

BEFORE THE COMPETITION AND MARKETS AUTHORITY

IN THE MATTER OF AN APPEAL UNDER

SECTION 23B OF THE GAS ACT 1986

BETWEEN:-

- (1) CADENT GAS LIMITED**
- (2) NORTHERN GAS NETWORKS LIMITED**
- (3) SCOTLAND GAS NETWORKS PLC**
- (4) SOUTHERN GAS NETWORKS PLC**
- (5) WALES & WEST UTILITIES LIMITED**

Appellants

and

THE GAS AND ELECTRICITY MARKETS AUTHORITY

Respondent

JOINT REPLY TO GEMA'S RESPONSE

A. INTRODUCTION

1. This is the joint reply submitted on behalf of Cadent, NGN, SGN and WWU (the Appellants) to GEMA's response to the appeals dated 23 April 2026 (the Response) in relation to the joined OE ground (Ground A).¹

B. OVERARCHING POINTS

2. GEMA's Response misstates both the Appellants' case and GEMA's own reasoning in its FDs. In several places, GEMA now advances arguments that do not appear in the FDs, or retreats from the reasoning it relied on at the time. We address overarching points on this theme below.
3. GEMA effectively argues that its choice of OE "*cannot be said to be wrong*" provided that the CMA is satisfied that GEMA followed a proper process (Response §§6 and 8). GEMA appears to assume that where it took evidence into account (in the sense of giving it ostensible consideration or mentioning it) and exercised regulatory discretion, its approach cannot be subject to legitimate challenge or revision by the CMA. In doing so, GEMA treats the existence of a process as a substitute for the quality of the reasoning and evidence

¹ In accordance with the conditions of permission set out by the CMA on 24 April 2026, this Reply addresses new points in GEMA's Response (i.e. that were not in FDs or where GEMA has changed its position in FDs) and mischaracterisations of the Appellants' Notices of Appeal ("NoAs"). The Appellants join issue with GEMA on its Response. Insofar as any point is not addressed below it should not be taken as admitted. In particular, the Appellants adopt the defined terms used in the Response, without thereby making any admissions.

underpinning the outcome. GEMA is wrong. The exercise of GEMA’s regulatory judgement is not unbounded. As specifically stated in the WWU judgment, the CMA is required to make its own assessment as to what appropriate weight to give to the various objectives and, in that context, assess whether GEMA’s decision in light of all the evidence was wrong, including whether there was a materially better alternative available to it. The specialist expertise of the CMA allows for this more intensive scrutiny of GEMA’s evaluation and judgement. See paragraphs 53 to 55 below.

4. GEMA characterises the errors identified by the Appellants as concerning “*granular decisions*” (Response §7). They are not. They go to the fundamental question of whether a 1% OE parameter is reconcilable with the evidence before GEMA at the time of its FDs and whether GEMA’s reasoning, properly examined, discloses the errors alleged under s.23D(4) GA86.² In this regard, a proper characterisation of the principal questions the GDNs are asking the CMA to assess is whether:
 - (a) A 1% OE parameter is compatible with, and reconcilable to, the very low rates of productivity growth observable in the relevant benchmarks since the GFC and forecast over the RIIO-3 period (Sub-Ground A1).
 - (b) If GEMA’s decision to set the 1% OE parameter places reliance on its assumption that GDNs are insulated from productivity slowdowns in the wider economy (and/or GT’s comparator sectors), whether that assumption is proven and correct, and/or could justify an OE parameter as high as 1% (Sub-Ground A2).
 - (c) It was wrong to move the lower bound of GEMA’s “plausible” range up from 0.1% to 0.7%, and in doing so, consider any OE parameter below 0.7% implausible, despite quantitative evidence to the contrary (Sub-Ground A3).
 - (d) The “qualitative factors” cited by GEMA in the FDs can alone justify the selection of a 1% OE parameter, materially above the level the quantitative evidence supports (Sub-Grounds A4 and A5).
5. At various points in its Response, GEMA seeks to mischaracterise the overall appeals (see for example, paragraphs 17, 20 to 21 and 42). The Appellants’ central case is that the overwhelming weight of economic evidence simply does not support an OE parameter of 1%. Accumulating and sustained economic evidence since the GFC shows that the scope for GDNs to achieve OE improvement in the current economic climate is materially lower than 1%. GEMA’s adoption of a 1% OE parameter is not reconcilable with this evidence.
6. GEMA’s Response repeatedly tries to justify the 1% OE parameter with post-hoc rationalisation, as well as unquantified qualitative assertion rather than evidence (see for example, paragraphs 28, 32 to 35 and 45). It offers no new evidence to support a 1% OE parameter. In fact, the GT Appeal Report, commissioned by GEMA, shows the opposite: the corrected OBR/BoE productivity CAGR for 2026-2030 is 0.58%, not 1.06% as previously stated (GT Appeal Report Table 1) and relied on by GEMA in support of the 1% OE parameter (FDs §8.49). Looking at the full OE period of 2024-2030, the corrected figure is even lower,

