

**Cadent Gas Limited, National Grid Electricity  
Transmission plc, National Grid Gas plc,  
Northern Gas Networks Limited, Scottish  
Hydro Electric Transmission plc, Southern  
Gas Networks plc and Scotland Gas  
Networks plc, SP Transmission plc, Wales &  
West Utilities Limited  
vs  
the Gas and Electricity Markets Authority**

**Final determination on costs**

**22 June 2023**



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## **Members of the Competition and Markets Authority who conducted this appeal**

Kirstin Baker (*Chair of the Group*)

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## **Chief Executive of the Competition and Markets Authority**

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The Competition and Markets Authority has excluded from this final determination information which the appeal group considers should be excluded having regard to section 23G Gas Act 1986 and section 11H Electricity Act 1989. The omissions are indicated by [§<].

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# Final determination on costs

## 1. INTRODUCTION

- 1.1 This document is the Competition and Markets Authority (the **CMA**)’s final determination on costs. These costs arose from the appeals by Cadent Gas Limited (**Cadent**), National Grid Electricity Transmission plc (**NGET**), National Grid Gas plc (**NGG**), Northern Gas Networks Limited (**NGN**), Scottish Hydro Electric Transmission plc (trading as SSEN Transmission) (**SSEN-T**), Southern Gas Networks plc and Scotland Gas Networks plc (together **SGN**), SP Transmission plc (**SPT**), and Wales & West Utilities Limited (**WWU**) (**the Appellants**) to the CMA against the determinations of the Gas and Electricity Markets Authority (**GEMA**) of the 2021-2025 Electricity Transmission price control (**RIIO-T2**), the 2021-25 Gas Transmission price control (**RIIO-GT2**), and the 2021-2025 Gas Distribution price control (**RIIO-GD2**).

## 2. THE APPEALS

- 2.1 The CMA conducted these appeals in accordance with the procedure set out in Schedule 4A to the Gas Act 1986 (**GA86**), Schedule 5A to the Electricity Act 1989 (**EA89**) (the **Schedules**), the Energy Licence Modification Appeals: Competition and Markets Authority Rules (CMA70) (the **Rules**) and the associated Energy Licence Modification Appeals: Competition and Markets Authority Guide (CMA71) (the **Guide**).<sup>1</sup>
- 2.2 On 3 March 2021, the following gas distribution network operators (**GDNs**) applied to the CMA for permission to appeal against GEMA's RIIO-GD2 price control determination pursuant to section 23B of the GA86:
- (a) Cadent on five<sup>2</sup> grounds of appeal;
  - (b) NGN on five<sup>3</sup> grounds of appeal;<sup>4</sup>
  - (c) SGN on four<sup>5</sup> grounds of appeal; and
  - (d) WWU on six<sup>6</sup> grounds of appeal.
- 2.3 On 3 March 2021, the following electricity transmission operators (**TOs**) applied to the CMA for permission to appeal GEMA's RIIO-T2 price control determination pursuant to section 11C of the EA89:
- (a) NGET on two<sup>7</sup> grounds of appeal;
  - (b) SSEN-T on four<sup>8</sup> grounds of appeal; and
  - (c) SPT on four<sup>9</sup> grounds of appeal.

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<sup>1</sup> See Appendices D and E for relevant Rules and Guide. Note the Rules and Guide were updated in October 2022 but the previous versions (CMA70 and CMA71, both dated October 2017) still apply to this case.

<sup>2</sup> 1A (LTS Rechargeable diversion), 1B (London regional factors), 1C (joined Ground C Ongoing efficiency), Cost of equity (joined Ground A), Outperformance wedge (joined Ground B).

<sup>3</sup> Cost of equity, Outperformance wedge, Ongoing efficiency, 4A: Business Plan Incentive Stage 4, 4B: Efficient costs benchmark.

<sup>4</sup> Note that on 26 May 2021, the CMA granted permission to NGN to withdraw one ground and one sub-ground of its appeal.

<sup>5</sup> Cost of equity, Outperformance wedge, Ongoing efficiency, SGN Ground 4 (Efficiency benchmark).

<sup>6</sup> Cost of debt, Cost of equity, Repex, Licence modification process (joined Ground D), Ongoing efficiency, Tax clawback.

<sup>7</sup> Cost of equity, Outperformance wedge.

<sup>8</sup> Cost of equity, Outperformance wedge, Licence modification process, Transmission Network Use of System Charges (**TNUoS**).

<sup>9</sup> Cost of equity, Outperformance wedge, Ongoing efficiency, Licence modification process.

- 2.4 On 3 March 2021, the following gas transmission network operator applied to the CMA for permission to appeal GEMA's RIIO-GT2 price control determination pursuant to section 23B of GA86:
- (a) NGG on two<sup>10</sup> grounds of appeal.
- 2.5 On 17 March 2021, the CMA received representations and observations on the applications for permission to appeal from GEMA. On 31 March 2021, the CMA granted permission to appeal to all Appellants on all grounds. Each grant of permission was conditional<sup>11</sup> upon common grounds of appeal being considered together with those pleaded by other Appellants.
- 2.6 On 20 April 2021, following representations from the Appellants and GEMA (together the Parties), the CMA decided to extend the statutory deadline for the determination of the appeals pursuant to section 11G(3)(b) of the EA89 and section 23F(3)(b) of the GA86, by one month to 30 October 2021.
- 2.7 On 23 April 2021, the CMA received applications for permission to intervene in particular grounds from the following five entities:
- (a) British Gas Trading (**BGT**) on two<sup>12</sup> grounds;
- (b) Citizens Advice on two<sup>13</sup> grounds;
- (c) Electricity North West Limited (**ENWL**) on one<sup>14</sup> ground;
- (d) The Water Service Regulatory Authority (**Ofwat**) on two<sup>15</sup> grounds; and
- (e) SPT on one<sup>16</sup> ground.
- 2.8 On 6 May 2021, the CMA granted permission to BGT and Citizens Advice (the **Interveners**) to intervene in the same two grounds of appeal<sup>17</sup> pursuant to Rule 10.3 of the Rules. On 6 May 2021, the CMA rejected the applications to intervene from ENWL, Ofwat and SPT. On 18 May 2021, the CMA invited Ofwat and ENWL, pursuant to Rule 14.4(e) of the Rules, to make representations by submitting the

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<sup>10</sup> Cost of equity, Outperformance wedge.

<sup>11</sup> The CMA's grant of permission may be made subject to conditions under paragraph 1(11) of Schedule 4A of the GA86 and paragraph 1(11) of Schedule 4A of the EA89.

<sup>12</sup> Cost of equity, Outperformance wedge.

<sup>13</sup> Cost of equity, Outperformance wedge.

<sup>14</sup> WWU Cost of debt.

<sup>15</sup> Cost of equity, Cost of debt.

<sup>16</sup> TNUoS (SSEN-T Ground 4).

<sup>17</sup> Cost of equity, Outperformance wedge.



evidence in their respective applications to intervene, to be admitted as evidence in the appeal.<sup>18</sup>

- 2.9 The CMA carefully considered the notices of appeal (**NoAs**), responses and other pleadings and submissions, and heard from the Parties at clarification hearings between 13 and 24 May 2021 and at main, substantive hearings between 21 June and 9 July 2021. In addition, the CMA held hearings with the Interveners, and with Ofwat under Rule 14.4(e) of the Rules.<sup>19</sup>
- 2.10 On 11 and 12 August 2021, the CMA issued its provisional determination of the appeals to the Parties and Interveners. On 3 September 2021, the Parties and Interveners submitted their responses to the provisional determination of the appeals. In light of the responses received, the CMA held one further hearing on Friday 17 September 2021 and roundtable meetings on 27 and 28 September 2021 and considered further evidence.
- 2.11 The CMA notified its final determination of the appeals to the Parties on 28 October 2021, dismissing seven of the grounds of appeal, partially dismissing three grounds, and allowing two grounds (**Appeal Determination**).

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<sup>18</sup> Rule 14.4(e) provides that '*The CMA may at any time: e) invite representations on any matter relating to the appeal from any person whom it appears to the CMA may be affected by the outcome of the appeal.*'

<sup>19</sup> Oral hearings with the Parties and the Interveners were held in accordance with Rule 16.

### 3. DETERMINATION OF COSTS

- 3.1 The CMA is required by paragraph 12(1) of the Schedules to make an order for the recovery from the Parties of the costs it incurred in connection with the appeals. The CMA may also, pursuant to paragraph 12(3) of the Schedules, require a party to the appeals to make payments to another party in respect of costs reasonably incurred by that other party in connection with the appeals. These are known as inter partes costs.
- 3.2 On 2 November 2021, we invited any party seeking an award of costs in its favour to provide a statement of costs.
- 3.3 On 16 November 2021, we received statements of costs from the Parties.
- 3.4 Having taken the Parties' submissions into account, we issued our first provisional determination on costs (**PDC**) on 21 January 2022, as well as a draft costs order. We invited the Parties' representations on the PDC.
- 3.5 On 2 and 4 February 2022, we received the Parties' responses to the PDC. On 24 February 2022, we received the response to a request for information from GEMA about the calculation of its costs.
- 3.6 On 10 May 2022, we informed the Parties that we were aware from recent proceedings before the Supreme Court that the outcome of those proceedings might be relevant to our costs decisions. We therefore decided to stay the costs process until there was more clarity regarding certain legal matters.
- 3.7 On 22 June 2022, we invited the Parties to make further representations on inter partes costs in this appeal following the Supreme Court's decision in *Competition and Markets Authority v Flynn Pharma Ltd [2022] UKSC 14 (Flynn Pharma SC)*. Each of the Parties made further representations in response to this invitation on 13 July 2022.
- 3.8 Having taken the Parties' submissions into account we issued a second provisional determination on costs (**SPDC**) on 13 January 2023, as well as a draft costs order. We invited the Parties' representations on the SPDC.
- 3.9 On 27 January 2023, we received the Parties' responses to the SPDC.
- 3.10 Having taken the Parties' responses into account, we now issue this final determination on costs and a final costs order.

## **4. LEGAL FRAMEWORK IN RELATION TO COSTS**

### **CMA's duties and powers in relation to costs**

4.1 The CMA's duty and power to make costs orders, both in respect of the CMA's costs and in respect of payments between parties, in determining an appeal under section 23B of the GA86 and section 11C of the EA89 are set out in the Schedules, each at paragraph 12, as follows:

(1) A group<sup>20</sup> 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-

where the appeal is allowed in full, by the Authority;

where the appeal is dismissed in full, by the appellant;

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.

(4) A person who is required by an order under this paragraph to pay a sum to another person must comply with the order before the end of the period of 28 days beginning with the day after the making of the order.

(5) Sums required to be paid by an order under this paragraph but not paid within the period mentioned in sub-paragraph (4) shall bear interest at such rate as may be determined in accordance with provision contained in the order.

(6) Any costs payable by virtue of an order under this paragraph and any interest that has not been paid may be recovered as a civil debt by the person in whose favour that order is made.

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<sup>20</sup> This is a group of the CMA's members, formed for the purpose of carrying out the CMA's functions. See paragraph 4 of the Schedules.

