

NORTHERN POWERGRID (NORTHEAST) PLC & NORTHERN POWERGRID (YORKSHIRE) PLC VS THE GAS AND ELECTRICITY MARKETS AUTHORITY

Final determination on costs

12 March 2024

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Website: www.gov.uk/cma

**Members of the Competition and Markets Authority
who determined this appeal**

Kip Meek (*Chair of the Group*)

Robin Cohen

Susan Hankey

Chief Executive of the Competition and Markets Authority

Sarah Cardell

The Competition and Markets Authority has excluded from this final determination on costs information which the appeal group considers should be excluded, having regard to section 11H Electricity Act 1989. The omissions are indicated by [✂].

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1. Introduction

- 1.1 This document is the Competition and Markets Authority (the CMA)'s final determination on costs. These costs are those incurred in connection with the appeal by Northern Powergrid (Northeast) PLC (**NPgN**) and Northern Powergrid (Yorkshire) PLC (**NPgY**) (collectively **NPg**) against the decision by the Gas and Electricity Markets Authority (**GEMA**) to proceed with modifications to NPgN's and NPgY's electricity distribution licences (the **Decision**) in order to implement its electricity distribution price control RII0-ED2 (**RIIO-ED2**).

2. The appeal

- 2.1 The CMA has conducted this appeal in accordance with the procedure set out in Schedule 5A to the Electricity Act 1989 (**EA89**), 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**).
- 2.2 On 3 February 2023, GEMA published its decision on proposed modifications to electricity Distribution Network Operators' (**DNOs**) licences. These modifications are based on GEMA's RIIO-ED2 price control decisions of 30 November 2022.¹
- 2.3 On 2 March 2023, NPgN and NPgY filed a Notice of Appeal² (**NoA**) applying for permission to appeal the Decision on two grounds:
- (a) Ground 1 – misallocation of allowances between costs categories;
 - (b) Ground 2 – BPI Stage 4 Reward.
- 2.4 On 24 April 2023, the CMA received an application from Citizens Advice for permission to intervene on Ground 1. Permission to intervene was granted by the CMA on 26 April 2023. On 21 September 2023 the CMA's final determination (**Final Determination**) was issued to the Parties and Citizens Advice allowing NPg's appeal on Ground 1 and dismissing NPg's appeal on Ground 2. Further details of the appeal and its procedural stages are set out in the summary and chapter 1 of the Final Determination.
- 2.5 Terms and expressions used in this document have the same meaning as they do in the Final Determination.

¹ [RIIO-ED2 Final Determinations](#).

² [Notice of Appeal](#).

3. Final determination on costs

- 3.1 A group that determines an appeal is required by paragraph 12(1) of Schedule 5A EA89 to make an order requiring the payment to the CMA of the costs incurred by the CMA in connection with the appeal. The group may also, pursuant to paragraph 12(3) of Schedule 5A, 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. These latter costs are known as inter partes costs.
- 3.2 On 22 September 2023, the CMA directed that any party seeking an order for costs in its favour should file and serve a statement of its costs together with any written submissions on its own costs by 2 October 2023. This deadline was subsequently extended on 29 September 2023, at GEMA's request, to 6 October 2023.
- 3.3 On 6 October 2023, the CMA received the following:
- (a) from NPg, a statement of costs and covering letter from NPg's solicitors Slaughter and May setting out representations as to NPg's costs; and
 - (b) from GEMA, a statement of costs, written submissions on its own costs and the CMA's costs, and a second witness statement from Steven McMahon (**McMahon 2**) on the potential chilling effect of a costs award against GEMA.
- 3.4 As the CMA had not directed the Parties to make submissions on its costs, or given permission for the submission of witness evidence, on 9 October 2023 it requested that GEMA:
- (a) refile its written submissions having removed those parts of the submissions referring to CMA costs; and
 - (b) apply for permission to submit witness evidence.
- 3.5 On 10 October 2023 GEMA filed amended written submissions and duly applied for permission to file witness evidence.
- 3.6 On 27 October 2023, the CMA granted GEMA permission to file and serve McMahon 2. At the same time NPg was informed that if it wished to file evidence in response to McMahon 2 it would be required to apply to do so by 1 November 2023. By letter dated 1 November 2023, NPg stated that it did not seek permission to file evidence in response.
- 3.7 Having considered the Parties' submissions and evidence, we issued a provisional determination on costs (**PDC**) and accompanying draft costs order on 5 January

2024 and invited the Parties to make representations on the PDC by 26 January 2024.

- 3.8 On 26 January 2024, we received representations on the PDC from each of the Parties. Having considered those representations, we issue this final determination on costs and the costs order.

4. Legal framework in relation to costs

The CMA's duties and powers in relation to costs

4.1 Paragraph 12 of Schedule 5A EA89 sets out the CMA's duties and powers in relation to costs in determining an appeal brought under section 11C EA89:

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

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

(a) where the appeal is allowed in full, by the Authority;

(b) where the appeal is dismissed in full, by the appellant; or

(c) where the appeal is partially allowed, by one or more parties in such proportions as the CMA considers appropriate in all the circumstances.

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

(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.

4.2 Paragraph 13(2) of Schedule 5A EA89 provides that references in the schedule to a 'party' are references to '(a) the appellant; or (b) the Authority'.

- 4.3 The Rules³ and the Guide⁴ make further provision in relation to costs.
- 4.4 Before making any order for costs 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.⁵
- 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.⁶ 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 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 the CMA's costs

- 4.7 In addition to the requirements at paragraphs 12(1) and 12(2) of Schedule 5A EA89, 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 partially allowed, the CMA will ordinarily follow the principle that costs follow the outcome of the appeal. This means that the Authority should normally pay the proportion of the CMA's costs incurred in connection with any appeal grounds 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

³ See Rule 20.

⁴ See chapter 6.

⁵ Rule 20.2, Rule 20.6. and paragraphs 6.3 and 6.5 of the Guide.

⁶ See, for example, paragraph 6.4 of the Guide in relation to inter partes costs.

opportunity to correct it prior to making its decision and whether the appellant could have reasonably raised the error with the Authority prior to initiating an appeal.

4.8 In its decision in *British Telecommunications plc v CMA*⁷ (**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 is significantly different from that of the cost regimes in Civil Procedure Rules 44 or CAT Rule 104;⁸
- (b) the CMA will recover all its costs incurred in connection with the appeal, not just its direct costs;⁹
- (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;¹⁰ and
- (d) the CMA is not entitled to make an order in relation to costs incurred unreasonably or unnecessarily.¹¹

4.9 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.¹²

4.10 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.¹³

⁷ *British Telecommunications Plc v Competition and Markets Authority (BT v CMA)* [2017] [CAT 11](#).

⁸ *BT v CMA* [2017] [CAT 11](#) at [25].

⁹ 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 Schedule 5A EA89 ('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).

¹⁰ *BT v CMA* [2017] [CAT 11](#) at [24].

¹¹ *BT v CMA* [2017] [CAT 11](#) at [29].

¹² *E.ON UK plc and GEMA and British Gas Trading Limited Decision (CC02/07)* (E.ON), at paragraph 9.4.

¹³ *British Gas Trading Limited v The Gas and Electricity Markets Authority* (BGT), at paragraph 9.7.

4.11 Procedural flaws or issues in a 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.¹⁴

Discretion to order inter partes costs

4.12 Paragraph 12(3) of Schedule 5A EA89 provides that 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 the appeal.

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

4.14 Where a CMA group decides that it is appropriate to make an order under paragraph 12(3) of Schedule 5A EA89 and Rule 20.3,¹⁵ it may have regard to all the circumstances, including but not limited to:¹⁶

- (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;
- (c) the proportionality and reasonableness of the costs claimed; and
- (d) whether any chilling effects would result from a costs order on the Authority.¹⁷

4.15 As regards the apportionment of costs, paragraph 6.4 of the Guide provides that:

¹⁴ [BGT](#) at paragraphs 9.9 and 9.11. See also [EDF Energy \(Thermal Generation\) Limited/SSE Generation Limited v Gas and Electricity Markets Authority and National Grid \(Electricity Transmission Plc \(Intervener\), Determination on costs](#) (SSE/EDF), at paragraph 30 where it was held that the procedural deficiencies identified in GEMA's approach (with one exception) did not materially affect the substance of the appeal.

¹⁵ Rule 20.3 is to the same effect as paragraph 12(3) of Schedule 5A EA89: in empowering the CMA group that determines an appeal to make an inter partes costs order.

¹⁶ Rule 20.5.

¹⁷ Rule 20.5(d) was added to the Rules when they were updated in October 2022 to reflect the Supreme Court's decision in *Competition and Markets Authority v Flynn Pharma Ltd & Another* [2022] UKSC 14. In that case, the Supreme Court held that 'whether there is a real risk of such a chilling effect [that is, a 'chilling effect' on the conduct of a public body] 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' (at paragraph 98).

