

**BEFORE THE COMPETITION AND MARKETS AUTHORITY**

**IN THE MATTER OF APPEALS UNDER SECTIONS 23B OF THE GAS ACT 1986 AND 11C OF THE  
ELECTRICITY ACT 1989**

- 1) CADENT GAS LIMITED**
- 2) NATIONAL GRID ELECTRICITY TRANSMISSION PLC**
- 3) NATIONAL GRID GAS PLC**
- 4) NORTHERN GAS NETWORKS LIMITED**
- 5) SOUTHERN GAS NETWORKS PLC AND SCOTLAND GAS NETWORKS PLC (JOINT  
APPLICATION)**
- 6) SCOTTISH HYDRO ELECTRIC TRANSMISSION PLC**
- 7) SP TRANSMISSION PLC**
- 8) WALES & WEST UTILITIES LIMITED**

Appellants

**- AND -**

**GAS AND ELECTRICITY MARKETS AUTHORITY**

Respondent

**- SUPPORTED BY -**

**BRITISH GAS TRADING LIMITED**

Intervening

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**INTERVENTION NOTICE**

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**Persons sent copies of this notice of intervention:** An electronic copy of this Intervention Notice and accompanying documents has been sent to the persons listed under 'Contact details' in the respective Notices of Appeal.

**References:**

- (A) References in the form "[Appellant \*/NoA/§\*]" are to paragraph \* of the respective Notice of Appeals.
- (B) References in the form "Edwards §\*" are to paragraph \* of the first witness statement of the Gregory William Edwards.

## 1. INTRODUCTION AND SUMMARY

- 1.1 This is a Notice of Intervention (for convenience, '**Nol**' or '**intervention**') by British Gas Trading Limited ('**BGT**'). BGT is one of the largest energy suppliers in the UK and is part of the Centrica plc group which has significant interests in generator assets. BGT opposes the Appellants' respective appeals to the Gas and Electricity Markets Authority ('**GEMA**')s decision of 3 February 2021 to modify certain electricity and gas transmission, and gas distribution, licences to give effect to the RIIO-2 price controls ('**Decision**')(together, the '**Appeals**') in their entirety.
- 1.2 BGT is intervening in support of GEMA and does not seek to repeat points made in GEMA's reply. Rather, the purpose of this intervention is to supplement GEMA's reply, by providing concise additional submissions in relation to certain aspects of the Appeals on which BGT is well-placed to comment due to its position as:
  - 1.2.1 an industry player (as opposed to a sector regulator);
  - 1.2.2 a stakeholder that participated in the development of the framework for the RIIO-2 price controls; and
  - 1.2.3 a business which is directly and materially impacted by the outcome of the Appeals (as set out in Edwards §§12-18 and below).
- 1.3 BGT's intervention is focused on narrow aspects of the Appeals, setting out that GEMA:
  - 1.3.1 acted contrary to its statutory and regulatory duties;
  - 1.3.2 did not, but should have, 'aimed up' above the mid-point of the range when setting the cost of equity; and
  - 1.3.3 was wrong to apply an outperformance adjustment to the allowed cost of equity.
- 1.4 Without BGT's evidence, there is a risk that certain assertions made by the Appellants will not be fully rebutted.
- 1.5 BGT endorses GEMA's position set out in the Decision, namely that:
  - 1.5.1 GEMA is within the scope of its regulatory discretion;
  - 1.5.2 GEMA effectively 'aimed up' when assessing the cost of equity and there is no need for additional 'aiming up'; and,

- 1.5.3 the outperformance adjustment (wedge) is justified.
- 1.6 Whilst this Nol addresses only a few points raised in the Appeals, there should be no assumption that BGT accepts any of the evidence or submissions made by the Appellants or any other party, even if it is not expressly disputed.
- 1.7 In support of its intervention, BGT relies on the matters set out in this Nol and the factual evidence set out in the first witness statement of Gregory William Edwards, dated 23 April 2021. This document should be read as an integral part of this Nol and BGT relies on it as if set out here in full.

