

SONI Limited v Northern Ireland Authority for Utility Regulation

Determination on costs

Contents

	<i>Page</i>
Introduction	3
Legal framework in relation to costs	4
The Electricity Order	4
Rules and guidance	4
Duty to order payment of the CMA's costs	5
Discretion to order payment of inter partes costs	6
Third party costs	7
CMA's costs	8
Statement of the CMA's costs	8
Apportionment of the CMA's costs to the parties	10
SONI's views	10
UR's views	11
Our assessment	12
Determination on the CMA's costs	13
Inter partes costs	13
SONI's views	14
UR's views	15
Our assessment	17
Determination on inter partes costs	19
Determination on costs	19
Costs Order	20
Appendix A: Statement of the CMA's costs	21
Overview	21
CMA's costs	21
Overheads	21
Staff costs	22
Appeal Group costs	22
Non-staff costs	23
CMA's costs	23

Introduction

1. On 12 April 2017, SONI Limited (SONI) applied to the Competition and Markets Authority (the CMA) for permission to appeal against the decision by the Northern Ireland Authority for Utility Regulation (the UR) to modify the conditions of SONI's electricity transmission licence. On 11 May 2017, the CMA granted SONI permission to appeal, under [Article 14B\(3\)](#) of the Electricity (Northern Ireland) Order 1992 (the Electricity Order). The appeal comprised three grounds of appeal, each of which was divided into various claimed errors.¹
2. The CMA notified its Final Determination of the appeal to the parties on 10 November 2017. The CMA allowed the appeal in respect of Ground 1 and claimed Errors 2, 6, 10(a) and 10(b), and 11(b) and dismissed the appeal in respect of the remaining claimed errors.
3. The CMA is required by paragraph 12 of [Schedule 5A](#) of the Electricity Order to recover its costs incurred in connection with the appeal from the parties. The CMA may also require a party to the appeal to make payments to another party in respect of costs reasonably incurred by that other party in connection with the appeal. These are known as *inter partes* costs.
4. On 13 November 2017, the CMA sent a letter to SONI and the UR, explaining the CMA's proposed approach to calculating its costs and inviting representations on the appropriate apportionment of the CMA's costs. The CMA also invited representations on whether it would be appropriate to make an order for *inter partes* costs.
5. The CMA received representations from SONI and the UR on 24 November 2017. Following consideration of these representations, and the analysis of the CMA costs during the appeal process, the CMA notified the parties of its provisional determination on costs (PDC) to be paid by each party on 21 December 2017, and invited comments.
6. Representations were received on 11 January 2018 from SONI, the UR and the Consumer Council (Northern Ireland) (CCNI).
7. Following consideration of parties' responses, the CMA has made its final determination on costs for the SONI appeal and its Order requiring the payment of costs. This determination on costs sets out the legal framework in relation to costs, includes a statement of the CMA's costs and how we have

¹ The appeal comprised a total of sixteen claimed errors: Errors 1(a), 1(b) and 1(c); Ground 2 which included Errors 2 to 8; Ground 3 which included Errors 9(a) and 9(b), 10(a) and 10(b) and 11(a) and 11(b).

apportioned these between the parties and presents our assessment of *inter partes* costs.

Legal framework in relation to costs

The Electricity Order

8. The CMA's duties and powers as regards making a costs order after determining an appeal under [Article 14B](#) of the Electricity Order are set out in [Schedule 5A](#), paragraph 12 as follows:

(1) A group that determines an appeal must make an order requiring the payment to the CMA of the costs incurred by the CMA in connection with the appeal.

(2) An order under sub-paragraph (1) must require those costs to be paid —

- (a) where the appeal is allowed in full, by the Authority;
- (b) where the appeal is dismissed in full, by the appellant; or
- (c) where the appeal is partially allowed, by one or more parties in such proportions as the CMA considers appropriate in all the circumstances.

(3) The group that determines an appeal may also make such order as it thinks fit for requiring a party to the appeal to make payments to another party in respect of costs reasonably incurred by that other party in connection with the appeal.

9. Paragraph 13(2) of Schedule 3A provides that references in that Schedule to a 'party' are references to '*(a) the appellant; or (b) the Authority*'.

Rules and guidance

10. The CMA's appeals rules² (the Rules) and associated guidance³ (the Guidance) make further provision in relation to costs. Rule 19(2) states that

² [Competition Commission Energy Licence Modification Appeals Rules \(CC14\)](#), September 2012, as adopted by the CMA board on 13 February 2014 pursuant to paragraph 11(1) of [Schedule 5A](#) to the Electricity Order. Following a [public consultation](#), the CMA [decided](#) in 2015 that it would use [the Rules](#), adapted as necessary to refer to the relevant NI legislation and decisions of the UR, to govern the procedure for appeals against the UR's energy licence modification decisions.

