appeals. What might be the downsides of this approach? Do you have any evidence of alternative models e.g., international comparators?

We would support this.

9. What are the risks to consider before giving CMA power to directly extend deadlines in energy and water appeals? What opportunities do you feel this proposal may create? Do you have any evidence regarding this proposal that the government should consider?

We have no views on this issue

10. In what other ways can the consumer voice be represented during energy, water

and telecoms appeals?

With energy appeals, in particular, there is no point at which the CMA invites wider input – and indeed the whole process is fairly untransparent. We would strongly support greater opportunities for external intervention.

11. Are there any concerns or opportunities you foresee in allowing interveners, who have acted on behalf of consumers' interest, to recover reasonable costs incurred alongside the body hearing the appeals costs? How may impact cases and legal practice in this sector? What would be useful to include in the guidance for the appeals body to deliver this mechanism?

    We support CMA being able to award costs to consumer bodies (and indeed other NGOs) as interveners.

12. What unintended consequences or risks should the government be aware of when considering making this amendment to code modification appeals?

We have no views on this issue

13. What are the costs and benefits of moving the regime from a redetermination to an appeals standard? Do you have any evidence for this, for example from other regulated sectors or international examples of appeals regimes?

There are pros and cons associated with change to appeals regime, and risks around investor perceptions which should be considered fully.

Any regulatory determination – particularly in the water sector – is fundamentally a 'package' reflecting a large number of individual judgements which a regulator must take a view on, having considered and tested the evidence, and allowed for consultation, feedback and further evidence submissions/representations. There is a school of thought that the bar for appeals should be quite high, and that it should relate to the combined impact of the regulatory 'package. It is inevitable that companies and the regulator will differ on individual elements within the regulatory package, and companies will need to take a view on whether they can accept the overall balance of risk and challenge reflected in the regulatory determination as a whole. Each part of the determination is inter-linked and, for example, it makes little sense to consider the regulatory assumption for the cost of capital independently from the assumptions made around the level of capital spend or the definition of price control deliverables or outcome delivery incentives.

This would suggest that it remains important that appeals are considered on a 'package' basis, and that they are not used to cherry pick particular individual assumptions that a company disagrees with. This would tend to increase the strategic advantage of information asymmetry that regulated companies tend to hold over regulators.

However, we also agree that the appeal process can become overwhelming and lengthy and it is not clear why the CMA should re-open all elements of a determination that have been considered at length by Ofwat. So there may be advantages in permitting the CMA more latitude to take a strategic view on the extent to which a full redetermination is required, taking account of views from both the appellant and Ofwat in terms of the overall balance of the regulatory package.

Finally, much of the heat could be taken out of the unfocused water appeals mechanism if there was greater joint working on the cost of capital between regulators, and potentially some external input to this. In the current regulatory environment however, the risk of a regulator setting too low a cost of capital, with a

very high bar for appeals, could have a detrimental impact on the reputation of the UK with international infrastructure investors. Equally, in the past, there cost of capital may have been set too high (or there have been insufficient mechanisms to adjust the WACC within price review periods to allow for a falling cost of funding).

14. What risks of making this change should the government be aware of?

In the current investor climate, particularly in water, there is a significant risk to investor confidence from a further source of uncertainty.

15. What information do you consider necessary for Ofcom to include in its decision documents?

We have no views on this issue, but are disappointed that this is the only question specifically on Ofcom.