- 4.2 Paragraph 13(2) of the Schedules provides that references in the Schedules to a ‘party’ are references to ‘(a) the appellant; or b) the Authority’.
- 4.3 The Rules<sup>21</sup> and associated Guide make further provision in relation to costs. We note in this context that the CMA adopted revised Rules and a revised Guide in October 2022. However, we have applied the Rules and Guidance that were in place during the appeal for the purposes of this determination of costs, copies of which are appended to this final determination.<sup>22</sup>
- 4.4 Before making any order for costs under Rule 21.1 or Rule 21.3:
- the CMA will provide the Parties with a provisional determination on costs and a draft of the costs order and give them a reasonable opportunity to make representations on each.<sup>23</sup>
- 4.5 In making its determination on costs, the CMA will have regard to decisions of the Competition Appeal Tribunal (**CAT**) in the specific context of regulatory appeals. The CMA may also draw guidance from previous decisions of the CMA and the Competition Commission (**CC**) made under similar legislative regimes in relation to the determination of costs.
- 4.6 However, the CMA is of the view that decisions on costs in respect of matters that are within the CMA’s discretion should not be allowed to harden into rigid rules, as they do not constitute binding precedent. A number of aspects of a determination on costs are matters of judgement and the CMA will seek to arrive at a result that is just in all the circumstances of the case.
- 4.7 In the following paragraphs, we address in more detail the considerations that are relevant to determinations of the CMA’s costs and inter partes costs.

## **Payment of CMA’s costs**

- 4.8 As noted above, paragraph 12 of the Schedules provides that a group which determines an appeal made under section 23B of the GA86 and section 11C of the EA89 must make an order requiring the payment to the CMA of its own costs incurred in connection with the appeal.
- 4.9 Paragraph 6.2 of the Guide sets out by way of general consideration that:
- When considering the appropriate proportions of the CMA’s costs to be paid by one of more of the parties where an appeal is allowed, the CMA’s starting point will ordinarily be the principle that costs follow

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<sup>21</sup> See Rule 21.

<sup>22</sup> See Appendices D and E for relevant Rules and Guide.

<sup>23</sup> Rule 21.2, Rule 21.6. and paragraph 6.3 of the Guide.

the outcome of the appeal. This means that the Authority should normally pay the proportion of the CMA's costs incurred in connection with an appeal ground allowed, and that the appellant should normally pay the proportion of the CMA's costs incurred in connection with the dismissed appeal grounds. The CMA will, however, also consider whether for each ground there are any good reasons to depart from this approach. The CMA might, for example, consider that good reasons exist for these purposes where a relevant ground of appeal is dismissed, but the CMA considers the ground of appeal was reasonably made in view of a relevant error made by the Authority in its decision **and** that error had a material impact on the time and expense of the CMA in addressing the ground of appeal to which it relates. In such a situation, the CMA might consider it appropriate for the Authority to pay the proportion of the CMA's costs incurred in connection with the relevant ground of appeal, notwithstanding that the ground of appeal was dismissed. This is likely to depend upon the magnitude of the error and whether the Authority had a reasonable opportunity to correct it prior to making its decision.

4.10 In its decision in *British Telecommunications plc v CMA*<sup>24</sup> (**BT v CMA**) the CAT 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 and was significantly different from that of the cost regimes in Civil Procedure Rules 44 or CAT Rule 104;<sup>25</sup>
- (b) the CMA will recover all its costs incurred in connection with the appeal, not just its direct costs;<sup>26</sup>

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<sup>24</sup> *British Telecommunications Plc v Competition and Markets Authority* [2017] [CAT 11](#).

<sup>25</sup> *BT v CMA* [2017] [CAT 11](#) at [25].

<sup>26</sup> In *BT v CMA* [2017] [CAT 11](#) at [32], the CAT 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 the Schedules ('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).

- (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;<sup>27</sup> and
- (d) the CMA is not entitled to make an order in relation to costs incurred unreasonably or unnecessarily.<sup>28</sup>

4.11 Where an appeal is partially allowed, an order for the CMA's costs:

should seek to reflect the substance of the appeal, and the time and effort expended by the [CMA] in connection with the substance of the appeal.<sup>29</sup>

4.12 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 the apportionment bearing in mind each party's relative success.<sup>30</sup>

4.13 Procedural flaws or issues 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.<sup>31</sup>

## **Discretion to order inter partes costs**

4.14 In relation to inter partes costs, paragraph 12(3) of the Schedules provides that the group:

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.

4.15 The Rules and Guide further set out some considerations the CMA will take into account when deciding whether and what order to make as regards inter partes costs.

4.16 Rule 21.3 echoes paragraph 12(3) of the Schedules and provides that the CMA group that determines an appeal may also make such order as it thinks fit for

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<sup>27</sup> *BT v CMA* [2017] [CAT 11](#) at [24].

<sup>28</sup> *BT v CMA* [2017] [CAT 11](#) at [29].

<sup>29</sup> *E.ON UK plc and GEMA and British Gas Trading Limited Decision (CC02/07)* (**E.ON**), at paragraph 9.4.

<sup>30</sup> *British Gas Trading Limited v The Gas and Electricity Markets Authority* (**BGT**), September 2015, at paragraph 9.7.

<sup>31</sup> *BGT* at paragraphs 9.9 and 9.11. It was held that the procedural deficiencies identified in GEMA's approach with one exception did not materially affect the substance of the appeal, *EDF Energy (Thermal Generation) Limited/SSE Generation Limited v Gas and Electricity Markets Authority and National Grid (Electricity Transmission Plc (Intervener), Determination on costs*, 3 May 2018 (**SSE/EDF**), at paragraph 30.

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.

4.17 Rule 21.5 provides that in deciding to make an order under Rule 21.3, the CMA group 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;

(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;

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

(c) the proportionality of the costs claimed.

4.18 On apportionment of costs, paragraph 6.4 of the Guide provides that:

The CMA will normally order an unsuccessful party to pay the costs of the successful party to the appeal, but may make a different order (for example, where it considers that an appeal has been brought by a consumer body in the public interest). The CMA will have regard to all the circumstances, including (as set out in Rule 21.5) the conduct of the parties, a party's degree of success and the proportionality of the costs claimed.[...] The CMA does not have the power to order costs against or for interveners.

4.19 In terms of the types of costs covered, paragraph 6.6 of the Guide clarifies that:

Where the CMA makes an order for costs in favour of one or more of the parties to the appeal under Rule 21.3, 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 in respect of costs incurred before the Authority first published its decision.

4.20 The Rules do not require interveners to contribute to the CMA's costs, nor to the costs of any party because, as noted above in paragraph 4.18, the CMA does not have the power to order costs against or for interveners.

4.21 Due consideration is also given to relevant case law, notably *Flynn Pharma SC* and [\*British Telecommunications Plc v Office of Communications, Judgment of the\*](#)

[Court of Appeal \(costs appeal\)](#) [2018] EWCA Civ 2542, [2019] Bus LR 592 (*BT v Ofcom*). Both these cases post-date the Guide and it is therefore appropriate to have regard to them when ordering inter partes costs against a regulator. The Supreme Court in *Flynn Pharma SC* rejected the position that there is a fixed starting point as to the determination of costs where the legislation is silent. Rather, the Supreme Court held that the matters which may be relevant to the determination of costs vary widely between cases.

- 4.22 The extent to which an adverse costs order against a public body might have a ‘chilling effect’ on its future performance of its functions can be a relevant consideration, though this must not be assumed (paragraphs 97 to 98 of the Supreme Court judgment).<sup>32</sup> The Supreme Court held at paragraph 98:

Whether there is a real risk of such a chilling effect depends on the facts and circumstances of the public body in question and the nature of the decision which it is defending - it cannot be assumed to exist. Further in my judgment, the assessment as to whether a chilling effect is sufficiently plausible to justify a starting point of no order as to costs in a particular jurisdiction is an assessment best made by the court or tribunal in question, subject to the supervisory jurisdiction of the appellate courts.

- 4.23 This is consistent with *BT v Ofcom*, in which the Court of Appeal recognised (at paragraph 86):

The CAT will itself be best placed to consider in detail the arguments on the ‘chilling effect’ advanced by both sides before us. It will need also to be astute to ensure that it is adopting a consistent and sustainable approach, based not on fine distinctions between the routes by which cases reach the CAT, but on applicable legal principle, the specific industry position best understood by the CAT itself, and its own procedural rules.

- 4.24 The Court of Appeal in *BT v Ofcom* set out further factors that were relevant to a consideration by specialist appeal bodies, of the appropriate starting point with respect to costs. Those factors were, broadly, an endorsement of the principles set out by Bingham LJ in *Bradford Metropolitan District Council v Booth* [2000] 164 JP 485, as later cited in cases including *Baxendale-Walker v Law Society* [2007] EWCA Civ 233; [2008] 1 WLR 426 and *R (Perinpanathan) v City of Westminster Magistrates’ Court* [2010] EWCA Civ 40; [2010] 1 WLR 1508,<sup>33</sup> specifically, that:

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<sup>32</sup> *Competition and Markets Authority v Flynn Pharma Ltd* [2022] UKSC 14

<sup>33</sup> *BT v Ofcom*, at paragraphs 69 and 71.



What the court will think just and reasonable will depend on all the relevant facts and circumstances of the case before the court. The court may think it just and reasonable that costs should follow the event, but need not think so in all cases.

Where a complainant has successfully challenged before justices an administrative decision made by a police or regulatory authority acting honestly, reasonably, properly and on grounds that reasonably appeared to be sound, in exercise of its public duty, the court should consider, in addition to any other relevant fact or circumstances, both:

the financial prejudice to the particular complainant in the particular circumstances if an order for costs is not made in his favour; and

the need to encourage public authorities to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged.

4.25 This line of authority was confirmed in *Flynn Pharma SC*.<sup>34</sup>

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<sup>34</sup> The Supreme Court held the principle supported by the Booth line of cases that 'where a public body is unsuccessful in proceedings, an important factor that a court or tribunal exercising an apparently unfettered discretion should take into account is the risk that there will be a chilling effect on the conduct of the public body, if costs orders are routinely made against it in those kinds of proceedings, even where the body has acted reasonably in bringing or defending the application', at paragraph 97 of *Flynn Pharma SC*.

## 5. CMA COST ASSESSMENT

### Overview of CMA costs

5.1 Our assessment of the CMA's costs takes account of the following:

- (a) The Appellants advanced 12 grounds of appeal. They raised a number of complex legal and practical questions in detailed pleadings comprising NoAs of more than 1,000 pages, further main submissions of more than 1,000 pages, more than 60 witness statements, around 50 commissioned reports and over 2,000 supporting documents.
- (b) GEMA's Response to the NoAs comprised 332 pages, and further submissions from GEMA comprised over 100 pages. These were supported by 20 witness statements.
- (c) The CMA also received five notices of intervention and additional information from information requests.
- (d) The CMA had statutory obligations:
  - (i) to appoint the required three group members to determine the appeal<sup>35</sup> (the **Group**), and
  - (ii) to determine the appeals within the period of 6 months beginning with the permission date.<sup>36</sup>
- (e) To meet this deadline, it was necessary for the CMA to appoint a substantial staff team to assist the Group. That team drew on relevant administrative, project management and delivery, technical, economic and legal skills from across the organisation, as well as two external counsel (junior and senior) and two contractors with relevant expertise. Both the Group and the CMA staff team used CMA resources (such as IT systems and support, administrative resources and human resource functions) to support the appeals. An expert panel was set up to provide expert input on the cost of equity ground. This panel included three additional senior specialists from the CMA.
- (f) The Group and the staff team were required to consider, analyse and understand a very large amount of complex material within the relevant time period. As well as the legal and regulatory issues involved, they were required to understand in a high level of detail the technical, practical and administrative

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<sup>35</sup> Paragraph 4(2) of the Schedules.

<sup>36</sup> Section 23F of the GA86 and Section 11G of the EA89. This time period was subject to a one-month extension pursuant to section 11G(3)(b) of the EA89 and section 23F(3)(b) of the GA86.

operation of the Great Britain (**GB**) electricity and gas transmission systems and the GB gas distribution system, and their organisation and management.