The CMA has discretion to make an order requiring a party to the appeal (appellant or the Authority) to make payments to another party in respect of costs reasonably incurred by the other party in connection with the appeal. The CMA may have regard to all the circumstances, including (as set out in Rule 20.5) the conduct of the parties, a party's degree of success and the reasonableness and proportionality of the costs claimed. In addition, the CMA considers that the principles as set out in *BT v Ofcom*¹⁸ apply where a regulator is carrying out its regulatory functions and that this is relevant in considering what costs order, if any, to make in relation to inter partes costs noting that an inter partes order is discretionary. Those principles are taken from the *Booth* line of judgments endorsed in both *BT v Ofcom* and *Flynn Pharma*, described at paragraph 97 of *Flynn Pharma* and set out at paragraph of *BT v Ofcom* extracting the statement by Bingham LJ in *Bradford MDC v Booth*.¹⁹ The CMA does not have the power to order costs against or for interveners.

4.16 In terms of the types of costs covered, paragraph 6.6 of the Guide provides that:

Where the CMA makes an order for costs in favour of one or more of the parties to the appeal under Rule 20.3, 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.

4.17 The Rules do not require interveners to contribute to the CMA's costs, nor to the costs of any party. As noted above, the CMA does not have the power to order costs against or for interveners.²⁰

4.18 As regards the proportionality and reasonableness of the costs claimed, the CMA will have regard to the following general principles:

- (a) In deciding whether the costs claimed by a party are proportionate, the CMA will balance the costs claimed against the significance of the appeal on the overall level of the price control if the appeal had succeeded.²¹

¹⁸ *British Telecommunications plc v Office of Communications* [2018] EWCA Civ 2542.

¹⁹ *Bradford MCD v Booth* [2000] 164 JP 485.

²⁰ Guide, paragraph 6.4.

²¹ [BGT](#), paragraph 9.21(c).

- (b) In deciding on what costs are reasonable, the exercise is one of standing back and seeking to arrive at an approach which does justice in all the circumstances of the case.²²

²² [BGT](#), paragraph 9.30, and SSE/EDF, paragraph 30.

5. CMA costs

Calculation of CMA costs

- 5.1 A statement of the CMA's costs is set out in Appendix A. Our assessment of the CMA's costs takes account of the following:
- (a) The CMA has a statutory obligation to appoint the required three group members to determine the appeal.²³ In order to meet its statutory obligation to determine the appeal within the applicable statutory period²⁴, the CMA appointed a 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. Both the group and the project team used CMA resources (such as IT systems and support, administrative resources and human resource functions) to support the appeals.
 - (b) Two external counsel (leading and junior) were retained to advise on a number of legal issues.
 - (c) The group and the staff team were required to consider, understand and analyse a significant amount of complex material within the relevant time period:
 - (i) NPg advanced two grounds of appeal. These each raised a number of complex issues.
 - (ii) The NoA (which ran to 50 pages) was supported by three witness statements of fact with exhibits (totalling approximately 400 pages), two expert reports (totalling 79 pages) and a bundle of supporting documents running to more than 4,500 pages. NPg's Reply (to GEMA's Response) comprised 20 pages.
 - (iii) GEMA's Response comprised 56 pages, supported by one witness statement, which ran to 99 pages with an exhibit of more than 2,500 pages.
 - (iv) The CMA also received one notice of intervention and additional information from information requests that it issued.
 - (v) The Parties and the Intervener also submitted skeleton arguments and a List of Issues prior to the main hearing.

²³ Paragraph 4(2), Schedule 5A EA89.

²⁴ Pursuant to section 11G EA89, the CMA must determine an appeal against a price control decision within the period of six months beginning with the permission date. This time period is subject to a one-month extension pursuant to section 11G(3)(b) and (4) EA89, although ultimately an extension was not needed in the present case.

- (d) During the appeal, the CMA had to consider and dispose of a number of procedural issues, including those arising from the following:
 - (i) NPg's application for permission to appeal, including consideration of GEMA's submissions objecting to the grant of permission;
 - (ii) An application by Citizens Advice to intervene;
 - (iii) An application by NPg for permission to make submissions in reply to GEMA's Response;
 - (iv) Submission of unsolicited information to the CMA by NPg on 16 May 2023 further to its permitted submissions in response to GEMA's Response; and
 - (v) An application by GEMA for an extension of time for filing submissions in response to the provisional determination.
- (e) The group and the staff team managed the conduct of the appeal 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 ad hoc meetings, written communications and advice.
- (f) Disposing of the appeal required the holding of a clarification hearing 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 appeal.
- (g) A main hearing with the Parties and the Intervener, requiring extensive preparation by the group and the staff team, was held on 12 June 2023. The staff team and leading counsel supported the group at the main hearing.
- (h) Following the main hearing, the group and the staff team considered the Parties' written evidence and submissions, as well as the written submissions of the Intervener, and the oral evidence from the Parties and the Intervener.
- (i) The CMA provided the Parties with its provisional determination for comment and considered the responses.
- (j) Disposing of the appeal, including considering properly all the relevant documents, submissions and other evidence, resulted in the Final Determination of 124 pages.
- (k) The CMA produced the PDC and draft costs order, as required under paragraph 12(1) of Schedule 5A EA89 in relation to the CMA's costs, and as permitted under paragraph 12(3) of Schedule 5A EA89 in relation to inter partes costs.

- 5.2 Determining the appeal within the statutory time frame was a significant exercise. It was necessary for the group and the staff team to devote to it a substantial number of hours of work, and to use the CMA's supporting resources (for which the standard overhead uplift rate is applied).²⁵ It was necessary for some members of staff to work significant excess hours at times. However, the CMA does not pay overtime to staff and costs are recovered only for hours for which the CMA has paid.
- 5.3 The total CMA costs of the appeal were £459,100²⁶ (see Appendix A for a detailed statement of costs). These costs include:
- (a) CMA staff and group (ie panel members) costs;
 - (b) External advisers' costs (Counsel);
 - (c) CMA overhead allowance (defined as a standard percentage uplift of staff and panel member costs); and
 - (d) Non-staff costs and disbursements (for example transcription costs).
- 5.4 The appeal was allowed on Ground 1 but dismissed on Ground 2. We therefore needed to consider the proportion of the CMA's costs to be met by each of the Parties as we consider appropriate in all the circumstances.²⁷

Allocation of CMA costs

CMA costs attributable to specific grounds

- 5.5 Further to paragraph 6.2 of the Guide, we have applied the principle that costs follow the outcome of the appeal (that is, the 'loser pays' principle) in respect of CMA costs associated with each of the grounds of appeal. Given the outcome of the appeal, namely that the appeal is allowed on Ground 1 but dismissed on Ground 2, we do not consider that there are any good reasons to take a different approach in respect of these costs.

Ground 1: misallocation of allowances between cost categories

- 5.6 Our records show that £100,100 of the CMA's costs are attributable to (in the sense that they are directly associated with) determining the appeal on this ground.

²⁵ 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. For more details, see Appendix A.

²⁶ Neither NPg nor GEMA challenged the quantum of the CMA's costs in their representations on the PDC.

²⁷ Paragraph 12(2)(c), Schedule 5A EA89.

- 5.7 We found that GEMA was wrong in law to use the cost proportions derived from NPg's submitted costs when allocating NPg's total efficient modelled costs and on that basis we have allowed the appeal on Ground 1.
- 5.8 Our provisional determination in relation to costs attributable to Ground 1 was that GEMA should pay this amount in full. Neither GEMA nor NPg challenged this aspect of the PDC. Our final determination is therefore that GEMA should pay this amount in full.

Ground 2: BPI Stage 4 reward

- 5.9 Our records show that £47,400 of the CMA's costs are attributable to (in the sense that they are directly associated with) determining the appeal on this ground.
- 5.10 We found that GEMA was not wrong to apply workload adjustments when determining eligibility for a BPI Stage 4 reward and we have dismissed the appeal on Ground 2.
- 5.11 Our provisional determination in relation to costs attributable to Ground 2 was that NPg should pay this amount in full. Neither NPg nor GEMA challenged this aspect of the PDC. Our final determination is therefore that NPg should pay this amount in full.

CMA costs not attributable to specific grounds

- 5.12 We note that, where possible, CMA costs have been recorded as having been incurred by reference to specific grounds. As regards the remaining costs, for the reasons set out below, we consider that they should be treated as costs incurred in connection with the overall appeal.
- 5.13 A substantial proportion of the work of the CMA was of a general nature in connection with the overall appeal. Our records show that £280,300 of the CMA's costs incurred in the substantive determination were not directly associated with a specific ground of appeal. Only one third of the CMA's costs were directly associated with a specific ground of appeal (as described above).
- 5.14 The costs not directly associated with a specific ground of appeal (**non-attributable costs**) included (but are not limited to):
- (a) the appointment and administration of an appeal group;
 - (b) resources to support the group and the staff team (the core 'delivery staff');
 - (c) the clarification hearing and main hearing;
 - (d) drafting of sections of the provisional and final determinations not relating to a specific ground of appeal;

- (e) dealing with matters of procedure;
- (f) instructing counsel, including counsel's fees;
- (g) transcription fees; and
- (h) communication and publication throughout and at the end of the appeal.

