

FINANCIAL RESILIENCE APPEAL 2023

Final costs determination

17 April 2024

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The Competition and Markets Authority has excluded from this version of the final determination on costs information which the appeal group considers to be sensitive information, having regard to the definition of sensitive information and the considerations set out in Energy licence modification appeals rules (CMA70).

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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 arising from the appeal by Utilita Energy Limited (**Utilita**) against the Gas and Electricity Markets Authority (**GEMA**)'s 'Decision on introducing a minimum capital requirement and ringfencing customer credit balances by direction' (the **Decision**), modifying the Standard Licence Conditions (**SLCs**) for all gas and electricity suppliers in Great Britain.

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**), Schedule 4A to the Gas Act 1986 (**GA86**), 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 26 July 2023, GEMA published its decision to modify the SLCs for all gas and electricity suppliers in Great Britain.
- 2.3 On 23 August 2023, Utilita filed a Notice of Appeal¹ (**NoA**) applying for permission to appeal the Decision on three grounds:
- (a) Ground 1 – that GEMA erred in concluding that the Capital Target would further the objectives it was intended to achieve;
 - (b) Ground 2 – that GEMA erred in calculating the level at which the Capital Target ought to be set; and
 - (c) Ground 3 – that the Capital Target (at any level, and certainly at the designated level) is unnecessary and disproportionate.²
- 2.4 On 21 September 2023, the CMA granted Utilita permission to appeal the Decision on all three grounds pleaded.³
- 2.5 On 12 October 2023, EDF Energy Customers Limited (**EDFE**) and OVO Energy Limited (**OVO**) each submitted a Notice of Intervention (**NoI**) to the CMA seeking permission to intervene in the appeal. EDFE sought permission to intervene in support of GEMA.⁴ OVO sought permission to intervene in support of Utilita.⁵
- 2.6 On 19 October 2023, we granted permission for both EDFE and OVO to intervene in the appeal, in relation to Grounds 1 and 3.⁶

¹ [Utilita Notice of Appeal \(Utilita NoA\)](#), 23 August 2023.

² [Utilita NoA](#), paragraph 8.

³ CMA, [Decision on Permission to Appeal](#), 21 September 2023.

⁴ [EDFE Notice of Intervention \(EDFE NoI\)](#), 12 October 2023.

⁵ [OVO Notice of Intervention \(OVO NoI\)](#), 12 October 2023.

⁶ CMA, [EDFE decision on permission to intervene](#), 19 October 2023, and [OVO decision on permission to intervene](#), 19 October 2023.

- 2.7 On 19 January 2024, the Final Determination was issued to the Parties in which the CMA dismissed the appeal and accordingly confirmed the decision. Further details of the appeal and its procedural stages are set out in the summary and chapter 1 of the Final Determination.
- 2.8 Terms and expressions used in this document have the same meaning as they do in the Final Determination.

3. Final determination on costs

- 3.1 A group that determines an appeal is required by paragraph 12(1) of Schedule 5A EA89 and paragraph 12(1) of Schedule 4A GA86 (together, the **Schedules**) 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 the Schedules, 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 25 January 2024, the CMA invited any party seeking an order for inter partes costs in its favour to file and serve a statement of its costs together with any written submissions by 15 February 2024. GEMA made submissions in relation to costs on 15 February 2024. Utilita did not submit any representations on costs.
- 3.3 On 13 March 2024, the CMA issued a provisional determination on costs in the Financial Resilience Appeal, an accompanying draft of the costs Order and invited the Parties to make any representations on the provisional determination on costs by 28 March 2024.
- 3.4 Neither of the Parties made substantive comments in response to the provisional determination on costs. However, both GEMA and Utilita provided short responses – on 27 and 28 March 2024 respectively – noting that they did not seek to challenge the provisional determination on costs. GEMA invited the CMA to make the final determination in the same terms as the provisional determination on costs.
- 3.5 Utilita indicated it did not have sufficient information to carry out a detailed review of either GEMA or the CMA’s costs, but ultimately did not intend to challenge the provisional determination on costs. As set out below, the CMA has provided detail in relation to the CMA’s broad and soundly based judgment as to its costs. The approach to inter partes costs as set out at paragraphs 6.35-6.36 is necessarily broad-brush, similar to summary assessment in ordinary court proceedings and involves the CMA standing back and considering the most appropriate order in all the circumstances between the Parties. The level of detail provided in the provisional determination on costs was consistent with the CMA’s practice in previous regulatory appeals and is reflected in this final determination on costs.
- 3.6 Having considered these responses, we therefore issue this final determination on costs and the costs order.