- (g) The Group and the staff team managed the conduct of the appeals primarily through a series of group meetings at which detailed papers relating to the progress and examination of the issues were considered. In addition, the Group and staff team progressed their work through a substantial number of ad hoc meetings, written communications and advice.
- (h) The number of Appellants, and the range of grounds to be heard, required additional planning and co-ordination resource in comparison with most regulatory appeals. The CMA developed and issued seven process notes during the appeals, reflecting the need for additional guidance to accompany the Rules and Guide arising from the particular circumstances of these appeals.
- (i) Disposing of the appeals required the holding of clarification hearings and the consideration of 'teach-in' materials prepared by the Parties, in order for the CMA better to understand the issues and facts in the appeals. Main hearings with the Parties and Interveners, requiring extensive preparation by the Group and the staff team, were held in June and July 2021. A fuller chronology of the key stages in the appeals is set out in Appendix B.
- (j) CMA staff supported the Group at the hearings, attending only those hearings or parts of hearings relevant to their responsibilities.
- (k) Following the main hearings, the Group and the staff team considered a large number of documents and submissions, and the substantial oral evidence from the Parties and Interveners.
- (l) The CMA provided the Parties with its provisional determination of the appeals for comment and assessed the responses. Following responses to the provisional determination of the appeal, the CMA held response and relief hearings, as appropriate, on several grounds.
- (m) Disposing of the appeals and considering properly all the relevant documents, submissions and other evidence, resulted in a final determination comprising over 1,000 pages.
- (n) The CMA producing provisional and, in due course, final cost determinations, to enable it to make an order requiring payment of the CMA's own costs in connection with the appeal as required under paragraph 12(1) of the Schedules.

5.2 Determining the appeals was therefore an intensive and substantial exercise. It was necessary for the Group and the staff team to devote to it the number of hours

of work set out in Appendix A, and to use the CMA's supporting resources (for which the standard overhead uplift rate of 56% is applied).<sup>37</sup> Indeed, it was necessary for many of the personnel involved to work significant excess hours at times. However, the CMA does not pay overtime to staff and costs are recovered only for hours which the CMA has paid.

5.3 The total CMA costs of the appeals to be reimbursed are £1,969,691 (see Appendix A for a detailed statement of costs). These costs include:

- (a) CMA staff, contractors' and panel members' costs;
- (b) External advisers' costs (Counsel);
- (c) CMA overhead allowance (defined as a standard percentage uplift of relevant staff and panel member costs); and
- (d) Non-staff costs and disbursements (for example transcription costs).

5.4 The appeals were partially allowed. We therefore need to consider the appropriate proportion of costs to be met by the various Parties, 'in all the circumstances'.<sup>38</sup>

5.5 The Guide sets out that in considering the appropriate proportions of the CMA's costs to be paid by one or more of the Parties where an appeal is partially allowed, the CMA's starting point will ordinarily be the principle that costs follow the outcome of the appeal. However, the Guide states that the CMA will also consider whether for each ground there are any good reasons to depart from this approach.<sup>39</sup>

## **Appellants' views**

5.6 Two appellants submitted comments in their original statements of costs dated 16 November 2021:

- SSEN-T did not provide detailed representations but submitted that GEMA should pay the relevant proportion of the CMA's costs relating to Grounds B and D, and the SSEN-T TNUoS ground.<sup>40</sup>

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<sup>37</sup> The CMA overhead rate applied to the recharging of costs is calculated by applying a pre-determined recovery charge percentage to the total direct costs of the rechargeable work. The CMA's pre-determined recovery charge percentage is calculated by dividing the combined back-office annual cost budgets (Corporate Services and Board & Panel) by the combined front line service annual cost budgets (Enforcement, Legal Services, Markets and Mergers, Office of Chief Economic Advisor and Policy & International). The recovery rate for both 2021/22 and 2022/23 is 56%.

<sup>38</sup> Paragraph 12(2)(c) of the Schedules.

<sup>39</sup> Guide, paragraph 6.2.

<sup>40</sup> SSEN-T's submission on costs, 16 November 2021, paragraph 1.7 <sup>41</sup> SPT's submission on costs, 16 November 2021, paragraph 10.

- SPT submitted that its suggested approach for apportioning inter partes costs (that costs should follow the result of the appeals in relation to each ground) might assist the CMA in considering the apportionment of its own costs.<sup>41</sup>

## **GEMA's views**

- 5.7 GEMA submitted that it and the Appellants should pay the CMA's costs of each appeal in proportion to their relative success.<sup>42</sup>

## **Our final determination**

- 5.8 Our starting point remains, as it was in the PDC and the SPDC, the principle that costs follow the outcome of the appeal, that is, GEMA pays the CMA's costs for grounds which were upheld, and the Appellants pay the CMA's costs for grounds dismissed. We do not consider that there are any good reasons to depart from this approach.
- 5.9 We determine, as we did in the PDC and the SPDC, that the CMA's own costs should be met by the Parties according to the following principles:
- (a) For grounds on which the CMA found wholly for the appellant(s), GEMA should meet the CMA's costs attributable to that ground (see paragraphs 5.26 to 5.29, and 5.57 to 5.58);
  - (b) For grounds on which the CMA found wholly for GEMA, the appellant(s) should meet the CMA's costs attributable to that ground (see paragraphs 5.22 to 5.25, and 5.59 to 5.71);
  - (c) For grounds on which the CMA found partially for the appellant(s), and partially for GEMA, both GEMA and the appellant(s) should meet the CMA's costs, in proportions set out below in paragraphs 5.30 to 5.45, and 5.47 to 5.52;
- 5.10 In relation to the CMA's costs which are not attributable to specific grounds, all Parties should meet the CMA's costs in equal shares according to the 'costs not attributable to specific grounds' principles set out in paragraphs 5.12 to 5.16.

### ***Costs not attributable to specific grounds***

- 5.11 A proportion of the CMA's costs of these appeals is not attributable to specific grounds. These costs include:

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<sup>41</sup> SPT's submission on costs, 16 November 2021, paragraph 10.

<sup>42</sup> GEMA's submission on costs, 16 November 2021, paragraph 2a.

- (a) the appointment and administration of an appeal group;
- (b) resources to support the Group and the staff in the project management of the appeal (the core 'delivery' staff);
- (c) clarification and main hearings;
- (d) communication and publication throughout and at the end of the appeal; and
- (e) preparation of the provisional and final cost determinations and the draft and final costs orders.<sup>43</sup>

- 5.12 In our view, the mixed outcome of the appeals, with neither GEMA nor any appellants succeeding on every point, means that there is no unsuccessful party which the CMA would ordinarily find should pay these non-attributable costs.
- 5.13 In the PDC and SPDC, we considered that non-attributable costs should be borne equally between eight Parties, with NGET and NGG bearing one share rather than two. NGET and NGG applied for their appeals to be joined at the permission stage and submitted substantially the same arguments in their NoAs. It was our view that the marginal additional cost of two National Grid parties appealing, rather than one, was small and it would be disproportionate either to seek to quantify it, or to require both parties each to meet a ninth of these costs.
- 5.14 In its response to the PDC, NGET/NGG submitted that these 'general' costs should not be allocated equally between the Parties but to each ground in proportion to the CMA's ground-specific costs. The Parties should then pay the CMA's costs following the principles that apply to each specific ground (as set out further below).<sup>44</sup>
- 5.15 We have considered NGET/NGG's submission but do not consider it a good reason to depart from the approach followed in the PDC. Allocating the CMA's 'general' costs by ground rather than by party does not produce a more appropriate result, especially because there are certain fixed costs to hearing appeals that would have to be incurred in any event. Any party appealing a price control should expect such costs to arise, regardless of the number of grounds or indeed appellants.
- 5.16 The CMA costs to be recovered which are not attributable to a specific ground have been assessed as £931,326 (see Appendix A).<sup>45</sup> Our final determination is

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<sup>43</sup> Note that the PDC did not include costs of the preparation of the provisional and final cost determination and the draft and final costs orders, but we consider these are appropriate to include as costs incurred by the CMA in connection with the appeal.

<sup>44</sup> NGET/NGG's Response to the Provisional Determination on Costs, 4 February 2022, paragraph 1.4.

<sup>45</sup> Appendix A, Tables 4 and 5 and paragraph 18.

that each party, with NGET and NGG counting as one party, should pay £116,416 towards this aspect of the CMA's costs.

***Costs attributable to specific grounds and specific parties***

5.17 The CMA staff team recorded their time against the following categories of work:

- (a) 'General' work to support the group hearing the appeals
- (b) Ground A (cost of equity)
- (c) Ground B (outperformance wedge)
- (d) Ground C (ongoing efficiency (**OE**))
- (e) Ground D (licence modification process), and
- (f) Individual grounds.

5.18 Our final apportionment of costs attributable to specific grounds is set out in detail in Appendix A (and has not changed from the provisional apportionment of costs set out in the PDC or SPDC, for the reasons set out below).

***CMA findings in the appeals***

5.19 The CMA found wholly for the appellant(s) in relation to two grounds:

- (a) Ground B, Outperformance wedge;
- (b) NGN Ground 4, Business Plan Incentive (**BPI**) Stage 4.

5.20 The CMA found wholly for GEMA in relation to seven grounds:

- (a) Ground A, Cost of equity;
- (b) Cadent Ground 1B, London Regional Factor;
- (c) SGN Ground 4, Benchmark efficiency;
- (d) SSEN-T Ground 4, TNUoS;
- (e) WWU 'Head A', Cost of debt;
- (f) WWU 'Head C', Repex;
- (g) WWU 'Head F', Tax clawback.

- 5.21 The CMA found partially for the appellant(s), and partially for GEMA, in relation to three grounds:
- (a) Joined Ground C, OE, on which the CMA found for GEMA in relation to the OE challenge, and for the appellants in relation to the innovation uplift;
  - (b) Joined Ground D, Licence modification process, on which the CMA found for GEMA in relation to WWU's appeal, and for SPT and SSEN-T in relation to appeals concerning certain Special Conditions;
  - (c) Cadent Ground 1A, on which the CMA found for GEMA in relation to including some local transmission scheme (**LTS**) rechargeable diversions project in the econometric model, and found for Cadent that GEMA was wrong in including large, atypical LTS rechargeable diversions projects in that model.

### ***Apportionment of costs attributable to specific grounds***

#### *Ground A, Cost of equity*

- 5.22 Our records indicate that £222,883 of the CMA's costs can be attributed directly to hearing this ground.
- 5.23 The CMA found that GEMA was not wrong in its approach to, or estimate of, the costs of equity, and dismissed this ground of appeal.
- 5.24 Our provisional determination in relation to costs attributable to this ground in the PDC was that the Appellants should pay this amount in full, in seven equal shares, with NGET and NGG, along with all other appellants, each paying one equal share of £31,840 each.
- 5.25 The Parties did not raise any objections to the apportionment of costs to Ground A appellants in their responses to the PDC or the SPDC and we therefore determine that each appellant should pay the CMA £31,840 in relation to Ground A, with NGET and NGG together paying one share.

#### *Ground B, Outperformance wedge*

- 5.26 Our records indicate that £128,943 of the CMA's costs can be attributed directly to hearing this ground.
- 5.27 The CMA found for the Appellants on this ground, determining that GEMA was wrong to introduce the outperformance wedge.



- 5.28 Our provisional determination in relation to costs attributable to this ground in the PDC was that GEMA should pay this amount in full.
- 5.29 The Parties did not raise any objections to the attribution of CMA's costs to GEMA in their responses to the PDC or the SPDC and we therefore determine that GEMA should pay £128,943 in full.

