

**BEFORE THE COMPETITION AND
MARKETS AUTHORITY**

(1) EDF ENERGY (WEST BURTON POWER) LIMITED

(2) SSE GENERATION LIMITED

(3) THE ENTITIES LISTED IN SCHEDULE 1 TO THE NOTICE OF APPEAL

- and -

GEMA

SUMMARY OF NOTICE OF APPEAL

1. INTRODUCTION

- 1.1 This appeal is brought by EDF Energy and SSE, as well as the separate companies identified in Schedule 1 to the Notice of Appeal, which are all licensed electricity generators within the EDF Energy and SSE company groups (together, ‘the Appellants’). The Appellants seek permission to appeal against GEMA’s Decision dated 16 November 2017 (‘the Decision’). By that Decision, GEMA rejected Connection and Use of System Code (‘CUSC’) Modification Proposal 261: “*Ensuring the TNUoS paid by Generators in GB in Charging Year 2015/16 is in compliance with the €2.5/MWh annual average limit set in EU Regulation 838/2010 Part B (3)*” (‘CMP261’). The appeal is brought pursuant to section 173 of the Energy Act 2004 (‘EA04’).¹
- 1.2 Transmission Network Use of System (‘TNUoS’) charges recover the costs that transmission network owners (‘TOs’) incur in providing and maintaining transmission network assets. The costs of the transmission network are set by National Grid Electricity Transmission plc (‘NGET’) each year and are levied on transmission connected generators and embedded generators over a certain size. The CUSC also sets out the means by which the TNUoS charges are to be recovered from Suppliers (i.e. Demand, which is also referred to as ‘Load’, from end consumers such as industrial, commercial and domestic sites).
- 1.3 In the spring following the end of each charging year (ending on 31 March) NGET, in accordance with CUSC condition 3.13.2, undertakes a reconciliation of forecast versus achieved usage to take account of data needed to apply charges in the charging year which are only available at the end of that year (i.e. after 31st March).
- 1.4 Generator TNUoS charges are based on network users’ capacity and comprise a locational element and a residual element. The locational element reflects the different costs that network users impose on the network depending on where they are located. The ‘residual’

¹ The Decision is not excluded from the right of appeal pursuant to section 173(2)(d) EA04 and the Electricity and Gas Appeals (Designation and Exclusion) Order 2014/1293.

element is set to recover the remaining costs that have been allocated between generation (G) and demand (D) network users by the 'G:D split'. This has historically, but for the €2.5/MWh GB cap, been set at '27:73.' That is, 27 per cent of transmission network costs are recovered from Generators and 73 per cent from Demand network users. Generators pay 'connection charges' in addition to and separately from TNUoS charges. Part 1 of Section 14 of the CUSC sets out the methodology for the calculation of Connection charges.

- 1.5 EU Regulation 838/2010 ('the Regulation') limits average annual transmission charges for Generators in European Union Member States. The annual average charge for each Member State is equal to the total transmission charges collected from Generators in that Member State in a given year divided by the total output of those Generators in that year. Charges paid by producers for physical assets required for connection to the system or the upgrade of the connection are excluded in this calculation. The range of allowable average transmission charges for Generators in GB is €0-2.5/MWh, and the range for most other EU countries is €0-0.5/MWh. The maximum permissible level for charges is accordingly five times higher for GB Generation than it is for most of their counterparts in most other Member States.
- 1.6 The issue is whether that upper limit was exceeded for charging year 2015/16. This itself depends on what costs can be excluded from calculating that upper limit.
- 1.7 By this appeal, the Appellants seek permission to appeal against the Decision on the following grounds being each either an error of law or an error of fact within the meaning of section 175(4) EA04:
 - (a) **First ground:** GEMA erred in law in its construction of the Regulation, for all or some of the following reasons:
 - (i) The objective of the Regulation was to achieve a certain degree of harmonisation in the EU electricity generation market, to facilitate the efficient use of the interconnected transmission system across Europe and to avoid distortion of investment decisions. GEMA failed to adopt a teleological construction of the Regulation.
 - (ii) GEMA erred in law by adopting a broad approach to permissible exclusions from transmission charges, rather than adopting a narrow construction of such exclusions which a teleological construction of the Regulation would mandate. As a matter of general principle, exclusions from the application of EU law are to be construed narrowly.
 - (iii) Whether because GEMA considered there was an ambiguity in the exclusion for connection charges in the Regulation, or otherwise as an aid more generally to interpretation, GEMA failed to have recourse to the *travaux préparatoires* for the Regulation when construing it.
 - (iv) GEMA failed to give the expression "charges paid by producers for physical assets required for connection to the system or the upgrade of the connection" its natural and ordinary meaning.
 - (v) GEMA accordingly erred in law in excluding local circuit / local substation / Generation only spur ('GOS') charges from the annual average transmission charge in GB in 2015/16 when seeking to determine if a breach had occurred.
 - (b) **Second ground:** GEMA erred in fact in treating GOS and local circuits / local substations as if they were "connection assets", rather than as "transmission assets"