- 5.15 Our provisional view was that, given the mixed outcome of the appeals with NPg and GEMA each succeeding on one ground, there was no single unsuccessful party which the CMA would ordinarily find should pay these non-attributable costs. We therefore needed to determine the appropriate way to apportion these costs between the Parties.
- 5.16 Grounds 1 and 2 were interrelated and a substantial proportion of work undertaken was of a general nature applicable to both Ground 1 and Ground 2. However, notwithstanding that situation, we considered that applying the ratio of costs recorded to Ground 1 and Ground 2 as a means of allocating non-attributable costs would result in an inappropriate proportion of CMA costs being allocated to the unsuccessful Party in relation to Ground 1. In the absence of any more reliable way of splitting non-attributable costs, we therefore considered that the most appropriate approach in all the circumstances was for non-attributable costs to be allocated equally between the Parties.
- 5.17 Our provisional determination in relation to non-attributable costs was therefore that each of NPg and GEMA should pay 50% of these costs, namely £140,150 each.
- 5.18 In its representations on the PDC, GEMA supported this allocation of non-attributable costs.²⁸
- 5.19 NPg disagreed with this aspect of the PDC, maintaining that liability for non-attributable costs should be split 68:32 between GEMA and NPg, based on the ratio of the CMA's costs attributable to Ground 1 and Ground 2.
- 5.20 In support of these submissions, NPg maintained that applying a split of 68:32 for non-attributable costs was fair, logical and appropriate, since (among other matters) it would accord more closely with the approach to common costs in civil proceedings in the Courts; and it cited *Mears v Leeds*²⁹ for the proposition that a party succeeding in one claim and obtaining relief in that respect is entitled to not only the costs of that claim but also the common costs expended to pursue the proceedings. NPg further submitted that Grounds 1 and 2 were largely distinct, which it submitted supported its argument that non-attributable costs should be

²⁸ GEMA Representations on PDC, paragraph 4.

²⁹ CC [2012] 4 Costs LO 456.

split in the ratio of the costs for Ground 1 to Ground 2.³⁰ NPg also submitted that the CMA had not explained why it considered the application of 68:32 split to its non-attributable costs would be inappropriate.³¹

- 5.21 Alternatively, NPg submitted that if the CMA were not to accept the 68:32 ratio, then the ratio to be applied should be 55:45, this being the split in allocation of inter partes costs liabilities for Ground 1 and Ground 2 proposed in the PDC.³²
- 5.22 We are not persuaded by NPg's representations that the allocation of the CMA's non-attributable costs should be aligned with the approach in civil proceedings. The judgment in *Mears v Leeds* relates to inter partes costs awards in civil proceedings, where the rule is that the loser pays the winning party's costs. The present proceedings are statutory appeal proceedings governed by the EA89. Here, where there is no overall winner, when making an order for the payment of its costs the CMA has discretion to make an order for payment of the CMA's costs by one or more parties in such proportions as it considers appropriate in all the circumstances.³³
- 5.23 We do not accept NPg's proposal that we apply a ratio of 55:45 to the split of the CMA's non-attributable costs, to align with our provisional determination of the relative success of the Parties on Ground 1 and Ground 2 in the context of any inter partes costs award. In that context, we considered the Parties' respective costs that were most likely associated with each of Ground 1 and Ground 2, based on the evidence and submissions provided. It does not follow from those submissions or evidence that the CMA's non-attributable costs should be split between the Parties in the same way.
- 5.24 We remain of the view that allocating liability for non-attributable costs in a 68:32 ratio is inappropriate. We noted in the PDC that Grounds 1 and 2 were interrelated and much of the work undertaken was of a general nature. To clarify that point, this meant that non-attributable costs could not reliably be identified as arising solely from Ground 1 or Ground 2. Our view is therefore that, in all the circumstances, the 50:50 split proposed in the PDC is appropriate.
- 5.25 Our final determination in relation to the CMA's non-attributable costs is therefore that each of NPg and GEMA should pay 50% of these costs, namely £140,150 each.

³⁰ NPg Response to PDC, paragraph 2.6(iii).

³¹ NPg Response to PDC, paragraph 2.4.

³² NPg Response to PDC, paragraphs 2.3 to 2.7.

³³ Paragraph 12(2)(c), Schedule 5A EA89.

CMA costs incurred in the determination on costs

- 5.26 CMA costs incurred in connection with the PDC, the draft costs order, the final determination on costs and the costs order (the **Costs Process**) were recorded separately from the costs of the appeal. We consider that costs associated with the Costs Process should be borne equally between the Parties. That is because the work involved in producing these documents does not relate to the substantive issues in the appeal and therefore the most appropriate split, given the outcome of the appeal, is 50:50.
- 5.27 Our records show that £31,300 of the CMA costs were attributable to the Costs Process.³⁴
- 5.28 Our determination in relation to the costs of the Costs Process is therefore that each of NPg and GEMA should pay 50% of these costs, namely £15,650 each.

Final determination on the CMA's costs

- 5.29 Accordingly, we determine that the CMA's costs should be met by the Parties according to the following principles.
- (a) For Ground 1, on which the CMA found wholly for NPg, GEMA should pay the CMA's costs attributable to that ground;
 - (b) For Ground 2, which the CMA dismissed, NPg should pay the CMA's costs attributable to that ground; and
 - (c) In relation to the CMA's non-attributable costs (including the costs of the Costs Process), each of NPg and GEMA should pay 50% of the CMA's costs.
- 5.30 In view of the above, our determination is that, pursuant to paragraph 12 of Schedule 5A EA89, the CMA's costs of £459,100 should be paid by NPg and GEMA as follows:
- (a) NPg: a total of £203,200 comprising £47,400 in respect of costs attributable to Ground 2, and £155,800 towards non-attributable costs; and
 - (b) GEMA: a total of £255,900 comprising £100,100 in respect of costs attributable to Ground 1 and £155,800 towards non-attributable costs.

³⁴ Up to the 'cut-off' date of 23 February 2024 for staff and group hours. Note that the 'cut-off' date for CMA costs included in the provisional determination on costs was 1 December 2023 (see Appendix A, footnote 94).

6. Inter partes costs

6.1 On 22 September 2023, we invited the Parties to provide statements of costs if they wished to apply for inter partes costs and to set out their reasoning for any costs claimed. The Parties each submitted statements of their own costs to the CMA on 6 October 2023.

NPg's statement of costs and representations

6.2 NPg submitted a statement of costs incurred in the appeal in the period 1 December 2022 to 5 September 2023 totalling £[REDACTED], comprised of:

- (a) External solicitors' fees of £[REDACTED];
- (b) Counsel (leading and junior counsel) costs of £[REDACTED];
- (c) In-house legal costs (of NPg's General Counsel) of £[REDACTED]; and
- (d) Fees for economic expert evidence provided by Frontier Economics of £[REDACTED].

6.3 NPg submitted that it should be awarded 66% of its external and internal legal costs to reflect its success on Ground 1. It arrived at this figure by assessing the proportions of each of the NoA, the transcript of the main hearing and the Final Determination relating specifically to either Ground 1 or Ground 2. However, it had not included in its calculations the proportion of the selected documents not relating to Ground 1 or Ground 2.³⁵

6.4 NPg further submitted that it was not practically possible to allocate the legal costs it incurred on a line-by-line basis as between the two grounds of appeal; any attempt to do so would be time-consuming and costly, and the resulting figures would not be absolutely precise.

6.5 NPg submitted that it should also be awarded a proportion of its costs in relation to expert evidence provided by Frontier Economics, based on Frontier's time recording of its work and the firm's good faith estimate of its work on each of the grounds. This proportion was reported on a month-by-month basis in Appendix C to NPg's statement of costs. The proportion varied throughout the period of the appeal but the average proportion attributed to Ground 1 was 72%.³⁶

6.6 On this basis, the inter partes costs claimed by NPg were £[REDACTED].

6.7 NPg submitted that its costs were reasonable and proportionate for the following reasons:

³⁵ Slaughter and May letter dated 6 October 2023, paragraphs 6-7.

³⁶ NPg Statement of Costs Appendix C.

- (a) Ground 1 was an ‘extremely important issue’ to NPg and worth a ‘very large’ sum³⁷ of approximately £157 million (subject to the precise mechanism that results from GEMA’s redetermination).
- (b) The case had important implications for the rigour of future decision- making by GEMA.
- (c) The appeal involved issues arising from a price control determination with a high level of complexity.
- (d) In these circumstances it was reasonable for NPg to instruct a leading City law firm, leading and junior counsel.
- (e) Given the significant economic detail involved in these proceedings, it was also reasonable for NPg to instruct a leading economic consultancy.
- (f) NPg succeeded wholly on Ground 1, which was a binary question in terms of potential outcome.
- (g) NPg conducted itself at all times during the appeal in a manner that furthered the overriding objective.
- (h) Under paragraph 6.6 of the Guide the costs recoverable ‘may include all those fees, charges, disbursement, expenses and remuneration incurred by a party in the preparation and conduct of the appeal’. However, in the interests of reasonableness and proportionality NPg claimed only the costs of external advisers and experts and in-house counsel. It had not claimed expenses and remuneration incurred by NPg in relation to the time spent by the significant number of other NPg employees and officers in the preparation and conduct of the appeal.
- (i) NPg incurred significant costs in the period before GEMA’s Final Determinations were issued in relation to the matters considered in Ground 1 but had not sought any contribution towards those costs.³⁸

GEMA’s statement of costs and representations

6.8 GEMA submitted a statement of costs incurred in defending the appeal totalling £[~~£~~] comprised of the following:

- (a) External solicitors’ fees of £[~~£~~];
- (b) Counsel (two juniors) costs of £[~~£~~];

³⁷ Slaughter and May letter dated 6 October 2023, paragraph 11 (a) (i).

