

Draft water redetermination reference guide

CMA205con

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1. Introduction

- 1.1 This Guide sets out guidance on the procedure that the CMA will typically use when conducting water redetermination references brought under section 12 of the Water Industry Act 1991.
- 1.2 This Guide is to be known as the *Water Redetermination References: Competition and Markets Authority Guide (CMA205)* and was adopted by the CMA on [XX] 2024.
- 1.3 The CMA has published procedural rules, the *CMA204 Water Redetermination Reference Rules: Competition and Markets Authority*, to govern water redetermination references under section 12 of the Act. This Guide should be read in conjunction with the relevant enactments and those Rules.
- 1.4 The procedural framework is designed to further the overriding objective as set out in Rule 4.
- 1.5 In particular, the Rules seek to ensure that the CMA has flexibility to manage redetermination references fairly, expeditiously and at proportionate cost, having regard to the interests of the main parties and third parties and the statutory time frames. Those involved in water redetermination references are required to assist the CMA in meeting the overriding objective.
- 1.6 This Guide does not contain details of all the provisions of the relevant enactments and the Rules relevant to redetermination references and is not intended to modify or restrict in any way the full application of those provisions. It is not intended to be binding and may be adapted to take account of the particular circumstances of a redetermination reference. This Guide may be revised and supplemented from time to time in the light of the CMA's experience of conducting water redeterminations.
- 1.7 This Guide is structured as follows:
 - (a) Section 2 sets out the background to water redeterminations.
 - (b) Section 3 sets out and describes the CMA's role in the overall process and the various stages of such process.
 - (c) Section 4 discusses the key documents used in the CMA's consideration of the redetermination reference.
 - (d) Section 5 discusses hearings and meetings.
 - (e) Section 6 discusses transparency and confidentiality.
 - (f) Section 7 discusses recovery of the disputing company's and CMA's costs.

1.8 In this Guide:

'the Act' means the Water Industry Act 1991;

'appointed company' means a company appointed to be the water undertaker or sewerage undertaker for any area of England & Wales pursuant to Chapter 1 of Part 2 of the Act;

'the Authority' means the Water Services Regulation Authority (Ofwat);

'the Authority's response' means the Authority's response to the Statement of Case;

'Chair' means the Chair of the CMA appointed under paragraph 1(1)(a) of Schedule 4 to ERRA13;

'CMA' means the Competition and Markets Authority;

'CMA Board' means the Chair and members appointed under paragraph 27 of Schedule 4 to ERRA13;

'CMA panel' means the panel of persons available for selection as members of a group constituted in accordance with Part 3 of Schedule 4 to ERRA13;

'disputing company' means an appointed company requiring the Authority under section 12 of the Act to refer the disputed determination to the CMA;

'disputed determination' means a determination by the Authority under section 12(1) of the Act that is disputed by an appointed company and has been referred to the CMA;

'EA02' means the Enterprise Act 2002;

'ERRA13' means the Enterprise and Regulatory Reform Act 2013;

'Final Determination' means the Authority's final determination under Condition B of the Appointment of the Price Controls;

'group' means a group constituted by the Chair under Schedule 4 to ERRA13 for the purpose of a water redetermination reference;

'group chair' means the member of a group appointed by the Chair to the chair the group;

'main party' to a redetermination reference means either the disputing company or the Authority;

‘Notice of Reference’ means the notice of the redetermination reference sent from the Authority to the CMA;

‘Notice of Extension’ means the notice setting out the terms of the extension granted by the Authority when requested by the CMA;

‘redetermination reference’ means a water determination reference referred to the CMA by the Authority at the request of a disputing company, pursuant to section 12 of the Act;

‘relevant enactments’ means the Act, EA02 and ERRA13;

‘sensitive information’ means information which is:

- (a) commercial information, the disclosure of which would or might significantly harm the legitimate business interests of an undertaking to which it relates; or
- (b) information relating to the private affairs of an individual, the disclosure of which would or might significantly harm the individual’s interests;

‘special reference group’ has the meaning given to it in paragraph 51(6)(c) of Schedule 4 to ERRA13;

‘Statement of Case’ means the document in which the arguments of the disputing company are set out; and

‘third party’ means a party that is not a main party.

1.9 In this Guide, unless the contrary intention appears, words in the singular include the plural and words in the plural include the singular.