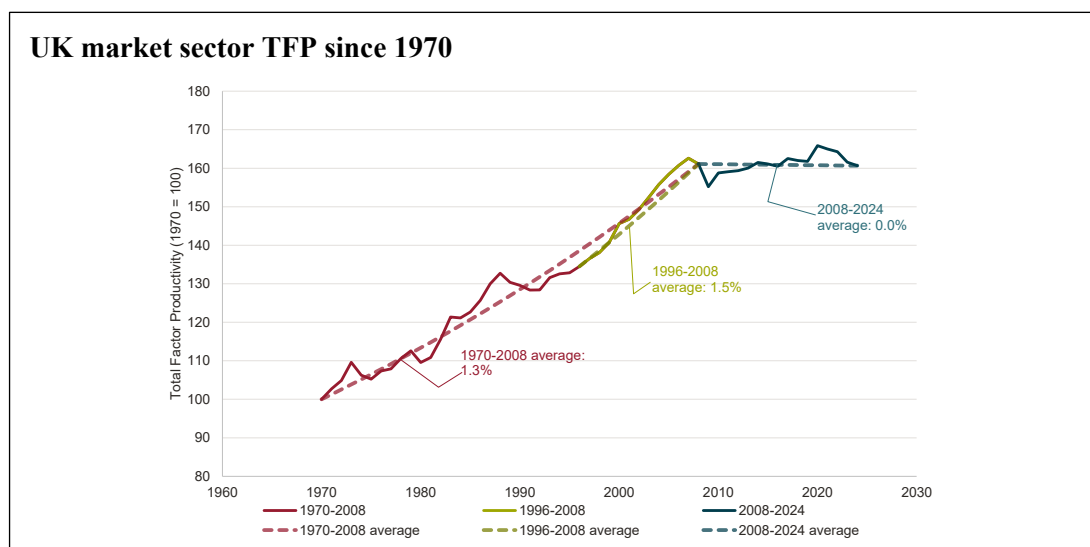
² In terms of matters to which GEMA was not able to have regard (s.23D(3)(a) GA86), such as the CMA’s FDs in PR24 and subsequent updates to the BoE/OBR forecasts, these further confirm that a 1% OE parameter is not reconcilable with the evidence. GEMA is not entitled to add *post-hoc* reasoning that is not in response to the Appellants’ appeals.

at 0.43%.³ This concession confirms that GEMA’s decision was based on erroneous data and that the correctly-interpreted independent forecasts were incompatible with a 1% OE parameter.

7. Since the submission of the NoAs, the CMA’s own Final Determinations in PR24 (“**PR24 FDs**”) contain a comprehensive assessment of frontier shift and confirm that the post-GFC productivity slowdown justifies a lower level of frontier shift in regulated sectors. The CMA found that a substantial and durable slowdown in productivity since the GFC, affecting the majority of sectors within the economy, was a reason to choose a lower level of frontier shift (PR24 FDs §§4.927-928). Moreover, it found that downward revisions to OBR and BoE forecasts were further reasons to reduce the frontier shift figure relative to its Provisional Determinations (“**PDs**”) (PR24 FDs §§4.930-937).

C. SUB-GROUND A1

8. GEMA correctly identifies that a central issue in this appeal is whether a 1% OE parameter is compatible with (i) relevant benchmarks of productivity growth since 2008 and (ii) independent forecasts of productivity growth over the RIIO-3 period.
9. In its Response, GEMA adopts new arguments that: the flatlining of productivity growth post-GFC (outlined in the chart below) is akin to normal “*fluctuation*”; the recent data has been abnormally impacted by “*exceptional events*”; and there is no reason for a regulator to extrapolate forward from the most recent post-GFC period to the RIIO-3 period (§46, relying on the GT Appeal Report).⁴



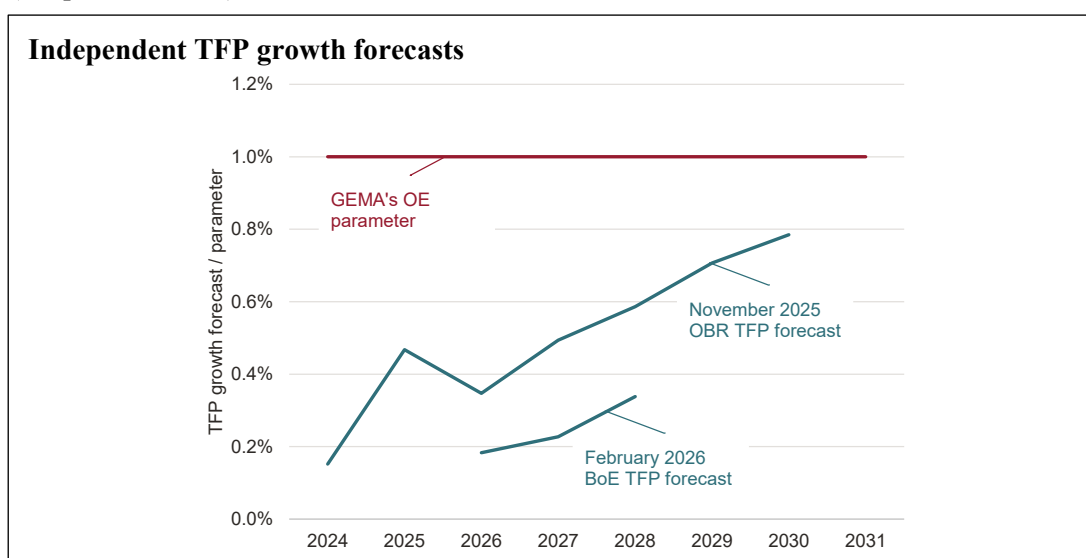
10. The Appellants’ position is that GEMA’s reading of this data is untenable. Setting the OE parameter requires a regulator to assess the scope for ongoing productivity growth by reference to relevant benchmarks. Those benchmarks clearly demonstrate that productivity

³ Including the 2024 and 2025 years (which are included in the period which GEMA applies OE to (NERA Report §18)) in the calculation brings down the CAGR due to low productivity growth in those years reported by both OBR and BoE. Even when relying on the March 2025 OBR figures, GT could only have correctly estimated a figure of 0.6% over 2024-2030. Sources: Office for Budget Responsibility, November 2025 Economic and fiscal outlook - charts and tables: Chapter 2.5; Bank of England, Monetary Policy Report February 2025: Table 1: Decomposition of estimated potential supply growth (a).

