

Draft water redetermination reference rules

CMA204con

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1. Introduction, citation and commencement

- 1.1 These Rules are made in exercise of the powers conferred by paragraph 51(1) of Schedule 4 to the Enterprise and Regulatory Reform Act 2013¹ for the purpose of regulating the conduct and disposal of water redetermination references brought under section 12 of the Water Industry Act 1991.
- 1.2 Before making these Rules, the CMA consulted such persons as it considered appropriate.
- 1.3 The Rules are to be known as the *Water Redetermination References: Competition and Markets Authority Rules (CMA204)*.
- 1.4 These Rules will have effect from [XX Month] 2024 and supersede those sections of *CMA rules of procedure for merger, market and special reference groups (CMA17)*² that were applicable to water redetermination references³ which had effect from 1 April 2014.⁴

2. Interpretation

- 2.1 In these Rules:

‘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);

‘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;

¹ 2013 c.24, as amended by The Enterprise and Regulatory Reform Act 2013 (Amendment) (Gas and Electricity Appeals) Regulations 2015 (S.I. 2015/16).

² See [CMA rules of procedure for merger, market and special reference groups \(CMA17\)](#) and in particular Part 7 that applies to special reference groups. As set out in paragraph 51(1)(6)(c) of Schedule 4 to ERRA13, a special reference group is to be constituted for water redetermination references under section 12 of the Act.

³ For the avoidance of doubt, Part 7 of CMA17 will continue to apply to all other special reference groups.

⁴ Rule 2.1 CMA17.

‘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;

‘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 chair the group;

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

‘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; and

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

2.2 In these Rules, unless the contrary intention appears, words in the singular include the plural and words in the plural include the singular.

3. Application of rules

- 3.1 These Rules are supplementary to the provisions of the relevant enactments. In the event of any conflict between these Rules and the relevant enactments, the latter will prevail.
- 3.2 The CMA has also published guidance to assist those involved in redetermination references governed by these Rules – see *Water Redetermination References: Competition and Markets Authority Guide (CMA205)*.

4. Overriding objective

- 4.1 The overriding objective of these Rules is to enable the CMA to dispose of redetermination references fairly, efficiently and at proportionate cost within the time periods prescribed in the Act. The CMA will apply these Rules to give effect to the overriding objective.
- 4.2 All parties to a redetermination reference must assist the CMA to further the overriding objective.

5. Appointment and conduct

Appointment

- 5.1 Where the CMA has received a redetermination reference from the Authority, the Chair shall promptly appoint members to form a group to conduct the redetermination reference and shall promptly appoint a member of the group to be the group chair.⁵
- 5.2 In making appointments to a group, the Chair shall have regard to any guidance published by the CMA on handling conflicts of interest and take into account any other factors which, in their opinion, might prejudice the independence and impartiality of the group.
- 5.3 A group must consist of at least three members of the CMA panel, one of which must be a specialist utility panel member.⁶
- 5.4 The group chair shall have a casting vote on any question to be decided by the group.⁷

⁵ Sections 12(3)(b) and 12(3D) of the Act.

⁶ Paragraph 38 of Schedule 4 to ERR13. A water redetermination reference under the Act is a specialist utility function for the purposes of ERR13, see paragraph 35(1)(c) of Schedule 4 to ERR13.

⁷ Paragraph 50 of Schedule 4 to ERR13.

Conduct

- 5.5 When determining a redetermination reference, the group shall decide the matter on its own merits in accordance with the principles that apply to the Authority in its determinations by virtue of the Act.⁸ The group shall exercise its own discretion as to how to appropriately balance the relevant statutory duties.
- 5.6 In making decisions that a group is required or permitted to make as part of a redetermination reference, it must act independently of the CMA Board.⁹
- 5.7 Rule 5.6 does not prevent:
- (a) the CMA Board from giving information in its possession to a group; or
 - (b) a group giving information in its possession to the CMA Board.¹⁰
- 5.8 Any reporting panel member¹¹ of the CMA panel who is not a member of the group may, at the invitation of the group chair, attend its meetings or otherwise take part in its proceedings for the purpose of offering the group advice about the exercise of its functions.¹²
- 5.9 It shall be the duty of a group to have regard to any advice given to it by the member of the CMA panel referred to in Rule 5.8 but that member may not vote or have any statement of their dissent from a conclusion of the group included in the group's report.¹³
- 5.10 A group may consult any member of the CMA panel with respect to any matter or question with which the group is concerned but, before doing so, the group shall consult the group chair, to avoid any conflict of interest arising.¹⁴
- 5.11 All members of the group shall have regard to any guidance issued by the CMA Board under paragraph 52 of Schedule 4 to ERRA13 and to the CMA's *Administrative penalties: statement of policy on the CMA's approach (CMA4)*¹⁵ made under sections 94B(1), 116(1) and 174E(1) EA02.
- 5.12 If, during the proceedings of a group:
- (a) a member of the group ceases to be a member of the CMA panel;