2. Background

2.1 The Act consolidates the post-privatisation provisions for the water industry in England and Wales. In particular, appointed companies have the power to charge for services provided in the course of carrying out their statutory functions¹ and the Act allows the Authority to set charging rules with which all appointed companies must comply.² The licence conditions include conditions related to such charges, which allow the Authority to carry out periodic reviews and to make price control determinations that are designed to limit the revenue allowed to each water company. In charging customers, water companies ordinarily need to levy charges in a way which complies with the price controls set by the Authority.

¹ Section 142 of the Act.

² Section 143B of the Act.

2.2 The Act also allows for an appointed company to dispute a price control determination by requesting that the Authority refer such a determination to the CMA for a redetermination.³ Where such a reference is made to the CMA by the Authority (on request of a disputing company), the CMA is to decide the matter on its own merits in accordance with the principles that apply to the Authority that include various statutory duties.⁴

2.3 The Authority's general statutory duties are split into primary and secondary duties.

2.4 The primary duties set out in section 2(2A) of the Act require the Authority to perform its powers and duties in the manner in which it considers is best calculated:

- (a) to further the consumer objective, which is to protect the interests of consumers, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the provision of water and sewerage services (consumer objective);
- (b) to secure that the appointed company's functions under the Act are properly carried out in respect of every area of England and Wales (functions duty);
- (c) to secure that the appointed company is able (in particular, by securing reasonable returns on its capital) to finance the proper carrying out of those functions (financing duty);
- (d) to secure that the activities authorised by the appointed company's licence and any statutory functions are properly carried out (licence duty); and
- (e) to further the 'resilience objective'.⁵

2.5 The secondary duties require the Authority to exercise these primary duties in the manner which it considers is best calculated to:

- (a) promote economy and efficiency on the part of appointed companies holding licences (efficiency duty);
- (b) secure that no undue preference (including for the relevant body itself) or undue discrimination is shown in the fixing of water or drainage charges;

³ Section 12(2) of the Act.

⁴ Section 12(3) of the Act.

⁵ The resilience objective is defined for these purposes in section 2(2DA) of the Act as: (a) to secure the long-term resilience of water undertakers' supply systems and sewerage undertakers' sewerage systems as regards environmental pressures, population growth and changes in consumer behaviour; and (b) to secure that undertakers take steps for the purpose of enabling them to meet, in the long term, the need for the supply of water and the provision of sewerage services to consumers, including by promoting: (i) appropriate long-term planning and investment by relevant undertakers; and (ii) the taking by them of a range of measures to manage water resources in sustainable ways, and to increase efficiency in the use of water and reduce demand for water so as to reduce pressure on water resources.

- (c) secure that no undue preference (including for itself) is shown and that there is no undue discrimination in the doing by an appointed company of things which relate to the provision of services by itself or another appointed company or things as relate to the provision of services by a water supply or sewerage licensee;
- (d) secure that consumers are protected as regards benefits that could be secured for them from the proceeds of any disposal of an appointed company's protected land;
- (e) ensure that consumers are protected as regards any activities of an appointed company which are not attributable to the exercise of its functions under the Act, in particular by ensuring that any transactions are carried out at arms-length and that in the exercise of its functions companies maintain and present themselves in a suitable form and manner; and
- (f) contribute to the achievement of sustainable development (sustainability duty).

2.6 In exercising its powers and performing all of its duties, the Authority is required to have regard to the principles of best regulatory practice, including the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed.⁶ The Authority and the appointed companies also have specific environmental duties in relation to the protection of areas of natural beauty, special environmental interest and historical sites.⁷

2.7 In addition to these statutory duties, the Secretary of State may publish from time to time a Strategic Policy Statement (SPS) which sets out strategic priorities and objectives which the Authority must act in accordance with when it is carrying out its functions in England. The SPS must take account of the Authority's statutory duties, social and environmental matters and other matters that the Secretary of State thinks fit. The SPS is not just relevant for price controls but for all the functions that the Authority carries out. A separate SPS is published for Wales by the Welsh Ministers.

3. CMA process

The overriding objective

3.1 The overriding objective of the Rules is to enable the CMA to dispose of redetermination references fairly, efficiently and at proportionate cost within the

⁶ Section 2(4) of the Act.

⁷ Sections 3 to 5 of the Act.

time periods prescribed in the Act. The CMA will apply the Rules and have regard to this Guide to give effect to the overriding objective.

- 3.2 All parties to a redetermination reference must assist the CMA to further the overriding objective.

