EDF Energy (Thermal Generation) Limited/SSE Generation Limited v Gas and Electricity Markets Authority and National Grid Electricity Transmission Plc (Intervener)

Determination on costs

CMA 80 3 May 2018

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Introduction

1. This document is the Competition and Markets Authority (the CMA)'s determination on costs. These costs are those arising from the appeal by SSE Generation Limited and EDF Energy (Thermal Generation) Limited (together the Appellants) to the CMA against a decision of the Gas and Electricity Markets Authority (GEMA), to reject an industry proposal to modify an industry code for the transmission of electricity, CUSC CMP 261.

2. On 6 December 2017, the Appellants applied to the CMA for permission to appeal against a decision of GEMA. By this decision, GEMA rejected an industry proposal to modify an industry code for the transmission of electricity in Great Britain, the Connection and Use of System Code (CUSC) Modification Proposal (CMP) 261: 'Ensuring the TNUoS paid by Generators in GB in Charging Year 2015/16 is in compliance with the €2.5 per megawatt hour (MWh) annual average limit set in EU Regulation 838/2010 Part B (3)' (CMP261). On 19 December 2017, the CMA granted the Appellants permission to appeal, under section 173(4) of the Energy Act 2004 (EA04). The appeal comprised four grounds of appeal.

3. On 8 January 2018, National Grid Electricity Transmission (NGET) made an application to become a party to the appeal pursuant to Rule 7 of the Energy Code Modification Rules 2005. Its application opposed the appeal for the reasons given by GEMA in its Reply, however it sought to make submissions on the scope and timing of relief. On 10 January 2018, the CMA granted NGET permission to intervene in the appeal.

4. The CMA notified its Determination of the appeal to the Appellants and GEMA (together the Parties) on 26 February 2018, dismissing the appeal in respect of all four grounds and confirming GEMA's CMP261 decision.

5. The CMA is required by paragraph 13(1) of Schedule 22 of the EA04 to recover from the parties its costs incurred in connection with the appeal. The CMA may also require a party to the appeal to make payments to another party in respect of costs incurred by that other party in connection with the appeal. These are known as *inter partes* costs.

6. On 26 February 2018, the CMA invited representations from the Parties on the appropriate apportionment of the CMA's and *inter partes* costs.

7. The CMA received representations from the Appellants on 8 March 2018 and GEMA on 28 February 2018 and 8 March 2018. Following consideration of these representations, and the analysis of the CMA costs during the appeal process, on 26 March 2018 the CMA notified the parties of its provisional

determination on costs (PDC) to be paid by each party, and invited comments on the PDC document.

8. In summary, the PDC provisionally determined the CMA's costs should be paid by the Appellants (for the same reasons as set out at paragraphs 60-76).

9. In the PDC, we noted that while the CMA would normally order an unsuccessful party to pay the costs of a successful party (see paragraph 27), it may make a different order taking account of all circumstances (see paragraph 28-29). The PDC provisionally determined that the Appellants should pay 75% of GEMA's claimed costs incurred in connection with the appeal.

10. The reduction to GEMA's costs was made because the CMA provisionally determined that some of these costs arose as a consequence of GEMA's actions in relation to the decision subject to this appeal and handling of the interpretation of the Connection Exclusion.[1]

11. In the PDC, we said that GEMA consulted and took its decision on CMP224, having in mind an interpretation of the charges which fall within the Connection Exclusion that was not concluded and which was different from GEMA's concluded view, as applied in its decision on CMP261, a process which took a period of over 18 months.[2]

12. We considered that the consequences of this conduct for GEMA's costs were relevant and that the approach GEMA took in CMP224 of deferring a firm decision on the interpretation, made an appeal intrinsically more likely. These circumstances also helped to explain why, in particular, the Appellants brought ground 3 of their appeal.[3] The PDC also provisionally found that GEMA's approach resulted in increased costs and delays to the process of identifying the confirmed view on the application of the Connection Exclusion.[4]

13. We provisionally concluded that in consequence GEMA should not recover all of its costs, notwithstanding that GEMA successfully defended the additional grounds of appeal. In support the PDC referred to a decision of the Competition Appeal Tribunal in *TalkTalk*[5] (see paragraph 72).

