

NON-CONFIDENTIAL

**BEFORE THE COMPETITION AND MARKETS AUTHORITY**

**IN THE MATTER OF AN APPEAL**

**UNDER SECTION 23B OF THE GAS ACT 1986**

**B E T W E E N : -**

**WALES & WEST UTILITIES LIMITED**

**Appellant**

**and**

**THE GAS AND ELECTRICITY MARKETS AUTHORITY**

**Respondent**

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**NOTICE OF APPEAL  
ENERGY LICENCE MODIFICATION  
RIIO-GD3 PRICE CONTROL (2026-2031)**

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## PART I. INTRODUCTION

### 1 OVERVIEW

- 1.1 The Appellant in this appeal is Wales & West Utilities Limited (**WWU**).
- 1.2 WWU is authorised, by way of a gas transporters' licence treated as granted under section 7 of the Gas Act 1986 (the **Gas Act**), to convey gas through pipes to any premises in the area specified in Schedule 1 of the licence (the 'authorised area') and to any pipeline system operated by any other gas transporter (the **WWU licence**).
- 1.3 The WWU licence, together with other relevant assets, was transferred to WWU by Transco plc (as it then was) on 1 May 2005 pursuant to a Hive Down Agreement dated 31 August 2004 and the consent of GEMA dated 26 April 2005.
- 1.4 As the holder of a gas transporters' licence and owner and operator of a regional gas distribution network (which was previously owned and operated by Transco plc) WWU is subject to a regulated price control set by GEMA.
- 1.5 WWU's network covers the areas of Wales and the South West of England, as illustrated in the map below.



*Map of WWU Area - Wales & South West of England including depots and main cities in area*

- 1.6 The gas distribution network consists of approximately 35,000km of gas pipelines within a geographical area which covers approximately 42,000km and has a population of 7.5m people. The network is used to transport gas to around 2.5m gas supply points in homes and businesses. WWU does this for around 53 gas shippers that use its network pursuant to the regulated industry arrangements.
- 1.7 WWU's headquarters are in Newport, South Wales and it directly employs around 1,950 personnel undertaking activities of the licensed gas distribution business. It has a stable workforce with low staff turnover of approximately 5% compared to a UK industry average of approximately 20%.

*Gas Distribution Business*

- 1.8 WWU is responsible for managing gas flows and storage from seventeen National Grid Offtakes<sup>1</sup> to premises of final consumers and/or other pipeline systems. As the volume of gas conveyed through the network fluctuates during the course of the day it is necessary for WWU to maintain gas supply to all parts of the network to meet the peak aggregate demand.
- 1.9 System Operation covers the activities required to operate the gas distribution network to ensure that supply and demand requirements are being met.
- 1.10 Among other things System Operation includes the following –
- (a) Maintaining and developing a System Architecture that enables WWU to forecast future customer demand, identify physical network investment needs to support load growth, booking capacity to ensure sufficient gas is available on the National Grid Offtakes and develop and implement operational strategies for daily balancing.
  - (b) Balancing the network on a daily basis (System Balancing) in accordance with the industry requirements and processes as set out in the Uniform Network Code.
  - (c) Being responsible for fiscal metering at the National Grid Offtakes, monitoring gas quality, and being the contact point for power station operations and biomethane entry points on the network.

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<sup>1</sup> These are sites at which gas flows from the National Transmission System (**NTS**) to the gas distribution networks (**GDN**). GDN operators book NTS capacity at these sites to ensure that they can meet their regulatory and legal obligations. Measurements from these sites are key in determining the flows of gas and the calorific values of gas which are used for downstream billing purposes.

- 1.11 In addition to the above, other principal activities include –
- (a) Providing a 24-hour emergency response for all gas escapes reported by the public within its area irrespective of the cause of the escape and irrespective as to whether the escape is from WWU's network, from networks of other independent gas transporters (**IGTs**) within WWU's area, or from an installation belonging to a final consumer. The time taken from receipt of an emergency call to attending the site is closely monitored and reported against specified standards to the Health and Safety Executive (**HSE**) and GEMA.
  - (b) Providing gas connection services which encompasses the supply and laying of gas mains and service pipes to connect domestic and non-domestic premises within WWU's area and the provision of related services to independent gas connection service providers and to IGTs to facilitate their gas connection activities.
  - (c) The provision of metering services which include the installation, maintenance and removal of gas meters pursuant to contractual arrangements with gas meter owners and their asset managers.

1.12 WWU is responsible for the construction, replacement and maintenance of the gas distribution network. It has a mains replacement programme in place.

#### *Company Performance*

1.13 WWU is currently on track to achieve all primary regulatory output targets for RIIO-GD2 including safety, reliability, environment and customer service. This is a continuation of its high standards of performance in previous controls.

1.14 WWU is focussed on delivering outstanding levels of customer service to the communities that rely on it, and particularly the most vulnerable in society. It has been accredited with the ISO 22458 Service Standard for Consumer Vulnerability and Kitemark for Inclusive Service.

1.15 It also has a leading gas safety record. In 2023, the Royal Society for the Prevention of Accidents awarded WWU the prestigious "President's Award" for ten consecutive Gold Awards. This record continues and WWU has now reached its twelfth successive year, continuing to recognise its industry leading health and safety performance and commitment. WWU is accredited with ISO 45001 (Occupational Health & Safety) and ISO 55001 (Asset Management Systems).

1.16 WWU is also focused on the wellbeing of its people. It recently won a leading industry award in the "Investment in People" category at the 2025 Institution of Gas Engineers and Managers

Gas Industry Awards. In winning the award, WWU was praised by judges for responding to colleague feedback and subsequently launching a financial and wellbeing initiative that was designed with colleague needs at its heart.

- 1.17 WWU is committed to playing its part in reducing greenhouse gas emissions and helping the UK reach Net Zero. Between 2019/20 and 2024/25, shrinkage emissions from WWU's network reduced by 13%, ahead of the company's target for a 10% reduction in the RIIO-GD2 period. Alongside other UK gas networks, it is exploring the use of hydrogen, biomethane and synthetic gasses to replace natural gas, and the role that smart hybrid heating systems could play in the future. It is also supporting regional and local area energy planning – including through the 2050 Energy Pathfinder model which WWU developed to inform these processes.
- 1.18 WWU is preparing for a range of future scenarios as government policies and technologies develop. As the energy sector changes, the company is developing a sustainable workforce which reflects the diverse communities it serves. WWU is training the next generation of gas engineers and has recruited over 260 apprentices since starting operations in 2005 – representing 10% of its team.
- 1.19 Official publications on the future of energy in the UK indicate a long-term role for gas network infrastructure, including in developing pathways to net zero carbon emissions. The UK government has indicated through its *"Midstream gas system: update to the market"* publication (June 2025) that it intends to undertake a long-term programme of work to ensure that the gas system supports its Net Zero ambitions while continuing to deliver for the British people.<sup>2</sup> Advisory publications to UK government such as the National Energy System Operator's Future Energy Scenarios, and the Climate Change Committee's Carbon Budget advice, imply that even in scenarios with higher electrification the gas system will continue to be substantially required into the 2040s and beyond.<sup>3</sup> WWU continues to track developments closely and is undertaking further work to understand the implications for the network.
- 1.20 In its Draft Determination for RIIO-3 GEMA stated –

'The gas networks continue to be of enduring importance, however the transition away from natural gas means that we will work closely together with government on its work to consider of the future of the gas system, including looking at how best to pay for gas infrastructure. We know that, without action, the fixed costs of paying for the gas network risk falling unfairly on a smaller population of future consumers. So, pending the outcome of the government's future of gas work,

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<sup>2</sup> Tab CE1/1: Department for Energy Security & Net Zero, Midstream Gas System: Update to the Market, 30 June 2025, para 2.

<sup>3</sup> Tab CE1/2: National Energy System Operator, Future Energy Scenarios: Pathways to Net Zero, November 2025; and Tab CE1/3: Climate Change Committee, The Seventh Carbon Budget: Advice for the UK Government, 26 February 2025.

we are taking steps to mitigate this risk by proposing that all new gas distribution network investment is paid back by consumers by 2050. This is a proportionate approach to a complex issue and aligns with actions to start accelerating depreciation being taken internationally, including Austria, the Netherlands and Germany.<sup>4</sup>

- 1.21 Noting the potential for lower carbon gases (biomethane, hydrogen and synthetic gases), WWU's ambition is to be net zero-ready in areas most likely to convert to hydrogen by 2035 if sufficiently funded and supported by central and local government and regulators. Subject to ongoing regulatory approval, the current iron mains pipe replacement programme will be completed during 2032 meaning that the majority of WWU's distribution network will be made of polyethylene which can then be utilised for the future distribution of hydrogen and hydrogen blended gas. This work programme may vary after the end of the current iron mains risk reduction programme in 2032.

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<sup>4</sup> Tab A1.1: GEMA, RIIO-3 Draft Determinations – Overview Document, 1 July 2025, page 6.

## 2 REQUEST FOR PERMISSION TO APPEAL

2.1 WWU wishes to appeal the decision made, and published by GEMA on 3 February 2026, under section 23(1)(a) of the Gas Act to modify the conditions of the WWU licence to give effect to the price control (referred to generically as RIIO-GD3) for the period 1 April 2026 to 31 March 2031 (the **RIIO-GD3 Decision**).<sup>5</sup>

2.2 Section 23B(2) of the Gas Act provides that an appeal may be brought by a relevant licence holder (within the meaning of section 23).

2.3 Section 23(10)(b) defines the relevant licence holder as follows –

'in relation to the modifications of a condition of a particular licence (other than a standard condition) means the holder of that particular licence.'

2.4 The RIIO-GD3 Decision relates to the modification of the non-standard conditions of the WWU licence. WWU is a relevant licence holder for the purposes of the RIIO-GD3 Decision.

2.5 Accordingly, under and in accordance with section 23B(1) and (3) of the Gas Act, WWU seeks permission from the CMA to bring an appeal against the RIIO-GD3 Decision in its capacity as a relevant licence holder under section 23(10)(b). If permission is granted, WWU brings an appeal against the RIIO-GD3 Decision in that capacity.

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<sup>5</sup> Tab A3.1: GEMA, Statutory Notice: Modification of the Special Conditions, Standard Licence Conditions and Standard Special Conditions of the Gas Transporter Licence, 3 February 2026.

**3 SCOPE OF THE APPEAL**

- 3.1 The appeal is brought by WWU in respect of GEMA's decision on a single aspect of the RIIO-GD3 price control for WWU.
- 3.2 This is that GEMA has erred in policy, fact and law in its decision to set ongoing efficiency (OE) at 1.0% per annum for RIIO-GD3. This is because –
- (a) GEMA's assumption that GDNs can sustain productivity growth above the UK economy-wide trend is wrong: both macroeconomic evidence and competitive sector benchmarks indicate a lower sustainable rate;
  - (b) GEMA's quantitative methodology contains multiple errors that individually and cumulatively bias the OE estimate upward; and
  - (c) the qualitative adjustments GEMA applies to justify 1.0% are either unsupported by evidence, irrational, or replicate errors previously rejected by the CMA.

This head of appeal is set out in more detail at Part III.

- 3.3 WWU has been materially affected by the RIIO-GD3 decision and the licence modifications implementing it. GEMA's errors in relation to OE are material and have a material effect on WWU's RIIO-GD3 price control allowances.
- 3.4 The grounds of appeal, reasons and supporting evidence are contained in this Notice of Appeal and in the Supporting Evidence (including a witness statement and an expert's report) listed in Annex 1.

**4 CONTACT DETAILS**

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## **PART II. THE LEGAL FRAMEWORK**

### **1 OVERVIEW**

1.1 In this section, we set out the legal framework governing this appeal and the legal principles to be applied by the CMA in determining the appeal.

1.2 This includes, in particular –

- (a) the statutory framework under which GEMA is empowered to make, and matters to which it must have regard in making, licence modifications;
- (b) the statutory grounds of appeal that apply under the applicable statutory framework; and
- (c) the standard of review to be applied by the CMA in considering and determining this appeal.

## 2 THE STATUTORY FRAMEWORK

2.1 The statutory framework governing the making of licence modifications which are the subject of the appeal and the making of the appeal is set out in the Gas Act.

### *Principal Objective/Statutory Duties*

2.2 GEMA has a duty under section 4AA(1B) to carry out its 'gas functions'<sup>6</sup> in the manner which it –

'considers is best calculated to further the principal objective, wherever appropriate by promoting effective competition between person engaged in, or in commercial activities connected with, the shipping, transportation or supply of gas conveyed through pipes.'

2.3 Under section 4AA(1), GEMA's principal objective is –

'to protect the interests of existing and future consumers in relation to gas conveyed through pipes...'

2.4 Section 4AA(1A) of the Gas Act confirms that the 'interests of existing and future consumers' are –

'their interests taken as a whole, including—

- (a) their interests in the Secretary of State's compliance with the duties in sections 1 and 4(1)(b) of the Climate Change Act 2008 (net zero target for 2050 and five-year carbon budgets);
- (b) their interests in the security of the supply of gas to them; and
- (c) their interests in the fulfilment by the Authority, when carrying out its designated regulatory functions, of the designated regulatory objectives.'

2.5 In performing this duty GEMA shall have regard to –

- (a) the need to secure that, so far as it is economical to meet them, all reasonable demands in Great Britain for gas conveyed through pipes are met;<sup>7</sup>

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<sup>6</sup> That is the functions under Part 1 of the Gas Act and functions under the Utilities Act 2000 which relate to gas conveyed through pipes.

<sup>7</sup> Section 4AA(2)(a) of the Gas Act.

- (b) the need to secure that licence holders are able to finance the activities which are the subject of obligations imposed by or under the legislation cited;<sup>8</sup>
- (c) the need to contribute to the achievement of sustainable development;<sup>9</sup> and
- (d) the interests of individuals who are disabled or chronically sick, of pensionable age, have low incomes, and reside in rural areas.<sup>10</sup>

2.6 Also, in carrying out its gas functions in accordance with the other provisions of section 4AA, GEMA must have regard to –

- '(a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent, and targeted only at cases in which action is needed; and
- (b) any other principles appearing to [GEMA] to represent the best regulatory practice.'<sup>11</sup>

#### *Licence Modifications*

2.7 Section 23(1)(a) of the Gas Act provides that GEMA may –

'make modifications of the conditions of a particular licence'

2.8 Where, following a statutory consultation under section 23(2) to (4A) of the Gas Act, GEMA decides to proceed with the making of licence modifications of any licence, it is required under section 23(7) of the Gas Act to –

- (a) publish the decision and the modifications;
- (b) state the effect of the modifications;
- (c) state how it has taken account of any representations made to the statutory consultation; and
- (d) state the reason for any differences between the modifications being made and those set out in the statutory consultation.

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<sup>8</sup> Section 4AA(2)(b) of the Gas Act.

<sup>9</sup> Section 4AA(2)(c) of the Gas Act.

<sup>10</sup> Section 4AA(3) of the Gas Act (which also confirms that it is not to be taken as implying that regard may not be had to the interests of other descriptors of consumer).

<sup>11</sup> Section 4AA(5A) of the Gas Act.

2.9 On 3 February 2026, GEMA published its decision to proceed with the making of modifications of the conditions of the gas transporters' licence held by WWU.<sup>12</sup>

2.10 GEMA has, in accordance with sections 23(8) and (9) of the Gas Act, specified that the modifications are to take effect on 1 April 2026.

*Appeal to the CMA*

2.11 Section 23B of the Gas Act provides for an appeal to be made to the CMA against a decision made by GEMA under section 23 to modify the conditions of a licence.

2.12 Among others, an appeal can be made by a relevant licence holder – which has the meaning given to in section 23(10) of the Gas Act.

2.13 WWU is making this appeal in its capacity as a relevant licence holder.

2.14 Section 23B(3) states that the permission of the CMA is required for the bringing of an appeal.

2.15 In relation to an appeal brought by a relevant licence holder, the CMA may only refuse permission where the appeal is brought for reasons that are trivial or vexatious or where the appeal has no reasonable prospect of success.<sup>13</sup>

2.16 WWU submits that neither of these apply in respect of this appeal being made by WWU.

2.17 Section 23D(2) of the Gas Act confirms that in determining the appeal, the CMA shall have regard to the same extent as is required of GEMA, to the matters to which GEMA must have regard –

(a) in the carrying out of its principal objective under section 4AA;

(b) in the performance of its duties under that section; and

(c) in the performance of its duties under sections 4AB and 4A.<sup>14</sup>

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<sup>12</sup> Tab A3.1: GEMA, Statutory Notice: Modification of the Special Conditions, Standard Licence Conditions and Standard Special Conditions of the Gas Transporter Licence, 3 February 2026.

<sup>13</sup> Section 23B(4)(d) of the Gas Act.

<sup>14</sup> GEMA's duties under this section are to consult with the HSE about all gas safety issues which may be relevant to the carrying out of its gas functions and to take into account any advice given by the HSE about any gas safety issue in carrying out its gas functions.

2.18 Further, as provided for by section 23D(3) of the Gas Act, in determining the appeal the CMA –

- (a) may have regard to any matter to which GEMA was not able to have regard in relation to the decision which is the subject of the appeal; but
- (b) must not, in the exercise of this power, have regard to any matter to which GEMA would not have been entitled to have regard in reaching its decision had it had the opportunity to do so.

2.19 Section 23E of the Gas Act applies where the CMA allows an appeal to any extent.

2.20 Where the appeal is in relation to a price control decision, the CMA must do one or more of the following –

- (a) quash the decision (to the extent that the appeal is allowed);
- (b) remit the matter back to GEMA for reconsideration and determination in accordance with any directions given by the CMA; and/or
- (c) substitute the CMA's decision for that of GEMA (to the extent that the appeal is allowed) and give any directions to GEMA or any other party to the appeal.<sup>15</sup>

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<sup>15</sup> Sections 23E(1) and (2) of the Gas Act.

### 3 GROUNDS OF APPEAL

3.1 Section 23D(4) provides that the CMA may allow the appeal where it is satisfied that the decision which is being appealed against was wrong on one or more of the five grounds listed in that section.

3.2 The five grounds are –

- (a) that the Authority failed properly to have regard to any matter which is mentioned in section 23D(2) [(as to which see Part II, paragraph 2.17 above)];
- (b) that the Authority failed to give the appropriate weight to any [such] matter...;
- (c) that the decision was based, wholly or partly, on an error of fact;
- (d) that the licence modifications fail to achieve, in whole or in part, the effect stated by the Authority...;
- (e) that the decision was wrong in law.'

*Grounds (a) and (b) – Failure to have regard, or give due weight to, statutory duties*

3.3 These two grounds of appeal can be considered together as if they were a single composite ground, as they are complementary of each other and both similarly focussed on the relevant statutory duties.

3.4 The starting point is that, as noted above, *'In determining an appeal the CMA must have regard, to the same extent as is required of the Authority, to the matters to which the Authority must have regard'* in the carrying out of its principal objective, and performance of its duties, under the Act.<sup>16</sup>

3.5 This requires the CMA to view an appeal through the lens of its own duties to apply the policy framework set out in sections 4A, 4AA and 4AB of the Gas Act.<sup>17</sup>

3.6 In *R (Wales & West Utilities Limited) v Competition and Markets Authority* [2026] EWHC 99 (Admin) (the **WWU Judgment**), the Court stated that these grounds of appeal require the CMA to scrutinise GEMA's approach to matters that involve an element of judgment or evaluation.<sup>18</sup> In doing so, the CMA's ability to find that GEMA was 'wrong' is not limited to

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<sup>16</sup> Section 23D(2) of the Gas Act.

<sup>17</sup> Tab F2.1: *R (Wales & West Utilities Limited) v Competition and Markets Authority* [2026] EWHC 99 (Admin), 22 January 2026, (WWU Judgment) at [150].