The CMA's role in redetermination references

- 3.3 In carrying out redeterminations, the CMA will be exercising its own regulatory discretion as to how to appropriately balance these statutory duties, including by considering how the Authority has sought to discharge its duties and taking account of main and third party views on the same. In doing so, the CMA may reach different conclusions from the Authority as to how duties and guidance should be interpreted and balanced.
- 3.4 The legislation does not set out any hierarchy of the primary duties.⁸ Furthermore, the SPS complements the Authority's existing statutory duties. The Authority's statutory duty is to carry out its functions in accordance with the SPS and to that extent it may prioritise certain work areas over others. The expectation is that the regulated water industry will reflect the priorities and objectives in its strategic direction.

The CMA's general approach to redetermination references

- 3.5 The CMA is required to undertake a full redetermination of the Authority's determination. Therefore, unlike in an appeal where the appellant determines the scope of the case, the CMA is not limited to assessing only the specific issues raised by the main parties in their Statements of Case.
- 3.6 However, the CMA may invite views to establish if there is common ground on aspects of the Authority's determination that do not warrant redetermination. The CMA may therefore focus on the major areas of dispute, consistent with the shorter timeframe for conducting its redetermination than the Authority has for making its determination. Furthermore, where the CMA receives multiple references, it may need to consider the scope of its review in a way which ensures that there is an appropriate level of consistency across these references.
- 3.7 The CMA may also invite third parties to inform it of any other areas it should consider as part of the redetermination reference.
- 3.8 Given the CMA's role, redeterminations may not necessarily lead to an outcome for the disputing companies which is better than the disputed determination.

⁸ Case law has also set out that the order in which duties are listed does not create a hierarchy. See *R v Director General of Telecommunications, ex p. Cellcom* [1999] ECC 314.

- 3.9 Where the CMA receives multiple references from the Authority reflecting the requests of multiple companies, it has a duty to make determinations for each such reference. The CMA is required to produce a report on a reference, which it must provide to the Authority, and which sets out conclusions on the questions or matters in the reference and reasons for those conclusions.⁹
- 3.10 The CMA is able to take account of current circumstances and information which is now available, which may not have been available at the time of the disputed determinations, and the CMA can also seek further evidence. Where there is relevant additional and updated information available, produced since the disputed determination (including information, views and evidence produced and provided to the CMA by the main parties during the course of the redetermination reference), the CMA can take appropriate account of this to inform its determination(s).
- 3.11 While the CMA is not bound by the decisions of other groups in past redetermination references, the CMA may have regard to previous decisions of the CMA and the Competition Commission (CC) to the extent relevant.
- 3.12 In carrying out redeterminations, the CMA's approach may include:
- (a) grouping issues for consideration into separate areas along common themes, on the basis that they may be closely related, relevant to the same areas of the disputed determinations or rest on similar evidence, bearing in mind the interlinkages and interdependencies arising between any such themes;
 - (b) reconsidering the constituent blocks of the disputed determinations following the structure used by the Authority, and reaching balanced, evidence-based conclusions on each of these separately on their merits;
 - (c) considering the objectives of the price control in order to guide its decisions in redeterminations, taking account of the submissions received from main and third parties on the interpretation of objectives and guidance (including whether and how there may be conflicts or a trade-off between the achievement of different objectives);
 - (d) considering material such as market data, submissions and hearings of the main parties and third parties, reviews of business plans and specific projects, the advice of engineering consultants, and customer evidence to reach its conclusions;
 - (e) considering whether any additional information should be obtained for the purposes of reaching its conclusions;

⁹ Section 12(3C) of the Act.

- (f) considering any revisions of case, arguments and allowance claims made by the main parties during the course of the CMA's investigations, bearing in mind the timing of any such claims on their merits (including whether they may be speculative or opportunistic);
- (g) determining whether any elements of the Authority's approach were flawed and should be rejected or adapted;
- (h) determining whether any revisions to or replacements of aspects of the disputed determination should be made; and
- (i) reviewing the overall balance of the redeterminations in the round to check whether they are consistent with all the principles that apply to the Authority in accordance with which the CMA is to decide the matter on its own merits, including the various statutory duties.

The CMA's approach to prioritisation and deprioritisation of issues

3.13 While the CMA is able to address any aspect of the price controls in the redeterminations, it will generally adopt a proportionate approach to the redetermination reference given the time available and scrutinise most closely the areas in the disputed determination(s) that would have the largest effect on customer prices and other outcomes, and on the disputing companies. For this reason, some issues in a redetermination reference may be prioritised or deprioritised.