14. Responses to the PDC were received on 4 April 2018 from the Parties. Following consideration of these responses, the CMA has made its final determination on costs for the appeal and order requiring the payment of

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[1] PDC, paragraph 50.
[2] PDC, paragraphs 52 and 54.
[3] PDC, paragraph 55.
[4] PDC, paragraph 57.
[5] *Talk Talk v Ofcom* [2012] CAT 15.

costs. This determination on costs sets outs the legal framework in relation to costs, includes a statement of the CMA's costs and presents our assessment of *inter partes* costs.

Payment of CMA's costs

15. Paragraph 13 of Schedule 22 to EA04 provides that a group which determines an appeal made under section 173 EA04 (Group) must make an order requiring the payment to the CMA of its own costs incurred in connection with the appeal.

16. In relation to the CMA's own costs in connection with the appeal, Schedule 22 requires that:

    (a) Where the appeal is allowed, the order must require those costs to be paid by GEMA;[6]

    (b) Where the appeal is dismissed, the order must require those costs to be paid by the appellant. If there is more than one appellant the order:

        (i) may provide that only such one or more of the appellants as specified in the order is to be liable for costs; and

        (ii) may determine the proportions in which the appellants so specified are to be liable.

    (c) Interveners are excluded from any liability to pay the CMA's costs.[7]

17. In its decision in *British Telecommunications plc v CMA*[8] the Competition Appeal Tribunal set out some general observations on the recovery of CMA costs following the CMA's determination of a regulatory appeal. Although these observations were made in the context of an appeal brought under the Communications Act 2003, we consider the principles set out are applicable to the recovery of the CMA's costs in regulatory appeals generally. They 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;[9]

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[6] Paragraph 13(2) of Schedule 22 to EA04.
[7] Paragraph 13(4) of Schedule 22 to EA04.
[8] *BT v CMA* [2017] CAT 11.
[9] *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;[10]

(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;[11] and

(d) the CMA is not entitled to make an order in relation to costs incurred unreasonably or unnecessarily.[12]

The CMA's costs

18. The total CMA costs of the appeal were £217,453 (see Appendix A for a detailed statement of costs). These costs include:

(a) CMA staff and panel members' costs;

(b) External advisers' costs (Counsel and economic adviser);

(c) CMA overhead allowance (defined as a standard percentage uplift of staff and panel member costs); and

(d) Non-staff costs and disbursements (for example transcription costs and travel and subsistence).

[10] 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 13(1) of Schedule 22 to the EA04 ('*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).
[11] *BT v CMA* [2017] CAT 11 at [24].
[12] *BT v CMA* [2017] CAT 11 at [29].

19. The appeal was dismissed in its entirety. The CMA must therefore, pursuant to paragraph 13(3) of Schedule 22 to EA04 make an order requiring that the CMA's costs are paid by the Appellants.

GEMA views

20. GEMA submitted that since the appeal has been dismissed, the CMA is required by paragraph 13(3) EA04 to order SSE/EDF to pay the CMA's costs.[13]

21. GEMA added that since SSE/EDF have conducted the appeal jointly, and there is no basis upon which to apportion costs between them they should, therefore, be jointly and severally liable for the CMA's costs.[14]

Determination on the CMA's costs

22. Our determination is that, pursuant to paragraph 13(3) EA04, the CMA's costs of £217,453 should be paid by the Appellants, SSE/EDF.

23. As SSE/EDF are joint appellants, the CMA has no basis for making an apportionment of its costs between them. Their cost-sharing arrangements, mentioned in their submissions (see also paragraph 33), are a matter for them. The CMA has therefore decided that SSE and EDF shall be jointly and severally liable to pay the CMA's costs.