4. Legal Framework in relation to costs in EA89 and GA86 appeals

The CMA's duties and powers in relation to costs

4.1 Paragraph 12 of the Schedules sets out the CMA's duties and powers in relation to costs in determining an appeal brought under section 11C EA89 or section 23B GA86:

(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;⁷

(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

⁷ The Acts refer to 'the Authority' as the Gas and Electricity Markets Authority, referred to as 'GEMA' in this determination on costs.

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 the Schedules provides that references in the Schedules to a 'party' are references to '(a) the appellant; or (b) the Authority'.
- 4.3 The Rules⁸ and the Guide⁹ 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.¹⁰
- 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.¹¹ 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 The requirements at paragraphs 12(1) and 12(2) of the Schedules explain how the CMA must approach an order for its own costs incurred in connection with the appeal. Paragraph 12(2) provides that an order under 12(1) must require the CMA's costs to be paid "where the appeal is dismissed in full, by the appellant".
- 4.8 In its decision in *British Telecommunications plc v CMA*¹² (**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

⁸ See Rule 20.

⁹ See chapter 6.

¹⁰ Rule 20.2, Rule 20.6. and paragraphs 6.3 and 6.5 of the Guide.

¹¹ See, for example, paragraph 6.4 of the Guide in relation to inter partes costs.

¹² *British Telecommunications Plc v Competition and Markets Authority* (**BT v CMA**) [2017] [CAT 11](#).

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;¹³
- (b) the CMA will recover all its costs incurred in connection with the appeal, not just its direct costs;¹⁴
- (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;¹⁵ and
- (d) the CMA is not entitled to make an order in relation to costs incurred unreasonably or unnecessarily.¹⁶

4.9 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.¹⁷

Discretion to order inter partes costs

4.10 Paragraph 12(3) of the Schedules provides:

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.

4.11 Rule 20.3 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

¹³ *BT v CMA* [2017] [CAT 11](#) at [25].

¹⁴ 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 Schedule ('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).

¹⁵ *BT v CMA* [2017] [CAT 11](#) at [24].

¹⁶ *BT v CMA* [2017] [CAT 11](#) at [29].

¹⁷ [British Gas Trading Limited v The Gas and Electricity Markets Authority](#) (BGT), at paragraph 9.7.

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.

4.12 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.

4.13 Where a CMA group decides that it is appropriate to make an order under paragraph 12(3) of the Schedules and Rule 20.3,¹⁸ it may have regard to all the circumstances, including but not limited to:¹⁹

(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.²⁰

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

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.²¹ The CMA may have regard to all the circumstances, including (as set out in Rule 20.5) the conduct of

¹⁸ Rule 20.3 is to the same effect as paragraph 12(3) of the Schedule: in empowering the CMA group that determines an appeal to make an inter partes costs order.

¹⁹ Rule 20.5.

²⁰ 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).

²¹ Paragraph 12(3) of the Schedule.

the parties, a party's degree of success and the reasonableness and proportionality of the costs claimed.²² In addition, the CMA considers that the principles as set out in *BT v Ofcom*²³ 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 29 of *BT v Ofcom* extracting the statement by Bingham LJ in *Bradford MDC v Booth*.²⁴ The CMA does not have the power to order costs against or for interveners.

4.15 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.

4.16 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.²⁵

4.17 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 and the overall impact if the appeal were to succeed.²⁶

²² The proportionality of the costs claimed will be assessed having regard to the matters in issue.

²³ *British Telecommunications plc v Office of Communications* [2018] EWCA Civ 2542.

²⁴ *Bradford MCD v Booth* [2000] 164 JP 485.

²⁵ Guide, paragraph 6.4.