<sup>18</sup> Tab F2.1: WWU Judgment at [145].

finding that it has made an irrational evaluation or judgment.<sup>19</sup> Rather, in determining whether GEMA has had 'proper' regard to the relevant duties, the CMA must make its own assessment of what constitutes 'proper' regard and 'appropriate' weight in relation to the relevant policy considerations.<sup>20</sup>

- 3.7 Institutional support for this more intrusive scrutiny of GEMA's evaluation or judgment is provided by the relevant expertise of the CMA panel members, and its ability to call for evidence.<sup>21</sup>

*Ground (c) – Error of Fact*

- 3.8 A valid ground of challenge exists where there is any error of fact underlying a price control decision and it can be demonstrated that the error of fact resulted in the decision that is being challenged and is a material error.

- 3.9 In the WWU Judgment,<sup>22</sup> the Court confirmed that this requires the application by the CMA of the test in *E v Secretary of State for the Home Department* –

'First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not ... have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning.'<sup>23</sup>

*Ground (d) – Failure to achieve claimed effect*

- 3.10 This ground of appeal is applicable where the licence modifications being made by GEMA do not, in whole or in part, achieve the effect claimed by GEMA.
- 3.11 This ground can be linked to the requirement in section 23(7) of the Gas Act to state the effect of the proposed modifications when it publishes the final decision to make them. GEMA publishes a 'reasons and effects' document to comply with this requirement in which it often states that the modifications are being made to implement its decisions in its Sector Specific Methodology and Final Determinations.

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<sup>19</sup> Tab F2.1: WWU Judgment at [149].

<sup>20</sup> Tab F2.1: WWU Judgment at [151].

<sup>21</sup> Tab F2.1: WWU Judgment at [152].

<sup>22</sup> Tab F2.1: WWU Judgment at [142].

<sup>23</sup> Tab F2.2: *E v Secretary of State for the Home Department* [2004] QB 1044 at [66].

- 3.12 In the WWU Judgment, the Court clarified that this requires the CMA to determine whether, in fact, the effect was achieved as outlined by GEMA. Depending on the circumstances, this may require the CMA to carry out its own investigation.<sup>24</sup>

*Ground (e) – Wrong in law*

- 3.13 In essence a decision will be '*wrong in law*' if it could successfully be challenged in a court of law on any of the legal grounds applicable in respect of GEMA decisions.<sup>25</sup>
- 3.14 In the WWU Judgment, the Court stated that this will involve the CMA determining whether there has been an error in construction, or whether GEMA has reached a conclusion that was irrational: including whether GEMA reached a conclusion that was not open to it on the evidence.<sup>26</sup>

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<sup>24</sup> Tab F2.1: WWU Judgment at [143].

<sup>25</sup> These will include (non-exhaustively) any grounds of challenge that relate to an alleged breach of public law or failure to comply with the Human Rights Act 1998.

<sup>26</sup> Tab F2.1: WWU Judgment at [144].

#### 4 STANDARD OF REVIEW

4.1 The 'standard of review' that the CMA is required to apply in its consideration and determination of whether GEMA is wrong on one of the prescribed statutory grounds has been deliberated and settled upon by the CMA in previous regulatory appeals.

4.2 The starting point is the meaning of the word 'wrong' – as the CMA may allow the appeal where it is satisfied that the decision appealed against is wrong on one or more of the prescribed statutory grounds.

4.3 The CMA has confirmed this to mean that it must focus on the decision made by GEMA, rather than to try and re-make a decision for itself *de novo*. Hence, the CMA has stated –

'We do not consider that an appeal under [the statute] involves a rehearing where it is open to us to decide matters afresh untrammelled by GEMA's decision...

Nor do we consider that we are required in the present context to have conducted a re-run of GEMA's original decision-making process or to have held a *de novo* rehearing of all the evidence. The CMA must limit its consideration to the specific grounds of appeal set out in [the statute], to the extent that such grounds are raised by the appellants...'<sup>27</sup>

4.4 In its determination on the gas price control appeal made by Firmus Energy, the CMA confirmed this position –

'We would note also that an appeal in which the merits must be taken into account does not constitute a rerun of the original investigation or a *de novo* rehearing of all the evidence.'<sup>28</sup>

4.5 This approach has now been confirmed in the WWU Judgment.<sup>29</sup>

4.6 It also agreed that –

'...we are not limited to reviewing the UR's decision on conventional judicial review grounds. The question for us to determine is whether the decision of the UR under appeal was wrong on one

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<sup>27</sup> Tab F1.3: CMA, Northern Powergrid v the Gas and Electricity Markets Authority – Final Determination, 29 September 2015, paras 3.35-3.36; and Tab F1.4: CMA, British Gas Trading v the Gas and Electricity Markets Authority – Final Determination, 29 September 2015, paras 3.36-3.37.

<sup>28</sup> Tab F1.2: CMA, Firmus Energy (Distribution) Limited v Northern Ireland Authority for Utility Regulation – Final Determination, 26 June 2017, para 3.21.

<sup>29</sup> Tab F2.1: WWU Judgment at [138].

or more of the statutory grounds and in order to do that the merits of the decision must be taken into account.<sup>30</sup>

4.7 In the same appeal, by building on its interpretation of the concept of a decision that is 'wrong', drawing guidance from appeals brought under the Communications Act 2003 (which requires consideration of appeals on the merits by reference to whether the decision under appeal was wrong), and considering the approach taken by the CMA in the two previous regulatory appeals under the GB framework, the CMA adopted the following eight principles to describe the applicable standard of review –

'It is for the appellant to marshal and adduce all the evidence and material on which it relies to show that the regulator's decision was wrong.'

'An appeal is against the decision, not the reasons for the decision. Therefore, it is not enough for the appellant to identify some error of reasoning; the appeal can only succeed if the decision cannot stand in the light of that error. '

'Where the appellant contends that the regulator ought to have adopted an alternative price control measure, it is for the appellant to deploy all the evidence and material it considers will support that alternative. It must show that its proposed alternative price control measure should be adopted.'

'Usually an appellant will succeed by demonstrating the flaws in the decision and the merits of an alternative solution. Also, the courts have not ruled out the possibility that there could be a case in which an appellant succeeds in so undermining the foundations of a decision that it cannot stand, without establishing what the alternative should be. In such a case, if there is no other basis for maintaining the decision, the CMA would be at liberty to conclude that the decision was wrong but that it could not say what decision should be substituted. Disposal of the appeal without substituting an alternative decision is not unknown, but is expected to be rare.'

'If the CMA is satisfied that the regulator's decision was correct, then the fact that the regulator's consultation process was deficient ought not to matter, unless that process was so deficient that the CMA cannot be assured that the regulator did indeed get it right.'

'Where a decision of the regulator requires an exercise of judgment, the regulator will have a margin of appreciation. The CMA should apply appropriate restraint and should not interfere with the regulator's exercise of judgment unless satisfied that it was wrong.'

'A regulator's assessment of the adequacy of the evidence and material before it will not be wrong unless it is outwith the range of reasonable conclusions.'

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<sup>30</sup> Tab F1.2: CMA, Firmus Energy (Distribution) Limited v Northern Ireland Authority for Utility Regulation – Final Determination, 26 June 2017, para 3.16.

'If the CMA concludes that the decision can be supported on a basis other than that on which the regulator relied, then the appellant will not have shown that the decision was wrong and will fail.'<sup>31</sup>

- 4.8 The CMA adopted a similar approach in the last regulatory appeal on price control made by SONI Limited.<sup>32</sup>
- 4.9 In the WWU Judgment, the Court clarified that, in order to find GEMA wrong, it is not necessary for the CMA to find that any reasonable alternative offered by an appellant is 'clearly superior' or 'much better' than that adopted by GEMA. Rather, all that is required is that the appellant's approach is 'materially better'; that, weighing up the pros and cons of the different approaches, it offers something more than GEMA's approach.<sup>33</sup>
- 4.10 In addition, the Court found that under section 4AA(2)(b) – the requirement for GEMA (and hence the CMA) to have regard to the need to secure that licence holders are able to finance the activities which are the subject of obligations imposed by various statutory provisions – regard must be had to the position of each individual licence holder, not just licence holders as a collective or group.<sup>34</sup>
- 4.11 Such individualised consideration is fundamentally important to protecting the interests of existing and future consumers as required by section 4AA(1) of the Gas Act, including their interests in security of supply under section 4AA(1A)(b). In the WWU Judgment, the Court stated that –
- 'if a particular licence holder cannot finance its activities, that is likely to have an impact on the interests of consumers, including their interests in the security of the supply of gas to them'.<sup>35</sup>
- 4.12 The CMA has also stated that in considering materiality, it will consider whether *'the cumulative effect of immaterial errors could have a highly significant impact on the price control'*.<sup>36</sup>

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<sup>31</sup> Tab F1.2: CMA, Firmus Energy (Distribution) Limited v Northern Ireland Authority for Utility Regulation – Final Determination, 26 June 2017, para 3.20.

<sup>32</sup> Tab F1.1: CMA, SONI Limited v Northern Ireland Authority for Utility Regulation – Final Determination, 10 November 2017, para 3.27.

<sup>33</sup> Tab F2.1: WWU Judgment at [156] – [158].

<sup>34</sup> Tab F2.1: WWU Judgment at [160] – [161], [167] – [169].

<sup>35</sup> Tab F2.1: WWU Judgment at [167].

<sup>36</sup> Tab F2.1: WWU Judgment at [28].

### PART III. STATEMENT OF FACTS AND GROUNDS

#### 1 INTRODUCTION AND SUMMARY

##### Overview

- 1.1 This ground of appeal challenges GEMA's determination to set OE at 1.0% per annum for RIIO-GD3. WWU contends that this determination is wrong within the meaning of section 23D of the Gas Act. The CMA should quash the determination and substitute an OE requirement of no more than 0.5%. Alternatively, WWU contends that the CMA should quash the determination and remit it to GEMA for redetermination in accordance with such directions as the CMA considers appropriate, including directions requiring GEMA to discharge its duty under section 4AA(2)(b) of the Gas Act by assessing, cumulatively, the financeability consequences of any redetermined figure.
- 1.2 The OE parameter determines the assumed annual rate at which the 'efficiency frontier' improves due to exogenous technological progress. Unlike catch-up efficiency (which reflects company-specific opportunities to reach current best practice), OE applies uniformly across all networks and reflects economy-wide productivity improvements that efficient companies can reasonably be expected to achieve.

##### Why the Determination is Wrong

- 1.3 GEMA's central assumption – that regulated networks are 'insulated' from the economy-wide productivity slowdown and can outperform competitive benchmarks – is wrong in law and fact because it mischaracterises the statutory framework, ignores the uncontroverted macroeconomic evidence, and substitutes aspiration for analysis in a manner that no reasonable regulator, properly directing itself on its financing duty, could have adopted.
- 1.4 GEMA's 1.0% OE determination should be quashed for three independent and cumulative reasons.
- 1.5 **First**, GEMA's central assumption – that regulated networks are 'insulated' from the economy-wide slowdown in productivity and can outperform competitive benchmarks – is wrong because it –
- (a) lacks any evidentiary support, repeating an error the CMA corrected at RIIO-2;
  - (b) ignores that many of the same structural productivity drivers affecting the UK economy also demonstrably affect gas distribution networks; and
  - (c) contradicts basic regulatory economic principles about competitive benchmarking.

1.6 **Second**, GEMA committed multiple errors in its quantitative methodology that systematically bias the result upward. It –

- (a) used incorrect Office of Budget Responsibility (**OBR**) forecast data (labour productivity instead of Total Factor Productivity (**TFP**));
- (b) failed to take appropriate account of the November 2025 OBR forecast downgrade published before the Final Determinations;
- (c) relied on Grant Thornton's (**GTh**) analysis containing material errors in external forecast interpretation;
- (d) changed its methodology from RIIO-2 to place less weight on post-Global Financial Crisis (**GFC**) data despite stronger evidence of structural productivity weakness that continued to support the approach adopted for GD2;
- (e) adopted a flawed 0.7%–1.3% '*plausible range*' that excluded outcomes the evidence supported, independently of its selection of 1.0% as the midpoint; and
- (f) treated NGET's challenging business plan OE proposal of 0.7% as the minimum all regulated networks should achieve.

1.7 **Third**, GEMA relied on qualitative factors to justify 1.0% OE that are either unevidenced, irrational, or repeat errors the CMA has already rejected. It –

- (a) mischaracterised OE as an '*incentive*' or '*stretching target*' when it serves neither function under *ex ante* regulation;
- (b) invoked innovation funding and IT and telecoms (**IT&T**) investment without evidence that these create productivity opportunities beyond economy-wide benchmarks and in circumstances where GD3 innovation funding, in common with GD2, is aimed at energy transition rather than 'business as usual' innovation; and
- (c) repeated the flawed '*innovation uplift*' logic the CMA rejected at RIIO-2 for lacking evidential support.

### What the Evidence Shows

1.8 The evidence overwhelmingly continues to demonstrate that UK productivity growth has suffered a sustained structural break since the GFC in 2008.

1.9 Historical data –

- (a) Office of National Statistics (**ONS**) data shows UK market sector TFP growth flatlining at ~0.0% p.a. post-GFC vs ~1.0% p.a. pre-GFC;
- (b) latest EU KLEMS data (2025 release) shows TFP growth in GEMA's comparator sectors averaging -0.1% in the post-GFC period (2009-2019), revised down from 0.1% in the prior data release;
- (c) every major UK economic institution (ONS, OBR, Bank of England (**BoE**), CMA, National Institute of Economic and Social Research (**NIESR**)) confirms the persistent and enduring slowdown in productivity growth; and
- (d) any GD2 cross-learning proves convergence to a shared frontier, not a permanent annual trajectory beyond it, and pointing to past outperformance under different macroeconomic conditions cannot substitute for quantified evidence that those gains are repeatable – let alone for discharging the financing duty.

#### 1.10 Forward-looking evidence –

- (a) OBR's November 2025 central forecast: TFP growth averaging 0.5% over 2024-2030 (supported by the latest OBR forecast in March 2026<sup>37</sup>);
- (b) BoE's February 2025 forecast: TFP growth averaging 0.1% over 2024-2027;
- (c) BoE's February 2026 forecast: '*a modest pickup in TFP growth*',<sup>38</sup> averaging less than 0.5% over 2026-2028;<sup>39</sup>
- (d) both OBR's and BoE's forecasts have been sequentially downgraded over the past decade, with the OBR consistently over-forecasting due to optimism bias.

1.11 GEMA's 1.0% OE assumption derives from weighting pre-GFC estimates (approximately 1.3%) with post-GFC estimates (approximately 0.1%), and giving equal weight to an 11-year historical period (1997-2007) and a 12-year period (2008-2019). According greater weight to historic pre-GFC data under GEMA's approach means that productivity levels from 1997-2007 – now 15+ years in the past – determine half of the forward-looking efficiency assumption, despite all post-GFC evidence pointing to a structural break in productivity trends. Neither forward-looking nor

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<sup>37</sup> Tab F2.5: Office for Budget Responsibility, Economic and Fiscal Outlook, 3 March 2026. The forecast remains unchanged from the forecast in November 2025.

<sup>38</sup> Tab MR1/2/035: Bank of England, Monetary Policy Report, 5 February 2026, page 42.

<sup>39</sup> Tab MR1/2/035: Bank of England, Monetary Policy Report, 5 February 2026, page 41, Chart C.1, green bars in right panel. This forecast corroborates the trends observed in OBR's November 2025 forecast and BoE's previous forecast in 2025.

historical analysis supports this reversion assumption. GEMA's willingness to adjust its methodology and weightings between price controls whenever the evidence threatens to produce a different answer is itself telling: it reveals a regulator working backwards from a conclusion, not forwards from the evidence.

### The WWU Judgment Framework

1.12 In the WWU Judgment, the High Court confirmed that –

[158] ...what is required is that the alternative approach is "materially" better than GEMA's approach: that is, the alternative approach is one which, weighing up the pros and cons of the different approaches, offers *something more* than GEMA's approach. That is all that is required for the CMA to adjudge that GEMA got it "wrong".'

1.13 The Court further held that GEMA's financing duties under section 4AA(2)(b) and (5) require consideration of individual licence holders' financial viability, not merely sector-wide assessment.<sup>40</sup> Where a determination threatens an individual network's ability to finance its licensed activities, that constitutes an error even if other networks remain financeable.

1.14 The determination is wrong for the reasons given in paragraphs 1.3 - **Error! Reference source not found.** above.

1.15 WWU has identified materially better alternatives: for example, setting an OE requirement of no more than 0.5%, which is supported by independent forecasts and long-run productivity data and is the figure that a correct application of the evidence-based framework produces. Even if the CMA prefers alternative approaches, correcting the errors at paragraphs 1.3 - **Error! Reference source not found.** above produces a materially better outcome and that is sufficient to require intervention.

### Structure of This OE Head of Appeal

1.16 This head of appeal proceeds as follows –

- (a) Section 2: Statutory framework and standard of review;
- (b) Section 3: Factual background on GEMA's OE determination;
- (c) Section 4: Ground 1 – Erroneous insulation assumption;
- (d) Section 5: Ground 2 – Errors in quantitative methodology;

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<sup>40</sup> Tab F2.1: WWU Judgment at [161], [169], and [173].

- (e) Section 6: Ground 3 – Reliance on unevidenced qualitative factors;
- (f) Section 7: Cumulative impact and financeability;
- (g) Section 8: Relief sought;
- (h) Section 9: Conclusion.

1.17 Evidence supporting this head of appeal includes –

- (a) Frontier Economics Technical Report on Ongoing Efficiency (**Frontier Report**);<sup>41</sup>
- (b) WWU Witness Statement – Carly Evans, Head of Regulation (**First Witness Statement of Carly Evans**) (financeability impacts, productivity drivers affecting network operations);<sup>42</sup>
- (c) WWU Business Plan – Ongoing Efficiency Submission;<sup>43</sup>
- (d) GEMA's RIIO-GD3 Final Determinations;<sup>44</sup>
- (e) Grant Thornton Second Independent Report on Ongoing Efficiency (2025);<sup>45</sup>
- (f) EU KLEMS 2025 data release;<sup>46</sup>
- (g) OBR Economic and Fiscal Outlook (November 2025 and March 2026);<sup>47</sup>
- (h) BoE Monetary Policy Reports (February 2025 and February 2026).<sup>48</sup>

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<sup>41</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026.

<sup>42</sup> Tab D1: First Witness Statement of Carly Evans, 28 February 2026.

<sup>43</sup> Tab C3.1: WWU, Our Business Plan for 2026-31, December 2024.

<sup>44</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025.

<sup>45</sup> Tab MR1/2/003: Grant Thornton, Second Independent Report on Ongoing Efficiency, November 2025.

<sup>46</sup> Tab MR1/2/061: LUISS, EUKLEMS & INTANProd – Release 2025.

<sup>47</sup> Tab MR1/2/004: Office for Budget Responsibility, Economic and Fiscal Outlook, 26 November 2025; and Tab F2.5: Office for Budget Responsibility, Economic and Fiscal Outlook, 3 March 2026.

<sup>48</sup> Tab MR1/2/005: Bank of England, Monetary Policy Report, 6 February 2025; and Tab MR1/2/035: Bank of England, Monetary Policy Report, 5 February 2026.

## 2 STATUTORY FRAMEWORK AND STANDARD OF REVIEW

### Statutory Duties

2.1 GEMA's determination of OE falls to be assessed against its statutory duties under the Gas Act. Section 4AA sets out GEMA's principal objective and general duties.

2.2 **Section 4AA(1): Principal objective –**

'to protect the interests of existing and future consumers in relation to gas conveyed through pipes...'

