Appeal from Ofgem's decision refusing approval of CMP344, dated 1 May 2026

Date of submission: 26 May 2026

BEFORE THE COMPETITION AND MARKETS AUTHORITY

AN APPEAL UNDER SECTION 173 OF THE ENERGY ACT 2004

B E T W E E N:

(1) GWYNT Y MÔR OFFSHORE WIND FARM LIMITED
(2) RWE RENEWABLES UK LIMITED
(3) RWE RENEWABLES UK SWINDON LIMITED

Appellants

-and-

THE GAS AND ELECTRICITY MARKETS AUTHORITY

Respondent

APPELLANTS' MAIN SUBMISSION

Pursuant to rule 5.2(a)[1]

Appellants

(1) Gwynt y Môr Offshore Wind Farm Limited, Windmill Hill Business Park, Whitehill Way, Swindon, Wiltshire, England, SN5 6PB
(2) RWE Renewables UK Limited, Windmill Hill Business Park, Whitehill Way, Swindon, Wiltshire, England, SN5 6PB
(3) RWE Renewables UK Swindon Limited, Windmill Hill Business Park, Whitehill Way, Swindon, Wiltshire, England, SN5 6PB

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[1] Energy Code Modification Appeals: Competition and Markets Authority Rules, CMA 196, 15 January 2025.

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References in the format **[CB/page]** *are to pages of the core appeal bundle enclosed with the Notice of Appeal.*

A. INTRODUCTION

1. This is the Appellants' main submission in support of their Notice of Appeal against a decision of the Respondent made on 1 May 2026 ("**Decision**") refusing consent to a proposal ("**CMP344**") to modify Section 14 of the Connection and Use of System Code ("**CUSC**") and the Transmission Network Use of System ("**TNUoS**") tariffs imposed for recovery of the cost of payments made to Transmission Owners ("**TOs**").

2. At present, adjustments made to the allowed revenue of an offshore TO ("**OFTO**") under its transmission licence as an Income Adjusting Event ("**IAE**") are recovered through TNUoS charges, initially, from demand users as part of the Transmission Demand Residual Tariff and then, from the start of the next price control period, from the generator as part of its Local Tariff.

3. CMP344 is a proposal to amend the CUSC to require the allowed revenue increases reflecting IAEs to be recovered under the Transmission Demand Residual Tariff only (and thus not passed on to generators). The proposer contended that the practice of passing the costs of IAEs to specific generators is discriminatory, anticompetitive and not cost-reflective, essentially because the costs which IAEs reflect are occasioned by events and circumstances outside of any party's reasonable control, including that of the generator. As such, they are necessary costs of operating the transmission system and

should be 'socialised'.[2] It is unfair and inappropriate for these costs to be borne by generators when they are not in a position to avoid or mitigate them and/or attempting to do so would impose inefficient costs on the system as a whole.

4. The grounds of appeal are, in summary, as follows.

5. **Ground 1**: **Appearance of bias on the basis of predetermination and relationship with one of the stakeholders**. Ofgem's decision was taken by Mr Stone, who had been the representative for NESO on the Workgroup at earlier stages of the CUSC amendment process and who had made clear that the baseline position should be maintained. A fair minded and informed observer would consider there to be a real risk of predetermination or lack of impartiality. For the same reasons there was a breach of the objective principle of independence and impartiality guaranteed by Article 6 of the European Convention on Human Rights ("**ECHR**"), given effect by s. 6 of the Human Rights Act 1998 ("**HRA 1998**") (paragraphs 93 to 98 below).

6. **Ground 2**: **Ofgem was wrong in fact and/or law in deciding that the modification would not facilitate competition and cost reflectivity and thus better serve Use of System Charging Objectives (d) and (e)**. Ground 2 has a number of sub-grounds:

   (a) **Ground 2A**: Ofgem erroneously relied upon generators being the *"party best placed to mitigate the risk [of an IAE occurring] and its consequences"*.

      (1) Ofgem adopted an unduly narrow view of an IAE, treating it as essentially concerned with uninsurable latent defects in sub-sea transmission cables (paragraphs 103 to 109 below).

      (2) Ofgem failed to consider or give appropriate weight to the lack of feasibility and costs of generators mitigating IAEs (paragraphs 110 to 123 below).

      (3) Ofgem failed to consider or give due weight to the existing incentives on generators, given that transmission assets represent their route to market (paragraphs 124 to 126 below).

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[2] See Annex 1 to the Third Modification Report – 'CMP344 Original Proposal', pp. 14-15. **[CB/1415]**

(4) Ofgem wrongly considered that imposing IAE costs on generators would be consistent with the principle of cost reflectivity and/or represent efficient economic signalling (paragraphs 127 to 135 below).

(5) Ofgem was wrong to reject the comparison with the SHETL subsea cable reopener (paragraphs 136 to 143 below).

(6) Ofgem wrongly focused on the generator qua developer rather than qua generator (paragraphs 144 to 145 below).

(b) **Ground 2B**: Ofgem was wrong to dismiss the existence of discrimination against offshore generators by comparison with entities with which they compete:

(1) Ofgem was wrong in stating that the treatment of onshore local circuit charges was *"in fact comparable to existing baseline arrangements for onshore local circuit charges"* (paragraphs 146 to 152 below).

(2) Ofgem was wrong to state that onshore and offshore generators are not in a materially equivalent position (paragraphs 153 to 155 below).

(c) **Ground 2C**: Ofgem was wrong to conclude that the impact on competition was nil or immaterial (paragraphs 156 to 158 below).

(d) **Ground 2D**: Ofgem was wrong to suggest that CMP344 could introduce an anti-competitive distortion on the CfD market (paragraphs 159 to 160 below).

7. **Ground 3**: **Ofgem was wrong to find that the proposal would not advance Use of System Charging Objective (h) by promoting efficiency in the implementation and administration of the charging methodology**. CMP344 would: (i) clarify the existing practice in relation to the point in time at which the revenues are set, which is currently not clear from the CUSC; (ii) enhance certainty and predictability for generators, by removing the lottery of being allocated IAE costs; and (iii) remove the uncertainty caused to generators by the prolonged and uncertain process of determining IAE events and their costs (paragraphs 161 to 163 below).

8. **Ground 4**: **Ofgem was wrong to hold that the baseline is advantageous for consumers and therefore consistent with its objectives and duties**. CMP344 would socialise the

costs of IAEs which are not efficiently allocated to generators (or, as Ofgem has previously held, OFTOs). That will reduce costs overall, particularly in the long term, and thus benefit consumers (paragraphs 164 to 165 below).

B. BACKGROUND

B1. The parties

9. The First Appellant ("**GYMOWFL**") is the owner of Gwynt y Môr, a 576MW offshore wind farm located north of Wales. The revenue of the owner of the offshore transmission infrastructure serving GYMOWFL has been increased on account of five IAEs accepted by the Respondent in connection with sub-sea export cable failures. The total amount of the increased revenue, some £79m, will largely be funded by local tariffs payable by GYMOWFL in this and the next price control period: see McCole 1, §§21-26.

10. The Second Appellant ("**RWE Renewables**") is, in effect,[3] the proposer of CMP344 and a member of the RWE group of companies ("**RWE Group**"). The RWE Group is one of the UK's leading generators of renewable energy, owning or having a stake (either through RWE Renewables or through the Third Appellant ("**RWE Swindon**")) in 10 offshore wind farms with a total installed capacity of c. 3.86 GW. This includes a 50% stake in GYMOWFL (held by RWE Swindon). Apart from its direct financial interest in GYMOWFL, the RWE Group has an interest in ensuring that every other offshore wind farm in which it has or may acquire a stake is not required to pay charges (i) that are designed to fund costs which it did not confer upon the system; and (ii) that are imposed selectively and are therefore distortive of competition and contrary to its own interests and the interests of existing and future consumers taken as a whole.

11. The Respondent is the Gas and Electricity Markets Authority, which delegates operational activities to Ofgem. We refer to the Respondent as "**Ofgem**" for convenience in these grounds.

[3] The proposal was originally raised by Bill Reed, an employee of RWE Supply & Trading GmbH (another member of the RWE Group). The conduct of the proposal was taken over by Thomas Steward, Senior Regulatory Affairs Manager and employee of RWE Renewables, from around May 2021: see Steward 1, §45.

B2. The licensing regime and the development of offshore assets

12. Electricity generated offshore must be transmitted to shore for use by consumers. In the case of a modern offshore wind farm, for example, electricity generated by the wind turbines is conveyed by inter-array cables to one or more offshore substations, where it is collected, exported to shore by sub-sea export cables, and landed at an onshore substation for transmission over the onshore transmission network: see e.g. McCole 1, §13. The transmission assets are typically built by the offshore generator together with the generation assets, pursuant to what is known as the 'generator build' model.[4] Every offshore wind farm owned by the RWE Group that has been built since the inception of the OFTO regime, including Gwynt y Môr, was built using this model; however, there is no legal requirement that this build model be adopted. Therefore, whilst it is presently the case that offshore generators will also be the entities that built the transmission infrastructure, it will not necessarily always be the case.

13. Under section 4 of the Electricity Act 1989 ("**EA 1989**"), a person is prohibited from participating in the transmission of electricity unless authorised to do so by a transmission licence. Further, pursuant to sections 10A to 10O of the EA 1989, a person who holds a transmission licence and participates in the transmission of electricity must be certified by Ofgem as 'independent'. These provisions mean that (subject to certain exceptions) generation and transmission assets must be owned separately.

14. In practice, a developer who has built a wind farm is required to sell the associated transmission assets (offshore substation(s), cable and onshore substation) to a third party. There is an 18-month period in which the developer can transmit electricity without a transmission licence, providing a limited time window for sale of the transmission assets.[5]

15. Ofgem holds a competitive tender process under The Electricity (Competitive Tenders for Offshore Transmission Licences) Regulations 2015/1555 to identify a party to own and operate the transmission assets, pursuant to a transmission licence, i.e. the OFTO. The transmission licence is usually granted for between 20 and 25 years. The qualified

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[4] The alternative to the 'generator build' model is the 'OFTO build' model. Under this model, Ofgem would hold a competitive tender process for the appointment of a separate entity from the outset of the project to design, build and operate the offshore transmission infrastructure: see Steward 1, §§19-20.

[5] This period is being extended to 27 months.

party that submits the lowest Tender Revenue Stream (or 'TRS') in the tender process will be selected as the OFTO: see Steward 1, §§21-22.

16. In addition, the OFTO must pay a sale price to the developer for the transmission assets. Ofgem determines the price that will be paid by assessing the build costs and allowing those that are economic and efficient: Steward 1, §18.

B3. The licensing regime and the calculation of allowed OFTO revenue

17. The OFTO's entitlement to revenue and the elements that affect it, namely revenue adjustments and performance incentives, are addressed in Amended Standard Conditions E12-J1 to E12-J10 of the OFTO's offshore transmission licence ("**OFTO Licence**").

18. Paragraph 6 of Amended Standard Condition E12-A1 contains the following relevant definitions **[CB/892]**:

> *""Allowed Pass-through Items" means the items referred to in paragraph 2 of amended standard condition E12–J3 (Restriction of Transmission Revenue: Allowed Pass-through Items).*
>
> *"Allowed Transmission Owner Revenue" or "$OFTO_t$" means in the Commencement Relevant Year and every subsequent Relevant Year the revenue calculated in accordance with the formula set out in paragraph 4 of amended standard condition E12–J2 (Restriction of Transmission Revenue: Revenue from Transmission Owner Services)."""*

19. Amended Standard Condition E12-J2 provides (emphasis supplied):

> *"**Amended Standard Condition E12–J2: Restriction of Transmission Revenue: Revenue from Transmission Owner Services***
>
> *1. The purpose of this condition is to establish the revenue restriction that determines the Allowed Transmission Owner Revenue (OFTOt) that the licensee may earn from its Transmission Owner Services in any Relevant Year.*
>
> *2. The revenue entitlement of the licensee, determined in accordance with paragraph 4 below, shall commence upon the date this condition comes into force.*
>
> *3. The licensee shall take all appropriate steps within its power to ensure that in any Relevant Year t, Regulated Transmission Revenue (AR_t) shall not exceed the Allowed Transmission Owner Revenue ($OFTO_t$) calculated in accordance with the formula given in paragraph 4 below.*

Formula for Allowed Transmission Owner Revenue ($OFTO_t$)

4. For the purposes of this condition, Allowed Transmission Owner Revenue ($OFTO_t$) shall take the value of zero in all Relevant Years preceding the Commencement Relevant Year (t=1) and thereafter Allowed Transmission Owner Revenue ($OFTO_t$) shall be calculated in accordance with the following formula:

$$OFTO_t = BR_t + PT_t + PA_t - K_t$$

where:

$OFTO_t$ means Allowed Transmission Owner Revenue in the Relevant Year t.

[…]

PT_t means the pass-through revenue adjustment term, whether of a positive or of a negative value, made in the Relevant Year t in respect of Allowed Pass-through Items as derived in accordance with amended standard condition E12–J3 (Restriction of Transmission Revenue: Allowed Pass-through Items);

PA_t means the performance availability revenue adjustment term, whether of a positive or of a negative value, made in the Relevant Year t in respect of annual revenue adjustments as derived in accordance with amended standard condition E12–J4 (Restriction of Transmission Revenue: Annual Revenue Adjustments);"

20. Amended Standard Condition E-12 J3 sets out Allowed Pass-through Items (emphasis supplied):

*"**E-12 J3 Amended Standard Condition E12–J3: Restriction of Transmission Revenue: Allowed Pass-through Items***

1. The purpose of this condition is to provide for revenue adjustments to reflect certain costs that can be passed through to consumers as part of Allowed Transmission Owner Revenue ($OFTO_t$).

2. For the purposes of paragraph 4 of amended standard condition E12–J2 (Restriction of Transmission Revenue: Revenue from Transmission Owner Services) the pass-through revenue adjustment term (PT_t) is derived from the following formula

$$PT_t = LF_t + RB_t + CEL_t + DC_t + IAT_t + TPD_t + TCA_t + MCA_t + CEA_t - RFG_t + HR_t + IW_t$$

where:

[…]

IAT_t means the income adjusting event revenue adjustment term, whether of a positive or of a negative value, and shall be determined in accordance with paragraphs 14 to 24. …"

21. Paragraphs 14 and 15 of Amended Standard Condition E12-J3 provide for IATs:

> *"**Formula for the Income Adjusting Event Revenue Adjustment (IATt)***
>
> *14. Where the licensee considers, and can provide supporting evidence that, in respect of Relevant Year t, there have been costs and/or expenses that have been incurred or saved by an Income Adjusting Event, then the licensee shall give written notice of this Income Adjusting Event to [Ofgem].*
>
> *15. An Income Adjusting Event in Relevant Year t may arise from any of the following:*
>
> *(a) an Event or circumstance constituting Force Majeure;*
>
> *(b) an Event or circumstance resulting from an amendment to the STC not allowed for when the Allowed Transmission Owner Revenue ($OFTO_t$) of the licensee was determined for the Relevant Year t; and*
>
> *(c) an Event or circumstance other than listed above which, in the opinion of [Ofgem], is an Income Adjusting Event and is approved by it as such in accordance with paragraph 21 of this licence condition,*
>
> *where the Event or circumstance has, for Relevant Year t, increased or decreased costs and/ or expenses by more than […] (the "threshold amount")."*

22. 'Force Majeure' is defined to mean:

> *"any Event or circumstance which is beyond the reasonable control of the licensee including act of God, strike, lockout or other industrial disturbance, act of the public enemy, war declared or undeclared, threat of war, terrorist act, blockade, revolution, riot, insurrection, civil commotion, public demonstration, sabotage, act of vandalism, lightning, fire, storm, flood, earthquake, accumulation of snow or ice, lack of water arising from weather or environmental problems, explosion, governmental restraint, Act of Parliament, other legislation, bye law and Directive (not being any order, regulation or direction under sections 32, 33, 34 and 35 of the Act) and provided, for the avoidance of doubt, that weather conditions which are reasonably to be expected at the location of the Event or circumstance are also excluded as not being beyond the reasonable control of the licensee"*

23. On 28 November 2018, Ofgem issued a policy titled 'Income Adjusting Events in Offshore Transmission Owner Licences' ("**Ofgem IAE Policy**") **[CB/771]**.