³ [Energy Licence Modification Appeals: Competition Commission Guide \(CC15\)](#), September 2012, as adopted by the CMA.

when it determines an appeal, the CMA may make such order as it thinks fit for requiring a party to the appeal to make payments to another party in respect of costs reasonably incurred by that other party in connection with the appeal. Rule 19(3) states as regards *inter partes* costs:

19.3 In deciding what order to make under Rule 19.2, the [CMA] will have regard to all the circumstances, including:

19.3.1 the conduct of the parties, including:

19.3.1.1 the extent to which each party has assisted the [CMA] to meet the overriding objective;

19.3.1.2 whether it was reasonable for a party to raise, pursue or contest a particular issue;

19.3.1.3 the manner in which a party has pursued its case or a particular aspect of its case;

19.3.2 whether a party has succeeded wholly or in part; and

19.3.3 the proportionality of the costs claimed.

11. In addition, the CMA has regard to the decisions of the CMA and the Competition Commission (CC) made under similar legislative regimes in relation to the determination of costs. These decisions do not, however, constitute binding precedent.⁴

Duty to order payment of the CMA's costs

12. In its decision in *British Telecommunications plc v CMA*⁵ the Competition Appeal Tribunal set out some general observations on the recovery of CMA costs following the CMA's determination of a regulatory appeal. These include the following:

(a) the purpose of a costs order is to enable the CMA to recover for the public purse costs incurred by it in connection with the appeal;⁶

⁴ See, by analogy, *IBA Health v OFT* [2004] CAT 6, at [35] and the dictum of Lord Lloyd of Berwick in *Bolton Metropolitan District Council v Secretary of State* [1995] 1 WLR 1176, at page 1178E that in respect of matters on costs that are within the discretion of the court 'a practice, however widespread and long-standing, must never be allowed to harden into a rule'.

⁵ *BT v CMA* [2017] CAT 11.

⁶ *BT v CMA* [2017] CAT 11 at [25].

- (b) the CMA will recover all its costs incurred in connection with the appeal, not just its direct costs;⁷
 - (c) the CMA must make a broad, soundly based judgement as to its costs and as to the proportion of those costs for which the paying party is to be made liable;⁸ and
 - (d) the CMA is not entitled to make an order in relation to costs incurred unreasonably or unnecessarily.⁹
13. The Electricity Order specifies that costs should be apportioned in accordance with each party's success and, where the appeal is partially allowed, that the CMA's costs are to be paid by one or more parties in such proportions as the CMA considers appropriate in all the circumstances.¹⁰ In these circumstances, other decisions of the CMA have applied the general principle that the CMA will ensure that the costs order reflects the time and effort expended in the appeal by reference to each ground for the purposes of apportionment, bearing in mind each party's relative success.¹¹

Discretion to order payment of inter partes costs

14. The CMA Rules provide that in deciding what order to make in respect of such costs, the CMA will have regard to all the circumstances, including:
- (a) the conduct of the parties, including:
 - (i) the extent to which each party has assisted the CMA to meet the overriding objective;¹²
 - (ii) whether it was reasonable for a party to raise, pursue or contest a particular issue;
 - (iii) the manner in which a party has pursued its case or a particular aspect of its case;

⁷ In *BT v CMA* [2017] CAT 11 at [32], the Competition Appeal Tribunal set out the level of detail the CMA should disclose of its costs to the parties at consultation stage, and this makes it clear that it is not just the CMA's direct costs which can be recovered. In addition, the broad language of paragraph 12(1) of [Schedule 5A](#) to the Electricity Order ('costs incurred by the CMA in connection with the appeal') implies that the CMA must recover not only direct costs such as staff costs, but also its other costs (including any external fees incurred).

⁸ *BT v CMA* [2017] CAT 11 at [24].

⁹ *BT v CMA* [2017] CAT 11 at [29].

¹⁰ Paragraph 12(2) [Schedule 5A](#).

¹¹ *British Gas Trading Limited v The Gas and Electricity Markets Authority* (BGT) September 2015 at paragraph 9.4.

¹² That is, to dispose of the appeal fairly and efficiently within the statutory time period ([Rule 4.1](#)).

(b) whether a party has succeeded wholly or in part; and

(c) the proportionality of the costs claimed.¹³

15. The CMA will also have regard to the following general principles:

(a) In deciding whether the costs claimed by a party are proportionate, the CMA will balance the costs claimed against the significance of the appeal on the overall level of the price control if the appeal had succeeded.¹⁴

(b) In deciding on what costs are reasonable,¹⁵ the exercise is one of 'standing back and seeking to arrive at an approach which does justice in all the circumstances of [the] case'.¹⁶

(c) The CMA will exercise its judgement after comparing the costs of the appellant, the respondent and the CMA, and will not conduct the level of detailed cost assessment that is required by Part 44 of the Civil Procedure Rules or Rule 104 of the Competition Appeal Tribunal Rules.¹⁷

Third party costs

16. A costs order may only require a party to the appeal to make or receive payment of costs incurred in connection with the appeal. The reference to a party to the appeal is defined for these purposes as referring to the appellant or the UR.¹⁸ The CMA therefore has no power to make a costs order requiring an Interested Third Party, such as the Consumer Council (Northern Ireland) (CCNI), to receive or make payment of costs incurred in the appeal.¹⁹

¹³ [Rule 19.3](#).