2.3 **Section 4AA(5): Manner of securing principal objective –**

'... in the manner ... best calculated— (a) to promote efficiency and economy on the part of persons authorised by licences or exemptions to carry on any activity, and the efficient use of gas conveyed through pipes'

2.4 **Section 4AA(2)(b): Matters to have regard to –**

'the need to secure that licence holders are able to finance the activities which are the subject of obligations imposed by or under this Part [1]'

2.5 These duties are cumulative and non-hierarchical. GEMA cannot pursue its principal objective of protecting consumers without regard to networks' financing needs. As the CMA has consistently held,<sup>49</sup> consumers are not protected by price controls that threaten financial viability – such controls create financing cost spirals that ultimately harm consumers.

2.6 The WWU Judgment at [161], [169] and [173] confirms that section 4AA(2)(b) and (5) require consideration of individual licence holders' financeability, not merely sector-wide averages. Where WWU specifically faces financeability pressure from GEMA's determinations, section 4AA duties are engaged even if other GDNs remain financeable.

### Relationship Between OE and Statutory Duties

2.7 The OE parameter directly affects WWU's ability to finance licensed activities by determining allowed total expenditure (**totex**) –

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<sup>49</sup> Tab F1.6: PR24 Provisional Determinations (Volume 4: Allowed Return, Risk & Return), 9 October 2025, para 7.548(c) and para 7.577. See also Tab F2.1: WWU Judgment at [167].

- (a) OE is applied as a post-modelling adjustment reducing allowed costs below GEMA's adjustments already made to arrive at an estimation of efficient business plan submissions;<sup>50</sup>
- (b) the 1.0% OE assumption compounds annually, starting in 2024/2025 in 2023/2024 prices reducing WWU's totex allowance by £91m over RIIO-GD3;<sup>51</sup>
- (c) if OE is set above attainable productivity levels, WWU must deliver outputs with inadequate cost recovery.

2.8 This is precisely the kind of cumulative impact that GEMA was required to consider when discharging its duty under section 4AA in the round – yet there is no evidence that it did so. By addressing the OE parameter in isolation, GEMA failed to assess whether the combined effect of its determinations was consistent with WWU's ability to finance its licensed activities (see Section 7).

2.9 GEMA's section 4AA duties require that OE be set at a level supported by evidence of sustainable productivity improvement. Setting OE above this evidence-supported level –

- (a) fails to *'have regard to'* or, in the alternative, *'give the appropriate weight to'* WWU's need to finance licensed activities (section 4AA(2)(b));
- (b) undermines WWU's ability to finance such activities (section 4AA(5)); and
- (c) ultimately harms consumers by creating financial stress and higher long-term financing costs (section 4AA(1)).

### **CMA's Role and Powers**

2.10 Under section 23E of the Gas Act, the CMA may –

- (a) remit the decision back to GEMA with directions;
- (b) substitute its own decision for that of GEMA; or
- (c) make any determination GEMA could have made.

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<sup>50</sup> Tab A2.2: GEMA, RIIO-3 Final Determinations – Gas Distribution, 4 December 2025, paras 5.11, 5.18, and 5.504, and Table 46; and Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, paras 9.5, 8.21, and 8.23.

<sup>51</sup> Tab A2.2: GEMA, RIIO-3 Final Determinations – Gas Distribution, 4 December 2025, Table 18.

- 2.11 WWU seeks an order quashing GEMA's determination, setting the OE requirement at within the range supported by the relevant evidence.

### 3 FACTUAL BACKGROUND: GEMA'S OE DETERMINATION

#### What is OE?

- 3.1 Under the RIIO framework, GEMA makes two distinct efficiency adjustments to company business plans.
- 3.2 **Catch-up efficiency:** Firm-specific efficiency improvements to close the gap between a company's current performance and the efficient frontier (economic best practice). This is company-specific and depends on how far each company is deemed by GEMA to lag behind current best practice.<sup>52</sup>
- 3.3 **OE:** The rate at which the efficient frontier itself improves due to exogenous technological progress. This is uniform across companies and reflects economy-wide productivity growth that shifts what 'best practice' means over time.<sup>53</sup>
- 3.4 As the regulatory textbook *Understanding Regulation* explains –
- '• the level of cost reduction of best practice producers. Costs will fall in most sectors as a result of technological progress, for example developments in the use of information technology. Sectors will vary in the rate at which such developments are attainable by firms which are 'on the frontier', or at the theoretical limit of efficiency.'<sup>54</sup>
- 3.5 This definition, which GEMA has historically adopted,<sup>55</sup> makes clear that –
- (a) OE reflects **exogenous technological progress** (outside individual firm control);
  - (b) OE represents the **rate at which the frontier improves** (not how individual firms reach the frontier – that is catch-up efficiency); and
  - (c) OE is **bounded by economy-wide productivity drivers** that set the ceiling for what any sector, including gas distribution, can sustainably achieve.
- 3.6 Critically, the level at which OE is set serves solely to estimate expected efficient costs. Under *ex ante* regulation, companies face fixed totex allowances with a sharing factor (under the Totex

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<sup>52</sup> Tab A2.2: GEMA, RIIO-3 Final Determinations – Gas Distribution, 4 December 2025, paras 5.57, 5.418, and 5.420.

<sup>53</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, para 8.20.

<sup>54</sup> Tab F2.4: Baldwin, R., Cave, M., and Lodge, M., *Understanding Regulation: Theory, Strategy, and Practice* (2<sup>nd</sup> Edition, 2012), Chapter 26, page 496.

<sup>55</sup> Tab B1.1: GEMA, Final Proposals - RIIO-T1/GD1 - Real Price Effects and Ongoing Efficiency Appendix, 17 December 2012, para 3.2.

Incentive Mechanism (**TIM**)). The incentive to achieve efficiency gains is independent of the OE level – a company outperforming its allowance keeps a share of gains regardless of what level OE was set at.

- 3.7 OE is not an '*incentive mechanism*' and cannot be a '*stretching target*'. These characterisations, which appear throughout GEMA's Final Determination,<sup>56</sup> fundamentally misunderstand OE's role. The incentive to achieve efficiency comes from *ex ante* allowances with gain-sharing, not from the level at which OE is set.

### **GEMA's Approach to Setting OE**

- 3.8 Paragraphs 8.47 to 8.49 of GEMA's Final Determination Overview<sup>57</sup> advance a single foundational premise – that regulated networks can outperform the average UK firm and are therefore not bound by economy-wide productivity forecasts,<sup>58</sup> that linking OE to such forecasts would be inconsistent with *ex ante* RIIO principles,<sup>59</sup> and that the OBR's November 2025 TFP growth downgrade to 0.8%<sup>60</sup> has no mechanistic effect on the determination<sup>61</sup> – all of which rest on the insulation hypothesis stated explicitly at paragraph 8.50.<sup>62</sup> WWU challenges that hypothesis at its root; the construction of the 1.0% figure that follows from it is vitiated in its entirety.

- 3.9 GEMA followed the following methodology.<sup>63</sup>

#### **3.10 Step 1 – Construct '*plausible range*': 0.7% to 1.3%**

- (a) **Construction of the initial range:** GEMA's quantitative analysis produced a range of 0.1% to 1.3%, derived from GTh's methodology applied to the underlying productivity evidence. GTh's analysis supporting the 1.3% upper bound used –

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<sup>56</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, paras 2.12 and 8.5; and Tab A2.2: GEMA, RIIO-3 Final Determinations – Gas Distribution, 4 December 2025, paras 2.12 and 5.58.

<sup>57</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, paras 8.47-8.49.

<sup>58</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, para 8.47.

<sup>59</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, para 8.48.

<sup>60</sup> Tab MR1/2/016, Office for Budget Responsibility, Briefing Paper No.9 Forecasting Productivity, 26 November 2025, para 1.1.

<sup>61</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, para 8.49.

<sup>62</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, para 8.50.

<sup>63</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, paras 8.23-8.55.

- (i) EU KLEMS 2023 release (not the 2025 release available during consultation).<sup>64</sup>
  - (ii) Gross output (**GO**) TFP measure.
  - (iii) Comparator sectors: construction, wholesale/retail trade, transportation and storage, financial services, manufacturing sub-sectors, professional services, and information and communications.
  - (iv) Only the 1997-2007 time period for the upper estimate (completely excluding more recent and relevant post-GFC data).
  - (v) Post-GFC period (2008-2019) only used for the lower estimate: 0.1%.
- (b) **Elevation of the lower bound:** GEMA then moved the lower bound upward from 0.1% to 0.7%, characterising National Grid's business plan submission as *'the minimum level ... all network companies should be able to achieve'*.<sup>65</sup>

3.11 **Step 2 – Select point within range: 1.0%**

- (a) Based on qualitative factors including the need to challenge monopolies, potential for networks to outperform the economy, innovation funding, IT&T investment, and regulatory precedent.

3.12 GEMA's Final Determination acknowledged the November 2025 OBR forecast downgrade but dismissed it –

'Explicitly linking our OE challenge to independent forecasts would therefore imply that the level of productivity challenge companies face should be updated throughout RIIO-3 ... We note the OBR's downgrade of the UK productivity forecasts published on 26 November 202[5]<sup>66</sup>... this recent revision does not mechanistically result in an update of our view...'<sup>67</sup>

**Material Facts about UK Productivity**

3.13 These facts are not disputed by GEMA. The disagreement is whether networks can somehow escape from this economy-wide reality.

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<sup>64</sup> Tab MR1/2/003: Grant Thornton, Second Independent Report on Ongoing Efficiency, November 2025, Table 1 and Appendix B.

<sup>65</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, paras 8.23 and 8.41.

<sup>66</sup> The original source incorrectly cited 2026; the correct year is 2025.

<sup>67</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, paras 8.48-8.49.

- 3.14 The uncontested facts about UK productivity are as follows.
- 3.15 **Historical structural break:** UK TFP growth averaged ~1.0% p.a. pre-GFC (1997-2007) but has flatlined at ~0.0% p.a. post-GFC (2008-present). The persistence of this weakness is confirmed by the OBR, BoE, CMA, NIESR, and EU KLEMS data.<sup>68</sup>
- 3.16 **Latest EU KLEMS data:** The 2025 release shows GEMA's comparator sectors averaging -0.1% TFP growth post-GFC (2009-2019), revised down from 0.1% (labour productivity growth and not TFP) in the 2023 release GEMA relied upon.<sup>69</sup>
- 3.17 **Independent forecasts –**
- (a) OBR November 2025: TFP growth forecast averaging 0.5% over 2024-2030.<sup>70</sup>
  - (b) BoE February 2025: TFP growth averaging 0.2% over 2026-2028.<sup>71</sup>
  - (c) BoE February 2026: '*a modest pickup in TFP growth*',<sup>72</sup> averaging less than 0.5% over 2026-2028.<sup>73</sup>
  - (d) Institutional consensus: Every major UK economic institution confirms the productivity slowdown is structural and persistent, driven by factors including low investment, skills gaps, trade frictions, sector composition changes, and weak business dynamism.<sup>74</sup>
  - (e) Forecast track record: The OBR has consistently over-forecast productivity recovery for 15 years (every forecast since 2010 assumed imminent rebound that failed to materialise), indicating systematic optimism bias.<sup>75</sup>

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<sup>68</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026, Section 3.1, paras 3.3-3.7.

<sup>69</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026, Annex B.

<sup>70</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026, para 1.12(a).

<sup>71</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026, para 1.12(b).

<sup>72</sup> Tab MR1/2/035: Bank of England, Monetary Policy Report, 5 February 2026, page 42.

<sup>73</sup> Tab MR1/2/035: Bank of England, Monetary Policy Report, 5 February 2026, page 41, Chart C.1, green bars in right panel.

<sup>74</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026, Section 3.1, paras 3.3-3.7.

<sup>75</sup> Tab MR1/2/016: Office for Budget Responsibility, Briefing Paper No.9 Forecasting Productivity, 26 November 2025, para 5.1 and Chart 5.1.

### Comparison to RIIO-2

- 3.18 At RIIO-2, GEMA's advisor CEPA used EU KLEMS data from 1997 to 2016, giving some weight to the post-GFC slowdown period. This produced OE estimates of 0.95% for capital expenditure (**capex**)/replacement expenditure (**repex**) and 1.05% for operating expenditure (**opex**).<sup>76</sup>
- 3.19 For RIIO-3, GTh examined four different time periods spanning 1970 to 2019.<sup>77</sup> Critically, the period producing the upper bound of GTh's range – and therefore the ceiling of the range from which GEMA selected 1.0% – runs from 1970 to 2007, excluding post-GFC experience entirely. For RIIO-3, GTh used data from 1997 to 2007, completely excluding post-GFC experience from the upper bound estimate.<sup>78</sup> This methodological shift systematically increases the OE estimate despite evidence of productivity weakness growing stronger since RIIO-2. To the extent GEMA's selection of 1.0% is anchored to or influenced by that upper bound, the estimate is systematically inflated by the exclusion of the period during which productivity weakness is strongest and the most recent period.
- 3.20 GEMA provides no explanation for this methodological change. The Final Determination does not acknowledge that a materially different approach was used at RIIO-2, let alone justify why departing from it is appropriate at RIIO-3 – particularly given that the evidence of structural productivity slowdown has grown stronger, not weaker, since RIIO-2 was set.

### The CMA's RIIO-2 Findings

- 3.21 In its Final Determinations for RIIO-2, the CMA rejected or questioned several aspects of GEMA's OE determination that are directly relevant here.
- 3.22 **Innovation uplift:** The CMA at RIIO-2 expressed material scepticism about GEMA's insulation hypothesis. Critically, the CMA did not endorse insulation as a freestanding justification for setting OE above economy-wide benchmarks – it left the question open for want of evidence. GEMA at RIIO-3 has not supplied that missing evidence; it has simply reasserted the hypothesis. The CMA's scepticism therefore remains unanswered, and GEMA cannot rely on its own prior assertion – which the CMA declined to validate – as regulatory precedent for the RIIO-3 determination. The CMA found –

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<sup>76</sup> Tab MR1/2/019: CEPA, RIIO-GD2 and T2: Cost Assessment – Advice on Frontier Shift Policy for Final Determinations, 27 November 2020, pages 7-8.

<sup>77</sup> Tab MR1/2/003: Grant Thornton, Second Independent Report on Ongoing Efficiency, November 2025, paras 1.19, 3.7 and 3.26. See also Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, para 8.28.

<sup>78</sup> Tab MR1/2/003: Grant Thornton, Second Independent Report on Ongoing Efficiency, November 2025, paras 1.19, 3.7 and 3.26. See also Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, para 8.28.

'GEMA's approach was to assume that the benefits from innovation funding were incremental... GEMA did not submit evidence showing that it had sought to quantify the extent of double-count nor compare the existing levels of R&D spending in the energy network companies with R&D spending in the comparator sectors or wider economy... Furthermore, there is no evidence in the FD that GEMA took qualitative account of these factors... Based on this evidence, our conclusion is that GEMA erred when it assumed that the innovation uplift was entirely incremental.'<sup>79</sup>

3.23 **Insulation from productivity slowdown:** GEMA argued networks were insulated from macroeconomic trends. The CMA found –

'GEMA said that demand for energy was relatively inelastic. We agree that this supports the view that the networks are relatively less exposed to macroeconomic fluctuations. However, this does not necessarily imply that networks should be able to achieve higher productivity growth rates... GEMA provided no evidence to support its view that management would be able to place greater focus on driving higher efficiency gains because of the lack of competitive pressure.'<sup>80</sup>

3.24 **Need for evidence:** The CMA repeatedly emphasised that qualitative judgements about productivity potential must be supported by evidence, not assertion.<sup>81</sup>

3.25 GEMA's RIIO-3 determination repeats these errors, as demonstrated below.

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<sup>79</sup> Tab MR1/2/006: CMA, ELMA (Volume 2B), 28 October 2021, paras 7.551-7.552.

<sup>80</sup> Tab MR1/2/006: CMA, ELMA (Volume 2B), 28 October 2021, paras 7.440-7.441.

<sup>81</sup> Tab MR1/2/006: CMA, ELMA (Volume 2B), 28 October 2021, paras 7.512, 7.552, 7.608 and 7.634.

## 4 GROUND 1: ERRONEOUS ASSUMPTION THAT NETWORKS ARE INSULATED FROM PRODUCTIVITY SLOWDOWN

### Introduction

4.1 This ground challenges GEMA's central assumption that regulated gas distribution networks can achieve productivity growth exceeding economy-wide benchmarks despite the pervasive UK productivity slowdown.

4.2 GEMA's Final Determination states –

'...on a forward-looking basis, we think there remains strong potential for energy network companies to continue delivering ongoing productivity improvements at levels above the average of the wider economy.'<sup>82</sup>

'As we've set out, we consider that regulated companies are afforded protection through the regulatory framework, and we consider this supports setting a stretching but achievable OE target for RIIO-3.'<sup>83</sup>

4.3 The fundamental flaw underlying GEMA's approach is simpler than any methodological dispute: there is no evidence that regulated energy networks will outperform wider economy productivity growth. Past outperformance against a less-optimised base, under more favourable macroeconomic conditions, is not forward-looking evidence that 1% can be sustained – and asserting otherwise is the substitution of assertion for analysis. Yet GEMA assumes they will achieve OE improvements materially exceeding the economy-wide productivity trends that drive competitive sectors facing genuine market discipline. This assumption inverts normal regulatory logic – typically, regulated monopolies are expected to lag, not lead, productivity performance. GEMA provides no evidence, theoretical framework, or regulatory precedent supporting this expectation of outperformance.

4.4 This '*insulation*' hypothesis is essential to GEMA's case. Without it, the overwhelming evidence of economy-wide productivity at 0.5% or below would directly indicate that networks should achieve similar levels. The insulation hypothesis (on GEMA's analysis) formed the basis for GEMA to set OE at 1.0% despite contrary evidence. Paragraph 8.50 of the Final Determination Overview is the insulation hypothesis restated, not substantiated<sup>84</sup> – GEMA '*considers*' that the RIIO framework insulates networks, but offers no evidence, no mechanism, and no quantification: it is the same assertion that the CMA found unsupported at RIIO-2, reproduced verbatim four years later, again with no support.

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<sup>82</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, para 8.43.

<sup>83</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, para 8.55.

<sup>84</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, para 8.50.

- 4.5 The insulation hypothesis is wrong in three specific respects –
- (a) **Sub-Ground 1.1:** It contradicts basic principles of regulatory economics;
  - (b) **Sub-Ground 1.2:** It lacks any evidentiary support, repeating an error the CMA corrected at RIIO-2; and
  - (c) **Sub-Ground 1.3:** It ignores that many of the structural productivity drivers affecting the UK economy also demonstrably affect GDNs.

#### **Sub-Ground 1.1: Contradicts Regulatory Economics Principles**

##### *The Principle of Competitive Benchmarking*

- 4.6 Elementary regulatory economics holds that price control regulation seeks to simulate competitive market outcomes for natural monopolies –
- (a) competition drives firms to minimise costs and maximise productivity;
  - (b) regulators cannot observe what prices/costs would prevail under competition; and
  - (c) therefore, regulators use benchmarking against competitive sectors to estimate efficient costs and productivity.<sup>85</sup>
- 4.7 The EU KLEMS sectors used in GEMA's analysis represent this competitive benchmark. The comparator set contains industries that are conducting a similar 'nature of work' to the activities that gas distribution networks engage. They include construction, manufacturing, professional services, transportation, financial services – all competitive sectors where firms face market pressure to improve productivity.
- 4.8 The TFP growth rates in these sectors represent the regulator's best estimate of productivity outcomes under competitive pressure. When construction sector TFP is -0.2% post-GFC, that reflects what competitive market forces delivered for construction firms facing cost pressure and customer demands.
- 4.9 Moreover, the First Witness Statement of Carly Evans demonstrates at paragraph 3.3 that gas networks' core activities most closely resemble the construction sector – not manufacturing, professional services, finance, or IT. This is critical: construction sector post-GFC productivity growth has been -0.1%, far below the 1.0% GEMA assumes networks will achieve. The

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<sup>85</sup> Tab F2.4: Baldwin, R., Cave, M., and Lodge, M., *Understanding Regulation: Theory, Strategy, and Practice* (2<sup>nd</sup> Edition, 2012), Chapters 22, 23, and 26.

operational reality of managing physical infrastructure in the ground cannot be divorced from the productivity constraints affecting the broader construction industry that networks depend upon.