⁴ GT Appeal Report, Section 2.

growth in the UK has been persistently low since the GFC and is forecast to remain similarly low over the RIIO-3 period. This is not a short-term fluctuation, as GEMA now suggests (Response §46.1, relying on the GT Appeal Report). It is an over 15-year, structural break in productivity growth reflected in long-term historical productivity trends in GT’s comparator sectors and the whole economy, and in the latest OBR and BoE forecasts.

11. Moreover, contrary to GEMA’s characterisation, the Appellants do not argue that the OE parameter should be close to zero and thereby “tethered” to “*historical productivity data relating to just one business cycle*” (Response §47).⁵ Rather their case is simpler: a 1% OE parameter is incompatible with evidence of the sustained UK productivity slowdown. GEMA’s view that complete business cycles carry equal weight regardless of their recency systematically over-weights a pre-GFC ‘cycle’ that is now over 15 years old (1997-2007) and under-weights the low-productivity environment that is continuing into the RIIO-3 period.
12. Further, bearing in mind that the OE parameter for RIIO-3 applies from 2024 to 2030, there is no *actual* data or evidence from 2024-2026 to support GEMA’s assumption that a rapid productivity rebound has already happened in the UK.
13. Accordingly, the Appellants ask the CMA to assess whether GEMA’s choice of an OE parameter can, as GEMA wishes, be defended on the basis that “*there is limited evidence to indicate that the most recent post-GFC period is necessarily more representative of future productivity trends than earlier periods*” (Response §46.2) or whether GEMA was required to set the OE parameter at a level that took proper account of the post-GFC slowdown.
14. Similar points can be made about GEMA’s reading of the latest OBR and BoE forecasts, which sit materially below 1% (as illustrated in the chart below). In its Response, GEMA downplays the relevance of this evidence, dismissing these forecasts as uncertain and mutable (Response §53.1.1) and suggesting the Appellants’ case amounts to an argument that it was irrational for GEMA to do anything but “*slavishly*” set OE in line with external forecasts (Response §53.1.2).



⁵ Each of the GDNs put forward an OE parameter of 0.5% in their BPs. GEMA does not address any of the GDNs’ proposed remedies, such as Cadent’s remedy of 0.5% that is aligned with the longest available averaging period.

15. This mischaracterises the Appellants’ case. We are not arguing that OE should be set directly by OBR or BoE forecasts. Rather, our point is that GEMA’s OE parameter should be consistent with consensus forecasts, which show a return to pre-GFC productivity trends is unrealistic even when factoring in recent trends, such as the impact of AI. This includes the latest OBR data which, correctly interpreted, undermines GEMA’s view that the OE parameter could be selected from towards the top-end of GT’s plausible range.⁶ GEMA’s Response acknowledges this error in its approach at FDs (see paragraph 23 below). GEMA did not properly account for the most recent independent forecast data and had it done so, this would not have supported an OE parameter of 1%.

Historical productivity growth figures

New arguments:

16. GEMA argues that even if there has been a ‘structural break’ in productivity, future productivity growth changes may not follow trends in the post-GFC period (which included exceptional events such as COVID-19, the war in Ukraine and Brexit), as opposed to earlier periods (such as the 1997-2007 period) (Response §§43 to 47, relying on the GT Appeal Report). In making this argument:
- (a) GEMA downplays the productivity slowdown seen over the 15-year period since the GFC by pointing to year-on-year fluctuation in productivity growth and suggesting the post-GFC period is characterised by “*exceptional events*” (Response §46.1). However, two of these events (COVID-19 and the war in Ukraine) fall outside the time period used by GT to undertake its historical productivity analysis (1970-2019), with the COVID-19 period specifically excluded as an outlier. As such, the historical productivity growth figure for the post-GFC period (0.1% for 2008-2019) is not impacted by these events. Moreover, Brexit and the war in Ukraine will continue to have an impact in the RIIO-3 regulatory period, as will new “exceptional events”.
 - (b) GEMA also downplays the importance of recent historical productivity data and introduces a new argument not set out in FDs (but drawing on comments previously made by GT) that “*There is no a priori reason to expect future productivity growth changes to follow past trends*” (Response §46.2). Irrespective of what can be expected *a priori*, the BoE and OBR *do actually expect* the productivity slowdown to continue during RIIO-3. Their forecasts account for recent trends and “exceptional events” that can be expected to have persistent effects. In particular, the OBR’s November 2025 forecast factored in a positive impact of AI (of 0.2%), yet still concluded that “*deep-rooted structural factors will continue to drag on growth*”.⁷ GEMA’s stance is directly at odds with this evidence.

⁶ GEMA also places new focus on Grant Thornton’s broad range of -1.0% to 4.2% (Response §37.3-4; Second McMahon §77 and 233) which was not referenced at all in GEMA’s DD or FD Overview. This broad range was never a meaningful starting point as it lacked credibility and had methodological flaws.

⁷ OBR, Briefing paper No.9 “*Forecasting productivity*” (November 2025).