²⁶ [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.²⁷

²⁷ [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 three group members to determine the appeal.²⁸ In order to meet its statutory obligation to determine the appeal within the applicable statutory period,²⁹ the CMA appointed a staff team to assist the group. That team drew on relevant administrative, project management and delivery, economic, business and financial analysis, 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 facilities management) to support the appeals.
- (b) One external KC was retained but no advice was sought from him. As such, only a small cost for 3 hours of counsels' reading-in time was incurred.
- (c) The group and the staff team were required to consider, understand and analyse a large amount of complex material within the relevant time period:
 - (i) Utilita advanced three grounds of appeal. These each raised a number of complex issues and their association with the legal grounds of review was not straightforward.
 - (ii) The NoA (which ran to 34 pages) was supported by one witness statement of fact (which ran to 31 pages); one expert report with two accompanying exhibit bundles (totalling 4,517 pages); and a bundle of supporting documents to the NoA and witness statement (running to more than 1,169 pages).
 - (iii) GEMA's Response (comprising 69 pages) was accompanied by an exhibit bundle (totalling 119 pages) and was supported by five witness

²⁸ Paragraph 4(2) of the Schedules.

²⁹ Pursuant to section 11G(1)(b) EA89 and section 23F(1)(b) GA86, the CMA must determine an appeal against a decision (excluding price control decisions) within the period of four 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 and section 23F(3)(b) and (4) GA86, although ultimately an extension was not needed in the present case.

statements (totalling 116 pages) with accompanying exhibits (totalling 2,864 pages).

- (iv) The CMA also received two Nols from EDFE and OVO seeking permission to intervene in the appeal. EDFE's application (24 pages) sought permission to intervene in support of GEMA. OVO's application (8 pages) sought permission to intervene in support of Utilita and was supported by a witness statement (51 pages, 243 pages of exhibits) and expert report (23 pages). Both were granted permission to intervene in the appeal, in relation to Grounds 1 and 3.
 - (v) The Parties submitted materials (GEMA provided a handout while Utilita provided powerpoint slides) prior to the main hearing to accompany their opening statements.
 - (vi) The Parties also submitted written closing statements following the main hearing (Utilita's was 15 pages and GEMA's was 15 pages). OVO submitted a response to GEMA's closing statement. EDFE submitted a further submission (4 pages) following the hearing and also provided a response to a CMA RFI.
 - (vii) Utilita also submitted responses to a CMA RFI following the hearing and GEMA provided clarification points further to the hearing which it provided by way of an Annex (21 pages) to its closing submissions (15 pages).
- (d) During the appeal, the CMA had to consider and dispose of a number of procedural issues, including those arising from the following:
- (i) Utilita's application for permission to appeal, including consideration of GEMA's submissions objecting to the grant of permission (13 pages).
 - (ii) The applications to intervene by EDFE and OVO.
 - (iii) An application by Utilita for permission to make submissions in reply to GEMA's Response (10 pages) and GEMA's objection to permit Utilita's reply (4 pages). The CMA received a witness statement of Imran Bannister (Chief Analytical Officer of Utilita) (which ran to 7 pages).
 - (iv) Dealing with requests to extend the statutory deadline, and to change the date of the hearings.

- (v) Establishing a Confidentiality Ring to enable all parties' advisers to review the full evidence submitted by other parties and dealing with specific requests for disclosure and directions.
- (vi) Accommodating the need for confidential sessions at the Hearing and dealing with confidentiality representations on the transcripts.
- (e) An administrative meeting was held with both parties over teams on 26 September 2023 to discuss the process for the conduct of the appeal.
- (f) The group and the staff team managed the conduct of the appeal primarily through a series of group meetings whereby agendas would be circulated in advance along with slides on occasion to present the parties' representations and issues arising, to prompt discussion and consideration of any such issues at the meetings. In addition, the group and staff team progressed their work through ad hoc meetings, written communications and advice.
- (g) The holding of a teach-in session with the Parties³⁰ on 6 October 2023 which included consideration of the teach-in materials prepared by the Parties in line with the CMA's topic guide, in order to clarify some of the technical matters raised in the Decision and the NoA.
- (h) A main hearing with the Parties and the Interveners, requiring extensive preparation by the group and the staff team, was held over two days on 30 and 31 October 2023. The staff team supported the group at the main hearing.
- (i) 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 Interveners, the written closing statements from the Parties, the oral evidence from the Parties and the Interveners.
- (j) Along with Utilita's NoA, GEMA's Response, and EDFE's and OVO's Nols, all Parties and Interveners submitted additional evidence as requested by the Group.
- (k) On 4 December 2023, the CMA provided the Parties with its provisional determination for comment and considered the responses.