24. The Ofgem IAE Policy contains the following discussion of the definition of an IAE in paragraph 15 of Amended Standard Condition E12-J3 **[CB/775]**:

"1.4 Events falling within limbs (a) or (b) of Paragraph 15 are expressly defined and do not involve the exercise of [Ofgem's] discretion in determining whether an IAE has arisen. However, in determining whether an event is an IAE within the meaning of limb (c) of Paragraph 15, [Ofgem] must exercise its discretion, which requires the application of a policy to be set by reference to our statutory duties, in particular our principal objective to protect the interests of existing and future consumers.

[...]

1.6 In our IAE decisions to date, we considered the following four factors when assessing whether each event was an IAE under limb (c) of Paragraph 15, and will continue to assess claims under limb (c) of Paragraph 15 in accordance with these four factors:

1. *whether the OFTO knew of the event or circumstance before it arose or ought to have known of it*

2. *whether the risk of damage of that type was reasonably foreseeable (even if the particular way in which the damage has occurred may not have been)*

3. *whether there are nevertheless exceptional factors in the relevant case that mean that the event or circumstance, or its consequences, could not have been reasonably foreseeable, and*

4. *the ability of the OFTO to manage the risk or impact by putting in place and pursuing risk management arrangements such as insurance, commercial recourse against third parties and/or operating practices.*

1.7 In each of our IAE decisions to date we have made clear that, similar to any other transaction involving a purchase of assets, an OFTO should enter into the transaction of acquiring OFTO assets with the awareness that it is assuming any risks arising from damage or defects that it has not been able to discover through its due diligence. The offshore regime was not designed to insulate OFTOs from all such risks. We consider that a latent defect is a type of risk that is reasonably foreseeable, and OFTOs should put in place appropriate commercial arrangements to manage or absorb these risks.

1.8 Notwithstanding this, the GyM SSEC2 decision allowed certain costs arising from a latent defect (net of amounts recovered through commercial recourse and a sum equivalent to the insurance deductible) to be passed through as an IAE on the ground that the risk had most likely become effectively or practicably uninsurable. In response to a number of cable failures, some insurance providers had in practice limited or withdrawn insurance protection for such failures which limited the ability of OFTOs to put appropriate commercial arrangements in place to manage or absorb these risks."

25. The Ofgem IAE Policy then sets out Ofgem's intended approach to the approval of IAEs arising from 'uninsurable' latent defects. In essence:

(a) Ofgem would *"continue to provide uninsurability protection under paragraphs 14 to 24 of Amended Standard Condition E12-J3 … (the **IAE Condition**), where the [OFTO] is unable effectively to mitigate the effects of latent defect risk (including, through no fault of its own, that risk becoming Uninsurable as defined in paragraphs 3.39 and 3.40 below)*[6]*"*: §2.1 **[CB/779]**.

(b) The principal benefit of doing so was thought to be: *"future OFTOs need not price the full risk of uninsurable latent defects into their bids. It would not be good value for money for consumers if all OFTOs created contingent provisions to fund uninsurable cable failures caused by latent defects, considering it is unlikely that the risk will crystallise in all projects"*. A secondary benefit was making OFTOs *"more resilient to risks that, through no fault of their own, they can neither forecast nor mitigate, thereby reducing the long-term risk of OFTOs ceasing to provide transmission services"*: §2.2 **[CB/779]**.

(c) Ofgem would *"apply a deductible to all successful IAE claims in respect of an uninsurable latent defect (an **Uninsurable IAE Claim**)"*. The amount of this deductible would be either the insurance deductible set out in the OFTO's bid (for existing OFTOs) or whichever was the higher of £5m and the insurance deductible set out in the OFTO's bid (for future OFTOs): §2.5(I) **[CB/779]**.

B4. Funding the payment of OFTO revenue from TNUoS charges

(a) The payment of an OFTO's allowed revenue

26. NESO and every TO (including OFTOs) are parties to the System Operator Transmission Owner Code ("**STC**"). NESO, which is the only entity licensed to coordinate and direct the flow of electricity over the transmission system, is required to prepare, maintain and

[6] 'Uninsurable' was defined in §3.39 to mean, in relation to physical loss or damage caused by a latent defect, either that *"(a) Insurance is not available to the licensee in respect of all or part of its Transmission Assets in the Worldwide Offshore Transmission Asset Insurance Market with reputable insurers of good standing in respect of that Risk, as determined by [Ofgem], or (b) [Ofgem] determines, in its absolute discretion, that the insurance premium payable for insuring that Risk is at such a level that the Risk is deemed as not being insured against in the Worldwide Offshore Transmission Asset Insurance Market with reputable insurers of good standing by a licensee(s)"*. **[CB/788]**

implement the STC under the conditions of its electricity system operator licence ("**ESO Licence**"). Under the STC:

(a) OFTOs are required to provide transmission services to NESO, e.g. by making their infrastructure available for the purpose of conveying electricity.

(b) OFTOs are entitled to charge NESO for those services in accordance with the conditions of their OFTO Licences.[7]

27. In particular, OFTOs charge NESO a TO General System Charge which is equivalent to the OFTO's Allowed Revenue under its licence for the given year. This includes pass-through items, including IAEs (see paragraph 19 above).

28. The cost to NESO of paying for an OFTO's transmission services is funded by TNUoS charges levied by NESO upon generators and suppliers under the CUSC, an industry code governing the use of the transmission system which NESO is also required to prepare, maintain and implement under the conditions of its ESO Licence.

(b) Basis for TNUoS charges and their modification under the ESO Licence

29. Part A of Condition E10 of the ESO Licence (**[CB/1369]**) requires NESO to have in force and keep under review a 'Use of System Charging Methodology' approved by Ofgem, i.e. *"the principles on which, and the methods by which, for the purposes of achieving the Use of System Charging Objectives, Use of System Charges are determined"* **[CB/1357]**.

30. Subject to Condition E2 of the ESO Licence and the provisions of the CUSC, NESO is required by Part B of Condition E10 to keep under review and modify the Use of System Charging Methodology where necessary *"for the purpose of better achieving the Use of System Charging Objectives"* **[CB/1370]**.

31. The 'Use of System Charging Objectives' are defined to mean the following objectives:

> *"(d) that compliance with the Use of System Charging Methodology facilitates effective competition in the generation and supply of electricity and (so far*

[7] See clause 2 of Section E and Schedule 10 of the STC, which refers to Special Condition J2 **[CB/1344]** **[CB/868]** (meaning Amended Standard Condition E12-J2: see E13.5 of the OFTO Licence. **[CB/974]**)

as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity;

(e) that compliance with the Use of System Charging Methodology results in charges that reflect, as far as is reasonably practicable, the costs (excluding any payments between [NESO] and Transmission Licensees that are made under and in accordance with the [STC]) incurred by Transmission Licensees in their Transmission Businesses, and that are compatible with condition C11 (Requirements of a Connect and Manage Connection);

(f) that, so far as is consistent with (a) and (b) [sic], and is reasonably practicable, the Use of System Charging Methodology properly takes account of developments in Transmission Licensees' Transmission Businesses and the ISOP [i.e. NESO] Business;

(g) compliance with the Electricity Regulation and any Relevant Legally Binding Decisions of the European Commission and/or the Agency; and

(h) promoting efficiency in the implementation and administration of the Use of System Charging Methodology."

32. Part A of Condition E2 describes the CUSC and so far as relevant provides:

(a) Condition E.2.2 requires NESO to establish arrangements (i.e. in the CUSC) for use of system which are calculated to facilitate the achievement of the 'Applicable CUSC Objectives' **[CB/1357]**. Those Objectives are defined in Condition E2.4(a) to mean, in relation to a proposed modification to the *"Use of System Charging Methodology established in accordance with condition 10"*,[8] the Use of System Charging Objectives **[CB/1357]**.

(b) Condition E2.3 requires NESO to comply with Condition E2.2 *"by modifying the CUSC, in accordance with the provisions of paragraphs E2.10 and E2.23"* **[CB/1357]**.

(c) Condition E2.5 makes clear that the CUSC is required to set out the Use of System Charging Methodology **[CB/1358]**.

33. Part B of Condition E2 is concerned with the procedure for the modification of the CUSC. In particular, Condition E2.10 requires NESO to *"establish and operate procedures for the modification of the CUSC … to better facilitate achievement of the Applicable CUSC*

[8] See the definition of 'Charging Methodologies'. **[CB/1357]**

Objectives" (which are defined to include the Use of System Charging Objectives) **[CB/1357-1359]**.

34. Section 8 of the CUSC sets out the detailed procedure for modifying the CUSC. Save in certain circumstances that are not material for present purposes, the Panel must prepare a final report on the modification proposal and submit it to Ofgem for its approval. If Ofgem believes that the proposal would not better facilitate achievement of the Applicable CUSC Objectives *"then there will be no approval"*: see CUSC, §§8.23.6 and 8.23.7 **[CB/1170]**.

35. In exercising its power of approval, Ofgem will have regard to its statutory objectives and duties. Section 3A of the EA 1989 (which is contained in that Part of the Act dealing with licensing) sets out Ofgem's *"principal objective"* in this regard **[CB/694]**:

> *"(1) The principal objective of […] [Ofgem] in carrying out [its] […] functions under this Part is to protect the interests of existing and future consumers in relation to electricity conveyed by distribution systems or transmission systems.*
>
> *(1A) Those interests of existing and future consumers are their interests taken as a whole, including –*
>
> *(a) their interest 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 electricity to them; and*
>
> *(c) their interests in the fulfilment by [Ofgem], when carrying out its designated regulatory functions, of the designated regulatory objectives.*
>
> *(1B) […] [Ofgem] shall carry out [its] […] functions under this Part in the manner which … [Ofgem] … considers is best calculated to further the principal objective, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the generation, transmission, distribution or supply of electricity or the provision or use electricity interconnectors.*
>
> *(1C) Before deciding to carry out functions under this Part in a particular manner with a view to promoting competition as mentioned in subsection (1B), […] [Ofgem] shall consider –*
>
> *(a) to what extent the interests referred to in subsection (1) of consumers would be protected by that manner of carrying out those functions; and*

(b) whether there is any other manner (whether or not it would promote competition as mentioned in subsection (1B)) in which [...] [Ofgem] could carry out those functions which would better protect those interests.

(2) In performing the duties under subsections (1B) and (1C), [...] [Ofgem] shall have regard to –

(a) the need to secure that all reasonable demands for electricity are met; and

(b) 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 [...]; and

(c) the need to contribute to the achievement of sustainable development."

(c) Generator's obligation to comply with the CUSC

36. Condition 19 of the 'Electricity Generation Licence: Standard Conditions' provides **[CB/866]**:

*"**Condition 19. Compliance with CUSC***

1. Insofar as the licensee shall construct or operate a generating station, the licensee shall be a party to the CUSC Framework Agreement and shall comply with the CUSC.

2. The licensee shall take all reasonable steps to secure and implement (consistently with the procedures applicable under or in relation to core industry documents to which it is a party (or in relation to which it holds rights in respect of amendment), as modified or replaced from time to time), and shall not take any steps to prevent or unduly delay, changes to the those [sic] documents, such changes being changes which are appropriate in order to give full and timely effect to and/or in consequence of any modification which has been made to the CUSC.

3. For the avoidance of doubt, paragraph 2 is without prejudice to any rights of approval, veto or direction in respect of proposed changes to the core industry documents which [Ofgem] may have."

37. Generators also agree to the CUSC Framework Agreement, which provides **[CB/750]**:

*"**4. CUSC***

4.1 The CUSC is hereby given contractual effect between and made binding upon each CUSC Party with effect from the Effective Date.

4.2 With effect from the Effective Date, each CUSC Party undertakes to each other CUSC Party to comply with and to perform its obligations in accordance with and subject to the CUSC."

(d) Local tariffs under the CUSC

38. Sub-section 14.14 of the CUSC, headed 'Principles', is located within Section 1 of Part 2 of the CUSC ('The Statement of the Use of System Charging Methodology'). Paragraph 14.14.1 provides **[CB/1225]**:

> *"Transmission Network Use of System Charges reflect the cost of installing, operating and maintaining the Transmission System for the Transmission Owner (TO) (including Competitively Appointed Transmission Owners (CATOs)) activity functions of the Transmission Businesses of each Relevant Transmission Licensee. […]"*

39. Paragraph 14.14.2 provides **[CB/1225]**:

> *"The allowed revenue defined for these activities agreed [sic] with [Ofgem] at the time of the Transmission Owners' price control review for the succeeding price control period. The allowed revenue can be adjusted during the price control period. Transmission Network Use of System Charges are set to recover the allowed revenue as set by the price control (where necessary, allowing for any K_t adjustment for under or over recovery in a previous year net of the income recovered through pre-vesting connection charges)."*

40. Sub-section 14.15 of the CUSC is headed 'Derivation of the Transmission Network Use of System Tariff'. Paragraph 14.15.1 provides **[CB/1230]**:

> *"The Transmission Network Use of System (TNUoS) Tariff comprises two separate elements. Firstly, a locationally varying element derived from the DCLF ICRP transport model[9] to reflect the costs of capital investment in, and the maintenance and operation of, a transmission system to provide bulk transport of power to and from different locations. Secondly, a non-locationally varying element related to the provision of residual revenue recovery from demand only."*

[9] Paragraph 14.15.4 et seq. of the CUSC describes the transport model. Paragraph 14.15.4 in particular provides: *"The DCLF ICRP transport model calculates the marginal costs of investment in the transmission system which would be required as a consequence of an increase in demand or generation at each connection point or node on the transmission system, based on a study of peak demand conditions using both Peak Security and Year Round generation backgrounds on the transmission system. One measure of the investment costs is in terms of MWkm. This is the concept that ICRP uses to calculate marginal costs of investment. Hence, marginal costs are estimated initially in terms of increases or decreases in units of kilometres (km) of transmission system for a 1MW injection to the system".* **[CB/1230]**

41. Paragraph 14.15.2 provides that the locationally varying element of the TNUoS Tariff, i.e. that part of it which is not related to the provision of residual revenue recovery from demand only, has 'wider' components and 'local' components. The two 'local' components are *"local substation"* and *"local circuit"* (which together *"reflect the costs of the local network"*) **[CB/1230]**.

Offshore local circuit tariffs

42. Any generation not connected to a Main Interconnected Transmission System node has a local circuit tariff which the connected generator is required to pay: see CUSC §§14.15.36 & 14.18.1 to 14.18.4 **[CB/1237] [CB/1290]**.

43. The method of calculating the local circuit tariff in £/kW is set out in paragraph 14.15.121 of the CUSC **[CB/1258]**:

> *"Generation with a local circuit tariff is calculated by multiplying the Year Round nodal marginal km along the local circuit by the expansion constant and the relevant local security factor (whether onshore or offshore) and summing across local circuits to give the local circuit tariff:*
>
> $$\sum_k \frac{NLMkm_{Gj}L \;\; x\; EC\; x\; LocalSF_k}{1000} = CLT_{Gi}$$
>
> *Where*
>
> k = *Local circuit k for generator*
>
> $NLMkm_{Gj}^{L}$ = *Year Round Nodal marginal km along local circuit k using local circuit expansion factor*
>
> EC = *Expansion Constant*
>
> $LocalSF_k$ = *Local Security Factor for circuit k*
>
> CLT_{Gi} = *Circuit Local Tariff (£/kW)"*

44. In summary, therefore, an offshore circuit tariff is calculated as follows:

(a) an Offshore Circuit Expansion Factor (a factor reflecting how costly it is to transmit electricity over the circuit compared with the baseline MWkm cost of a 400kV overhead power line, as calculated by NESO from time to time)[10] is multiplied by

[10] See CUSC, §§14.15.13 & 14.15.30. **[CB/1232] [CB/1237]**

a nodal marginal km value (a notional measure of electrical 'distance' modelled by NESO, which, in the context of a radial circuit, is the same as the length in km of the circuit);[11]

(b) the product of the Offshore Circuit Expansion Factor and nodal marginal km value is multiplied by a baseline cost representing the capital investment required to transport 1MW over 1km of 400kV overhead power line;[12]

(c) the result is multiplied by a Local Security Factor (essentially, a factor to reflect the cost of any redundancy built into the circuit);[13]

(d) the product of the above is a £/MW figure, which is then divided by 1000 to give a £/kW tariff.