3.14 In particular, the CMA will be mindful of whether in respect to specific issues:

- (a) any concerns have been raised by any main or third party;
- (b) the CMA has identified any potential concerns, for instance in the Authority's approach;
- (c) there is any impact on other parts of the redeterminations; and/or
- (d) there is a significant scale of impact on current and/or future customer bills and/or other outcomes, including but not limited to service quality and resilience.

3.15 The CMA will be alert to any new evidence submitted that may suggest a change to these views and will also take account of any interlinkages and interdependencies from the work it will be doing that could have consequences in other parts of the redetermination reference.

3.16 The CMA may publish an 'approaches document' on the case webpage, inviting comments on any proposals for areas to deprioritise. The CMA will have regard to

any such comments when deciding which, if any, areas to deprioritise. The CMA will summarise any areas that have been deprioritised in its final report.

Key stages in the CMA's process

3.17 The CMA's process in making redetermination references may comprise the following stages.

Pre-reference

3.18 A disputing company that is considering requesting the Authority to refer a disputed determination to the CMA for a redetermination is strongly encouraged to provide the CMA with reasonable notice in advance of making any such request. This may be done informally, for example, through a call or, where the disputing company does not possess a named contact at the CMA, by emailing appeals@cma.gov.uk. Reasonable notice in this context would typically cover an initial contact with the CMA at the latest two weeks prior to the disputing company requesting the Authority to refer a disputed determination to the CMA, to warn the CMA of the possibility of such a reference and to provide a high level indication of the likely arguments in such reference (even if no final decision to refer has been made). These pre-reference contacts will be treated as confidential between the prospective disputing company and the CMA.

3.19 In person or virtual meetings to discuss technical issues may be arranged prior to receipt of the Notice of Reference. The CMA will ensure that any such meetings are recorded and that any transcripts are made available to the main parties to any eventual redetermination reference.

Submission of the redetermination reference

3.20 The Authority will formally refer the disputed determination to the CMA at the request of the disputing company through the Notice of Reference.

Preparatory stage

3.21 Following receipt of the Notice of Reference, the CMA will initiate a dialogue with the main parties to plan its process and to obtain an understanding of the case. The cooperation of the main parties during this preparatory stage assists the CMA and the main parties in making an effective start to the redetermination reference. This stage may involve:

- (a) identifying CMA staff to engage with the main parties;
- (b) discussing the potential administrative timetable for the redetermination reference and, where relevant, any extension thereof;

- (c) discussing the mechanics of the disputing company's submission of its Statement of Case;
- (d) identifying any technical issues with which the CMA will need to become familiar and setting up any in person or virtual meetings to discuss such issues;
- (e) the CMA writing to the main parties, advising them of various procedural matters (such as points of contact) and providing further direction if appropriate; and/or
- (f) the discussion of case management issues.

Constitution of the CMA group

3.22 Following receipt of the Notice of Reference, a group is constituted in accordance with Part 5 of the Rules.

Setting of the administrative timetable

3.23 The CMA will, after consulting the main parties on a draft administrative timetable, finalise such timetable and communicate it to the main parties and the public as it considers appropriate.¹⁰

Conducting case management conferences

3.24 The CMA will invite the main parties to discuss case management issues, including:

- (a) the process for the redetermination reference, including key stages and timetable;
- (b) availability for hearings and the conduct thereof;
- (c) arrangements for teach-ins and site visits, including potential dates and content;
- (d) approaches to submissions and confidentiality;
- (e) key issues and arguments likely to be raised by the disputing companies as part of the redetermination reference;
- (f) whether the main parties hold any information relevant to the redetermination reference; and/or

¹⁰ Rule 7 of the Rules.

- (g) other administrative matters such as key CMA contacts, transparency and confidentiality requirements, and market sensitivity issues.

Initial submissions and information gathering

- 3.25 Initial submissions will ordinarily include the Notice of Reference, the Authority's Final Determination, notice that the Final Determination has been sent to the disputing companies and Statements of Case from the disputing companies. The Authority will be given the opportunity to respond to such Statements of Case and third parties will also be entitled to submit observations on the Statements of Case.
- 3.26 During the course of its determination, the CMA will consider if further submissions from the main parties are required. The CMA will provide the main parties with a reasonable opportunity to reply to any further submissions from any other main parties to the redetermination reference and may also invite further submissions from third parties (in accordance with Rules 10.1 and 10.2) on the issues raised by the main parties' submissions and any other issues on which it considers necessary to receive submissions.
- 3.27 At any time during its assessment of the redetermination reference, the CMA may raise written questions on the arguments and evidence contained in the main parties' submissions and the submissions of any third party,¹¹ giving them a reasonable period within which to respond taking into account the reporting period.