⁸ Section 12(3)(b) of the Act.

⁹ Paragraph 49(1) of Schedule 4 to ERRA13.

¹⁰ See paragraph 49(2) of Schedule 4 to ERRA13.

¹¹ See paragraph 35(1)(d) of Schedule 4 to ERRA13.

¹² See paragraph 45(1) of Schedule 4 to ERRA13.

¹³ Paragraph 45(2) of Schedule 4 to ERRA13.

¹⁴ See paragraph 45(1) and (3) of Schedule 4 to ERRA13.

¹⁵ See [Administrative penalties: Statement of Policy on the CMA's approach \(CMA4\)](#).

- (b) the Chair is satisfied that a member of the group will be unable for a substantial period to perform their duties as a member of the group; or
- (c) it appears to the Chair that because of a particular interest of a member of the group it is inappropriate for that member to remain in the group,

the Chair may appoint a replacement.¹⁶ Alternatively, in the case of (a), the Chair may request the reappointment of the member to the CMA panel for the purpose of completing the redetermination reference.¹⁷

6. Reporting period

- 6.1 The CMA will report on a disputed determination within the period specified by the Authority, beginning with the date of the reference being received by the CMA. The Authority may specify a period of up to six months within which a report on the reference is to be made.¹⁸
- 6.2 The CMA may request an extension of the period specified by the Authority in its reference by making representations to the Authority. The CMA may request only one extension from the Authority. The Authority may grant such an extension, where it is satisfied that there are special reasons why the report cannot be made within the period specified in the reference, for a period of no more than six months.¹⁹
- 6.3 A request for an extension shall be made by the group chair in writing to the Authority.
- 6.4 Where the Authority grants a request for an extension, the CMA shall:
 - (a) publish a copy of the Notice of Extension on the CMA's website;
 - (b) revise its administrative timetable (where applicable) to reflect the new reporting period; and
 - (c) inform the main parties to the disputed determination of the Authority's decision in response to the request for an extension.

¹⁶ Paragraphs 40-43 of Schedule 4 to ERRA13.

¹⁷ Paragraph 4 of Schedule 4 to ERRA13.

¹⁸ Section 14A(1) of the Act.

¹⁹ Section 14A(3) of the Act.

7. Administrative timetable

- 7.1 After the group has been appointed, it shall, as soon as practicable, make arrangements for an administrative timetable to be drawn up which shall make provision for the major stages of the redetermination reference.
- 7.2 The administrative timetable may, in particular, include arrangements for the following stages:
- (a) gathering and verifying information;
 - (b) holding case management conferences;
 - (c) hearing witnesses;
 - (d) notifying provisional findings;
 - (e) providing additional documents such as statements of case or working papers;
 - (f) considering responses and replies to documents provided in accordance with Rules 7.2(d) and (e) above;
 - (g) notifying and considering possible directions; and
 - (h) considering exclusions from disclosure;
- provided that where these stages are mentioned in the administrative timetable, they need not necessarily take place in the order in which they are mentioned in this Rule.
- 7.3 The administrative timetable shall also include arrangements for the CMA's final report to be provided to the Authority in accordance with section 12(3C) of the Act.²⁰
- 7.4 The group shall, when drawing up the administrative timetable, have regard to any views which the main parties to the redetermination reference have submitted to it as well as to the overriding objective and the circumstances of the case.
- 7.5 Once the final administrative timetable has been produced, the group shall make such arrangements as it thinks appropriate in order for it to be notified to the main parties to the redetermination reference. The CMA may publish the timetable on its website.

²⁰ The final report shall then be published by the Authority in accordance with sections 15(5) and (6) of the Act.