45. The expansion factor is a key input for present purposes. The method of calculating the expansion factor for an offshore local circuit is set out in paragraphs 14.15.80 to 14.15.82 of the CUSC **[CB/1247]**:

> *"14.15.80 Offshore expansion factors (£/MWkm) are derived from information provided by Offshore Transmission Owners for each offshore circuit. Offshore expansion factors are Offshore Transmission Owner and circuit specific. Each Offshore Transmission Owner will periodically provide, via the STC, information to derive an annual circuit revenue requirement. The offshore circuit revenue shall include revenues associated with the Offshore Transmission Owner's reactive compensation equipment, harmonic filtering equipment, asset spares and HVDC converter stations.*
>
> *14.15.81 In the year that the offshore transmission assets are transferred to the Offshore Transmission Owner, the offshore circuit expansion factor would be calculated as follows:*
>
> $$\frac{CRevOFTO1}{L \; x \; CircRat} \div \; Onshore \; 400kV \; OHL \; ExpansionConstant$$
>
> *Where:*
>
> *CRevOFTO1 = The offshore circuit revenue in £ for Year 1*
>
> *L = The total circuit length in km of the offshore circuit*

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[11] See CUSC, §§14.15.27 to 14.15.29, 14.15.32 & 14.15.36. **[CB/1236-1237]** See also NESO's 'Guidance on TNUoS Onshore Local Circuit Charges', updated 24 November 2025, p. 6. **[CB/875]**

[12] See CUSC, §14.15.59. **[CB/1243]**

[13] See CUSC §§14.15.88 to 14.15.95. **[CB/1250]**

CircRat = *The continuous rating of the offshore circuit*

14.15.82 *In all subsequent years, the offshore circuit expansion factor would be calculated as follows:*

$$\frac{AvCRevOFTO}{L\ x\ CircRat} \div Onshore\ 400kV\ OHL\ ExpansionConstant$$

Where:

AvCRevOFTO = *The annual offshore circuit revenue averaged over the remaining years of the onshore National Electricity Transmission Operator (NETSO) price control*

L = *The total circuit length in km of the offshore circuit*

CircRat = *The continuous rating of the offshore circuit"*

46. In summary, therefore, an Offshore Circuit Expansion Factor is calculated as follows:

(a) An *"annual circuit revenue requirement"* (or annual *"offshore circuit revenue"*) is *"derived"* from information provided *"periodically"* by the OFTO to NESO under the STC.

(b) The length of the circuit in km is multiplied by the continuous rating of the circuit (a measure, in MW, of the maximum power that can be continuously passed through the circuit). This gives a MWkm value for the circuit.

(c) The annual offshore circuit revenue is divided by this MWkm value.

(d) The result, a £/MWkm figure, is divided by the baseline £/MWkm cost of a 400kV overhead power line, giving a 'factor' which represents the relative cost to the system of the circuit compared with a 400kV overhead powerline.

47. Paragraph 14.15.84 of the CUSC provides **[CB/1247]**:

> *"Prevailing Offshore Transmission Owner specific expansion factors will be published in the Statement of Use of System Charges which is available from the Website. These shall be recalculated for the start of each price control period using the formula in paragraph 14.15.82. For each subsequent year within the price control period, these expansion factors will be adjusted by the annual Offshore Transmission Owner specific indexation factor, OFTOInd, […]"*

48. As these provisions have been administered by NESO since July 2017,[14] an offshore local circuit tariff can be increased from one price control period to the next where Ofgem has been persuaded by an OFTO in the previous price control period to approve one or more IAEs (the amount of the IAE apparently being reflected in the *"annual circuit revenue requirement"* and thereby increasing the size of the Offshore Circuit Expansion Factor and ultimately the £/kW tariff).

Offshore substation tariffs

49. The other local tariff applicable to an offshore generator is the substation tariff: see CUSC, §14.18.4 **[CB/1290]**.

50. The method of calculating the offshore substation tariff is set out in paragraphs 14.15.129 to 14.15.133 of the CUSC **[CB/1260]**:

"14.15.129 All offshore chargeable generation is subject to an offshore substation tariff. The offshore substation tariff shall be the sum of transformer, switchgear and platform components.

14.15.130 Each tariff component, expressed in £/kW, shall be the ratio of the Offshore Transmission Owner revenue (£) and rating associated with the transformers, switchgear or platform (kW) at each offshore substation. The Offshore Transmission Owner revenue of each tariff component shall include that associated with asset spares. In the case of the platform component, the relevant rating shall be the lower of the transformer or switchgear ratings. As with the offshore circuit expansion factors, the Offshore Transmission Owner revenue associated with each tariff component shall be averaged over the remaining years of the NETSO price control.

14.15.131 Offshore Transmission Owner revenue associated with interest during construction and project development overheads will be attributed to the relevant asset category with which it is associated. If these or any other costs included in the Offshore Transmission Owner revenue are not readily attributable to a given asset category, they will be pro-rated across the various asset categories based on their relative cost.

14.15.132 A discount shall be provided to the offshore substation tariff to reflect the average cost of civil engineering for onshore substations. The currently applicable discount is detailed in the Statement of Use of System Charges. This will be inflated by TOPI each year and reviewed every price control period.

14.15.133 Offshore substation tariffs shall be reviewed at the start of every onshore price control period. For each subsequent year within the price control

[14] See National Grid's letter to industry dated 27 July 2017. **[CB/765]**

period, these shall be inflated in the same manner as the associated Offshore Transmission Owner Revenue."

51. In summary, therefore, an offshore substation tariff is calculated by summing the following:

    (a) annual OFTO revenue associated with the transformers (£) divided by their kW rating;

    (b) annual OFTO revenue associated with the switchgear divided by its kW rating; and

    (c) annual OFTO revenue associated with the platform (the structure in which the equipment is housed) divided by the lower of the kW rating of the transformers or the switchgear.

52. The result is a £/kW tariff which is *"reviewed"* at the beginning of each price control period, and, for each subsequent year within the price control period, *"inflated in the same manner as the associated Offshore Transmission Owner Revenue"*.

Calculation of the amount payable

53. The method of calculating the charges payable by a particular generator under a tariff is set out in paragraphs 14.18.3 to 14.18.18 of the CUSC. The position is summarised in paragraph 14.18.19 (headed 'Monthly Charges'):

> *"Initial Transmission Network Use of System Charges for each Financial Year will be based on the Power Station Transmission Entry Capacity (TEC) for each User as set out in their Bilateral Agreement. The charge is calculated as above. This annual TNUoS generation charge is split evenly over the months remaining in the year. […]"*

54. A Bilateral Agreement is an agreement governing the generator's connection to the transmission system. The TEC is a measure of the amount of power that the generator is permitted to export onto the transmission system at a given time, measured in kW. The generator's TEC may be lower than the actual capacity of the OFTO's transmission infrastructure, and, where that is so, the charge collected from the offshore generator may be less than the allowed OFTO revenue associated with that infrastructure: see Steward 1, §32.

(e) The Demand Residual Tariff

55. OFTO revenue not funded by the locationally-varying element of the TNUoS tariff (e.g. because a generator's TEC is used to calculate the applicable charges) is recovered under the non-locationally varying element, i.e. the Transmission Demand Residual Tariffs: see CUSC, §14.15.1 (quoted in paragraph 40 above).

56. This is addressed in more detail in paragraphs 14.15.135 to 14.15.137 of the CUSC **[CB/1261]**:

> *"14.15.135 The total revenue to be recovered through TNUoS charges is determined each year with reference to the Transmission Licensees' Price Control formulas less the costs to be recovered through Pre-Vesting connection charges. Hence in any given t, a target revenue figure for TNUoS charges (TRRt) is set as follows:*
>
> $$TRR_t = R_t - PVC_t$$
>
> *Where*
>
> *TRR_t = TNUoS Revenue Recovery target for year t.*
>
> *R_t = Forecast revenue allowed under [NESO's] Price Control for year t (this term includes a number of adjustments, including for over/under recovery from the previous year). For further information, refer to condition F3 of the ESO Licence.*
>
> *PVC_t = Forecast Revenue from Pre-Vesting connection charges for year t.*
>
> *14.15.136 In normal circumstances, the revenue forecast to be recovered from initial transport tariffs will not equate to the total revenue target. This is due to a number of factors. For example, the transport model assumes, for simplicity, smooth incremental transmission investments can be made. In reality, transmission investment can only be made in discrete 'lumps'. The transmission system has been planned and developed over a long period of time. Forecasts and assessments used for planning purposes will not have been borne out precisely by events and therefore some distinction between an optimal system for one year and the actual system can be expected.*
>
> *14.15.137 As a result of the factors above, in order to ensure adequate recovery of total Transmission Owner revenue, a set of non-locational Transmission Demand Residual Tariffs are calculated, which include infrastructure substation asset costs. These tariffs are billed alongside the initial transport tariffs for demand only so that the total revenue recovery is achieved. The total amount of revenue to be recovered through Transmission Demand Residual Tariffs is defined as the Transmission Demand Residual …"*

57. The only type of entity liable to pay charges under the Transmission Demand Residual Tariff is the 'Lead Party' of a 'Supplier BM Unit': see CUSC, §§14.17.1, 14.17.13 and 14.26 **[CB/1276] [CB/1323]**. A 'Supplier' is a person holding a supply licence; a 'Supplier BM Unit' is, in effect, a distinct electricity distribution system for which that supplier is responsible; and a 'Lead Party' means a party to the Balancing and Settlement Code registered in relation to that BM Unit under that Code **[CB/1348]**. In essence, it is suppliers who are liable to pay.

B5. The procedural history of CMP344

58. CMP344 was proposed by the RWE Group on 21 May 2020. The Panel directed that the proposal be assessed by a Workgroup (an industry-led group appointed by the Panel to assist in the evaluation of the proposal). The text of the proposed modification was undeveloped at that time, but the purpose of the modification was clear: "*that revenue adjustments associated with actual costs incurred and costs saved for a Transmission Licensee that occur within price control periods from unforeseen and unforeseeable events, including Income Adjusting Events (IAEs), are recovered from Transmission Users by adjusting the Demand Transmission Residual … There will be no further recovery from Users in relation [to] these costs*".[15]

59. The Workgroup met three times to discuss the issue, detail the scope of the defect, devise potential solutions and assess the proposal against the Use of System Charging Objectives. It held a consultation between 2 and 23 November 2020. Eight responses were received. All were supportive of the modification save for a response from NESO[16] prepared by Mr Stone. In answer to the question 'Do you believe that the CMP344 Original Proposal better facilitates the Applicable Objectives', he said:[17]

> *"One of the fundamental arguments for this change proposal is the 'non-discriminatory treatment of costs in arrangements that are fair, proportionate and non-distortive'. The proposal argues that Offshore and Onshore generator costs should be dealt with in the same manner (recovered via the Demand Residual element of TNUoS) to ensure non-discriminatory treatment. However, we believe there is need for a balance to be found within this modification as it could be argued, that in principle, different assets being treated in a different way is not*

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15 See Annex 1 to the Third Final Modification Report – 'CMP344 Original Proposal', p. 1. **[CB/1402]**

16 At the time, 'National Grid ESO' or 'NGESO'.

17 See Annex 4 to the Third Final Modification Report – 'CUSC Workgroup Response Pro Forma' prepared by Mr Stone on behalf of NGESO, p. 2. **[CB/1573]**

necessarily unfair nor discriminatory. Another consideration is that it might be prudent that instead the same items such as circuits (both Onshore and Offshore) are treated in a specific manner in the same way rather than focusing exclusively on the alignment and identical treatment of generator costs.

We consider that the CMP344 proposal may have some merit as it would ensure consistency across both the Onshore and Offshore Transmission Owner frameworks in terms of where the recovery of costs associated with unforeseen or unforeseeable events, particularly in relation to IAEs, are targeted. This alignment would ensure there is no difference between the treatment of Onshore and Offshore connected generators [sic] costs by using the Demand Residual as means of recovery. To that end we believe this change will, to some degree better facilitate competition in the generation and supply of electricity (objective a).

As stated within the proposal this change will result in changes to wider and local TNUoS tariffs at the start of price control periods which will exclude the costs of unforeseen or unforeseeable events. Our concern is that this change will mean any adjustments associated with these costs will no longer be recovered by the user of the assets but rather through adjustments to the Demand Residual. This will ultimately impact end consumers [sic] tariffs, which may not result in cost reflective recovery, which therefore may not better facilitate objective b. Initial tariff impact analysis has been produced by the ESO and will be shared in the workgroup report […]"

60. The Workgroup expressed the view that there would be a positive benefit for consumers in the proposal:[18]

> *"The workgroup noted that there would be a corresponding benefit to consumers from the reduction in the risk associated with income adjusting events which is currently recovered through local charges. This reduction in risk should be reflected in a lower cost of capital for Offshore projects, and potentially in lower CfD prices. This should result in the removal or uncertainty over cost recovery of Income Adjusting Events, manifesting a cost of capital benefit for Offshore TOs."*

61. On 24 November 2020, the Workgroup met to vote on whether CMP344 better facilitated the Use of System Charging Objectives than the current arrangements. Five of the Workgroup's six members voted in favour of the proposal. The sixth member, Mr Stone, voted against it, affirming NESO's preference for the "baseline", i.e. the status quo. His reasons for doing so were as follows. After noting that the proposal was positive in ensuring no differential treatment between Onshore and Offshore Transmission Owner frameworks, he stated that *"it could be argued that in principle, different assets being treated in a different way is not necessarily unfair nor discriminatory"*. The same items,

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[18] See Annex 5 to the Third Final Modification Report – 'CMP344 – Tariff Analysis', p. 1. **[CB/1588]**

such as circuits, should be treated in the same way rather than alignment of generator costs. It was therefore neutral in respect of ACO (c) and (d) and, whilst it was positive in respect of ACO (a) and (e), Mr Stone was against the proposal overall.[19]

62. All responses were supportive of the proposed implementation date of April 2021, the start of the RIIO-T2 charging period, to some degree. NESO indicated that April 2021 was achievable if a decision was made in enough time to finalise tariffs. It proposed April 2022 as an alternative date, noting it may require further adjustment to the legal text.[20]

63. The Code Administrator (a role filled by NESO) held a Code Administrator consultation between 1 and 22 December 2020. Four responses were received. The only negative response was from Mr Stone, who explained that NESO did not believe that the proposal better facilitated the Applicable CUSC Objectives (for essentially the same reasons that he had given in the Workgroup consultation and vote).[21]

64. On 8 January 2021, the Panel met to vote on CMP344. A majority (7:2) voted in favour of the proposal. The Panel's Final Modification Report, recommending that the proposal be implemented, was submitted to Ofgem on 12 January 2021.[22]

65. On 5 May 2021, Ofgem wrote to the Panel chair 'sending back' CMP344 and directing the Panel to *"revise and resubmit"* the Final Modification Report. Ofgem considered the Report to be deficient in that (i) it was unclear from the Report and the legal text of the proposed modification *"which OFTO costs the Proposal applies to"*; and (ii) there was *"no quantitative information regarding how the change impacts each set of network users"*.[23]

66. On 28 May 2021, the Panel met to discuss Ofgem's letter. It decided that a Workgroup should be convened to address the deficiencies identified by Ofgem and that a further

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[19] See Annex 6 to the Third Final Modification Report – 'CUSC Alternative and Workgroup Vote', p. 4. **[CB/1592]**

[20] See Annex 4 to the Third Final Modification Report – 'CUSC Workgroup Response Pro Forma' prepared by Mr Stone on behalf of NGESO, p. 3. **[CB/1574]**

[21] See Annex 7 to the Third Final Modification Report – 'CUSC Administrator Consultation Response Pro Forma' prepared by Mr Stone on behalf of NGESO, p. 3. **[CB/1597]**

[22] See Annex 8 to the Third Final Modification Report – 'First Final Modification Report'. **[CB/1606]**

