Appeal from Ofgem's decision refusing approval of CMP344, 1 May 2026 **Submission date: 19 June 2026**

BEFORE THE COMPETITION AND MARKETS AUTHORITY

AN APPEAL UNDER SECTION 173 OF THE ENERGY ACT 2004

BETWEEN:

(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

RESPONDENT'S RESPONSE
TO APPELLANT'S MAIN SUBMISSION DATED 26 MAY 2026

References are as follows: (i) [ACB/page] is to the Appellants' Core Bundle; (ii) [RCB/page] is to the Respondent's Core Bundle; (iii) Surname, § for witness statements

A. INTRODUCTION AND SUMMARY

1. On 1 May 2026, the Respondent ("**GEMA**", or "**Ofgem**") rejected a proposal ("**CMP344**") to modify s.14 of the Connection and Use of System Code ("**CUSC**") in relation to the costs associated with certain "*income adjusting events*" ("**IAEs**") relevant to offshore transmission assets (the "**Decision**"). The Appellants (collectively, "**RWE**"[1])

[1] Comprising the owner and operator of Gwynt y Môr, a 576MW offshore windfarm located north of Wales and the "generator" in this appeal; RWE Renewables UK Limited (effectively the proposer of CMP344); and RWE Renewables UK Swindon Limited, part of the RWE Group.

appeal the Decision on the basis that it is "*wrong*" pursuant to s. 175(4) Energy Act 2004 ("**EA 2004**"). For the reasons below and in the evidence, that challenge is unfounded.

2. Offshore transmission assets are the assets which link offshore electricity generation (e.g. offshore windfarms) to the onshore grid, including subsea cables, substations and the like. They are designed and built by offshore generators such as RWE (described in the evidence as "**generators**" or "**developer-generators**"), and then competitively tendered to offshore transmission owners ("**OFTOs**"). OFTOs will earn revenue from those offshore transmission assets, but that revenue is controlled by Ofgem, being fixed at the point the OFTO acquires the assets for a period of c.25 years. IAEs, so far as relevant to this appeal, are events which cause OFTOs to incur additional unforeseen costs, such as cable failures caused by latent defects, where Ofgem decides that those costs should be reflected in an adjustment to the OFTO's permitted revenue.

3. The "**Baseline**" *status quo* is that the costs of IAEs are apportioned between OFTOs, generators and consumers (sometimes known as "demand"). In broadest summary:

   (1) OFTOs are expected to take measures against the risks and costs of IAEs. If a cable failure or other relevant event was foreseeable and the OFTO failed to take reasonable steps to avoid associated costs through insurance, warranties or similar, Ofgem may refuse to treat the associated costs as an IAE, in accordance with its IAE policy, and the OFTO will have to absorb those costs in full.[2]

   (2) Further, even if an OFTO can show that (e.g. after repeated failures) particular defects had become uninsurable in the global market, Ofgem will still generally require the OFTO to bear an 'insurance deductible',[3] i.e. a payment towards the costs of the IAE to mirror the commercial position as if the cost *had* been insurable.

   (3) As to generators and consumers, if Ofgem agrees to treat an event as an IAE, the National Energy System Operator ("**NESO**") will pay the OFTO the relevant

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[2] Stone, §§38-39. As noted in Mr Stone's witness statement, his statement *"…has been prepared in a short period, consistently with the CMA's rules and directions (and draws on information provided to me by Ofgem colleagues as noted below). Without waiver of privilege, Ofgem is continuing to review material we hold, in light of the matters raised on the Appellants' appeal, to ensure that all relevant matters have been fairly and properly addressed. In the time available before finalising this witness statement it has not been possible to complete that exercise. We will, however, do so as swiftly as possible*."

[3] Stone, §40

adjusted annual revenue, and will recoup that cost from generators and consumers through Transmission Network Use of System ("**TNUoS**") charges.[4]

(4) In practice, generators typically pay around 75-80% of costs associated with IAEs, and consumers around 20-25%.[5]

4. These arrangements are reflected in paragraph 15 of the Amended Standard Condition E12-J3 in the OFTO Licence, Ofgem's IAE policy, and NESO's letter to industry on 27 July 2017.[6] The balance struck is appropriately cost-reflective and (accordingly) facilitative of competition, reflecting both that offshore transmission assets are for the sole use of the relevant generators (in connecting their wind farms or other generation assets to the onshore grid), and, further, that generators are relatively better placed than consumers to avoid IAEs and/or to mitigate the costs of IAEs by building high quality transmission assets and securing appropriate commercial protections in the first place.[7]

5. CMP344 proposed a fundamental change: that the costs of IAEs[8] should be borne entirely by consumers, with generators paying **none** of those costs, notwithstanding it is the generators which designed and built the relevant transmission assets and sold them to the OFTO, and the generators which continue to use those assets for their sole benefit.

6. The backdrop to the Proposal is repeated cable failures at the Gwynt y Môr offshore windfarm. Since 2023, Ofgem has allowed 5 IAE claims by the relevant Gwynt y Môr OFTO in respect of cable failures at Gwynt y Môr, in an aggregate sum of c.£79 million, and at least 1 further IAE claim is anticipated. The cost of those claims will be divided between the First Appellant (the relevant generator) and consumers, as set out above. From RWE's perspective, CMP344 is a route to seek to avoid liability in relation to any further IAEs at Gwynt y Môr or any other windfarm that they have or may construct in future. It is unclear from the CMP344 proposal itself and the Main Submission whether

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4 Stone, §54. In practice, given complications in adjusting generators' annual charges, the costs are recouped initially from consumers, and then further recouped as appropriate from generators over a period.

5 Stone, §54.

6 ABC/30/765-770.

7 Which can then often be novated to the relevant OFTO. See generally, Stone, §§88-96.

8 After any OFTO 'insurance deductible'.

RWE is in fact seeking to go further, and to argue that CMP344 would remove liability even for existing IAEs.

7. Perhaps unsurprisingly, Ofgem rejected CMP344.

8. It was not satisfied that it "*would better facilitate achievement of the Applicable CUSC Objectives*" ("**ACOs**") in NESO's Electricity System Operator Licence as compared to the Baseline, in accordance with the test at E.23(a) and CUSC 8.23.7.[9] As Green LJ explained in *R (SSE Generation Ltd and others) v GEMA,* §22 [2022] 4 WLR 115, *"GEMA cannot approve a proposal unless it considers that the proposal would better facilitate achievement of the ACOs"*. Ofgem further considered that "*rejecting the Proposal is also consistent with our statutory duties, including our principal objective to protect the interests of existing and future consumers."*[10]

9. The relevant decision maker was James Stone, Ofgem's Head of Electricity Network Charging within the Energy Systems Management and Security Directorate, supported by a wider network of Ofgem policy and economic specialists as explained in his evidence. But his was certainly not an isolated or marginal view. CMP344 was first proposed on 21 May 2020.[11] It had already been 'sent back' twice to be revised and resubmitted by the time it came before Mr Stone, on the basis that the relevant Final Modification Reports ("**FMRs**") were insufficiently clear for Ofgem to be able to form an opinion. Mr Stone's Decision was in accordance with internal recommendations, and was supported contemporaneously by Shai Hassid (Ofgem's Deputy Director for Electricity Charging and Market Design).[12] It is supported by Ofgem's Chief Economic Adviser, Gavin Knott, in his evidence on this appeal. The Decision is unexceptionable, and there is no basis to impugn Ofgem's judgment under s.175(4) of the EA 2004.

10. The CMA is invited to dismiss this appeal. In summary, and as explained below:

(1) **Ground 1**: RWE alleges 'apparent predetermination' on the basis that in or around 2020, Mr Stone (then employed by the National Grid Electricity System Operator

9 Decision, p. 13.
10 Decision, p. 28.
11 Stone, §66.
12 Hassid, §14.

("**NGESO**")) had attended early Workgroup meetings as NGESO's representative. This is a thoroughly bad point. There is no allegation of actual bias or predetermination. No fair-minded observer would consider there to be any real risk of bias or predetermination. Taking RWE's case at its highest, it is that some 5 years before the Decision, in a different job, for a different entity, considering a different (early) version of CMP344 as part of a Workgroup,[13] NGESO (through Mr Stone) was sceptical that the (then) proposal was positive against the ACOs. That is nowhere remotely close to unlawful apparent bias or predetermination. But in any event, RWE has known of Mr Stone's involvement in the CMP344 decision in his role at Ofgem since early 2024. It has known that he was the decision-maker since November 2025. It raised no concern or challenge. Having sat on its hands for months whilst he took his decision, it has waived any complaint in that regard.