Hearings

- 3.28 In conducting hearings, the CMA may among other things determine:
 - (a) whether or not hearings or oral submissions should be public or joined between multiple disputing companies;¹²
 - (b) whether witnesses or experts should be called;
 - (c) whether and if so which documents should be disclosed by the main parties and any third parties;
 - (d) whether third parties should be involved; and
 - (e) whether any follow up written submissions should be invited after the conclusion of oral hearings.

¹¹ Rule 8.4(a) of the Rules.

¹² Rules 9.2 to 9.6 of the Rules.

Provisional determination

- 3.29 The CMA will normally issue a provisional determination stating its provisional conclusions which will be notified to the main parties, as well as to any third parties. It will invite written comments on the provisional determination from the main parties and, where relevant, any third parties.¹³
- 3.30 The main purpose of the provisional determination is to allow the main parties and any third parties to comment on the CMA's reasoning and accuracy of arguments, as well as the factual accuracy of the matters in the provisional determination, confidentiality matters and any key issues in need of clarification. There may be cases where the CMA considers that it is not appropriate to issue a provisional determination. In such cases, the CMA will determine what alternative procedure is appropriate based on the circumstances of the case and in accordance with the overriding objective.
- 3.31 If a provisional determination is issued, a deadline will be set for written comments. To demonstrate how their comments correspond to the evidence and arguments previously submitted, the main parties' written comments must cross-refer to specific paragraphs within their written submissions. The CMA will consider the written comments on the provisional determination.

Further information gathering

- 3.32 After issuing any provisional determination, the CMA may conduct further information gathering where necessary, including by:¹⁴
- (a) holding further hearings with the main and third parties;
 - (b) issuing further documents or reports (for instance working papers) on specific issues and consulting on the same with the main and third parties; and/or
 - (c) inviting further submissions from the main and third parties on any issue the CMA considers necessary.

Final submissions

- 3.33 The CMA will then invite final submissions from the main parties and third parties where necessary for the purposes of finalising the final report.

¹³ Rule 11.4 of the Rules.

¹⁴ Rule 11.6 of the Rules.

Final report

3.34 Once the CMA has received any final submissions from the main parties and third parties invited pursuant to paragraph 3.33, it will then submit the final report to the Authority.

4. Key documents

Notice of Reference

4.1 The redetermination reference to the CMA is set out in the Notice of Reference from the Authority to the CMA. We expect the Notice of Reference to specify:

- (a) details of the disputing company that has required the disputed determination to be referred to the CMA under the Act;
- (b) the terms of the disputed determination to which the redetermination reference relates; and
- (c) the period in which the CMA will report and determine the disputed determination.¹⁵

Notice of Extension

4.2 Where the CMA has requested an extension, which the Authority has granted,¹⁶ the terms of the extension shall be outlined in a Notice of Extension from the Authority. The CMA will publish a copy of the Notice of Extension on its website.

Main party submissions

Statement of Case

4.3 The arguments of the disputing company will be set out in its Statement of Case. The disputing company should submit its Statement of Case within the period specified by the CMA.

4.4 The Statement of Case should:

- (a) set out the disputing company's reasons for requiring the disputed determination to be referred to the CMA;

¹⁵ Sections 12(3B) and 14A(1) of the Act.

¹⁶ The Authority may, having received representations from the CMA, extend the period specified in the reference by which the CMA is to make its report by no more than six months if it is satisfied that there are special reasons for doing so (see section 14A(3) of the Act).

- (b) identify concerns in relation to the Final Determination;
- (c) specify the issues that it considers that the CMA should prioritise in its redetermination and the approach that it considers that the CMA should adopt in relation to those issues. This should include an explanation of the scale of impact of those issues on current and future customer bills and other outcomes such as service quality and resilience; and
- (d) include a glossary and an explanation of the industry and technological structure that supports the supply of services subject to the Final Determination.

Authority's response to the Statement of Case

4.5 The CMA will provide the Authority with an opportunity to respond to the arguments presented by the disputing company in its Statement of Case.