- 4.10 **Evidence:** Frontier Report;<sup>86</sup> *Understanding Regulation: Theory, Strategy, and Practice* (2nd Edition, 2012);<sup>87</sup> First Witness Statement of Carly Evans.<sup>88</sup>

*GEMA's Position Inverts this Logic*

- 4.11 GEMA's position is that because networks are regulated monopolies, they should achieve higher productivity than competitive benchmarks. This inverts basic regulatory logic –

- (a) If regulated monopolies can systematically outperform competitive sectors on productivity, this implies regulation is superior to competition for driving efficiency.
- (b) If true, this would undermine the entire case for competitive markets – why allow competition in telecoms, airlines, energy retail if regulated monopoly delivers better productivity?
- (c) It contradicts GEMA's own regulatory philosophy that competition drives optimal outcomes and regulation seeks to mimic competition.<sup>89</sup>

- 4.12 GEMA cannot simultaneously claim –

- (a) competition drives best productivity outcomes (justifying use of competitive sector benchmarks); and
- (b) regulation allows networks to exceed competitive sector productivity (justifying setting OE above benchmarks).

- 4.13 The positions are mutually contradictory.

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<sup>86</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026, Section 4.2, paras 4.11-4.21.

<sup>87</sup> Tab F2.4: Baldwin, R., Cave, M., and Lodge, M., *Understanding Regulation: Theory, Strategy, and Practice* (2<sup>nd</sup> Edition, 2012), Chapter 26, pages 496-502.

<sup>88</sup> Tab D1: First Witness Statement of Carly Evans, 28 February 2026, para 3.3 and Section 4.

<sup>89</sup> Tab F2.3: Department for Energy Security & Net Zero, *A Review of Ofgem – A Call for Evidence*, December 2024, page 17 ('Better outcomes for consumers and more accountability').

4.14 **Evidence:** Frontier Report.<sup>90</sup>

*The Correct Approach*

4.15 The correct approach is to –

- (a) Identify competitive sector productivity through EU KLEMS or similar sources → This shows post-GFC TFP of -0.1%.
- (b) Assess whether networks have structural differences that would justify different productivity expectations → If networks face easier/harder productivity challenges than competitive sectors, adjust accordingly.
- (c) Set OE based on evidence-based assessment → In the absence of evidence that networks differ materially, adopt the competitive benchmark.

4.16 GEMA has provided no analysis at step (b). It simply asserts that networks can outperform without explaining why GDNs face materially better productivity opportunities than construction, professional services, or manufacturing firms.<sup>91</sup>

*Legal Characterisation*

4.17 GEMA's position that GDNs can systematically exceed competitive sector productivity benchmarks constitutes –

- (a) **Error of fact and error of law:** GEMA relies on competitive sector TFP as the efficiency standard to be simulated, yet departs upward from that benchmark without identifying any structural feature of gas distribution that would justify doing so. This engages section 23D(4)(c) as an error of fact and section 23D(4)(e) as an error of law, in that GEMA misdirected itself by treating the competitive benchmark as a floor to be exceeded rather than the standard to be applied.
- (b) **Irrationality:** A rational decision-maker cannot simultaneously rely on competitive sector benchmarks as the evidential basis for OE and set OE above those benchmarks without explanation. The positions are mutually contradictory.

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<sup>90</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026, Section 4.2.1, paras 4.14-4.21.

<sup>91</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, paras 8.47, 8.50 and 8.51.

- (c) **Breach of section 4AA duties:** An unevidenced upward departure from competitive benchmarks fails GEMA's duty to protect consumer interests under section 4AA(1), fails to have regard to networks' financing needs under section 4AA(2)(b), and is inconsistent with the requirements of transparency, accountability, and evidence-based decision-making under section 4AA(5A). Each of these failures constitutes a failure to comply with a relevant statutory duty within the meaning of section 23D(4)(a) or in the alternative, give sufficient weight to networks' financing needs within the meaning of section 23D(4)(b).

**Sub-Ground 1.2: Lacks Evidentiary Support – Repeats RIIO-2 Error**

*The CMA's RIIO-2 Finding*

4.18 At RIIO-2, GEMA made essentially the same argument: networks are insulated from macroeconomic fluctuations due to demand inelasticity and regulatory protection, therefore can achieve higher productivity.<sup>92</sup>

4.19 The CMA rejected this argument, finding –

'GEMA said that demand for energy was relatively inelastic. We agree that this supports the view that the networks are relatively less exposed to macroeconomic fluctuations. However, this does not necessarily imply that networks should be able to achieve higher productivity growth rates.'<sup>93</sup>

'GEMA provided no evidence to support its view that management would be able to place greater focus on driving higher efficiency gains because of the lack of competitive pressure.'<sup>94</sup>

4.20 GEMA has not filled that RIIO-2 evidential gap at RIIO-3 – it has simply repeated the same unsubstantiated assertion. An unanswered question is not a settled answer.

*GEMA Provides No Such Evidence at RIIO-3*

4.21 GEMA's Final Determination for RIIO-3 contains –

- (a) no comparative analysis of historical network productivity vs economy-wide or sector benchmarks;
- (b) no quantification of the alleged '*insulation effect*' on productivity;

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<sup>92</sup> Tab MR1/2/006: CMA, ELMA (Volume 2B), 28 October 2021, para 7.72.

<sup>93</sup> Tab MR1/2/006: CMA, ELMA (Volume 2B), 28 October 2021, para 7.440.

<sup>94</sup> Tab MR1/2/006: CMA, ELMA (Volume 2B), 28 October 2021, para 7.441.

- (c) no evidence that gas distribution networks have structural characteristics enabling superior productivity;
- (d) no response to the CMA's finding that such evidence is required.

4.22 The Final Determination simply asserts that networks *'have greater potential to outperform the wider economy'*<sup>95</sup> and that regulation *'insulates them from the wider economic productivity slowdown.'*<sup>96</sup> These are conclusions stated as facts, not conclusions derived from analysis.

4.23 This is precisely the error the CMA corrected in 2021. GEMA has repeated it in 2025 without modification or additional evidence.

#### *Legal Characterisation*

4.24 GEMA's failure to provide evidence supporting the insulation hypothesis constitutes –

- (a) **Error of fact and error of law:** The CMA determined at RIIO-2 that the insulation hypothesis was unproven on the evidence then available. GEMA has repeated the same assertion in its RIIO-3 determination without supplying the evidence the CMA identified as missing and without identifying any material change in circumstances that would justify a different conclusion. Where a regulator repeats a finding that a previous CMA determination has held to be evidentially unsubstantiated, and nothing of relevance has changed, the finding remains wrong for the same reasons – engaging section 23D(4)(c) as a decision based on an error of fact and section 23D(4)(e) as a decision that is wrong in law, in that GEMA misdirected itself by treating an unresolved evidential question as settled.
- (b) **Irrationality:** Basing a determination on an unevidenced assumption contradicting economic principles is irrational. A rational decision-maker following proper process would require evidence before accepting a claim that regulated monopolies systematically outperform competitive markets.
- (c) **Breach of section 4AA(1) duties:** Setting OE on the basis of unsupported assumptions rather than evidence fails GEMA's duty to protect the interests of consumers under section 4AA(1) – since regulatory error ultimately manifests in higher financing costs passed to consumers – fails to have regard to or, in the alternative, give appropriate weight to, networks' financing needs under section 4AA(2)(b), and is inconsistent with the principles of best regulatory

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<sup>95</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, para 8.50.

<sup>96</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, para 8.50.

practice under section 4AA(5A) which require that GEMA have regard to the principles under which regulatory decisions should be transparent, accountable, and evidence-based; repeating an unsubstantiated assertion that the CMA left unresolved is none of those things.

### **Sub-Ground 1.3: Structural Productivity Drivers Affect Networks**

#### *Productivity Drivers are Relevant to Networks*

- 4.25 Paragraphs 4.22-4.38 of the Frontier Report identify structural drivers of UK productivity weakness.<sup>97</sup> It explains that regulated energy networks operate within the real UK economy and are therefore fundamentally exposed to the same structural factors driving the country's broader productivity slowdown. Key shared constraints include human capital deficits, such as STEM skill shortages and an ageing engineering workforce, which inherently limit the adoption of new technologies. Additionally, networks suffer from a lack of efficiency-enhancing investments, as much of their expenditure is directed towards tangible assets or raw materials that proportionately increase inputs rather than generating total factor productivity growth. Furthermore, network productivity is restricted by heavy regulatory burdens – encompassing both sector-specific safety mandates and wider UK planning laws – as well as trade frictions that disrupt international supply chains and slow the global diffusion of innovation. These drivers are not abstract macroeconomic phenomena – they directly affect gas distribution network operations. Most importantly, because the core, labour-intensive activities of building and maintaining grid assets so closely mirror the historically low-productivity construction sector, there is no evidence or theoretical basis to assume that the regulatory framework insulates energy networks from these widespread economic drags.
- 4.26 **Construction sector:** GDNs rely fundamentally on construction activities (mains laying, connections, excavation, reinstatement). The construction sector experienced negative TFP growth post-GFC and is characterised by persistent 'zombie firms' (low-productivity companies kept alive by low interest rates).<sup>98</sup>
- 4.27 Section 4 of the First Witness Statement of Carly Evans explains why WWU's core operations are fundamentally akin to the construction sector, a heavily manual, site-based industry that historically underperforms the wider UK economy's productivity growth. It highlights several structural constraints outside of WWU's control that restrict its capacity for continuous efficiency improvements –

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<sup>97</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026, paras 4.22-4.38.

<sup>98</sup> Tab D1: First Witness Statement of Carly Evans, 28 February 2026, para 7.9; and Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026, para 3.6(a).

- (a) **Supply Chain Constraints:** While WWU strategically insourced its mains replacement workforce to combat skill shortages, it still relies on a highly uncompetitive contractor market for periodic specialist projects, limiting its ability to secure cost efficiencies through competitive procurement.<sup>99</sup>
- (b) **Planning and Consent Delays:** Strict environmental constraints, complex local authority highway notifications, and extensive stakeholder engagement requirements cause significant, unavoidable project delays that inflate costs in ways WWU cannot mitigate.<sup>100</sup>
- (c) **Workforce Challenges:** WWU struggles with staff recruitment and retention due to the uncertain future of the gas industry in a net-zero landscape and the looming 2032 conclusion of the Iron Mains Replacement Programme. Furthermore, training highly skilled mechanical engineers takes up to three years, creating inherent productivity lags.<sup>101</sup>
- (d) **Legislative and Administrative Burdens:** Expanding environmental and ESG obligations, streetworks legislation, and new HSE rules – such as a recent fatigue management mandate costing approximately £24m – impose heavy financial and administrative burdens.<sup>102</sup>
- (e) **Regulatory Reporting:** GEMA has dramatically increased WWU's reporting obligations from fewer than 10 to over 60 annual submissions. This intensive regulatory scrutiny consumes substantial resources, compounding the difficulty of meeting economy-wide efficiency targets.<sup>103</sup>

4.28 Networks cannot build infrastructure faster or more efficiently than the construction sector enables. If construction productivity is negative, network productivity faces headwinds regardless of management quality.

4.29 **Skills gaps:** Gas distribution requires skilled engineers, technicians, and construction workers. Multiple authoritative sources document acute skills shortages in these areas –

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<sup>99</sup> Tab D1: First Witness Statement of Carly Evans, 28 February 2026, paras 4.6-4.9.

<sup>100</sup> Tab D1: First Witness Statement of Carly Evans, 28 February 2026, paras 4.10-4.12.

<sup>101</sup> Tab D1: First Witness Statement of Carly Evans, 28 February 2026, paras 4.13-4.16.

<sup>102</sup> Tab D1: First Witness Statement of Carly Evans, 28 February 2026, paras 4.17-4.19.

<sup>103</sup> Tab D1: First Witness Statement of Carly Evans, 28 February 2026, paras 4.20-4.23.

- (a) DESNZ assessment: engineering and construction workforce aging, STEM skills competition from other sectors;<sup>104</sup>
- (b) First Witness Statement of Carly Evans, summarised in paragraph (c)(c) above;<sup>105</sup>
- (c) Skills constraints limit productivity growth regardless of regulatory framework. Networks face the same labour market as competitive sectors.

- 4.30 **Planning and regulatory constraints:** Gas distribution projects require numerous consents and permits. Planning delays and regulatory complexity are identified as UK productivity drags. See: First Witness Statement of Carly Evans, summarised in paragraphs (b) - (e) above.<sup>106</sup>
- 4.31 **Climate adaptation:** GEMA explicitly required networks to embed climate resilience in RIIO-3 plans.<sup>107</sup> Network assets face flood risk, heat stress on gas infrastructure, and extreme weather disruption.
- 4.32 The First Witness Statement of Carly Evans demonstrates that the 1% OE target cannot reasonably be met given the substantial operational and financial demands of climate change adaptation.<sup>108</sup>
- 4.33 First, **WWU faces significant new administrative and regulatory requirements.** GEMA mandates embedding climate resilience into the RIIO-GD3 business plan, requiring extensive risk assessments, new environmental surveys, and asset vulnerability mapping under various future warming scenarios for the Adaptation Reporting Power (**ARP**) framework. WWU must also satisfy climate reporting expectations from the Environment Agency, the HSE, and financial investors. Additionally, GEMA expects WWU to collaborate with regional Public Service Boards to understand compound climate risks, a process WWU lacks the resources to replicate across all relevant local regions. These expanding compliance and reporting obligations consume substantial management time and resources without generating any cost efficiencies.
- 4.34 Second, **WWU operates in a particularly challenging geography.** Its region contains extensive coastlines, river systems, and five national parks, which inherently impose strict

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<sup>104</sup> For example, DESNZ's assessment of the clean energy skills challenge noted that the engineering and construction workforce is ageing, there is competition for qualified workers (particularly for STEM roles) with other industries such as finance and technology, and young recruits can be poorly prepared for work: Tab MR1/2/042: Department for Energy Security & Net Zero, Assessment of the Clean Energy Skills Challenge, 25 March 2025.

<sup>105</sup> Tab D1: First Witness Statement of Carly Evans, 28 February 2026, paras 4.13-4.16.

<sup>106</sup> Tab D1: First Witness Statement of Carly Evans, 28 February 2026, paras 4.10-4.12 and 4.20-4.23.

<sup>107</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, paras 4.74-4.79.

<sup>108</sup> Tab D1: First Witness Statement of Carly Evans, 28 February 2026, paras 7.11-7.22.

environmental and access constraints on construction work. WWU’s infrastructure is highly vulnerable to extreme weather, necessitating reactive and costly interventions. For instance, an Above Ground Installation in Devon suffers from frequent flooding, requiring small boat access, heightened emergency readiness, and eventual relocation, while deteriorating pipe bridges require ongoing surveying and refurbishment. Severe storms have already necessitated nearly £900,000 in unplanned reactive pipeline diversions and height adjustments.

- 4.35 Finally, **WWU must adapt to emerging, unprecedented climate threats**, such as 'wet-dry-wet whiplash', extreme heat, and unseasonal peat soil fires that threaten both transmission and distribution networks. Capital investments to mitigate these physical risks are strictly necessary to maintain service reliability, but they inherently involve specialist engineering and environmental planning that increase overall costs rather than reducing unit costs. WWU concludes that these compounding climate adaptation responsibilities represent a structural increase in its operational burden, directly constraining its ability to achieve GEMA’s assumed efficiency savings.
- 4.36 **Evidence:** Frontier Report;<sup>109</sup> First Witness Statement of Carly Evans;<sup>110</sup> Department for Energy Security & Net Zero skills assessment;<sup>111</sup> OBR analysis of productivity drivers.<sup>112</sup>

*Comparative Sector Evidence*

- 4.37 The EU KLEMS comparator sectors include activities directly analogous to network operations, of which construction is the most relevant for the reasons cited at paragraphs 4.26 - 4.28 above.

**Table 1: Selected Comparative Sector Evidence**

Comparator Sector	Relevance to GDNs	Post-GFC TFP Growth
Construction	Core activity (mains laying, connections)	-0.3%
Professional services	Engineering, project management	-0.3%
Transportation and storage	Asset management, logistics	-0.7%
Manufacturing - machinery	Equipment procurement	0.1%

<sup>109</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA’s Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026, paras 4.22-4.38.

<sup>110</sup> Tab D1: First Witness Statement of Carly Evans, 28 February 2026, Section 4 and paras 7.11-7.22.

<sup>111</sup> MR1/2/042: Department for Energy Security & Net Zero, Assessment of the Clean Energy Skills Challenge, 25 March 2025.

<sup>112</sup> Tab MR1/2/016: Office for Budget Responsibility, Briefing Paper No.9 Forecasting Productivity, 26 November 2025.

4.38 These sectors experienced the same productivity slowdown. Networks procure services from these sectors and perform similar activities. The notion that networks achieve 1.0% productivity while their input sectors achieve negative productivity requires explanation GEMA has not provided.

4.39 **Evidence:** Frontier Report (Annex A, Table 4), showing sector-by-sector post-GFC productivity.<sup>113</sup>

*GEMA's Error*

4.40 GEMA's Final Determination does not engage with this evidence. It contains no analysis of which productivity drivers affect networks, whether networks face those drivers to a greater or lesser degree than comparator sectors, or how alleged regulatory 'insulation' overcomes structural constraints that apply economy-wide. The absence of that analysis is not merely a procedural failing – it renders the outcome itself irrational: a regulator that cannot identify the mechanism by which its assumption holds cannot rationally assert that it does.

*Legal Characterisation*

4.41 This constitutes –

- (a) **Failure to have regard to relevant considerations:** GEMA failed to consider whether structural productivity drivers affect networks before assuming networks can escape economy-wide trends.
- (b) **Irrationality:** Assuming networks achieve 1.0% productivity while: (i) construction sector (their primary activity) achieves -0.2%, (ii) skills gaps affect their workforce, (iii) planning constraints affect their projects, (iv) climate adaptation requires investment, is irrational absent compelling evidence that networks are structurally different.
- (c) **Inconsistency with statutory duties:** Section 4AA(2)(b) requires GEMA to have regard to networks' actual circumstances. Setting OE as if networks operate in a different economic reality than they actually face fails this duty.

**Conclusion on Ground 1**

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<sup>113</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026, Annex A, Table 4.