Inter partes costs

24. In relation to *inter partes* costs, paragraph 13(5) of Schedule 22 to EA04 provides that the Group may make such order as it thinks fit for requiring a party to the appeal to make payments to another in respect of costs incurred by that other party in connection with the appeal.

The Energy Code Modification Rules ('the Rules')[15]

25. The CMA has adopted the Competition Commission Rules, made in accordance with paragraph 12(1) of Schedule 22 to EA04. Rule 22 deals with the CMA Group's assessment of *inter partes* costs.

26. Rule 22 sets out some considerations the CMA will take into account when deciding what order to make as regards *inter partes* costs.

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[13] GEMA submissions on costs, paragraph 3.
[14] GEMA submissions on costs, paragraph 4.4 and GEMA responsive submissions on costs, paragraph 7.
[15] CC10 – July 2005.

27. Rule 22.1 sets out the general rule that when it determines an appeal the CMA will normally order an unsuccessful party to pay the costs of the successful party, but it may make a different order.

28. If the CMA Group decides that it is appropriate to make an order, Rule 22.2 sets out matters to which the Group will have regard in deciding what order to make.

29. Accordingly, the Rules provide that:

> 22.2 …the CMA Group will have regard to all the circumstances, including the following:
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> 22.2.1 The conduct of the parties, including:
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> 22.2.1.1 The extent to which each party has assisted the CMA to meet the overriding objective[16];
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> 22.2.1.2 Whether it was reasonable for a party to raise, pursue or contest a particular issue;
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> 22.2.1.3 The manner in which a party has pursued its case or a particular aspect of its case.
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> 22.2.2 Whether a party has succeeded wholly or in part; and
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> 22.2.3 The proportionality of the costs claimed having regard to the matters in issue and the resources of all the parties.[17]

30. In its decision in the British Gas Trading appeal (BGT),[18] the CMA set out 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.[19]

(b) In deciding on what costs are reasonable, the exercise is one of 'standing back and seeking to arrive at an approach which does justice in all the circumstances of [the] case'.[20]

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[16] The overriding objective is set out in Rule 2.2 as follows: '*to enable the [CMA] to dispose of appeals fairly and efficiently within the time periods prescribed by the Act'*.
[17] Rule 22.2.
[18] British Gas Trading Limited v GEMA (2015).
[19] BGT [2015], paragraph 9.21(c).
[20] BGT, paragraph 9.30.

(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.[21]

(d) Procedural flaws in the regulator's consultation process or subsequent conduct in the appeal must be sufficient to justify departure from the principle that costs should be apportioned in relation to each party's success.[22]

The Guide to Appeals in Energy Code Modification Cases ('the Guide')[23]

31. Part 4 of the Guide also provides guidance with regard to which costs incurred by the parties may be recoverable.

32. Paragraph 4.2 states that the costs recoverable may include all those fees, charges, disbursements, expenses and remuneration incurred by a party in the preparation and conduct of the appeal. However, the CMA will not normally allow any amount of costs incurred before GEMA first published its decision.

SSE/EDF views

33. We now set out the views of the Appellants on the allocation of *inter partes* costs, including their response to the PDC.

34. The Appellants highlighted the CMA's wide discretion in relation to *inter partes* costs provided in Schedule 22 to the EA04 and Rule 22 and cited legal precedent that recognises that regulated parties should not be exposed to unduly onerous costs, which could impact their ability to bring appeals.[24]

35. The Appellants submitted that, having regard to the overriding objective and the proportionality of the costs claimed, the Appellants should not be liable for the full costs that GEMA claimed, for the following reasons:[25]

(a) The appeal raised an important point of EU law, not previously determined by any UK or EU authority;

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[21] BGT, paragraph 9.30.
[22] BGT, paragraph 9.4.
[23] CC11 – July 2005.
[24] SSE/EDF submissions on costs, paragraph 1.4, citing *BT v Ofcom* [2005] CAT 21.
[25] SSE/EDF submissions on costs, paragraph 1.5.