4.6 The Authority's response to the Statement of Case should:

- (a) explain the Authority's approach in reaching its Final Determination;
- (b) set out how the Authority has fulfilled its statutory duties in reaching its Final Determination;
- (c) respond to any issues or potential concerns raised by the disputing company in its Statement of Case;
- (d) identify the issues that the CMA should prioritise in its redetermination and the approach that it should adopt in relation to those issues. This should include an explanation of the scale of impact of those issues on current and future customer bills and other outcomes such as service quality and resilience; and
- (e) include cross references to the disputing company's Statement of Case.

4.7 Where there is more than one disputing company to the redetermination reference, it will be helpful if the Authority's response can identify issues that are cross-cutting and those that are specific to individual disputing companies.

Further submissions from the main parties

4.8 During the course of its determination, the CMA will consider if further submissions from the main parties are required. Where relevant, the CMA will provide the main parties with a reasonable opportunity to reply to any further submissions from any other main parties to the redetermination reference.

Third party submissions

- 4.9 The CMA may invite submissions from third parties (in accordance with Rules 10.1 and 10.2) on the issues raised by the main parties' submissions and any other issues on which it considers necessary to receive submissions.
- 4.10 The CMA will set a deadline for third party submissions. The CMA reserves the right to reject third party submissions made after the deadline, particularly where accepting them would be inconsistent with the overriding objective.

Format for submission of documents

- 4.11 The main and third parties should send correspondence to the CMA in electronic form, in a format compatible with Microsoft Office programs, or as PDF or Microsoft Word files. Spreadsheets, charts and all other digital source data files should be submitted, as far as possible, in Microsoft Excel or their equivalent original format, to facilitate our internal analysis. Spreadsheets should include underlying formulae and other linked spreadsheets (ie they should not include links to other spreadsheets that are not also provided).
- 4.12 When submitting documents to the CMA, the main and third parties should also in parallel send non-sensitive versions of such documents that can be published on the CMA's website.
- 4.13 When sending material electronically, main and third parties should ensure that each file is given a fully explanatory title and that the files are sent without being grouped into folders and subfolders.
- 4.14 The CMA will send some documents to parties as PDF files and some as Microsoft Word files.
- 4.15 The CMA may provide additional instructions on the practicalities for the submission of documents as part of a specific redetermination reference.

Provisional determination

- 4.16 As noted above, the purpose of a provisional determination is to allow parties to comment on the CMA's reasoning and accuracy of arguments.
- 4.17 If issued, the provisional determination will be notified to the main parties and third parties that have made submissions to the CMA. The provisional determination will normally be published on the CMA's website. The CMA will invite submissions from the main and third parties within such a time that it considers appropriate. The CMA may publish a summary of the provisional determination where

considered appropriate based on the circumstances of the redetermination reference.

- 4.18 The final report will be primarily written for the main parties; it is likely to make use of technical language (as used in main parties' submissions) and be based on an expectation that the reader has a general knowledge of the industry and regulatory context.

Final report

- 4.19 The CMA's final report setting out its conclusions on the questions or other matters contained in the redetermination reference (and other matters referred to in Rule 12.4) will be submitted to the Authority. The CMA may publish a summary of its findings at the same time that it submits its final report to the Authority. After the final report has been submitted by the CMA to the Authority, there is a formal process that the Authority and the Department for Environment, Food & Rural Affairs need to follow before the final report can be published by the CMA on the Authority's behalf. This process will take a minimum of fourteen days.

5. Hearings and meetings

Hearings

- 5.1 The CMA will not normally conduct hearings in public and, in determining whether to do so, will take into account the factors set out in Rule 9.3. The CMA will consider whether hearings should be held in person, virtually or on a hybrid basis in accordance with the overriding objective in Rule 4.
- 5.2 The CMA may conduct separate hearings with the disputing company and the Authority, which the disputing company or Authority (as applicable) may be invited to attend as observers. The CMA may also conduct joint hearings with multiple disputing companies, or with one or more disputing company and the Authority together in certain circumstances, for instance where similar topics are being discussed.
- 5.3 Third parties may request a hearing. The CMA will consider any such request and the reasons for the request. The CMA may of its own initiative invite third parties to attend any hearing.
- 5.4 During the course of the hearing, it may become clear that an oral answer to a question may have to be supplemented by further material. In such cases, the main party or third party (as applicable) will normally be given a short time period to produce the necessary material.