4.42 Ground 1 establishes that GEMA's insulation hypothesis – the foundation for setting OE above economy-wide benchmarks – is wrong on multiple independently sufficient bases, each engaging distinct statutory grounds under section 23D –

- (a) **Theoretically unsound:** In setting the OE requirement at 1.0%, GEMA proceeded on the basis of the insulation hypothesis — the proposition that a regulated monopoly faces efficiency pressures equivalent to those experienced by firms in competitive markets, such that economy-wide productivity benchmarks provide an appropriate basis for setting a frontier shift requirement. That proposition is theoretically unsound: a regulated network, insulated from competitive discipline by its regulatory settlement, does not face equivalent efficiency incentives, and the application of economy-wide productivity metrics without adjustment for that structural difference involves a fundamental error in the analytical framework. GEMA thereby misdirected itself on the correct basis for the determination, contrary to section 23D(4)(e), and its determination was in consequence based wholly or partly on an error of fact contrary to section 23D(4)(c);
- (b) **Empirically unsupported:** In its RIIO-2 determination, the CMA found that the insulation hypothesis was unproven on the evidence then available. GEMA has repeated that hypothesis as a basis for the RIIO-3 OE determination without adducing the evidence the CMA identified as missing and without identifying any material change in circumstances capable of justifying a different conclusion. The determination is accordingly based wholly or partly on an error of fact contrary to section 23D(4)(c), in that it proceeds on an empirical premise that remains evidentially unsubstantiated. Further or alternatively, by treating an unresolved evidential question as an established analytical premise, GEMA misdirected itself in law contrary to section 23D(4)(e);
- (c) **Factually wrong:** Productivity drivers demonstrably affect networks, and GEMA's contrary assumption constitutes an error of fact (section 23D(4)(c));
- (d) **Without the insulation hypothesis, the evidence directly indicates OE should align with historical comparator sector data and forward-looking economy-wide productivity forecasts.**

4.43 This ground is independently sufficient to vitiate the 1.0% determination.

## 5 GROUND 2: ERRORS IN QUANTITATIVE METHODOLOGY

### Introduction

- 5.1 This ground establishes that GEMA's quantitative methodology for determining OE contains multiple errors that systematically bias the result upward, rendering the determination wrong within the meaning of section 23D.
- 5.2 The errors fall into the following overlapping categories –
- (a) **Sub-Ground 2.1:** Incorrect use of external forecasts (wrong data, outdated sources);
  - (b) **Sub-Ground 2.2:** Unjustified methodology change from RIIO-2 to exclude, disregard or underweight post-GFC data;
  - (c) **Sub-Ground 2.3:** Overweighting of pre-GFC data; and
  - (d) **Sub-Ground 2.4:** Flawed in-period adjustment analysis.
- 5.3 Each error is independently sufficient to vitiate the determination. Cumulatively, they demonstrate systematic disregard of evidence pointing to OE below 1.0%.

### Sub-Ground 2.1: Incorrect Use of External Forecasts

#### *GEMA's Errors*

- 5.4 GEMA's Final Determination states –
- 'We note the OBR's downgrade of the UK productivity forecasts published on 26 November 2025. This has resulted in a 0.3% decrease to the medium-term outlook for UK productivity since its previous forecast from 1.3% to 1%. Trend productivity growth is forecast to increase in 2024 and 2025, and then reach 1% in 2030...However, we note that this forecast also sits within at the top-end of the narrow range we have used to set the OE challenge in RIIO-3.'<sup>114</sup>
- 5.5 GEMA's reliance on OBR forecasts to support its 1.0% OE assumption contains two material errors that systematically overstate the external evidence base.
- 5.6 **Error 1 – Citing the wrong productivity measure:** GEMA relies on OBR forecasts to show productivity increasing to around 1% by 2030. In fact, GEMA relies on an erroneous measure of productivity. The OBR's November 2025 forecast shows labour productivity reaching 1.0%

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<sup>114</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, para 8.49.

by 2030, while TFP – the measure GEMA’s entire methodology relies upon – reaches only 0.8%, with a 2024-30 average of 0.5%.

**Table 2: GEMA’s labour productivity forecasts**

Year	GEMA's Cited Figure	OBR Labour Productivity	OBR (correct variable)	TFP	Source
2030	1.0%	1.0%	0.8%		OBR, <i>Economic and Fiscal Outlook</i> , November 2025; <sup>115</sup> Frontier Report <sup>116</sup>
2024-30 avg	[implied ~1%]	1.0%	0.5%		OBR, <i>Economic and Fiscal Outlook</i> , November 2025; <sup>117</sup> Frontier Report <sup>118</sup>

5.7 **Why this is an error:** This is not a minor technical point. GTh explicitly states that TFP is the appropriate measure for totex productivity.<sup>119</sup> GTh’s entire analysis uses EU KLEMS TFP data. Yet when citing OBR forecasts to justify the 1.0% determination, GEMA switches to labour productivity – a consistently higher measure that overstates support for its position.

5.8 **Error 2 – Illogical dismissal of updated forecasts:** GEMA argues it cannot use the November 2025 OBR downgrade because –

‘Explicitly linking our OE challenge to independent forecasts would therefore imply that the level of productivity challenge companies face should be updated throughout RIIO-3, as revised forecasts are published.’<sup>120</sup>

5.9 This reasoning is irrational because it –

<sup>115</sup> Tab MR1/2/004: Office for Budget Responsibility, *Economic and Fiscal Outlook*, 26 November 2025, paras 1.5-1.6 and 2.16.

<sup>116</sup> Tab MR1/1: Frontier Economics, *Assessment of GEMA’s Approach to Setting Ongoing Efficiency at RIIO-3*, 2 March 2026, paras 1.23-1.24 and Figure 9.

<sup>117</sup> Tab MR1/2/004: Office for Budget Responsibility, *Economic and Fiscal Outlook*, 26 November 2025, paras 1.5-1.6 and 2.16.

<sup>118</sup> Tab MR1/1: Frontier Economics, *Assessment of GEMA’s Approach to Setting Ongoing Efficiency at RIIO-3*, 2 March 2026, paras 1.23-1.24 and Figure 9.

<sup>119</sup> Tab MR1/2/003: Grant Thornton, *Second Independent Report on Ongoing Efficiency*, November 2025, Appendix B.

<sup>120</sup> Tab A2.1: GEMA, *RIIO-3 Final Determinations – Overview Document*, 4 December 2025, para 8.48.

- (a) **Conflates determination-time evidence with in-period updates:** Using the best available forecast evidence at determination time does not require an automatic reopener mechanism – it simply requires GEMA to use the most accurate evidence available when setting the *ex ante* target. GEMA routinely fixes allowances on this basis without creating adjustment mechanisms –
- (i) beta values are set at determination using historical data, with no mechanism to adjust as market conditions evolve;
  - (ii) the National Insurance Contributions (**NICs**) uplift in the allowed cost of debt is fixed at determination, notwithstanding that the underlying market conditions change;
  - (iii) the Total Market Return (**TMR**) and Risk Free Rate (**RFR**) estimates used in calculating the cost of equity are set once, *ex ante*, on the basis of data available at determination time, with no in-period adjustment.
- (b) GEMA's own practice demonstrates that incorporating the best available evidence at determination time is entirely consistent with *ex ante* regulatory stability – it does not necessitate a reopener. The OBR November 2025 outlook was published on 26 November 2025. GEMA's Final Determinations followed on 9 December 2025 – a gap of thirteen days. GEMA has demonstrated in this very price control that it is capable of turning around substantial financial and cost changes within three weeks, as evidenced by its movement from statutory consultation to direction. There is no principled basis on which GEMA can claim that updated OBR productivity data, published a fortnight before Final Determinations, could not have been incorporated: the timeline was sufficient and the precedent for rapid adjustment was GEMA's own.
- (c) Using the best available evidence at the time of determination is not in any event the same as committing to re-open determinations whenever new evidence emerges. GEMA routinely uses evidence subject to future update without creating automatic reopener mechanisms –
- (i) cost of debt indices update annually, but GEMA does not continuously adjust all allowances;
  - (ii) EU KLEMS data was revised during RIIO-2 (2019 to 2021 releases), but GEMA did not reopen price controls;
  - (iii) Real Price Effect (**RPE**) indices are updated, but initial determinations use best available forecasts.

- (d) **Contradicts regulatory principle:** The allowances set at Final Determinations should reflect all relevant evidence available to GEMA at decision time. Using outdated evidence when current evidence is available is arbitrary and irrational.
- (e) **Ignores that downgrade was foreseeable:** The November 2025 OBR downgrade was not a surprise. It was extensively trailed in economic commentary –
  - (i) Financial Times articles in October 2025 discussed the expected downgrade;<sup>121</sup>
  - (ii) the Chancellor's speeches referenced persistent productivity weakness.<sup>122</sup>

5.10 **The combined effect:** These errors are not peripheral. GEMA finalised its determinations after the November 2025 OBR publication yet declined to engage with the updated evidence. When it did reference the OBR, it cited labour productivity forecasts – the wrong measure for setting an OE challenge that is grounded in TFP – from a release it simultaneously acknowledged had downgraded the productivity outlook. It also failed to engage with the forecast averages over the control period, which is the relevant metric for calibrating an *ex ante* five-year target: a point estimate at the end of the period obscures the compounding shortfall in the intervening years. The correct statement of the evidence, on Frontier's analysis,<sup>123</sup> is that the OBR's latest TFP forecasts show average growth of approximately 0.5% over 2024-30 – materially below the 1.0% assumption – and that GEMA's determination cannot be reconciled with that figure on any defensible reading of the evidence.

*What Corrected Forecasts Show*

5.11 Using the correct OBR TFP forecasts –

- (a) 2024-2030 average: 0.5% (not the ~1% GEMA implied);
- (b) 2030 endpoint: 0.8% (not the 1% GEMA cited). The difference between 0.8% and 1% understates the true impact: because efficiency is compounded annually from the start of the control, the cumulative divergence by the final year represents not a 0.2 percentage point gap but a materially larger shortfall

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<sup>121</sup> Tab MR1/2/052: Fleming, S. and Parker, G., Reeves Faces £20bn Hit to UK Public Finances from Productivity Downgrade, 27 October 2025.

<sup>122</sup> Tab MR1/2/053: The Rt Hon Rachel Reeves MP, Chancellor's Scene-Setter Speech Ahead of Budget 2025, 4 November 2025.

<sup>123</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RII0-3, 2 March 2026, para 1.12(a).

– on WWU's figures, the difference between cumulative efficiency of approximately 4% and 7% over the control period;

- (c) The BoE's February 2025 forecast shows even lower productivity –
  - (i) 2024-2027 average: 0.1%;
  - (ii) the BoE concluded: '*potential productivity has been much weaker than estimated previously*'.<sup>124</sup>
- (d) BoE's February 2026 forecast: '*a modest pickup in TFP growth*',<sup>125</sup> averaging less than 0.5% over 2026-2028.<sup>126</sup>

5.12 The convergence between independent institutions is significant. The UK's two most authoritative macroeconomic forecasting bodies, using different methodologies, both project TFP growth materially below 1% over the RIIO-3 period.

5.13 **Evidence:** Frontier Report;<sup>127</sup> OBR Economic and Fiscal Outlook November 2025;<sup>128</sup> BoE Monetary Policy Report February 2025 and February 2026.<sup>129</sup>

#### *GTh's Forecast Errors*

5.14 GEMA relied on GTh's analysis purporting to show that external forecasts '*support the view that CMA Panel's provisional findings [in PR24] are not necessarily inconsistent with Ofgem's OE target*'.<sup>130</sup>

5.15 GTh's analysis contains the following errors –

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<sup>124</sup> Tab MR1/2/005: Bank of England, Monetary Policy Report, 6 February 2025, pages 12 and 86.

<sup>125</sup> Tab MR1/2/035: Bank of England, Monetary Policy Report, 5 February 2026, page 42.

<sup>126</sup> Tab MR1/2/035: Bank of England, Monetary Policy Report, 5 February 2026, page 41, Chart C.1, green bars in right panel.

<sup>127</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026, Section 3.2, paras 3.8-3.13.

<sup>128</sup> Tab MR1/2/004: Office for Budget Responsibility, Economic and Fiscal Outlook, 26 November 2025.

<sup>129</sup> Tab MR1/2/005: Bank of England, Monetary Policy Report, 6 February 2025; and Tab MR1/2/035: Bank of England, Monetary Policy Report, 5 February 2026.

<sup>130</sup> Tab MR1/2/003: Grant Thornton, Second Independent Report on Ongoing Efficiency, November 2025, para 7.22.

- (a) **Error 1 – Outdated source:** GTh used the March 2025 OBR forecast despite the November 2025 update being published before the Final Determinations and before GTh finalised its report.<sup>131</sup>
- (b) **Error 2 – Wrong variable:** GTh's Table 5 is labelled '*Average between OBR and BoE annual TFP growth rates*' but uses OBR labour productivity figures, not TFP. This can be verified by comparing the figures in GTh's Table 5 against OBR source publications.
- (c) **Error 3 – Omitted data:** GTh omits the BoE's 2024 TFP estimate of 0.4% from its calculations, despite this figure being available in the BoE February 2025 publication GTh cites. No explanation is provided for the omission.

5.16 These errors inflate GTh's calculated Compound Annual Growth Rate (CAGR). Correcting all three errors –

**Table 3: GTh's Calculations**

Period	GTh's Calculation (Wrong)	Corrected Calculation
2025-2029	0.8%	0.5%
2026-2030	1.1%	0.6%

5.17 **Even using GTh's chosen methodology**, the evidence supports OE of 0.5-0.6%, not 1.0%.

5.18 **Evidence:** Frontier Report;<sup>132</sup> Grant Thornton Second Report;<sup>133</sup> corrected analysis in the Frontier Report.<sup>134</sup>

*Legal Characterisation*

5.19 These errors constitute –

<sup>131</sup> Tab MR1/2/003: Grant Thornton, Second Independent Report on Ongoing Efficiency, November 2025, paras 7.19 and 7.24.

<sup>132</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026, Annex A.

<sup>133</sup> Tab MR1/2/003: Grant Thornton, Second Independent Report on Ongoing Efficiency, November 2025, Table 5.

<sup>134</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026, para 4.51.

- (a) **Errors of fact:** GEMA relied on factually incorrect data (wrong OBR variable, outdated forecasts). GTh's analysis contained factual errors. These are straightforward mistakes vitiating the determination.
- (b) **Irrationality:** GEMA's dismissal of updated forecasts on grounds they might later be revised is irrational – it means deliberately using evidence known to be outdated to avoid risk of future evidence proving inconvenient.
- (c) **Failure to have regard to relevant considerations:** In failing to have regard to the correct external forecast evidence available at determination time, GEMA misdirected itself on its section 4AA(2)(b) duty – which requires it to have regard to the need to secure that licence holders are able to finance their functions – because a regulator cannot properly discharge that duty without reference to the macroeconomic conditions that directly determine whether the efficiency requirement it sets is sustainable.

5.20 Applying the standard set in the WWU Judgment, materially better decisions are clearly available: using correct TFP forecasts and latest OBR data would indicate OE of 0.5% or below, not 1.0%.

#### **Sub-Ground 2.2: Unjustified Exclusion of Post-GFC Evidence**

##### *The Methodology Shift from RIIO-2*

- 5.21 At RIIO-2, GEMA's advisor CEPA constructed the OE range using EU KLEMS data from 1997 to 2016, thereby giving weight to both pre-GFC and post-GFC periods.
- 5.22 For RIIO-3, GTh examined four time periods spanning 1970 to 2019. The periods that carry most weight in anchoring the upper end of the range – and therefore in shaping where within that range GEMA selects its point estimate – are dominated by pre-GFC data. To the extent that post-GFC productivity weakness is underrepresented across those periods, the entire range is shifted upward, and the 1.0% selection within it is correspondingly inflated.
- 5.23 This is not a point about the upper bound in isolation. The bias infects the range as a whole: by underweighting the post-GFC period, the entire range from which GEMA selects its point estimate is shifted upward relative to where it would sit under the RIIO-2 methodology applied to current data. Frontier's analysis demonstrates that applying a consistent methodology to the latest EU KLEMS data produces estimates materially below 1.0% – illustrating that the 1.0% determination is an artefact of period selection rather than a conclusion supported by the evidence as a whole.

5.24 **Evidence:** Frontier Report, paragraphs 4.58-4.59;<sup>135</sup> comparison to CEPA RIIO-2 OE methodology in Frontier Report, Annex C.<sup>136</sup>

*Why the Shift Cannot be Justified*

5.25 The methodological shift is unjustified because –

- (a) **Evidence strengthened, methodology weakened:** Since RIIO-2, evidence of structural productivity weakness has grown stronger—<sup>137</sup>
  - (i) additional years of post-GFC low productivity outcomes (2017-2024);
  - (ii) multiple forecast downgrades by OBR and BoE;
  - (iii) institutional studies confirming structural nature of slowdown;
  - (iv) EU KLEMS data revisions showing post-GFC period worse than previously estimated; and
  - (v) one would expect methodology to evolve toward giving more weight to recent experience, not less. GEMA has moved in the opposite direction without explanation.
- (b) **No explanation provided:** GEMA's Final Determination does not acknowledge that a different time period selection approach was used compared to RIIO-2. It provides no rationale for why the 1997-2007 period alone is appropriate for the upper bound.
- (c) **Methodology inconsistent with evidence:** The methodological choices made by GEMA in constructing the upper bound systematically favour a higher estimate in a manner that is difficult to reconcile with a neutral, evidence-led approach. The change in methodology at RIIO-3 gives GEMA a higher upper bound than it had at RIIO-2. Where a methodological choice consistently produces the same outcome regardless of changing underlying evidence, that consistency is itself a reason to scrutinise whether the method is genuinely driving the result or whether the result is driving the method. The CMA is invited to consider whether GEMA has adequately justified why a methodology that

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<sup>135</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026, paras 4.58-4.59.

<sup>136</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026, Annex C.

<sup>137</sup> See paragraphs 1.8 - 1.11 above.

discounts the most recent and most relevant evidence produces the most appropriate estimate or whether a materially better approach is available as WWU argues.

*What Post-GFC Data Shows*

5.26 Analysis that includes post-GFC data yields materially different results –

**Table 4: Post GFC TFP data analysis**

Time Period	Average TFP Growth (Simple Average of All Comparator Sectors)	Source
1997-2007 (pre-GFC only)	1.2%	EU KLEMS 2025, Frontier Report, Annex A, Table 4
2008-2019 (post-GFC only)	0%	EU KLEMS 2025, Frontier Report, Annex A, Table 4
1970-2019 (very long-run)	0.5%	EU KLEMS 2025, Frontier Report, Annex A, Table 4

5.27 The construction of the upper bound of the plausible range itself reflects an unjustifiable weighting choice: a range whose ceiling is derived from periods that exclude post-GFC productivity experience entirely cannot credibly be described as capturing the full distribution of plausible outcomes. Even if GEMA were entitled to give some weight to pre-GFC data in its central estimate, a properly constructed upper bound must assign non-zero weight to the post-GFC period – which represents 17 years of uninterrupted (and more recent) evidence, institutional consensus that the slowdown is structural, and forward-looking forecasts projecting continued weakness. A 'plausible range' that treats that evidence as irrelevant to its ceiling is not a range at all: it is a pre-GFC estimate with a label attached.

5.28 Neither GEMA nor GTh provide any analysis supporting such a rebound assumption. They simply select the pre-GFC period and assert its relevance for RIIO-3 (2024-2030).

5.29 **Evidence:** Frontier Report;<sup>138</sup> EU KLEMS 2025 data.<sup>139</sup>

*Legal Characterisation*

<sup>138</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026, Annex A.

<sup>139</sup> Tab MR1/2/061: LUISS, EUKLEMS & INTANProd – Release 2025.

5.30 These errors in constructing the upper bound are not cured by GEMA's selection of 1.0% rather than 1.3%. The contamination operates in two directions –

- (a) First, the upper bound defines the ceiling of the plausible range. A range constructed on an inflated upper bound is itself inflated: GEMA's selection of 1.0% as a point estimate within that range carries the implicit judgment that 1.0% sits toward the lower-middle of what is plausible. On a correctly constructed range – one that gives non-zero weight to post-GFC evidence at the upper bound – 1.0% would fall toward or beyond the upper end, not the middle. The infected range therefore anchors the point estimate at a structurally higher level than the evidence supports.
- (b) Second, and critically, GEMA provides no adequate explanation for why it departed from the lower bound of its own range when selecting 1.0%. The lower bound – itself already elevated by the methodology errors – would have been the natural starting point for a regulator properly attending to the evidence of productivity weakness. GEMA's failure to justify the upward departure from that bound compounds the original error.