³⁸ Slaughter and May letter dated 6 October, paragraph 11.

- (c) In-house legal team costs of £[~~xx~~]; and
- (d) Expert (CEPA) costs of £[~~xx~~].

6.9 GEMA submitted that:

- (a) the appropriate position is that each party should recover 50% of its costs, for a number of reasons (including that each party had been successful on one ground);
- (b) the level of NPg's recoverable costs should be reduced to the level of GEMA's costs, which were reasonably incurred;
- (c) with the net result that there should be no order as to inter partes costs.³⁹

6.10 GEMA further submitted that if the CMA were to make an inter partes costs award having regard to the relative success of each party, the appropriate starting point would be that GEMA should recover its reasonably incurred costs of Ground 2 and NPg should recover its reasonably incurred costs of Ground 1. However, there was considerable overlap between the grounds, such that it is difficult to apportion the Parties' costs neatly between them. It was only possible to address Ground 2 efficiently because the detailed evidence in relation to the cost assessment process and methodology had already been explained in relation to Ground 1.⁴⁰

6.11 Further, GEMA submitted that similar analysis applies to the written arguments: GEMA's Response to the NoA contained nine pages addressing the background and costs assessment process, eight pages addressing Ground 1, and 15 pages addressing Ground 2. In the first witness statement of Steve McMahon filed on behalf of GEMA 122 paragraphs were devoted to background and context, 88 paragraphs to Ground 1 and 92 paragraphs to Ground 2. In the NoA 14 pages were devoted to Ground 1 and only six pages to Ground 2, but NPg included its discussion of the costs assessment process generally within the discussion on Ground 1. Much of that background was relevant across both grounds.⁴¹

6.12 GEMA also submitted that at the main hearing on 12 June 2023, the CMA questioned NPg on Ground 1 for approximately 40 minutes and on Ground 2 for approximately 1 hour and 15 minutes. The CMA then questioned GEMA for approximately 2.5 hours, but there was no clear division between questions on Grounds 1 and 2 and much of the focus was on Load Related Expenditure adjustment which was relevant to both grounds.⁴²

³⁹ GEMA Amended Submissions on Costs 10 October 2023, paragraph 21.

⁴⁰ GEMA Amended Submissions on Costs 10 October 2023, paragraphs 11-12.

⁴¹ GEMA Amended Submissions on Costs 10 October 2023, paragraph 13.

⁴² GEMA Amended Submissions on Costs 10 October 2023, paragraph 14.

- 6.13 GEMA therefore submitted that in these circumstances the just result would be for the CMA to conclude that each ground occupied roughly equal time and that costs incurred by each party should be apportioned equally to each ground.⁴³
- 6.14 GEMA also submitted that the true value of NPg's success on Ground 1 was unclear. The attributed value of £157 million was premised on NPg succeeding in obtaining its preferred remedy of cost allocation by reference to the proportions derived from disaggregated modelling only, but the CMA did not award NPg this remedy.⁴⁴
- 6.15 GEMA additionally submitted that the level of NPg's recoverable costs should be set no higher than the level of costs incurred by GEMA for the following reasons:
- (a) First, the CMA can only make a costs order in respect of costs reasonably incurred in the appeal. GEMA's own costs should serve as a benchmark for the costs which it was reasonable to incur in the appeal.⁴⁵
 - (b) Second, to the extent that NPg's costs exceeded GEMA's it would be reasonable to reduce those costs to the level which GEMA incurred to reflect the likely chilling effect on the proper exercise of GEMA's regulatory functions.⁴⁶
- 6.16 As referred to at paragraphs 3.3 to 3.6 above, GEMA was permitted to file a witness statement in support of its submission that an award of NPg's costs against GEMA could have a chilling effect on the exercise of GEMA's regulatory functions. In summary, the second witness statement of Steve McMahon (**McMahon 2**) made the following points:
- (a) Ofgem is a non-ministerial department that advises and supports GEMA. Ofgem's work is principally funded from licence fees payable by electricity and gas transmission and distribution companies. Those fees are passed on by licensees through gas shippers and energy suppliers to consumers.⁴⁷
 - (b) Ofgem's annual budget is agreed and approved by HM Treasury and subsequently by Parliament. In any financial year Ofgem is required to balance expenditure and income. Any difficulties or potential bids for exceptions are referred to HM Treasury for approval.⁴⁸
 - (c) Ofgem budgets for external legal advisory costs to undertake what it considers would be a 'normal' level of legal activity. There is no provision in

⁴³ GEMA Amended Submissions on Costs 10 October 2023, paragraph 15.

⁴⁴ GEMA Amended Submissions on Costs 10 October 2023, paragraph 16.

⁴⁵ GEMA Amended Submissions on Costs 10 October 2023, paragraphs 17-18.

⁴⁶ GEMA Amended Submissions on Costs 10 October 2023, paragraphs 19-20.

⁴⁷ McMahon 2 paragraphs 2 and 5.

⁴⁸ McMahon 2 paragraphs 6-7.

Ofgem's budget for legal costs outside 'normal' costs, nor is there any provision for adverse costs awards in litigation.⁴⁹

- (d) Ofgem has had discussions with HM Treasury regarding 'outside normal' costs including in relation to the prospects of appeals in RIIO-2 (including RIIO-ED2). HM Treasury has accepted in principle that it would not be appropriate for adverse costs orders to be recouped through the licence fee and indicated that it would provide budget from its reserves (the 'reserve claim process'). However, this agreement with HM Treasury is not formalised and there continues to be a risk, particularly in the current volatile political and economic climate, that HM Treasury would ultimately refuse to reimburse Ofgem.⁵⁰
- (e) Ofgem expects that in the event that it is subject to an adverse costs award it would have to pay the award from its cash reserves. Ofgem carries cash reserves for two main purposes: the payment of staff costs and the payment of invoices incurred for services or goods during the standard course of Ofgem's business.⁵¹
- (f) If HM Treasury were not prepared to refund GEMA via the reserve claim process, Ofgem's options would be:
 - (i) to seek agreement from HM Treasury to increase Ofgem's budget funded via an increase in the licence fee levy. HM Treasury's agreement to this is far from certain because the levy is set at a level the UK Government considers appropriate to impose on stakeholders;
 - (ii) alternatively, to fund any adverse costs order from Ofgem's existing cash budget.⁵²
- (g) McMahon 2 contended that in the event that GEMA was subject to an adverse costs order, a chilling effect on the exercise of GEMA's functions could arise in three ways:
 - (i) First, the prospect of a substantial adverse costs order would increase the weight placed on minimising litigation risk when taking decisions. Ofgem may be compelled to adopt a more cautious stance on regulatory decisions to avoid having to pay these costs from its own cash reserves. This could have an impact on consumer welfare.
 - (ii) Second, Ofgem may be forced to defend litigation on a highly restrictive budget in order to minimise costs that might be incurred. This would

⁴⁹ McMahon 2, paragraphs 8-9.

⁵⁰ McMahon 2, paragraphs 10 and 14.

⁵¹ McMahon 2, paragraph 11.

⁵² McMahon 2, paragraph 15.

constitute a practical limitation on Ofgem's ability to protect consumers' interests.

- (iii) Third, if Ofgem were required to fund any such costs out of its own budget, this would be likely to mean that it would need to de-prioritise or cease other critical work in order to have an appropriately sized litigation budget. If Ofgem needed to maintain such a contingency fund in its annual budget, that would result in its needing to reduce other areas of its work.⁵³

Our assessment

- 6.17 As explained above at paragraphs 4.12 to 4.18, the CMA has discretion to make such inter partes costs order as it thinks fit in respect of costs reasonably incurred in connection with this appeal and which are reasonable and proportionate in amount.
- 6.18 In accordance with Rule 21.5 we have considered all the circumstances and have also taken into consideration the Guide at paragraph 6.4.
- 6.19 We consider that in this case it would be appropriate to make an order for inter partes costs. Our assessment is set out below in respect of each of the factors identified in Rule 20.5 (which we note is not an exhaustive list).
- 6.20 Before addressing each of these factors, however, we address two points arising from NPg's submissions on what costs are properly recoverable as costs of the appeal: first, pre-decision costs and second, costs associated with in-house lawyers.