(2) **Ground 2A**: Ground 2A is an attack on Ofgem's conclusions as to ACO(e) (cost reflectivity). RWE alleges variously (and inconsistently) that Ofgem was wrong to conclude that generators could do anything material to avoid IAEs or to control associated costs, *or* (if generators could in fact do something material) that they would do so in any event, without the need for any IAE-related charging signal *or* (if that too was wrong) that Ofgem should have held that any steps generators could have taken were uneconomic and inefficient. Each of those ways in which the Ground is put miss the essential point of the Decision. Ofgem's assessment was that CMP344 did not better facilitate cost reflectivity and/or ACO(d) (competition) as compared to the Baseline, both (i) because it would mean that generators avoided liability for costs associated with transmission assets which they constructed for their sole benefit, and (ii) because it would remove a valuable incentive to design and build to a high standard, and to secure or enable the OFTO to ensure commercial protections by way of insurance, warranties and the like. Nothing in Ground 2A, or the minutiae of the detail in RWE's evidence, undermines that fundamental (indeed, obvious) conclusion. Ofgem was fully entitled to reach the judgement set out in the Decision and nothing about it was "*wrong*".

13 It later changed in scope, to be limited to IAEs. See Stone, §§67-68.

(3) **Grounds 2B-2D**: Grounds 2B to 2D are an attack on Ofgem's conclusion that CMP344 would not better facilitate effective competition than the Baseline status quo. That attack is unfounded for multiple reasons as addressed by Mr Stone, not least because of the distortion that CMP 344 would itself introduce. But perhaps most simply, it misses the point that improved costs reflectivity is important to facilitating effective competition.[14] Ofgem was entitled to conclude, in those circumstances, having concluded that CMP344 did not better facilitate cost reflectivity than the Baseline *status quo*, that it equally did not better facilitate competition. Again, none of RWE's complaints undercut that core regulatory judgement. RWE's principal objection is that onshore and offshore generators are treated differently. But that is unsurprising: onshore generators and offshore generators are in materially different positions. Unlike offshore generators, onshore generators do not design or build onshore transmission infrastructure for their sole use. The onshore transmission system is built and operates differently. In any event, even on RWE's own analysis, IAE charges have only the most negligible or *de minimis* impact on pricing/investment in the relevant markets. Ofgem was fully entitled to conclude that there is no anti-competitive discrimination, and in any event, overall, that CMP344 did not better facilitate competition than the Baseline.

(4) **Ground 3**: This is a makeweight ground. RWE contend that Ofgem was *"wrong"* to find that CMP344 would not advance ACO (h), by promoting efficiency in the implementation and administration of the charging methodology. But CMP344 was not simply clarifying or codifying the *status quo*. It entailed a substantive <u>change</u> to the existing charging methodology, in respects Ofgem considered undesirable and inefficient for all the reasons given in the Decision.

(5) **Ground 4:** It is difficult to see how Ground 4 arises. CMP344 was judged negative against the ACOs, and Ofgem was therefore CUSC-bound to reject it. But for the avoidance of doubt, Ofgem was fully entitled to conclude that approving CMP344, moving IAE costs from generators to consumers, and thereby introducing "windfall" gains for those generators who have already secured Contracts for Difference ("**CfDs**") (or equivalent) including a risk premia for the risk of IAE

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[14] Stone, §88-98.

costs – for the (obvious) reasons in the Decision and explained in Stone §§219-234.

B. KEY FACTUAL BACKGROUND

The parties

11. GEMA is the gas and electricity markets regulatory for Great Britain. The civil servants who work for GEMA are often referred to collectively as the Office of Gas and Electricity Markets.[15] 'GEMA' and 'Ofgem' are used interchangeably.

12. The First Appellant is "**GYMOWFL**", the owner and operator of Gwynt y Môr, a 576MW offshore windfarm located north of Wales. The Second Appellant is in effect the proposer of CMP344 and a member of the "**RWE Group**". The Third Appellant, **RWE Swindon,** is part of the RWE Group and has a 50% stake in GYMOWFL.[16]

Basic concepts

13. Stone, §§18-58 provides an overview of the basic concepts that are relevant to the Decision and this appeal. By way of high-level overview only:

    (1) Generators produce electricity through a variety of means, ranging from conventional power stations to renewable generation such as offshore wind farms.[17] They sell that electricity in the wholesale markets. Many offshore generators and renewable generators in Great Britain ("**GB**") do so with the benefit of CfDs, which are long-term, government backed financial agreements designed to support low carbon electricity generation.[18] Under the CfD regime, eligible generators are offered long-term contracts with a predictable level of revenue determined by the 'strike price' in a competitive auction. Generators submit 'sealed bids' in each auction taking account of their projected revenues and liabilities.

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15 Stone, §1. Ofgem does not have any legal personality separate from GEMA.
16 Main Submission, §10.
17 Stone, §18.
18 Earlier offshore windfarms, such as Gwynt y Môr, were supported under the predecessor renewables support scheme, the Renewables Obligation. See generally, Stone, §76 for an overview of CfDs.

(2) The infrastructure which transports electricity from where it is generated to where it is needed throughout Great Britain ("**GB**") comprises both the transmission system (known as the National Electricity Transmission System ("**NETS**")) and the distribution system.[19] The NETS, in turn, comprises both offshore and onshore transmission infrastructure, and is operated by NESO, a publicly owned, but operationally independent organisation established on 1 October 2024.[20] The offshore transmission network is currently made up of radial (or point-to-point) cables which typically link a single offshore generator to the onshore transmission system. The onshore network is organised differently: see further Stone, §24.

(3) To date, all offshore wind generation in GB has been constructed under a "*generator build*" model whereby an offshore generator designs and installs both: (i) the relevant generation assets (e.g. offshore wind turbines) as well as (ii) the transmission assets required to link the offshore generation to the onshore network.[21] Following construction, the generator will continue to own, operate and maintain the offshore generation assets. However, unbundling requirements mean that generators are not permitted to own and operate transmission assets beyond an initial 27-month period.[22] Offshore transmission assets are therefore sold off to an OFTO by competitive tender. The successful bidder is granted an OFTO licence.[23]

(4) OFTO licences fix each OFTO's revenue for a period of up to 25 years. This total allowed revenue is known as the Tender Revenue Stream ("**TRS**"). The TRS is set based on the OFTO's required return on investment, the cost of financing its investment, and the ongoing cost of financing, operating and managing the assets.

(5) The OFTO licence further provides in paragraphs 14 and 15 of condition E12-JE that the TRS may be adjusted to reflect the cost of IAEs.[24] There are three categories of IAE under the licence: (a) *force majeure;* (b) unexpected changes to the System Operator Transmission Owner Code; and (c) other events and

19 Stone, §19.
20 Stone, §23.
21 Stone, §25.
22 Having been extended from 18 months.
23 Stone, §25.
24 Stone, §33.

circumstances which Ofgem approves as IAEs, which might include e.g. latent defects discovered in transmission assets.[25] Ofgem's IAE policy notes that "*the general purpose of the [*condition*] is to provide protection to OFTOs for identified unexpected costs arising from certain low probability but high impact events.*"[26]

(6) IAE categories (a) and (b) are expressly defined. In determining whether an event comes within category (c), Ofgem exercises discretion by applying a policy set by reference to its statutory duties, in particular its principal objective to protect the interests of existing and future consumers. In particular, Ofgem considers:

a. Whether the OFTO knew of the event or circumstance before it arose or ought to have known of it;

b. 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);

c. 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

d. The ability of the OFTO to manage the risk or impact by putting in place and pursuing risk management arrangements such as insurance, commercial resource against third parties and / or operating practices.[27]

(7) Each year, NESO sets Transmission Network Use of System Charges ("**TNUoS Charges**"). As Mr Stone explains at §§44-57, the charging arrangements are complex, but in essence, TNUoS Charges are levied on onshore and offshore generators based on the maximum amount of power a generator has a contractual right to put into the transmission system at any one time. They comprise: (i) Local Charges; (ii) Wider Locational Charges; and (iii) a Generator TNUoS Adjustment Tariff. Local Charges; Wider Locational Charges and Generator TNUoS Adjustment Tariffs are explained further in Stone, §§49-53. Generator charges

25 Stone, §34.
26 Stone, §34.
27 Stone, §38.

alone are insufficient to cover the revenues which NESO pays to OFTOs and to onshore Transmission Owners ("**TOs**"). Accordingly, the remainder is recovered by NESO via a residual charge levied on consumers known as the Transmission Demand Residual ("**TDR**").

(8) Presently, the majority of TNUoS Charges are paid by consumers, through the TDR. In 2026/2027, generators will pay only 16.2% of total TNUoS Charges.[28]

(9) If Ofgem approves a claim by an OFTO for the costs of a particular event to be treated as an IAE, the OFTO will request payment of the allowed sum to be made by NESO in the charging year following Ofgem's decision on the IAE. This happens in two stages. First, NESO will pay the OFTO the allowed sum by adjusting the TRS during the following charging year, and will fund that payment in the short term through the TDR, i.e. by TNUoS Charges levied on consumers. Second, at the beginning of the next price control period, when the relevant offshore generator's TNUoS charges are reset, NESO will increase the relevant offshore Local Charges paid by the relevant generator and will reduce the TDR paid by consumers in that year. This ensures that generators pay their relevant share of the allowed IAE costs and consumers are reimbursed for covering that cost initially. As noted above, however, even then offshore generators do not bear the full amount of allowed IAE costs (typically only 75-80% of those costs, with the remainder falling on consumers).[29]

<u>The CUSC modification process</u>

14. The CUSC is a multilateral contract between participants in the electricity industry in GB which, amongst other matters, governs charges for use of the electricity transmission system in GB.[30] Any changes to the CUSC must follow the modification procedures in Section 8 of the CUSC, which is an industry-driven process.