7.6 The group will proceed on the basis that the main parties will comply with the administrative timetable.

7.7 If, at any point during the redetermination reference, the group has reason to believe that the administrative timetable will not be met for any reason, including any unforeseen circumstance, any difficulty concerning any stage of it, or any change to the reporting period, then the group shall prepare a revised timetable to which the notification and publication requirements contained in Rule 7.5 shall apply.

8. Procedure

8.1 Subject to the provisions of the Act and these Rules, the CMA may determine its own procedure in conducting a redetermination reference.

8.2 The CMA may at any time, on application or of its own motion, give directions or make requests as it considers necessary for the conduct of any redetermination reference including but not limited to any of the following matters:

- (a) the holding of case management conferences;
- (b) the filing and service of written statements, including provision for joint submissions where there are multiple disputing companies;
- (c) the conduct of hearings, including the calling of witnesses, as well as provision for joint hearings and/or joint oral submissions on particular arguments to be made at hearings where there are multiple disputing companies;
- (d) the filing and service of further written statements after any hearings, including provision for joint submissions where there are multiple disputing companies;
- (e) the appointment and instruction of experts, whether by the CMA or by the main parties or any third party, and as to the manner in which expert evidence is to be given;
- (f) the preparation and submission of witness statements, expert reports, working papers (including inviting comments on consultation of such papers), final submissions or other documents;
- (g) the examination or cross-examination of a person who gives oral evidence at a hearing;
- (h) the arrangement of site visits, teach-ins or technical meetings;

- (i) the publication of any provisional findings and the invitation for comments on the same;
- (j) the fixing of time limits in respect of any aspect of the redetermination reference (other than where specified in the Act);
- (k) the setting of restrictions in terms of the form and content of any submissions made by any person pursuant to these Rules (such as page limits);
- (l) the disclosure or production of documents, or classes of documents, or the supply of estimates, forecasts, returns or other information, between the main parties and between the main parties and any third party;²¹
- (m) the giving of directions as to the treatment of sensitive information;
- (n) the variation of the provisions of these Rules in relation to the requirements for sending documents;
- (o) the hearing of a third party where it is proposed to give a notice or direction in relation to that party;
- (p) the provision to the Authority of the final report; and
- (q) such other matters as appear to the CMA to be necessary to meet the overriding objective.

8.3 The CMA will give written notice of its directions and requests.

8.4 The CMA may at any time:

- (a) put questions to the main parties and any third party;
- (b) invite the main parties and any third party to make written or oral submissions on aspects of the redetermination reference;
- (c) direct the main parties and any third party to provide information or particulars and direct them to produce documents or papers relating to the redetermination reference; and
- (d) require the main parties and any third party to attend meetings or hearings.

8.5 The main parties and any third party may apply to the CMA for permission under this Rule to make further submissions or provide supplementary evidence. When doing so, these parties must explain why such submissions or the provision of such evidence are justified in the circumstances and why it was not possible to make such submissions or provide such evidence earlier in the redetermination

²¹ Paragraph 53(2)(c) of Schedule 4 to ERRA13.

reference process. The CMA reserves the right to reject unsolicited submissions or provision of supplementary evidence where accepting them would be inconsistent with the overriding objective or where the parties have submitted them on an unsolicited basis without following the procedure set out in this Rule 8.5.

Case management conferences

8.6 The CMA may hold case management conferences with the main parties to the redetermination reference and any third party where it considers that to do so would further the overriding objective.

Investigation powers

8.7 The CMA may during the course of a redetermination reference exercise any of the investigation powers contained in sections 109 to 115 of the EA02.²²

8.8 Where the CMA is minded to impose a penalty under section 110(1) or (3) of the EA02, it shall have regard to the CMA's *Administrative penalties: statement of policy on the CMA's approach (CMA4)*²³ made under section 116(1) of the EA02.

8.9 Where, at any stage of a redetermination reference, any individual or body has been asked to provide information within a reasonable period of time and has failed to do so, without a reasonable explanation, the CMA shall not be obliged to have regard to any information received from that person or body after the date specified.²⁴

9. Hearings

Conduct of hearings

9.1 Hearings will be opened and directed by the group chair or by such other member of the CMA as is appropriate.

9.2 It shall be the duty of the group to decide which, if any, of its hearings are to be held in public.²⁵

9.3 In taking that decision, the group shall have regard to:

- (a) the views of the main and third parties;

²² Sections 12(3B) and 14(B) of the Act.