Recoverability of pre-decision costs

- 6.21 NPg seeks to recover its costs from 1 December 2022 as costs in the appeal. In submissions it states that it does not seek to recover costs before 'GEMA's Final Decision' (by which we take NPg to mean GEMA's price control decisions dated 30 November 2022) as a matter of reasonableness and proportionality.
- 6.22 Paragraph 6.6 of the Guide provides that:
 - ... the CMA will not normally allow any amount in respect of costs incurred before the Authority first published its decision.
- 6.23 'Decision' is not defined in the Guide in this context. Indeed 'decision' is not defined in either the Guide or Rules. Read in conjunction with the EA89 however, it is arguable that 'decision' in the Rules and Guide is intended to refer to a

⁵³ McMahon 2, paragraph 19.

decision that may be the subject of an appeal to the CMA under section 11C EA89, namely a decision to proceed with the modification of a condition of a licence. In this instance the appealable decision was published by GEMA on 3 February 2023.

- 6.24 However, the CMA has discretion to order inter partes costs ‘reasonably incurred in the appeal’ and this requires consideration of what were costs incurred in the appeal on this occasion.
- 6.25 We do not consider that costs incurred by NPg before GEMA’s price control decisions can be costs in the appeal, as before those pricing decisions were published, it would not have been certain that there was a decision that NPg would wish to appeal. NPg was therefore right not to include any costs before 1 December 2022. However, once GEMA’s price control decision had crystallised there was no further opportunity for NPg to influence that decision in so far as it affected the subsequent licence condition modification. We therefore provisionally considered that NPg’s costs from 1 December 2022 onwards were costs incurred in the appeal.
- 6.26 In their respective submissions on the PDC, NPg agreed with this provisional conclusion and GEMA did not dispute our approach. In conclusion, our view is therefore that NPg’s costs from 1 December 2022 onwards were costs incurred in connection with the appeal.

Recoverability of costs associated with in-house legal teams

NPg

- 6.27 NPg sought to recover expenses associated with work on its appeal by its General Counsel. In doing so it relied on paragraph 6.6 of the Guide where it states:
- ... 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.
- 6.28 We do not agree with the interpretation that NPg sought to attribute to paragraph 6.6 of the Guide. It is a well-established principle in litigation that a litigant cannot recover its own costs for work done preparing its case or for loss of time, as opposed to recovering legal representatives’ costs.⁵⁴ There are a small number of exceptions to this, one of which is where work is done by a party’s expert staff, if they are the most suitable or convenient experts to employ.⁵⁵

⁵⁴ London Scottish Benefit Society v Chorley and others (1884) 13QBD 872.

⁵⁵ Re Nossen’s Letter Patent [1969] 1 WLR 638.

- 6.29 Expert staff may include in house lawyers. However, if external lawyers have been instructed, in-house legal costs are not usually recoverable unless it can be demonstrated that:
- (a) the nature of the work by the in-house lawyers is legal work, such as advising, drafting etc, rather than work done in the role of the client such as liaising with solicitors, or finding information needed for the case;
 - (b) there is a record of the work done and time spent; and
 - (c) there is no duplication of the work of external lawyers.⁵⁶
- 6.30 In this case, NPg had an extensive team of external lawyers, including leading and junior counsel. NPg's statement of costs in relation to its General Counsel does not identify the nature of the work they undertook and there is no record of the tasks involved or the time taken for each of those tasks. The General Counsel's time is reconstructed only broadly. Although NPg's General Counsel may have had a heavy workload in relation to NPg's appeal, no evidence was provided in NPg's statement of costs that their work extended to legal tasks. Our provisional view was therefore that NPg's General Counsel's time was not recoverable and these costs (said to be £[~~£~~]) should be disallowed.
- 6.31 In its response, NPg submitted that the PDC was incorrect in concluding that its General Counsel's costs were not recoverable, stating that our consideration of *Ultraframe* in the PDC did not give adequate weight to comments within that judgment, where it was held that in-house legal costs could be reclaimed in situations where external solicitors were instructed.⁵⁷ NPg further submitted that its General Counsel's costs were measurable and that the General Counsel had contributed particular technical 'know how' given their role as an in-house legal adviser, with the result that there was no duplication of work undertaken by NPg's external solicitors.⁵⁸
- 6.32 Having considered NPg's further submissions, we remain of the view that its General Counsel costs are not recoverable in the present circumstances.
- 6.33 In *Ultraframe*, the judge concluded that in principle, an in-house lawyer's costs could be recovered provided that the tasks undertaken were distinct from those undertaken by the external solicitors and were measurable. However, in the present case, NPg has not provided sufficient information about the precise nature or extent of tasks undertaken by NPg's General Counsel in the appeal, or how they were distinct from the legal work undertaken by NPg's external legal team, to enable us to form a view on whether the costs are recoverable in practice rather

⁵⁶ *Ultraframe (UK) Ltd v Eurocell Building Plastics Ltd & anr* (2006) EWHC 90069 (Costs).

⁵⁷ NPg Response to PDC, paragraphs 3.5-3.6.

⁵⁸ NPg Response to PDC, paragraphs 3.7-3.10.

than in principle. Although NPg has submitted that its General Counsel's work was measurable, we note that this was an estimate of the General Counsel's overall time.⁵⁹

- 6.34 GEMA supported our provisional conclusions regarding NPg's General Counsel's costs.⁶⁰
- 6.35 Our final determination is therefore that NPg's General Counsel's costs are not recoverable in the present circumstances.
- 6.36 NPg submitted that it had not claimed expenses and remuneration incurred by NPg in relation to the time spent by the significant number of other NPg employees and officers in the preparation and conduct of the appeal as a matter of proportionality.⁶¹ For the reasons outlined above, in particular that litigants are not usually able to recover their own costs (see paragraph 6.28), we consider that any such costs would not be recoverable in any event.

GEMA

- 6.37 GEMA's statement of costs also included costs attributable to in-house lawyers as well as external solicitors (Hogan Lovells).
- 6.38 Applying the principles set out at paragraphs 6.28 to 6.29 above and in the absence of any representations by NPg in relation to GEMA's costs, our view is that GEMA should be permitted to recover the costs of its in-house lawyers on the basis that:
- (a) The narratives indicate that the work undertaken by them was mostly of a legal nature such as drafting submissions and witness evidence, or drafting instructions to counsel;
 - (b) Time has been recorded and hourly rates provided for both in-house and external lawyers; and
 - (c) While the narratives of work undertaken indicate there may have been some overlap in work, the hours recorded by Hogan Lovells are modest overall; therefore this risk appears to us to be low.

Rule 20.5(a): conduct of the parties

- 6.39 In deciding what order to make under Rule 20.3, the CMA may have regard to the conduct of the parties. NPg submitted that it conducted itself throughout the appeal in a manner conducive to the overall objective. GEMA made no

⁵⁹ NPg Statement of Costs, page 19.

⁶⁰ GEMA representations on PDC, paragraphs 7-8.

⁶¹ Slaughter and May letter dated 6 October 2023, paragraph 11(g).

submissions in respect of its behaviour. We do not consider there is any reason to make an adjustment to the award of costs as a result of the behaviour of either party.

Rule 20.5(b): whether a party has succeeded in whole or in part

- 6.40 In determining what order to make under Rule 20.3 the CMA may consider whether a party has succeeded in whole or in part. In this appeal NPg succeeded on Ground 1, but Ground 2 of its appeal was dismissed. NPg was therefore the successful party on Ground 1 and GEMA the successful party on Ground 2. While the CMA has discretion in determining whether to make an award for inter partes costs, it typically exercises that discretion so that costs follow the event. We provisionally determined in the PDC that in this appeal an appropriate outcome in all the circumstances would be for NPg to be awarded its reasonable and proportionate costs of the appeal in relation to Ground 1 (after disallowance of the costs claimed in respect of NPg's General Counsel) and that GEMA should be awarded its costs of the appeal in relation to Ground 2.
- 6.41 Turning to the proportion of each party's costs that would be attributable to either Ground 1 or Ground 2, we note that neither party offered any evidence from fee-earners' time recording as to the proportion of time spent on Ground 1 or Ground 2. NPg estimated that 66% of its legal expenses and 72% of Frontier Economics' fees were attributable to Ground 1. In relation to NPg's legal expenses this estimate was based on analysis of a selection of documents produced in the appeal. GEMA carried out a similar exercise and concluded that an appropriate attribution of costs was 50% to each of Ground 1 and Ground 2.
- 6.42 We consider that seeking to analyse the amount of time devoted to a particular ground in the appeal by reference to the proportion of a selection of documents produced is not appropriate, not least given that the time spent on each document will depend on a number of factors (including the complexity of the points in question). Moreover, in this case each party referred to a different selection of documents without explaining why those documents were representative of all work done on the appeal. Further, NPg (unlike GEMA) has not taken into account in its calculations that the documents it referred to included background information and argument not specific to a particular ground.
- 6.43 We also consider that there is some force in GEMA's representations that there was considerable overlap between Ground 1 and Ground 2 and that it was only possible to address Ground 2 efficiently because the detailed evidence in relation to the cost assessment process and methodology had already been explained in relation to Ground 1.
- 6.44 Having had regard to all the circumstances, we therefore provisionally considered that the appropriate order was that:

- (a) GEMA pays NPg 55% of its reasonably incurred costs of the appeal, reflecting NPg's success on Ground 1; and
- (b) NPg pays GEMA 45% of its reasonably incurred costs of the appeal, reflecting GEMA's success on Ground 2.