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[28] Stone, §48.

[29] Stone, §5.

[30] Stone, §45. See also, *R (SSE Generation Ltd) v Competition and Markets Authority* [2022] 4 WLR 76, §5 (Swift J).

15. At the Workgroup stage, Workgroup parties – which include generators and suppliers as well as a NESO representative[31] – consider a modification proposal and are entitled to put forward alternatives.[32]

16. Next, members of an industry panel (the "**Panel**") consider the output of the Workgroup process and vote to recommend to Ofgem (i) whether each proposal would better facilitate the ACOs when compared with the baseline; and (ii) if there are multiple options, which one they consider "*best*".[33]

17. Proposals (save *de minimis* modifications) are then submitted to Ofgem for decision in the form of an FMR.[34]

18. Ofgem decides whether to approve a modification proposal by reference to the ACOs. Where a proposed modification affects the "*Use of System Charging Methodology*" in Section 14 of the CUSC, the relevant ACOs are the "*CUSC Charging Objectives*". So far as relevant to this appeal they include:

    (1) ACO (d), as to effective competition: "*compliance with the Use of System Charging Methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity*";

    (2) ACO (e), as to 'cost reflectivity': "*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 the licensee and Transmission Licensees that are made under and in accordance with the System Operator – Transmission Owner Code (STC)) incurred by Transmission Licensees in their Transmission Businesses, and that are compatible with condition C11 (Requirements of a Connect and Manage Connection)*";

31 Stone, §61.
32 Stone, §61.
33 Stone, §62.
34 Stone, §63.

(3) ACO (h), as to efficiency in administration: "*promoting efficiency in the implementation and administration of the Use of System Charging Methodology*".[35]

19. As noted, the test that Ofgem must apply when consider whether to approve a modification is whether the proposal "*would better facilitate the Applicable CUSC Objectives*" as compared to the Baseline. By CUSC 8.23.7:[36]

> *"Subject to Paragraphs 8.23.9 to 8.23.13, in accordance with the ESO Licence, the Authority may approve the CUSC Modification Proposal or a Workgroup Alternative CUSC Modification(s) contained in the CUSC Modification Report (which shall then be an "Approved CUSC Modification" until implemented). If the Authority believes that neither the CUSC Modification Proposal (nor any Workgroup Alternative CUSC Modification(s)) would better facilitate achievement of the Applicable CUSC Objectives, then there will be no approval. In such a case, the Code Administrator will notify CUSC Parties and will raise the issue at the next CUSC Modifications Panel meeting."*

20. As will be well-known to the CMA, and is made clear from the above text, this is not a free-handed policy decision by Ofgem as to how best to amend the CUSC. Ofgem only has three options, when considering an FMR: (i) to approve one proposal contained in the FMR (rejecting all others); (ii) to reject all proposals in the FMR (i.e. maintaining the status quo); or (iii) if (but only if) it cannot properly form an opinion on the proposal, to 'send-back' the FMR for revision and resubmission.[37] Ofgem cannot approve *part* of a proposal, or amend a proposal, or add its own qualifications or caveats or limitations, or devise its own proposed modifications (save in limited and prescribed circumstances, which do not arise here). Moreover, if Ofgem believes that neither the original proposal, nor any Workgroup alternative proposal in the FMR, would better facilitate achievement of the ACOs than the Baseline, then the CUSC prescribes that there will be no approval.

CMP344

21. A detailed overview of the Workgroup and Panel process and Ofgem's 'send backs' is set out at Stone, §§66-84 and pp. 8-12 of the Decision.

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35 Electricity licensing (from October 2025) - Publications - Ofgem Public Register (A1.4)

36 ACB/40/1170. See also licence condition E2.23(a) [ACB/44/**1367**].

37 Stone, §64.

22. In short, there were three FMRs. The first, dated 12 January 2021, was sent back by Ofgem on 5 May 2021.[38] The second, dated 8 February 2023, was sent back by Ofgem on 12 February 2024.[39] The third, dated 9 July 2025,[40] was rejected by Mr Stone in the Decision on 1 May 2026.

23. The Decision comprises 29 pages. It sets out: (i) the background to the Decision, including how electricity transmission charging operates in practice (pp. 1-8); (ii) the CUSC modification process (pp. 8-12); (iii) the Panel recommendation (p. 12); (iv) the substantive decision and reasoning (pp. 12-29). As explained in the Decision at p. 12, and Stone, §85, Ofgem considered the FMRs, voting statements, industry consultation responses, the Panel recommendations and votes, analysis from Cornwall Insights, as well as the relevant licence conditions, Ofgem's IAE policy and the relevant sections of the CUSC.

24. The Decision's reasoning is comprehensive and comprises six key parts, addressing: (i) ACO (d) (pp. 13-21); (ii) ACO (e) (pp. 21-25); (iii) ACO (f) (pp. 25-26); (iv) ACO (g) (p. 26); (v) ACO (h) (pp. 26-27); and (vi) assessment against Ofgem's principal objectives and statutory duties. The CMA is invited to read the Decision in full.

C. KEY LEGAL FRAMEWORK

Appeals against Ofgem Decisions

25. By s. 173 EA 2004, an appeal may be brought against a decision of Ofgem *"relating to a document by reference to which provision is made by a condition of a gas or electricity licence"*. This includes a CUSC modification decision.

26. By s.175(4) EA 2004, the CMA may allow an appeal under s.173 only if satisfied that Ofgem's decision is "*wrong*" on one or more specified grounds, including as material:

> *"(a) that GEMA failed properly to have regard to the matters mentioned in subsection (2);*

38 Stone, §72; ACB/63/1627-1630.
39 Stone, §80; ACB/62/1606-1626; ACB/70/1669-1697.
40 Stone, §82; ACB/45/1372-1401.

(b) *that GEMA 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 GEMA failed to give the 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…"*[41]

27. The "*matters mentioned in subsection (2)*" are as follows, so far as relevant:

"In determining the appeal the CMA must have regard, to the same extent as is required of GEMA, to the matters to which GEMA must have regard—

(a) *in the carrying out of its principal objectives under … section 3A of the [Electricity Act 1989] (principal objectives and general duties);*

(b) *in the performance of its duties under those sections…."*

28. By virtue of the definition of "*relevant condition"* in s.175(11), ss. 175(4)(b)(i) and (c) are concerned with whether Ofgem failed properly to have regard to, or failed to give appropriate weight to, the ACOs.

29. By s.175(3) EA 2004, in determining an appeal, the CMA:

"(a) may have regard to any matter to which GEMA 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 GEMA would not have been entitled to have regard in that case had it had the opportunity of doing so."

Grounds and standard of review

30. It is well-established that whilst the CMA is required to consider the merits of an Ofgem decision by reference to the specific grounds advanced on an appeal, a CMA appeal is not a *de novo* rehearing of a code modification proposal. The key (and only) question is whether Ofgem made a decision that was wrong on one of the prescribed statutory

41 For the avoidance of doubt, whilst it is not likely to be material on this appeal, Ofgem rejects the assertion that *"wrong in law"* in s.175(4)(e) imports, *sub silentio*, all potential grounds of judicial review (Main Submission, §86(e)).

grounds. The CMA does not step into Ofgem's shoes as the primary decision-maker. It does not substitute its assessment or weighting of the evidence and arguments for that of Ofgem simply on the basis that it would have taken a different view; the burden is on an appellant to show that Ofgem's decision was "*wrong*" on a particular statutory ground.

31. Further, Ofgem as an expert body is afforded a margin of appreciation, particularly where what is impugned is an overall value judgement based on competing considerations, or an exercise of regulatory judgement in selecting potential solutions.