(b) CMP224 stated there were two reasonable interpretations;

(c) GEMA was required according to the Guide[26] to provide sufficient detail as to how its costs were incurred and failed to do so;[27]

(d) The claimed costs are unreasonable and disproportionate.

36. The Appellants also challenged GEMA's claim for the recovery of its in-house legal costs. SSE/EDF drew the CMA's attention to the approach taken in *BT v Ofcom (MCT)* judgment[28] in relation to Ofcom's in-house recoverable costs being calculated as a realistic hourly rate for the lawyer (which can be worked by taking into account the annual cost of that lawyer, the annual number of hours that this lawyer is contractually obliged work) multiplied by the number of hours actually worked in this case.[29]

37. The Appellants submitted that GEMA's costs are unreasonable and disproportionate, on the following grounds:[30]

(a) GEMA's legal team was disproportionately large (5 senior lawyers and 3-member Counsel team) by contrast to SSE/EDF's legal team. In particular, the Appellants submitted that GEMA could have staffed its legal team more efficiently by involving more junior and therefore lower rate staff instead of senior lawyers.

(b) Notwithstanding that (i) the Appellants are typically expected to incur more costs, (ii) in this case the Appellants' external solicitors and Counsel were instructed by two different clients and (iii) the Appellants had to file an additional submission (Reply to the Defence), GEMA has claimed more hours for its in-house lawyers (1,279 hours in comparison to the 770 hours of work of the Appellants' external solicitors).

(c) The total time claimed for GEMA's in-house lawyers implies an average of 28 hours per working day, in contrast to an average 17 hours per working day for the Appellants.

(d) It is disproportionate for five qualified GEMA lawyers to attend the CMC or attend internal meetings and meetings with Counsel.

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[26] Paragraph 4.5(iv) of the Guide to appeals in Energy Code Modification Case (July 2005) (CC11) states that each statement of costs should state: '*the nature of the work performed, broken down by category including attendances on client, attendances on counsel, attendance at the [CMA], the preparation of documents served on the [CMA], contact with the [CMA] and contact with other parties to the appeal*'.
[27] In particular, GEMA has failed to split out time and there is an unreasonable degree of repetition of work by GEMA's in-house lawyers, see SSE/EDF's submissions on costs, paragraph 3.1(d).
[28] *BT v Ofcom (MCT)* [2012] CAT 30, paragraph 39.
[29] SSE/EDF submissions on costs, paragraphs 2.1-2.3.
[30] SSE/EDF submissions on costs, paragraph 3.1.

(e) GEMA's hourly rates are unreasonably high (£[✂]-£[✂] per hour). Those rates indicate annual payroll costs in the range of £[✂]-£[✂] per employee, if one follows the approach set in *BT v Ofcom* (see paragraph 36).

(f) GEMA's claimed reprographic costs of £[✂] are excessive. The claimed figure is similar to the Appellants' reprographics costs albeit GEMA was not responsible for producing hearing bundles or copies for other parties.

38. Finally, SSE/EDF submitted that should a cost award be made against the Appellants, the order should be made on a several basis; this would be in line with SSE/EDF's cost sharing agreement.[31]

Response to the PDC

39. In response to the PDC, the Appellants submitted that a larger reduction should be made to reflect the CMA's view that – in effect – GEMA had led them to believe that GEMA took a certain view of the Connection Exclusion, from which GEMA subsequently departed.[32] Moreover, they submitted, it took over 18 months for GEMA to set out its concluded view on the interpretation of the Connection Exclusion and this caused considerable costs and commercial uncertainty for the Appellants.[33]

40. The Appellants repeated their submission that GEMA's costs were unreasonable, as its team was too large, too senior and had recorded a disproportionate amount of time on the appeal.