*Ground C, OE and innovation uplift (IU)*

- 5.30 The CMA found for GEMA that it did not err in its application of the OE challenge.
- 5.31 The CMA found for those appellants which challenged the IU, that GEMA was wrong in its decision to set the IU at 0.2%. The CMA determined that this decision was wrong in that it was based on errors of fact, was wrong in law, and further was in breach of GEMA's best practice duty.
- 5.32 The CMA's costs attributable to this ground were £182,951 in total. In the PDC, we considered that around 75% of our resources and time on this ground were spent assessing evidence in relation to the OE challenge, and 25% assessing evidence in relation to the IU.
- 5.33 Our provisional determination in relation to the CMA's costs attributable to this ground was that:
- (a) GEMA should pay 25% of the CMA's costs attributable to this ground (£45,738);
  - (b) Cadent, NGN, SPT and WWU should each pay an equal share of the remaining 75% of the CMA's costs attributable to this ground, ie 18.75% (£34,303) each; and
  - (c) As SGN was wholly successful in its appeal under this ground, which was limited to the IU, we did not consider that SGN should contribute to the CMA's costs attributable to this ground.
- 5.34 In its response to the PDC, SPT submitted that the correct split should instead be 50-50 between the two sub-grounds (OE challenge and IU). SPT argued that the CMA had found multiple deficiencies in GEMA's reasoning in relation to the OE challenge. Subsidiarily, SPT argued that the work on the two sub-grounds had been relatively even.<sup>46</sup>
- 5.35 We have considered SPT's submission but maintain the allocation of our costs for this ground as set out in the PDC. The CMA carried out more detailed work on the

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<sup>46</sup> SPT's Representations on the Provisional Determination on Costs, 4 February 2022, paragraph 17.

OE challenge than on the IU. In particular, the CMA's work in respect of Ground C was more heavily weighted towards OE because it required a significant amount of complex analysis which took up significantly more internal CMA resource than the IU. The differences between the sub-grounds are furthermore reflected in the Final Report which included around 150 pages on OE and around 55 pages on IU.

5.36 Accordingly, we determine that the position in relation to the CMA's costs attributable to this ground is as follows:

- (a) GEMA should pay 25% of the CMA's costs attributable to this ground (£45,738);
- (b) Cadent, NGN, SPT and WWU should each pay an equal share of the remaining 75% of the CMA's costs attributable to this ground, ie 18.75% (£34,303) each.

#### *Ground D, Licence modification process*

5.37 The CMA found for SPT and SSEN-T in relation to the majority of Special Conditions that these two appellants appealed, determining that GEMA was wrong in law and acted ultra vires in the way it provided for self-modification of those Special Conditions.

5.38 The CMA found for GEMA in relation to the appeal brought by WWU, determining that GEMA did not fail to have regard to its statutory duties and therefore was not wrong to include obligations in subsidiary documents and provide that those documents could be modified by issuing directions.

5.39 Determining both these aspects of Ground D involved considering a number of detailed issues as well as complex legal questions involving statutory interpretation, including applying the legal principles to each of the 15 Special Conditions appealed by SPT and SSEN-T and reviewing the Associated Documents that related to WWU's appeal, and in both cases considering associated guidance and documents, where these were available.

5.40 Our provisional assessment in the PDC was that of the CMA's costs of determining this ground, two-thirds could be attributed to consideration of SPT's and SSEN-T's appeals, and one-third to consideration of WWU's appeal. The CMA's costs attributable to this ground total £124,789.

5.41 Our provisional determination in the PDC was that:

- (a) GEMA should pay two thirds of the CMA's costs attributable to this ground, ie £83,193; and

(b) WWU should pay one third of the costs attributable to this ground, ie £41,596.

5.42 In its response to the PDC, WWU submitted that it should only pay 20% of the CMA's costs in relation to ground D rather than one-third, arguing that considerably more time, effort and legal resource was devoted to considering the case made by SSEN-T and SPT than was given to the case of WWU.<sup>47</sup>

5.43 WWU has not made submissions in response to the SPDC on the basis that the Court of Appeal has remitted its application for judicial review to the Administrative Court for hearing, and if WWU is successful it will need to seek a consequential declaration and quashing order in respect of the final determination and order on costs.

5.44 Having therefore based our considerations on WWU's representations in response to the PDC, we remain of the view that the allocation outlined in the PDC is appropriate. We have considered the staff and Group time involved in the various aspects of this ground. While some additional time was incurred in respect of SPT's and SSEN-T's appeal due to GEMA changing its case, it was also the case that SPT's and SSEN-T's appeals raised similar arguments that could be considered together. Much time on this ground was also spent on WWU's appeal, in particular due to the large volume of material provided by WWU.

5.45 We therefore determine that:

(a) GEMA should pay two thirds of the CMA's costs attributable to this ground, ie £83,193; and

(b) WWU should pay one third of the costs attributable to this ground, ie £41,596.

### *Individual grounds*

5.46 From our records, £378,798 of the CMA's costs can be attributed to the eight individual grounds brought in the appeals. Of these grounds, from considering the hours spent by individual staff members, each allocated to work on one or more of the individual grounds, in the PDC we had provisionally attributed the costs of 'individual grounds' as follows:

(a) Cadent 1A, LTS rechargeable diversions: £55,083;

(b) Cadent 1B, London Regional Factors: £62,011;

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<sup>47</sup> WWU's Response to the CMA's Provisional Determination on Costs, 4 February 2022, paragraph 3.2.

- (c) NGN4, BPI Stage 4: £17,455;
- (d) SGN4, Efficiency benchmark: £38,161;
- (e) SSEN-T 4, TNUoS: £51,334;
- (f) WWU Head A, Cost of debt: £29,878;
- (g) WWU Head C, Repex: £63,242; and
- (h) WWU Head F, Tax clawback: £61,634.

### ***Cadent Ground 1A***

- 5.47 The CMA found for Cadent that GEMA was wrong in including large, atypical LTS rechargeable diversions projects in the econometric model. In doing so GEMA reached an incorrect conclusion when calculating the regressed costs that are used in the econometric modelling, which was thus based wholly or partly on an error of fact. The CMA concluded, following from this, that by incorrectly incorporating large, atypical LTS rechargeable diversions in the above exercise, GEMA had failed to have regard to best regulatory practice.
- 5.48 The CMA determined that GEMA was not wrong in including the other LTS rechargeable diversions projects in the econometric model.
- 5.49 Our provisional determination in the PDC and the SPDC on the CMA's costs was that GEMA and Cadent should each pay 50% of the CMA's costs attributable to this ground, ie £27,542 each.
- 5.50 In its responses to the PDC and to the SPDC,<sup>48</sup> Cadent submitted that the CMA's costs in relation to its Ground 1A should not be split 50-50 between GEMA and Cadent, but should instead be borne solely by GEMA. Cadent reasoned that its appeal on this ground had substantially succeeded in whole, given that 95% of the costs claimed had been removed from the model.
- 5.51 This ground was a partial win for Cadent as the CMA found that some of the LTS projects should be excluded from the calculation while others could be included, as set out above. We acknowledge that in terms of value, this results in around 95% of the costs claimed being removed from the model. However, our approach on grounds that are partial wins is to split costs equally between the relevant

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<sup>48</sup> Cadent's Representations on the Provisional Determination on Costs and Draft Order, 2 February 2022, paragraphs 5 and 6 and Cadent's Representations on the Second Provisional Determination on Costs and Draft Order, 27 January 2023.

parties (unless the ground can be divided into sub-grounds, some of which were outright wins and others outright losses, as for Grounds C and D).

- 5.52 We therefore determine that GEMA and Cadent should each pay 50% of the CMA's costs attributable to this ground, ie £27,542 each.

***Cadent Ground 1B***

- 5.53 Our provisional determination in the PDC was that Cadent should pay £62,011 of the CMA's costs in respect of this ground, on the basis that we dismissed the appeal on this ground.
- 5.54 The Parties did not raise any objections in their responses to the PDC or the SPDC and we therefore determine that Cadent should pay the CMA £62,011 for its costs attributable to this ground.

***NGN Ground 4***

- 5.55 Our provisional determination in the PDC on the CMA's costs was that GEMA should pay £17,455, on the basis that we allowed the appeal on this ground.
- 5.56 The Parties did not raise any objections in their responses to the PDC or the SPDC and we therefore determine that GEMA should pay this amount in full.

***SGN Ground 4***

- 5.57 Our provisional determination in the PDC on the CMA's costs was that SGN should pay £38,161 of the CMA's costs in respect of this ground, on the basis that we dismissed the appeal on this ground.
- 5.58 The Parties did not raise any objections in their responses to the PDC or the SPDC and we therefore determine that SGN should pay the CMA £38,161 for its costs attributable to this ground.

***SSEN-T Ground 4***

- 5.59 Our provisional determination in the PDC was that SSEN-T should pay £51,334 of the CMA's costs, on the basis that we dismissed the appeal on this ground.
- 5.60 In its response to the PDC, SSEN-T submitted that GEMA should pay the CMA's costs relating to this ground on the basis that it was GEMA's unreasonable conduct that led to SSEN-T having to pursue an appeal on this ground.<sup>49</sup> SSEN-T stated that the CMA's decision on this ground was based on information which

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<sup>49</sup> SSEN-T's Response to Provisional Determination on Costs, 4 February 2022, paragraphs 61 and 62.

only came to light during the course of this appeal rather than during the price control consultation process.<sup>50</sup> In the Appeal Determination, we have indeed stated that:

despite requests during the consultation process, GEMA did not carry out analysis or share information, for example, on the extent of the under-recoveries.<sup>51</sup>

- 5.61 SSEN-T stated that it should not have to bear the costs that could have been avoided if GEMA had carried out its consultation in a transparent, thorough, and well-evidenced manner.<sup>52</sup>
- 5.62 In our SPDC, we maintained that SSEN-T had not pointed to any specific pieces of analysis or information that would have avoided the need for it to bring an appeal on this ground, had it been made available by GEMA at the consultation stage. We also indicated that it is in the nature of appeals of this type that more thorough investigations take place than at the consultation stage; indeed, this is the case in relation to most of the grounds considered in this appeal.
- 5.63 In response to the SPDC,<sup>53</sup> SSEN-T accepted that it is expected that more detail often comes to light during an appeal, but maintained that the critical point that the CMA does not factor into its reasoning is that GEMA only revealed the evidence forming the basis on which the CMA dismissed the appeal during the course of the appeal. SSEN-T should not have to bear the costs of a ground of appeal that could have been avoided due to GEMA's own conduct.
- 5.64 While we acknowledged in our final Appeal Determination that there was a lack of quantitative analysis during the consultation process, including the impact on SSEN-T,<sup>54</sup> we also disagreed with SSEN-T that GEMA's decision was so unevidenced that it was essentially arbitrary, and therefore an error of law.<sup>55</sup> SSEN-T has not convinced us that there were specific things that GEMA might and should have done at the consultation stage that would clearly have led to SSEN-T not bringing an appeal on this ground. Overall, we do not consider it appropriate to depart from the principle that the loser pays the winner's costs on this ground.
- 5.65 For this reason, we determine that SSEN-T should pay the CMA £51,334 for its costs attributable to this ground.

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<sup>50</sup> SSEN-T's Response to Provisional Determination on Costs, 4 February 2022, paragraph 58.

<sup>51</sup> Appeal Determination dated 28 October 2021, paragraph 13.119.

<sup>52</sup> SSEN-T's Response to Provisional Determination on Costs, 4 February 2022, paragraph 59.

<sup>53</sup> SSEN-T's Response to the Second Provisional Determination on Costs, 27 January 2023, paragraphs 2 and 10-16.

<sup>54</sup> See paragraph 13.119.

<sup>55</sup> See paragraph 13.123.