[23] See Annex 9 to the Third Final Modification Report – 'First Authority Send Back Letter', pp. 1-2. **[CB/1627]**

Code Administrator consultation would need to be held before the proposal was re-presented to the Panel for another vote.[24]

67. The Workgroup met to address the send back on 9 September 2021 and 31 October 2022. This significant lapse in time occurred at least in part because the proposer was required to commission a report from Cornwall Insight performing the quantitative economic analysis that Ofgem had requested: Steward 1, §§46-47. The Workgroup proposed new legal text (limiting the proposal to IAEs) and *"welcomed"* the analysis provided by Cornwall Insight, concluding that this addressed the 'ask' from Ofgem.[25]

68. NESO held a second Code Administrator consultation between 16 December 2022 and 17 January 2023. Six responses were received (one of which was confidential). The five non-confidential responses were all supportive of the proposal.[26]

69. On 27 January 2023, the Panel met to vote on CMP344 for a second time. A majority (7:2) voted in favour of the proposal. The Panel's second Final Modification Report, recommending that the proposal be implemented, was submitted to Ofgem on 8 February 2023.[27]

70. On 12 February 2024, Ofgem wrote to the Panel chair 'sending back' CMP344 for a second time. Ofgem directed the Panel to revise and resubmit the Final Modification Report to address certain matters which it did not consider to be clearly or sufficiently explained or evidenced. It also made the following observation about the Cornwall Insight report:[28]

> *"Notwithstanding that we have been unable to form a view of the Proposal, based on the information available, we have considered the quantitative analysis provided in the second FMR. Our initial view is that the analysis does not provide a well-rounded view of the impacts of CMP344, with respect to existing generators with CfD contracts. If it is the case that generators price risk premia into their CfD bids to financially mitigate against the risk of IAEs occurring, on that logic – the removal of the financial risk covered by that risk premium via the approval of CMP344 would result in a windfall gain for those generators that already have*

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24 Third Final Modification Report, pp. 12-13. **[CB/1383]**

25 Third Final Modification Report, pp. 13-16. **[CB/1384]**

26 See Annex 13 to the Third Final Modification Report – 'CMP344 Second Code Admin Consultation Responses'. **[CB/1656-1668]**

27 See Annex 14 to the Third Final Modification Report – 'Second Final Modification Report'. **[CB/1669]**

28 See Annex 15 to the Third Final Modification Report – 'Second Authority Send Back Letter', p. 4. **[CB/1701]**

contracts in place. Therefore, by not quantifying the value of this windfall gain in the analysis, we consider it does not provide a balanced assessment. We would encourage the Workgroup to consider whether the analysis could be adapted or supplemented to provide a more holistic view of the potential impacts."

71. On 23 February 2024, the Panel met to discuss Ofgem's letter. It decided that a Workgroup should be convened to address the deficiencies identified by Ofgem and that a further Code Administrator consultation would need to be held before the proposal was re-presented to the Panel for another vote.[29]

72. The Workgroup met on 24 February 2025 (a lapse in time due in part to the proposer having to commission a further report from Cornwall Insight to address Ofgem's observation about the existing report: see Steward 1, §50). The Workgroup concluded that those deficiencies had been addressed in the course of its discussions and by the further report provided by Cornwall Insight.[30]

73. NESO held a third Code Administrator consultation between 9 May 2025 and 2 June 2025. Two responses were received (one from the RWE Group, which was supportive, and one from Centrica, which was not).[31]

74. On 27 June 2025, the Panel met to vote on CMP344 for a third time. A majority (7:2) voted in favour of the proposal. The Panel's third Final Modification Report, recommending that the proposal be implemented, was submitted to Ofgem on 9 July 2025.[32]

75. At the time of this vote, the proposed modified terms of the CUSC were as follows:[33]

*"14.14.2 The **Onshore Transmission Owners**' revenue ~~The allowed revenue defined~~ for these activities is agreed with the **Authority** at the time of the **Onshore Transmission Owners**' price control review for the succeeding price control period. The **Offshore Transmission Owners**' revenue for these activities is set at the point of the asset transfer of its Offshore Transmission System. The allowed revenue can be adjusted during the price control period. Transmission Network Use of System Charges are set to recover ~~the allowed~~ this revenue. ~~as set by the price control (where necessary, allowing for any~~*

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29 Third Modification Report, p. 17. **[CB/1388]**

30 Third Modification Report, pp. 18-20. **[CB/1389]**

31 See Annex 20 to the Third Modification Report – 'CMP344 Third Code Administration Consultation Responses'. **[CB/1719-1725]**

32 Third Modification Report. **[CB/1372]**

33 See Annex 3 to the Third Modification Report – 'Legal Text', pp. 31, 35-36. **[CB/1450]**

~~*Kt adjustment for under or over recovery in a previous year net of the income recovered through pre-vesting connection charges).*~~

[…]

14.14.13 *Under an **Offshore Transmission Licence** there is provision for an Income Adjusting Event. The effect of this is to adjust the allowed revenue which was set at the point of asset transfer.*

14.14.14 *For **Offshore Transmission Owners'** an adjustment (whether positive or negative) due to an Income Adjusting Event approved by the **Authority** in **Financial Year** 't' will need to be made to the **Offshore Transmission Owners'** revenue. The value (as approved by the **Authority**) of the Income Adjusting Event will be used to adjust the **Offshore Transmission Owners'** revenue for **Financial Year** 't+1' (unless otherwise approved by the **Authority**) following **Authority** approval in **Financial Year** 't' for recovery through the **Transmission Demand Residual** for **Financial Year** 't+1'. For the avoidance of doubt, if an Income Adjusting Event is approved by the **Authority** after 25 January in **Financial Year** 't', the approved value will be used to adjust the **Offshore Transmission Owners'** revenue for **Financial Year** 't+2', for recovery via the **Transmission Demand Residual** for **Financial Year** 't+2'."*

B6. The Decision

76. The Decision, made by Mr Stone on behalf of Ofgem, was published on 1 May 2026. Ofgem decided that the modification proposal *"will not better facilitate the achievement of the [Applicable CUSC Objectives]"* and that directing the modification to be made *"would not be consistent with our principal objective and statutory duties"*: p. 13 **[CB/1745]**.

77. Ofgem's reasoning with respect to Use of System Charging Objective (d) (facilitation of competition) was as follows:

(a) Ofgem considered that allocating the costs of an IAE to the offshore generator better facilitated competition because the offshore generator, as the builder of the offshore transmission infrastructure, was *"the party best placed to mitigate the risk [of an IAE] and its consequences"* by *"procuring quality assets, providing relevant contractual protections (e.g. warranties and indemnities) and by negotiating requirements with the OFTO during the transaction phase (prior to the asset transfer) such as extended warranties or project specific indemnities"*: p. 15 **[CB/1747]**.

(b) To the extent that an onshore generator would not be required to bear similar costs in similar circumstances, Ofgem reasoned that the *"distinct differences between onshore and offshore generators in terms of the ability to mitigate both the risk of such events occurring and the impact of such events in terms of costs arising"* warranted *"a differential in the cost recovery mechanism applying as between OFTOs and TOs"*: pp. 15-16 **[CB/1747]**.

(c) In any event:

i. The first onshore cost recovery mechanism relied on by the Workgroup, a Cost and Output Adjusting Event or "**COAE**", was not *"directly comparable"* with an IAE because *"COAEs generally apply for unexpected costs related to the scope, cost and/or delivery impacts outside of a TO's control which will have an impact on the delivery of large network upgrade projects, such as Large Onshore Transmission Investment ('LOTI') and Accelerated Strategic Transmission Investment ('ASTI') projects"*. Whereas the costs associated with COAEs *"relate to projects that are generally part of wider strategic works and/or projects required for security of supply and, as these costs cannot be attributed to a single user, are socialised and recovered through the TDR"*, the costs associated with IAEs *"are recovered from the offshore generator through offshore local circuit tariffs on the grounds that these costs relate to transmission assets, which are for the sole use of the offshore generator"*: pp. 16-17 **[CB/1748]**.

ii. The second onshore cost recovery mechanism referred to by the Workgroup, the Scottish Hydro Electric Transmission Limited subsea cable repair reopener, was dismissed on the basis that (i) SHETL had not submitted a claim in respect of a sub-sea cable repair reopener; and (ii) SHETL's sub-sea cable was likely to be *"used for the wider network rather than being attributable to a specific generator"*: p. 17 **[CB/1749]**.

iii. To the extent that there was a *"perceived onshore equivalent for an IAE"*, Ofgem 'added' the following observation: *"for onshore local circuit failures the cost of the TO fixing or replacing the local circuit asset itself is recovered through onshore local circuit charges via an update to the SEF at the start of*

the following price control period. Onshore local charges are payable by generators and not demand consumers. This is in fact comparable to existing baseline arrangements for offshore local circuit charges […]": p. 16 **[CB/1748].**

(d) Ofgem considered that the baseline better facilitated competition by *"ensuring generators are appropriately exposed to the costs they confer on the system"*, i.e. that it was *"appropriate to target the recovery of costs on the party that, relatively speaking, is more likely to drive those costs"*. Consumers did not drive the costs of IAEs because the transmission infrastructure in question was *"for the sole use of the offshore generator"*. By contrast, the generator was *("relatively speaking")* *"more likely to be able to influence the quality or installation of the offshore transmission assets in the first place"* and could *"to a degree"* mitigate the occurrence and cost of IAEs by *"negotiating supplier warranties"*: p. 18 **[CB/1750]**.

(e) Although Ofgem accepted that the offshore generator had a *"strong commercial incentive"* to ensure a quality build whatever the ultimate treatment of IAEs, such that this was *"marginal consideration"*, it reasoned that *"if the generator's incentive to ensure quality build is reduced even to a very small degree, if any associated repair or replacement costs are moved to consumers who are unable to mitigate such risks, it is possible that this could lead to competitive distortions through artificially low CfD bids by some generators into auctions"*. This was because, in the event of asset failure, the costs would be visited upon consumers rather than the offshore generator *"which built the asset and is best placed to mitigate cost impacts through contractual protections"*: pp. 18-19 **[CB/1750]**.

(f) Ofgem recognised that *"as the market develops, it may not always be the generator in question who builds the relevant asset*s*"* such that, in future, *"the risk profile for an offshore generator may need to look different to today's arrangements"*. However, this did not affect its assessment of the proposal, which was conducted against *"the current arrangements, where OFTOs purchase, rather than build transmission assets for generator*s*"*: p. 19 **[CB/1751]**.

(g) Notwithstanding the view of potential impacts in relation to CfD bids and consumer costs provided in the second and third Final Modification Reports, Ofgem's *"understanding and expectation remains that removing the costs of IAEs from offshore generators will not necessarily result in greater volumes of offshore generation entering the market and potentially better facilitating competition through improved liquidity in the CfD auctions"*. Moreover, it was *"unclear"* whether *"the level of risk premia assumed to be applied to CfD bids and alleged to be removed via the Proposal [...] would be material enough to reduce CfD strike prices or meaningfully improve competitiveness"*: pp. 19-20 **[CB/1751]**.

(h) Ofgem considered that the proposal would not improve an offshore generator's ability to compete with *"other forms of generation"* because, in the past, offshore wind had had a separate subsidy budget under the CfD regime. This structure *"essentially prevents offshore projects from directly competing for subsidies against other technologies (i.e. onshore wind)"*: p. 20 **[CB/1752]**.

(i) Ofgem considered that an offshore generator was *"able to compete effectively"* in relation to the sale of electricity because the different levels of subsidy available for onshore and offshore generation *"essentially [...] put them on a level playing field"*. Any difference in cost exposure would be *"factored into the relevant level of their CfD bids"*, and, once the subsidy was secured, *"they are each put in a comparable situation"*: p. 20 **[CB/1752]**.

(j) Ofgem agreed with a Code Administrator consultation respondent who *"highlighted the risk"* that the proposal could *"introduce a distortion"* (a matter which Ofgem described as 'important'). The purported distortion was this: if risk premia in respect of IAEs had been factored into CfD bids in the past, and that risk were to be removed by the proposal, existing CfD holders would benefit from a strike price *"inflated"* to cover potential costs they would never face. This would not be the case for future CfD-backed generators *"or indeed any other generators"* and would therefore negatively impact competition *"even if only to a marginal extent given the estimated value of the risk premia"*: p. 21 **[CB/1753]**.

78. Ofgem's reasoning with respect to Use of System Charging Objective (e) (cost reflectivity) was as follows:

(a) Ofgem considered it *"important"* that generators *"benefitting from network infrastructure are contributing fairly towards its operation and maintenance, and should receive charging signals that appropriately reflect the costs they confer on that network"* and that targeting recovery on the party *"most likely to drive those costs or best placed to respond to a cost signal"* was *"appropriate"*. It considered that the current arrangements were *"more cost reflective"* than *"fully charging consumers who have no ability to manage those costs or respond to the signals"*: p. 23 **[CB/1755]**.

(b) Ofgem did not agree with *"the views presented that offshore generators cannot mitigate the risk of IAEs and their associated costs and therefore can't act upon any potential signal"*. The offshore generator was *"best placed to ensure appropriate arrangements are in place to reduce the risk of such events occurring by ensuring the quality of the assets and the installation, together with appropriate commercial recourse to mitigate the subsequent cost impacts of any such occurrence (through asset warranties, indemnities, and relevant contractual protections to be agreed as part of the transaction phase i.e. insurance)"*: pp. 23-24 **[CB/1755]**.

(c) The current arrangements were *"more cost reflective than fully charging consumers, as the assets in question are for the sole use of the offshore generator"*: p. 24 **[CB/1756]**.

(d) In any event, offshore generators did not *"always"* bear the *"full"* costs of IAEs because the IAE framework included an "*insurance deductible, meaning the OFTO will bear some of the cost"* and *"in some instances"* there may be a consumer contribution insofar as the capacity of the transmission infrastructure is greater than the amount of power the generator is permitted to deliver to the network at any given time (which may mean that the amount recovered from the generator does not reflect the OFTO's total revenue requirement in respect of the relevant infrastructure): see pp. 24-25 **[CB/1756]**.

79. Ofgem considered that rejecting the proposal was *"also consistent"* with its statutory duties, including its principal objective to protect the interests of existing and future consumers taken as a whole. In this regard:

(a) Ofgem noted that it had *"already addressed several factors … which indicate that the Proposal does not protect the interests of existing and future consumers"* (albeit none are expressly identified): p. 28 **[CB/1760]**.

(b) Ofgem criticised the quantitative analysis provided by Cornwall Insight on the basis that:

i. Cornwall Insight's conclusion as to resulting consumer benefits through the removal of risk premia was *"premised on the Proposal being implemented prior to CfD Allocation Rounds AR5, AR6 and AR7 commencing"*, which had *"now taken place"*, such that generators included in these rounds *"will already have their CfD strike price […] contractually fixed"*. This was said to *"affect the accuracy of Cornwall Insight's conclusions"*: p. 28 **[CB/1760]**.

ii. There were *"limitations"* in the Cornwall Insight analysis because it *"makes a number of simplifying assumptions of how an IAE is funded in practice, which are not fully correct"*, i.e. *"the analysis does not reflect certain aspects of the existing IAE cost recovery mechanism, including the treatment of OFTO insurance deductibles or the potential for sharing of the awarded IAE cost [with consumers]"*. This meant it was *"unclear"* how *"accurate the analysis provided is in terms of the magnitude of likely risk reductions"*: p. 29 **[CB/1761]**.

iii. Given these limitations, Ofgem considered it *"unlikely, or at least uncertain"* that the overall net consumer savings identified by Cornwall Insight *"will materialise in practice"* and did not consider it to be *"in consumer interests that they potentially require to face a double burden in respect of IAEs for existing CfD generators"*, i.e. a strike price 'inflated' by risk premia and the costs flowing from an IAE, should one materialise: p. 29 **[CB/1761]**.

C. NATURE OF APPEAL TO COMPETITION AND MARKETS AUTHORITY

80. Under section 173 of the Energy Act 2004 ("**EA 2004**"), an appeal lies to the Competition and Markets Authority ("**CMA**") from a decision by Ofgem *"relating to a document by reference to which provision is made by a condition of a gas or electricity licence"* **[CB/734]**.