41. In these circumstances, the Appellants submitted that they should pay no more than 50% of GEMA's costs.

GEMA's views

42. We now set out GEMA's views on the allocation of *inter partes* costs, including its response to the PDC.

43. GEMA submitted that it has been wholly successful in these proceedings and that there is no reason to depart from the general rule under which the Appellants, as the unsuccessful party, should bear GEMA's costs.[34]

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[31] SSE/EDF submissions on costs, paragraph 4.2.
[32] SSE/EDF submissions on PDC, paragraph 1.1-1.3.
[33] SSE/EDF submissions on PDC, paragraph 1.5.
[34] GEMA submissions on costs, paragraphs 4.2 and 6.

44. GEMA added that its total costs are reasonable and proportionate as the total sum is over 34% less than the Appellants' total costs.[35]

45. As to the interest rate that the CMA Group has the power to determine should SSE/EDF fail to pay within the period specified in paragraph 13(6) EA04, GEMA submitted that it should be a rate of 8% per annum, following the same approach of civil courts.[36]

46. GEMA also made additional submissions to respond to the Appellants' submissions on costs.

47. GEMA disagreed with the Appellants' reliance on legal precedent to support that a regulated entity which brings an unsuccessful appeal should escape liability for the regulator's costs (see above paragraph 29).

48. GEMA emphasised that any legal precedent in the context of the Competition Appeal Tribunal cases is irrelevant as in this case the applicable rules prescribe the presumption that the unsuccessful party should pay the successful party's costs.[37]

49. GEMA also rejected the Appellants' claims about the recovery of GEMA's in-house lawyers' costs. GEMA added that if claims in respect of in-house lawyers' costs were treated with scepticism, this would incentivise regulators to make greater use of external lawyers, which is not always cost-reflective.[38]

50. GEMA disagreed with the Appellants' method of computation of in-house costs by reference to gross salaries and pension costs of individual lawyers. GEMA cited *In re Eastwood*[39] and *Sidewalk Properties Ltd v Twinn*[40] as legal authorities that support that the rate recoverable in respect of work done by an in-house solicitor (whether employed by a public body or otherwise) should ordinarily be assessed on the basis of the rate which would apply to work done by a solicitor in private practice. GEMA added that the Appellants' in-house costs statement also appears to calculate their costs in accordance with this principle.[41]

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[35] GEMA submissions on costs, paragraph 4.3.
[36] GEMA submissions on costs, paragraph 5.
[37] GEMA's responsive submissions on costs, paragraph 2.
[38] *Ibid*, paragraph 3.
[39] [1975] 1 Ch 112, 129-132.
[40] [2015] UKUT 122 (LC), [2016] 2 Costs LR 253, paragraphs 7, 24-31.
[41] GEMA's responsive submissions on costs, paragraph 4.

51. GEMA responded to the Appellants' objection to the format of GEMA's statements of costs and submitted that SSE/EDF did not raise any objection earlier in the appeal or requested GEMA to provide a clarification.[42]

52. With regard to the reasonableness and proportionality of GEMA's costs, GEMA noted that the Appellants' costs are over 50% higher than GEMA's costs and it argued that neither the composition of GEMA's legal team (three of the five lawyers being G7 lawyers) nor their hourly rate are unreasonable or disproportionate.[43]

Response to the PDC

53. In response to the PDC, GEMA made nine submissions.[44]

54. GEMA submitted that its approach to CMP224 was not an aspect of its conduct in the appeal. GEMA further submitted that (and especially as the CMA had not challenged the legitimacy of GEMA's approach to CMP224) it was not properly open to the CMA to reduce GEMA's recoverable costs on the basis of GEMA's approach to CMP224.

55. In a similar vein, GEMA submitted that it was no part of the CMA's function in the appeal to assess GEMA's regulatory decision-making or 'penalise GEMA in costs to mark disapprobation of such decision-making'.

56. GEMA submitted that any criticism of its handling of CMP224 was misplaced, and that it was reasonable for it 'to adopt a course of prudent caution'. Moreover, GEMA submitted there was no inconsistency in it taking a provisional view in CMP224 and reaching a different conclusion 'upon further reflection' in CMP261.