³⁰ Utilita and GEMA led the teach-in session; the interveners were not present at this time in the appeal.

- (l) Disposing of the appeal, including considering properly all the relevant documents, submissions and other evidence, resulted in the Final Determination of 139 pages.
- (m) On 13 March 2024, the CMA produced a provisional determination on costs and draft costs order, as required under paragraph 12(1) of the Schedules in relation to the CMA's costs, and as permitted under paragraph 12(3) of the Schedules in relation to inter partes costs.

5.2 Determining the appeal within the statutory timeframe 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 of 50.38% is applied).³¹

5.3 The total CMA costs to be reclaimed for the substantive determination, after applying the overhead uplift are £472,369 (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 (ie retaining 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).

Allocation of CMA costs

5.4 The group must make an order requiring the payment to the CMA of the costs incurred by the CMA in connection with the appeal. Given the group dismissed Utilita's appeal on all three grounds, the CMA costs order must require those costs to be paid by Utilita. This outcome is prescribed by the statutes at paragraph 12(2)(b) of the Schedules (also reflected at paragraph 6.1(b) of the Guide) which provide that where an appeal is dismissed in full, the appellant pays the CMA's costs.

³¹ 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 the Appendix A.

- 5.5 CMA costs 'in connection with the appeal' are considered to start when an NoA is received (ie including Permission Stage) and end with the Final Determination of Costs.
- 5.6 While Utilita is required to pay all of the CMA's costs (attributable to each of the Ground 1, Ground 2, Ground 3, and General categories) we have still included a breakdown of the CMA's costs attributable to specific grounds for transparency.
- 5.7 Neither GEMA nor Utilita challenged the provisional determinations regarding CMA costs. Our final determinations in respect of CMA costs therefore remains consistent with those presented in the provisional determination.

Ground 1: GEMA erred in concluding that the Capital Target would further the objectives it was intended to achieve

- 5.8 Our records show that £97,006 of the CMA's costs are attributable to (in the sense that they are directly associated with) determining the appeal solely on this ground.
- 5.9 We found that GEMA was not wrong to have concluded that the Decision to introduce the Capital Target would have a net beneficial effect on consumer outcomes in the future. When we corrected for some errors we identified in the impact assessment, we found that the result of the Impact Assessment model remained positive. As this means that the corrected Impact Assessment would still have supported the implementation of the Decision, we also found that the errors we identified were not material and that the Decision was therefore not wrong on this basis. We therefore dismissed the appeal on Ground 1.
- 5.10 Our final determination in relation to costs attributable to Ground 1 is that Utilita should pay this amount in full.

Ground 2: GEMA erred in calculating the level at which the Capital Target ought to be set

- 5.11 Our records show that £22,906 of the CMA's costs are attributable to (in the sense that they are directly associated with) determining the appeal solely on this ground.
- 5.12 We found that GEMA was not wrong to set the Capital Target at £115. In particular, we considered that GEMA's use of historic profit margins was a reasonable basis on which to calculate the Capital Target and that GEMA's

decision to do so was therefore not wrong. We also concluded that GEMA did not make any errors in its calculations and assumptions underlying that analysis. We also concluded that GEMA's reduction in the Capital Target could be justified by the factors it highlighted and was within GEMA's margin of appreciation and therefore not wrong. We therefore dismissed the appeal on Ground 2.

- 5.13 Our final determination in relation to costs attributable to this Ground 2 is that Utilita should pay this amount in full.

Ground 3: the Capital Target is unnecessary and disproportionate

- 5.14 Our records show that £17,670 of the CMA's costs are attributable to (in the sense that they are directly associated with) determining the appeal solely on this ground.

- 5.15 We found that neither of the alternatives, being a risk-based Capital Target or a Capital Target with greater flexibility, as presented to us, were clearly preferable to the single common Capital Target introduced by GEMA and therefore GEMA's Decision was not wrong on the basis of this Ground. We therefore dismissed the appeal on Ground 3.

- 5.16 Our final determination in relation to costs attributable to this Ground 3 is that Utilita should pay this amount in full.