5.31 These errors constitute –

- (a) **Systematic disregard of relevant evidence:** In structuring its methodology to exclude the substantial body of post-GFC productivity evidence, GEMA failed to have regard to the need to secure that WWU is able to finance its licensed activities, contrary to section 23D(4)(a). By setting a frontier shift requirement on the basis of a truncated dataset that systematically excludes the period most probative of current productivity trends, GEMA failed to discharge its duty under section 4AA(2)(b) to have regard to financeability – in that a methodology that yields a higher efficiency requirement, by omitting evidence that would have supported a lower one, cannot be said to reflect proper regard to the financing consequences for the licensee. Further or alternatively, GEMA failed to give that duty appropriate weight contrary to section 23D(4)(b), and its determination was based wholly or partly on an error of fact contrary to section 23D(4)(c) in that it proceeded on a distorted evidential picture.
- (b) **Irrationality:** Giving less weight to recent evidence when that evidence has grown stronger and been revised downward is irrational – no reasonable decision-maker properly directing itself on the evidence could have reached this result, engaging section 23D(4)(e).
- (c) **Failure in transparency:** GEMA's OE requirement has remained at 1.0% across successive price controls notwithstanding materially weaker underlying

evidence over time. Section 4AA(5A) imposes a duty on GEMA to have regard to the principles of best regulatory practice, including transparency. By providing no adequate explanation for the consistency of its OE conclusion in the face of changing evidence – and in particular by failing to explain how methodological choices including period selection and data source weighting have produced the same result across successive controls – GEMA failed properly to have regard to that duty contrary to section 23D(4)(a), and in any event failed to give it appropriate weight contrary to section 23D(4)(b).

- 5.32 Applying the standard set out in the WWU Judgment, materially better decisions are clearly available: using post-GFC data (reflecting structural change) would be an evidence-based approach that avoids this error and supports an ongoing efficiency rate of 0.5%.

**Sub-Ground 2.3: Over-Weighting of Pre-GFC Data is Irrational**

- 5.33 Even accepting that some weight should be given to pre-GFC experience, the determination that pre-GFC data alone can support the upper bound of a *'plausible range'*<sup>140</sup> is irrational.

- 5.34 GEMA's range (0.7% to 1.3%) was constructed using –

- (a) Lower bound (0.7%): based on the NGET business plan, described as the *'minimum level of annual OE improvement all network companies should be able to achieve'*;<sup>141</sup>
- (b) Upper bound (1.3%): based exclusively on 1997-2007 pre-GFC productivity.<sup>142</sup>

- 5.35 This structure means GEMA considered it *'plausible'* that RIIO-3 productivity could reach 1997-2007 levels, notwithstanding –

- (a) no such productivity levels have been achieved for 17 years;
- (b) all independent forecasts project TFP at 0.5% or below;
- (c) structural economic analysis explains why pre-GFC levels are unlikely to recur.

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<sup>140</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, para 8.23.

<sup>141</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, para 8.23.

<sup>142</sup> Tab MR1/2/003: Grant Thornton, Second Independent Report on Ongoing Efficiency, November 2025, paras 3.25-3.27 and Table 2.

- 5.36 A reasonable 'plausible range' would give primary weight to post-GFC evidence (as the more recent and relevant period) while potentially considering pre-GFC as an upside scenario. GEMA's approach inverts this, treating pre-GFC as the baseline expectation.
- 5.37 The upper bound therefore embeds the proposition that RIIO-3 productivity could return to levels last seen over 17 years ago – notwithstanding that no such productivity levels have been achieved since, that all independent forecasts project TFP at 0.5% or below,<sup>143</sup> and that the structural economic analysis explaining why pre-GFC levels are unlikely to recur is uncontroverted.
- 5.38 A properly constructed plausible range would treat post-GFC experience as the primary evidence and pre-GFC data as an upside scenario at most. GEMA inverts this: it treats pre-GFC productivity as the ceiling of what is plausible and post-GFC weakness as the floor. That inversion is not a matter of regulatory judgement within a margin of appreciation – it is a conclusion that no reasonable decision-maker properly directing itself on the evidence could have reached.
- 5.39 The consequence for the 1.0% selection is direct: a point estimate cannot be rescued from an irrational range simply by selecting a figure below the ceiling. Where the range itself is contaminated, every point within it is tainted – including 1.0%, which on a correctly constructed range would fall at or beyond the upper bound rather than toward its midpoint.
- 5.40 **Evidence:** Frontier Report;<sup>144</sup> Figure 11 in Annex A showing GTh's own analysis produces 0.6% over the full period.<sup>145</sup>

*The 'Lower Bound' is Arbitrary*

- 5.41 GEMA's lower bound of 0.7% is equally flawed. GEMA states –

'The lower bound of 0.7% represents the highest estimate submitted by one of the network companies in its business plan. We consider this to be the minimum level of annual OE improvement all network companies should be able to achieve, given the implicit incentives on them to 'aim down' in proposing OE targets.'<sup>146</sup>

- 5.42 This reasoning –

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<sup>143</sup> See paragraph 3.17 above.

<sup>144</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026, paras 4.56-4.60.

<sup>145</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026, Annex A, Figure 11.

<sup>146</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, para 8.23.

- (a) **Incorrectly assumes gaming, rewards outliers:** GEMA dismisses WWU's 0.5% OE estimate as insufficiently ambitious, implying strategic gaming. Yet WWU's submission was based on EU KLEMS analysis over 1996-2019.<sup>147</sup> GEMA provides no evidence this was anything other than good faith analysis. The arbitrary nature of GEMA's approach is revealed by its treatment of NGET's 0.7% proposal. Because one company – NGET – submitted 0.7% (the highest of all business plan submissions), GEMA declares this the regulatory floor. This is incoherent. Companies submitting lower estimates are accused of gaming. But one company's higher estimate immediately becomes the minimum for everyone. GEMA never explains why NGET's outlier should set the baseline – it simply provides a convenient anchor for a 0.7-1.0% range.
- (b) **Ignores that GEMA's own analysis supports lower figures:** GTh's post-GFC estimate is 0.1% (or -0.1% with latest data).<sup>148</sup> Full-period estimates from GEMA's own expert are 0.5% (GTh). GEMA provides no analysis to prefer 0.7% when its own advisor's analysis consistently produces lower results.
- (c) **Treats business plan as policy judgement rather than evidence:** GEMA uses NGET's business plan figure to set the lower bound but then dismisses all business plan arguments as potentially self-interested.<sup>149</sup> It cannot have it both ways – either business plans represent evidence or they do not.

5.43 A rational lower bound would reflect the substantial possibility that post-GFC productivity weakness persists.

5.44 **Evidence:** Frontier Report;<sup>150</sup> WWU Business Plan – OE derivation.<sup>151</sup>

*Cumulative Effect of Methodology Errors*

5.45 The cumulative effect of these methodology choices is to create a range (0.7% to 1.3%) that –

- (a) excludes post-GFC evidence from the upper bound;
- (b) uses an arbitrary lower bound disconnected from GEMA's own evidence; and

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<sup>147</sup> Tab D1: First Witness Statement of Carly Evans, 28 February 2026, para 9.13.

<sup>148</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026, Annex B.

<sup>149</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, para 8.23.

<sup>150</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026, paras 4.61-4.64.

<sup>151</sup> Tab C3.1: WWU, Our Business Plan for 2026-31, December 2024.

- (c) biases the entire analysis toward higher OE estimates.

**5.46 GEMA's construction of the '*plausible range*' between 0.7% and 1.3% therefore was itself methodologically flawed, independently of its selection of 1% as the central figure.**

- (a) The upper bound of 1.3% is not plausible. It was derived by placing significant and undue weight on pre-2008 productivity data that predates the structural break caused by the GFC and is therefore unrepresentative of the productivity gas networks will face during RIIO-GD3. GEMA's own methodology at RIIO-2 placed less weight on this pre-GFC period. Its decision to reverse that approach in RIIO-3 – in the face of stronger evidence of persistent structural weakness, not weaker – is internally inconsistent and irrational.
- (b) The lower bound of 0.7% is equally wrong. GEMA moved the floor upward from the 0.1% identified by its own appointed expert without adequate justification, discarding the lower portion of the expert-determined range before even beginning its central estimate exercise. The purpose of establishing a plausible range is to anchor that exercise; contracting it without evidential basis distorts the entire assessment.
- (c) The consequence is that GEMA constructed an artificially narrow and inflated range that excluded productivity outcomes its own evidence supported, then selected 1% as the midpoint of that artificial range. The selection of 1% therefore depends entirely on the validity of a range that was itself incorrectly constructed. If either bound is wrong, 1% cannot stand as a reasoned central estimate. This constitutes an independent basis on which the OE determination was irrational and wrong in law.

**5.47 GEMA further erred in treating NGET's business plan OE proposal of 0.7% as an absolute floor on its assessment.**

- (a) As addressed at paragraphs (a) and 5.41 above, GEMA mischaracterised NGET's 0.7% submission: it was presented as the highest level supportable by the evidence, not a minimum expectation. The consequence for range construction is direct – anchoring the lower bound to a figure that was itself an evidence-based ceiling in the company's own analysis means GEMA's range, and the point estimate drawn from it, sits higher than the evidence supports.
- (b) That is a straightforward error of fact: GEMA mischaracterised the nature of NGET's own submission, inverting an evidence-based upper bound into a starting point as a lower bound for a higher determination.

- (c) GEMA's approach to the company submission creates perverse incentives that undermine the integrity of the regulatory process. If companies know that submitting an evidence-based upper bound will be treated as a minimum expectation, the rational response is to suppress future business plan submissions – eroding the very evidence base on which GEMA purports to rely. A methodology that systematically produces that outcome cannot reflect the principles of best regulatory practice to which GEMA is required to have regard under section 4AA(5A). By failing properly to have regard to those principles in structuring its approach to company submissions, GEMA acted contrary to section 23D(4)(a) and in any event failed to give them appropriate weight contrary to section 23D(4)(b).

#### **Sub-Ground 2.4: Flawed Approach to 'In-Period' Adjustment**

- 5.48 GEMA further erred in concluding that incorporating updated OBR forecasts into the Final Determinations would require it to adjust OE throughout the price control period.
- 5.49 GEMA declined to reflect the November 2025 OBR forecast downgrade – published and available before the Final Determinations were issued – on the basis that doing so would, in principle, commit it to continuous in-period revision of OE parameters as forecasts evolved. The submissions at paragraphs 5.8 - 5.9 above repeated.
- 5.50 That reasoning is wrong in fact and in law.
- 5.51 **First**, it is an error of fact. Updating an OE assumption at the Final Determination stage to reflect the most current available evidence does not logically create any in-period adjustment obligation. A Final Determination sets parameters for the price control period; there is no mechanism by which a single evidential update generates a precedent for continuous in-period revision. GEMA conflated two distinct regulatory moments – setting the initial determination and making in-period adjustments – and used a risk applicable to the latter to avoid proper evidential rigour at the former.
- 5.52 **Second**, GEMA's approach is internally inconsistent. Elsewhere in the Final Determinations, GEMA incorporated the latest available data to update other parameters.<sup>152</sup> Its refusal to apply

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<sup>152</sup> For example, from the RIIO-3 Final Determinations themselves –

- OBR medium-term CPIH forecast: Between Draft Determinations (July 2025) and Final Determinations (December 2025), GEMA switched from using the Bank of England's long-run 2% CPI target to the OBR's 5<sup>th</sup> year CPIH forecast of 2.08% to deflate the index-linked debt (ILD) portion of the cost of debt allowance (Tab A2.4: GEMA, RIIO-3 Final Determinations – Finance Annex, section 2 summary).
- Updated market data for cost of equity / RFR: The Final Determinations Finance Annex data cut-off date was 31 October 2025 – later than the Draft Determinations' cut-off of 31 March 2025. Market

the same approach to the OE determination – defaulting instead to an older dataset when more probative data was available – is logically incoherent and irreconcilable with its own methodology as applied across the determination as a whole. A decision that applies different evidential standards to different parameters without rational justification is wrong in law contrary to section 23D(4)(e).

- 5.53 The practical effect was that GEMA knowingly set OE at a level it had contemporaneous evidence to believe was too high. That is an independent and serious legal error.

### Conclusion on Ground 2

- 5.54 Ground 2 establishes that GEMA's quantitative methodology is vitiated on multiple independently sufficient bases, each engaging distinct statutory grounds under section 23D –

- (a) **Factual errors in forecast usage:** GEMA mischaracterised the OBR data and NGET's business plan submission, constituting errors of fact (section 23D(4)(c)) and, to the extent those errors infected the analytical framework, an error of law (section 23D(4)(e));
- (b) **Unjustified exclusion of post-GFC evidence:** GEMA excluded the most relevant and recent productivity data without rational justification. By structuring its methodology to omit the substantial body of post-GFC evidence, GEMA's determination was based wholly or partly on an error of fact contrary to section 23D(4)(c), in that it proceeded on a materially incomplete evidential picture. Further or alternatively, by excluding evidence that bore directly on the correct value of the OE parameter without adequate explanation, GEMA misdirected itself in law contrary to section 23D(4)(e);
- (c) **Irrational weighting toward pre-GFC data:** The decision to weight pre-GFC evidence more heavily than post-GFC evidence is wrong in circumstances where the existence of a structural break is uncontroverted. A regulator properly directing itself to the correct analytical framework could not rationally treat the pre-GFC period as more probative of current productivity trends than

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movements between those dates were reflected in updated WACC parameters. GEMA therefore applied market data available at Final Determinations for cost of capital purposes (Tab A2.4: GEMA, RIIO-3 Final Determinations – Finance Annex, section 4).

- Totex allowances updated on new evidence: The Final Determinations approved £28.7bn of upfront investment – a 18% increase from Draft Determinations reflecting new evidence from the network companies and updated modelling (Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, Executive Summary).

the post-GFC period in those circumstances. That decision was wrong in law contrary to section 23D(4)(e) as a misdirection on the correct analytical approach, and was based wholly or partly on an error of fact contrary to section 23D(4)(c) to the extent it reflects an incorrect factual premise for the assessment of the relative probative value of the two datasets;

- (d) **Arbitrary construction of the plausible range:** The plausible range was constructed on the basis of the errors identified in (a) and (b) above, such that both GEMA's lower and upper bounds are themselves contaminated. The selection of 1.0% within that range, without adequate reasons for departing from a lower bound that is itself too high, compounds those errors. The determination is accordingly wrong in law contrary to section 23D(4)(e) and based wholly or partly on errors of fact contrary to section 23D(4)(c).

5.55 Each error is independently sufficient to render the determination wrong. Cumulatively, they demonstrate systematic avoidance of evidence pointing to OE well below 1.0% and no higher than 0.5%.

5.56 Materially better decisions are clearly available –

- (a) 0.1% or lower: supported by post-GFC evidence and recognition of structural change;
- (b) 0.5%: supported by external forecasts (OBR, BoE) and very long-run EU KLEMS analysis.

## 6 GROUND 3: RELIANCE ON UNEVIDENCED QUALITATIVE FACTORS

### Introduction

6.1 Even if networks could outperform the economy (which Ground 1 establishes they cannot), or GEMA's quantitative analysis were sound (which Ground 2 establishes it is not), GEMA's decision would still be wrong due to its reliance on qualitative factors that are either –

- (a) conceptually misconceived (OE as '*incentive*');
- (b) empirically unsupported (innovation, IT&T);
- (c) contradict CMA latest thinking (innovation uplift redux).

6.2 GEMA's Final Determination lists the following qualitative factors supporting 1.0% OE –

- (a) OE as a '*stretching*' challenge providing '*incentives*';
- (b) innovation funding from RIIO-2;
- (c) IT&T investment ambitions;
- (d) networks' '*insulation*' from productivity slowdown (addressed in Ground 1);
- (e) regulatory precedent (addressed briefly below);
- (f) external forecasts (addressed in Ground 2).

6.3 This section primarily addresses the first three factors, demonstrating each is fundamentally flawed.

### **Sub-Ground 3.1: OE cannot function as '*Incentive*' or '*Stretching Target*'**

#### *GEMA's Characterisation*

6.4 Throughout the Final Determination, GEMA characterises 1.0% OE as –

- (a) '*stretching but achievable OE target*';<sup>153</sup>
- (b) providing necessary '*incentives*' for efficiency;<sup>154</sup>

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<sup>153</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, para 8.20.

<sup>154</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, para 8.50.

(c) challenging monopolistic networks to improve.<sup>155</sup>

6.5 This characterisation pervades GEMA's reasoning. The qualitative factors are assessed through the lens of: 'does this support setting a stretching challenge?'

*Why this is Fundamentally Misconceived*

6.6 The characterisation mistakes OE's function within RIIO's regulatory framework. OE is not an incentive mechanism – it is a cost forecasting parameter.

6.7 **What OE actually does:** OE adjusts the *ex ante* totex allowance to reflect expected productivity improvements. It determines what cost recovery companies receive, not what incentives they face.

6.8 **Where incentives come from:** Under RIIO's *ex ante* regulatory model, companies receive a fixed totex allowance determined at the start of the price control and then incur their actual costs over the period. Any difference between the allowance and actual costs is shared between the company and consumers in accordance with the totex incentive mechanism. Where a company spends less than its allowance it retains a share of the saving; where it spends more it bears a share of the excess.

6.9 **Why OE level does not affect incentives:** The incentive at the margin to reduce costs exists because of the TIM, regardless of the OE level.

6.10 **Example:** assume a network achieves 1.2% actual productivity improvement –

(a) The incentive to pursue a marginal efficiency saving is determined by the totex incentive rate, not by the level of the OE assumption. If a company identifies a £1m cost saving, it retains its share of that saving under the totex sharing mechanism whether the OE assumption is set at 0.5%, 0.7% or 1.0%. The OE level does not affect what the company earns on the margin – it affects only the baseline from which outperformance is measured.

(b) A higher OE assumption therefore transfers revenue from the company to consumers by raising the hurdle before the sharing mechanism bites, but it does not sharpen the incentive to find the next pound of efficiency. The marginal return on effort is identical under either assumption. GEMA's characterisation of 1.0% as a '*stretching target*' that drives efficiency behaviour conflates the level of the allowance with the strength of the incentive – they are analytically distinct, and the former has no bearing on the latter.

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<sup>155</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, para 8.52.

6.11 **Evidence:** Frontier Report.<sup>156</sup>

*The Implication*

- 6.12 If OE is not an incentive mechanism, then phrases like '*stretching target*' are meaningless. The question is not 'what would stretch companies?' but rather 'what productivity improvement is reasonably expected based on evidence?'
- 6.13 GEMA's entire qualitative framework is therefore built on a conceptual error. It asks 'does X support a stretching challenge?' when it should ask 'does X provide evidence that 1.0% productivity is achievable?'
- 6.14 This distinction is not semantic; it changes the analysis –

**Table 5: OE Relevant Questions**

<b>Ofgem's Wrong Question</b>	<b>Correct Question</b>
'Does innovation funding support a stretching target?'	'Does innovation funding provide reason to think that networks will exceed economy-wide productivity?' → Only if network innovation exceeds economy-wide innovation
'Should we challenge networks given monopoly position?' → Yes, challenge is good	'What productivity growth can networks achieve given monopoly characteristics?' → Must assess actual constraints and opportunities

*Legal Characterisation*

- 6.15 This error constitutes –
- (a) **Fundamental misunderstanding of regulatory framework:** GEMA has misconceived the purpose and function of the OE parameter within RIIO, leading to assessment against the wrong criteria.
  - (b) **Failure to ask relevant question:** The relevant question under section 4AA is whether allowances enable individual networks to finance their licensed activities efficiently. This requires evidence-based assessment of achievable productivity, not aspirational '*stretching*'.