57. GEMA submitted that it was inappropriate to reduce its recoverable costs on the premise that its approach to CMP224 may have caused the industry to incur additional costs. Moreover, the decision to include Grounds 3 and 4 in the appeal was the decision of the Appellants, and so 'cannot be a proper reason to penalise GEMA in costs'.

58. GEMA submitted that a decision to reduce its recoverable costs might deter GEMA and other regulators from expressing provisional views on issues. It also stated that the case cited by the CMA, *TalkTalk,*[45] was distinguishable from the facts of this appeal. GEMA submitted that in *TalkTalk* a document

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[42] *Ibid*, paragraph 5.
[43] *Ibid*, paragraph 6.
[44] GEMA's submissions on PDC, paragraphs 2 to 11.
[45] *Talk Talk v Ofcom* [2012] CAT 15.

prepared by Ofcom contained an error of fact, and this helped explain why TalkTalk had appealed on the grounds that it did. There was no suggestion that GEMA had made any erroneous statement of fact in respect of CMP224.

59. GEMA also asserted that a 25% reduction in GEMA's recoverable costs was 'manifestly excessive'.

Our assessment

60. Rule 22.1 states that the CMA will normally order an unsuccessful party to pay the costs of the successful party. It has not been submitted that it would be appropriate to depart from this general principle (albeit that the amounts to be recovered, and whether the Appellants should be liable for all of GEMA's costs, are disputed) and we have concluded that it is appropriate to make an *inter partes* order in this case.

61. We have considered what would be an appropriate costs order, taking into account all the circumstances of the case.

62. To determine the appropriate level of the *inter partes* cost order, we have had regard to the general principle set out in rule 22.1 that the CMA will normally order an unsuccessful party to pay the costs of the successful party and to all the circumstances including, but not limited to, the matters mentioned in Rule 22.2.

63. We have considered whether GEMA's costs are higher than would be reasonable and proportionate in responding to the appeal, having regard to the reasons identified by the Appellants.

64. In considering GEMA's costs, we have accepted the principle set out in *Eastwood*[46] and confirmed by the decisions in *Sidewalk Properties*[47] and *Mazanor Bakhtiyar*,[48] that GEMA's costs should be assessed on the same basis as if GEMA had engaged a solicitor in private practice.

65. We also consider that GEMA's costs are not unreasonably high in terms of the amount of time spent by GEMA in preparing its case. In particular, with regard to in-house legal costs, we consider they are not unreasonable when looked at in conjunction with the cost of GEMA's external legal advice. We also note the Appellants challenged whether there were excessive numbers of internal legal staff used and reprographic costs incurred. However, we

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[46] *In re Eastwood* [1975] Ch 112.
[47] *Sidewalk Properties Ltd v Twinn* [2015] UKUT 122 (LC).
[48] *The Queen on the Application of Mazanov Bakhtiyar v The Secretary of State for the Home Department* [2015] UKUT 00519 (IAC).

consider that, as noted in paragraph 30a, the costs incurred were not out of proportion given the importance of the sums of money at issue and that, as noted in paragraph 30c, GEMA's costs are not out of proportion when compared to those of the Appellants. It is not appropriate for us to undertake a detailed assessment of individual cost items (see paragraph 30c).

66. We have also considered whether GEMA's costs should be adjusted to reflect the other considerations in 22.2 of the Rules, including the reasons identified by the Appellants. We consider that there are reasons for making an adjustment to the costs recovered by GEMA from the Appellants, to the extent that some of GEMA's costs related to its own conduct as part of the process relating to the decision subject to this appeal.