### ***WWU Head A, Cost of debt***

- 5.66 Our provisional determination in the PDC was that WWU should pay £29,878 of the CMA's costs, on the basis that we dismissed the appeal on this ground.
- 5.67 Neither WWU, nor indeed any other Party, raised any objections in their responses to the PDC or the SPDC and we therefore determine that WWU should pay the CMA £29,878 for its costs attributable to this ground.<sup>56</sup>

### ***WWU Head C, Repex***

- 5.68 Our provisional determination in the PDC was that WWU should pay £63,242 of the CMA's costs, on the basis that we dismissed the appeal on this ground.
- 5.69 Neither WWU, nor indeed any other Party, raised any objections in their responses to the PDC or the SPDC and we therefore determine that WWU should pay the CMA £63,242 for its costs attributable to this ground.

### ***WWU Head F, Tax clawback***

- 5.70 Our provisional determination in the PDC was that WWU should pay £61,634 of the CMA's costs, on the basis that we dismissed the appeal on this ground.
- 5.71 Neither WWU, nor indeed any other Party, raised any objections in their responses to the PDC or the SPDC and we therefore determine that WWU should pay the CMA £61,634 for its costs attributable to this ground.

## **Final determination on the CMA's costs**

- 5.72 Our final determination is that, pursuant to paragraph 12 of the Schedules, the CMA's costs of £1,969,691 should be paid by the Appellants and GEMA as follows:
- (a) Cadent: £116,416 towards non-attributable costs and £155,696 in respect of costs related to Grounds A and C, and Cadent's Grounds 1A and 1B, totalling £272,112;
  - (b) NGET/NGG: £116,416 towards non-attributable costs and £31,840 in respect of costs related to Ground A, totalling £148,256;

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<sup>56</sup> WWU did not object to the CMA's provisional determination on costs in respect of this specific ground (nor in relation to its two other individual grounds, WWU Repex and WWU Tax clawback) though it submitted that the CMA's costs determination should be stayed pending resolution of its judicial review proceedings brought against the final Appeal Determination (see further paragraph 5.43).

- (c) NGN: £116,416 towards non-attributable costs and £66,144 in respect of costs related to Grounds A and C, totalling £182,560;
- (d) SGN: £116,416 towards non-attributable costs and £70,002 in respect of costs related to Ground A and SGN's Ground 4, totalling £186,417;
- (e) SPT: £116,416 towards non-attributable costs and £66,144 in respect of costs related to Grounds A and C, totalling £182,560;
- (f) SSEN-T: £116,416 towards non-attributable costs and £83,175 in respect of costs related to Ground A and SSEN-T's Ground 4, totalling £199,591;
- (g) WWU: £116,416 towards non-attributable costs and £262,494 in respect of costs related to Grounds A, C and D, WWU's three individual grounds (which it had named Heads A, C and F), totalling £378,910;
- (h) GEMA: £116,416 towards non-attributable costs and £302,870 in respect of costs related to Grounds, B, C, D, Cadent's Ground 1A and NGN's Ground 4, totalling £419,286.



## **6. INTER PARTES COSTS**

- 6.1 On 2 November 2021, we invited the Parties to provide statements of costs if they wished to apply for inter partes costs. All Parties submitted statements of costs to us on 16 November 2021. The Parties were asked to set out the reasoning for any costs claimed.

### **Our previous provisional assessment in the SPDC**

- 6.2 As explained above at paragraphs 4.14 to 4.25 the CMA has discretion to make an inter partes costs order in respect of costs reasonably incurred in connection with this appeal.
- 6.3 In contrast to the position in respect of the CMA's own costs, the CMA is not required by the statute to make an order in respect of inter partes costs. However, the CMA has a discretion to make such an order as it thinks fit for requiring one party to the appeal to make payments to another party in respect of costs reasonably incurred by that other party.
- 6.4 In considering whether and, if so, what order to make as to the payment of inter partes costs, our starting point is the Rules which provide, at Rule 21.5, that when deciding what order to make, the CMA will have regard to all the circumstances, including (i) the conduct of the parties, (ii) whether a party has succeeded in whole or in part, and (iii) the proportionality of the costs claimed.
- 6.5 Further, the Guide explains that the CMA will normally order the unsuccessful party to pay the costs of the successful party, but that it may make a different order by reference to the factors in Rule 21.5.
- 6.6 In the SPDC, we provisionally found that an inter partes costs order should be made providing for the Appellants to pay GEMA's costs attributable to the grounds on which it succeeded, including a proportion of GEMA's costs on the grounds on which it was partially successful, and providing for GEMA to pay the Appellants' costs attributable to the grounds on which they succeeded, including a proportion of their costs on the grounds on which they were partially successful, reduced by 75%. This provisional finding gave due consideration to *Flynn Pharma SC*, the chilling effect an adverse costs order may have on GEMA, the mixed levels of success enjoyed by each of the Parties, the number of Appellants, that the Appellants' costs far exceed those of GEMA, and the importance of ensuring a just result for all parties.

## **Appellants' views**

### ***Treating the Appellants as one litigant body with respect to the imposition of a 75% reduction***

- 6.7 The Appellants variously disagreed with the CMA's position that GEMA was overall the more successful party in the appeal, and the decision to effectively treat the Appellants as one litigant body with respect to the imposition of a 75% reduction, rather than considering each Appellant and ground of appeal separately.
- 6.8 NGN argued that each appeal was separate, and that in the case of NGN, it was successful on at least 50% of its grounds, and as such, should not be subject to a 75% reduction as that would be 'demonstrably unfair.' SGN broadly agreed with this assessment of the situation.
- 6.9 Cadent agreed with NGN's position that each appeal was separate and argued that the CMA had not sufficiently reasoned why the 75% reduction had been applied across the board or why the CMA decided on 75% specifically. SSEN-T adopted a similar approach and argued that the 75% figure was 'arbitrary and disproportionate' and that no detailed explanation of the figure had been provided.
- 6.10 NGET/NGG argued that 75% did not apply to them as they appealed only on two grounds, one they lost and one they won, and as such the 75% reduction should not apply to their appeal. SGN argued a similar position, that in its case, the result was 'effectively a draw' and that at the most 50% would be a more reasonable and proportionate discount.
- 6.11 SPT argued that with regard to the 75% reduction, the grounds that SPT did not choose to appeal should not be included in this assessment. SPT argued that overall the 75% reduction was unreasonable as it was 'fully successful on two grounds, partially successful on one ground and unsuccessful on one ground' and as such, was 'considerably more successful than GEMA'.
- 6.12 The Appellants also made submissions with respect to levels of success on specific grounds and their view on the appropriate apportionment of costs.
- 6.13 In Cadent's response to the SPDC, it noted that for Ground 1A the starting point should not be 50:50. Cadent maintained that it won 95% of this ground and, as such, that it would be disproportionate for Cadent to pay 50% of the costs. Additionally, Cadent noted that as it had already reduced the costs associated with Ground C, the ground should not be further reduced.
- 6.14 In its response to the SPDC, NGN suggested that the costs associated with the IU sub-ground of Ground C should not be further 'adjusted for success' as NGN only

claimed costs on this ground and it was wholly successful on this ground. NGN also noted that the approach taken to this ground would result in only '6.25%' being recovered due to the 'CMA's application of two separate 75% haircuts'.

- 6.15 SPT and SSEN-T argued in relation to Ground D that the interests of justice and application of the rule of law require that reasonably incurred costs are recouped, and that, as such, they should be able to recover their costs on Ground D. SSEN-T also argued that sufficient analysis was not provided in respect of TNUoS prior to the appeal, and, as such, SSEN-T should not pay GEMA or the CMA's costs with respect to the ground of appeal challenging TNUoS.

### ***Chilling effect***

- 6.16 The Appellants submitted that the CMA had failed to take account of their views regarding the chilling effect of an adverse costs order against GEMA. The Appellants set out their position that GEMA had provided no evidence of a real risk of a chilling effect. SSEN-T submitted that there is no requirement to consider a chilling effect argument given that the legislative intent for price control appeals under the EA89 is clear that the starting point should be that costs should follow the event.
- 6.17 The Appellants also made submissions to the effect that an asymmetrical costs position may deter parties from bringing reasonable appeals against decisions by public bodies.<sup>57</sup>
- 6.18 Cadent submitted that the CMA erred in its statement in the SPDC that the Appellants cannot speak with sufficient weight to the existence of a chilling effect on GEMA. Cadent citing *BT v Ofcom* noted that the Court of Appeal has established that the court or tribunal will 'be best placed to consider in detail the arguments on the "chilling effect" advanced by both sides before [it]'. As such Cadent noted that the CMA must give weight to the arguments put forward by GEMA and the Appellants. Further to this point, Cadent noted that the CMA had failed to take into consideration the Appellants' evidence that 'GEMA recovers its costs from the licensed companies it regulates'. SSEN-T echoed Cadent's statement and submitted that the CMA should give the appropriate weight to the parties' submissions on the existence of a chilling effect.
- 6.19 NGET and NGG reiterated the decision of the Supreme Court in *Flynn Pharma SC* that a chilling effect 'cannot be assumed to exist' and rejected GEMA's assertion of one as they maintained that GEMA had not provided sufficiently compelling evidence to establish that there is a real risk of a chilling effect. As such, NGET

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<sup>57</sup> See, for example the supplemental submissions of SGN dated 13 July 2022, at paragraph 17 (which refers to their earlier submissions as relevant).

and NGG agreed with the CMA's position that the starting point for the costs assessment was that costs follow the event.

- 6.20 SGN, SPT and SSEN-T submitted that they agreed with the CMA's application of the judgment in *Flynn Pharma SC* and its assessment that GEMA had not sufficiently evidenced that there was a 'demonstrable risk of a chilling effect'. SGN and SSEN-T made similar arguments in their subsequent conclusions that, as the CMA had concluded that no chilling effect existed, it followed that there was 'no obvious justification for shielding GEMA from the consequences of its actions' and as such, the 75% reduction was an unnecessarily high reduction as it was apparent that GEMA could afford the costs of the adverse decisions.
- 6.21 SSEN-T continued in its assessment to maintain that there was insufficient evidence provided by GEMA that there was a risk of a chilling effect,
- 6.22 NGN did not make any submissions on the chilling effect.

### **WWU**

- 6.23 WWU has not made submissions in response to the SPDC (as further explained at paragraph 5.43 above).

### **SPT costs by ground**

- 6.24 In its response to the SPDC, SPT queried the CMA calculation of SPT's costs allocated to each of its grounds.<sup>58</sup> Given the total SPT costs submitted by SPT in November 2021, it suggested that the amount we had calculated as being due to SPT from GEMA on grounds where SPT was successful (Ground B and D, and C in part) was too low and requested clarity on the CMA's calculations.

### **EA89**

- 6.25 SSEN-T submitted that the legislative intent in EA89 clearly provided a fixed starting point that costs follow the event, and that *Flynn Pharma SC* was therefore not applicable.

### **GEMA's views**

- 6.26 In response to the SPDC, GEMA submitted that the CMA made an error when it stated that GEMA was aware that the *Flynn Pharma CA* judgment was overturned when responding to the appeal.