<sup>156</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026, Section 5.1, paras 5.3-5.6.

- (c) **Irrationality:** Setting OE based on desire to '*challenge*' or '*incentivise*' when OE serves neither function is irrational – it is using the wrong tool for the alleged purpose.

### **Sub-Ground 3.2: Innovation Funding Does Not Justify Higher OE**

#### *GEMA's Position*

- 6.16 GEMA states the following in its Draft Determinations –

'Companies' ability to benefit from efficiency gains resulting from historical customer-funded innovation funding provided in previous price controls. In RIIO-2, we made £563m of innovation funding available through the SIF and £262m (2023/24 prices) available through the NIA... it is reasonable to expect productivity benefits from these historical investments to occur during RIIO-3.<sup>157</sup>

'We also expect companies to benefit from investments in innovative new technologies (eg advanced leakage detection and data platform for leakage analytics in GD) which offer significant potential for productivity improvements in RIIO-3.<sup>158</sup>

- 6.17 Despite networks' detailed objections, GEMA's response was to restate its conclusion: '*a 1% pa OE challenge is appropriate for RIIO-3*'.<sup>159</sup> That is not a reason – it is the proposition to be proved.
- 6.18 This argument that innovation funding justifies higher OE – fails for three independent reasons.

#### *Reason 1: Double-Counting*

- 6.19 Any cost savings achievable from RIIO-2 innovation projects are already reflected in RIIO-3 business plan costs. Companies forecast costs based on their expected efficiency, which incorporates benefits from innovation.
- 6.20 A further error in GEMA's reasoning is the assumption that innovation funding translates into OE gains. The majority of the innovation allowance in RIIO-GD3 is directed at net zero transition, decarbonisation, and environmental objectives – activities whose purpose is to deliver new or changed outputs, not to reduce the cost of delivering existing ones. The link between that funding and a higher OE assumption is therefore not established: spending on hydrogen trials, methane leakage reduction, and network decarbonisation does not reduce the unit cost of gas distribution in a way that supports a 1% productivity trajectory. WWU addresses

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<sup>157</sup> Tab A1.1: GEMA, RIIO-3 Draft Determination – Overview Document, 1 July 2025, para 8.33.

<sup>158</sup> Tab A1.1: GEMA, RIIO-3 Draft Determination – Overview Document, 1 July 2025, para 8.33.

<sup>159</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, para 8.55.

this in detail in the First Witness Statement of Carly Evans at paragraphs 8.2-8.7,<sup>160</sup> which explains that WWU's £60m IT&T allowance primarily funds system maintenance and regulatory compliance. Mandatory investments like digitising regulatory reporting (£2m) and upgrading health and safety systems (£1.25m) strictly fulfil compliance obligations, generating zero ongoing efficiency savings. Crucially, only £14.4m is allocated to transformation. But even within this category, a significant proportion of expenditure is directed towards projects that do not lead to efficiency savings.

- 6.21 Paragraphs 8.8-8.11 of the First Witness Statement of Carly Evans<sup>161</sup> clarifies that any efficiency benefits expected from WWU's IT systems are already fully embedded into its baseline business plan cost forecasts. The requested IT&T investment (initially £78m) is strictly necessary to achieve these pre-forecasted efficiency levels, rather than serving as a tool to unlock unquantified, additional savings. Consequently, GEMA fundamentally misinterprets the basis of WWU's business plan by incorrectly assuming that this IT&T funding will generate extra productivity gains on top of the efficiencies that have already been accounted for.
- 6.22 This is not hypothetical double-counting – it is actual double-counting in the arithmetic of the price control. Business plan costs are reduced to reflect innovation benefits, and then the OE requirement is increased on the basis of the same innovation benefits, so the company receives an allowance reduced twice over for a single efficiency gain.
- 6.23 **Evidence:** First Witness Statement of Carly Evans;<sup>162</sup> WWU Business Plan, in which innovation benefits are incorporated in the forecasts.<sup>163</sup>

*Reason 2: No Comparative Evidence*

- 6.24 Even if innovation benefits were not already in baselines, using innovation funding to justify OE above economy-wide benchmarks requires evidence that –
- (a) network innovation spending exceeds innovation spending in comparator sectors;
  - (b) the proportion of innovation aimed at cost reduction is higher for networks.
- 6.25 GEMA provides no such comparative evidence. The Final Determination contains –

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<sup>160</sup> Tab D1: First Witness Statement of Carly Evans, 28 February 2026, paras 8.2-8.7.

<sup>161</sup> Tab D1: First Witness Statement of Carly Evans, 28 February 2026, paras 8.8-8.11.

<sup>162</sup> Tab D1: First Witness Statement of Carly Evans, 28 February 2026, paras 8.1-8.11.

<sup>163</sup> Tab C3.1: WWU, Our Business Plan for 2026-31, December 2024.

- (a) no data on R&D intensity (R&D spend as % of revenue) for networks vs comparator sectors;
- (b) no analysis of whether £563m Strategic Innovation Fund (**SIF**) and £262m Net Innovation Allowance (**NIA**) represents high, average, or low innovation investment relative to sector size;
- (c) no assessment of what proportion of network innovation funding targets cost reduction vs other objectives (environmental, safety, service quality).

6.26 The available SIF data deepens rather than resolves this gap. Of the £450m RIIO-2 SIF allocation, only 27% of committed funding – approximately £78.2m across 89 projects – has been directed to gas networks, with 73% flowing to electricity.<sup>164</sup> This alone undermines any suggestion that GDNs are beneficiaries of exceptional innovation investment.

6.27 More fundamentally, the SIF data reveals nothing about what proportion of funded projects target operational cost reduction as opposed to environmental, safety, or service quality objectives. GEMA has not attempted that disaggregation. If the majority of network innovation spending targets decarbonisation or resilience rather than cost efficiency, it provides no basis – even in principle – for expecting productivity growth above the competitive sector norm.

6.28 **The principle:** EU KLEMS TFP benchmarks already reflect whatever productivity benefits flow from typical innovation levels in competitive sectors. Unless network innovation is demonstrably higher, there is no basis to expect superior productivity.

6.29 **Example:** Equal R&D intensity across sectors cannot support a differential productivity assumption: if Sector A and Sector B both invest 3% of revenue in R&D, the investment is equally matched and no productivity advantage can be attributed to it. Only a material difference in R&D intensity – say 5% against 3% – could rationally ground such an assumption. GEMA may respond that absolute spend matters as much as intensity, and that the quality of investment focus drives differential outcomes; but that argument requires evidence of both, which GEMA has not provided.

6.30 **Evidence:** Frontier Report;<sup>165</sup> absence of comparative R&D analysis in FD.

*Reason 3: The CMA's Approach in RIIO-2*

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<sup>164</sup> Tab D1: First Witness Statement of Carly Evans, 28 February 2026, para 7.6.

<sup>165</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026, Sections 5.2-5.3, paras 5.7-5.13.

6.31 At RIIO-2, GEMA applied an explicit 'innovation uplift' to OE based on essentially identical reasoning: innovation funding should drive additional productivity.

6.32 The CMA rejected this, finding –

'GEMA's approach was to assume that the benefits from innovation funding were incremental... GEMA did not submit evidence showing that it had sought to quantify the extent of the double-count nor compare the existing levels of R&D spending in the energy network companies with R&D spending in the comparator sectors or wider economy, nor the proportion of R&D that was spent on cost reduction.'<sup>166</sup>

'Furthermore, there is no evidence in the FD that GEMA took qualitative account of these factors... Based on this evidence, our conclusion is that GEMA erred when it assumed that the innovation uplift was entirely incremental.'<sup>167</sup>

6.33 The CMA's reasoning applies with equal force to RIIO-3 –

- (a) GEMA again assumes innovation benefits are incremental (not already in costs);
- (b) GEMA again provides no evidence on comparative R&D intensity;
- (c) GEMA again provides no analysis of cost-reduction vs other innovation objectives.

6.34 The only difference between RIIO-2 and RIIO-3 is labelling –

- (a) RIIO-2: explicit '*innovation uplift*' quantified at 0.1-0.2%,<sup>168</sup>
- (b) RIIO-3: implicit innovation contribution within qualitative justification for 1.0%.

6.35 The substance is identical. GEMA is using innovation funding to justify OE above what quantitative evidence supports. The CMA found this wrong in 2021. It remains wrong in 2025.

6.36 **Evidence:** CMA RIIO-2 Final Determination Volume 2B;<sup>169</sup>

*'7.551 GEMA's approach was to assume that the benefits from innovation funding were incremental, based on its view that this funding was unique to the energy network companies. While GEMA says that it considered the risk of double-counting, GEMA did not submit evidence showing that it had sought to quantify the extent of the double-*

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<sup>166</sup> Tab MR1/2/006: CMA, ELMA (Volume 2B), 28 October 2021, para 7.551.

<sup>167</sup> Tab MR1/2/006: CMA, ELMA (Volume 2B), 28 October 2021, paras 7.551-7.552.

<sup>168</sup> Tab MR1/2/006: CMA, ELMA (Volume 2B), 28 October 2021, paras 7.815-7.817.

<sup>169</sup> Tab MR1/2/006: CMA, ELMA (Volume 2B), 28 October 2021, paras 7.551-7.552.

*count nor compare the existing levels of R&D spending in the energy network companies with R&D spending in the comparator sectors or wider economy, nor the proportion of R&D that was spent on cost reduction. Furthermore, there is no evidence in the FD that GEMA took qualitative account of these factors. GEMA said that its lack of quantification of possible double-counting with R&D spending in the wider economy was not an error in itself (see paragraph 7.543). While it would have been difficult for GEMA to precisely quantify the overlap, we find that GEMA should have at least taken account of this factor qualitatively.*

*7.552 Based on this evidence, our conclusion is that GEMA erred when it assumed that the innovation uplift was entirely incremental.'*

See also: Frontier Report.<sup>170</sup>

#### *Legal Characterisation*

6.37 Reliance on innovation funding without addressing these three points is legally untenable –

- (a) **An unresolved evidential deficit treated as settled:** The CMA at RIIO-2 rejected an innovation uplift on materially identical reasoning – that the benefits were not incremental and were already reflected elsewhere in the price control. GEMA has provided no explanation of how its RIIO-3 position differs from the approach the CMA found to be wrong. A regulator that repeats a methodology already found to be in error, without distinguishing it or supplying the missing evidential foundation, misdirects itself on the applicable legal and analytical framework contrary to section 23D(4)(e).
- (b) **A conclusion the evidence cannot support:** Relying on innovation funding to justify a higher OE assumption requires, at minimum, evidence that the benefits are not already captured in baseline cost allowances, that network innovation materially exceeds economy-wide levels such that a sector-specific uplift is warranted, and that the innovation in question is directed at cost reduction rather than new or changed outputs. GEMA has adduced no such evidence. A conclusion reached without evidential foundation for each of those propositions is one no regulator properly directing itself could rationally have reached, and is wrong in law contrary to section 23D(4)(e).
- (c) **A question the CMA left open at RIIO-2 that GEMA answered at RIIO-3 without evidence:** Whether innovation benefits are already embedded in

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<sup>170</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026, Section 5.3, paras 5.12-5.13.

company baselines is a directly material question going to the double-counting issue – and one the CMA identified as unresolved at RIIO-2. By proceeding to apply the same adjustment at RIIO-3 without addressing it, GEMA failed to take into account a consideration it was bound to address before reaching its conclusion, contrary to section 23D(4)(e). To the extent that unresolved double-counting produces an allowance that does not properly reflect the costs WWU requires to finance its licensed activities, GEMA also failed properly to have regard to its duty under section 4AA(2)(b) contrary to section 23D(4)(a) or, alternatively, failed to give that duty appropriate weight contrary to section 23D(4)(b).

### **Sub-Ground 3.3: IT&T Investment Does Not Justify Higher OE**

#### *GEMA's Position*

6.38 GEMA states –

'We have allowed over £2.2bn of costs for IT&T investments across the ET, GT and GD sectors at Final Determinations, with a further almost £900m allowed for D&D. Combined, this accounts for 11% of ex ante totex allowances in RIIO-3...We view the high level of stated ambition, combined with the level of funding provided, as supportive of setting a stretching but achievable OE target in RIIO-GD3.<sup>171</sup>

6.39 This argument replicates all three errors from the innovation analysis.

#### *IT&T Benefits Already in Baselines*

6.40 Companies justified the £2.2bn IT&T investment in business plans by explaining what outputs and efficiencies it would enable.<sup>172</sup> Those efficiencies are incorporated in business plan cost forecasts.

6.41 As summarised at paragraphs 6.21 - 6.22 above, paragraphs 8.8-8.11 of the First Witness Statement of Carly Evans explains that any efficiency benefits expected from WWU's IT systems are already fully embedded into its baseline business plan cost forecasts.<sup>173</sup> GEMA fundamentally misinterprets the basis of WWU's business plan by incorrectly assuming that this IT&T funding will generate extra productivity gains on top of the efficiencies that have already been accounted for. These projected efficiency benefits were already reflected in WWU's business plan cost forecasts for the relevant activities. The IT&T investment is not additional efficiency potential on top of WWU's forecasts.

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<sup>171</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, para 8.53.

<sup>172</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, para 8.53.

<sup>173</sup> Tab D1: First Witness Statement of Carly Evans, 28 February 2026, paras 8.8-8.11.

6.42 This is the same double-counting issue as with innovation. If IT&T benefits are in baseline costs and also used to justify higher OE, companies pay twice for the same efficiency.

6.43 **Evidence:** First Witness Statement of Carly Evans;<sup>174</sup> WWU Business Plan in the justification for IT&T investment.<sup>175</sup>

*No Comparative Evidence on IT&T Spending*

6.44 GEMA provides no analysis of whether GDNs' IT&T intensity, as a proportion of totex, is high by economy-wide standards – and without that benchmarking, the assumption of above-average technology-driven productivity gains is unsubstantiated.

6.45 Without evidence that 11%<sup>176</sup> is unusually high, there is no basis to assume networks will achieve above-economy productivity from IT investment. The comparator sectors in EU KLEMS also invest in IT – their TFP growth already reflects whatever productivity benefits flow from typical IT investment levels.

6.46 **Evidence:** Frontier Report.<sup>177</sup>

*AI Speculation*

6.47 GEMA specifically mentions '*ambitions to leverage AI and machine learning*'.<sup>178</sup> However –

(a) **AI already in the forecasts:** Network companies are actively exploring AI applications and committed to exploiting efficiency opportunities where they arise. However, the OBR's 0.5% average TFP projection for 2024-30 already incorporates its baseline AI assumptions. GEMA cannot use AI as a qualitative reason to set OE above that forecast when the expected AI dividend is already reflected within it.

(b) **AI benefits comparator sectors more than GDNs:** To the extent AI delivers gains beyond the OBR's central case, those gains will accrue disproportionately to data-intensive, scalable sectors – professional services, financial services, manufacturing – that can automate core workflows. GDNs, whose operations are asset-heavy, geographically dispersed, and physically constrained, are structurally less exposed. Any AI upside therefore raises the

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<sup>174</sup> Tab D1: First Witness Statement of Carly Evans, 28 February 2026, paras 8.1-8.11.

<sup>175</sup> Tab C3.1: WWU, Our Business Plan for 2026-31, December 2024.

<sup>176</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, para 8.53.

<sup>177</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026, Section 5.1, paras 5.7-5.8.

<sup>178</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, para 8.53.

economy-wide TFP benchmark against which networks are measured, not the network-specific efficiency ceiling.

6.48 GEMA reasons that networks will use AI, therefore they can achieve 1.0% productivity. This misses the point entirely. Economy-wide AI adoption means the relevant question is differential impact: will gas networks benefit more than comparator sectors? The answer is almost certainly no. Networks are fundamentally physical infrastructure businesses – digging, laying pipes, managing assets in the ground. These activities offer far less scope for AI-driven productivity than information-intensive sectors like financial services where AI's impact will concentrate. If AI drives the wider economy to 0.5-0.7% TFP growth, networks should be expected to lag that benchmark, not exceed it.

6.49 **Evidence:** Frontier Report;<sup>179</sup> OBR November 2025 outlook.<sup>180</sup>

*Legal Characterisation*

6.50 The IT&T argument fails for identical reasons to innovation –

- (a) double-counting (benefits already in baselines);
- (b) no comparative evidence (network IT spending not shown to exceed economy); and
- (c) speculation rather than evidence (AI benefits uncertain and economy-wide).

6.51 It constitutes the same errors: irrationality, failure to have regard to relevant considerations, and disregard of CMA latest thinking requiring evidence for qualitative factors.

*Regulatory Precedent Does Not Override Evidence*

6.52 GEMA cites recent regulatory precedent: several price controls (PR19, H7, PR24, RIIO-ED2) set OE at or around 1.0%.<sup>181</sup>

6.53 However, regulatory precedent cannot override evidence for two reasons –

- (a) **First – Changing Evidence Base:** Most cited precedents predate recent productivity data downgrades and the accumulation of evidence that the post-

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<sup>179</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026, Annex E.

<sup>180</sup> Tab MR1/2/004: Office for Budget Responsibility, Economic and Fiscal Outlook, 26 November 2025.

<sup>181</sup> Tab A2.1: GEMA, RIIO-3 Final Determinations – Overview Document, 4 December 2025, para 8.23. See also Tab MR1/2/003: Grant Thornton, Second Independent Report on Ongoing Efficiency, November 2025, para 5.24 and Table 4.

GFC slowdown is structural and persistent. Evidence available for RIIO-3 is materially different than evidence available for PR19 (2020) or even RIIO-ED2 (2023).

- (b) **Second – Principle:** Administrative law requires each determination to be decided on its merits based on current evidence. Regulators cannot perpetuate error simply because past determinations made the same assumption or error. If the evidence shows UK productivity is structurally lower than previously assumed, the correct response is to adjust methodology – not mechanically replicate past figures.

6.54 Notably, the CMA's recent PR24 redetermination may represent evolution away from mechanical 1.0% figures. The CMA's PR24 Provisional Determinations reduced the frontier shift assumption from 1.0% to **0.7%**, expressly acknowledging the disconnect between declining UK productivity trends and the mechanical application of a 1% figure – captured in Figure 4.3, tellingly titled *'Falling UK productivity, increasing regulatory frontier shift decisions'*. This is the most recent cross-sector example and directly undermines GEMA's unreflective application of 1.0% in RIIO-GD3.<sup>182</sup>

6.55 **Evidence:** Frontier Report;<sup>183</sup> regulatory precedent is contextual not mechanical.

### Conclusion on Ground 3

6.56 Ground 3 establishes that GEMA's qualitative factors – advanced as justification for setting OE above the quantitative evidence – are fundamentally flawed on multiple independently sufficient bases, each engaging distinct statutory grounds under section 23D –

- (a) **Conceptual error on incentive framing:** Treating OE as a stretching target or incentive mechanism mischaracterises its statutory and analytical function. OE is an estimate of the rate at which a firm operating at the frontier can be expected to reduce its costs – it is a factual premise, not an incentive tool. By proceeding on that mischaracterisation, GEMA misdirected itself on the correct legal and analytical framework contrary to section 23D(4)(e), and its

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<sup>182</sup> Tab MR1/2/012: CMA, Water PR24 References – Provisional Determinations (Volume 1), 9 October 2025, Chapter 4, Table 4.6; and Figure 4.3. The CMA's final determination is due by 17 March 2026, which is after the deadline for this Notice of Appeal. The provisional determinations are nonetheless a material statement of the CMA's current reasoning and are cited on that basis. WWU reserves the right to rely on the final determination in subsequent submissions if it confirms or strengthens the provisional position.