67. At paragraphs 4.34 – 4.35 of our Decision on the appeal we noted that GEMA had given different views in its decisions in CMP224 and CMP261 as to which charges fall within the Connection Exclusion. We said:

> 4.34 GEMA noted in its CMP261 Decision that in relation to CMP224, it had consulted on the legal interpretation of the charges that fall within the Connection Exclusion, and in the consultation document, it had said that, on balance, its preliminary view was that the narrow interpretation was more persuasive. In relation to regulatory risk, it said the risk of successful challenge did not arise in relation to options using the narrow interpretation because they would be compliant with the Regulation regardless of which interpretation was correct. It said that it had not been necessary for the purposes of that decision (CMP224 Decision) for it to reach a concluded view on which interpretation was correct, and it had not done so. It said it had taken a pragmatic approach to favour options based on the narrow interpretation on grounds of legal risk.
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> 4.35 In the CMP261 Decision, GEMA concluded that a broad interpretation was correct.

68. GEMA consulted and took its decision on CMP224, having in mind an interpretation of the charges which fall within the Connection Exclusion which (albeit not concluded) was different from GEMA's view, as applied in its decision on CMP261.

69. As a consequence, we consider that, although the Appellants and others in the industry could not be certain how GEMA would interpret the scope of the Connection Exclusion, should it become necessary to do so, they were aware of what GEMA considered the better view as expressed in its decision in

CMP224. This explains why, when the interpretation of the Connection Exclusion became moot, industry participants, including the Appellants, developed a number of detailed proposals for Code modification in order to comply with the cost cap, on the basis that the narrow interpretation of the Connection Exclusion was to be followed.

70. We note that a period of over 18 months elapsed during GEMA's consideration of these proposals, from the initial submission of CMP261 until it issued its CMP261 decision, adopting a different, broad interpretation of the Connection Exclusion. We consider that the combination of the change from the 'premilinary view' indicated in CMP224, and the delay in GEMA stating that it was of the view that the broad interpretation was correct, is a factor which should be given weight in exercising our discretion as to the appropriate award of costs.

71. While we are not making any adjustment to the allocation of costs on the basis of the Appellants' own costs (or the rest of the industry), we consider that the consequences for GEMA's costs are of relevance. We consider that these circumstances contributed to the Appellants' decision to bring grounds 3 and 4 of their appeal. We also consider that circumstances in which a regulator, after a lengthy period, reaches a concluded view on a matter of this kind, on which considerable sums of money depend, which is different from its previously-expressed view (albeit not a concluded view) are ones in which an appeal is intrinsically more likely to be made by those affected. We therefore consider that GEMA's approach will have caused higher costs to be incurred by all parties to the appeal, including, as is relevant to this decision on *inter partes* costs here, GEMA's own costs.

72. We consider that the views of of the Competition Appeal Tribunal in *TalkTalk*[49] are consistent with a decision to make an adjustment to GEMA's costs in this case. The Tribunal said:

> [7] … The question then arises whether there are any circumstances which mean that costs should not follow the event. We have reached the conclusion that a costs order in OFCOM's favour is not justified in this particular case.
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> [8] … the Tribunal noted at paragraph 136(g) of the Judgment that the summary description of Market 1 contained in paragraph 1.19 of the WBA Market Power Determination was wrong and that respondents to OFCOM's 20 January 2011 consultation might well

[49] *Talk Talk v Ofcom* [2012] CAT 15.

not have understood exactly how OFCOM had defined Market 1 in the WBA Market Power Determination. In the event, this deficiency of process was cured in this case by the fact that the Tribunal heard TalkTalk's appeal on the merits. It is our judgment that weight should be given to this factor when exercising our discretion whether to award costs, in particular because it helps to explain why TalkTalk brought its appeal on the grounds it did.

73. As noted at paragraph 58, GEMA submitted that *TalkTalk* reflected an error of fact by the regulator. We acknowledge this factual difference. However, we consider that the effect in both cases is the same. Rather than dealing with an error of fact, in this instance the statement in CMP 224 of GEMA's view of the better interpretation of the price cap, issued after due and careful consideration in the process of adopting that decision, was capable of misleading the Appellants as to the correct interpretation of the price cap. This was especially so in view of the long delay in GEMA making its revised position clear. In both cases, a party was unclear as to the regulator's position and has subsequently extended the scope of its litigation as a result. So to that extent the regulator has brought some of issues to be decided in the appeal on itself.