¹⁴ BGT at paragraphs 9.21(c) and 9.25 and NPG at paragraph 7.17(c).

¹⁵ The CMA may only allow costs that are 'reasonably' incurred by a party in connection with the appeal (paragraph 12(3) of Schedule 3A to the Electricity Order).

¹⁶ BGT at paragraph 9.30.

¹⁷ BGT at paragraph 9.30.

¹⁸ Paragraph 13(2) of [Schedule 5A](#) to the Electricity Order.

¹⁹ See also paragraph 5.3 of [Energy Licence Modification Appeals: Competition Commission Guide \(CC15\)](#), September 2012, as adopted by the CMA.

CMA's costs

Statement of the CMA's costs

17. The total CMA costs of the appeal were £589,511.33²⁰ (see Appendix A for a detailed statement of costs). These costs include:
- (a) CMA staff and panel members' costs;
 - (b) External advisers' costs (Counsel);
 - (c) CMA overhead allowance (defined as a standard percentage uplift of staff and panel member costs);
 - (d) Non-staff costs and disbursements (for example, travel and accommodation costs for the CMA's visit to Belfast, transcription costs); and
 - (e) Other disbursements.
18. The appeal was partially allowed. It is therefore necessary to apportion the CMA's costs between the parties. In order to do so, we first set out how the CMA's costs should be allocated between the grounds of appeal and claimed errors. We then set out the appropriate apportionment of these costs between the parties.

Allocation of the CMA's costs to grounds of appeal

SONI's views

19. SONI submitted that the total costs incurred by the CMA should be split between the three grounds of appeal on the following basis: 50% Ground 1, 30% Ground 2, and 20% Ground 3. This was based partly on the pages devoted to each ground in the CMA Final Determination. SONI submitted that it was likely that the CMA would have spent at least half of its time in assessing Ground 2 focusing on Errors 2 and 6, and 20% of its time in assessing Errors 3 and 8. In Ground 3, SONI submitted that it was a reasonable assumption that the CMA spent equal time on each of the three errors (and six sub-errors).²¹

²⁰ This includes CMA costs up to 15 December 2017 – reflecting CMA costs in connection with the appeal up to the provisional determination on costs.

²¹ SONI Costs Submission, paragraphs 3.6 to 3.27; SONI response to PDC, paragraphs 1.1 to 1.8.

20. In its response to the PDC, SONI noted that the CMA was taking a different approach to allocating costs to specific errors than that used in the recent Firmus Energy appeal, without providing justification. SONI submitted that the approach used by the CMA to allocate costs in the PDC, namely assuming all errors within a ground were weighted equally, was not reasonable in circumstances where the CMA had acknowledged that far more time was spent on certain errors than others.²²

UR's views

21. In its Costs Submission, the UR did not suggest what the appropriate split of CMA costs should be between grounds of appeal. In its response to the PDC, the UR submitted that the allocation of the CMA's costs had not taken into account that some of the CMA's time would have been spent on matters that did not fall within the three grounds (for example, on SONI's unsuccessful applications to suspend the Licence Modification Decision and to disclose information requested by SONI).²³

Our view

22. In our view, the appropriate apportionment of CMA time and resources to the three grounds should be 40:40:20, based on a broad brush estimate of the amount of time spent on each ground throughout the appeal (see Appendix A for more details of the breakdown of the CMA's costs).
23. We decided that a proportionate approach would be to assume an equal split of the CMA's costs between errors within each ground. This allocation of costs was used as the starting point for our assessment of the appropriate apportionment of the CMA's costs to parties.
24. We note that in this particular case, many of the errors were interrelated. A detailed analysis of CMA staff time between specific errors would therefore not be appropriate and would be disproportionate (taking note of the general principles outlined in paragraph 13).
25. Although we recognised that not all of the errors carried equal weight in terms of their importance or to the amount of work involved, we considered that seeking to weight each individual error differently in this case would create a spurious level of precision and that, in the round, our approach of assuming

²² SONI response to PDC, paragraphs 1.9 & 1.10.

²³ UR response to PDC, paragraphs 2.8 to 2.9.

an equal split at this stage in our assessment gave an appropriate outcome overall.

26. We note the UR's submission about costs incurred by the CMA which were not linked to the specific grounds of appeal. However, the time spent on these issues was insignificant compared to the time spent on the grounds of appeal and therefore we do not consider it would make a material difference to the overall apportionment to separate out these costs.