32. In *SSE Generation Limited v GEMA* (12 December 2022)*,* the CMA explained the standard of review under s.175(4) EA 2004 as follows (with emphasis added):

> *"5.13 Given the scope of the above grounds, the appeal is not limited to the traditional judicial review grounds of illegality, irrationality and procedural impropriety. This is evident on the face of the legislation.*
>
> *5.14 However,* ***the legislation does not confer a full merits jurisdiction on the CMA. That is because section 175(6) of the EA04, which prescribes the actions to be taken if the CMA allows an appeal, does not include any reference to the CMA substituting its own decision for that of GEMA.***
>
> *5.15 We set out here the guiding principles we apply in approaching our review of the grounds of appeal advanced in this case.*
>
> *5.16 First, we agree with the point made by the Competition Commission in E.ON UK Plc v GEMA, which also concerned an appeal brought under section 173 of the EA04, relied upon by GEMA and quoted above at paragraph 5.8.* ***Beyond cases involving errors of law, we do not intervene simply because we might have reached a different view if we were the primary energy regulator. The test under section 175 of the EA04: clearly admits of circumstances in which we might reach a different view from GEMA but in which it cannot be said that GEMA's decision is wrong on one of the statutory grounds.*** *That is not to say that every aspect of a code modification decision will be a matter for GEMA's discretion. There may be issues in respect of which it can more easily be said that GEMA's decision is wrong - for example, if GEMA has made an error of principle. The [CMA] will therefore consider on a case by case, and issue by issue, basis whether GEMA's decision is wrong on one or more of the statutory grounds.*
>
> *5.17 Second, in the context of challenges relying on an alleged error of law, it was common ground between the Parties that there was no role for 'regulatory judgement' or discretion on the question of what is the correct construction of legislation (in the present case, the ITC Regulation). We agree with that and we agree also with the Appellants that, on that question, the concept of reasonable judgement, as embodied in the Wednesbury test, has no part to play.*

5.18 Third, in the context of challenges made to findings of fact, we note that: ***GEMA, as the specialist regulator may well have an advantage over the CC in finding the relevant primary facts. … GEMA … has an advantage of experience, and will often have the benefit of having conducted a consultation with the industry … . For these reasons, the CC will be slow to impugn GEMA's findings of fact. Nevertheless, the CC has a clear jurisdiction in respect of factual errors, and we will exercise that jurisdiction where we conclude that GEMA has based its decision on a plain error of fact.***

5.19 It is also clear that for an error of fact to be capable of rendering a decision unlawful, the appellant must show that the error identified is a material one: In considering whether GEMA's decision is wrong for an error of fact, the words 'based ... on' in section 175(4)(d) must be accorded their full weight. ***It is not enough to succeed under that section for an appellant to demonstrate that some error of fact, whether consequential or inconsequential, has been made by GEMA in its decision. Rather, an appellant will need to demonstrate that the error was material to the outcome of the decision. Only if the error was material in this way will we regard the decision as 'wrong' under section 175(4)(d)."***

33. See further *E.ON UK Plc* (CC02/07, 10 July 2007), in which the Competition Commission observed that s.175 clearly admits of circumstances in which the Commission (now the CMA) might reach a different view from GEMA but in which it cannot be said that GEMA's decision is wrong on a statutory ground. Not least, GEMA may have taken a view as to the weight to be attributed to a factor which differs from the CMA's own view, but which cannot be said to have been inappropriate (§§5.11, 5.12).

34. RWE notes the decision of Sheldon J in *R (Wales & West Utilities Ltd) v Competition and Markets Authority* [2026] 4 WLR 29, in respect of s.23D Gas Act 1986, which contains similar (although not identical) provision to s.175(4).[42] Sheldon J's findings were *obiter* (§137) and the context was different. Nonetheless, Sheldon J clearly underscored:

(1) "…a*n appeal does not give rise to a re-run of the original investigation or a de novo hearing of all the matters that were before GEMA"* (§138);

[42] In relevant part, s.23D Gas Act 1986 provides:
"*(4) The CMA may allow the appeal only to the extent that it is satisfied that the decision appealed against was wrong on one or more of the following grounds—*
(a)that the Authority failed properly to have regard to any matter mentioned in subsection (2);
(b)that the Authority failed to give the appropriate weight to any matter mentioned in subsection (2);
(c)that the decision was based, wholly or partly, on an error of fact;
(d)that the modifications fail to achieve, in whole or in part, the effect stated by the Authority by virtue of section 23(7)(b);
(e)that the decision was wrong in law."

(2) the CMA *needed to consider whether GEMA made a decision that was 'wrong' on one of the prescribed statutory grounds"* (§140). In this regard, the CMA were right to regard themselves as being in the position described by Green J in *R (Hutchinson 3G UK Ltd) v Office of Communications* [2017] EWHC 3376 (Admin) at [40] that *'there is no blank canvas upon which the parties can paint a new picture which fails to heed the reasoning in the decision under challenge'"* (§141);

(3) the CMA does not "*stand in the shoes of GEMA…*". GEMA is, moreover, a "*specialist body which is expected to have great familiarity with the sector for which it is the regulator"* (§153), and the CMA's role is to "*consider the adequacy of GEMA's chosen approach rather than which approach we might have chosen had we been in GEMA's position*" (§§154-155).

35. Further, as to errors of fact, "*… that the decision was wrong on the ground of an error of fact – will be a working out by the CMA of the well-known test in E v Secretary of State for the Home Department at para 66: First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established' in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his or her advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the … reasoning*" (§143).

36. For completeness, Sheldon J's *obiter* observations that when assessing whether GEMA "*got it wrong*" for the purposes of the Gas Act, "*what is required is that the alternative approach is 'materially' better than GEMA's approach: that is, the alternative approach is one which, weighing up the pros and cons of the different approaches, offers something more than GEMA's approach…"* add little in a code modification case where, as here, Ofgem's choice was binary (cf. a choice between multiple alternative approaches to a regulatory issue), even if those observations are right on their own terms (§§158-159); and even then, note that if "*GEMA's approach is equally good to the other approaches then it should be upheld by the CMA, even if the CMA would have preferred one of the other approaches"*).

37. Further, it is clear from Sheldon J's judgment that by "*materially better*" in §158, Sheldon J did not create a new standalone ground of appeal wherever an appellant has identified some materially better approach to (in that case) calculating gas price control allowances. Rather, the alternative must relate to one of the statutory grounds in s. 175(4)(a)-(c).

38. All that said, this is not a case in which the appeal will turn on nuance as to the appropriate standard of review. Ofgem's position is that the standard of review was accurately stated by the CMA in *SSE Generation* and *E.ON*, as reiterated in *Wales*. If Sheldon J's comments in *Wales* went beyond *SSE* and *E.ON*, they were *obiter*, and are inapposite here. There is no warrant for RWE's further proposed departures from Sheldon J's judgment, which fail to respect the limits of s.175(6) and the CMA's jurisdiction. But ultimately, whichever test the CMA applies here – whether the approach set out in *SSE Generation* and *E.ON*; the approach advocated *obiter* by Sheldon J in *Wales*; or even RWE's own formulation – there is no proper basis for interfering with Ofgem's Decision in this case. It was not "*wrong*" within the meaning of s.175(4).

<u>Available relief</u>

39. As to relief, ss.174(5)-175(8) provide:

> *"(5)Where the CMA does not allow the appeal, it must confirm the decision appealed against.*
>
> *(6)Where it allows the appeal, it must do one or more of the following—*
>
> *(a)quash the decision appealed against;*
>
> *(b)remit the matter to GEMA 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 GEMA, and to such other persons as it considers appropriate, for securing that the relevant condition has effect as if the consent had been given.*
>
> *(7)A person shall not be directed under subsection (6) to do anything that he would not have power to do apart from the direction.*
>
> *(8)A person to whom a direction is given under subsection (6) must comply with it; and such a direction given to a person other than GEMA shall be enforceable as if it were an order of the High Court or (in Scotland) of the Court of Session."*

40. These provisions are clear. There is no basis whatever for the CMA to conduct a "*full re-hearing of the issues*" as advocated by RWE, whether under Article 6 ECHR or otherwise.

D. GROUND 1

41. Ground 1 is that the Decision is unlawful because it was vitiated by an appearance of bias, arising by predetermination and / or a historic connection between Mr Stone and NGESO (Main Submission, §93). There is (rightly) no suggestion of actual bias or predetermination. RWE's principal complaint, as Ofgem understands it, appears to be one of apparent predetermination. That complaint is meritless, as set out below.

Apparent bias and predetermination

42. The test for apparent bias and predetermination is well-established. RWE must show that a fair-minded and informed observer, having considered the facts, would conclude that there was a real risk that Mr Stone was biased or had predetermined the issue: *Porter v Magill* [2002] 2 AC 357, 103 (Lord Hope of Craighead); *R (Lewis) v Redcar and Cleveland Borough Council* [2009] 1 WLR 83, §§68 and 96-97 (Pill LJ and Rix LJ). The fair-minded and informed observer is neither complacent nor unduly sensitive nor suspicious.[43] He or she is not unduly sympathetic to the claimant, but takes an objective and balanced approach.[44]

43. The courts "*adopt a different approach to the appearance of predetermination in the context of judicial decision-makers to that adopted in the context of administrative decision-makers*".[45] Unlike judicial decision-makers, administrative decision-makers "*are entitled to hold strong views about the matters that they are to decide*".[46] They "*may legitimately be predisposed, sometimes strongly, in favour of or against a particular decision*".[47] The threshold for alleged predetermination is high.[48] Thus: ***"… unless there is positive evidence to show that there was indeed a closed mind, I do not think that***

43 *Lawal v Northern Spirit Ltd* [2004] All ER 187, §14 (Lord Steyn); *Johnson v Johnson* (2000) 201 CLR 488, §53 (Kirby J).

44 *Porter v Magill* [2002] 2 AC 357, §104 (Lord Hope). *Lawal v Northern Spirit Ltd* [2003] UKHL 35, §14 (Lord Steyn).