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<sup>58</sup> SPT response to SPDC, paragraph 9

- 6.27 GEMA further submitted that the CMA had applied the wrong law for the following alleged reasons:
- (a) The CMA had mischaracterised GEMA's evidence relating to the chilling effect;
  - (b) The CMA erred in concluding that GEMA had not sufficiently particularised its submission relating to the de-prioritisation or cessation of critical work following an adverse inter partes order as GEMA could not realistically predict what decisions it would be required to make in the future;
  - (c) The CMA accepted GEMA's submission following the PDC that the adverse costs order would have an impact on GEMA's decision as to whether or how to defend a similar decision in the future, but that the CMA did not give sufficient weight to this factor in the SPDC and its reasoning for the lack of deference to this factor was incorrect; and
  - (d) The CMA appeared concerned about the chilling effect on licensees where they were unable to recover inter partes costs despite them being profitable companies.
- 6.28 Furthermore, GEMA argued that as the CMA had found that GEMA was 'in the round, more successful than the appellants', the starting point should be 'a net costs order in GEMA's favour or... no order as to inter partes costs'.
- 6.29 GEMA also questioned the scrutiny applied by the CMA to the Appellants' costs and noted that they were 'very substantial'. In particular, GEMA noted that the Appellants' costs were significantly larger than those incurred by GEMA and that where Appellants pursued the same ground of appeal, the costs paid by GEMA on those grounds should not be duplicated for each Appellant.
- 6.30 In relation to the 75% reduction, GEMA noted that it did not accept that the reduction would result in a 'just result' and submitted that at a minimum an 82% reduction would be more capable of achieving justice.

### **Our final assessment of inter partes costs**

- 6.31 As set out above at paragraphs 4.14 to 4.25, the CMA has discretion to make an inter partes costs order in respect of costs reasonably incurred in connection with this appeal.

### ***Relevant guidance***

- 6.32 We have had regard to all the circumstances on the information presently before us, in accordance with Rule 21.5, and the Guide at paragraph 6.4 that the CMA will normally order an unsuccessful party to pay the costs of the successful party.<sup>59</sup>

### ***Rule 21.5(a): conduct of the parties***

- 6.33 We have considered the representations from SSEN-T concerning increased costs due to GEMA's behaviour on specific grounds. However, we consider that with respect to the submissions from SSEN-T described at paragraphs 5.60 to 5.61 and 6.16, we are not convinced that anything in particular that GEMA might and should have done at the consultation stage would have led to SSEN-T not bringing an appeal on this ground. With respect to SSEN-T's submissions that costs were incurred as a result of GEMA changing its case during the course of the appeals, our final view is that this did not materially affect our ability to meet the overriding objectives<sup>60</sup> during the course of the appeals.
- 6.34 Overall, therefore, we consider that the Parties acted reasonably in their pursuit of the issues and their cases.

### ***Rule 21.5(b): whether a party has succeeded in whole or in part***

- 6.35 We note that no party was entirely successful, nor entirely unsuccessful, in this case.
- 6.36 The CMA found:
- (a) wholly for GEMA in relation to seven grounds;
  - (b) wholly for the Appellant(s) in relation to two grounds; and
  - (c) partially for the Appellant(s), and partially for GEMA, in relation to three grounds.
- 6.37 It follows that GEMA was, in the round, more successful than the Appellants.
- 6.38 We refer to our summary of the findings in the appeals above at paragraphs 5.19 to 5.21 which demonstrates the mixed levels of success of the Parties in respect of each ground.

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<sup>59</sup> As per paragraph 6.4 of the Guide.

<sup>60</sup> As per Rule 4.1

- 6.39 Having regard to paragraph 6.4 of the Guide, our position is to place significant weight on the mixed levels of success enjoyed by each of the Parties.

***Rule 21.5(c): proportionality of costs claimed***

- 6.40 We are satisfied that the costs claimed by the Parties are proportionate.
- 6.41 We note the submission from Cadent that GEMA will be recovering costs greater than those incurred, and that ‘To allow GEMA to recover costs as if its lawyers were independent solicitors, yet then apply a 75% reduction to the costs of the appellants’ independent solicitors is irrational’.
- 6.42 On the basis of the information we have received, we are satisfied that GEMA may seek to recover its costs as if its lawyers were independent solicitors, per *Re Eastwood (deceased)* [1975] Ch 112 in which the Court of Appeal held:
- the appropriate method of taxation of a bill of costs where a party was represented by a salaried solicitor was to treat it as though it were the bill of an independent solicitor assessing the reasonable and fair amount of a discretionary item, having regard to all the circumstances of the case and the principle that the tax costs should not be more than an indemnity to the party against the expense he had incurred in litigation.
- 6.43 We now turn to the rate charged. The rates charged by GEMA are lower than the guideline hourly rates provided by HM Courts & Tribunals Service for use in summary assessment. GEMA’s London office is in Canary Wharf (E14), so it is entitled to charge rates within the applicable London bands. The rates charged by GEMA in the present case are lower than all London bands. Insofar as GEMA’s rates have been impugned because the rates differ from those claimed by the CMA, we note the different role the CMA played as an appellate body, and that it has also not claimed equivalent solicitor guideline hourly rates. Rather, the CMA’s actual costs are in line with the assessment of the Tribunal in *BT v CMA* [2017] CAT 11. We additionally note that the rates charged by GEMA are well below those of the Appellants who used independent solicitors.
- 6.44 We do not accept GEMA’s submission that the CMA failed to subject the Appellants’ costs to real scrutiny. The CMA has a broad discretion when awarding inter partes costs, as set out above. While we are satisfied that the costs claimed by the Appellants are proportionate, we note that given the number of Appellants (eight), and that the Appellants required assistance from external law firms given the absence of in-house legal expertise in the relevant area, the costs of the Appellants far exceed the costs of GEMA when combined.

6.45 We therefore make a final determination that the costs claimed by the Parties are proportionate.

***Paragraph 6.4 of the Guide: The CMA will normally order an unsuccessful party to pay the costs of the successful party to the appeal***

6.46 Having regard to paragraph 6.4 of the Guide, we have placed significant weight on the mixed levels of success enjoyed by each of the Parties.

***Final position on exercise of discretion***

6.47 Having regard to the relevant guidance materials, we are satisfied that:

- (a) The conduct of the Parties in the appeals ought not to affect the costs order;
- (b) Costs claimed by the Parties are reasonable and proportionate; and
- (c) Significant weight ought to be given to the mixed success of the Parties.

6.48 We must then consider all relevant circumstances in accordance with Rule 21.5. In so doing, we have considered the following relevant circumstances:

- (a) The extent to which an adverse costs order against GEMA, to the extent it has been unsuccessful in this case, risks a 'chilling effect' in the circumstances of this particular case at this particular time;
- (b) The role of GEMA as a regulator with a statutory obligation to make price control decisions;
- (a) The incentive an inter partes costs order may give to the Parties in respect of future decision making, and future appeals; and
- (c) Ensuring a just result for all Parties.

6.49 We do not consider that GEMA's submissions regarding the chilling effect added materially to those received ahead of the SPDC. We acknowledge that the statement at paragraph 6.52 of the SPDC 'that GEMA decided to defend the case where the risk of adverse costs was known (at least prior to the Court of Appeal judgment in *Flynn Pharma CA*, now overturned)' is not correct. However, it is correct to observe that GEMA was aware that *Flynn Pharma CA* was subject to appeal in the Supreme Court at the time permission to appeal was sought in this matter and throughout the proceedings.

6.50 The regulatory function exercised by GEMA in the present case – to issue a price control decision – is a legislative requirement, not a discretionary function. Thus, GEMA must continue to exercise its price control function irrespective of the



CMA's final determination on inter partes costs. It is highly likely that GEMA's price control decisions will continue to be subject to appeal.<sup>61</sup> We note the inherently uncertain basis on which future decisions may be made and appealed and the difficulties associated with providing evidence of expected conduct in future decisions and appeals. We further note GEMA's submission that the risk of adverse inter partes costs orders in appeals challenging its exercise of statutory functions such as price control decisions may require it to de-prioritise or cease other critical work. However, GEMA has not sufficiently particularised this submission and we therefore have limited evidence before us which supports a demonstrable risk of a chilling effect.

- 6.51 We accept that the risk of adverse costs orders requires GEMA to consider whether – and if so how – to defend similar decisions in future. In doing so we also note that GEMA's statutory 'principal objective' is to protect the interests of existing and future consumers making this a primary consideration when making and defending price control decisions.
- 6.52 In this respect, we have had regard to the evidence before us and have considered GEMA's conduct in the present case, in which it continued to defend its decision despite considerable opposition.
- 6.53 We have had regard to the submissions and evidence advanced by GEMA as to the effect an adverse costs order is likely to have on its funding. We note that HM Treasury has indicated (although not formally agreed) that it would provide additional budget from its reserves for payment of adverse costs where Ofgem needs to engage in litigation and unsuccessfully defends a decision in the performance of its statutory functions. We further note GEMA's submissions that if payment of an adverse costs order came from Ofgem's own budget (as opposed to the HM Treasury reserve) it might mean de-prioritising or ceasing other critical work in order to have an appropriately sized litigation budget. We find this has some merit and gives rise to plausible concern that GEMA's conduct may be influenced by needing to meet adverse inter partes costs from Ofgem's own budget. However, we do not consider that GEMA has demonstrated a chilling effect of sufficient strength to merit a starting point of no order as to costs.

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<sup>61</sup> We note that both decisions made under the RIIO price control model have been subject to appeal (in addition to the energy licence modification appeals that are the subject of this determination on costs, see also the two Energy price control appeals of the first RIIO price control: [British Gas Trading Limited v The Gas and Electricity Markets Authority \(publishing.service.gov.uk\)](#) and [Northern Powergrid \(Northeast\) Limited and Northern Powergrid \(Yorkshire\) plc v the Gas and Electricity Markets Authority \(publishing.service.gov.uk\)](#)) and that similar decisions in other sectors are also prone to appeal, see for example the price control determination made by Ofwat in 2019 [Ofwat Price Determinations - GOV.UK \(www.gov.uk\)](#).

- 6.54 We have had regard to the nature of the price control decision and appeals process. We refer to the background of the price control decision, as described to us by GEMA, set out in the Appeal Determination.<sup>62</sup> In particular we note GEMA's periodic price controls are given effect by way of modifications to licences. As set out in the Appeal Determination:
- (a) GEMA sets price controls to protect the interests of consumers (both existing and future), which includes determining the amount of revenue that each company is allowed to recover. The private companies that hold relevant licences (network operators) undertake the necessary activities to meet their obligations to deliver the relevant service safely and collect the revenue that GEMA has allowed. This revenue is collected from downstream participants, and ultimately paid for by consumers of gas and electricity through their energy bills, with network charges making up around 25% of the average dual-fuel bill.<sup>63</sup>
  - (b) In carrying out the relevant licensing functions in relation to the supply of electricity and gas, GEMA is further subject to a statutory 'principal objective' which is to protect the interests of existing and future consumers.<sup>64</sup> It is therefore plain that price control decisions are of significant importance to all involved – including GEMA, consumers and licence holders.
- 6.55 We have considered the public interest in making our decision as to costs. In this regard we have considered 'the need to strike a balance between maintaining flexibility whilst providing predictability and between ensuring that costs awards do not undermine the effectiveness of the competition or regulatory regime whilst ensuring a just result for both parties'.<sup>65</sup> As shown in the present case, the outcome of appeals can materially change the decisions of the regulator in the first instance. Companies should not be disincentivised from bringing such appeals.
- 6.56 In light of all the circumstances including (1) the evidence supporting a finding of some risk of a chilling effect on GEMA although not of sufficient strength to merit a starting point of no order as to costs, (2) the risk of disincentivising the bringing of appeals of price control decisions given the significance of those decisions (and the importance of the integrity of the appeals process) and (3) the mixed success of the Parties, we do not consider that any of the considerations set out above justify an absolute asymmetrical order as to costs in favour of any Party.
- 6.57 We note the Appellants' submissions that the SPDC failed to consider the potential chilling effect a final costs order in the terms proposed may have on bringing future

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<sup>62</sup> See especially paragraph 2.57 onwards.