81. The CMA's permission is required to bring such an appeal, but that permission may only be refused on the grounds (a) that the appeal is brought for reasons that are trivial or vexatious; or (b) that the appeal has no reasonable prospect of success: section 173(4)-(5) **[CB/735]**.

82. Section 175 relevantly provides **[CB/738]**:

> *"(2) In determining the appeal the CMA must have regard, to the same extent as is required of [Ofgem], to the matters to which [Ofgem] must have regard –*
>
> *(a) in the carrying out of its principal objectives under […] section 3A of the [EA 1989] (principal objectives and general duties);*
>
> *(b) in the performance of its duties under [that section]; and*
>
> *(c) in the performance of its duties under … sections 3B and 3C of the [EA 1989] (environmental and health and safety considerations).*
>
> *(3) In determining the appeal the CMA –*
>
> *(a) may have regard to any matter to which [Ofgem] was not able to have regard in the case of the decision appealed against; but*
>
> *(b) must not, in the exercise of that power, have regard to any matter to which [Ofgem] would not have been entitled to have regard in that case had it had the opportunity of doing so.*
>
> *(4) The CMA may allow the appeal only if it is satisfied that the decision appealed against was wrong on one or more of the following grounds –*
>
> *(a) that [Ofgem] failed properly to have regard to the matters mentioned in subsection (2);*
>
> *(b) that [Ofgem] failed properly to have regard to –*
>
> *(i) the purposes for which the relevant condition has effect (in the case of an appeal by virtue of section 173(2)) […]*
>
> *(c) that [Ofgem] failed to give appropriate weight to one or more of those matters or purposes;*
>
> *(d) that the decision was based, wholly or partly, on an error of fact;*
>
> *(e) that the decision was wrong in law."*

83. The term *"the relevant condition"* is defined to mean, in relation to a decision, *"the licence condition the provisions of which have effect by reference to the document to which the decision relates"*: EA 2004, section 175(11) **[CB/740]**. This means that, read

together, the grounds set out in paragraphs (b)(i) and (c) of section 175(4) are concerned with whether Ofgem failed properly to have regard to, or failed to give appropriate weight to, the relevant CUSC objectives: see Explanatory Notes to the EA 2004, §437 **[CB/742]**.

84. Sheldon J considered a provision similar to section 173(4) of the EA 2004 in *R (Wales & West Utilities Ltd) v Competition and Markets Authority* [2026] EWHC 99 (Admin), [2026] 4 WLR 29 ("*Wales & West Utilities*") **[CB/628]**. That case was concerned with section 23B(4) of the Gas Act 1986, which sets out the same grounds of appeal as section 175(4) of the EA 2004, save that (i) the ground in sub-paragraph (a) is directed to Ofgem's objective and duties under the Gas Act 1986 alone, rather than both the Gas Act 1986 and EA 2004; and (ii) instead of there being a ground available in respect of a failure properly to have regard to the purposes for which *"the relevant condition"* has effect, as there is under section 173(4), there is a ground that *"the modifications fail to achieve, in whole or in part, the effect stated by [Ofgem] by virtue of section 23(7)(b)"*. This is because section 23B is concerned with the modification of the conditions of a licence rather than the modification of a Code document. Under section 23(7)(b) of the Gas Act 1986, Ofgem was required to *"state the effect"* of any modifications that it made to licence conditions.

85. Sheldon J made the following observations about the scope of these grounds of appeal in the *Wales & West Utilities* case:

    (a) An appeal does not give rise to a re-run of the original investigation or to a de novo hearing of all the matters that were before Ofgem [138].

    (b) The CMA is required to consider the merits of Ofgem's decision through the prism of the specific errors alleged by the appellant; that is, to consider whether Ofgem made a decision that was *"wrong"* on one of the prescribed statutory grounds [139].

    (c) The different grounds on which the CMA may find that Ofgem's decision was *"wrong"* necessarily require consideration of the way in which the appeal is put, based on the conclusion reached by Ofgem and the findings of fact and analysis that led to that conclusion [141].

    (d) A decision will be wrong on the ground of error of fact where, applying *E v Secretary of State for the Home Department* [2004] QB 1044, (i) there was a mistake as to an existing fact, including a mistake as to the availability of evidence

on a particular matter; (ii) the fact or evidence was *"established"* in the sense that it was uncontentious and objectively verifiable; (iii) the appellant must not have been responsible for the mistake; and (iv) the mistake played a material (not necessarily decisive) part in the tribunal's reasoning [142].

(e) A decision will be wrong in law if there has been an error in construction or if Ofgem has reached a conclusion that was irrational, including where Ofgem reached a conclusion that was not open to it on the evidence [144]. (To this we would add: or if any other ground of judicial review is made out, including want of procedural fairness: see *E.ON UK Plc v GEMA*, Competition Commission, 10 July 2007 at §§5.18-5.19 **[CB/354]**.)

(f) The grounds that Ofgem failed to *"properly"* consider or give *"appropriate weight"* to particular matters require the CMA to *"scrutinise"* Ofgem's approach to matters that involve an element of judgment or evaluation and ask whether Ofgem got it *"wrong"*. This is not limited to Ofgem making an irrational or *Wednesbury* unreasonable evaluation or judgment. The CMA is required to view an appeal through the lens of its own duty to apply section 3A of the EA 1989; to scrutinise the decision in a manner consistent with its institutional expertise; and make its own assessment of what is *"proper"* regard and *"appropriate"* weight (but showing *"some deference"* to Ofgem's evaluation or judgment where the subject matter is within Ofgem's specialism) [151]-[153].

(g) In this regard, the CMA is ordinarily concerned, at least in matters of fact, with the adequacy of Ofgem's approach rather than which approach the CMA might itself have taken. In considering whether Ofgem's approach discloses an error, it is appropriate for the CMA to consider the *"inherent merits"* of that approach, including by comparing its merits *"with those of any reasonable alternatives advanced by the appellants"*. The alternative approach need only be *"materially"* better than Ofgem's approach in the sense that, weighing up the pros and cons of the different approaches, the alternative approach offers *"something more"* than Ofgem's approach. That is all that is required for the CMA to adjudge Ofgem's decision *"wrong"* [154]-[158].

86. Sheldon J's decision is not binding on the CMA in this appeal, and his comments on the grounds of appeal were expressly said to be *obiter dicta*. Sheldon J's comments about the scope of an appeal for error of fact were, with respect, plainly wrong. An appeal on ground of error of fact is sufficiently ample to allow any errors of fact to be corrected. *E v SSHD* was concerned with the ability of appellate bodies to allow appeals on grounds of error of fact where the statutory right of appeal is limited to issues of law (see e.g. [26], [36]). The appeal to the CMA is not so limited. Sheldon J's judgment should not be followed on this point.

87. Moreover, clear statutory authority to consider whether Ofgem had proper regard to, or gave sufficient weight to, the relevant CUSC objectives, plainly entitles the CMA not only to correct errors in construction of the objectives but also how they are applied, and the evaluation of the facts as they apply to the objectives (cf. [146]).

88. In other words, the grounds are extremely broad, covering all errors of fact and law, and in addition, by way of belt-and-braces, errors in the regard had and weight given to the objectives of the CUSC. As Lord Kerr stated in *Michalak v General Medical Council* [2017] UKSC 71, [2017] 1 WLR 4193, with the agreement of all the other members of the Supreme Court at [20] **[CB/584]**:

> *"In its conventional connotation, an 'appeal'(if it is not qualified by any words of restriction) is a procedure which entails a review of an original decision in all its aspects. Thus, an appeal body or court may examine the basis on which the original decision was made, assess the merits of the conclusions of the body or court from which the appeal was taken and, if it disagrees with those conclusions, substitute its own."*

89. See also the approach in *British Telecommunications Plc v Cable and Wireless Worldwide Plc* [2014] CAT 14 at [62]-[70] **[CB/466]**.

90. The breadth of the CMA's appellate jurisdiction is also informed by the context, which includes: (i) the fact that the decision appealed from did not involve any overt primary fact finding or oral evidence, (ii) the ability to adduce new evidence on appeal to the CMA (Rule 5.2(b)(iii)), and (iii) the fact that the original decision is vitiated by apparent bias (see below).

91. Furthermore, these points are reinforced by the requirements of Article 6, ECHR in the particular and unusual circumstances of this appeal, which require the CMA to interpret

its powers on appeal broadly, if necessary by reference to section 3 of the Human Rights Act 1998, to ensure that it has full jurisdiction as a matter of fact and law to reconsider for itself all the issues of fact and law arising: see paragraph 98 below.

92. Section 175(6) provides that if the appeal is allowed, the CMA must do one or more of the following:

> *"(a) quash the decision appealed against;*
>
> *(b) remit the matter to [Ofgem] for reconsideration and determination in accordance with the directions given by the CMA;*
>
> *(c) where it quashes the refusal of a consent, give directions to [Ofgem], and to such other persons as it considers appropriate, for securing that the relevant condition has effect as if the consent had been given."*

D. GROUNDS OF APPEAL

GROUND 1: APPEARANCE OF BIAS ON THE BASIS OF PREDETERMINATION AND RELATIONSHIP WITH ONE OF THE STAKEHOLDERS

93. The decision is contrary to law because it is vitiated by an appearance of bias, arising by predetermination and/or the connection between the decision-maker and one of the interested parties.

94. Ofgem's decision was taken by Mr Stone, who had been the representative for NESO on the Workgroup at earlier stages of the CUSC amendment process and who had repeatedly made clear that the baseline position should be maintained.

95. The test for apparent bias, whether arising by interest or predetermination, is the same. It is whether the fair-minded and informed observer would consider that there was a real risk that the decision-maker was biased or had predetermined the issue: *R (Lewis) v Redcar and Cleveland Borough Council* [2008] EWCA Civ 746, [2009] 1 WLR 83 **[CB/394]**. This is entirely distinct from whether the decision-maker was in fact biased or had a closed mind: *Mitchell v Georges* [2014] UKPC 43, at [34] **[CB/572]**.

96. The test is the same as that applied under Article 6 of the European Convention on Human Rights, which protects the right to an independent and impartial tribunal: *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 at [103] **[CB/215]**.

97. A fair-minded and informed observer would certainly consider that there was a real risk of bias/predetermination in the present case, having regard to the following:

(a) In November 2020, the Workgroup received 8 positive responses to CMP344 with the only negative response being from Mr Stone on behalf of NESO.

(b) On 24 November 2020, the Workgroup met to discuss the responses received. Mr Stone's view did not change: five of the six Workgroup members voted in favour of CMP344, Mr Stone voted against it.

(c) In December 2020, the Code Administrator, NESO, held a Code Administrator consultation. Four responses were received. The only negative response was from Mr Stone, on the basis that CMP344 did not better facilitate the relevant Code objectives.

(d) Mr Stone has therefore previously expressed his position on CMP344 and has maintained that view after receiving the views of those supporting the amendment.

(e) Mr Stone was also the decision-maker for Ofgem in respect of CMP463, whereby Ofgem approved an amendment to Section 14 of the CUSC to freeze Specific Expansion Factors at their 2025/26 level. In a decision taken on 27 January 2026, Mr Stone accepted that increases in TNUoS charges that *"could not have reasonably been foreseen"* are *"detrimental to competition"*[34] – reasoning that is prima facie inconsistent with his reasoning in CMP344.

(f) In addition, whilst Mr Stone no longer works for NESO, he previously advanced NESO's position on this precise policy issue in the context of the CMP344 amendment proposal. In *R (Ortona Ltd) v Secretary of State for Communities and Local Government* [2009] EWCA Civ 863, [2010] 1 P & CR 15, apparent bias was established where a planning inspector had previously worked for the local council on "*the very policy area"* in issue: see [34]-[35] (Sullivan LJ) & [40] (Patten LJ) **[CB/436]**. NESO's position, for which Mr Stone had been responsible, remained an important consideration for Ofgem and one that fell to Mr Stone to evaluate in

[34] The reason for the code amendment was that *"significant and unexpected changes"* to the level of TNUoS charges which *"could not reasonably have been foreseen" "can undermine competition"* and would provide a *"level playing field"*: see p. 6 of Ofgem's decision on CMP463. **[CB/1738]**

taking the decision (his decision refers to consultation responses and positions of the Workgroup).

(g) These facts and circumstances give rise both to a breach of the common law and of Article 6 ECHR **[CB/747]**: see *Kingsley v United Kingdom* (2001) 33 EHRR 13 at [49]-[50] **[CB/43]**.[35]

98. The consequences of the matters set out above are that:

(a) The CMA should quash the Decision and adopt a full re-hearing of the issues, adopting an approach whereby it has "*full jurisdiction*" to reconsider all issues arising, whether of law, fact or evaluation, as required by Article 6: *Kingsley* at [51] **[CB/44]**; *Tsfayo v United Kingdom* (2009) 48 EHRR 18, at [47] **[CB/323]**; *R (Wilkinson) v Broadmoor Special Hospital* [2001] EWCA Civ 1545, [2002] 1 WLR 419 **[CB/49]**; *R (British Medical Association) v Secretary of State for Health and Social Care* [2020] EWHC 64 (Admin), [2020] Pen. LR 10, at [105]-[108] **[CB/617]**.[36] Such an approach would also ensure the breach of natural justice at common law is cured by the appeal.[37]

(b) This would involve the CMA deciding the issues afresh without affording weight to the decision below. The appeal jurisdiction, being a jurisdiction over both fact and law, is sufficiently ample to allow a *de novo* consideration where required by Article 6, but, if necessary, section 3 of the HRA 1998 enables such an approach. It will also ensure that there is no further delay in the proceedings, contrary to the right under Article 6 to a determination within a reasonable time.

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35 Considered by the Grand Chamber in respect of Article 41. See (2002) 35 EHRR 10. **[CB/233]**

36 There is ample authority for the proposition that a sufficient appeal can cure a breach of Article 6. See *R v Secretary of State for the Home Department, ex p. Garner* (High Court, 19 April 1999), at p. 15 (Rose LJ & Richards J) **[CB/21]**.

37 See e.g. *R (DR) v Head Teacher of St George's Catholic School* [2002] EWCA Civ 1822, at [26]-[45] (Simon Brown LJ) & [55] (Keene LJ) **[CB/262]**.

GROUND 2: OFGEM WAS WRONG IN FACT AND/OR LAW IN DECIDING THAT CMP344 WOULD NOT FACILITATE COMPETITION AND THUS BETTER SERVE USE OF SYSTEM CHARGING OBJECTIVES (d) AND (e)

99. Ofgem erred in failing to approve CMP344, since it both better facilitates competition than the baseline and is more consistent with the principle of cost reflectivity.

100. CMP344 was proposed on the basis that it positively contributes to Use of System Charging Objectives (d) and (e). The reasons can be summarised as follows:

(a) It would allow offshore generators to compete on a level playing field with onshore generators, since onshore generators are not required to bear costs equivalent to IAEs;

(b) It would allow offshore generators to compete on a level playing field with other offshore generators on the basis of underlying project costs and without attributing to them unforeseeable and non-location specific costs as a form of *"punitive lottery"*, which is inconsistent with effective cost-signalling; and

(c) It would promote competition and the interests of consumers by most efficiently allocating the costs of IAEs, since the overall long-term costs of allocating these to generators will be to increase costs overall.

Ground 2A: Erroneous reliance on generators being the "party best placed to mitigate the risk and its consequences"

101. The central line of reasoning in Ofgem's decision is that offshore generators should bear the costs of IAEs because they are *"the party best placed to mitigate the risk and its consequences"*: p. 15 **[CB/1747]**. It is also said that they are *"more likely"* to *"drive"* those costs: p. 18 **[CB/1750]**. The explanation given is that they are *"more likely"* to be able to *"influence the quality or installation"* of the assets and *"mitigate the occurrence, and costs, of IAEs needing to be recovered by negotiating supplier warranties"*: p. 18 **[CB/1750]**.