45 Moffett, Auburn and Sharland 9.92.

46 Moffett, Auburn and Sharland 9.92.

47 Moffett, Auburn and Sharland 9.104.

48 *R (Lewis) v Redcar and Cleveland Borough Council* [2009] 1 WLR 83, §96 (Rix LJ). (See also §62, Pill LJ.)

***prior observations or apparent favouring of a particular decision will suffice to persuade the court to quash the decision*.”**[49]

44. Further, a person can waive a right to object to a decision-maker on grounds of apparent bias or the appearance of predetermination, provided that such waiver was voluntary, informed (in full knowledge of the relevant facts) and unambiguous.[50] As summarised in *Judicial Review Principles and Procedures* (2nd Edition, Moffet, Auburn and Sharland) at [9.21]: *"… a waiver can be 'clear and unequivocal' even if it is implicit. A court may imply waiver from the passage of time that has elapsed since the party became aware of the basis for making an objection. For example, a person may be found to have waived the right to alleged apparent or presumed bias, the appearance of predetermination or lack of independence if, after becoming aware of the relevant facts, he or she does not object to the decision-maker within a reasonable time."* What a person must not do is to wait and see if a decision is favourable or unfavourable before raising their objection.[51]

45. RWE advances its bias and predetermination arguments in the alternative by reference to Article 6 ECHR. This additional ground adds nothing. Even if Article 6 ECHR did apply to Ofgem's decision-making under E.23(a) and CUSC 8.23.7[52]: (a) the test for apparent bias or predetermination is the same as set out above: *Lawal v Northern Spirit Ltd* [2004] All ER 187, §14 (Lord Steyn); and (b) it is trite that the fairness of administrative decision-making is considered as a whole under Article 6 ECHR, including any statutory appeal.[53]

<u>Waiver</u>

46. There is no apparent bias or predetermination, for the reasons summarised below. But in any event, this is a clear case of waiver.

47. On the face of the contemporaneous documents:

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49 *R (Lewis) v Redcar and Cleveland Borough Council* [2009] 1 WLR 83, §96 (Rix LJ).

50 *R (Angello) v Hounslow LBC* [2003] EWHC 3112 (Admin) at §78 (Silber J). *Jones v DAS Legal Expenses Insurance Limited* [2003] EWCA Civ 1071, §36 (Ward, Waller and Hale LLJ).

51 *Competition Commission v BAA Ltd* [2011] UKCLR, 1, §39 (Maurice Kay LJ).

52 Ofgem does not accept that such decision-making entails the determination of a civil right or obligation.

53 See by analogy *R (Youssef) v Secretary of State for Foreign Commonwealth and Development Affairs* [2022] 1 WLR 2454, §§83-93, 104; *Khan v Secretary of State for Foreign, Commonwealth and Development Affairs* [2025] 1 WLR 2009 §§143-146.

(1) RWE knew that Mr Stone initially participated in that Workgroup on behalf of NGESO, prior to joining Ofgem in October 2023. As Mr Stone explains at §§127, he initially worked as Senior Commercial Code Charge Lead at NGESO (from February 2020 to June 2022) and then as Transmission Charging Strategy Manager. He attended some 4 or 5 Workgroup meetings in relation to CMP344 in 2020 and 2021. RWE was a member of the CMP344 Workgroup at all material times.

(2) RWE also knew that Mr Stone was involved in Ofgem's decision-making on CMP344 from at least 2 February 2024, when Ofgem's Interim Director of Networks (Rebecca Barnett) emailed RWE's Head of Regulatory Affairs UK and Ireland to inform him that Mr Stone would be dealing with CMP344 and that Dr Steward should reach out to Mr Stone as a point of contact.[54] There followed discussion between them, Dr Steward wanting to "*chat on next steps to make sure we can get OFGEM what it needs next time.*"[55]

(3) RWE knew that Mr Stone was the decision-maker on CMP344 by 20 November 2025 at the latest, Mr Stone stating "*I plan on taking the decision on this one…*".[56] Dr Steward responded on the same day "*That's great…*".[57]

(4) Further, Lauren Jauss, RWE's Head of UK Markets and Performance Improvement, is a member of the CUSC Panel. Mr Stone has attended numerous CUSC Panel meetings to update on expected decision dates, including on 24 April 2026, providing an update *inter alia* on CMP344.[58]

48. Yet RWE made no complaint at all before filing this appeal on 26 May 2026.

49. RWE's case is that Dr Steward did not "*consider the implications of this at the time…*".[59] That is not an answer to waiver. RWE knew of Mr Stone's involvement in Ofgem's decision-making on CMP344 for many months before the Decision (indeed, more than two years). It did not object until after learning that the Decision was adverse to RWE.

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[54] Stone, §112.
[55] Stone, §112.
[56] Stone, §113.
[57] Stone, §113.
[58] Stone, §111.
[59] Steward, §64.

No apparent bias or predetermination

50. In any event, no fair-minded and informed observer would consider there to be a real risk of bias and / or predetermination. Indeed, Dr Steward's own reaction on 20 November 2025 is telling: he saw nothing untoward in Mr Stone taking the relevant decision.

51. The fair-minded and informed observer would have in mind the following.

52. **First**, Mr Stone's only prior involvement with CMP344 was more than 5 years ago.

53. **Second**, that involvement was only as a member of the Workgroup, at the very earliest stages in the evolution of this modification.[60] Mr Stone did not propose CMP344. He was not a Panel member.[61] He had no decision-making responsibility at all.[62]

54. **Third**, his involvement in the Workgroup was on behalf of NGESO, and to convey NGESO's position.[63] NGESO had no commercial interest in the outcome of CMP344.

55. **Fourth**, any views Mr Stone expressed in 2020 and 2021 reflected the evidence and analysis he was considering at that stage. They were not in any sense 'final'. Even had Mr Stone stayed at NGESO, he would have had to keep those views under review as the evidence and analysis developed.[64]

56. **Fifth**, in his role at OFGEM, Mr Stone is required to act in accordance with the Civil Service Code, which include integrity, honesty, objectivity and impartiality and was trained in that regard. Civil servants can be expected to act in accordance with these principles: see *R (Island Farm Development Ltd) v Bridgend County Borough Council* [2007] LGR 60, Collins J, at §31.

57. **Sixth**, Ofgem decision-makers do not act in a vacuum. In reaching a decision on CMP344, Mr Stone was acting with the benefit of extensive input from experts within OFGEM (including both policy and economic specialists, as explained in Stone, §§119-

60 Stone, §132.
61 Stone, §131.
62 Stone, §131.
63 Stone, §130.
64 Stone, §135.

126) and with the approval and support of Ofgem's Deputy Director for Electricity Charging and Market Design. See Hassid, §12.

58. **Seventh**, the evidence shows that Mr Stone actively assessed the evidence before him, seeking clarifications from Cornwall Insights at appropriate points.[65] The fair-minded and reasonable observer would recognise that he was approaching CMP344 fairly, and seeking fully to understand the evidence, rather than with a predetermined view.

59. **Eighth**, <u>no-one</u> involved in CMP344 (including RWE) objected to Mr Stone's role.[66]

60. Whether taken individually or cumulatively, those factors are compelling. No fair-minded and informed observer would see a real risk of bias or predetermination. Electricity charging regulation is a small and specialist field. Officials can be expected to approach their work with professionalism and independence, as Mr Stone did here.[67]

61. For the avoidance of doubt, *R (Orltona Ltd) v Secretary of State for Communities and Local Government* [2010] 1 P & CR 15 cited at Main Submission, §97(f) is not analogous. *Orltona* was a planning case, in which the decision-maker on a statutory appeal had previously been responsible for the policies that were at issue on the appeal. There is no equivalent here. Mr Stone was not deciding a statutory appeal. Nor was he responsible for the formulation and application of a policy that is now under appeal.

E. <u>GROUND 2</u>

62. Ground 2 comprises a series of sub-grounds alleging, in broad terms, that Ofgem was wrong in fact and / or in law in deciding that CMP344 would not better facilitate ACOs (d) and (e) as compared to the Baseline. The Notice of Appeal makes no serious attempt to explain how or why the pleaded matters fall within the scope of s. 175(4) EA 2004 or pass the threshold identified in *SSE* and *E.ON*, nor explain why any of the errors of fact they allege are as to existing, uncontentious and objectively verifiable facts that are material. Ground 2 should accordingly be dismissed. The Decision was, in any event, properly open to Ofgem as a matter of expert evaluative judgment (indeed, Ofgem would

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65 Stone, §126.

66 Stone, §133.

67 See generally, Stone, §§109-135.

say it was plainly right). There were no procedural errors as alleged or at all, and on no view was Ofgem "*wrong*" by reference to the specific criteria in s.175(4) EA 2004.