Apportionment of the CMA's costs to the parties

27. The parties' views on the apportionment of the CMA's costs between them are set out below.

SONI's views

28. SONI submitted that it was successful in respect of the majority of the issues covered by the appeal, and won on the most important errors pleaded. In SONI's view, the UR should therefore pay the majority of the CMA's costs.²⁴
29. SONI submitted that the CMA had found the UR's decision to be wrong on Ground 1 in its entirety, and there was no reason for the CMA to depart from the starting point that the UR should pay all of the CMA's costs for Ground 1.²⁵
30. In relation to Ground 2, SONI submitted that the CMA had found that the UR decision was wrong in respect of Errors 2 and 6, and there was no reason for the CMA to depart from the starting point that the UR should pay all of the CMA's costs for these errors.²⁶
31. For Error 3, although the CMA had found that the UR was not 'wrong', SONI submitted that the UR should pay the CMA's costs for this ground because the UR's Price Control Decision was not transparent as to its meaning and/or it changed its position during the appeal. SONI submitted that the effect of the change in position was that the UR had in effect conceded the Error, and had it started from this position, SONI would not have appealed the issue. SONI submitted it was therefore reasonable for the CMA to depart from its usual starting position and to exercise its judgement in requiring the UR to pay its costs.²⁷

²⁴ SONI Costs Submission, paragraph 3.5.

²⁵ SONI Costs Submission, paragraphs 3.6 to 3.8.

²⁶ SONI Costs Submission, paragraphs 3.9 to 3.11.

²⁷ SONI Costs Submission, paragraph 3.13.

32. For Error 8, SONI submitted that while the CMA did not find the UR was 'wrong', it was highly critical in the Final Determination of the lack of clarity as to how the Q_t adjustment would be made. Given the lack of certainty and potential magnitude of the cost involved, SONI had no choice but to appeal the issue. SONI submitted that there were therefore compelling reasons why the CMA should depart from its usual position that costs should follow the outcome of the appeal, and should instead order that the UR should pay the CMA's costs in relation to Error 8.²⁸
33. Overall in respect of Ground 2, SONI submitted that the CMA should order the UR to pay 70% of its costs on Ground 2.²⁹
34. In relation to Ground 3, SONI submitted that the CMA had found that the UR was wrong in respect of Errors 10(a), 10(b) and 11(b), and there were no good reasons why the CMA should depart from its starting principle that the UR should pay the CMA's costs in relation to these Errors. In respect of Error 11(a), while the CMA did not find an error, SONI submitted that the CMA had criticised the fact that the UR changed its position in respect of this error during the appeal process. SONI therefore submitted that given the failure by the UR to resolve the issue outside the appeal process, there were compelling reasons for the CMA to depart from its usual starting point and order the UR to pay its costs in relation to Error 11(a).³⁰ SONI submitted that the CMA should order the UR to pay two-thirds of its costs incurred in relation to Ground 3.³¹
35. Overall, SONI initially submitted that the UR should be ordered to pay 85% of the CMA's costs.³²
36. In response to the PDC, SONI submitted that CMA costs should be allocated 78% to the UR, 22% to SONI.

UR's views

37. The UR submitted that as there was an even split between the parties in terms of the number of grounds allowed or dismissed, the fairest and most proportionate approach would be for the CMA to make an order for its costs by reference and in proportion to the grounds allowed or dismissed. As such,

²⁸ SONI Costs Submission, paragraph 3.14.

²⁹ SONI Costs Submission, paragraph 3.16.

³⁰ SONI Costs Submission, paragraphs 3.18 to 3.20.

³¹ SONI Costs Submission, paragraph 3.21.

³² SONI Costs Submission, paragraph 3.27.

the UR submitted that the CMA's costs should be apportioned between the parties on a 50:50 basis.³³

38. Whilst the CMA upheld the appeal in respect of Ground 1, the UR noted that the CMA did not uphold all of SONI's arguments, in particular SONI's argument that the RAB/WACC approach was flawed and that a margin based approach should be adopted.³⁴
39. In response to the PDC, the UR submitted that in light of some of SONI's costs being unconnected with the grounds of appeal (see paragraph 21) and given the equal split between the number of errors allowed and dismissed in the appeal, the UR remained of the view that the CMA's costs should be apportioned between the parties on a 50/50 basis.³⁵
40. The UR also submitted that 50/50 apportionment would ensure that NI electricity consumers are not unfairly expected to pay for a greater proportion of the CMA's costs given the outcome of the appeal.³⁶

Our assessment

41. As described above (see paragraph 13), in deciding what proportion of the CMA's costs each party should pay, in accordance with paragraph 12(2) of [Schedule 5A](#) to the Electricity Order, the CMA starts from the principle that costs follow the outcome of the appeal – that is, the UR should pay the CMA's costs for appeal grounds and errors which were upheld, and SONI should pay the CMA's costs for appeal errors which were dismissed.
42. Our starting point is therefore that the UR should pay the CMA's costs for Ground 1 and Errors 2, 6, 10(a), 10(b) and 11(b), and that SONI should pay the CMA's costs for the remaining 8 errors and sub-errors. Using the allocations of the CMA's costs between the grounds and errors indicated above (see paragraph 22 and Table 5 in Appendix A), assuming costs follow outcome would result in SONI paying 40% and the UR paying 60% of the CMA's costs.³⁷ We note the UR's argument that there was an even split between the parties in terms of the number of *errors* allowed or dismissed, but we consider that the outcome reflects the fact that the CMA time assessing

³³ UR Costs Submission, paragraphs 2.3 to 2.4

³⁴ UR Costs Submission, paragraphs 3.13 to 3.15.