## **2. INTERESTS MATERIALLY AFFECTED BY THE DECISION**

- 2.1 BGT's interests are materially affected by the Decision in various capacities:
- 2.1.1 BGT holds an electricity supply licence under section 6(1) Electricity Act 1989, and a gas supply licence under section 7A Gas Act 1986, which entitles it to supply electricity and gas to its wide customer base. Since privatisation, BGT has become one of the UK's major electricity and gas suppliers. As detailed in Edwards §13, BGT is subject to distribution as well as transmission network use of system charges in addition to the charges levied by the Electricity System Operator (the '**ESO**') for the delivery of gas and electricity to its customers. As these charges are a necessary and unavoidable input cost, they are consequently reflected in BGT's gas and electricity tariffs. The distribution and transmission network use of system charges account for approximately 25%<sup>1</sup> of the average annual domestic energy bill.
- 2.1.2 BGT, and inevitably its customers, will be directly impacted by the outcome of the Appeals as the charges payable to transmission and gas distribution network operators will ultimately influence the prices of gas and electricity tariffs for BGT's customers. The outcome of the Appeals will impact on how much transmission and distribution network operators are required to contribute to the overall costs of the network, which in turn will impact on how much BGT and other suppliers (and their customers) will be required to pay during the price control period.
- 2.1.3 As detailed in section 5 below, the impact of the Appeals will have a serious

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<sup>1</sup> As detailed at Edwards §15.

commercial impact on BGT.

- 2.2 BGT therefore has a direct, material interest in the Decision. Furthermore, BGT considers that the Decision is in the best interests of its customers, and all customers of electricity and gas suppliers (regardless of the identity of their supplier).
- 2.3 For the reasons set out above, BGT is materially interested in the outcome of the Appeals for the purposes of Rule 10 of the Energy Licence Modification Appeals Rules (CMA70).<sup>2</sup>
- 2.4 BGT's intervention will assist the Competition and Markets Authority ('CMA') in determining the Appeals by giving evidence and perspectives which are relevant to the Appeals, but to which the CMA may not otherwise have access.<sup>3</sup>
- 2.5 BGT intends its intervention to be targeted and proportionate, and it is content for this intervention to be in writing only (though BGT would, of course, be delighted to help if the CMA would like to set up a hearing).<sup>4</sup>

### 3. GEMA'S DISCRETION AND THE STANDARD OF REVIEW

- 3.1 The Appellants make repeated attempts to portray GEMA's Decision as '*erroneous*', and '*inconsistent with regulatory practice*', and GEMA's approach generally as failing to provide regulatory certainty. With regard to the cost of equity, the Appellants allege that, for example:
- 3.1.1 "*Using such broad evidence to justify making a specific adjustment on the basis of regulatory discretion is wrong*" [Cadent NoA/5.52];
- 3.1.2 "*GEMA's approach to matters of regulatory discretion here, as in other areas of its cost of equity methodology, is wrong and inconsistent with best regulatory practice*" [Cadent NoA/5.58]; and
- 3.1.3 "*The choice whether to aim up or not, is not a question of regulatory discretion. This is justified by the consumer benefit of doing so, and the harm to consumers in not doing so. Moreover, an element of judgement in the extent of aiming up does not excuse GEMA from considering all of the*

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<sup>2</sup> CMA70: "Energy licence modification appeals: Competition and Markets Authority Rules", dated October 2017, para 10.3 (a).

<sup>3</sup> Ibid, para 10.3 (b).

<sup>4</sup> Ibid, para 10.3 (c).

*relevant considerations and adequately justifying its decision, or from properly having regard to its statutory duties such as the duty to give appropriate weight to principles of best regulatory practice and the principal objective."* [National Grid NoA/§3.349].

- 3.2 As an overarching point, BGT supports GEMA's position and considers that the decisions taken by GEMA in this Decision are within the realms of what is permitted by regulatory discretion.

#### **GEMA's statutory duties and the standard of review**

- 3.3 In exercising its functions under Part 1 of the Gas Act 1986 and Electricity Act 1989, GEMA is subject to a set of statutory objectives and duties. This includes, in section 4AA(1) of the Gas Act 1986 and section 3A(1) of the Electricity Act 1989 that:

*"The principal objective of [...] the [Authority] in carrying out [its] respective functions under this [Part 1] is to protect the interests of existing and future consumers in relation to [gas conveyed through pipes/electricity conveyed by distribution systems of transmission systems]"* Emphasis added.