Mischaracterisation and omission:

17. In relation to the submissions made by Cadent and WWU that GEMA's approach departs from regulatory precedent:
- (a) GEMA selectively references the CMA's RIIO-2 Final Determination (Response §48.1), omitting to mention that the CMA also concluded "*we agree with the appellants that an approach which placed insufficient weight on the lower productivity since 2008 could lead to an overestimate of the appropriate OE challenge*".⁸
 - (b) Cadent did not argue that GEMA should have followed its RIIO-2 approach "*slavishly*" (Response §48.3). Rather, Cadent sought to demonstrate the impact of properly accounting for the lower productivity period post-2008, by simply updating CEPA's RIIO-2 methodology with the latest EU KLEMS data. This update results in an OE parameter well below 1%. Cadent's position is simple: genuine regulatory consistency requires GEMA to properly reflect updated inputs (evidence and data on productivity growth) in setting the OE parameter.⁹ GEMA's change in approach since RIIO-2 (to place less weight on the lower productivity since 2008) is incompatible with the weight of evidence and thereby regulatory practice.

New evidence:

18. Since the submission of the NoAs, in its PR24 FDs, the CMA recognised the impact of the productivity slowdown on the wider economy, including on the comparator sectors used to assess productivity trends for regulated sectors. It went on to specifically reflect the lower UK wide productivity growth in the 2009 to 2019 period in its determination on the level of frontier shift:

"...the EU KLEMS data showed that most sectors had been affected by a substantial and durable slowdown in productivity since the GFC. This slowdown had been observed in the majority of sectors within the economy, including those traditionally used by Ofwat and other utility regulators to assess productivity trends and set the frontier shift... Further, this slowdown has affected most sectors to some degree, including the water sector. Many of the sectors which the water sector's supply chain depends upon have seen low productivity growth. Therefore, given there has been lower UK wide productivity growth in the 2009 to 2019 period, our view is that this would be a reason to choose a lower level of frontier shift relative to the CMA PR24 PD level..." (PR24 FDs §§4.927-928)

19. The CMA's PR24 FDs are a recent, detailed, and directly relevant precedent that the slowdown in productivity since the GFC will continue to impact the rate of productivity growth in regulated sectors and that this ought to be reflected in regulatory decisions on the level of OE. The CMA's own findings on the direction and weight of the productivity evidence (based on EU KLEMS data) confirm that the structural break in productivity justifies a lower OE rate and directly contradict GEMA's decision to set the OE parameter at 1%. The

⁸ CMA (28 October 2021), Final determination Volume 2B, §7.80.

⁹ Cadent Notice §99(f).

Appellants do not advocate applying the PR24 methodology to RIIO-3. The point is directional only.

Forecasts of productivity improvements

Mischaracterisation:

20. GEMA claims that Cadent and SGN “*in essence argue that it was irrational for GEMA to do anything but set the OE rate in line with external forecasts of future economy-wide productivity*” (Response §53.1) and the logical consequence of their arguments is that GEMA would be required “*slavishly to follow such forecasts*” (Response §53.1.2).
21. This is a fundamental mischaracterisation of their appeals (and inconsistent with the remedies Cadent, SGN and the other GDNs propose).¹⁰ Rather, the crux of Cadent and SGN’s arguments is that a 1% OE parameter cannot reasonably be reached once independent forecast evidence is properly taken into account. Independent forecasts are highly relevant sources of data (and recent historical mis-forecasting by the OBR has almost exclusively *overestimated* future productivity, a point omitted by GEMA at Response §53.1.1). All such forecasts (taken across the relevant OE period) are below even GEMA’s lower bound of 0.7%, providing significant evidence that the economy-wide productivity slowdown is likely to persist. They therefore do not support an OE parameter of 1%.

New argumentation:

22. GEMA now re-characterises FDs §§8.47-48 as having been directed only at the question of whether a single forecast update should mechanistically change the OE level between DDs and FDs, rather than the question of what weight should be given to independent forecasts more broadly (Response §53.1.4). This is inconsistent with the clear terms of those paragraphs, in which GEMA states “*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*” (FDs §8.48).
23. In any event, GEMA admits that it mistakenly and erroneously relied upon the OBR’s labour productivity growth forecasts instead of TFP growth forecasts at §8.49 of its FDs. GEMA now claims that this was a “*subsidiary observation*” and the error was “*immaterial*” as external forecasts were “*just one factor among many*” (Response §53.2.2). This is plainly wrong:
 - (a) The 26 November 2025 OBR forecast was highly relevant, in representing the most recent outlook on the UK’s expected productivity growth.
 - (b) GEMA expressly used this forecast to justify its decision to set an OE figure of 1%, stating in its FDs “*this forecast [the labour productivity OBR forecast] also sits within at [sic] the top-end of the narrow range we have used to set the OE challenge in RIIO-3.*” (FDs §8.49). This cross-check was stated by GEMA in its FDs as the primary means by which independent productivity forecasts were brought to bear on its OE decision. To now recast this as a “*subsidiary observation*” is clearly at

¹⁰ The Appellants submit that the CMA should substitute GEMA’s decision with a decision to set OE at 0.5% p.a (see Cadent Notice §101, SGN Notice §371, NGN Notice Annex III and WWU Notice §8.1).

odds with GEMA's assertion that it properly took the updated forecast data into account.

- (c) The average of the OBR's TFP growth forecast over 2024-2030 is 0.5%. Had the correct OBR forecast been considered, it would not have supported GEMA's decision to set an OE parameter of 1%.

New evidence:

24. In its PR24 FDs, the CMA expressly relied on OBR and BoE productivity growth forecasts and, in particular, found that downward revisions to these forecasts since its PDs were reasons to choose a lower level of frontier shift at FDs (relative to its PDs):

"We assessed official forecasts of productivity changes in the wider economy in our provisional determination to inform our decision on the frontier shift in AMP8. For our final determination, we continue to assess recent OBR and Bank of England productivity growth forecasts. (...)