Ground 2A(1)

63. Ground 2(A)(1) is short and misconceived. RWE contends that Ofgem misdirected itself as to the scope of potential IAEs, considering only latent defects causing cable failures and not e.g. force majeure or other events (Main Submission, §§105, 106). The short and complete answer is that there was no such misdirection (or, as RWE seek to characterise it, error of law or fact).[68] Mr Stone considered both the "*relevant IAE condition and Ofgem's IAE policy*" as part of the Decision.[69] Indeed, pp.5-6 of the Decision clearly treat latent cable defects only as **<u>an example</u>** of potential IAEs:

"*… the OFTO licence allows for revenue adjustments ('Pass-through Items') to be made to an OFTO's… Pass-through Items are provided for in the Amended Standard Condition (ASC) E12-J3s of the OFTO licence…* ***<u>An example</u>*** *of a previous IAE is the costs incurred in addressing a cable failure caused by an uninsurable latent defect.*" [Emphasis added.]

64. Ofgem's consideration in the Decision of cable failures caused by uninsurable latent defects reflects the reality that all the IAEs approved to date have involved such failures.[70] Unsurprisingly, the Workgroup and FMR focused on latent cable failures.[71] Ofgem was fully entitled to do likewise.

65. RWE next contends that the Decision was unlawful because generators are not 'best placed' to deal with IAEs "*such as sabotage or vandalism of transmission asserts, or those arising from terrorism, warlike activities of enemy states, or changes in the law*" (Main Submission, §108). This is a bad point. As Mr Stone explains at §143, he did not proceed on the basis that it is possible for a generator to mitigate the occurrence and costs of all IAEs. Rather Ofgem's view was a relative and far more nuanced one, that a generator is relatively better placed to mitigate the occurrence and cost of at least some

68 As to error of fact specifically, Ofgem repeats that any relevant error of fact must be as to an existing, uncontentious and objectively verifiable fact that is material.

69 Stone, §136.

70 Stone, §138.

71 Stone, §138.

IAEs than consumers, given generators design the offshore transmission asset, procure the components, construct and operate the asset for more than 2 years until asset transfer.

66. It would have been open to RWE or any other Workgroup member to put forward an alternative modification proposal that the costs of different types of IAEs be addressed differently, with the costs of e.g. sabotage, terrorism, war or other *force majeure* events to be borne by consumers, not generators.[72] Ofgem expresses no view on whether such a proposal would have been approved; there may be good reasons of cost reflectivity/competition for generators to bear the cost of IAEs arising from e.g. *force majeure*. But absent any such proposal, Ofgem's only choice was to accept or reject CMP344 <u>in its entirety</u>.[73] It was fully entitled to conclude, in those circumstances, that CMP344 did not better facilitate the relevant ACOs as compared to the Baseline.

Ground 2A(2)

67. Ground 2A(2) contends that Ofgem failed to consider or give appropriate weight to the lack of feasibility and costs of generators mitigating IAEs, and that Ofgem's position was 'speculation' (Main Submission, §110). Again, there is no serious attempt to explain how the matters alleged fall within s. 175(4) or meet the threshold explained in *SSE* and *E.ON*. The Notice of Appeal is essentially an (impermissible) attempt to re-argue the merits of CMP344 *de novo*. This Ground is plainly wrong. Ofgem did consider feasibility/cost, and there is no proper basis for any challenge to its evaluative judgment. Insofar as this ground is in fact seeking to raise procedural complaints, those are clearly unfounded.

68. Ofgem underscores six points.

69. **First**, nothing in this Ground touches Ofgem's assessment that it would better facilitate cost reflectivity, and accordingly effective competition, for the party which built an offshore transmission asset for its sole use to pay the majority of any associated costs – i.e. here, the generators, for whose sole use and benefit these subsea cables and associated infrastructure transmit electricity to the mainland.[74]

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72 Stone, §144.
73 In circumstances in which it was able to make a decision.
74 Stone, §§88-96; 143.

70. **Second**, Ofgem expressly considered feasibility and availability of mitigations (*contra*, §113). Indeed, on p. 24 of the Decision, Ofgem gave specific examples.

71. **Third,** RWE's own position is that there are existing incentives on generators to ensure good build quality, and that Ofgem should have given weight to those incentives: see Ground 2A(3) below and McCole, §§35-46, most notably that in the event of a cable failure the "*financial impact of such events is significant"* (§37). It follows that it is both feasible and efficient for generators to take at least <u>some</u> steps to mitigate <u>some</u> IAEs.

72. **Fourth**, Ofgem accepted that there were certain risks that offshore generators could not mitigate and judged that CMP344 was negative as against the relevant ACOs notwithstanding. As Mr Stone explains at §143, "*We did not conclude (and do not consider) that it is possible for a generator-developer to mitigate the occurrence and cost of all IAEs…"* Ofgem's view was, however, a relative one that "*the developer is **better** placed to mitigate the occurrence and cost of IAEs than consumers are, given that they design the asset, procure the components, construct the offshore asset, and operate the asset for an initial period of up to 27 months until asset transfer as part of the commissioning and testing phase."*[75]

73. **Fifth**, Ofgem's assessment that generators were relatively better placed than consumers to avoid IAEs or to mitigate the cost and impact if an IAE arises is fully consistent with the evidence. Among other matters, in 2020 Ofgem commissioned a report by Det Norske Veritas ("**DNV**"), which, in the context of Gwynt y Môr, found that it was more likely than not that good industry practice could have prevented the cable failure in issue. See also Stone at §§147-149 and §§152-153. Following good industry practice at the design and construction phase in relation to transmission assets reduces the risk of faults, and therefore the risk of assets becoming uninsurable by the OFTO. That in turn reduces the risk of the occurrence of IAE events. As to commercial recourse, see Stone, §§150-155. Indeed, when Ofgem consulted on its IAE policy in February 2018, responses from industry indicated that some generators had obtained comprehensive cable warranties which they transferred to the OFTO on transfer of the transmission asset. As to insurance, Indec, a specialist insurance consultancy, has confirmed that Operating All Risk

75 Stone, §143.

Insurance is available to generators in the initial 27 months before transfer of the transmission asset.[76]

74. **Sixth**, insofar as RWE's real concern is as to the cost of mitigation (Main Submission, §116), this is a new point. The third FMR asserted rather, and simply, that "*offshore generators cannot mitigate the risk of IAEs*".[77] Ofgem was entitled to take a different view, for all the reasons above, and the Decision was not "*wrong*". But in any event Ofgem was and is not required to determine that it would be cost efficient for a particular generator to take particular steps in respect of every possible potential IAE. Whether to take particular steps at the build stage, or to buy particular insurance or negotiate particular warranties, or instead to price in risk to a CfD bid, is a commercial decision for the generator, balancing cost, risk and reward. The point of the Decision is simply that when generators are considering how to act, and whether to mitigate particular risks, the Baseline *status quo* provides a desirable charging signal, incentivising mitigations.

75. Further:

    (1) As to insurance, Indec's view in respect of OAR is that "*Applying the maximum for both coverages I see a combined premium of only -2% of the insured value, which I would consider to be economic during the operating phase.*"[78]

    (2) RWE's reliance on the Offshore Transmission Guidance for Costs Assessments (2022) (the "**Guidance**") is not understood. The Guidance relates to Ofgem's role in assessing the economic and efficient costs of offshore transmission assets for the purposes of calculating the Indicative Transfer Value before transfer to an OFTO. It is aimed at protecting consumers against wasteful spending. It is not an instruction to reduce the robustness of assets or to take particular risk, and has nothing to do with the charging incentive in respect of IAEs which CMP344 was seeking to remove. Further, RWE's analogy with the Indicative Transfer Value set by Ofgem in respect of the Beatrice Offshore Windfarm is a bad one in any event (Anstey, §105). When it came to the Indicative Transfer Value, Ofgem disallowed the £3.9 million cost of spare transformer because the probability of an event

[76] [SB/45].
[77] Stone, §158.
[78] Stone, §161; [SB/45].

necessitating the use of a spare transformer was between 1 in 189 to 1 in 500 years – significantly lower than the 25 year OFTO licence period. In contrast, and as Mr Stone explains, there are other examples in which Ofgem has allowed spare parts to enhance offshore reliance, including as to Gwynt y Môr itself.[79]

76. The short point in respect of this Ground 2A(2) is that even recognising that generators may not be able to completely avoid or mitigate the impact of all IAEs,[80] and indeed that generators may decide against particular mitigations on grounds of cost and commercial risk-appetite, Ofgem's regulatory judgment was nonetheless that the Baseline charging arrangements sent a valuable costs signal, and that removing that signal through CMP344 would not better facilitate the relevant ACOs. There was nothing illogical or irrational about Ofgem's approach. It was certainly not "*wrong*".

Ground 2A(3)

77. RWE's essential complaint on Ground 2A(3) is that Ofgem failed to consider or give due weight to *other* potential incentives on generators to avoid IAEs or mitigate the cost of IAEs (Main Submission, §§124-126). Again, the Main Submission makes no attempt to identify which limb of s.175(4) is said to be engaged. That aside, Ground 2A(3) is wrong insofar as it suggests that Ofgem did not consider the possibility of other incentives and is otherwise an impermissible challenge to Ofgem's evaluative regulatory judgement.