CMA costs not attributable to specific grounds

- 5.17 We note that where possible, CMA costs have been recorded as having being 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.

- 5.18 A substantial proportion of the work of the CMA was of a general nature in connection with the overall appeal. Our records show that £309,492 of the CMA's costs incurred in the substantive determination were not directly associated with a specific ground of appeal. Just over one third of the CMA's costs were directly associated with a specific ground of appeal.

- 5.19 The costs not directly associated with a specific ground of appeal ("**non-ground specific costs**") included (but are not limited to):

- (a) all hours posted up to 21 September 2023 were assigned to 'General', as that is when additional codes were introduced to split time into Ground 1, Ground 2, Ground 3 and General;
- (b) the appointment and administration of an appeal group;
- (c) work that related to issues in the case that spanned more than one Ground;
- (d) resources to support the group and the staff team;
- (e) the teach-in;
- (f) time spent on non-attributable matters at the main hearing (e.g. opening statements and clarificatory questions, and discussion on next steps);
- (g) drafting of sections of the provisional and final determinations not relating to a specific ground of appeal;
- (h) dealing with matters of procedure relevant to multiple grounds;
- (i) retaining counsel, including counsel's fees;
- (j) transcription fees; and
- (k) communication and publication throughout and at the end of the appeal.

5.20 As aforementioned, the outcome of the appeal being dismissed in full requires these non-ground specific costs to be borne by the appellant.

5.21 Our final determination in relation to non-ground specific costs is therefore that Utilita should pay these costs in full, namely £309,492.

CMA costs incurred in the determination on costs

5.22 CMA costs incurred in connection with making the provisional determination on costs, the draft costs order, the final determination on costs and the final 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 by Utilita, as the appeal was dismissed in full.

5.23 Our records show that £25,294 of the CMA costs were attributable to the Costs Process.

5.24 Our final determination is that Utilita should pay 100% of these costs, namely £25,294.

Final determination on the CMA's costs

5.25 Accordingly, we determine that the CMA's costs should be met by Utilita according to the following principles.

- (a) For Ground 1, which the CMA dismissed, Utilita should pay the CMA's costs attributable solely to that ground;
- (b) For Ground 2, which the CMA dismissed, Utilita should pay the CMA's costs attributable solely to that ground;
- (c) For Ground 3, which the CMA dismissed, Utilita should pay the CMA's costs attributable solely to that ground; and
- (d) In relation to the CMA's non-ground specific costs (including the costs of the Costs Process), Utilita should pay 100% of the CMA's costs.

5.26 In view of the above, our final determination is that, pursuant to paragraph 12 of the Schedules, the CMA's costs of **£472,369** should be paid by Utilita.

6. Inter partes costs

6.1 On 25 January 2024, 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. GEMA submitted a statement of costs and representations on costs on 15 February 2024.

GEMA's statement of costs and representations

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

- (a) External solicitors' fees of £[<];
- (b) Counsel (one KC and two juniors) costs of £[<]; and
- (c) In-house legal team costs of £[<];

6.3 GEMA submitted that the appropriate order for inter partes costs is that Utilita be required to pay all of GEMA's costs, subject to a "modest" deduction of no more than 10% to reflect the costs GEMA incurred in relation to OVO on matters which were not also adopted by Utilita.³²

6.4 GEMA made specific submissions regarding:

Rule 21.5(a): conduct of the parties

6.5 GEMA submitted that it acted reasonably in defending the appeal, which was reflected in the result, in which GEMA's decision was upheld in full.³³

Rule 21.5(b) whether a party has succeeded in part

6.6 GEMA submitted that it was successful on all three grounds of appeal and its Decision was upheld in full. Any suggestion that a deduction should be made to reflect the fact that GEMA's Impact Assessment was found to be wanting, is wrong. GEMA said that is because GEMA's case from the outset was that the Impact Assessment was not intended as a precise quantification of costs and benefits and the CMA agreed that "the Impact Assessment model was one of a

³² GEMA Representations on Costs 15 February, paragraph 2

³³ GEMA Representations on Costs 15 February, paragraph 9

number of factors considered by GEMA in its weighing up exercise” and that the errors identified were immaterial.³⁴