- 5.5 Hearings will normally be held with the group, although CMA staff will also participate. The CMA will determine the appropriate structure and topics to be covered in the hearings. Subject to the CMA's direction on the topics to be covered, the hearings are an opportunity for the group to ask such questions as it considers necessary in order to make the necessary findings in its redetermination. However, they are also an opportunity for the parties to make oral submissions to the group. Although the Rules allow for cross-examination, the CMA expects that it will rarely be necessary to make use of this provision.¹⁷
- 5.6 Hearings are formal and will normally be led by the group chair or by such other member of the CMA as appropriate.
- 5.7 Participants will normally be directed before the hearing as to the topics that the CMA wishes to cover and the length of time they will be allowed to make an opening statement. The CMA will indicate the order in which it wishes to hear the participants. A main or third party may be represented by more than one person and the CMA will encourage such arrangements where this would facilitate the clear presentation of technical issues and ensure that the person with the requisite level of expertise and knowledge is available to answer the group's questions. Main or third parties who wish to use technology during their submissions should make prior arrangements with the CMA in order to facilitate preparation for the use of that technology at the hearing. An electronic copy of any presentation or exhibits used by main or third parties must be provided to the CMA in advance of the hearing (for example, for use by the CMA as a backup in the event of any technical issues arising during the hearing).
- 5.8 Recordings are taken of hearings. Any verbatim transcripts taken will be sent to the main or third party (as applicable) after the hearing to check for accuracy and to enable the party to identify any sensitive material. The CMA may request the main or third party to verify by a statement of truth the transcript of the statements made by it (or on its behalf) at the hearing. The CMA will share transcripts with the Authority and may share non-sensitive versions of transcripts with such other persons as it considers appropriate based on the circumstances of the case.

Clarification hearings

- 5.9 In order to better understand any technical or other key issues relating to the redetermination reference, the CMA may hold clarification hearings in advance of the main hearing to further the overriding objective in Rule 4. These hearings are primarily designed to allow the group to ask questions relevant to the redetermination reference. The CMA may decide to use these hearings to focus on narrow areas of a redetermination reference that require clarification.

¹⁷ Rule 9.8 allows the group to decide the extent, if any, to which third parties are allowed to cross-examine witnesses.

- 5.10 The clarification hearing is not an opportunity for examination or cross-examination of witnesses by the main parties. Furthermore, the main parties will not be permitted to respond substantively to each other's presentations made, or answers provided, during a clarification hearing.

Main hearings

- 5.11 Main hearings provide an opportunity for the main and third parties to explain their positions orally directly to the CMA and for the CMA to test the evidence and explore key issues with the main and third parties. They form part of the CMA's process of clarifying and understanding the main and third parties' positions. They are not an opportunity for main and third parties to put questions to the CMA.
- 5.12 The staff team will contact the main parties early in the redetermination process to arrange an appropriate date for the main hearings. The CMA will endeavour to schedule main hearings for mutually agreeable dates but will have regard to the overall requirements of the administrative timetable. Where applicable, the CMA will contact third parties to arrange third party hearings as early as possible in the determination process.
- 5.13 Main hearings will take place after any clarification hearing and will proceed on the basis that the main and third parties have already made developed arguments to the CMA. At the hearing, the CMA will ask questions relating to particular themes arising from the main and third parties' submissions and evidence in order to test the arguments and their evidential basis. The CMA will generally send a hearing agenda to main and third parties ahead of the hearing.
- 5.14 Whilst the CMA will not generally be prescriptive as to who should represent main and third parties at hearings, the CMA is likely to wish to discuss the case and evidence with the business and technical specialists from the parties themselves.
- 5.15 While such hearings are ordinarily conducted bilaterally, observers from the other main and third parties may, on invitation by the CMA, attend. In exceptional circumstances, where observers are in attendance, the CMA may require those observers to leave the hearing while any confidential material is discussed. Alternatively, the CMA may require the main or third parties to comment in writing.
- 5.16 A main or third party may, at the CMA's discretion, be offered an opportunity to make opening and/or closing statements. Where the CMA agrees to such a request, it may impose a time limit on any such statement. Alternatively, the CMA may invite such statements in written form, in which case it may impose page limits on such written statements.

Staff meetings

- 5.17 The CMA may conduct meetings or calls to clarify specific facts; for example, CMA staff may hold meetings with the Authority or the disputing companies to discuss modelling issues. A transcript will not normally be taken, but, where practical, other main parties may be invited to send observers. A note of substantive (rather than administrative) meetings or calls will be circulated to the main parties.