102. This line of reasoning is flawed and wrong for a number of reasons.

Ground 2A(1): Ofgem adopted an unduly narrow view of an IAE

103. The term 'Income Adjusting Event' is defined in paragraph 15 of Amended Standard Condition E12-J3 to mean, in a particular financial year, an Event or circumstance (a) constituting 'Force Majeure'; (b) resulting from an amendment to the STC not allowed for when the OFTO's allowed revenue for that year was determined; or (c) which in the opinion of Ofgem is an IAE (see paragraph 21 above, where the definition is set out).

104. 'Force Majeure' is defined to mean an Event or circumstance beyond the reasonable control of the OFTO other than weather conditions that are reasonably to be expected at the location of the Event or circumstance in question. The 'Force Majeure' definition expressly includes, for example, Acts of God, fire, storm, lightning, flood, earthquake, accumulation of snow or ice, strike, act or war or terrorism, act of vandalism, public demonstration, governmental restraint and a change in the law (see paragraph 22 above, where the definition is set out).

105. Despite the breadth of the concept, Ofgem considered IAEs to be confined to events and circumstances that can be avoided or mitigated during development by the offshore generator procuring quality assets and supplier warranties and indemnities, i.e. latent defects. This misconstruction is clear from the following:

    (a) The Decision does not attempt to analyse the scope of the concept (indeed, it does not even set out the definition, referring to an IAE simply as *"arising in certain defined circumstances"*: p. 5 **[CB/1737]**).

    (b) The only examples of IAEs given in the Decision are cable failures caused by latent defects: see pp. 5-6, 15 **[CB/1737] [CB/1747]**.

    (c) The references to procuring quality assets or supplier warranties and indemnities clearly relate to the generator as having been the developer of the transmission assets: p. 15; see also pp. 18-19 & 23-24 **[CB/1750] [CB/1755]**.

106. However, this reasoning is erroneous and represents a misdirection and error both in fact and law.

107. To determine whether CMP344 better achieved the Use of System Charging Objectives, the baseline position needed to be compared with the proposed amended rule in light of

the full scope of the concept of an IAE to which it would apply, not with the contingent manner that the IAE concept has had effect in the past (which happens to have been related to cable failures). As stated in the Ofgem IAE Policy, *"although all IAE claims to date have concerned subsea cables we cannot predict what issues may arise with different parts of an offshore transmission system in the future"*: §3.29 **[CB/786]**.

108. It was accordingly erroneous in law for Ofgem to adopt a myopic focus on cable failures arising from latent defects, and to treat this as the exclusive perspective from which to analyse CMP344. Ofgem makes no attempt to explain or consider how a generator could be *"best placed"* to deal with other IAEs, such as sabotage or vandalism of transmission assets, or those arising from terrorism, warlike activities of enemy states, or changes in the law. Quite obviously, they are not in a position to mitigate such risks.

109. Indeed, in respect of a number of IAE risks it is clear that OFTOs would be *"best placed"* to mitigate their *"occurrence or cost"*, even if it would not be reasonable, even for OFTOs, to do so: OFTOs are in possession of the assets and have rights of access over them, and as such are best placed to take any available precautions if faced with, say, an environmental protest at an onshore substation, or a threat of sabotage to an offshore substation or sub-sea cables (such as by establishing patrols or enhanced perimeters). Furthermore, the costs of an IAE are principally the costs of fixing and remediating damage to transmission assets, which are fully within the control of OFTOs (and not within the control of generators): McCole 1, §§50-57. It was therefore wrong in fact for Ofgem to conclude that offshore generators are the party *"best placed"* to mitigate the risk and consequences of IAEs.

Ground 2A(2): Ofgem failed to consider or give appropriate weight to the lack of feasibility and costs of generators mitigating IAEs

110. Ofgem failed to consider or give appropriate weight to the feasibility or costs of generators seeking to mitigate the occurrence or costs of IAEs, even on the unduly narrow and inaccurate view of IAEs that it adopted. Ofgem's position was mere speculation and it was inadequately reasoned. This flaw in Ofgem's reasoning links with a further error, considered below, that Ofgem wrongly assumes that imposing liability for IAEs provides meaningful and efficient economic signals to generators.

111. Ofgem essentially proceeded on the assumption that if there was something that generators might be able to do to mitigate a cable failure risk more than an OFTO (or other party) then it would be efficient for them to have the costs of those risks imposed on them. The idea seems to be that imposing such costs would send a *"signal"* to generators encouraging them to take steps which would reduce costs of the system overall, by reducing the risks of costly asset failures. It is clear, for instance, in the following sentence in the Decision (p. 18 **[CB/1750]**):

> *"This approach is most likely to ensure competitive incentives for offshore generators to design and build their assets in a manner that mitigates the risk of asset failure, and to seek to negotiate supplier recourse as well as contractual protections, thus imposing lower transmission costs on consumers."*

112. There are a number of flaws in this reasoning.

113. First, there was no evidence before Ofgem that generators can do anything to mitigate the risks of cable failures (let alone any other IAEs) beyond that which they already do. One of the problems is that cable failures due to latent defects are unpredictable. One does not necessarily know what they will be caused by. Given this, one cannot sensibly assume that it is possible to select a cable which is less likely to have a latent defect. Ofgem's decision refers generically to *"procuring quality assets"* but there is no evidence that generators are able to purchase better quality assets or that they would be superior in terms of mitigating IAE risks — and even if they might be in some respects better they might have other unknown vulnerabilities; that is the very nature of latent defects.

114. There was, moreover, no evidence to support the assertion that warranties beyond those already procured could be obtained.

115. If one considers IAEs more widely, the flaw in Ofgem's reasoning becomes even more apparent. Take changes in the law, for example: there was no evidence that generators can do anything to mitigate the risks of a change in the law (and any assertion that it could would be absurd). The same could be said of acts of war or terrorism, or deliberate acts of sabotage, for instance.

116. Second, even if it is imaginable that a generator could take some step to mitigate a risk arising from an IAE, such as cable failure, Ofgem failed to appreciate that it needed to

consider the costs of such activities. It simply assumed that taking such steps would be economically efficient and reduce costs in the system as a whole. That is clearly the wrong approach. As the Appellants' economist Mr Anstey puts it, whilst the logic of TNUoS charging arrangements is in general that generators pay the costs of assets that they use, *"[i]t is less apparent that allocating IAE costs to offshore generators promotes effective competition or serves consumers' collective interest"*: Anstey 1, §§84-85.

117. Perhaps, for instance, a generator could reduce the risk arising from a protest or vandalism of an onshore substation by building the substation underground. But doing so would be unreasonably costly and would increase the costs of transmission assets. It would not be an efficient step to take and seeking to incentivise such a step would be perverse and may increase other risks: see McCole 1, §66.

118. The same logic applies to the steps that Ofgem relied on: the *"quality"* of transmission assets and supplier warranties. Even if it were possible for a generator to procure bespoke, more heavily armoured transmission cables, for instance, this would likely be extremely costly and inefficient by comparison with the *"cost"* of cable failure caused by such lack of reinforcement (as established by the remote risk multiplied by the cost of fixing the cable): see McCole 1, §§58-69; Cash 1, §§8-33.

119. Similarly, the cost of such a warranty would, at a minimum, be the expected value of the IAE costs plus whatever margin the provider adds, with the result that *"placing incentives on offshore generators to obtain insurance or warranties will only increase the costs of developing the transmission cable by at least as much as the expected IAE costs"*: Anstey 1, §96. In terms of insurance, Ofgem's own IAE Policy recognises that these events may be uninsurable: *"we consider the IAE Condition should operate to provide uninsurability protection that puts the claimant OFTO back in the position it would have been in had the risk of damage caused by a latent defect been insurable"*: see §3.8 **[CB/782]**.

120. Ofgem fails, in other words, to consider the costs to the system of allocating to generators risks which are not controllable or which would be inefficient to seek to mitigate because of their low probability of occurrence (i.e. "tail" risks) and the uncertainty as to how to seek to address them; in other contexts, Ofgem has recognised that imposing tail and particularly uncontrollable risks on market participants is inefficient and not in the interests of consumers: Anstey 1, §§98-102. Indeed, in its IAE Policy, Ofgem reasoned

that it would *"not be good value for money"* for OFTOs to create contingent provisions to fund uninsurable cable failures *"considering it is unlikely that the risk will crystallise"*: §2.2 **[CB/779]**. It is equally the case that it is not good value for money for generators to expend money on prophylactic measures given it is unlikely they will crystallise. In respect of such risks, value for money is achieved by socialising them if and when they occur, thus ensuring the cost to the system is no more than the cost of the event.

121. Consideration of the possibility and efficiency of generators taking Ofgem's postulated mitigation measures was also necessary in assessing the desirability of CMP344 given that the costs expended by generators in building transmission assets are subject to review and disallowance by Ofgem when the assets are transferred to the OFTO. In undertaking this exercise, Ofgem considers the efficiency of costs incurred and they disallow costs that are inefficient. Developers are expected to manage costs effectively and costs that are deemed not *"economic and efficient"* are disallowed.[38] It is a specific requirement under existing guidance that developments must provide evidence of *"sufficient pre-installation risk assessment and mitigation practices"*.[39]

122. In relation to spare cable and other assets, Ofgem allows only the costs which it considers to represent *"economic and efficient costs"*, which will include no more than 1km of spare cable without specific justification.[40] Seabed surveys are not recoverable by the generator.[41] One particularly striking example is that Ofgem disallows the cost of spare transformers, although included by generators in the past.[42] Buying spare transformers, cable or other equipment is one way of building resilience into the system and may reduce any periods of transmission outages; however, Ofgem has refused to allow recovery of the costs of such assets by developers. This is compelling evidence that Ofgem does not itself consider the costs of such measures, when taken at the point of development, to be efficiently incurred. Moreover, generators cannot be expected to incur costs which Ofgem may preclude them recovering on the sale of the asset.

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38 Specifically in relation to cables, Ofgem's policy provides: *"we will assess the economic and efficient costs associated with these generation assets. If the developer hasn't done so already, we will make an adjustment for the whole costs associated with supplying and installing these fibres, for both on and offshore cables"*: see Ofgem's Guidance – Offshore Transmission: Guidance for Costs Assessment (2022), §3.32. **[CB/823]**

39 Ibid, §3.35. **[CB/824]**

40 Ibid, §3.42. **[CB/825]**

41 Ibid, §3.34. **[CB/824]**

42 Ibid, §3.43. **[CB/825]**

123. Ofgem also fails to take into account the fact that generators work within current regulatory requirements and guidelines as to the quality of assets and suitability of warranties: McCole 1, §§66-67.

Ground 2A(3): Failure to consider or give due weight to the existing incentives on generators

124. A related point to that addressed in Ground 2A(4) below, which is an aspect of Ofgem's failure to consider whether the allocation of costs to generators on the basis that they are *"best placed"* to mitigate the risk, is that they are already under incentives relating to cable and network integrity because transmission disruption has a direct impact on their revenues, which principally derive from the sale and export of electricity to energy suppliers: see McCole 1, §§35-46.

125. By contrast, OFTOs are not incentivised by economic incentives (and certainly are not incentivised to anything like the same extent to minimise transmission disruption as their Annual Revenue is not dependent upon actual transmission). Ofgem considers that the licence conditions requiring OFTOs to maintain and repair transmission assets is adequate: Ofgem IAE Policy, §3.31 **[CB/786]**.

126. The commercial incentives on generators render any additional incentive effect caused by the risk of an IAE insignificant (given the unlikelihood, unpredictability and level of such liability).

Ground 2A(4): Ofgem wrongly considered that imposing costs on generators would be consistent with the principle of cost reflectivity and/or represent efficient economic signalling

127. A useful statement of the rationale behind cost-reflective charging is contained in Ofgem's decision on CMP213:[43]

> *"Cost reflective charging targets the costs of establishing and operating transmission infrastructure on users of the system who impose those costs. This provides a signal to enable them to make informed commercial decisions about where to situate new generation and when to adjust or close existing generation.*

[43] See Ofgem's 'Project TransmiT: Decision on proposals to change the electricity transmission charging methodology', 25 July 2014, §1.4. **[CB/1767]**

This supports the development of an economically efficient system at lowest cost to the consumer."

128. This is reflected in paragraph 14.14.6 of the CUSC, which states that the underlying rationale behind TNUoS charges *"is that efficient economic signals are provided to Users"* to reflect the differing local costs of using transmission services **[CB/1228]**.

129. In the present decision, Ofgem's reasoning is premised on the belief that its approach is most likely to ensure *"competitive incentives"* that would avoid asset failure or produce other benefits for the consumer. Ofgem's reasoning in this regard was a premise of its conclusion that the baseline arrangements are *"cost reflective"* in a way that *"promote effective competition"*: pp. 17-18 **[CB/1749]**. However, such incentives have to be communicated in a manner that they can be responded to by rational economic operators in a manner which enhances competition.

130. Ofgem's reasoning was wrong in law and/or fact and failed properly to interpret or apply Use of System Charging Objectives (d) and (e). IAEs represent unforeseeable and uncontrollable risks which do not systematically arise for less efficient market participants; nor are they locationally specific. It is inefficient and distorts competition for these to be imposed on generators because it creates a form of *"punitive lottery"* (Anstey 1, §78) without any proper basis for considering that establishing such a lottery will reduce the risk of IAEs occurring or their extent. IAEs are costs of the system, which should be socialised.

131. Further, Ofgem assumed that the current arrangements *do* send efficient economic signals to mitigate locationally varying costs, even though that is not the case. In particular:

    (a) If a generator cannot take any efficient steps to avoid or mitigate the cost of an event or circumstance, the reallocation of that cost to the generator does not send any meaningful locational signal to the generation development market. As set out above, Ofgem simply failed to consider whether there was anything that an offshore generator could efficiently do to avoid or mitigate the costs of cable failures caused by latent defects, let alone the costs of IAEs generally.

    (b) Moreover, the costs of IAEs are not in their general nature locationally specific in the sense of being risks that foreseeably arise because of the specific location of

the transmission assets. Cable failures caused, for instance, by Acts of God, latent defects in cables, or substation failures, could occur in any location and are not specific to the location of any particular generating station or transmission assets.

132. In other contexts, Ofgem has recognised the need to shield market participants from unpredictable risks to preserve and promote competition. Ofgem's position is not consistent with its reasoning in these other contexts. For example, in its decision on CMP463, Ofgem argued that unexpected charges are detrimental to competition. Ofgem therefore approved a stabilisation measure freezing SEFs for onshore generators. In its reasons, Ofgem finds that *"unexpected changes in charges with little advanced notice are… detrimental to competition"*.[44] It thus allowed a modification to prevent a situation where some users would face *"significant changes to TNUoS charges, that…could not have been reasonably foreseen"*.[45] The proposal had noted that the cost imposition on Users "*appears more like a 'lottery' as opposed to cost reflective charging"*.[46] The same logic applies to CMP344.

133. Similarly, Ofgem's approval of CMP308 to remove BSUoS charges from generation provides precedent for allocating to demand customers those costs whose risks generators cannot reduce. The second BSUoS task force, headed by NGESO, stated that a signal to which market participants cannot respond becomes a cost recovery charge that is most efficiently placed directly on demand:[47] see Anstey 1, §117.

134. Indeed, in its IAE Policy, Ofgem relied in precisely the present context upon the fact that it would not be *"value for money"* for OFTOs to *"price the full risk of uninsurable latent defects into their bids"* for transmission assets during the OFTO tender process: §2.2 **[CB/779]**. However, by CMP344, Ofgem is reasoning that this is precisely what should happen, by suggesting that generators should purchase prophylactic protection against such risks (warranties, insurance, different calibre equipment); without taking into account that these increased costs would form the basis of the value of the transmission assets for which OFTOs would be required to pay through the asset transfer value (unless

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44 See Ofgem's decision on CMP463, p. 6. **[CB/2085]**

45 Ibid.

46 See Final Modification Report in CMP463, p. 5. CMP463 Final Modification Report

47 See the Final Report of NESO's Second Balancing Services Charges Task Force dated 30 September 2020, pp. 6-11. **[CB/2119-2124]**

such expenditure were to be disallowed by Ofgem as uneconomic and inefficient, which would itself be inconsistent with its reasoning in the Decision).

135. Ofgem's position in relation to the Shetland subsea cable reopener is a further example of its inconsistent position. Since that example was specifically relied upon by the Workgroup and rejected by Ofgem, it is addressed separately in the next sub-ground.