- 6.7 GEMA submitted that Rule 21.5(b) requires a high-level assessment of the parties’ overall success on each ground of appeal. It does not require the CMA to engage in a detailed analysis of the winner and loser on each point and sub-point on which argument was heard. To support this, GEMA cited the CMA’s Final Determination in BGT at §9.21(b):

6.8 *“We consider that it is not accurate to say that GEMA has succeeded only ‘in part’ in respect of grounds 1, 2, 4 and 5. Each of those grounds was dismissed in full, even if GEMA came in for a degree of criticism along the way.”*

- 6.9 GEMA submitted as in BGT, that even if GEMA’s Impact Assessment could be said to have been afforded a degree of criticism, this would not warrant any reduction to the costs awarded in respect of the appeal, in circumstances where GEMA succeeded on each ground and the appeal was dismissed in full.³⁵

Costs incurred in relation to the Interveners

- 6.10 GEMA submitted that they incurred no additional costs in relation to EDF’s intervention (beyond de minimis costs associated with reading documents filed by EDF), but they did incur costs in relation to OVO’s intervention, since that intervention (which was accompanied by a further expert report) raised substantive new points which were required to be addressed by GEMA.³⁶
- 6.11 GEMA submitted that all of OVO’s substantive points were subsequently adopted by Utilita and as such, the CMA’s assessment of GEMA’s Impact Assessment treated the parties’ criticisms of the Impact Assessment compendiously in the Final Determination.³⁷
- 6.12 GEMA submitted that “in choosing to adopt OVO’s criticisms (presumably in the hope that doing so would strengthen Utilita’s hand), Utilita became liable for GEMA’s adverse costs in responding to those criticisms advanced in common by Utilita and OVO”.³⁸

³⁴ GEMA Representations on Costs 15 February, paragraph 12

³⁵ GEMA Representations on Costs 15 February, paragraph 12

³⁶ GEMA Representations on Costs 15 February, paragraph 13

³⁷ Final Determination, paragraph 4.159-223

³⁸ GEMA Representations on Costs 15 February, paragraph 13

6.13 GEMA submitted there are certain exceptions to this:

- (a) Costs incurred by GEMA as a result of procedural steps connected to OVO's intervention, such as responding to OVO's letter of request to intervene;
- (b) Costs incurred by GEMA in responding to points made by OVO which were specific to OVO's business; and
- (c) Costs incurred by GEMA in preparing for/attending OVO's confidential session at the hearing on 31 October 2023 at 12.30 to 13.00.³⁹

6.14 GEMA submitted that costs of this nature were modest overall compared to the costs incurred by GEMA in responding to those of OVO's points which were adopted by Utilita. GEMA explained that they extracted individual line items relating solely to the aforementioned 'exceptions' from its Statement of Costs, to reflect that no claim is made in respect of those costs. However, for the most part, GEMA's records (and those of its advisors) did not differentiate between time incurred in relation to these unrecoverable costs. Accordingly, GEMA considers that it is appropriate to make a modest deduction to the costs claimed (no more than 10% overall) to reflect costs incurred solely in response to OVO in relation to points not adopted by Utilita.⁴⁰

GEMA's costs were reasonable and proportionate

6.15 GEMA submitted that its costs incurred were reasonable and proportionate in amount.

6.16 As to reasonableness, GEMA refers to the significance of the subject matter of the appeal, which concerned measures of fundamental significance to the Great Britain energy market. GEMA submitted that if Utilita's appeal had succeeded, it would have destabilised the keystone of GEMA's financial resilience regime, with the potential for serious adverse consequences for energy consumers.⁴¹

Our assessment

6.17 As explained above at paragraphs 4.10 to 4.17, the CMA has discretion to make such inter partes costs order as it thinks fit in respect of costs reasonably incurred

³⁹ GEMA Representations on Costs 15 February, paragraph 13.1 to 13.3

⁴⁰ GEMA Representations on Costs 15 February, paragraph 14

⁴¹ GEMA Representations on Costs 15 February, paragraph 17

in connection with this appeal and which are reasonable and proportionate in amount.

- 6.18 In accordance with Rule 20.5 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). We also take into account the responses from GEMA and Utilita, in which GEMA supported the provisional determination on costs and Utilita did not seek to challenge the provisional determination on costs.
- 6.20 Before addressing each of these factors, however, we address one point from GEMA's submissions in relation to the recoverability of costs incurred in relation to the Interveners.