³⁵ UR response to PDC, paragraphs 2.8 & 2.9.

³⁶ UR response to PDC, paragraph 2.11.

³⁷ To an appropriate level of accuracy.

the *grounds* was weighted to some extent towards the more complex grounds and where detailed consideration of remedies was required.³⁸

43. We then considered whether there were good reasons to depart from this approach, and in particular whether a) SONI should contribute towards Ground 1 costs, and/or b) the UR should contribute towards Errors 3 and 8. Whilst the parties have both made some valid arguments as to why the cost allocation should not follow the outcome in respect of several of the errors, we note that these arguments push in different directions. Therefore, on balance, we consider that there are not sufficient reasons to depart from the approach whereby costs follow the outcome.
44. In the round, we therefore consider that an appropriate allocation of CMA costs to be paid is 40% for SONI and 60% for the UR.³⁹
45. We note the UR's submission that NI electricity consumers should not unfairly be expected to pay for a greater proportion of the CMA's costs than suggested by the outcome of the appeal. However, the CMA is legally required to recover its costs, and it would not be appropriate for the CMA to recover a greater proportion of its costs from the appellant than is justified by the outcome of the appeal.

Determination on the CMA's costs

46. Our determination is that the CMA's costs should be apportioned as follows:
 - (a) SONI should pay 40% of the CMA's costs.
 - (b) The UR should pay 60% of the CMA's costs.
47. Taking the CMA's costs into account (see Appendix A), this results in SONI paying £235,804.53 and the UR paying £353,706.80.

Inter partes costs

48. As noted above (see paragraphs 8, 14 and 15), we have discretion to make an order as we think fit for requiring one party to the appeal to make payments to another party in respect of costs reasonably incurred by that other party in connection with the appeal.

³⁸ As noted in paragraph 22 above, we consider that an appropriate apportionment between the three grounds of appeal is 40:40:20.

³⁹ See Table 5 in the Appendix; note that the percentage split has been rounded to the nearest 10% to avoid spurious accuracy

SONI's views

49. SONI submitted that the CMA should use its discretion to make an *inter partes* costs order, and that the circumstances of the case justified such an order. SONI submitted that the UR should pay an amount equivalent to approximately 85% of SONI's costs,⁴⁰ which SONI submitted were £[~~8~~] in total. SONI explained its reasoning with reference to the relevant factors stated in the Electricity Order.

Conduct

50. SONI submitted that the appeal concerned fundamental issues relating to the selection and design of the regulatory framework and the degree of risk and uncertainty faced by SONI, and included more complex issues than typically arise in appeals about operating expenditure (opex) costs. SONI submitted that it went to significant lengths to assist the CMA, proactively producing detailed proposals for remedies. SONI submitted it was selective in only pleading the most important errors in its appeal, including some which it might not have done other than for the UR's conduct (in terms of the delay in the Price Control and lack of clarity). SONI engaged certain experts to support its case so as to assist the CMA to not only understand its concerns but also how to remedy these concerns, and the expert reports related to errors on which SONI was successful.⁴¹

Whether a party has succeeded wholly or in part

51. SONI submitted that it succeeded on the majority of the issues pleaded in the appeal, measured in terms not only of the CMA and parties' time spent on each error pleaded, but of the significance of those errors in relation to securing SONI's financeability.⁴²

Proportionality of costs claimed

52. SONI submitted that the CMA had previously emphasised that in deciding whether the costs claimed by a party are proportionate, it will balance the costs claimed against the significance of the appeal on the overall level of the price control if the appeal had succeeded. SONI submitted that the appeal was significant, going to the fundamental issue of ensuring an appropriate regulatory framework capable of securing SONI's financeability. It also

⁴⁰ SONI Costs Submission, paragraph 4.6.

⁴¹ SONI Costs Submission, paragraphs 4.7 to 4.14.

⁴² SONI Costs Submission, paragraph 4.15.

submitted that SONI's costs were proportionate when measured against the funding gap of £14.7 million that SONI identified in the Notice of Appeal (in the context of the £69 million revenues awarded under the UR's price control decision).⁴³

Response to the PDC

53. In response to the PDC, SONI submitted that the allocation deemed to be appropriate for the CMA's costs (ie 60% the UR, 40% SONI) should also be the starting point for determining *inter partes* costs.⁴⁴ SONI also questioned the reasoning for the CMA adjusting the level of SONI's costs for reasonableness, and submitted that there was no apparent consideration of the UR's conduct and delay leading to the extent of the appeal and costs incurred.⁴⁵
54. SONI submitted that the CMA's adjustment of SONI's claimed costs downwards to £[REDACTED] was 'excessive'.
55. SONI submitted two worked examples on what it considered to be the appropriate costs payable by the UR to SONI: £[REDACTED] (based on a 60:40 UR:SONI split as a starting point) and £[REDACTED] (based on 78:22 UR:SONI split, preferred by SONI). In SONI's view, this approach was more proportionate, appropriate and robust than the PDC proposal to award SONI 25% of its 'reasonable' costs, because it took into account the parties' relative overall success in the appeal.⁴⁶
56. SONI also asked the CMA to take into account an additional £[REDACTED] incurred by SONI incurred since the CMA Final Determination in respect of providing monthly compliance reports to the CMA, liaising with the UR about the CMA's remedies and in preparation of SONI's cost submission and response to the PDC.⁴⁷