<sup>63</sup> *Kaul 1 (GEMA)*, 23 April 2021 paragraph 13.

<sup>64</sup> EA89, section 3A(1) and GA86, section 4AA(1).

<sup>65</sup> *Flynn Pharma SC* at 153

appeals. We consider that the case law is clear that the relevant chilling effect to consider is that on the public body and that this is reflected at paragraph 98 of *Flynn Pharma SC*.

- 6.58 We do not accept the submissions from SSEN-T that the legislative intent of EA89 clearly supports a fixed starting point of costs follow the event. With respect to inter partes costs, EA89 states ‘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’, and other relevant considerations are set out in section 4 of this final determination.<sup>66</sup> There is clearly no provision for a fixed starting point with respect to inter partes costs and the wide grant of discretion indicates an absence of legislative intent that there be a fixed starting point on inter partes costs.
- 6.59 With the exception of WWU where no submissions were made (as set out above at paragraph 5.43) each Appellant made submissions against the CMA’s treatment of them as one litigant body for the purposes of imposing a 75% reduction in costs. GEMA submitted that the 75% reduction was insufficient and that an 82% reduction would be more appropriate.
- 6.60 We have considered these submissions and decided to maintain the 75% reduction and the methodology applied in the SPDC. The methodology applied is described below at paragraphs 6.64 to 6.65. We have decided to treat the Appellants as one litigant body for this purpose and to apply a 75% discount taking into account the following:
- (a) The factors identified at paragraphs 6.55 and 6.56 above.
  - (b) That the Supreme Court in *Flynn Pharma SC* rejected the position that there is a fixed starting point as to the determination of costs where the legislation is silent and rather held that the matters which may be relevant to the determination of costs vary widely between cases.
  - (c) That GEMA was overall the most successful Party to the Appeal, such that we consider that requiring GEMA to pay the entirety of the Appellants’ costs attributable to the grounds on which they succeeded, including a proportion of their costs on the grounds on which they were partially successful, would not be just as GEMA would be required to pay far greater costs than it recovers despite being the more successful party.

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<sup>66</sup> EA89 Schedule 5A 12(3)

- (d) The CMA granted permission to appeal subject to the condition that four common grounds of appeal would be joined across appellants that pleaded the ground, in addition to the individual grounds of appeal considered.
- (e) The Appellants were consulted in respect of these conditions prior to the grant of permission.
- (f) The decision granting permission to appeal specifically stated that the conditions were intended to 'enable the CMA to dispose of the appeals fairly and efficiently and at proportionate cost'.
- (g) EA89 and GA86 grant the CMA discretion in identical terms 'to make such order as it thinks fit' with respect to inter partes costs.

- 6.61 With the exception of WWU where no submissions were made (as set out above at paragraph 5.43) each appellant made submissions, in various terms, that the CMA should have conducted an exercise to apportion costs as between each appellant and GEMA individually with respect to each separate ground. We note the need to arrive at a just outcome and the overriding objective that the CMA dispose of appeals fairly and efficiently, and at proportionate cost. We consider it would be disproportionate to conduct an apportionment exercise as described by the Appellants.
- 6.62 We have considered SPT's query about the distribution made by the CMA of SPT's total costs across each of the grounds it appealed, and accept that an error was made by the CMA in the SPDC in interpreting the costs information provided by SPT. We have therefore corrected the level of costs that should be allocated to each ground and applied the same process as before to arrive at the amount to be paid by GEMA to SPT (details can be found in Appendix C). This corrects the arithmetic, but not the logic of arriving at the amount due to SPT by GEMA, which has increased by approximately £[X].
- 6.63 We have considered WWU's response to the SPDC set out above at paragraph 5.43. We have considered WWU's position and decided to stay implementation of this final determination and order on costs with respect to WWU only, pending conclusion of the judicial review proceedings.

#### *Costs recoverable by Appellants*

- 6.64 We have had regard to all the circumstances, set out above. Accordingly, we determine that GEMA should pay the Appellants' costs attributable to the grounds on which they succeeded, including a proportion of their costs on the grounds on which they were partially successful.

- 6.65 For the reasons set out above we determine that the amount of the Appellants' costs to be paid by GEMA, in respect of each ground on which an Appellant was wholly or partially successful, should be subject to a reduction of 75%. In addition, we note that where the Appellants' statements on costs were not set out by ground, we have split the costs equally between grounds on which the Appellants were successful, before adjusting the costs for grounds on which they were partially successful and applying the 75% reduction.
- 6.66 Our assessment of the amount of costs Appellants are due to recover from GEMA, taking into account what each Appellant spent on each ground, the degree to which we found for that Appellant on each ground, and the 75% reduction, is £2,390,832.
- 6.67 In making an Order for costs to be paid between GEMA and each Appellant, rather than order two payments, in each direction, between those parties, we have made a single order of a net payment. In each case, either GEMA or the Appellant is required to make a payment equal to the difference between the two amounts.
- 6.68 In line with the rationale set out above, we determine that GEMA shall pay a total contribution to the Appellants' costs of £1,386,533 allocated between the Appellants as indicated in Appendix C.

#### *Costs recoverable by GEMA*

- 6.69 In respect of costs recoverable by GEMA, and having had regard to all the circumstances set out above, including the CMA's discretion as to inter partes costs and the relevant provisions of the Rules and Guide considered above, we consider that GEMA should recover its costs from the Appellants in proportion to its degree of success on each ground.
- 6.70 GEMA provided a schedule showing the costs that it incurred in these appeals. We have reviewed this schedule of costs and consider that the costs incurred seem reasonable at £2,323,282, given the scale of the appeals. We also consider that the allocation of GEMA's costs between the various grounds seems reasonable.
- 6.71 We have considered the overall outcome of the appeals and the fact that GEMA succeeded on the majority of the grounds. GEMA's costs attributable to the grounds on which it succeeded (including a proportion of its costs on the grounds on which it was partially successful) amount to £1,734,996, which represents

roughly 75% of its total incurred costs. Appendix C sets out how we have calculated this figure on the basis of GEMA's schedule of costs.<sup>67</sup>

- 6.72 Our final assessment of the amount of costs GEMA is due to recover from the appellants, taking into account what it spent on each ground, and the degree to which we found for GEMA on each ground, is £1,734,996.<sup>68</sup>
- 6.73 As noted above, we have made an Order for net payments of the 'balance', in each case, between what each Appellant should recover and what GEMA should recover.
- 6.74 We therefore determine that the Appellants shall pay a total contribution to GEMA's costs of £730,697 in amounts split between the Appellants as indicated in Appendix C.<sup>69</sup>

### **Final determination on the inter partes costs**

- 6.75 In view of the foregoing, and in all the circumstances, our final determination regarding inter partes costs is:
- (a) GEMA to pay the Appellants' costs attributable to the grounds on which they succeeded, including a proportion of their costs on the grounds on which they were partially successful, reduced by 75%; and
  - (b) The Appellants to pay GEMA's costs attributable to the grounds on which it succeeded, including a proportion of GEMA's costs on the grounds on which it was partially successful.
- 6.76 This final determination means the following net payments between GEMA and each appellant:
- (a) GEMA to pay NGG/NGET £[X];
  - (b) GEMA to pay SPT £[X];
  - (c) GEMA to pay SSEN-T £[X];

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<sup>67</sup> GEMA listed its total incurred costs by ground in its schedule of costs without specifying the figure of costs claimed.

<sup>68</sup> As in the PDC, this figure was calculated from GEMA's costs submission, adjusted to include only the costs relating to grounds on which the CMA found for GEMA, and to include only part of GEMA's costs in relation to grounds on which the CMA found partly for GEMA.

<sup>69</sup> The net effect on GEMA of these two sets of net payments (payments to each of the appellants where the costs awarded for them exceed those awarded against, minus payments from each of the appellants where the costs awarded against them exceed those awarded for them) is a total payment to appellants of £655,386.

- (d) Cadent to pay GEMA £[X];
- (e) GEMA to pay NGN £[X];
- (f) GEMA to pay SGN £[X]; and
- (g) WWU to pay GEMA £[X].<sup>70</sup>

6.77 Paragraph 12(4) of the Schedules 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.<sup>71</sup>

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<sup>70</sup> As noted in paragraph 6.63, we have decided to stay implementation of this final determination and order on costs with respect to WWU only, pending conclusion of the judicial review proceedings.

<sup>71</sup> Paragraph 12(5) of the Schedules.

## 7. FINAL COSTS DETERMINATION

7.1 Our final costs determination is therefore as follows:

- (a) In relation to the CMA's costs incurred in connection with the appeal, the Parties should pay £1,969,691 to the CMA, apportioned as set out at paragraph 5.72 above; and
- (b) In relation to inter partes costs:
  - (i) GEMA should pay NGG/NGET £[~~3~~];
  - (ii) GEMA should pay SPT £[~~3~~];
  - (iii) GEMA should pay SSEN-T £[~~3~~];
  - (iv) Cadent should pay GEMA £[~~3~~];
  - (v) GEMA should pay NGN £[~~3~~];
  - (vi) GEMA should pay SGN £[~~3~~]; and
  - (vii) WWU should pay GEMA £[~~3~~].<sup>72</sup>

7.2 In addition, our final determination is that the interest rate which shall apply in the event of sums set out in paragraph 7.1 (a) being unpaid (see paragraphs 4.1 and 6.77) will be one percentage point above the Bank of England's base rate in force.

7.3 An Order is enclosed with this final costs determination.

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<sup>72</sup> As noted in paragraph 6.63, we have decided to stay implementation of this final determination and order on costs with respect to WWU only, pending conclusion of the judicial review proceedings.



## Appendix A: Statement of CMA costs

### Overview

- 1 This appendix outlines how the CMA's costs were calculated. All costs incurred by the CMA in connection with the appeals 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 panel who worked on the appeals, together with the number of hours worked;
  - (b) travel and subsistence costs incurred in the appeals;
  - (c) a breakdown of fees charged by Counsel instructed by the CMA;
  - (d) direct costs; and
  - (e) a description of how the CMA's overhead rate has been calculated.
- 2 This Appendix also describes how the CMA's costs have been attributed to specific grounds, and how we have allocated non-attributable costs.

### CMA costs

#### *Costs of making the Appeal Determination*

##### *Overheads*

- 3 The CMA is able to recover all costs incurred, not just its direct costs. It therefore includes an amount for the recovery of indirect costs, which we refer to as overheads, in the amounts that it calculates as costs.
- 4 The CMA overhead rate applied to the recharging of costs is calculated by applying a pre-determined recovery charge percentage to the total direct costs of the rechargeable work. The CMA's pre-determined recovery charge percentage is calculated by dividing the combined back-office annual budgets (Corporate Services and Board & Panel) by the combined front line service annual budgets (Enforcement, Legal Services, Markets and Mergers, Office of Chief Economic Advisor and Policy & International). The rate is 56%.

### 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 time for and associated costs of making the Appeal Determination**

[illegible]



### Panel member costs

- 6 Table 2 sets out the names, job titles, grades and cost recovery rates (£ per hour) for the Group chair and Group members who worked on the appeal. It also includes the number of hours worked by the Group chair and each of the Group members, and the consequent direct costs and overhead costs incurred by the Group member. Overhead costs are attributable to the salaried Group chair's direct costs but not to other Group members' direct costs (see paragraph 4 above).
- 7 Panel members who were not Group members contributed to expert panel discussions on the Cost of Equity.

**Table 2: Panel member time for and costs of making the Appeal Determination\***

Name	Job title	Grade	Recovery rate (£ per hour)	Time spent (hours)	Grounds	Direct costs (£s)	Overhead (£s)**	Total (£s)
[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]
<b>Total</b>	[X]		[X]	[X]		[X]	[X]	<b>187,656</b>

Source: CMA analysis.