for the benefit of the transmission system as a whole. It made other material errors of fact.

- (c) **Third ground:** The Decision is vitiated by errors of law in that it constitutes an abuse of process and/or infringes the principle of regulatory consistency, since GEMA had previously adopted a “narrow” construction to the exclusions in the Regulation in the course of its decision in CMP224. The decision in CMP224 was not subject to any appeal by NGET or parties to the CUSC. It is still binding on those parties in the absence of any material change in circumstances. For GEMA now to seek to depart from its previous decision is an abuse of process and infringes the principle of regulatory consistency.
- (d) **Fourth ground:** GEMA also erred in law in that the Decision infringes general EU law principles of legal certainty, proportionality, non-discrimination (or equality) and/or the right to effective legal protection of EU law rights.

2. APPLICATION FOR PERMISSION TO APPEAL

2.1 The Appellants respectfully seek permission to appeal against the Decision pursuant to section 173(4) EA04 for the following reasons:

- (a) The appeal has a real prospect of success as GEMA’s interpretation of the Regulation is wrong in law and represents a reversal of a prior decision it adopted.
- (b) The appeal raises important questions of EU law and its application to the GB energy market, that have not previously been definitively determined.
- (c) The Decision has very significant consequences for the Appellants and other GB generators, as well as for the energy market as a whole. For GB generators, the value of the breach of the Regulation is almost £120 million (plus interest).
- (d) The Decision is likely to lead to significant uncertainty in the GB generation market. By its Decision, GEMA has apparently abandoned its previous regulatory practice in respect of the delineation between connection assets and transmission assets. Were it to be correct, there is significant scope for numerous regulatory and charging disputes to arise.

2.2 There is no basis for the CMA to refuse permission on the grounds set out in section 173(5) EA04.

3. RELIEF

3.1 The Appellants seek the following relief from the CMA:

- (a) An order quashing the Decision;
- (b) A direction that GEMA should approve WACM1 in the CMP261 FMR (post send-back);
- (c) Alternatively, a direction for payment by NGET to the Appellants of sums (including interest on a compound, alternatively a simple, basis) to be determined at a further hearing, alternatively by GEMA, if not agreed;

- (d) Further or alternatively, a direction by the CMA to GEMA that GEMA should direct NGET to pay to the Appellants an appropriate level of rebate on the overpaid sums (to include interest on a compound, alternatively a simple, basis), to be determined at a further hearing, alternatively by GEMA, if not agreed;
- (e) Alternatively, an order remitting the matter back to GEMA for reconsideration and determination in accordance with the directions given by the CMA;
- (f) An order that GEMA pays the Appellants their costs of this appeal;
- (g) Such further or other relief as the CMA considers appropriate.

Kieron Beal QC, Blackstone Chambers
Keith Jones, Jennifer Reeves, Colm O'Grady
Baker McKenzie
6 December 2017