UR's views

57. The UR submitted that the CMA should make no order as to *inter partes* costs as the CMA has found equally as between the parties in relation to the 16 errors pleaded by SONI. The UR submitted that SONI's success in relation to this appeal was not founded on the case that it pleaded, nor did it attain all of the remedies that it sought. It also submitted that: SONI should not be

⁴³ SONI Costs Submission, paragraphs 4.16 to 4.18.

⁴⁴ SONI response to PDC, paragraph 2.3 & 2.4.

⁴⁵ SONI response to PDC, paragraph 2.2.

⁴⁶ SONI response to PDC, paragraphs 2.7 to 2.10.

⁴⁷ SONI response to PDC, paragraph 3.1.

entitled to receive all of its costs in relation to those errors on which it was successful because much of the work undertaken by its experts pre-dated the publication of the Price Control Decision; Error 10(a) was unnecessary, as the UR had already commenced consultation in advance of the appeal being filed; and SONI's costs should be benchmarked against those claimed by the UR, in line with the approach taken by the CMA in the ED1 appeals.⁴⁸

58. Although the UR submitted that no *inter partes* cost order should be made by the CMA, it also submitted a statement of costs indicating that the total costs incurred by the UR in connection with the appeal were approximately £[~~£~~].
59. In response to the PDC, the UR submitted that the CMA did not accurately reflect the outcome of the appeal by considering that SONI was more successful overall than the UR.⁴⁹
60. The UR also submitted that the CMA had not given due regard to its decision on costs in the Firmus Energy appeal, in particular that the CMA had decided to make no order for *inter partes* costs, notwithstanding that the UR was the more successful party.⁵⁰
61. The UR submitted that the CMA was wrong in taking the view that it was reasonable to consider some of SONI's costs incurred prior to the UR publishing its decision as being costs incurred in connection with the appeal. It also submitted that no valid reason had been provided for the CMA departing from its usual policy that such costs should not be recoverable.⁵¹
62. The UR also submitted that the costs claimed by SONI are nearly [~~£~~] times as much as the costs claimed by the UR, and there is no good reason why they needed to be – either in terms of hourly rates charged or time spent. The UR submitted that if the CMA remain of the view that the UR should pay a proportion of SONI's costs, the CMA should follow the approach in the ED1 appeals and use the UR's costs as the appropriate benchmark.⁵²
63. Lastly, the UR submitted that the CMA had failed to take account of the general principle that consumers should not be unfairly expected to pay for any of SONI's costs associated with the appeal.⁵³

⁴⁸ UR Costs Submission, paragraphs 3.2 to 3.8. 'ED1' refers to the appeals by British Gas Trading and Northern Powergrid against Ofgem's price control for electricity distribution companies.

⁴⁹ UR response to PDC, paragraph 3.6 to 3.16.

⁵⁰ UR response to PDC, paragraphs 3.17 to 3.22.

⁵¹ UR response to PDC, paragraphs 3.30 to 3.43.

⁵² UR response to PDC, paragraphs 3.44 to 3.51.

⁵³ UR response to PDC, paragraphs 3.57 to 3.61.

Our assessment

64. As explained above (see paragraphs 8, 14 and 15), we have discretion to make an *inter partes* costs order as we think fit in respect of costs reasonably incurred in connection with the appeal.
65. In deciding whether to make an order for *inter partes* costs, the starting point is that the unsuccessful party should pay the costs of the successful party. The outcome of the appeal was relatively evenly split between the parties in terms of the individual errors pleaded. However, taking into account the relative weight and importance of the different errors, we consider that, on balance, SONI was more successful overall than the UR. In particular, Ground 1, where SONI was successful, was clearly a significant part of SONI's overall appeal. Moreover, we consider that SONI won the appeal in terms of the fundamental ground of financeability, as well as in respect of the broad principle within Ground 2 that the UR had failed to put in place an approach to remunerating a large proportion of SONI's costs in a way which would ensure its financeability. Our finding that SONI was successful in these important aspects of its case was reflected in our finding that the UR should pay 60% of the CMA's costs.
66. We therefore concluded that it was appropriate to also make an *inter partes* order and for the UR to contribute to SONI's costs incurred in the appeal. Had we concluded that SONI and the UR were equally successful in the appeal, we would not in this case have made an *inter partes* costs order.
67. Having decided that an *inter partes* cost order would be appropriate, we have used our judgment in reaching a decision on the appropriate amount of such a costs order, taking into account all the circumstances of the case. To determine the appropriate level of the *inter partes* cost order, we have considered the factors outlined in the Rules: success in the appeal, conduct, proportionality and reasonableness of costs incurred.
68. As noted above, we concluded that, overall, SONI had been the more successful of the parties. We therefore decided that the UR should pay a proportion of SONI's costs (subject to adjustment as explained below), related to the extent to which we found that SONI was more successful than the UR.
69. As described earlier, our assessment of the appropriate allocations of CMA costs between the parties has resulted in a decision that (rounded to the nearest 10%) the UR should pay 60% and SONI should pay 40%. That reflects a difference of 20% between the parties. Prior to rounding, this