²³ See [Administrative penalties: Statement of Policy on the CMA's approach \(CMA4\)](#).

²⁴ Paragraph 53(3) of Schedule 4 to ERRA13.

²⁵ Paragraph 53(6)(b) of Schedule 4 to ERRA13.

- (b) the likelihood that a matter relating to the private affairs of an individual or body might be made known to the public and, being made known, might significantly harm the interests of that individual or body;
- (c) the extent to which an individual or body might be inhibited from providing information to the CMA if the hearing were to be held in public;
- (d) the extent to which an individual or body might be encouraged to provide information to the CMA if the hearing were to be held in public;
- (e) the efficient and proper conduct of the redetermination reference;
- (f) the administrative timetable;
- (g) the resource implications for the hearing; and
- (h) when the hearing is held entirely in person, the transport implications of the location of the hearing.

9.4 If, during the course of any hearing in public, the group considers that it would be appropriate, having regard to the factors set out in Rule 9.3(b), (c), (d) and (e), that the hearing should no longer continue to be held in public, it shall hold the hearing in private, after having given its reasons in public for doing so.

9.5 Where there are multiple disputing companies, the group may, if it considers that it would further the overriding objective, hold joint hearings with one or more of them, or with one or more of the main parties.

9.6 If the group decides to hold joint hearings then it shall be the duty of the group to consider which, if any, of those joint hearings are to be held in public, and in taking that decision the group shall have regard to the factors described in Rule 9.3.

9.7 If no previous direction or other notification has been made, at the start of the hearing the attendees will be directed as to the length of their oral submissions, the issues on which the CMA wishes to concentrate at the hearing, the order in which the CMA wishes to hear the submissions, and when and how the CMA will pose questions of the attendees. It is for the CMA to determine the form and structure of the hearing and the CMA will not necessarily cover all of the main parties' arguments at a hearing.

Appearances at hearings

9.8 The group shall decide the extent, if any, to which third parties are allowed at a hearing:

- (a) to be present or to be heard, either by themselves or by their representatives;

(b) to cross-examine witnesses; and

(c) otherwise to take part.²⁶

9.9 The group, or any person nominated by it, may take evidence on oath and for that purpose may administer oaths.²⁷

9.10 Any person who objects to being sworn shall be permitted to make a solemn affirmation instead of taking an oath.

9.11 Subject to Rule 9.8, at a hearing a main party or third party may appear on its own behalf and/or may be represented by:

(a) a qualified lawyer having a right of audience before a court in the United Kingdom; or,

(b) such other person as the CMA allows.

10. Submissions

Invitation to submit

10.1 The group may invite submissions from the main and third parties on:

(a) the issues it proposes to prioritise;

(b) how, if at all, it should take into account any issues that may impact the reporting period of a redetermination, supported where relevant by detailed evidence which would allow the group to quantify those impacts;

(c) its provisional determination (in accordance with Rule 11.4); and,

(d) any other issue on which the group considers it necessary to receive submissions.

10.2 The group may invite submissions from a third party and may specify the matters on which it wishes to receive submissions, such as:

(a) the issues raised in the reference from the Authority and main party submissions;

(b) whether they are in agreement with the Authority's determination in respect of any issue;

²⁶ Paragraph 53(6) of Schedule 4 to ERRA13.

²⁷ Sections 109(5) and 174(6A) EA02.

- (c) where a third party is not in agreement with the Authority's determination, whether it should be amended or replaced and if so, with what; and,
 - (d) whether there are any other issues that the group should be addressing.
- 10.3 The group shall specify how submissions are to be made and the CMA may publish any non-sensitive submissions on the CMA's website.
- 10.4 Subject to any non-disclosure application made pursuant to Rule 10.5, the group may ask the main parties to copy each other into their submissions to the group.

Non-disclosure of submissions

- 10.5 Where a main party or third party believes that information contained within a submission is sensitive information which should not be disclosed, they may:
- (a) make a non-disclosure application to the group at the same time (unless otherwise specified in writing by the group) that they send the submission to the group. The non-disclosure application must include a table setting out such main party or third party's reasons for treating each item or category of information as sensitive information; and,
 - (b) pending the CMA's direction, excise the sensitive information from the submission provided to any person other than the CMA.