78. As set out in the Decision and confirmed in Stone, §§165, Ofgem specifically identified and considered that there were other existing incentives on generators to design and build transmission assets in a manner that mitigates the risk of asset failure. See e.g. the Decision, p. 18 where Ofgem stated expressly that "*We recognise that there will still be a strong commercial incentive for an offshore generator to ensure a quality build whatever the ultimate treatment of IAEs*". See also, Decision, p. 21.

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79 Stone, §162. Ofgem allowed one spare offshore transformer and one spare offshore in the 2015-published cost assessment report for Gwynt y Môr. Another example is the Hornsea Project Two, where the cost of 14km of spare cable was allowed.

80 Stone, §143.

79. Ofgem was entitled to conclude that CMP344 did not better facilitate ACOs (d) and (e) as compared to the Baseline, notwithstanding these other existing incentives. This was a matter for Ofgem's evaluative judgement. Ofgem underscores four short points.

80. **First**, nothing in this Ground touches Ofgem's assessment that it would better facilitate cost reflectivity, and accordingly competition, for the party which constructed and uses an offshore transmission asset to pay a portion of any associated costs – i.e. here, the generators, for whose sole use and benefit these subsea cables and associated infrastructure transmit electricity to the mainland.

81. **Second**, even if the commercial risk of lost revenue in the event of an IAE operates as a substantial existing cost signal to generators to ensure quality build and strong recourse, that signal operates alongside and in combination with the concurrent cost signal sent by existing charging policy, including exposure to the risk of costs of IAEs.

82. Ofgem was entitled to conclude that exposure to the risk of IAE costs is a meaningful and valuable incentive: see e.g. Stone §165. Indeed, the very fact that RWE contends that existing commercial incentives mean that generators take steps to mitigate IAE risk rather underscores Ofcom's point: that the risk of financial exposure provides a valuable incentive, whether that exposure comes from commercial consequences, or from IAE costs, or a combination of the two. And as Mr Stone notes at §166, if generators' own financial exposure to IAEs is considered to be a strong costs incentive (as RWE contends) so too must the parallel exposure to IAE costs given their comparable size.

83. In any event, it is doubtful that the cost signal associated with the commercial risk of lost revenue in the event of an IAE is as strong as RWE now contends. In at least some cases, generators may be able to secure business interruption insurance providing cover for at least a material part of those costs. Indeed, McCole, §§44-45 notes that business interruption insurance was originally available at Gwynt y Môr and is only unavailable for GYMOWFL now because of the history of cable failure. Indecs confirm that business interruption insurance is, in principle, available in the market.[81]

81 [SB/45]

84. Ofgem would add, by way of response to RWE's case on this appeal, Indec's common sense point that if generators are not exposed at all to the costs of IAEs, insurers may, over time, become more reluctant to provide insurance coverage to OFTOs in respect of latent defects. At present, OFTOs are expected to seek insurance cover in the worldwide markets, as set out in the IAE policy. If an OFTO obtains such cover, the insurer will bear the costs of a cable failure or similar event. If an OFTO fails to obtain such cover when it was realistically available, the OFTO will likely have to bear those costs, as Ofgem will reject any IAE claim, as set out above. This is important cover, reducing costs overall. Ofgem does not suggest that predicting the response of the insurance markets to a change in charging policy is precise or scientific. But Ofgem is entitled nonetheless to seek to avoid the risk that removing generators' exposure to the costs of IAEs may reduce insurers' appetite to provide cover for OFTOs in the first place.[82]

Ground 2A(4)

85. Ground 2A(4) asserts that Ofgem wrongly considered that exposing generators to the risk of IAE-related costs would be consistent with the principle of costs reflectivity and / or represent efficient economic signalling. Ofgem's reasoning is said to be "*wrong in law and/or fact and failed to properly interpret or apply Use of System Charging Objectives (d) and (e)*" (Main Submission, §130). Even leaving aside the absence of any explanation as to which conditions in s.174(5) are met and why, and the failure to explain why there are alleged errors of fact as to existing, uncontentious and objectively verifiable facts that are material, the short answer to Ground 2A(4) is that it fails for all the reasons already addressed above under Grounds 2A(1)-(3). There was no misdirection in law and / or error of fact and Ofgem was fully entitled to conclude on the facts that CMP344 did not better facilitate cost reflectivity or effective competition.

86. As to RWE's additional points:

(1) RWE contends that IAE charges are not locationally specific, and accordingly not a relevant signal as regards cost reflectivity and competition (Main Submission, §130). That is simply wrong. ACO (e) does not limit cost reflectivity to locational

[82] See also, Stone, § 168.

signals. But in any event, IAE costs are recouped by way of Local Charges, which are locational by their nature. See Stone, §§173(a).

(2) For whether the Baseline constitutes a distortion of competition and / or a "*punitive lottery*" (Main Submission, §129), see Knott, §§18-21 and Stone, §173.

(3) RWE contends that the Decision is inconsistent with Ofgem's reasoning in other contexts, for example its decisions in CMP463 and CMP308 (Main Submission, §§132 and 133). These are not good analogies. Each decision falls to be considered on its own terms. As explained at Stone, §173(b) and (c) and 198-199, CMP463 was a proposal to freeze SEFs in an upcoming price control period at 2025/2026 values, on the basis that significant and unexpected changes to charges undermine competition where they arise at short notice and without reasonable justification. It was a temporary measure to mitigate potential harm prior to further review as part of wider reforms. CMP344 is fundamentally different, not least on account of being a proposed enduring change. As to CMP308, BSUoS Charges are very different from TNUoS Local Charges. Not least, they are <u>cost recovery</u> charges, not (as with TNUoS Local Charges) forward looking changes which could send a signal.

Ground 2A(5)

87. Ground 2A(5) asserts that Ofgem was wrong to reject a comparison between CMP344 and Special Condition 3.28 of the Scottish Hydro Electric Transmission plc onshore transmission licence ("**SHETL**"). It is again unclear how RWE says that this complaint engages the grounds in s.175(4) EA 2004. But in any event, there are obvious and material differences between the cost arrangements for the Shetland High-Voltage Direct Current Link ("**SHVL**") under SHETL Special Condition 3.28.

88. In short, and as set out in Stone, §§175-183:

(1) Offshore transmission assets are built by generators. SHVL, in contrast, was built by the onshore TO;

(2) Offshore transmission assets link a single offshore generator to the onshore transmission system by a single radial (point-to-point) connection, and are built by

the generator solely for this purpose. The offshore generator, as the sole user of the asset, is primarily responsible for the associated costs (subject to a consumer contribution as explained earlier). SHVL, in contrast, supports both generation and demand. In contrast, offshore transmission

(3) SHVL is important for security of supply in the Shetland isles, over and above the interests of any specific generator and SHVL's construction was pre-approved by Ofgem with regard to a combination of factors, including that SHVL would protect the interests of consumers. The Shetland isles had previously been isolated from the GB electricity network, and SHVL would connect it to the NETS. The 'needs case' for SHVL placed significant weight on the whole system need.

89. As to Main Submission, §§141-142, see Stone, §183.

Ground 2A(6)

90. Ground 2A(6) asserts that Ofgem wrongly focuses on generators as developers and that this in some sense gives rise to an error of law or fact (Main Submission, §144). This is misconceived. At present, offshore transmission assets are designed and built by generators. That is to say, the generators <u>are</u> the relevant developers, developing those assets. That is the real world context for the Decision, and indeed the premise for Ofgem's IAE policy generally e.g. at [3.42]). Further, the Decision expressly left open the prospect that IAE charging methodology should be reviewed, if and when any OFTO build model ever materialises. See, for example, the third paragraph on p. 19 of the Decision which expressly recognised that "*…as the market develops, it may not always be the generator in question who builds the relevant assets*" and that if those facts change, the regulatory framework "*may require review*".[83] There is nothing arguably unlawful in that approach. Ofgem must make decisions based on the facts that are before it at the relevant time, and based on the specific proposal advanced.

91. See also, and generally, Stone, §§184-188.

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[83] Decision, p. 19.

Ground 2B

92. Ground 2B asserts that Ofgem should have found that CMP344 better facilitated ACO (d) because it would remove discrimination between offshore and onshore generators.

93. Ground 2B(1) is that Ofgem was wrong in stating that the treatment of onshore local circuit charges was comparable to existing baseline arrangements for offshore local circuit charges. Ground 2B(2) is that Ofgem was wrong to state that the onshore and offshore generators are not in a materially equivalent position. How these alleged errors fall within s. 175(4) is not explained, nor why any of the alleged errors of fact are as to existing, uncontentious and objectively verifiable facts that are material. But in any event:

(1) Onshore generators and offshore generators are not in a materially equivalent position. The offshore network has used a generator build model to date. That is not the position onshore. Further, there is no IAE mechanism for onshore transmission owner ("**TO**") licensees.[84] If an onshore TO is required to carry out unforeseen works in respect of its network, it must either absorb that cost or approach Ofgem, generally under specific pre-determined mechanisms in its licence to request that it be permitted to recover further sums through a specific 'Re-opener' or 'Cost and Output Adjusting Event'.[85]

(2) Even ignoring those differences, any impact on competition was negligible and *de minimis* as set out under Ground 2C below.