74. GEMA also claimed that a decision to reduce its recoverable costs might deter GEMA and other regulators from expressing provisional views on issues (see paragraph 58). We do not agree that this a direct consequence of the approach in this case. GEMA has told us it did not make a provisional decision in CMP224, instead adopting an interpretation based on a course of prudent caution. Nor did it proceed to a final decision until required to do so by CMP261.

75. We consider that the approach GEMA took in CMP224 of deferring a firm decision on the interpretation and the delay in GEMA clarifying its position that it considered the broad interpretation of the Connection Exemption to be the correct legal interpretation, were capable of misleading the Appellants as to GEMA's interpretation of the Connection Exclusion and the firmness of that view. As we consider that GEMA has, therefore, to some extent brought these additional costs on itself, we consider that it should not recover all of its costs, notwithstanding that GEMA successfully defended the additional grounds of appeal. We have therefore decided that an adjustment to the amount that SSE/EDF is required to pay to GEMA in *inter partes* costs is appropriate.

76. We did not consider that either the Appellants or GEMA had presented persuasive reasons in their responses to the PDC to justify a change in the adjustment in the costs that GEMA can recover from the Appellants, as provisionally determined in the PDC.

Determination on inter partes costs

77. In view of the foregoing, and in light of all the circumstances, we consider that the appropriate *inter partes* costs order to impose is for the Appellants to pay GEMA 75% of GEMA's claimed costs incurred in connection with the appeal, which total £[✂] [0.75 x £[✂]].

Interest

78. Section 13(6) of EA04 provides that a person who is required by an order to pay a sum to another person must comply with the order before the end of the period of twenty eight days beginning with the day after the making of the order. If sums required to be paid have not been paid within this period, they shall bear interest at such rate as may be determined in the CMA's order.[50]

Determination

79. Our determination in relation to *inter partes* costs is that SSE/EDF are jointly and severally liable to pay £[✂] to GEMA in respect of GEMA's claimed costs of the appeal.

80. In addition, our determination is that the interest rate which shall apply in the event of sums set out in paragraphs 18 and 60 being unpaid (see paragraph 59) will be one percentage point above the Bank of England's base rate.

Costs Order

81. 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.

[50] Paragraph 13(7) of Schedule 22 to EA04.

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 and Economic adviser instructed by the CMA;

   (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, 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, based on average salaries for staff of that grade) 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

Name	*Job title*	*Grade*	*Recovery rate (£ per hour)*	*Time spent (hours)*	*Direct costs (£000s)*	*Overhead (£000s)**	*Total (£000s)*
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Totals				[✂]	[✂]	[✂]	[✂]

Source: CMA analysis.
*Numbers presented to nearest £000s but underlying calculations are not rounded. Overhead percentage (47.65%) 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 (£000s)*	*Overhead (£000s)**	*Total (£000s)*
John Wotton	Inquiry Panel Chair	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Anne Fletcher	Panel Member	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Jon Stern	Panel Member	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Totals				[✂]	[✂]	[✂]	[✂]

Source: CMA analysis.
* Numbers presented to nearest £000s but underlying calculations not rounded. Overhead percentage (47.65%) 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 London.

   (c) Travel and subsistence costs. These include the travel and accommodation costs of group members.

Table 3: Non-staff costs

Non-staff costs	*Amount (£000s)*
Counsel	[✂]
Technical/economic advisor	[✂]
Transcripts	[✂]
T&S	[✂]
	[✂]
Total	[✂]

Source: CMA analysis.
* Numbers presented to nearest £000s but underlying calculations not rounded.

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 (£000s)*
Staff	[✂]
Appeal Group	[✂]
Non-staff	[✂]
Roundings	[✂]
Total	**217**

Source: CMA analysis.
* Numbers presented to nearest £000s but underlying calculations not rounded.