6. Transparency and confidentiality

- 6.1 The CMA places great importance on transparency between the main parties and expects as a starting point that each main party will have access to all materials relevant to a redetermination reference to which they are a party. This applies to all documentation, including those the disclosure of which is not covered in detail in the Rules or this Guide (for instance, additional submissions, correspondence (including pre-appeal correspondence), and any materials prepared for site visits, teach-ins and/or hearings). Transcripts of hearings and written questions will typically be circulated.
- 6.2 Further, if a main or third party considers that it is not appropriate for other parties to have access to a particular document or material, it should make representations to the CMA explaining why it considers that to be the case in accordance with Rule 10.5.
- 6.3 The CMA may invite additional attendees as observers to hearings and impose limits on the number of such observers.

7. Recovery of costs

Disputing company's costs

- 7.1 When the group makes its determination, it must decide to what extent it is reasonable to take account the costs incurred by a disputing company in connection with the redetermination reference.¹⁸ In doing so, the CMA will have regard to the factors listed in Rule 13.2, in particular, the extent to which its determination is likely to support the disputing company's (rather than the Authority's) claims.
- 7.2 In determining what proportion of costs are recoverable by a disputing company, the CMA will consider if its determination agrees with the disputing company or with the Authority, and how that should translate into recovery of costs from

¹⁸ Section 12(3A) of the Act.

customers. The CMA will take into account what costs, if any, should be recoverable and what would be reasonable in the circumstances.¹⁹

- 7.3 The disputing company will be invited by the CMA to provide details of their costs incurred in relation to the redetermination references. The disputing company should file a statement of costs, once invited by the CMA, which should be disclosed to the Authority. Each statement of costs should include detailed information about the costs (including categories such as legal fees, experts' costs and any other disbursements) reasonably incurred by the disputing company in relation to the redetermination reference.
- 7.4 In considering the costs of the disputing company, the CMA may determine that only certain categories of costs may be recovered, such as external costs of legal, economic and other specialist advisers. The CMA will consider the reasonableness of the costs claimed by the disputing company.
- 7.5 The CMA will also consider whether there are reasons that costs of the disputing company should not be recoverable even if the CMA's determination agrees with a disputing company's representations. For example, if the CMA's determination was based on information withheld or not accessible to the Authority at the time, or if the disputing company raised new issues with the CMA that it could have reasonably raised with the Authority between the draft and Final Determination, the CMA will need to consider if it is fair for the disputing company to recover its costs when the Authority was not in receipt of the information or could not have reasonably been expected to know such information when the Authority made its Final Determination.
- 7.6 Where there are multiple disputing companies to a redetermination reference, the CMA, in its determination of costs, may decide that it is reasonable to take into account a different proportion of costs for each company. The proportion of costs that the CMA will take into account will reflect the range of issues raised by the company and the extent to which a disputing company's claims are supported by the CMA's determination.
- 7.7 Before making a determination of costs, the CMA will provide the main parties with a provisional determination on costs and give them a reasonable opportunity to make representations.
- 7.8 The Authority does not directly recover costs incurred in the redetermination reference from the disputing companies. The CMA cannot direct a disputing company to pay the Authority's costs or vice-versa.

¹⁹ The Authority cannot claim any costs directly against the disputing company.

CMA's costs

- 7.9 The disputing company is required to pay in full to the Secretary of State under the conditions of their licences a CMA fee for the redetermination process, which is defined as the Authority's estimate of the costs incurred by the CMA in carrying out the redetermination. The Authority is required to consult with the CMA in order to determine the estimate of costs payable for the CMA fee.
- 7.10 The CMA may recover all costs associated with the redetermination reference from the disputing companies through the CMA fee and will provide an estimate of the costs incurred in carrying out a redetermination reference before making a determination of costs.
- 7.11 Where there are multiple disputing companies to a redetermination reference, the CMA's costs paid by each of the disputing companies will consist of the specific costs for each company plus a proportion of common costs. The CMA may attribute different proportions of its costs to each disputing company and will decide the most reasonable way for doing so by considering whether there is any evidence indicating that different proportions of common costs should be allocated across the disputing companies.
- 7.12 The CMA will determine the appropriate way to divide up common costs incurred during the course of the redetermination reference.
- 7.13 The CMA fee is payable by the disputing company on service of notice by the Authority and must be paid within 30 days to the Secretary of State. The Authority does not contribute to the CMA fee, nor can the CMA require it to do so.