94. As to Stone, §194, the confusion has no impact on Ofgem's reasoning as to ACO(d) (effective competition) and is immaterial.

Ground 2C

95. By Ground 2C, RWE attacks Ofgem's conclusion that CMP344 would not better facilitate ACO(d) (effective competition), as compared to the Baseline status quo.

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84 Stone, § 193.
85 Stone, §193.

96. These are, again, bad points. The analysis in the Main Submission and RWE's evidence is a very long way from a case that Ofgem's assessment in the Decision is "*wrong*" in the statutory sense. But even engaging with the detail, RWE's arguments are unfounded.

97. As to the wholesale electricity markets, whether or not a particular generator incurs the costs of an IAE does not affect pricing within the wholesale electricity market, and any conceivable impact on competition would be *de minimis*, as Mr Knott explains at §38.

98. As to CfD auctions, onshore and offshore generators do not compete directly against one another in the CfD allocation process,[86] as Mr Knott explains at §41. RWE also takes issue with the CfD process itself, arguing that recovering IAE costs from generators exacerbates distortions in the CfD regime.[87] The advantages or disadvantages of the CfD mechanism per se are well outside the scope of the Decision and of this appeal. But in any event, this makes no economic sense. There is no 'market' for DESNZ funding in an economic sense.[88] Even if investors factor IAE costs into their CfD auction bids, leading to higher strike prices, the cost is immaterial.[89] And nothing in RWE's evidence explains what distortion is said to arise from the Decision relative to CMP344 being accepted.[90]

99. The remainder of Main Submission §§158-159 raise points of detail. None suggest that the Decision is "*wrong*", or are material:

(1) At Main Submission, §158(a), RWE queries Ofgem's judgment that passing the costs of IAEs from offshore generators to consumers would not "*necessarily*" result in greater volumes of offshore generation entering the market. This duplicates the points addressed above. And, as Mr Stone notes, at §205, there is in fact strong competition in the CfD auctions as evidenced by the most recent AR7.

(2) At Main Submission, §158(b), RWE asserts that that Ofgem failed to consider whether CMP344 would better facilitate competition in investment in existing offshore generation, i.e. by incentivising generators to continue operating or

86 In the AR7 allocation, offshore wind was not included within the same allocation pot as onshore wind, nor did all offshore wind generation project compete directly with each other. Rather each competed within its respective grouping against technologies with broadly comparable cost profiles.

87 Knott, §43.

88 Knott, §44.

89 Knott, §46.

90 Knott, §48.

repower aging assets. There are new points, not made in the third FMR. The short answer is that IAE costs as a proportion of the overall cost of an offshore windfarm are *de minimis* and that there are a range of different factors that would influence investment decisions. See Mr Knott's view at §50 and Stone, §208.

(3) At Main Submission, §158(c), RWE asserts that Ofgem failed to consider the distortive effect of allocating unforeseeable and uncontrollable risks to generators rather than socialising them. This is a repeat of Ground 2A(2)-(3) as to cost reflectivity, and is unfounded for all the reasons already set out. As to the alleged "*punitive lottery*" see Knott, §§18-20. As to distortive effects generally, see further the response to Ground 2D.

(4) At Main Submission, §158(d)-(e), RWE complains that Ofgem should have adopted Cornwall Insight's analysis and found CMP344 would reduce strike prices and meaningfully improve competitiveness. As to that, see paras. 105-106 below.

Ground 2D

100. By Ground 2D, RWE complains of Ofgem's observation that CMP344 could in fact introduce anti-competitive distortion on the CfD market. This is a makeweight ground. CMP 344 was negative against ACO (d) irrespective of any anti-competitive distortion. But for what it matters, Ofgem was fully entitled to conclude that if the removal of any exposure to IAE costs led generators to remove or reduce their risk premia in CfD bids,[91] CMP344 would itself be distortive and accordingly undesirable. As Mr Stone and Mr Knott explain, §§210 and 57-58 respectively, the essential point is that CMP344 would prompt distortive "windfall gains", in that it would alter charging arrangements for IAEs even for generators who had already priced in the risk of IAE costs at CfD auctions.

[91] As to which, Main Submission §160(a) and (b) are surprising and wrong. The third FMR (p. 3) positively asserted that "*Cornwall Insight indicates that CMP344 is consistent with reducing costs for consumers as Offshore Generators will no longer be forced to include additional risk premia in CfD bids*". See further Cornwall Insights at p.16 of Annex 16, acknowledging that generators applied a risk premia included IAE risk.

F. GROUND 3

101. Ground 3 is that Ofgem was wrong to find that CMP344 would not advance ACO (h) by promoting efficiency in the implementation and administration of the charging methodology. There is no basis for this ground of appeal. As Stone, §§217-218, explains, if CMP344 had been a proposal which updated the CUSC to clarify when revenues were set under the Baseline, this would have been positive against ACO (h). But CMP344 was not limited to clarification. It provided for substantive change to existing charging methodology, which Ofgem considered inefficient and undesirable for the reasons above. And the draft text is far from a model of clarity, even on its own terms. (It does not even identify how (if at all) CMP344 affects the costs of IAEs *already* approved by Ofgem.)

G. GROUND 4

102. Ofgem held in the Decision: *"Having concluded that the assessment against the objectives is overall negative, section 8.23.7 of the CUSC provides that there shall be no approval. For completeness, however, we note that we consider that rejecting the Proposal is also consistent with our statutory duties, including our principal objective to protect the interests of existing and future consumers"* (Decision, p. 28).

103. Ground 4 is directed to that conclusion, and should be dismissed. It takes RWE nowhere. In circumstances in which CMP344 did not better facilitate the ACOs than the Baseline, Ofgem was required to reject it. It had no discretion to do otherwise.

104. But in fact, there are clear and important reasons why rejecting CMP344 is consistent with Ofgem's statutory duties and principal objective, as explained in Stone §§219-234, not least having regard to the distortion and "windfall" gains it was likely to introduce.

105. RWE advances two narrow complaints. First, to characterise Ofgem's treatment of the Cornwall Insights reports as irrational and based on an error of fact. That is not remotely fair. As Mr Stone explains, at §§212-214, he considered Cornwall Insight's analysis carefully and engaged directly with the authors to ensure that he had understood their assumptions and modelling. There were, however, significant limitations and

inaccuracies in Cornwall Insights' approach. As explained in Stone, §§215-219 and Knott 61-63: (i) the data was outdated; (ii) Cornwall Insights made mistaken assumptions as to the treatment of IAE charges; (iii) they sought to calculate a figure for consumer benefit through reduced CfD costs, whilst ignoring the impact of increased consumer charges through the TDR to meet the costs of future IAEs; and (iv) they assumed that shifting IAE costs from generators to consumers would have no impact on either the number or cost of future IAEs (i.e. it that removing the incentive on generators under the existing charging policy would have no practical impact). At best, the benefits identified by Cornwall Insights were highly uncertain. There may be no net benefits at all.

106. Second, Main Submission §165(b)(i) complains that Ofgem should have engaged directly with RWE to raise specific concerns as to the Cornwall Insights analysis and offered RWE an opportunity to correct or address the position. The practical answer is that Ofgem engaged directly with Cornwall Insights (who were instructed by RWE), and Dr Steward confirms that Cornwall Insights raised Ofgem's position with RWE before the Decision. But in any event, Ofgem had no such procedural obligation. The CUSC prescribes a carefully calibrated process for evidence to be submitted to Ofgem through the FMR. If Ofgem cannot reach a decision, it can 'send back' that proposal for revision and resubmission. But if it can reach a decision, it must do so. It has no duty to invite a proposer to put forward additional or corrected evidence outside the FMR and Workgroup procedures, and the process it adopted was fair.

H. <u>RELIEF</u>

107. The relief sought by RWE at Main Submission §§166-167 should be refused for all the reasons above. For the avoidance of doubt, RWE's submission that the CMA should both quash the Decision and "*adopt a full re-hearing of the issues, adopting an approach whereby it has 'full jurisdiction' to reconsideration all issues"* is unprincipled and wrong. The CMA's powers are limited as set out in s.175(6) EA 2004. It has no power to assume

'full jurisdiction' over CMP344, or to stand in Ofgem's shoes as primary decision-maker.[92]

AMY ROGERS K.C.

JONATHAN WORBOYS

11 King's Bench Walk

19 June 2026

STATEMENT OF TRUTH

The Respondent believes that the facts stated in this Response are true. I am authorised by the Respondent to sign this Response. The Respondent understands 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.

[redacted]

Signed

Name: Fiona Parker

Role: Legal Director, Ofgem

Dated: 19 June 2026

92 Whether by reference to Article 6 ECHR or at all.