- 3.4 In performing its duties, under sections 4AA(5) of the Gas Act 1986 and 3A(5) of the Electricity Act 1989, GEMA is required to carry out its functions in a manner best calculated to: *"to promote efficiency and economy on the part of persons authorised"*; and, under section 4AA(5A) of the Gas Act 1986, and section 3A(5A), GEMA must *"have regard to - (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and (b) any other principles appearing to him or, as the case may be, it to represent the best regulatory practice."* Emphasis added.

- 3.5 In BGT's view, GEMA has met these obligations, and – of foremost importance – GEMA's approach in this Decision seeks to protect customers.

- 3.6 In accordance with section 23D of the Gas Act 1986 and section 11C of the Electricity Act 1989, the lens through which the CMA can consider an appeal is clearly set out. This includes that the CMA must, amongst other things:

- 3.6.1 *"have regard, to the same extent as is required of the Authority, to the matters to which the Authority must have regard—(a) in the carrying out of its principal objective under section 4AA4; (b) in the performance of its duties under that*

section" (as per section 23D(2) of the Gas Act 1986); and

3.6.2 only allow an appeal *"to the extent that it is satisfied that the decision appealed against was wrong on one or more of the following grounds— (a) that the Authority failed properly to have regard to any matter mentioned in subsection (2); (b) that the Authority failed to give the appropriate weight to any matter mentioned in subsection (2); (c) that the decision was based, wholly or partly, on an error of fact; (d) that the modifications fail to achieve, in whole or in part, the effect stated by the Authority by virtue of section 23(7)(b)6; (e) that the decision was wrong in law."* (as per section 23D(4) of the Gas Act 1986). Emphasis added.

3.7 This standard of review is clear, and supported by the CMA guidance for this appeal, which clarifies that *"the CMA's function is to hear an appeal and it will review the challenged decision for error on the grounds of appeal put forward by the appellant"*.<sup>5</sup>

3.8 BGT considers the following findings from *British Gas Trading Limited v. GEMA (2015)*<sup>6</sup> particularly relevant:

3.8.1 Firstly, it is for the Appellants to establish that the Decision is wrong on one of the grounds specified in the relevant statute;<sup>7</sup>

3.8.2 Secondly, the CMA should not substitute its views for GEMA purely on the basis that it would have taken a different approach;<sup>8</sup>

3.8.3 Thirdly, GEMA's decision cannot be regarded as wrong simply because a different view would have been taken by another authority, or because that other authority attributes a different level of weight to certain factors;<sup>9</sup>

3.8.4 Fourthly, there should be no interference with the primary findings unless the CMA is *"satisfied that the [first instance] conclusion lay outside the bounds within which reasonable disagreement is possible"*;<sup>10</sup> and

3.8.5 Fifthly, the appeal procedure is not to be misused as a 're-run' of the original

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<sup>5</sup> CMA71: "Energy licence modification appeals: Competition and Markets Authority Guide", dated October 2007, para 3.2.

<sup>6</sup> The first appeal brought under section 11C of the Electricity Act (available [here](#)).

<sup>7</sup> Op. Cite. footnote 5, para 3.19 and 3.20.

<sup>8</sup> Op. Cite. footnote 5, para 3.43.

<sup>9</sup> *British Gas Trading Limited v. GEMA* (notified 29 September 2015) para 3.28, confirmed in 2007 E.ON UK plc v GEMA appeal (CC02/07).

<sup>10</sup> *British Gas Trading Limited v. GEMA* (notified 29 September 2015) para 3.30, and the Court of Appeal, quoted by the CMA in *Azzicurazioni Generali Spa v Arab Insurance Group* [2003] 1 WLR 577.

process already carried out by GEMA.<sup>11</sup>

- 3.9 This approach is different to that in the water sector, where the CMA is permitted to 'reopen' the price control. Therefore, the CMA's approach to the Appeals, and any references to the water appeals, must be considered in light of the difference in standard of review that is in play here, and what the CMA is permitted to comment on in the context of this statutory framework.
- 3.10 BGT also notes that, even though the Appellants (e.g., Cadent and National Grid) seek to draw parallels, and criticise GEMA for not following the approach adopted by the CMA in the PR19 appeal (and provisional determinations) and the Bristol Water determinations,<sup>12</sup> the energy sector is, in fact, a separate sector with its own regulatory precedents and processes. GEMA has carried out its own analysis, based on the evidence collated and its own analysis which it has consulted on. GEMA is not bound by the approach taken by the CMA or the Water Services Regulation Authority, Ofwat.
- 3.11 In addition, in order to permit an appeal, the CMA must come to the view that "*on the balance of probabilities that the Authority's decision was wrong on one or more of the grounds set out in the Acts*".<sup>13</sup>