*We note that the OBR and Bank of England forecasts differ in their levels and time coverage. Over the period 2024 to 2028, the Bank of England's labour productivity forecast is more pessimistic than the OBR's. The revisions down of both the Bank of England's and OBR's latest labour productivity forecasts are substantial. Further, the Bank of England's TFP forecast was lower than its labour productivity forecast. We note that TFP is a more appropriate estimate of frontier shift than labour productivity. This is since labour productivity can capture increases in capital inputs and capital productivity, so it will be higher than TFP forecasts. **Therefore, our view is that the recent revisions down of labour productivity forecasts and the lower Bank of England TFP forecast would be reasons to choose a lower level of frontier shift relative to the CMA PR24 PD level, with greater weight placed on the lower TFP forecast.**" (emphasis added) (PR24 FDs §§4.930-937)*

25. This further supports the Appellants' case that GEMA ought to have ensured its OE parameter was compatible with independent forecasting data and appropriately reflected material downward revisions contained within the OBR's November 2025 forecast.

D. SUB-GROUND A2

26. It is the Appellants' case that GEMA's decision to set the OE parameter at 1% for RIIO-3 places significant reliance on its assumption that GDNs can outperform the wider economy (and/or GT's comparator sectors) and that this assumption is wrong.
27. GEMA has now clarified its view that regulation only provides *partial* insulation (Response §63.1), which was not stated in its DDs or FDs.¹¹
28. Regardless of whether GEMA assumed partial or full insulation, there is no evidence that such insulation allows GDNs to achieve higher productivity growth rates than the wider economy, let alone justifies a 1% OE parameter. In fact, GEMA concedes that regulated sectors should

¹¹ GEMA's FDs said this: "*These companies [the energy networks] have greater potential to outperform the wider economy because they operate within the RIIO price control frameworks, which we consider insulates them from the wider economic productivity slowdown due to higher certainty over revenues and returns than for companies operating in competitive sectors. This allows for greater management focus on cost savings and cost efficiency.*" (FDs §8.50, emphasis added)

not outperform the wider economy in the long-term, although maintains, without evidence, that this is not the case in the short-term (Response §63.4).

29. In its Response, GEMA provides new reasoning on the potential upsides of the regulatory framework (Response §70 and Second McMahon §§184-189), which did not appear in DDs or FDs. For the reasons set out in the Frontier Economics and NERA expert reports and the company factual witness statements,¹² there is no scope for assuming that GDNs can outperform the wider economy. In any case, even if there were any partial advantage from the regulatory regime (which is not accepted), this is not enough to support GEMA's conclusion to a 1% OE parameter, especially given the constraints of operating in a regulated environment, which GEMA in part recognises.¹³
30. GEMA also introduces GT's new concept of 'industry catch-up' (Response §75). This new economic concept is unevidenced and inconsistent with the rest of GEMA's arguments (as explained further below). That GDNs cannot be expected to outperform the wider economy, either in the long-term or the short-term, is therefore the correct conclusion.

Shift in argumentation:

31. GEMA seeks to confine the relevance of the assumption (that GDNs can outperform the wider economy) to a factor in its qualitative assessment cited at §8.23 of the FDs (Response §§66-68). However, it is clear that this assumption holds a central role in GEMA's FDs: in its reasoning as to the appropriateness of a 1% OE parameter as well as its use of external forecast evidence (see FDs §§8.43 and 8.47). It is therefore wrong for GEMA to suggest that this assumption is not essential to its case (Response §68). To the extent that GEMA is now moving away from this assumption, the CMA still needs to consider whether GEMA has sufficient grounds for setting an OE parameter at a level that is manifestly out of line with productivity growth in relevant benchmarks.

New argumentation:

32. GEMA now retrospectively attempts to bolster its position by relying on new argumentation, in spite of its recognition that as a matter of economic theory, "*in the long-term it is true that regulated sectors should not outperform the wider economy*" (Response §63.4).
33. GEMA advances new arguments on the protection afforded by RPEs, inelastic demand and increased totex allowances.¹⁴ It is not credible that these factors move GDNs' expected productivity materially beyond competitive benchmarks, particularly given the regulatory burdens imposed on GDNs:

¹² NGN notes that GEMA misrepresents NGN's position on the impact of policy uncertainty around the future of gas on the scope for productivity increases in the sector, stating that such uncertainty does not prevent "*the kinds of productivity improvements that are capable of being realised within the RIIO-GD3 period*" (Second McMahon §206). NGN's submission is not that policy uncertainty prevents incremental and modest productivity improvements at GD3, but rather that it is a relevant factor that contradicts GEMA's contentions that (i) GDNs should be able to outperform the wider economy (given that, compared to other sectors, it militates against more material investments) and (ii) GDNs do not face a policy uncertainty that makes their position worse than the wider economy (Second McMahon §§206-207). GEMA's position is not credible in light of the existential nature of the uncertainty.

¹³ Response §79.

¹⁴ Response §70 and Second McMahon §§184-189.