11. Provisional determination

- 11.1 The group shall normally issue a provisional determination stating its provisional conclusions. However, where the group considers that it is not appropriate to issue a provisional determination, it will determine what alternative procedure is appropriate in the circumstances of the case and in accordance with the overriding objective.
- 11.2 When a group makes a provisional determination on a reference, it shall notify the main and third parties on such terms and in such manner as the group considers appropriate.
- 11.3 The provisional determination will normally contain:
- (a) the CMA's provisional findings on the issues raised by the disputing companies in connection with the redetermination reference; and
 - (b) an explanation for the CMA's provisional conclusions and findings.
- 11.4 The provisional determination will normally be published on the CMA's website. Where the group issues a provisional determination, it will at the same time invite

submissions from the main and, where relevant, third parties in response to the provisional determination within such time as the CMA considers appropriate.

- 11.5 After considering any submissions received from the main and third parties in response to a provisional determination, the group may undertake any further work it considers necessary, including:
- (a) holding further hearings with the main and third parties;
 - (b) issuing further documents or reports (such as working papers) and consulting on such documents or reports with the main and third parties; and
 - (c) inviting further submissions from the main and third parties on any issue it considers necessary.

12. Final report

- 12.1 Once the group has had regard to any submissions made or evidence given in response to any provisional determination, it shall adopt its final report on the redetermination reference and proceed to make and publish its final report in accordance with these Rules.
- 12.2 A group may, for the purpose of preparing its report, send any material which it has produced back to any person or body so that its accuracy can be verified.
- 12.3 A group may, for the purposes of Rule 12.1, ask any person or body to identify any matter which that person or body might wish to have excluded from its report.
- 12.4 The final report shall contain:²⁸
- (a) the CMA's conclusions on the questions or other matters contained in the redetermination reference;
 - (b) an explanation for the CMA's conclusions; and,
 - (c) the CMA's determination on costs (in accordance with Part 13 of these Rules).
- 12.5 Where the final decision of a group is taken by a majority, the report may contain a statement or statements from the member or members in the minority of their dissent from that decision.

²⁸ Section 12(3C) of the Act.

- 12.6 As soon as practicable after adopting its final report, the group shall submit the report to the Authority. On submission of the final report to the Authority, a summary of the final report may be published on the CMA's website.
- 12.7 The group shall publish the final redetermination report on the CMA's website once the Authority has indicated that the report can be published.²⁹

13. Costs

- 13.1 When the group makes its determination, it must decide to what extent it is reasonable to take into account the costs incurred by a disputing company in connection with the redetermination reference.³⁰
- 13.2 In deciding what costs may be taken into account, the group may have regard to:
- (a) the extent to which the determination is likely to support the disputing company's (rather than the Authority's) claims;
 - (b) any details provided by the disputing company regarding their costs incurred in connection with the redetermination reference; and,
 - (c) the proportionality and reasonableness of the costs detailed by the disputing company.
- 13.3 Before reaching its determination, a group must provide to the Authority an estimate of the costs incurred by the CMA in carrying out the redeterminations.

14. Slip rule

- 14.1 Where any notice or decision of the CMA contains a clerical error, or a slip or omission, that error, slip or omission may be corrected and a further notice or decision issued by the CMA.

15. Filing of documents

- 15.1 All documents sent to the CMA or any other person should be clearly marked to identify information which should be treated as sensitive information. The absence of such marking shall be treated as denoting that the information should not be treated as sensitive information.
- 15.2 It would assist the CMA if, when submitting documents, parties confirm in a cover email which documents contain confidential text (which has been highlighted) and

²⁹ Section 15(5) of the Act directs that the Authority will publish a copy of the report fourteen days after that copy is received by the Secretary of State.

³⁰ Section 12(3A) of the Act.

which should be considered non-sensitive and, where possible, indicate this in a header on each document.

- 15.3 Unless a person is notified otherwise by the CMA, any document that is to be sent to the CMA under the relevant enactments or these Rules must be:
- (a) provided in an electronic, searchable and machine-readable format and appropriately indexed; and
 - (b) sent via email to appeals@cma.gov.uk.
- 15.4 If the CMA informs a person that it requires hard copy documents, unless notified otherwise, these must be sent by first class post or personal delivery, marked for the attention of the Regulatory Appeals team, Competition and Markets Authority, The Cabot, 25 Cabot Square, London E14 4QZ.