Ground 2A(5): Wrong to reject comparison with SHETL subsea cable reopener

136. The Workgroup drew a comparison between the proposed modification and the Sub-Sea Cable Reopener contained in Special Condition 3.28 of the transmission licence held by Scottish Hydro Electric Transmission Plc ("**SHETL**") **[CB/878]**. SHETL is the owner and operator of the Shetland High-Voltage Direct Current Link ("**SHVL**") connecting Shetland to the mainland, allowing electricity to be transported to and from the islands. The sub-sea transmission assets were constructed by SHETL in around 2022.

137. The reopener is a mechanism for the upward adjustment of SHETL's revenue, subject to Ofgem's approval, in the event that there is a need for unanticipated sub-sea cable repair works: see Special Condition 3.28.5 **[CB/880]**. The reopener was introduced by Ofgem's RIIO-2 Final Determination to *"enable SHET[L] to seek funding for efficient costs associated with resolving unexpected subsea cable faults, or for mitigating the risk of these faults occurring"*.[48] Such costs are recovered under the TDR. Ofgem decided that this was appropriate as consumers would only be required to pay necessary and efficient costs of mitigation and repair. Significantly, Ofgem did not consider that the costs should be borne by SHETL, although the (flawed) logic of its decision in CMP344 would mean that it should have done so on the basis that, as the developer of the transmission assets, SHETL was best placed to address the risks. Instead, Ofgem recognised that it was appropriate for such costs to be socialised.

138. The position has been retained in RIIO-3. In deciding to retain it, Ofgem explained:[49]

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[48] See Ofgem's 'RIIO-2 Final Determinations – SHET Annex (REVISED)' dated 3 February 2021, pp. 59-60. **[CB/2003]**

[49] See Ofgem's 'RIIO-3 Final Determinations – Scottish Hydro Electric Transmission (SHET)', dated 4 December 2025, pp. 27-28. **[CB/2064]**

(a) that the purpose of the reopener is to enable SHETL to seek funding for *"efficient costs"* associated with resolving *"unexpected subsea cable faults"* or for *"mitigating the risk of these faults occurring"*; and

(b) that the benefits of the reopener included the improvement of security of supply in areas of SHETL's network that are reliant on subsea cables and ensuring that the consumer *"is only paying SHET[L] to manage necessary risks"*.

139. Despite that similarity with the proposed modification, Ofgem dismissed the comparison (p. 17 **[CB/1749]**):

> *"To the extent that comparisons were also drawn between IAEs and the SHETL subsea cable reopener, SHETL has not submitted a claim in respect of a subsea cable repair reopener. Whilst OFTOs usually own offshore transmission assets for use by offshore generators, we note that a TO's subsea cables (including SHETL subsea cable) are likely to be used for the wider network rather than being attributable to a specific generator ..."*
>
> *Overall, we do not consider the comparisons made by the Proposer and Workgroup sufficiently evidence that those specific onshore and offshore cost recovery mechanisms for unforeseeable events need to be aligned with each other, nor that more effective competition would specifically result from such alignment. IAEs are used to target events associated with assets used by a single generator whereas COAEs and certain specific reopeners are used to recover unexpected costs TOs face in relation to the wider network."*

140. Ofgem was wrong to reject the comparison drawn by the proposer and the Workgroup between CMP344 and the reopener, for a number of reasons.

141. First, the fact that SHETL *"has not submitted a claim in respect of a subsea cable repair reopener"* was irrelevant. What is relevant is how costs are allocated by the licensing and charging regime approved by Ofgem, not whether such costs have actually arisen. By taking this point into account, Ofgem relied upon an irrelevant consideration and erred in law.

142. Second, the distinction drawn by Ofgem between IAEs and the SHETL reopener was in any event flawed and failed to address or give any adequate weight to the force of the comparison drawn by the Workgroup. Ofgem's logic appears to be that, since an OFTO's assets are "*usually"* for use *"attributable to a specific generator"* or *"used by a single generator"*, it should bear the costs incurred in relation to those assets, even if

unforeseeable (see p. 17 **[CB/1749]**; logic that is repeated elsewhere in the Decision: see pp. 18 and 24 **[CB/1750-1756]**). This reasoning is, however, inadequate and flawed:

(a) At the level of principle, the fact that an offshore generator is the only generator conveying electricity over an offshore transmission asset is immaterial. It does not follow that the generator is the sole user or the sole beneficiary of those assets (cf. Ofgem's statement at p. 23 that it considers it *"important that generators benefitting from the network infrastructure are contributing fairly towards its operation and maintenance"* **[CB/1755]**). The electricity suppliers and end-users of the transmission network are beneficiaries and users of OFTO assets.

(b) In any event, the reasoning fails to take into account that the SHVL was specifically built to facilitate the Viking Wind Farm, an onshore development and generation project owned by the SSE group, to allow its 443MW to be exported to the mainland grid. Ofgem approved the SHVL only on the basis that the Viking Wind Farm would go ahead because of the contribution it would make to meeting the UK's Net Zero target.[50] The SHVL converts power from the Viking Wind Farm to DC current at the Kergord Converter Station, to export to the mainland grid.[51] Whilst it is possible that other generating stations might use some of the spare export capacity of the SHVL in the future, the SHVL was developed specifically for the Viking Wind Farm, which is capable of using around 74% of the 600MW transmission capacity of the transmission link.

(c) There is no necessary reason for offshore generators to use separate transmission assets. Sharing of transmission assets occurs in other European countries and is proposed for the Morgan and Morecambe and Sheringham and Dudgeon projects in the UK.[52] It is a feature of NESO's Holistic Network Design, which covers 37

[50] See Ofgem's 'Decision on the Final Needs Case for Shetland electricity transmission project' dated 16 July 2020. **[CB/1942]**

[51] Once an onshore 132kV Kergord to Gremista GSP link is operational (in 2026), the vast majority of the time Shetland's energy will be supplied by the Viking Wind Farm, and the Lerwick Power Station will transition to a standby station. See https://www.ssen.co.uk/about-ssen/our-works/shetland-energy/

[52] See https://morecambeandmorgan.com/transmission/the-project/transmission-assets/ & https://dudgeonoffshorewind.co.uk/extensionproject/overview; See also Morecambe's 'Morgan and Morecambe Offshore Wind Farms: Transmission Assets', Environmental Statement, volume 1, chapter 3.

planned offshore wind farms with over 50GW of capacity with substantial sharing of transmission assets.[53]

(d) Ofgem's reasoning in any event ignores the fact that the logic of Ofgem's approach in relation to the Shetland reopener is that the costs of unexpected cable failures should not fall on the entity that has constructed the cables, but socialised to customers as part of the general costs of the system.

143. Thus, by rejecting the relevance of the treatment of the Shetland subsea cable reopener, Ofgem erred in fact and/or law and/or failed properly to have regard or give appropriate weight to Use of System Charging Objectives (d) and/or (e).

Ground 2A(6): Wrongly focuses on generator as developer

144. A further flaw in Ofgem's decision is that whilst it purports to allocate the costs of IAEs to generators on the basis that they are best able to mitigate the risk, the reasoning is not premised on the capacity of generators to mitigate the risk but the capacity of developers to do so. There is no necessary reason in either law or fact for this equivalence to be drawn by Ofgem. The context is that:

(a) Ofgem licences the activities of electricity generation, transmission and supply (etc): it does not licence the activity of development. The CUSC provides a contractual mechanism for imposing charges on users, including generators, all of whom are required by the conditions of their licence to subscribe to the CUSC.

(b) The regulation of build costs is, indirectly, managed by Ofgem only through the process of assessing and disallowing costs during the OFTO tender process. However, once those build costs have been assessed, the OFTO assumes the risks associated with the build. It is open to the OFTO to either price risks into its bid, negotiate warranties with the developer or seek its own insurance. Ultimately, if it is unwilling to assume the risks, it does not commit to purchasing the transmission assets.

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[53] See https://www.neso.energy/consultation-begins-connecting-offshore-wind-power-britains-electricity-grid; NESO's 'Pathway to 2030: Holistic Network Design' document dated July 2022 Pathway to 2030: Holistic Network Design; NESO's 'Beyond 2030: A national blueprint for a decarbonised electricity system in Great Britain' document dated March 2024 Beyond 2030; and NESO's 'ESO Offshore Coordination Quarterly Update' dated April 2024 ESO Offshore Coordination Quarterly Update.

145. The approach adopted by Ofgem is in conflict with this regime because:

(a) It imposes costs on generators not by reference to their activities as generator but by reference to their activities as developer, i.e. qua developer not qua generator, because the principal rationale for doing so is not (as with TNUoS charges generally) that they should bear the costs because they use the transmission assets, and should pay for the costs of such use, but because they are (supposedly) best placed to mitigate the risks. But this is a reason that has nothing to do with the activities of generation and confuses the separate stages of development and generation.

(b) The error is apparent if one considers that the developer need not remain the generator, but could sell the generating assets once the transmission assets have been sold to the OFTO. There is also a potential for an OFTO build model, by which the OFTO builds the transmission assets itself, which, although it has not yet occurred, is being encouraged by Ofgem: see Steward 1, §§19-20. Ofgem's reasoning is thus erroneous by maintaining the practice under the CUSC of allocating costs to generators not for their use of the system as generators and despite the fact that they may not have had any control over the development of the generating assets, and that this may not be the case going forward.

(c) Ofgem dismisses the potential for a generator not to have been the developer in its Decision, stating that it is *"hypothetical"*, but recognises that its arguments would not hold in such a situation (*"We appreciate that under such a model the risk profile [...] may need to look different to today's arrangement"*; its assessment *"is conducted against the current arrangements"*: p. 19 **[CB/1751]**). This concession however sells the pass:

i. The CUSC should be designed to allocate costs *in principle*, not on the basis of current contingent arrangements in the market. In principle, the costs should be allocated between OFTO, generator (*qua* generator) and consumers generally.

ii. The possible future market changes, i.e. that generators are not always also the developers, demonstrates the lack of principle in Ofgem's approach. Assuming in the future that some generators would not have been developers,

it would nonetheless be the case that some, perhaps many would have been. Yet in that circumstance, it could not possibly be justified to impose IAE costs on any generator on the basis of the logic in Ofgem's current decision, whether they had been developer or not. That reveals a flaw in the logic of Ofgem's reasoning.

iii. Furthermore, changes in legislative rules should take into account foreseeable market developments and ensure that they are fit for purpose in the future. Otherwise, the rules will apply in ways that are unjust and anti-competitive, and it may take many years for them to be changed (as the present code modification process vividly shows).

iv. The promotion of efficient cost signalling is, moreover, an approach that by its nature looks to future decisions by current or future market participants. Contingent past market practice does not provide the correct perspective from which to assess whether cost allocation rules send signals to market participants (and potential market participants) that minimise costs and market distortions.

Ground 2B: Ofgem was wrong to dismiss the existence of discrimination against offshore generators by comparison with entities with which they compete

Ground 2B(1): Ofgem was wrong in stating that the treatment of onshore local circuit charges was "in fact comparable to existing baseline arrangements for offshore local circuit charges"

146. Ofgem accepted that offshore and onshore generation *are* generally treated differently with regard to the recovery of additional transmission costs because additional costs incurred by an OFTO are recovered from the generator and additional costs incurred by an onshore TO are recovered from demand. Nonetheless, it observed that (see pp. 15-16 **[CB/1747]**):

> *"… to the extent that there is a perceived onshore equivalent for an IAE … for onshore local circuit failures, the cost of the TO fixing or replacing the local circuit asset is recovered through onshore local circuit charges via an update to the SEF at the start of the following price control period. Onshore local charges are payable by generators and not demand consumers. This is in fact comparable to existing baseline arrangements for offshore local circuit charges (for example, if an IAE is*

awarded due to an offshore circuit failure the cost is recovered via an update to the generator offshore local circuit tariff and charges at the start of the next price control).”

147. That comparison is limited in a number of important respects, none of which are addressed by Ofgem in its Decision.

148. First, an onshore generator may be directly connected to a Main Interconnected Transmission System (MITS) node, in which case it does not pay a local circuit tariff at all: see CUSC, §§14.15.35 to 14.15.36 **[CB/1237]**. That is not an option available to an offshore generator because of the practical requirement for a circuit to carry electricity to the shore for onward transmission.

149. Second, even where an onshore generator is connected to the transmission network via a local circuit, the local circuit tariff is generally calculated by reference to a *non-specific* circuit expansion factor. The only circuits to which specific circuit expansion factors (SEFs) apply are AC sub-sea cables and HVDC (High Voltage Direct Current) links: CUSC, §14.15.75 **[CB/1246]**. According to the Final Modification Report for CMP463, there are only six of these in the UK: p. 4. Indeed, when provision for SEFs was introduced in 2013 and modified in 2019, no such circuits existed.[54]

150. Third, Ofgem was wrong in stating that, *“the cost of the TO fixing or replacing the local circuit asset is recovered … via an update to the SEF at the start of the following price control period”*. SEFs are limited to the cost of converters, the cost of the cable and a percentage of the total overhead *project costs* for cable and converters (according to a specified formula): see CUSC, §14.15.76. CMP301, which introduced CUSC, §14.15.76, was specifically intended to ensure that generators have certainty as to their cost exposure for TNUoS charges.[55] Paragraphs 14.15.75 and 14.15.76 of the CUSC have effect as follows:

    (a) Paragraph 14.15.75 of the CUSC provides that *“AC sub-sea cable and HVDC circuit expansion factors (Specific Circuit Expansion Factors) are calculated on a*

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[54] See Ofgem’s decision on CMP301, dated 11 June 2019, at p. 3: *“no such circuits exist on the system yet”* **[CB/1936]**. See also Ofgem’s ‘Project TransmiT: Decision on proposals to change the electricity transmission charging methodology’, 25 July 2014 **[CB/1762]**.

[55] See e.g. the modification proposal in CMP301, p. 4 **[CB/2093]**.

case by case basis using actual project costs net of any cost adjustments" **[CB/1246]** (emphasis supplied).

(b) Despite being in lower case in the most recent version of the CUSC,[56] the term *"cost adjustments"* is a defined term, meaning *"a payment whose value and timing has been approved by [Ofgem] and which is made by a Licensed Distribution Network Operator as a contribution to the cost of a Transmission infrastructure investment made by the Licensed Transmission Owner that recognises the shared value to different parties"* (emphasis supplied): see CUSC, Section 11, p. 20 **[CB/999]**.[57]

(c) Paragraph 14.15.76 of the CUSC then sets out how Specific Circuit Expansion Factors are to be calculated (emphasis supplied) **[CB/1246]**:

> *"Calculation of Specific Circuit Expansion Factors shall include only: the cost of the converters (where applicable); and the cost of the cable; and a percentage of the total overhead project costs, defined as the combined costs of the cables and converters (as relevant) divided by the total capital cost of the project minus a percentage of the cost adjustment, defined as the combined costs of the cables, converters (as relevant) and appropriate overhead costs, as calculated above, all divided by the total capital cost of the project."*

(d) In other words, a SEF is to be calculated by reference to the capital cost of the cable, the capital cost of any converters, and a percentage of the overhead costs of *"the project"*. That percentage is calculated by summing the capital cost of the cable and any converters then dividing the result by the *"total capital cost of the project"*. In context, *"the project"* must mean the construction of the circuit, i.e. the investment in transmission infrastructure made by the onshore TO. The overhead costs to be included in the *"actual project costs"* for this purpose must therefore be the overhead costs of the construction of the circuit, not its ongoing operation as part of the TO's business.

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[56] Although not in some earlier versions.

[57] That this definition was intended to apply to paragraphs 14.15.75 and 14.15.76 is clear from CMP337, which introduced the definition into the CUSC. See the proposal, legal text and Ofgem's decision on the same at **[CB/2097]** **[CB/2113]** and **[CB/1937]** respectively.

(e) As such, there has never been any scope for the cost of repairing a local circuit to be included in the calculation of a SEF.