- (a) RPEs are intended to ensure that uncontrollable and exogenous inflationary pressures which directly affect GDNs' costs are captured in allowances, consistent with GEMA's statutory duties.¹⁵
 - (b) There is no evidence that inelastic demand translates to incremental productivity growth over and above sectors with more elastic demand.
 - (c) GDNs' RIIO-3 allowances are already subject to engineering review, statistical cost assessment, and catch-up challenge, resulting in £1.5 billion of disallowances.¹⁶
34. GEMA also points to some GDNs forecasting underspend in RIIO-2,¹⁷ but underspend can arise for many reasons as acknowledged by Mr McMahon (First McMahon §28) and therefore does not justify a 1% OE parameter.¹⁸
35. GEMA now argues that GDNs can draw on "*three distinct sources of efficiency improvement*" and so have a "*wider set of efficiency opportunities than comparator firms*" (Response §§75-76). It suggests that OE should capture two of these sources: catch-up with other frontier firms (i.e. the ability of even the most efficient GDN to catch-up with the most efficient firm in the wider economy)¹⁹ and frontier shift (i.e. the ability of the most efficient companies in the whole economy to improve efficiency).²⁰ This is a new economic concept introduced by GT in these appeals, which is unevidenced and inconsistent with the rest of GEMA's arguments:
- (a) There is no evidence that "*catch-up with 'frontier' firms in the wider economy*" (Response §75.2) exists in reality. GEMA's position hinges on the unproven assertion that every GDN is less efficient than the rest of the economy at the outset of RIIO-3, despite decades of private sector ownership and a regulatory framework that has been specifically designed to encourage (and has successfully achieved) considerable cost reductions.
 - (b) In fact, the whole point of industry regulation under the RIIO framework is to mimic an environment that a competitive firm faces. Therefore, there should not be any prolonged deficit in efficiency (as GEMA itself recognises at Response §63.4).
36. Finally, the NERA Report included supporting analysis which showed that the EU KLEMS sector: electricity, gas, steam and air conditioning supply ("**EGSACS**") had in fact underperformed the wider economy between 2008 and 2019.²¹ GEMA's Response (relying on GT's Appeal Report) finds fault with this analysis, maintaining the choice of proxy is problematic and that the analysis is highly sensitive to the choice of base year (Response §82). These allegations are unfounded:

¹⁵ Companies in competitive sectors would also expect to pass through sector-wide inflationary pressures to end consumers.

¹⁶ GEMA file "GD3_Allowances_File_GD_noRPEs.xlsx", sheet "Out_Evolution".

¹⁷ Second McMahon §195.

¹⁸ The Frontier Report explains how company performance is driven by a range of factors and cannot be linked mechanistically to OE. During the RIIO-2 appeal, GEMA and the CMA recognised that not all outperformance can equate to OE improvement. It is also not the case that networks are systematically outperforming totex allowances (Frontier Report §4.19 and footnote 112).

¹⁹ GT Appeal Report §6.3(ii).

²⁰ GT Appeal Report §6.3(iii).

²¹ NERA Report, Section 3.5.4.

- (a) NERA’s analysis was provided in the context of the debate on whether there is any evidence of GDNs outperforming the wider economy/GT’s comparator sectors since the GFC. This analysis was not intended, as GT appears to suggest, to replace GT’s selected comparator sectors informing the range of OE based on historical productivity growth analysis. Therefore, GT’s critique of NERA’s analysis is entirely misguided. This analysis simply shows there is no positive evidence that the energy sector can outperform the wider economy, contrary to GEMA’s assertion.
- (b) Moreover, GT states “*it is unclear why NERA chose 2008 as the base year or why it did not consider more recent years than 2019*” (GT Appeal Report §3.14). NERA chose the 2008-2019 period as it is consistent with the most recent whole business cycle identified by GT in its analysis on behalf of GEMA. NERA’s analysis was therefore entirely consistent with GT’s.

E. SUB-GROUND A3

- 37. The Appellants consider that GEMA’s significant adjustment to the starting point of its ‘plausible range’ from 0.1% to 0.7% is an error, as it systematically biases the OE parameter upwards.
- 38. In its Response, GEMA clarifies its position at FDs, maintaining the evidence in submitted business plans, as well as a series of qualitative considerations could support an OE parameter of up to 0.7% (see Response §98 and DDs §§8.31-2). Mr McMahon confirms that 0.7% was a feasible option for the OE parameter that “*was considered as one of the options in our internal decision-making*” (Second McMahon §231). GEMA explains it arrived at a “*landing point*” of 1% OE, well above the benchmark option it acknowledged to be supportable on the evidence, using a series of separate qualitative factors as distinct from the quantitative evidence (Response §49.4). The key issues in dispute here are therefore whether GEMA was entitled to:
 - (a) Treat 0.7% as a minimum floor and any OE parameter below 0.7% implausible, despite quantitative evidence to the contrary.
 - (b) Raise the OE parameter above 0.7% (itself a top-end estimate of what is supportable by the quantitative evidence), by ‘layering on’ a series of qualitative factors, without any consideration of whether these factors were already reflected in its starting point of 0.7% and/or the extent to which those factors should be weighed against the material quantitative evidence to the downside. This is considered below, as part of sub-ground A4.

Mischaracterisation:

- 39. GEMA appears to conflate (i) the level at which it would be reasonable to set an OE parameter, in light of networks’ own BP submissions on the level of OE they could achieve (consistent with the approach it adopted in RIIO-2)²² and (ii) using the highest of those assumptions as the floor (or lower bound) of a range from which GEMA then selected the mid-point (which

²² At RIIO-2, GEMA took the OE BP submissions of the most ambitious companies to support a more stretching challenge (Cadent Notice §77).

would necessarily be significantly higher than the highest of the energy networks' estimates). In particular:

- (a) GEMA incorrectly compares the mid-point of the Appellants' OE estimates (0.5 per cent), with its own lower bound (Response §101, and similarly Response §102.4). EI (for the Appellants) estimated a range of 0.2-0.8%, in which 0.5% sits in the middle. This was not a 'floor' but a balanced estimate, based on a credible, evidence-based range. Indeed, all of the networks estimated feasible OE ranges, none of which had a lower bound above, or indeed near, 0.5%.²³
- (b) Similarly, whilst it is acknowledged that evidence from the networks' consultants suggested plausible ranges which included figures up to 0.8% (Response §100.2),²⁴ it is irrational for GEMA to consider these estimates of the 'top-end' of the plausible range of OE, as justifying the lower bound of its own plausible range of OE (also applicable to the similar submission made by GEMA at Response §102.4).