Costs incurred in relation to the Interveners

- 6.21 In relation to interveners' costs, the Group cannot make an order for or against interveners.
- 6.22 As identified at paragraph 6.10 above, GEMA submitted that OVO's intervention, which was accompanied by a further expert report, raised substantive new points which were required to be addressed by GEMA. GEMA submitted that these points were subsequently adopted by Utilita.
- 6.23 We consider that the substantive arguments put forward by OVO were adopted by Utilita. Following OVO's Nol and GEMA's Response, Utilita's legal representatives wrote to the CMA on 18 October 2023. In this letter, Utilita submitted that, if OVO's application for permission is granted, they would not seek to adduce reply evidence in response to the points made by GEMA in relation to the Impact Assessment to avoid duplication. We consider that this indicated Utilita sought to rely on OVO's arguments. We consider that Utilita then adopted OVO's arguments in relation to Ground 1 and 3.
- 6.24 By adopting those arguments, we consider that Utilita stood to benefit from the arguments, and it was reasonable for GEMA to address the arguments in response to Utilita. It therefore follows that, in doing so, Utilita should also bear the risk of those arguments failing and the associated costs.

- 6.25 GEMA do not contend that Utilita should bear the costs in relation to OVO's intervention that were specific to OVO, as set out at paragraph 6.13 above. We consider that based on their submission, GEMA is unable to identify and remove all of those costs from its calculation, which has resulted in them inviting the CMA to apply a general reduction of up to 10% to reflect costs associated purely with OVO's intervention.
- 6.26 We consider a deduction in GEMA's costs of 10% to account for the costs specific to OVO, standing back and considering all the circumstances of the case, is a reasonable and proportionate reduction.

Rule 20.5(a): conduct of the parties

- 6.27 In deciding what order to make under Rule 20.3, the CMA may have regard to the conduct of the parties. GEMA submitted that they acted reasonably in the appeal, which is reflected in the outcome. Whilst we do not consider the outcome of an appeal is necessarily reflective of the conduct of a party in an appeal, we do not consider there is any reason to make an adjustment to the award of costs as a result of the behaviour of GEMA.

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

- 6.28 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, Utilita's appeal was dismissed on all three grounds. 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 have determined that in this appeal an appropriate outcome therefore is for GEMA to be awarded its reasonable and proportionate costs of the appeal in relation to all three grounds.
- 6.29 GEMA do not provide evidence from fee-earners' time recording as to the proportion of time spent on Ground 1, Ground 2 and Ground 3 and given GEMA were successful on all grounds, we do not consider it necessary to apportion time between grounds.
- 6.30 We therefore consider that the appropriate order is that Utilita pays GEMA's reasonable costs, taking into account the decision set out above at paragraph 6.26 in relation to GEMA's submission on interveners, reflecting the fact that Utilita was unsuccessful in its appeal of Ground 1, Ground 2 and Ground 3.

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

6.31 We consider that GEMA's costs as set out in its statement of costs were reasonably incurred and reasonable and proportionate.

6.32 Reviewing GEMA's Statement of Costs, we have considered the following:

- (a) In-house lawyers carried out most of the legal work at hourly rates that were at 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;⁴²
- (c) The rates for GEMA's external lawyers, Dentons, overall were below the Guideline Hourly Rates for London 1 even though they are a centrally based London firm conducting work appropriate for that band. Denton's time recording also showed that most hours were recorded at an associate and counsel level, while hours recorded at partner level were commensurate with supervising that work;
- (d) Counsel was instructed at Attorney General panel rates, with the majority of the work being conducted by junior counsel at the C panel member rates. GEMA did instruct leading Counsel (Ben Jaffey KC) but his rate is within the standard range of hourly rates for government work for KCs and is significantly lower than commercial rates; and
- (e) GEMA did not instruct external expert economists which has significantly reduced costs.