6.45 In its representations on the PDC, GEMA agreed with our provisional conclusions.

6.46 NPg submitted that (as in its original statement of costs) it should receive 66% of its legal costs and 72% of Frontier Economics' fees.⁶² In doing so it relied on the same argument and legal authority regarding the allocation of common costs in civil proceedings referred to in relation to the allocation of the CMA's non-attributable costs, which are discussed at paragraphs 5.19 to 5.25 above. NPg submitted that alternatively, it should be awarded 59% of its costs as relating to Ground 1 following a re-assessment of the word count attributable to Grounds 1 and 2 in the NoA, the transcript of the main hearing and the Final Determination and adding the background wording as a proxy for common costs split on a 50-50 basis.⁶³

6.47 We were not persuaded by NPg's submissions in response to the PDC on these points. The present proceedings are statutory appeal proceedings governed by the EA89. In determining any inter partes costs award in a statutory appeal, the CMA has discretion to make such award as it thinks fit.⁶⁴ NPg's re-assessment of the content of the NoA, the transcript of the main hearing and the Final Determination does not address our fundamental concerns about such an approach being used as a proxy for hours of work undertaken.

6.48 Our final determination is therefore that:

- (a) GEMA pays NPg 55% of its reasonably incurred costs in connection with the appeal, reflecting NPg's success on Ground 1; and
- (b) NPg pays GEMA 45% of its reasonably incurred costs in connection with the appeal, reflecting GEMA's success on Ground 2.

Rule 20.5(c): proportionality and reasonableness of costs claimed

NPg's costs

6.49 After deducting costs claimed in respect of its General Counsel, NPg's costs incurred in the appeal totalled £[REDACTED].

⁶² NPg response to PDC, paragraph 3.12.

⁶³ NPg response to PDC, paragraphs 3.14-3.16.

⁶⁴ Paragraph 12(3), Schedule 5A EA89.

- 6.50 NPg submitted that given the overall value it placed on Ground 1 it was reasonable and proportionate to instruct a leading City law firm, leading and junior counsel and a leading economics firm in the appeal.
- 6.51 Reviewing NPg's Statement of Costs, we have concerns about whether its costs were reasonably incurred and were reasonable and proportionate in amount:
- (a) The schedule of Slaughter and May's work indicates that there was heavy staffing at the senior level including two partners and two senior associates/of counsel. The narratives of work carried out indicate that many fee-earners appear to have been involved in the same tasks (for example working on pleadings and evidence). This raises concerns about duplication of effort.
 - (b) Use of counsel, including a KC, was not unreasonable, but again from the narratives provided there are concerns about duplication of effort with that of Slaughter and May, particularly on tasks such as drafting of pleadings and evidence.
 - (c) We do not consider it was reasonable or proportionate for NPg's counsel team to attend the clarification hearing, when this was intended to be non-contentious.
 - (d) Slaughter and May's hourly rates are high, significantly more than the Guideline Hourly Rates for 'London 1' set out in the Judicial Guide to the Summary Assessment of Costs 2021.⁶⁵ 'London 1' is defined by type of work undertaken as well as locality, being 'very heavy commercial and corporate work by centrally based London firms'.
 - (e) Given the complexity of the economic issues it was reasonable for NPg to instruct Frontier Economics as its economic expert, in particular to prepare expert evidence to be filed with the NoA. The breakdown of Frontier Economics' time shows that Frontier Economics recorded [REDACTED] hours in the period 5 December 2022 to 5 March 2023, preparing the two expert reports filed by NPg.⁶⁶ Frontier Economics then recorded a further [REDACTED] hours for subsequent work on the appeal. By way of comparison, time recorded by GEMA's economic experts CEPA totalled £[REDACTED]hours,⁶⁷ although this did not include the provision of an expert report.
- 6.52 While NPg is entitled to instruct such legal and economic advisers as it chooses, we do not consider that it follows that GEMA should be liable for the full extent of its costs. We note that in *Unichem v OFT*⁶⁸ the CAT stated that:

⁶⁵ [Guide to the Summary Assessment of Costs 2021 \(final\) \(judiciary.uk\)](#) .

⁶⁶ NPg Statement of Costs Part C, pages 22 to 25.

⁶⁷ GEMA Statement of Costs, page 6.

⁶⁸ CAT [2005] CAT 31 at [27], cited with approval by the Supreme Court in *Flynn Pharma*.

While it is open to a company which chooses to make an appeal to the Tribunal to assemble a legal team and to present its case in the manner it sees fit, and to incur any costs which it considers appropriate in doing so, it does not necessarily follow that the Authority, (or indeed any other party) against whom an order for costs is made should necessarily be liable for the full extent of those costs. A successful applicant is entitled to no more than reasonable and proportionate costs.

- 6.53 GEMA submitted that its own costs, totalling £[redacted], were an appropriate measure of what are reasonable costs in the appeal. While a paying party's costs are a factor to be taken into consideration, they are not automatically determinative of what is reasonable:
- (a) Generally, an appellant has the greater task in launching an appeal than a respondent in resisting an appeal;
 - (b) GEMA was able to call upon an in-house legal team to carry out most of the legal work it undertook in responding to the appeal. NPg necessarily had to instruct external solicitors;
 - (c) As a public authority GEMA is able to procure junior counsel from the Attorney General's panel at much lower rates than commercially available.
- 6.54 Given the limited information available to it in making an inter partes costs determination, the CMA's approach is necessarily broad-brush, analogous to summary assessment in litigation in the High Court or CAT.
- 6.55 Standing back and considering the most appropriate order in all the circumstances between the Parties, in the PDC we provisionally determined that 60% of NPg's costs were reasonably and proportionately incurred.
- 6.56 In its response to the PDC, NPg submitted that the costs of its external solicitors and expert economists should not be reduced for reasons of reasonableness and proportionality, for example because different solicitors and/or counsel performed different roles and functions in progressing items of work⁶⁹; and that Frontier Economics' role was different from that of CEPA, as NPg was not supported by in-house experts.⁷⁰ NPg further submitted that its counsel costs should be reduced by only 4% to reflect the cost of the attendance of its counsel team at the clarification hearing (see paragraph 6.51(c) above).⁷¹
- 6.57 In its representations on the PDC, GEMA maintained that further significant reductions should be made to NPg's costs on the basis that they were 'manifestly

⁶⁹ NPg Response to PDC, paragraphs 3.18 (i) and (ii).

⁷⁰ NPg Response to PDC, paragraph 3.18 (v).

⁷¹ NPg Response to PDC, paragraphs 3.18(iii) and 3.19.

excessive'.⁷² GEMA submitted that, overall, NPg's costs were roughly [X] times higher than GEMA's, in particular⁷³:

- (a) NPg's costs in relation to Slaughter and May were nearly [X] times GEMA's solicitors' costs as a result of not just higher rates, but a much higher number of hours claimed (more than [X] in total). Reducing Slaughter and May's fees to Guideline Hourly Rates would result in a reduction of [X]%. Further deductions should be made for duplication and overstaffing⁷⁴.
- (b) NPg's counsel fees were over [X] times more than those incurred by GEMA, whereas it would have been reasonable and proportionate for NPg to have incurred counsel fees [X] times those of GEMA.⁷⁵

6.58 GEMA further submitted that NPg's expert costs were nearly [X] times those of GEMA and that a maximum of 50% of Frontier's fees should be allowed as reasonable and proportionate.⁷⁶ In addition, GEMA submitted that NPg received funding for regulatory and compliance activities, so should have internal resources that it could have applied to the appeal at a more proportionate cost.⁷⁷ Further even if only 60% of NPg's costs were recoverable, that implied that it was permissible for NPg to spend nearly [X] times as much as GEMA, which GEMA considered could not be right.⁷⁸ GEMA added that the CMA had, in previous energy appeals, used GEMA's costs as a benchmark for what was reasonable and proportionate when assessing opposing parties' costs.⁷⁹

6.59 Having considered the Parties' submissions on the PDC, we are not persuaded to depart from our provisional finding that GEMA's own costs are not the most appropriate yardstick in this case to assess the reasonableness and proportionality of NPg's costs. They are a potentially relevant factor but are not necessarily the most appropriate measure in every case. Although the CMA has applied the regulator's costs as a measure of reasonableness in some other regulatory appeals, it has not always done so. The CMA's previous decisions are not binding.

6.60 NPg may receive funding for regulatory matters and compliance, but of itself this is not evidence that it has appropriate internal resources that can be applied in an appeal of this nature. It would be a perverse outcome if NPg was effectively required to maintain appropriate internal resources to cover any conceivable technical point that might arise in connection with an appeal to the CMA under the EA89.

⁷² GEMA representations on PDC, paragraph 9.

⁷³ GEMA representations on PDC, paragraphs 10-13.

⁷⁴ GEMA representations on PDC paragraph 10

⁷⁵ GEMA representations on PDC, paragraph 26.

⁷⁶ GEMA representations on PDC, paragraphs 11(4) and 27.