difference was closer to 25%.⁵⁴ We decided that, in these particular circumstances, 25% represented a reasonable proportion of SONI's costs for the UR to pay, subject to adjusting these costs downwards for the reasons set out below.

70. We noted that SONI's costs were considerably higher than the UR's costs. We do not consider it unreasonable in principle for SONI to have incurred higher costs than the UR. However, we considered it appropriate to make some downwards adjustment in the level of SONI's costs to reflect the fact that the Appeal Group did not accept all the arguments put forward by SONI, even where the UR was found to be wrong. We have taken this into account in determining the level of reasonable costs incurred by SONI to which the UR should contribute.
71. We also note that SONI is claiming costs of expert reports which were incurred prior to the UR's Price Control Decision. Our view is that in this particular case it is appropriate to consider at least part of these costs as being in connection with the appeal. Whilst these costs pre-date the Licence Modification Decision, they post-date the publication of the Final Determination which contains much of the UR's substantive reasoning. However, while it is appropriate for an appellant to commission expert reports to develop and explain their case, we note that the cost of such reports was a significant proportion of the appellant's costs in this case, and that much of the expert material provided was not particularly helpful to the Appeal Group's deliberations. We have therefore taken this into account when determining the level of SONI costs to be considered appropriate.
72. We also note that the costs claimed by SONI in connection with the appeal are over [X] times those claimed by the UR. We are mindful of the need to incentivise appellants to spend prudently and in a proportionate manner in appeals, although as noted earlier, we would not necessarily expect the appellant's costs to be at the same level as that of the regulator in an appeal.
73. For the reasons set out above, we have reduced the costs claimed by SONI by approximately [X]% to a level which we consider to be appropriate in all the circumstances.
74. We acknowledge that the cost allocated to the UR will result in costs being applied to industry and ultimately to NI consumers. We note that consumers, current and future, would be expected to benefit from an effective appeals regime. The risk that the regulator may be required to pay costs where an

⁵⁴ See Appendix A, Table 5 for details on how we weighted each error.

appeal is successful, and that those costs will fall ultimately to be recovered through licence fees, is a consequence of the symmetric *inter partes* costs powers associated with the appeal regime. In other cases this regime may allow a regulator to recover the costs incurred in an appeal from an unsuccessful appellant. In this case, we consider that there is no reason to diverge from this approach although, as noted above, we have made a [X]% adjustment to the costs incurred by SONI in calculating the amount payable by the UR.

75. We note that in its response to the PDC, SONI has claimed an additional £[X] of costs incurred since the CMA's Final Determination in respect of providing monthly compliance reports, liaising with the UR about the CMA's remedies and in preparation of SONI's cost submission and response to the PDC. However, we consider that costs due to implementation of remedies post-order should not be regarded as having been incurred in relation to the appeal. Although in principle we accept costs incurred in relation to the appeal costs process are claimable, in the light of such costs not being claimed by the CMA and the UR, and the limited scale of such costs, we do not consider it appropriate to adjust the *inter partes* costs order in this case.
76. We have had regard to the approach to determining costs used in the recent Firmus Energy appeal costs, but have taken the view that the appropriate approach should be determined on the circumstances of the particular case.

Determination on inter partes costs

77. In view of the foregoing, and in all the circumstances, we have exercised our judgment in considering the case in the round. In our view, the appropriate *inter partes* costs order to impose is for the UR to pay SONI £325,000 in respect of SONI's costs incurred in connection with the appeal. This is based on the UR paying 25% of SONI's costs, reduced by [X]% for the reasons set out above.
78. Our decision reflects the specific circumstances of this case, and conveys the appropriate balance between the outcome of the appeal in terms of relative success for the parties, while guarding against creating expectations that successful appellants would necessarily recover all their costs from the regulator.

Determination on costs

79. In summary, our determination in relation to costs is as follows:

(a) **CMA Costs:** SONI should pay 40% and the UR should pay 60% of the CMA's costs of the appeal, which are deemed to be a total of £589,511.33. That is, SONI will pay £235,804.53 and the UR will pay £353,706.80.

(b) **Inter partes costs:** we have decided to make an order as to *inter partes* costs in this case. Our decision is that the UR should pay £325,000.00 to SONI towards SONI's costs of the appeal.

Costs Order

80. An order has been made according to our determination on costs and notified to the parties. It has also been published on the CMA [website](#).