6.33 In relation to (a)-(b) above in particular, 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

⁴² 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.

liasing with solicitors, or finding information needed for the case. 'Client work', such as time spent by internal factual witnesses, has not been claimed;

(b) There is a record of the work done and time spent; and

(c) There is no duplication of the work of external lawyers.⁴³

6.34 Applying the principles set out above, 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 work undertaken by them was mostly legal in nature, such as co-ordinating submissions and witness evidence, advising on confidentiality, preparatory work for the main-party hearings and instructing 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 of work, the hours recorded by Dentons are modest overall; therefore this risk appears to us to be low.

6.35 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 and Competition Appeal Tribunal.

6.36 Standing back and considering the most appropriate order in all the circumstances between the Parties, we determine that GEMA's costs were reasonably and proportionately incurred, subject to a deduction of 10% to account for costs specific to OVO.

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

6.37 Given we are making no award of costs against GEMA, this criterion does not require further consideration.

⁴³ Ultraframe (UK) Ltd v Eurocell Building Plastics Ltd & anr (2006) EWHC 90069 (Costs).

Costs recoverable by GEMA against Utilita

6.38 In view of the foregoing, we have determined that:

- (a) Utilita is liable to pay GEMA 90% of such of its costs that are reasonable and proportionate.
- (b) Utilita's liability for GEMA's costs of Ground 1, Ground 2 and Ground 3 in the appeal is therefore calculated as follows: £[X]

Final determination on the inter partes costs

6.39 In view of the foregoing, and in all the circumstances, our final determination regarding inter partes costs is that Utilita is liable to GEMA for its costs of £[X].

7. Interest

- 7.1 Paragraph 12(4) of the Schedules provide 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. Paragraph 12(5) of the Schedules provide that 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.

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, Utilita is required to pay a total of **£472,369**;
- (b) In relation to inter partes costs, Utilita is required to pay to GEMA the sum of **£[X]** in respect of GEMA's costs in connection with the appeal.

8.2 In addition, our final 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 An Order accompanies 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 CAT 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;
 - (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.
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 50.38%.

Table 4: Appeal Group costs incurred in making provisional determinations on costs

<i>Name</i>	<i>Job title</i>	<i>Rate (£/h)</i>	<i>Hours</i>	<i>Direct cost (£)</i>	<i>Overhead (50.38%)</i>	<i>Total (£)</i>
Richard Feasey	Chair	[X]	[X]	[X]	[X]	[X]
Anne Fletcher	Panel Member	[X]	[X]	[X]	[X]	[X]
Jo Armstrong	Panel Member	[X]	[X]	[X]	[X]	[X]
Expenses (non-staff)						[X]
			Total	[X]	[X]	[X]

Source: CMA analysis.

Non-staff costs

7. Table 5 sets out the non-staff costs incurred on the appeal, including:
- (a) Counsel costs.
 - (b) Transcription costs. These include transcription services for hearings.
 - (c) Travel and subsistence costs, for both staff and the Appeal Group.

Table 5: Non-staff costs

<i>Non-staff costs</i>	<i>Amount (£)</i>
Counsel	[X]
Transcripts	[X]
Travel and subsistence	[X]
Total	[X]

Source: CMA analysis.

Total CMA costs to recover

Table 6: Total CMA costs to recover

	<i>Decision</i>	<i>Final costs determination</i>	<i>Total costs to recover</i>
Staff team	[<]	[<]	[<]
Panel Members	[<]	[<]	[<]
Non-staff costs	[<]	[<]	[<]
Total	447,074	25,294	472,369

Source: CMA analysis.

Allocation of the CMA's costs to grounds

8. Tables 1 to 6 above show the total costs incurred by the CMA in connection with the appeal.
9. 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-ground specific costs, as described in paragraph 5.19;
 - (b) Ground 1;
 - (c) Ground 2;
 - (d) Ground 3;
 - (e) Costs Determination
10. Similarly, the group members reported where their time should be attributed to specific grounds.
11. 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.
12. This allocation process resulted in the attribution of the CMA's costs to grounds and 'general' as shown in Table 7.

Table 7: CMA costs of the substantive determination, apportioned to Grounds

	<i>General</i>	<i>Ground 1</i>	<i>Ground 2</i>	<i>Ground 3</i>	<i>Total</i>
Staff team	[X]	[X]	[X]	[X]	[X]
Panel Members	[X]	[X]	[X]	[X]	[X]
Non-staff costs	[X]	[X]	[X]	[X]	[X]
Total	309,492	97,006	22,906	17,670	447,074