⁷⁷ GEMA representations on PDC paragraph 12.

⁷⁸ GEMA representations on PDC paragraph 13.

⁷⁹ GEMA representations on PDC, paragraph 14.

- 6.61 As set out in paragraph 6.52 above, parties may choose to retain a legal team and other advisers but are encouraged to be prudent in incurring costs. This is managed by the principle that they should have no expectation that they will be able to recover all of their costs following an assessment of the proportionality and reasonableness of those costs.
- 6.62 In the PDC, a reduction of 40% to NPg's claimed costs of Ground 1 across all of their external advisers (solicitors, counsel and economic experts) was proposed to reflect our concerns expressed at paragraph 6.51 about the reasonableness of NPg's costs in respect of each of those teams. However, as GEMA has pointed out, reducing Slaughter and May's costs to Guideline Hourly Rates would reduce their fees by [X]%. The 40% reduction proposed in the PDC therefore did not fully address our concerns about overstaffing and potential duplication. This was highlighted by GEMA's representations regarding Slaughter and May's hours (see paragraph 6.57(a) above), which underscored our existing concerns. In light of this and GEMA's representations more generally, we have re-visited the fact that, as identified in the PDC, Slaughter and May's team included two partners and two senior fee earners (senior associate and 'of counsel'), as well as leading and junior counsel. In our view, this combination of external legal advisers was 'top heavy' and it was also 'time heavy' in the circumstances of the present case. Slaughter and May's fees also included around [X] hours of trainee solicitor time.
- 6.63 Having reflected on the Parties' representations on the PDC, we therefore conclude that there should be a further adjustment to NPg's recoverable costs to adjust further in relation to overstaffing and duplication.
- 6.64 Our final determination is therefore that 50% of NPg's costs were reasonably and proportionately incurred.

GEMA's costs

- 6.65 We provisionally considered that GEMA's costs as set out in its statement of costs were reasonably incurred and reasonable and proportionate:
- (a) In-house lawyers carried out most of the legal work at hourly rates that were below the Guideline Hourly Rates for 'London 3' (defined in the judicial Guide to Summary Assessment as solicitors in outer London boroughs, including Tower Hamlets where Ofgem offices are located).

- (b) Provided that in-house lawyers are charged at no more than the Guideline Hourly Rates for their location, the indemnity principle is unlikely to be infringed.⁸⁰
- (c) The rates for GEMA's external lawyers Hogan Lovells were well below the Guideline Hourly Rates for 'London 1' even though they are, as NPg submitted, a leading City of London law firm. Hogan Lovells' time recording also showed that most hours were recorded at associate level, while hours recorded at partner and of counsel level were commensurate with supervising that work.
- (d) Counsel was also employed sparingly. We note that although GEMA appears to have instructed leading counsel (Daniel Beard KC) in the preparation of its Response to the NoA, it has not sought to recover any fees in respect of Mr Beard's work. The other members of GEMA's counsel team are both members of the Attorney General's panels and their hourly rates are commensurate with the rates that are charged for B and C panel members.
- (e) GEMA instructed external expert economists, CEPA. As in the case of NPg, given the complexities of the economic issues we consider it was reasonable to do so. CEPA's hourly rates and hours recorded are modest when compared with the fees/hours incurred by NPg in respect of Frontier Economics.

6.66 NPg made no submissions regarding GEMA's costs. Our final determination is therefore that GEMA's costs were reasonable and proportionate.

Rule 20.5 (d): whether chilling effects would result from a costs order against GEMA

6.67 In *Flynn Pharma & Anr v CMA* Lady Rose, delivering the Supreme Court's decision (with which all the other justices agreed) stated:

In my judgment, there is no generally applicable principle that all public bodies should enjoy a protected status as parties to litigation where they lose a case which they have brought or defended in the exercise of their public functions in the public interest. The principle supported by the *Booth* line of cases is, rather, 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

⁸⁰ The indemnity principle prevents a party recovering more by way of costs from an opponent than it is obliged to pay its own lawyers. However, where in-house lawyers' costs are sought at no more than Guideline Hourly rates the indemnity principle is not infringed. Re Eastwood [1975] Ch 112, *Ping Europe Limited v CMA* [2019] CAT 7.

made against it in those kinds of proceedings, even where the body has acted reasonably in bringing or defending the application.

... Whether or not 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 exist⁸¹

6.68 GEMA's evidence on the risk of a chilling effect was set out in McMahon 2. We were unpersuaded by Mr McMahon's evidence that on the balance of probabilities that there was a real risk of chilling effect. In particular:

- (a) McMahon 2 contained no data or figures regarding the extent of GEMA's budget, cash reserves etc that would have enabled the CMA to understand the quantitative effect of any costs order on GEMA's finances.⁸²
- (b) McMahon 2 explained that although GEMA has a fixed annual budget and no contingency for adverse costs awards, it can apply to HM Treasury for additional funding through the reserve claim process. This arrangement has not been formalised so that there was said to be a risk that HM Treasury could refuse to provide additional funding. However, McMahon 2 did not identify how high that risk might be.
- (c) Mr McMahon's evidence on the potential effects of a costs award against GEMA was unparticularised and speculative.

6.69 Given the lack of evidence of the real risk of a chilling effect on GEMA, in the PDC we provisionally determined that there should be no further adjustment to the costs to be awarded to NPg in respect of Ground 1.

6.70 In its response to the PDC, NPg submitted that an inter partes costs award should be made in NPg's favour. GEMA should be incentivised to apply an appropriate degree of rigour to its analysis in future pricing control determinations, and an adverse costs award was a legitimate way of reinforcing that incentive. NPg further submitted that it was not in the public interest for regulators to be insulated from the costs that they imposed on market participants through bad decision-making.⁸³

6.71 NPg also submitted that in circumstances where the CMA had found that GEMA's approach to allocating total efficient model costs was irrational, an adverse costs award was justified and should not be outweighed by any alleged 'chilling effect'.⁸⁴

⁸¹ [2022] UKSC 14, paragraphs 97- 98.

⁸² GEMA does publish an annual financial report, but no information from that financial report was included in McMahon 2. The CMA can only consider the evidence before it.

⁸³ NPg Response to PDC, paragraph 3.21.

⁸⁴ NPg Response to PDC, paragraph 3.24.

- 6.72 We do not agree with these submissions by NPg. An inter partes costs award is compensatory, simply reflecting the overall success of each party. It is not a form of ‘incentive’ for GEMA’s future price control decisions, nor would it be appropriate for the CMA to seek to influence a regulator’s future decision-making in the way suggested by NPg.
- 6.73 The fact that the CMA upheld NPg’s appeal on Ground 1 for reasons of irrationality does not automatically cancel out consideration of whether or not an adverse costs award would cause a chilling effect on GEMA. That is a matter of evidence (per Lady Rose’s speech in *Flynn Pharma & Anr v CMA* – see paragraph 6.67 above).
- 6.74 In its representations on the PDC, GEMA made further submissions regarding the potential impact of the adverse costs award identified in the PDC. In summary, it stated that it was not anticipating an award at this level, and its cash reserves were insufficient to pay the costs of the CMA and the costs awarded to NPg; the total costs would be around [X]% of GEMA’s annual cash requirement. GEMA added that it had anticipated it might have to pay approximately £[X] to £[X] by way of costs of the appeal.⁸⁵ GEMA would therefore need to either (i) reallocate cash already committed to existing obligations, or (ii) seek emergency cash with approval from HM Treasury, which would require longer than the 28 days envisaged by the draft costs order.⁸⁶
- 6.75 GEMA further submitted that if it were required to ring-fence a high proportion of its cash reserves, it would inevitably have to deprioritise other work or avoid all litigation risk.⁸⁷ This chilling effect would be exacerbated as GEMA would need to consider when taking decisions that unless it would be wholly successful in defending an appeal, it was likely to be the substantial loser in costs terms.⁸⁸ In addition, GEMA maintained that the PDC would result in perverse incentives for appellants to run up very significant costs.⁸⁹
- 6.76 Having considered GEMA’s further representations we remain unpersuaded that GEMA will suffer a chilling effect as a result of the inter partes costs award now contemplated in this final determination. The information provided regarding GEMA’s cash requirements is difficult to interpret without further context and other aspects of the submissions are unsupported by evidence.
- 6.77 In our view, the inter partes costs award contemplated in this final determination will not create perverse incentives for parties to run up excessive costs. The award to NPg in this appeal (before the offset of GEMA’s costs award) is approximately

⁸⁵ GEMA representations on PDC, paragraph 30.1.

⁸⁶ GEMA representations on PDC, paragraph 30.2.

⁸⁷ GEMA representations on PDC, paragraph 30.3.

⁸⁸ GEMA representations on PDC, paragraph 30.4.

⁸⁹ GEMA representations on PDC, paragraph 30.4.

25% of its total costs and less than 40% of the sum originally sought by NPg in respect of its costs of Ground 1.

- 6.78 GEMA’s submissions regarding the time needed to seek emergency cash from the Treasury are noted. However, where the CMA makes an order for inter partes costs, the payment must be made before the end of the period of 28 days beginning with the day after the making of the order.⁹⁰
- 6.79 We therefore determine that there should be no further adjustment to the costs to be awarded to NPg in respect of Ground 1 in respect of any chilling effect.