New argumentation:

- 40. GEMA sets out in further detail, including by reference to new witness evidence, its consideration of the evidence supporting an OE parameter lower than 0.7% (Response §§92-99). GEMA attempts to counter the Appellants' arguments by focusing on the *process of the determination*, rather than the *substance of the determination* (see also paragraph 3 above). But the two are not the same.
- 41. GEMA does not address the substantive evidence showing that an OE parameter below 0.7% is 'plausible'. GEMA refers back to high-level statements made at DDs (see Response §98), such as that all companies "*have the same opportunities to access the available technologies and markets*", the "*potential for above-average technical change*" and "*the need to provide a sufficiently strong incentive to improve productivity*" (DDs §§8.31-2). However, that fails to respond to the point that lower productivity growth estimates, including the GDNs' robust estimates of 0.5%, are entirely plausible and consistent with the economic evidence, including GEMA's own consultants' analysis.

F. SUB-GROUND A4

- 42. It is important to note that the Appellants do not contend that the consideration of qualitative factors *per se* is incorrect (as would be implied by Response §127 – this is a mischaracterisation of the Appellants' appeals). Rather, the Appellants maintain that the qualitative factors considered by GEMA do not justify the selection of a 1% OE parameter.
- 43. Standing back from the new argumentation regarding qualitative factors (addressed below), GEMA has provided no evidence that these qualitative factors impact GDNs more than the average firm in GT's selected comparator sectors and/or the wider economy, and hence are not already captured by historical productivity analysis and/or independent forecasts respectively. It is simply not credible that GEMA's reliance on qualitative factors alone can sustain an OE parameter of 1%, when this sits against the weight of prevailing economic

²³ The fact that other companies have chosen not to appeal bears no relevance to the merits of the Appellants' appeal (contrary to the claim made at Response §110).

²⁴ Economic Insight for each of the GDNs proposed a range of 0.2-0.8%.

evidence, as well as any qualitative factors that point towards a lower level of OE.²⁵ With that overarching point in mind, we now turn to GEMA's new argumentation on specific points.

New argumentation:

44. GEMA relies on the VA metric and embodied technical change as qualitative justifications for setting OE above virtually all GO-based quantitative estimates of TFP growth in GT's analysis. The parties are aligned that GO is the appropriate primary metric given OE is applied to totex. GEMA's qualitative reliance on the VA metric and embodied technical change ignores the duplication between these considerations, as the CMA itself recognised at RIIO-2 when it held that "*the reliance on embodied technical change should be commensurate with the reliance on GO measures.*"²⁶ In any event, like GO TFP growth, VA TFP growth has slowed materially and persistently since the GFC, demonstrating that a 1% OE parameter can no longer be justified. Hence, the main issue at hand, the inconsistency of GEMA's OE parameter with the slowdown in productivity growth, cannot be excused by the presence of embodied technological change or placing weight on VA measures of TFP.

New argumentation:

45. GEMA makes a number of new arguments in the context of IT&T, data and digitalisation that do not stand up to scrutiny. GDNs are not unique in the types of IT&T activities they carry out and GEMA's submissions to the contrary are without substance (Response §§140.1-3). In particular, GEMA does not provide evidence for its unproven assertion that GDNs have "*lower digital maturity*" as compared to other relevant benchmark sectors (Response §140.3).
46. GEMA's argumentation in its Response also contains two significant sources of duplication:
- (a) The potential productivity benefits of IT&T activities for firms with similarities with GDNs are already captured by GT's historical productivity analysis as GT's comparator set was guided by "*commonalities between comparator sectors and the activities carried out by energy network companies*",²⁷ including the Information and Communications sector, which itself has a larger weighting in GT's TFP calculations than GDNs' own share of IT&T costs. GEMA's reliance on the productivity improvement achievable in the IT&T sector as a qualitative justification for its OE parameter is therefore duplicative, as this has already been factored into the relevant historical benchmarks.
 - (b) GEMA cites GDNs' expected efficiency gains from IT&T investment included in GDNs' business plans as a qualitative factor justifying its high OE target (Response §141). This argument is inherently duplicative, as such efficiencies have already been accounted for in GEMA's modelling to set the catch-up efficiency target.
47. Consideration of the additional arguments put forward by GEMA comes back to whether the GDNs' activities in respect of IT&T, data and digitisation allow them to achieve greater

²⁵ GEMA's submissions in relation to innovation investment and regulatory precedent are not considered to advance materially new arguments, reasoning or data beyond that contained within the FDs. Due to the page limit of this joint submission, the Appellants do not respond to GEMA's further submissions on these topics. The Appellants remain at the CMA's disposal to the extent it requires further information on these matters. For the avoidance of doubt, the submissions made by GEMA in the Response are disputed.

²⁶ CMA, RIIO-2 Final Determination, Volume 2B, §7.259.