#### **GEMA's margin of discretion**

- 3.12 A certain margin of discretion is within the regulator's statutory duties (and indeed in its capacity as a specialist professional body). A number of decisions support the view that the regulators' judgments should not be readily dismissed purely on the basis that alternative solutions and/or approaches can be presented.<sup>14</sup>
- 3.13 For example, in the recent RIIO-ED1 appeals,<sup>15</sup> the CMA noted that GEMA had made "*legitimate choices*" when balancing different considerations, and that the shortcomings of the consultation process or potential improvements to regulator's approach did not render the decision wrong.

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<sup>11</sup> Op. Cite. Footnote 5, para 3.36 and 3.37.

<sup>12</sup> The final determination of the CMA, dated 6 October 2015 and published 21 October 2015 in the reference to the CMA of Ofwat's PR14 price control, determination in respect of Bristol Water plc, and the provisional determinations of the CMA published on 29 September 2020 in relation to the Anglian Water, Bristol Water, Northumbrian Water and Yorkshire Water price controls for 2020-2025 following a reference from Ofwat on request of each company.

<sup>13</sup> Op. cite. Footnote 5, para 3.2.

<sup>14</sup> For example in BT v Ofcom; TalkTalk v Ofcom (Case numbers 1237-1238/3/3/15), dated 13 June 2016, paras 1.33 and 4.38.

<sup>15</sup> CMA Final determination: BGT v GEMA, dated 29 September 2015, para 5.63



- 3.14 Although the margin of discretion afforded to a regulator is not boundless (or particularly wide), the decisions made by GEMA in this Decision are, in BGT's view, within the bounds of GEMA's so called 'margin of discretion'. As set out in Edwards §§19-25, BGT consider that in this consultation process, GEMA's approach has been rigorous and extensive.

#### 4. THE APPEALS SHOULD NOT BE ALLOWED

- 4.1 It is not permissible for the Appellants to challenge the standard of review purely because of a mere disagreement with the Decision. As set out in Edwards §21, the Appellants' grounds appear to be the Appellants' 'disagreements' with the Decision dressed up as 'errors' made by GEMA.

- 4.2 In this regard, BGT would like to address the following points:

4.2.1 with regard to the allowed cost of equity, GEMA effectively 'aimed up' when setting the value of the cost of equity. The Decision structurally offers some protection for the Appellants against the downside risks and, as a consequence, ***no further 'aiming up' is required.***

4.2.2 The ***outperformance adjustment*** is required and justified as it sets out a well-calibrated price control that provides incentives to improve performance without generating excessive rewards, but recognising the practical difficulties of perfectly calibrating each individual element of the price control.

#### 5. POTENTIAL COMMERCIAL IMPACTS OF THE DECISION

- 5.1 BGT paid approximately £2.1 billion in transmission (including electricity system operation) and gas distribution charges for the 2020 calendar year (in nominal prices).
- 5.2 The Decision allows transmission and gas distribution network operators and the ESO to recover approximately £38.1 billion of allowed revenues (based on 2018/19 prices) over the RIIO-2 price control period.
- 5.3 The Appeals, if successful, would allow the transmission and gas distribution network operators to recover an additional £2.6 billion over the period of five years, starting 2021 and running until 2026. Further details on the potential commercial impact of the Decision on the Appeals are set out in Edwards §16.

#### 6. DIRECTIONS AND REMEDIES

- 6.1 For the reasons set out in sections 1, 2 and 5 above, BGT's interests are materially

affected by the Decision and its evidence and submissions are necessary to ensure certain assertions made by the Appellants are able to be challenged. Accordingly, BGT seeks a direction that BGT be admitted as an Intervener in the Appeals.

- 6.2 In respect of the substantive appeal, BGT considers that the CMA should dismiss the Appeals.
- 6.3 However, in the event that the Appeals are allowed, BGT requests that any remedy be delayed until April 2023 for the reasons set out in Edwards §18.

**Towerhouse LLP / British Gas Trading Limited**

**23 April 2021**