<sup>183</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026, Section 5.5, paras 5.17-5.19 and Annex C.

determination was in consequence based wholly or partly on an error of fact contrary to section 23D(4)(c).

- (b) **Innovation funding double-counting:** The CMA at RIIO-2 found that relying on innovation investment to justify a higher OE assumption was wrong because the benefits were not incremental and were already reflected elsewhere in the price control. GEMA has repeated that adjustment at RIIO-3 without distinguishing its position or supplying the missing evidential foundation. A regulator that repeats a methodology already found to be in error without doing either misdirects itself contrary to section 23D(4)(e). To the extent the resulting double-counting produces an allowance inconsistent with WWU's ability to finance its licensed activities, GEMA failed properly to have regard to its duty under section 4AA(2)(b) contrary to section 23D(4)(a) and failed to give that duty appropriate weight contrary to section 23D(4)(b).
  
- (c) **IT&T investment:** The same analysis applies. The CMA at RIIO-2 found the equivalent IT&T adjustment to be wrong on the same basis – benefits not incremental, already reflected in cost allowances. GEMA has repeated it at RIIO-3 without adducing comparative evidence of a network-specific productivity advantage and without explaining how its position is distinguishable from what the CMA found to be wrong. That is wrong in law contrary to section 23D(4)(e) and based wholly or partly on an error of fact contrary to section 23D(4)(c). Section 23D(4)(a) and (b) are engaged on the same basis as for innovation funding to the extent the double-counting produces an allowance inconsistent with financeability.
  
- (d) **Regulatory precedent as override:** GEMA relied on historical regulatory precedent to displace contrary quantitative and empirical evidence. To the extent that reliance treats prior regulatory decisions as determinative of the correct value rather than as one consideration among others, GEMA fettered its regulatory judgment and misdirected itself on the correct analytical approach contrary to section 23D(4)(e). A regulator that insulates its conclusion from empirical challenge by treating precedent as an override rather than a reference point produces a decision that is wrong in law on that basis alone.

6.57 These qualitative factors cannot rationally support setting OE at 1.0% when all quantitative evidence (Grounds 1-2) points to 0.5% or below.

6.58 The qualitative factors appear to serve as *post-hoc* rationalisation for a predetermined 1.0% figure rather than genuine analysis leading to evidence-based conclusion.

## 7 CUMULATIVE IMPACT AND FINANCEABILITY

### Integration of Grounds

- 7.1 The three grounds above each independently establish that GEMA's 1.0% OE determination is wrong. As Frontier Economics concludes,<sup>184</sup> a 1.0% OE parameter is not compatible with the evidence of the UK's sustained and ongoing structural productivity weakness.
- (a) Ground 1 demonstrates that the insulation hypothesis on which it rests is theoretically unsound and empirically unsubstantiated.
  - (b) Ground 2 demonstrates that the quantitative methodology contains multiple factual errors that systematically bias the range upward.
  - (c) Ground 3 demonstrates that the qualitative adjustments used to justify the selection of 1.0% within that range are each vitiated.
- 7.2 Each ground is sufficient to render the determination wrong. Cumulatively, they disclose a systematic failure to follow an evidence-based regulatory process.

### Cumulative Assessment

- 7.3 In its RIIO-2 determination, the CMA confirmed at paragraph 3.97 that it considered whether the cumulative effect of immaterial errors could have a highly significant impact on the price control.<sup>185</sup> The CMA should adopt the same approach here. The individual errors identified in this appeal do not fall to be assessed in isolation: their combined effect on WWU's allowed revenues is a material consideration that the CMA is required to weigh in determining whether the determination as a whole was wrong on one or more of the section 23D(4) grounds. The WWU Judgment confirms at [161] that the financing duty under section 4AA(2)(b) requires regard to the position of individual licence holders, not merely a sector-wide assessment.
- 7.4 The effect of an arbitrarily high OE is to set totex allowances too low – not to increase incentive strength. The gap between GEMA's 1.0% assumption and the evidence-based level is not a rounding difference. Because OE is applied annually and compounds across the RIIO-GD3 period, an overstatement that may appear modest in any single year becomes structurally embedded in the allowance, producing a cumulative revenue shortfall that grows progressively larger and cannot be corrected within the period.

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<sup>184</sup> Tab MR1/1: Frontier Economics, Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3, 2 March 2026, Section 4.1, paras 4.3-4.10.

<sup>185</sup> Tab F2.1: WWU Judgment at [28].

- 7.5 The OE determination does not operate in isolation. Under the RIIO framework, GEMA aims to set totex allowances that balance consumer protection against the need to ensure companies are sufficiently funded to deliver required outputs. The 1.0% OE assumption does not operate against a neutral baseline: WWU also faces a substantial catch-up efficiency reduction on its totex – materially exceeding the burdens imposed in RIIO-GD2 – despite a weaker productivity outlook, alongside a cost of equity set at the conservative end of the available range. The cumulative effect of these concurrent pressures is greater than the sum of their individual parts. The financing duty required GEMA to assess them in aggregate. It did not do so.
- 7.6 WWU does not assert that the OE determination alone has produced a financeability crisis. The point is narrower and legally precise: GEMA failed to consider the cumulative effect of its determinations on WWU's ability to finance its licensed activities, as required by section 4AA(2)(b). By addressing the OE parameter in isolation, without assessing its interaction with the catch-up efficiency challenge and the conservatively-set cost of equity, GEMA failed properly to have regard to that duty contrary to section 23D(4)(a) and failed to give it appropriate weight contrary to section 23D(4)(b). That failure was one of process but it calls into question the outcome: the financing duty required a holistic assessment, and none was undertaken. Correcting the OE to an evidence-based level is not a choice between customers and shareholders – it is the means by which GEMA discharges its duty to prevent determinations that are individually defensible in isolation from combining into a revenue shortfall that serves neither.

## **8 RELIEF SOUGHT**

### **Primary Relief**

- 8.1 For the reasons set out above, WWU respectfully requests that the CMA –
- (a) finds that GEMA's determination of 1.0% OE is wrong within the meaning of section 23D Gas Act 1986; and
  - (b) substitutes a determination of no higher than 0.5% OE for RIIO-GD3.
- 8.2 **Basis for 0.5% –**
- (a) OBR November 2025 forecast (average TFP 2024-2030);
  - (b) long-run EU KLEMS analysis (1970-2019);
  - (c) GTh's corrected forecast analysis;
  - (d) conservative approach given forecast uncertainty.
- 8.3 WWU submits that correcting OE to no higher than 0.5% would –
- (a) remedy the identified errors;
  - (b) fulfil GEMA's section 4AA duties to WWU;
  - (c) ultimately benefit consumers by avoiding financing cost spirals;
  - (d) represent materially better decisions clearly available to the CMA in accordance with the WWU Judgment standard.

### **Further Alternative Relief**

- 8.4 In the alternative, WWU seeks remittal to GEMA with a direction to reconsider its OE determination by correcting the specific methodological errors identified in OE Grounds 1, 2 and 3 of this Notice of Appeal, including in particular the errors in productivity forecasting, comparator selection, and the treatment of macroeconomic evidence, so as to produce a determination that properly discharges GEMA's financing duty under section 4AA(2)(b) of the Gas Act.

## 9 CONCLUSION

- 9.1 WWU submits that GEMA's determination of a 1.0% OE requirement for RIIO-GD3 was wrong within the meaning of section 23D(4) of the Gas Act on the following grounds.
- 9.2 **Ground 1 – The insulation hypothesis is wrong in law and fact:** The proposition that GDNs are insulated from economy-wide productivity pressures and can systematically outperform competitive benchmarks is theoretically unsound and empirically unsubstantiated. By proceeding on that basis, GEMA misdirected itself on the correct analytical framework contrary to section 23D(4)(e), and its determination was in consequence based wholly or partly on an error of fact contrary to section 23D(4)(c). The CMA identified at RIIO-2 that the hypothesis was unproven on the evidence then available. GEMA has repeated it at RIIO-3 without supplying the missing evidential foundation and without identifying any material change in circumstances. An evidential deficit identified by the CMA and unremedied at RIIO-3 remains a decision based on an error of fact: wrong then, wrong now.
- 9.3 **Ground 2 – The quantitative methodology contains multiple independently sufficient errors:** GTh's analysis misinterprets OBR data, relies on outdated forecasts, unjustifiably excludes the substantial body of post-GFC productivity evidence, and applies flawed period selection. Each error independently constitutes a decision based wholly or partly on an error of fact contrary to section 23D(4)(c), and a misdirection on the correct analytical approach contrary to section 23D(4)(e). Together they systematically bias the plausible range upward, contaminating both its bounds and the selection of 1.0% within it. By structuring its methodology to exclude the most probative evidence of current productivity trends without adequate justification, GEMA also failed properly to have regard to its duty under section 4AA(2)(b) to have regard to financeability contrary to section 23D(4)(a), and failed to give that duty appropriate weight contrary to section 23D(4)(b).
- 9.4 **Ground 3 – The qualitative adjustments are each vitiated:** Treating OE as a stretching target or incentive mechanism mischaracterises or misdirects its statutory and analytical function, contrary to section 23D(4)(e). Relying on innovation and IT&T investment to justify a higher figure repeats an error the CMA found to be wrong at RIIO-2 on the basis that the benefits were not incremental and were already reflected in baseline allowances; GEMA has provided no explanation of how its RIIO-3 position is distinguishable, contrary to section 23D(4)(e) and section 23D(4)(c). The absence of any comparative analysis or quantification of the alleged benefits means GEMA failed to give appropriate weight to the considerations that would be required to sustain those adjustments, contrary to section 23D(4)(b).
- 9.5 **Cumulative effect:** Each ground independently vitiates the determination. Cumulatively, as the CMA confirmed in its RIIO-2 determination at paragraph 3.97, it will consider whether the

cumulative effect of errors has a highly significant impact on the price control;<sup>186</sup> the same approach applies here. Taken together, the grounds demonstrate a systematic failure to follow an evidence-based regulatory process, with GEMA selecting 1.0% in a manner irreconcilable with the available evidence.

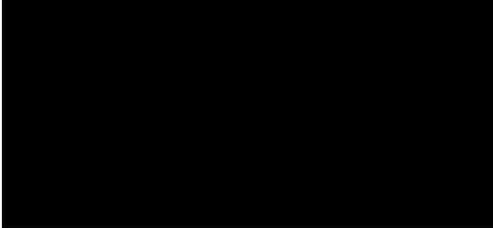
- 9.6 **Relief:** WWU requests that the CMA quashes the determination and substitutes an OE requirement of no more than 0.5%, which is supported by independent forecasts and long-run productivity data and is the figure that a correct application of the evidence-based framework produces. In the alternative, WWU requests that the CMA quashes the determination and remits it to GEMA for redetermination in accordance with such directions as the CMA considers appropriate, including directions requiring GEMA to discharge its duty under section 4AA(2)(b) by assessing the financeability consequences of any redetermined figure in the round.

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<sup>186</sup> Tab F2.1: WWU Judgment at [28].

**PART IV. STATEMENT OF TRUTH**

The Appellant believes that the facts stated in this Notice of Appeal are true.



Signature of Authorised Representative

Name of Authorised Representative: **Graham Edwards**

Date: **3 March 2026**

for and on behalf of Wales & West Utilities Limited

**ANNEX 1 – SUMMARY OF SUPPORTING EVIDENCE**

First Witness Statement of Carly Evans (Tab D1)
First Witness Statement of Matthew Roberts (Tab E1), together with Frontier Economics, 'Assessment of GEMA's Approach to Setting Ongoing Efficiency at RIIO-3' (Tab MR1/1)

**Note:** Where we refer to 'Tab XX' in this Notice of Appeal this is a reference to the tab reference and document in the Bundle as listed in the Bundle Index.

The following documents, which appear in Exhibit MR1 to the First Witness Statement of Matthew Roberts were unavailable to GEMA at the time that it made its Final Determination for RIIO-GD3, although most were available by the time that it made the licence modification decision on 3 February 2026 which is the subject of this appeal. We confirm that GEMA would have been entitled to have regard to these documents had they been available at the time of the Final Determination or the licence modification decision.

Ref	Document	Date
MR1/2/031	(CMA) Technology, productivity and competition	10 December 2025
MR1/2/034	(BoE) Forecast Evaluation Report	23 January 2026
MR1/2/035	(BoE) Monetary Policy Report	5 February 2026
MR1/2/045	(Keynes, S.) Would a 'mild zombie apocalypse' be a good thing for the UK economy	15 January 2026
MR1/2/046	(Resolution Foundation) New Year Outlook 2026	5 December 2026
MR1/2/071	(Fleming, S. and Strauss, D.) Is the UK on the cusp of a productivity revival?	29 January 2026
MR1/2/072	(Keynes, S.) Where is AI showing up in the productivity data?	5 February 2026
MR1/2/078	(Boulette, A.) Most workers spend 3+ hours per week cleaning up AI workslop	14 January 2026
MR1/2/079	(Coderabbit) Our new report: AI code creates 1.7x more problems	17 December 2025
MR1/2/080	(Fleming, S. and Romei, V.) US to extend productivity lead on back of AI boom, say economists	4 January 2026

In addition to this list, the document at Tab F2.5, entitled 'Office for Budget Responsibility, Economic and Fiscal Outlook, 3 March 2026' was not available to GEMA at the time that it made the Final Determination or the licence modification decision giving effect to it.

## ANNEX 2 – CHRONOLOGY

Date	Event
1 April 2026 – 31 March 2031	Price control period for RIIO-GD3.
29 September 2022	Publication of an open letter entitled 'Future Systems and Network Regulation' setting out the strategic context for future network regulation, inviting stakeholder views on the framework for the next price controls.
10 March 2023 – 20 May 2023	Consultation on the Future Systems and Network Regulation framework.
26 October 2023	Publication of the decision for the framework for RIIO-GD3.
13 December 2023 – 7 March 2024	RIIO-GD3 Sector Specific Methodology consultation for the methodologies to apply the new price control framework.
18 July 2024	Publication of the RIIO-GD3 Sector Specific Methodology decision.
18 July 2024	Publication of RIIO-GD3 Business Plan guidance.
31 July 2024	Submission of draft Business Plan Data Templates and supporting commentary.
14 August 2024	Submission of draft Business Plan Financial Models.
30 August 2024	Submission of draft Network Asset Risk Metric workbooks.
September 2024	Licence Drafting Working Group commence review of RIIO-GD3 Licences.
30 September 2024	Re-publication of RIIO-GD3 Business Plan guidance.
11 December 2024	Submission of final Business Plans (including Financial Models and Data Templates).
18 December 2024 – 11 February 2025	Call for evidence on the electricity transmission, gas transmission and gas distribution business plans for RIIO-GD3 from stakeholders.
19 December 2024	GEMA's formal commission to the National Energy System Operator (NESO) requesting advice on the alignment of National Gas Transmission's RIIO-GT3 Business Plan with the long-term energy system needs.
1 July 2025	Publication of RIIO-GD3 Draft Determinations.
1 July 2025	RIIO-GD3 Draft Determination Investor Call.
1 July 2025 – 27 August 2025	Consultation on the RIIO-GD3 Draft Determinations.
30 July 2025 – 17 September 2025	RIIO-GD3 initial licence consultation. This included subsidiary documents comprising of the draft – <ul style="list-style-type: none"> <li>• GD3 Price Control Financial Models</li> </ul>

## NON-CONFIDENTIAL

Date	Event
	<ul style="list-style-type: none"> <li>• GD3 Price Control Financial Models Guidance</li> <li>• GD3 Price Control Financial Handbook.</li> </ul>
4 December 2025	Publication of RIIO-GD3 Final Determinations.
4 December 2025	RIIO-GD3 Final Determinations Investor Call.
16 December 2025 – 16 January 2026	Statutory consultation on proposed changes to the licence conditions requires to implement the RIIO-GD3 price control.
2 February 2026 – 26 February 2026	Consultation of the proposed changes on the associated documents – <ul style="list-style-type: none"> <li>• Decarbonisation project development 'use it or lose it' (UIOLI) governance document.</li> <li>• Small decarbonisation projects re-opener governance document.</li> <li>• Collaborative street works financial output delivery incentive (ODI-F) governance document.</li> <li>• Vulnerability and carbon monoxide initiatives UIOLI governance document.</li> <li>• Terms of reference for the Digital Platform for Leakage Analytics working group.</li> </ul>
3 February 2026	Publication, in final form, of – <ul style="list-style-type: none"> <li>• GD3 Price Control Financial Model.</li> <li>• GD3 Price Control Financial Handbook.</li> </ul>
1 April 2026	Proposed commencement date for RIIO-GD3 price control.

## ANNEX 3 – GLOSSARY

TERM	MEANING
Act or the Gas Act	The Gas Act 1986 (as amended).
CMA	The Competition and Markets Authority.
EU KLEMS	A long-running, European Commission-supported research database that provides industry-level growth accounting statistics for the UK (among other countries).
Gas Distribution Networks (or GDNs)	GDNs transport gas from the National Transmission System to final consumers and to connected system exit points. There are eight network areas managed by four companies that are subject to RIIO price controls.
GEMA/Ofgem	The Gas and Electricity Markets Authority (also referred to as the Authority).
Net Zero	Achieving a balance between the amount of greenhouse gas emissions produced and the amount removed from the atmosphere.
Network Innovation Allowance (or NIA)	A baseline allowance provided by GEMA through its price controls which each GDN receives to fund innovative projects as part of its price control settlement. The NIA funds research, development and demonstration projects, which, for example, cover commercial, technological and operational innovation, and is focused on the energy system transition and/or addressing consumer vulnerability.
RIIO	Revenue = Incentives+Innovation+Outputs.
RIIO-GD1 (or GD1)	The price control for gas distribution companies for the period 1 April 2013 – 31 March 2021.
RIIO-GD2 (or GD2)	The price control for gas distribution companies for the period 1 April 2021 – 31 March 2026.
RIIO-GD3 (or GD3)	The price control for gas distribution companies for the period 1 April 2026 – 31 March 2031.
Real Price Effects (or RPE)	A regulatory mechanism used in the price control to provide additional totex allowances to cover expenditure that is expected to rise by more than inflation.

TERM	MEANING
Risk Free Rate (or RFR)	The expected return on a zero beta portfolio used by GEMA in the Capital Asset Pricing Model (CAPM) to calculate the cost of equity.
Strategic Innovation Fund (or SIF)	An innovation funding stream provided by GEMA which GDNs can apply for. It is additional to the NIA and is focused on the achievement of Net Zero and the energy system transition, whilst delivering net benefits to energy consumers.
System Architecture	System Architecture covers a range of processes which ensure 1:20 demand requirements can be met, including forecasting future customer demand requirements, identifying physical network investment required to support load growth, booking NTS Flat Capacity to ensure sufficient gas is available at the National Grid Offtakes, putting in place commercial agreements with significant sites and developing and implementing operational strategies for daily balancing.
System Balancing	System Balancing happens on a Local Distribution Zone ( <b>LDZ</b> ) and National Transmission System ( <b>NTS</b> ) basis for each gas day. The LDZ process begins with production of a demand forecast from which storage and intake requirements are calculated. Volumes for intake are booked with NTS and controlled (by the GDN) via the NTS Offtakes. Processes are documented in the Uniform Network Code.
System Operation	System Operation is the action of operating the gas network to ensure demands and supplies are balanced as described under 'System Balancing' above.
Total expenditure (totex)	Totex includes capital expenditure (capex), operating expenditure (opex) and replacement expenditure (repex).
Total Market Return (or TMR)	The inflation-adjusted (real) expected return for an investor who invests in a diversified market portfolio used by GEMA in the Capital Asset Pricing Model (CAPM) to calculate the cost of equity.
WWU	Wales & West Utilities Limited.