²⁷ Grant Thornton, Independent Report on Ongoing Efficiency, RIIO-3 Technical Annex, 2025, page 20.

productivity improvements than businesses in comparator sectors (already captured within the historical productivity analysis) and the wider economy, which also make sustained IT&T investments. For all the reasons explained at Sub-Ground A2 above, GDNs do not have an ability to access efficiencies over and above the many other businesses in the economy harnessing such technologies, and there are in fact reasons to consider the opposite may be true (in light of the operational realities of GDNs, as explained in company factual witness statements).²⁸

G. SUB-GROUND A5

48. In their NoAs, WWU, SGN and NGN submit that GEMA misdirected itself as to the purpose of OE by claiming that the OE parameter should be increased in order to provide an additional “*incentive*” and by setting a “*stretching*” OE parameter which is not supported by the available economic evidence. The Appellants consider that this topic should be considered as part of Sub-Ground A4 rather than under a separate stand-alone heading. In any case, GEMA’s Response does not engage with the substance of these Appellants’ submissions.

Mischaracterisation:

49. GEMA’s Response cites the relevant GDNs’ argument that OE “*cannot be a stretching target*” (Response §159, quoting WWU Notice §3.7) and uses this characterisation to invoke the CMA’s RIIO-2 Final Determination as a complete answer to Sub-Ground A5.²⁹ This fails to address the key points in the Appellants’ positions.
50. Leaving aside whether the proper function of the OE level is to incentivise (which is not the case for the reasons explained in the Frontier Report),³⁰ the Appellants’ argument is that any “stretch” must be commensurate with what the evidence of efficiency in competitive markets can support.³¹
51. The Appellants’ position is consistent with the CMA’s finding at RIIO-2 FDs that OE must be “*stretching but achievable*” (emphasis added).³² Achievability can only be assessed by comparison to the available economic evidence, none of which points towards an OE parameter of 1% as explained in the Appellants’ NoAs and this Reply.
52. In the Frontier Report, it is submitted that setting a higher (or lower) OE does not *incentivise* firms to exert additional (or less) effort to improve efficiency, and that GEMA is therefore wrong to justify a higher OE on the basis of seeking to increase incentives (Frontier Report, §§5.3-5.6). GEMA’s Response entirely misses this primary error. The Totex Incentive Mechanism provides the *incentive* to outperform allowances, whilst OE *sets* the allowance level. Conflating the two is an error.

²⁸ First Witness Statement of Richard Court §§72-75; First Witness Statement of Dean Pearson §§38-39; First Witness Statement of David Handley §73.2; First Witness Statement of Carly Evans §6.5.

²⁹ Response §159.

³⁰ Frontier Report §§5.4-5.6.

³¹ The OE parameter should not be used to incentivise networks by setting a “stretching target” “*beyond what can be supported by any reasonable view of the relevant evidence*” (NGN Notice §195, emphasis added) or that “*goes materially beyond [efficiency] observed in the wider economy*” (SGN Notice §468, emphasis added). On that basis, setting OE therefore requires an “*evidence-based assessment of achievable productivity*” (WWU Notice §6.15(b), emphasis added).

³² CMA RIIO-2 Final Determination, Volume 2B, §7.20.

H. LEGAL POINTS

53. The standard of review applicable to these appeals is that established by *WWU v CMA* [2026] EWHC 99 (Admin). The WWU judgment makes clear (at §145) that the CMA *itself* must consider under the statutory test whether GEMA failed to have proper regard or “*give the appropriate weight to any matter mentioned in subsection (2)*” (i.e. to the statutory objectives) and that such a ground of appeal “*require[s] the CMA to scrutinise GEMA’s approach to matters that involve an element of judgment or evaluation*”. Moreover, the WWU judgment stresses (at §151) specifically that the statute “*calls for the CMA to make its own assessment as to what is “proper” regard and “appropriate” weight*”.
54. It is in that context of the CMA making its own assessment of whether proper regard/weight has been given to the statutory objectives (e.g. of financeability, long term interest of consumers etc) that it then scrutinises GEMA’s approach and considers whether any of the alternative approaches proposed by the Appellants are “*materially better*” (WWU §§154-159). Whilst the Court did confirm that “*some deference*” must be shown to GEMA’s evaluative judgements (see *WWU* §153 which the Response cites at §29.3):
- (a) The Court states, crucially, that “*the CMA contains members with relevant expertise, and has powers to call for evidence. This provides institutional support for a more intensive scrutiny of GEMA’s evaluation or judgment*” (*WWU* §152).
 - (b) The Court makes clear (§§154-159) that the appropriate degree of such deference is built into the requirements that (i) the CMA does not start entirely from scratch but has regard to the approach of GEMA and to any alternative approaches of the Appellants and (ii) that the approach of the Appellants should be materially better.
55. Further, the cases cited at Response §31 in support of a deferential approach (including *Wyatt, London and Continental Stations*) involve challenges to the Administrative Court on the exercise of discretionary powers where a much more restrained standard applies. By contrast, the CMA is required to engage substantively with the evidence and reach its own conclusions on whether GEMA went wrong on the statutory grounds; it must, in the language of *WWU*, “*roll up its sleeves*” (*WWU* §68) rather than simply satisfy itself that GEMA’s position was arguable.
56. GEMA’s Response at footnote 40 and First McMahon §42 also dismisses the financing duty by asserting that all GDNs were found financeable under the totality of the FD package. This is new reasoning not in the FDs and does not answer the point. A sector-wide financeability assessment of the overall settlement is not equivalent to an assessment of the specific 1% OE parameter - compounding annually across five years - against the s.4AA(2)(b) duty at the level of individual licensees, as *WWU* §§168-170 requires. GEMA has done neither.
57. Drawing this all together, where an alternative approach better accords with GEMA’s statutory duties, then GEMA has failed to give those duties appropriate weight and is thereby “*wrong*” on the statutory grounds.

8 May 2026