\* Costs relate to time incurred in the periods March 2021 to October 2021

\*\*Numbers presented to nearest £s but underlying calculations not rounded. Overhead percentage 56%.

\*\*\* [X] were members of the expert panel for the cost of equity ground as described in paragraph 5.1(e).

### Non-staff costs

- 8 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.
  - (c) Note: there were no 'Travel and subsistence costs', due to the staff team and Group working remotely during the pandemic.

**Table 3: Non-staff costs of making the appeal determination (£)**

<i>Non-staff costs</i>	<i>Grounds</i>								<i>Total</i>
	A	B	C	D	Cadent 1A	WWU Cost of debt	WWU Tax clawback	General	
Counsel				21,986		2,552	6,380	5,104	36,022
Transcripts	1,812	766	406	1,031	150			6,815	11,058
<b>Total</b>									<b>47,080</b>

Source: CMA analysis.

\* Numbers presented to nearest £s but underlying calculations not rounded.

### ***Attribution of CMA costs of making the appeal determinations to grounds***

- 9 The CMA's staff time recording system allowed staff time to be recorded against the following categories:
  - (a) General;
  - (b) Ground A;
  - (c) Ground B;
  - (d) Ground C;
  - (e) Ground D; and
  - (f) Individual Grounds.
- 10 From timesheet information relating to individuals who recorded time to 'Individual Grounds', we have made an estimate of staff costs in that category which should be attributed to specific individual grounds.
- 11 The Group chair and other Group members have reported where their time should be attributed to specific grounds, either joined grounds or individual grounds.
- 12 Counsel costs have been attributed to the following grounds:
  - (a) General – for the legal test;
  - (b) Ground D;
  - (c) WWU Cost of debt; and

(d) WWU Tax clawback.

- 13 Transcription costs for the joint hearings on grounds, and for the response hearing and roundtable hearings which were held after the Parties had responded to our provisional determination, have been attributed to the respective grounds. Transcription costs for the hearings with Ofwat and BGT have been attributed to Ground A and Ground B. Transcription costs for all other hearings – clarification hearings and main party hearings – have been allocated to ‘General’ costs.
- 14 The process as described above resulted in the provisional attribution of the CMA’s costs to grounds shown in Table 4.

**Table 4: Analysis of CMA costs of making the appeal determinations to grounds and to general costs (£)**

	Group and Panel Members excluding Chair	Contractors	Counsel	Transcripts and other expenditure	Staff and Group Chair*	Overhead	Total
Ground A	10,741			1,812	134,827	75,503	222,883
Ground B	5,866	77,336		766	28,830	16,145	128,943
Ground C	2,480	115,769		484	41,165	23,053	182,951
Ground D	12,113		21,986	1,031	57,474	32,185	124,789
Cadent 1A	1,696	1,971		150	32,863	18,403	55,083
Cadent 1B	1,696	1,971			37,400	20,944	62,011
NGN 4	485	438			10,598	5,935	17,455
SGN 4	1,938	2,743			21,461	12,108	38,161
SSEN-T 4	1,938				31,664	17,732	51,334
WWU Cost of debt	1,394		2,552		16,623	9,309	29,878
WWU Repex	1,938				39,298	22,007	63,242
WWU Tax clawback	1,394		6,380		34,526	19,334	61,634
General	29,041		5,104	6,815	554,722	310,645	906,326
<b>Total</b>	<b>72,718</b>	<b>200,229</b>	<b>36,022</b>	<b>11,058</b>	<b>1,041,451</b>	<b>583,213</b>	<b>1,944,691</b>

Source: CMA analysis

\*Includes Group chair whose costs attract overhead.

### **Costs of making the costs determination and costs order**

- 15 The CMA is entitled to recover its costs in connection with the appeals, including the costs of making the costs determination and order. However, we recognise the unique circumstances of this case, in particular the fact that the law changed part way through the costs assessment resulting in additional work and consultation in making the costs determination and order. Given this, we propose to reclaim only £25,000 as a contribution to the CMA costs of the costs determination and order, which we note would be approximately 1% of the total CMA costs being recovered.<sup>73</sup>

<sup>73</sup> Were we to provide a schedule, the costs incurred would significantly exceed what we are claiming, but we consider this to be a reasonable and proportionate approach.

- 16 We consider that the contribution to the CMA costs of making the cost determination and costs order should be considered non-attributable to grounds and should therefore be added to the value of the non-attributable costs of the appeal determination (as described above) for equal allocation between the Parties.

### **Total CMA costs**

- 17 In Table 5 below we set out our estimate of the provisional total costs we have incurred in connection with the ELMA2021 appeals and the total amount we are provisionally seeking to recover.

**Table 5: Provisional total CMA costs and cost recovery (£)**

Costs of the appeal determinations	1,944,691
Contribution to CMA costs of the cost determination and order	25,000
Total to be recovered	1,969,691

*Source: CMA analysis*

- 18 Of this total amount of CMA costs being reclaimed, £931,326 is non-attributable and £1,038,365 is attributable to specific grounds of appeal.

## Appendix B: Chronology of appeals

- 1 By NoAs served on 3 March 2021, the Appellants sought permission to appeal against GEMA's decisions.<sup>74</sup> The Appellants' NoAs were published on a case page on the CMA website on 5 March 2021.<sup>75</sup>
- 2 The CMA granted the Appellants permission to appeal on 31 March 2021 and appointed the members of the Group to conduct the appeal.
- 3 The administrative timetable for the appeals was published on the CMA's case page on 22 April 2021, reflecting the decision of 20 April 2021 to extend the deadline for determining the appeals by one month to 30 October 2021, due to the nature and scale of work involved in the appeals.
- 4 On 8 and 9 April 2021, the Parties delivered factual 'teach-ins' providing background and context to the CMA.
- 5 On 23 April 2021, GEMA responded to the Appellants' NoAs.
- 6 On 23 April 2021, the CMA received applications for permission to intervene in particular grounds from five entities:
  - (a) BGT: Ground A (Cost of equity) and Ground B (Outperformance wedge).
  - (b) Citizens Advice: Ground A (Cost of equity) and Ground B (Outperformance wedge).
  - (c) ENWL: WWU Head A (Cost of debt).
  - (d) Ofwat: Ground A (Cost of equity) and WWU Head A (Cost of debt).
  - (e) SPT: SSEN-T Ground 4 (TNUoS).
- 7 On 23 April 2021, the CMA received submissions from the Appellants in relation to the CMA PR19 Redetermination.<sup>76</sup>
- 8 On 6 May 2021, the CMA granted permission to BGT and Citizens Advice to intervene in the Cost of Equity and Outperformance Wedge grounds of appeal, but rejected ENWL's, Ofwat's and SPT's applications to intervene,

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<sup>74</sup> On 3 February 2021, GEMA published its decisions for the electricity transmission, gas transmission and gas distribution network companies and the Electricity System Operator, modifying the conditions of their respective licences to give effect to the RIIO-2 price control Final Determinations, which were published on 8 December 2020 and revised on 3 February 2021.

<sup>75</sup> [Energy Licence Modification Appeals 2021](#).

<sup>76</sup> [Ofwat Price Determinations - GOV.UK \(www.gov.uk\)](#).



- 9 On 10 May 2021, the CMA received GEMA's Response to the Appellants' submissions on the CMA PR19 Redetermination
- 10 On 10 May 2021, the Appellants each submitted their replies to GEMA's Response.
- 11 On 10 May 2021, NGN sought permission to withdraw sub-ground 4A(i) and Ground 4B of its appeal.
- 12 Between 13 and 24 May 2021, the CMA held clarification hearings with each of the Appellants and GEMA.
- 13 On 17 May 2021, the CMA granted permission to NGN to withdraw sub-ground 4A(i) and Ground 4B of its appeal.
- 14 On 18 May 2021, the CMA invited Ofwat and ENWL, pursuant to Rule 14.4(e) of the Rules, to make representations by submitting the evidence in their respective applications to intervene, to be admitted as evidence in the appeal.
- 15 In May 2021, all Appellants except SPT supplied us with pre-recorded virtual site visits, which focused on operational matters and descriptions of the companies' activities.
- 16 Between 21 June and 9 July 2021, the CMA held main hearings. The CMA held joint hearings for each of the joined grounds, for which all appellants to the relevant ground and GEMA attended.
- 17 On 11 and 12 August 2021, the CMA issued its provisional determination of the appeals to the Parties and Intervenors.
- 18 On 3 September 2021, the Parties and Intervenors submitted their responses to the provisional determination.
- 19 In light of the responses received, the CMA held one further hearing on Friday 17 September 2021. The CMA also held roundtable meetings on 27 and 28 September 2021.
- 20 In October 2021, the CMA reconsulted the Parties on aspects of two grounds (Joined Ground C: OE and Joined Ground D: Licence Modification Process) where we were minded to change from a provisional decision in our provisional determination.
- 21 On 28 October 2021, the CMA issued its Appeal Determination to the Parties and Intervenors.
- 22 On 1 November 2021, the CMA published its Appeal Determination.

- 23 On 2 November 2021 the CMA asked Parties to provide us with their Statements of Costs if they wished to claim inter partes costs. Submissions were received on 16 November 2021 from all Parties.
- 24 On 21 January 2022 the CMA issued its provisional determination on costs (PDC) to the Parties.
- 25 On 4 February 2022 Parties provided their responses to the PDC.
- 26 On 10 May 2022 the CMA stayed the cost determination process in the light of ongoing litigation (Flynn Pharma) which could potentially impact the costs decision.
- 27 On 22 June 2022 the CMA consulted with the Parties on the impact of the Flynn Pharma litigation outcome on the inter partes costs in this case. Responses were received from all Parties on 13 July 2022.
- 28 On 13 January 2023 the CMA issued its second provisional determination on costs.
- 29 On 27 January 2023 the Parties provided their responses to the SPDC.
- 30 On 22 June 2023 the CMA issued its final determination on costs.

## **Appendix C: Final inter partes costs awards**

- 1 Negative numbers indicate that our final determination is for the appellant to pay GEMA the amount in respect of costs.
- 2 Positive numbers indicate that the CMA's final determination is for GEMA to pay the appellant the amount in respect of costs.

### ***Costs awarded between Cadent and GEMA***

[✂]

### ***Costs awarded between NGET/NGG and GEMA***

[✂]

### ***Costs awarded between NGN and GEMA***

[✂]

### ***Costs awarded between SGN and GEMA***

[✂]

### ***Costs awarded between SPT and GEMA***

[✂]

### ***Costs awarded between SSEN-T and GEMA***

[✂]

### ***Costs awarded between WWU and GEMA***

[✂]

**Summary: Costs awarded between the Appellants in aggregate and GEMA**

£

Ground	Costs against GEMA	Costs against Appellants	Net
Ground A, Cost of Equity	-	[X]	[X]
Ground B, Outperformance Wedge	[X]		[X]
Ground C, OE and IU	[X]	[X]	[X]
Ground D, Licence modification	[X]	[X]	[X]
Cadent 1A (LTS)	[X]	[X]	[X]
Cadent 1B (LRF)	[X]	[X]	[X]
NGN 4	[X]	[X]	[X]
SGN 4		[X]	[X]
SSEN-T 4		[X]	[X]
WWU A, Cost of debt		[X]	[X]
WWU C, Repex		[X]	[X]
WWU F, Tax clawback		[X]	[X]
GEMA to pay Appellants in aggregate (net)	2,390,832	(1,734,996)	655,836

## **Appendix D: 2017 Rules applicable to these appeals**

- 1 See separate document.

## **Appendix E: 2017 Guide applicable to these appeals**

1            See separate document.