Costs recoverable by NPg against GEMA

- 6.80 In view of the foregoing, we determine that:
- (a) NPg’s costs in respect of its General Counsel are not recoverable in the present circumstances.
 - (b) GEMA is liable to pay NPg 55% of such of its costs (excluding General Counsel’s costs) that are reasonable and proportionate, reflecting its success on Ground 1 of the appeal.
 - (c) 50% of NPg’s costs are reasonable and proportionate.
- 6.81 GEMA’s liability for NPg’s costs of Ground 1 in the appeal is therefore calculated as follows:

A	NPg total costs	[X]
B	NPg General Counsel costs	[X]
C	NPg costs excluding General Counsel costs (A-B)	[X]
D	NPg costs of Ground 1 as claimed (55% of C)	[X]
E	NPg reasonable and proportionate costs of Ground 1 (50% of D)	[X]

Costs recoverable by GEMA against NPg

- 6.82 In view of the foregoing, we determine that:
- (a) GEMA’s costs of its in-house legal team are recoverable.
 - (b) NPg is liable to pay GEMA 45% of its costs, reflecting GEMA’s success on Ground 2, which the CMA considers were reasonable and proportionate.
- 6.83 NPg’s liability for GEMA’s costs of Ground 2 in the appeal is therefore calculated as follows:

A	GEMA total costs	[X]
B	GEMA costs of Ground 2 (45% of A)	[X]

⁹⁰ Paragraph 12(4), Schedule 5A EA89.

Final determination on inter partes costs

6.84 In view of the foregoing, and in all the circumstances, our final determination regarding inter partes costs is as follows:

- (a) GEMA is liable to NPg for its costs of Ground 1, being £[~~0~~]
- (b) NPg is liable to GEMA for its costs of Ground 2, being £[~~0~~]
- (c) Offsetting NPg's liability to GEMA in respect of Ground 2, GEMA is liable to pay NPg the sum of £[~~0~~].

7. Interest

- 7.1 Paragraph 12(4) of Schedule 5A EA89 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 by an order have not been paid within this period, they shall bear interest at such rate as may be determined in the CMA's order.⁹¹

⁹¹ Paragraph 12(5), Schedule 5A EA89.

8. Final costs determination

8.1 Our final determination on costs is therefore as follows:

- (a) In relation to the CMA's costs incurred in connection with the appeal, the Parties should pay the CMA's costs as follows:
 - (i) NPg: a total of £203,200 comprising £47,400 in respect of costs attributable to Ground 2 and £155,800 towards non-attributable costs;
 - (ii) GEMA: a total of £255,900 comprising £100,100 in respect of costs attributable to Ground 1 and £155,800 towards non-attributable costs.
- (b) In relation to inter partes costs, GEMA is required to pay to NPg the sum of £[✂] in respect of NPg's costs in connection with the appeal.

8.2 In addition, our determination is that the interest rate which shall apply in the event of sums set out in paragraph 8.1 being unpaid (see paragraph 7.1) will be one percentage point above the Bank of England's base rate.

8.3 A costs order is made with this final determination.

Appendix A: Statement of the CMA's costs

Overview

1. This appendix outlines how the CMA's costs were calculated. All costs incurred by the CMA in connection with the appeal have been included in the assessment and, in line with the recommendations of the Tribunal in *BT v CMA* this appendix provides details of:
 - (a) the names, grades and cost recovery rate for each of the staff and the group who worked on the appeal, together with the number of hours worked;⁹²
 - (b) travel and subsistence costs incurred in the appeal;
 - (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.

CMA costs

2. The CMA is entitled to recover its costs in connection with the appeals, including the costs of making the costs determination and order. Details of these costs have been provided separately below.⁹³
3. The CMA is able to recover all costs incurred, not just its direct costs. It therefore includes an amount for the recovery of overheads in the amounts that it calculates as costs.
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) and depreciation by the combined front line service annual budgets (including Enforcement, Legal Services, Mergers, Markets, Regulation, Office of Chief Economic Advisor, Policy & International and Panel) for the relevant financial year. The rate applied in this case is 47.51% for direct costs arising from hours recorded by CMA staff and panel members in FY22/23 and

⁹² Capped at salaried hours – see paragraph 6 below.

⁹³ Note that the costs incurred in working on the provisional determination of costs are up to 1 December 2023 and may be updated before the issuing of the final determination on costs.

[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Total					[X]	[X]	[X]

Source: CMA analysis.

* Numbers presented to nearest £100 but underlying calculations are not rounded. Overhead percentage is 47.51% applied to direct costs arising from staff hours recorded in FY22/23 and 50.38% applied to direct costs arising from staff hours recorded in FY23/24.

Table 2: Staff costs for the final determination on costs⁹⁴

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

Source: CMA analysis

* Numbers presented to nearest £100 but underlying calculations are not rounded. Overhead percentage applied to direct costs is 50.38%.

Group costs

7. Tables 3 to 4 set out the names, job titles, grades and cost recovery rates (£ per hour) for the group members who worked on the appeal. It also includes the number of hours worked by the each of the group members, and the consequent direct costs and overhead costs incurred by the group member. Overhead costs are attributable to all group members’ direct costs.

⁹⁴ Up to the cut-off date of 23 February 2024.

Table 3: Appeal group costs for the substantive decision

Name	Job title	Recovery rate (£ per hour)	Time spent (hours)	Direct costs (£000s)	Overhead (£000s)*	Total (£000s)
Kip Meek	Appeal Panel Chair	[£]	[£]	[£]	[£]	[£]
Robin Cohen	Panel member	[£]	[£]	[£]	[£]	[£]
Susan Hankey	Panel member	[£]	[£]	[£]	[£]	[£]
Total			[£]	[£]	[£]	[£]

Source: CMA analysis.

* Numbers presented to nearest £100 but underlying calculations not rounded. Overhead percentage is 47.51% applied to direct costs arising from panel member hours in FY22/23 and 50.38% applied to direct costs arising from panel member hours in FY23/24.

Table 4 Appeal group costs incurred in making the final determinations on costs

Name	Job title	Recovery rate (£ per hour)	Time spent (hours)	Direct costs (£000s)	Overhead (£000s)*	Total (£000s)
Kip Meek	Appeal Panel Chair	[£]	[£]	[£]	[£]	[£]
Robin Cohen	Panel member	[£]	[£]	[£]	[£]	[£]
Susan Hankey	Panel member	[£]	[£]	[£]	[£]	[£]
Total				[£]	[£]	[£]

Source: CMA analysis.

* Numbers presented to nearest £100 but underlying calculations not rounded. Overhead percentage is 50.38%

Non-staff and non-panel costs

8. Table 5 sets out the non-staff and non-panel costs incurred on the appeal, including:

- (a) Counsel costs.
- (b) Transcription costs. These include transcription services for hearings.
- (c) Travel and subsistence costs.

Table 5: Non-staff and non-panel costs

Non-staff costs	Amount (£000s)*
Counsel	[£]
Transcripts	[£]
Total	[£]

Source: CMA analysis.

* Numbers presented to nearest £100 but underlying calculations not rounded.

Allocation of the CMA's costs to grounds

9. Tables 1 to 5 above show the total costs incurred by the CMA in connection with the appeal.
10. As Ground 1 was allowed and Ground 2 dismissed, the CMA costs attributable to each ground need to be determined to allow them to be recovered from the appropriate party (see paragraph 5.5 above). In addition, the 'general' costs (ie non-attributable costs) incurred by the CMA need to be determined and apportioned between the Parties.
11. The CMA's staff time recording system was set up for staff time to be recorded against the following categories:
 - (a) General costs (ie non-attributable costs, as described in paragraph 5.14);
 - (b) Ground 1;
 - (c) Ground 2; and
 - (d) Costs Determination.
12. Similarly, the group members reported where their time should be attributed to specific grounds.
13. Counsel and transcription costs are considered to be 'general' and have not been attributed to any specific ground. Similarly, the costs incurred by the CMA in determining the appropriate costs order are considered to be 'general' costs.⁹⁵
14. This allocation process resulted in the provisional attribution of the CMA's costs to grounds and 'general' as shown in Table 6.

Table 6: Recording of CMA costs to grounds and general costs

<i>£000</i>	<i>Ground 1</i>	<i>Ground 2</i>	<i>General – substantive</i>	<i>General - Costs</i>	<i>Total</i>
Staff	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Group	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Counsel			[REDACTED]		[REDACTED]
Other			[REDACTED]		[REDACTED]
Total	100.1	47.4	280.3	31.3	459.1

Source: CMA analysis

15. The apportionment between Parties of the costs shown in Table 6 above is explained in the final determination on costs, paragraphs 5.5 to 5.24.

⁹⁵ For the purposes of the provisional determination on costs we imposed a 'cut-off' of 1 December 2023 for calculating the CMA costs incurred during the costs process. For the final determination on costs, we have included additional costs incurred after that date up to a 'cut-off' of 23 February 2024.