151. Fourth, SEFs in the upcoming price control period will be frozen at 2025/26 values because (as Ofgem puts it) *"significant and unexpected changes in charges [driven by SEFs] can undermine competition, where material effects are witnessed at short notice, and without reasonable justification"* (emphasis supplied).[58] The current position under the CUSC is therefore that a SEF cannot be 'updated' at the start of the next price control period to include the cost of circuit repairs (assuming that, contrary to the above, such a course was ever open to NESO).

152. Ofgem misdirected itself as to the meaning and effect of the CUSC and consequently failed to appreciate the discriminatory effect of imposing the cost of IAEs on offshore generators when onshore generators are not subject to such costs. Onshore circuit charges are not *"in fact comparable"* to offshore circuit charges, as currently administered by NESO, whether in fact or in law. Accordingly, Ofgem's conclusion to the contrary was based wholly or partly on an error of fact and/or was wrong in law.

Ground 2B(2): Ofgem was wrong to state that onshore and offshore generators are not in a materially equivalent position

153. Since Ofgem implicitly accepted that offshore generators generally face an impost that onshore generators generally do not (see pp. 15-16 **[CB/1747]**), it ought to have concluded that CMP344, which would have put them on a level playing field, better facilitated competition. As Ofgem has observed **[CB/1797]**:[59]

> *"Competition is best facilitated by non-discriminatory arrangements that lead to the most efficient businesses succeeding, ultimately driving down costs for consumers."*

154. Indeed, in approving the proposal to freeze SEFs, Ofgem agreed that significant and unexpected changes to charges undermine competition where material effects between generators are witnessed at short notice and without reasonable justification.[60]

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58 See Ofgem's decision on CMP463, p. 6. **[CB/2085]**

59 See Ofgem's 'Impact Assessment and Decision on industry proposals (CMP264 and CMP265) to change electricity transmission charging arrangements for Embedded Generators' dated 22 June 2017, p. 7. **[CB/1797]**

60 See Ofgem's decision on CMP463, p. 6. **[CB/2085]**

155. In seeking to justify the retention of a regulatory rule conferring a selective advantage on one set of market participants, Ofgem adopted the position that onshore and offshore generation are not in an *"equivalent position"*. However, that view was based on the spurious proposition that offshore generators, as the builder of the OFTO's transmission assets, are *"best placed"* to avoid or mitigate IAEs, whereas onshore generators, who do not build transmission assets, are not: pp. 15-16 **[CB/1747]**. For the reasons set out in the foregoing grounds, had Ofgem properly considered the inability of an offshore generator to avoid or mitigate such risks, or to do so efficiently, it would have recognised that there was no material distinction between onshore and offshore generators, and concluded that the current arrangements are discriminatory and anticompetitive: see Anstey 1, §§49-53. Furthermore, Ofgem's reasoning is erroneously comparing onshore generators with offshore generators not *qua* generator but *qua* developer, which is not a correct comparison, for the reasons given in paragraphs 144 to 145 above.

Ground 2C: Wrong to conclude impact on competition was nil or immaterial

156. There was uncontradicted economic evidence before Ofgem that CMP344 would *"in the long run"* avoid detrimental impacts on consumers that the current arrangements were likely to cause: see p. 23 of Cornwall Insight's first report **[CB/1653]**. Ofgem's principal reason for dismissing this evidence appears to have been as follows (pp. 19-20 **[CB/1751]**):

> *"We note that whilst the second and third FMRs provide a view of potential CMP344 impacts in relation to CfD bids and consumer costs, our understanding and expectation remains that removing the costs of IAEs from offshore generators will not necessarily result in greater volumes of offshore generation entering the market and potentially better facilitating competition through improved liquidity in the CfD auctions. In addition, it is unclear that the level of risk premia assumed to be applied to CfD bids and alleged to be removed by the Proposal, for events considered as rare within the analysis, would be material enough to reduce CfD strike prices or meaningfully improve competitiveness."*

157. Moreover, Ofgem believed that, because (in its view) there was no *"direct"* competition for subsidies under the CfD regime, there was no meaningful competition between onshore and offshore generation at all: see pp. 20-21 **[CB/1752]**.

158. As to this:

(a) There was no basis for Ofgem's *"understanding and expectation"* that removing the costs of IAEs from offshore generators would not *"necessarily"* result in greater volumes of offshore generation entering the market, nor for its assumption that the way in which the CfD regime has been administered to date meant that onshore and offshore generation do not meaningfully compete for subsidies: see Anstey 1, §§61-67 & 107-118. In any case, Ofgem clearly accepted that CMP344 might have a positive impact on the investment market, hence its use of the expression *"not necessarily"* (an instinct supported by the evidence of Mr Anstey just referred to). Ofgem's conclusion that CMP344 would not better facilitate competition was therefore based wholly or partly on an error of fact and/or was irrational (and involved a failure to have proper regard or give appropriate weight to Use of System Charging Objective (d)).

(b) Ofgem failed to consider whether CMP344 would better facilitate competition to invest in <u>existing</u> offshore generation, i.e. when deciding whether to continue operating or repower an aging asset (the 'disinvestment horizon'). Alternatively, Ofgem wrongly assumed that CMP344 would have no impact on the disinvestment horizon: cf. Anstey 1, §§68-73. Accordingly, Ofgem failed to have regard to a relevant consideration, based its decision wholly or partly on an error of fact and/or acted irrationally (and reached a conclusion that involved a failure to have proper regard or give appropriate weight to Use of System Charging Objective (d)).

(c) Ofgem also failed to consider the distortive effect of allocating unforeseeable and uncontrollable risks to certain agents rather than socialising them (described by Mr Anstey as creating a *"punitive lottery"* that obscures the impact of competition as the method for identifying and rewarding successful plant ownership and operation: Anstey 1 §§74-80). Alternatively, Ofgem wrongly assumed that there would be no such distortive effect. In doing so, Ofgem failed to have regard to a relevant consideration, based its decision wholly or partly on an error of fact and/or acted irrationally (and reached a conclusion that involved a failure to have proper regard or give appropriate weight to Use of System Charging Objective (d)).

(d) Finally, Ofgem's opinion that it was *"unclear"* whether the level of risk premia assumed (by Cornwall Insight) to be removed by CMP344 *"would be material enough to reduce CfD strike prices or meaningfully improve competitiveness"* was

unsupported by any analysis and contrary to the uncontradicted economic evidence that had been placed before it: see e.g. pp. 4 & 22-23 of the Cornwall Insight's first report **[CB/1634] [CB/1652]**. See also Anstey 1, §§107-110.

(e) To the extent that Ofgem intended by this statement to implicitly criticise the findings of the Cornwall Insight report, that would be unfair: both because it is unclear what that criticism is intended to be and because the only criticism actually raised with the proposer prior to the Decision was the purported *"failure"* of the report to address the *"windfall gain"* point, which was then addressed in a second report (Ofgem's reasoning with respect to this purported *"windfall gain"* point is addressed in Ground 2D below): see Steward 1, §§52-55. In any case, when the shoe was on the other foot, and Ofgem was assessing the significance of the *"windfall gain"* that it speculated might be obtained by existing CfD-backed generation were CMP344 to be implemented, Ofgem took a strikingly different tact: in that context, the mere risk of any such impact, even an impact of *"marginal"* size, was considered to justify the conclusion that CMP344 would not better facilitate competition: see p. 21 **[CB/1753]**. That contradictory approach was irrational and wrong.

Ground 2D: Wrong to suggest that CMP344 could introduce an anti-competitive distortion on the CfD market

159. Ofgem reasoned that CMP344 would not better facilitate competition because it *"could introduce a distortion"* between existing CfD holders and other generators (including future CfD holders). Ofgem said at p. 21 **[CB/1753]**:

> *"If it is correct that generators will factor in a risk premia in respect of IAEs (under the current arrangements), it is expected to be the case that existing CfD holders will have benefited from a strike price that includes such risk premia. If the Proposal was implemented, existing CfD generators would therefore obtain the benefit of a strike price inflated to cover the costs of potential IAEs in respect of which (if they were to materialise) they would not face the costs. This would not be the case for future CfD backed generators (or indeed any other generators) and as such, would negatively impact competition (even if only to a marginal extent given the estimated value of the risk premia). In practice, this distortion would result in consumers continuing to fund risk premia for some existing projects, while also bearing IAE costs directly should one be awarded."*

160. In so reasoning, Ofgem had regard to an irrelevant consideration, acted irrationally, based its decision wholly or partly on an error of fact and reached a conclusion that involved a failure to have proper regard or give appropriate weight to Use of System Charging Objective (d). That is because:

(a) Ofgem made no finding whether it was *"correct"* that generators had in the past factored risk premia in respect of IAEs into their CfD bids and so obtained the benefit of a *"strike price inflated to cover the costs of potential IAEs"*. Indeed, Ofgem did not even attempt to grapple with the probability of their having done so, describing CMP344 as giving rise to no more than a *"risk"* of this occurring: see p. 28 **[CB/1760]** (this is also apparent from the argument that CMP344 *"could"* introduce a distortion on this basis). Any such risk of distortion should have been disregarded or given no weight by Ofgem in light of the fact that Ofgem was unwilling to do more than speculate about its existence.

(b) Instead of disregarding this risk, Ofgem moved from speculating about its existence to concluding that CMP344 *"would negatively impact competition"* and *"[i]n practice … result in consumers continuing to fund risk premia for some existing projects, while also bearing IAE costs directly should one be awarded"* (emphases supplied). That was irrational.

(c) In any event, it was wrong in principle, and contrary to Ofgem's statutory objective and duties, for Ofgem to make a decision that entrenched an anticompetitive rule merely because, in the short-term, there was a risk (no matter how slight) of an advantage being conferred upon some incumbent market participants: see Anstey 1, §§111-114. The approval of CMP344, which would have better facilitated the long-term competitiveness of the market, would also have advanced Ofgem's principal objective, namely serving the interests of consumers, existing and future, taken as a whole. In rejecting the proposal, Ofgem failed to have proper regard or give appropriate weight to both Use of System Charging Objective (d) and its own statutory objective and duties.

(d) Finally, Ofgem considered that any negative impact on competition should this risk materialise would be *"marginal"* due to the (relatively low) estimated value of the risk premia. As set out above, this was inconsistent with the approach that Ofgem

took to the assessment of materiality when considering whether CMP344 would have a positive impact on competition: see pp. 19-20 **[CB/1751]**. That inconsistent approach was irrational.

GROUND 3: WRONG TO FIND THAT THE PROPOSAL WOULD NOT ADVANCE USE OF SYSTEM CHARGING OBJECTIVE (h) BY PROMOTING EFFICIENCY IN THE IMPLEMENTATION AND ADMINISTRATION OF THE CHARGING METHODOLOGY

161. The proposal would advance this objective in several ways:

(a) It would clarify existing practice in relation to the point in time at which the revenues are set, which is currently not clear from the CUSC.

(b) It would enhance certainty and predictability for generators as to the charges that they can be subjected to, by removing the lottery of being allocated IAE costs.

(c) It would also remove the uncertainty caused by the prolonged and uncertain process of determining IAE events and their costs, which extend over many years, and in respect of which generators have no control, including the uncertainty as to when such costs will ultimately be imposed and their eventual level: see McCole 1, §§35-57.

162. Ofgem stated that *"[w]e do recognise that removing demonstrably unnecessary steps in the charging methodology would ordinarily simplify the process and in that respect may be considered to improve efficiency"* : p. 27 **[CB/1759]**. However, it decided that objective (h) was not advanced by adopting its reasoning in respect of objectives (d) and (e).

163. This misunderstood and misapplied objective (h), which sets out an independent objective and value which requires separate consideration and assessment. For the reasons given above, the proposal would advance objective (h).

GROUND 4: WRONG TO HOLD THAT THE BASELINE IS ADVANTAGEOUS FOR CONSUMERS AND THEREFORE CONSISTENT WITH OFGEM'S OBJECTIVE AND DUTIES

164. Ofgem expressed the view, *"for completeness"*, that it considered rejecting CMP344 to be consistent with its *"statutory duties, including our principal objective to protect the*

interests of existing and future consumers": pp. 28-29 **[CB/1760]**. This section of the Decision refers (without specificity) to *"several factors above which indicate that the Proposal does not protect the interests of existing and future consumers"*. The Appellants understand this to be a reference to, in essence, Ofgem's view that imposing the cost of IAEs upon offshore generators incentivises them to build higher quality transmission assets and obtain warranties and indemnities from suppliers when developing those assets, thus (on Ofgem's view) reducing the overall cost to the system.

165. The above grounds address why that reasoning was flawed and Ofgem's overall conclusion in this regard was incorrect. The only new material put forward by Ofgem under this heading of the Decision is some criticism of the Cornwall Insight analysis. That criticism was unfair, irrational and based wholly or partly on an error of fact:

(a) Ofgem asserts that the *"accuracy"* of Cornwall Insight's analysis is affected by the fact that its report was prepared prior to CfD allocation rounds AR5, AR6 and AR7. The idea appears to be that, because generators bidding in these rounds will now have their CfD strike prices fixed, Cornwall Insight's conclusions as to the consumer costs and benefits of CMP344 have become out-of-date: p. 28 **[CB/1760]**. As to this:

i. Cornwall Insight's analysis was current when it was prepared. The only reason AR5, AR6 and AR7 had taken place by the time of the Decision was due to the unreasonably long time Ofgem took to make it (e.g. over a year passed between the submission of the second Final Modification Report and Ofgem's second 'send back', which sought further analysis that Ofgem could have requested on the first 'send back', some three years beforehand).

ii. In any case, the fact that AR5, AR6 and AR7 had occurred made no difference to the basic principle: CMP344 represented a long-term benefit to competition. Rejecting it because of the potential, *"marginal"* short-term impact of a regulatory change was not in the interests of existing and future consumers taken as a whole: see Anstey 1, §§107-118.

(b) Ofgem asserts that the Cornwall Insight report makes a number of *"simplifying assumptions"* that meant it was *"unclear how accurate the analysis provided is in terms of magnitude of likely risk reductions"* and *"unlikely, or at least uncertain,*

that the overall net consumer savings identified by Cornwall Insight will materialise in practice": pp. 28-29 **[CB/1760]**. The gist of this criticism is that Cornwall Insight did not take into account (i) that Ofgem's current practice is to apply an insurance deductible to an IAE claim in respect of an uninsurable latent defect; and (ii) that a proportion of the cost of an IAE may be borne by the consumer where a generator's local charge is fixed by reference to a TEC that is lower than the actual capacity of the transmission infrastructure. That reasoning was unfair, irrational, based wholly or partly on an error of fact, and wrong in principle:

i. It was unfair because the criticism was never drawn to the proposer's attention. No opportunity to address it was afforded to it: see Steward 1, §§52-55.

ii. It was irrational and/or based on an error of fact because a degree of uncertainty over the magnitude of the consumer savings meant only that the savings might be smaller than they otherwise would be. It did not justify the conclusion that CMP344 was not in the interests of existing and future consumers taken as a whole.

iii. It was wrong in principle because Ofgem was required to approve or disapprove CMP344 by reference to whether it facilitated the Use of System Charging Objectives; in particular Objectives (d) and (e): see paragraph 34 above. Ofgem's principal statutory objective would only have been relevant to the exercise of this jurisdiction if there was more than one course open to it, each equally conducive to competition, but one of which was clearly more beneficial to consumers than the others. Here, there was an option which the economic evidence demonstrated to be facilitative of competition in the long-term (approval of CMP344) and one which that evidence demonstrated to be detrimental to competition in the long-term (the discriminatory baseline).

E. RELIEF

166. The CMA is asked to quash Ofgem's decision and remit the matter to Ofgem, directing it to approve CMP344, alternatively directing it to reconsider CMP344 on terms

consistent with the findings of the CMA on the appeal. The CMA should also direct that the specified steps be taken within a limited and defined period of time.

167. The Appellants ask for their costs of this appeal.

TOM HICKMAN KC

WARREN FITT

Blackstone Chambers

26 May 2026

STATEMENT OF TRUTH

The Appellants believe that the facts stated in this Main Submission are true. I am authorised by the Appellants to sign this Main Submission. The Appellants understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed: 

Name: Daniel Gardiner

Role: Partner of Pinsent Masons LLP, the Appellants' legal representative

Dated: 26 May 2026