Appendix A: Statement of the CMA's costs

Overview

1. This appendix outlines how the CMA's costs were calculated. All costs incurred by the CMA in connection with the appeal have been included in the assessment and in line with the recommendations of the Tribunal in *BT v CMA* [2017] CAT 11, this appendix provides details of:
 - (a) the names, grades and cost recovery rate for each of the staff and the Appeal Group who worked on the appeal, together with the number of hours worked;
 - (b) travel and subsistence costs incurred in the appeal;
 - (c) a breakdown of fees charged by Counsel;
 - (d) direct costs; and
 - (e) a description of how the CMA's overhead rate has been calculated.

CMA's costs

Overheads

2. The CMA is able to recover all costs incurred, not just its direct costs. It therefore includes an amount for the recovery of overheads in the amounts that it calculates as costs.
3. The CMA's overhead rate of 47.65% is applied to direct salaried staff and panel member (the Appeal Group) costs and is calculated on the basis of the cost of accommodation, IT and central support costs. It reflects:
 - (a) the total direct costs of staff working in CMA front line delivery functions excluding corporate services;
 - (b) the costs of the CMA areas supporting the delivery functions, including the staff costs of the corporate support functions, as well as the non-staff costs, relating to accommodation and IT; and
 - (c) other non-staff costs relating to the CMA were also included, for example, travel and staff training.
4. The overhead rate (as a percentage) is calculated on the basis that the costs of the support areas are fully absorbed in proportion to the staff costs of the

delivery functions. This rate is used commonly within the CMA for these purposes.

Staff costs

- 5. Table 1 sets out the names, job titles, grades and cost recovery rates (£ per hour) for each member of the staff team who worked on the appeal. It also includes the number of hours worked by each member of the staff team on the appeal, and the consequent direct costs and overhead costs incurred by the staff member.

Table 1: Staff costs

<i>Name</i>	<i>Job title</i>	<i>Grade</i>	<i>Recovery rate (£ per hour)</i>	<i>Time spent (hours)</i>	<i>Direct costs (£)</i>	<i>Overhead (£)*</i>	<i>Total (£)</i>
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Totals				[X]	[X]	[X]	[X]

Source: CMA analysis.

* Overhead figures rounded to 2 decimal places.

Appeal Group costs

- 6. Table 2 sets out the names, job titles, grades and cost recovery rates (£ per hour) for the panel member Chair and panel members who worked on the appeal. It also includes the number of hours worked by the panel member Chair and each of the panel members, and the consequent direct costs and overhead costs incurred by the group member.

Table 2: Appeal Group costs

Name	Job title	Grade	Recovery rate (£ per hour)	Time spent (hours)	Direct costs (£)	Overhead (£)*	Total (£)
Martin Cave	Inquiry Panel Chair	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Katherine Holmes	Panel Member	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Jon Stern	Panel Member	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Totals				[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Source: CMA analysis.

* Overhead figures rounded to 2 decimal places.

Non-staff costs

7. Table 3 sets out the non-staff costs incurred on the appeal, including:
- (a) Counsel costs.
 - (b) Transcription costs. These include transcription services for hearings in Belfast and London.⁵⁵
 - (c) Travel and subsistence costs. Travel expenses include the travel and accommodation costs of the site visit and clarification hearings in Belfast, as well as group member travel expenses.

Table 3: Non-staff costs

Non-staff costs	Amount (£)
Counsel	[REDACTED]
Transcripts	[REDACTED]
T&S	[REDACTED]
Total	[REDACTED]

Source: CMA analysis.

CMA's costs

8. Table 4 summarises the CMA's final costs to be included in the draft costs order.

Table 4: CMA costs

Costs	Amount (£)
Staff	[REDACTED]
Appeal Group	[REDACTED]
Non-staff	[REDACTED]
Total	589,511.33

Source: CMA analysis.

⁵⁵ Note that the amount for transcription services is less than would usually be expected due to discounts following quality problems.

9. Table 5 provides a breakdown of the allocation of the CMA's costs between errors. In our view, the appropriate apportionment of CMA time and resources to the three grounds should be 40:40:20, based on an estimate of the amount of CMA resources expended on each ground throughout the appeal. As a starting point, the costs are allocated equally between errors within a ground (see paragraph 23 above).

Table 5: Allocation of CMA's costs

<i>Ground</i>	<i>Error</i>	<i>Unsuccessful party</i>	<i>Allocation to Ground / Error (%)</i>
1	1(a), 1(b) and 1(c)	UR	40
	2	UR	40/7
	3	SONI	40/7
	4	SONI	40/7
2	5	SONI	40/7
	6	UR	40/7
	7	SONI	40/7
	8	SONI	40/7
	<i>Total</i>		40
	9(a) and 9(b)	SONI	2*20/6
3	10(a) and 10(b)	UR	2*20/6
	11(a)	SONI	20/6
	11(b)	UR	20/6
	<i>Total</i>		20
Total			100

Source: CMA analysis.