CMA Ref: EDF/SSE vs GEMA

BEFORE THE COMPETITION AND MARKETS AUTHORITY
IN THE MATTER OF AN APPEAL UNDER SECTION 173 ENERGY ACT 2004

B E T W E E N:

(1) EDF ENERGY (WEST BURTON POWER) LIMITED
(2) SSE GENERATION LIMITED
(3) THE ENTITIES IN SCHEDULE 1 TO THE GROUNDS OF APPEAL

Appellants

-and-

THE GAS AND ELECTRICITY MARKETS AUTHORITY

Respondent

SUMMARY OF REPLY TO GROUNDS OF APPEAL

---

1. The Gas and Electricity Markets Authority (**"the Authority"**) resists the Appellants' appeal against its decision dated 16 November 2017 (**"the Decision"**), to reject **"CMP261"**, a proposed modification to the contractual framework which governs charging for electricity transmission in Great Britain (**"GB"**).

2. The present document sets out, by way of summary only, the principal reasons why the Authority resists the appeal. The Authority's position is set out in its Reply dated 29 December 2017 (**"the Reply"**), and in the Decision itself.

3. CMP261 was premised on the assumption that, during the year 2015-16, there had been a breach of EU Regulation 838/2010 (**"the Regulation"**), which prescribes that *"annual average transmission charges"* paid by generators in GB must not exceed 2.5 €/MWh (**"the €2.5 Cap"**). CMP261 proposed to remedy the alleged breach by requiring that generators be paid a rebate, i.e. by making an *ex post* adjustment to the previously-agreed charging arrangements for 2015-16.

4. The Regulation provides that charges in respect of *"physical assets required for connection to the system"* shall not count towards the €2.5 Cap (**"the Connection Exclusion"**). The central issue in this appeal is whether charges paid by the operators of offshore windfarms in respect of equipment installed to connect those windfarms to the pre-existing electricity transmission system (an **"Offshore Generation-Only Spur"**) fall within the Connection Exclusion. If charges in respect of Offshore Generation-Only Spurs fall within the Connection Exclusion, there has been no breach of the €2.5 Cap.

5. But for the existence of an offshore windfarm, an Offshore Generation-Only Spur would not be built: its purpose is to connect the new windfarm to the pre-existing transmission system. Equally, but for the installation of an Offshore Generation-Only Spur, the windfarm would not be connected to the national transmission system, and the windfarm operator would be unable to sell the electricity that it generated. In light of this, the Authority submits that charges which generators pay in respect of Offshore Generation-Only Spurs are paid *"for physical assets required for connection to the system"*, i.e. that such charges fall within the Connection Exclusion. If that conclusion is correct, the €2.5 Cap has not been breached. Absent a breach of the €2.5 Cap, there is no justification for the rebate proposed by CMP261. The Authority was therefore right to reject CMP261.

6. The appeal against the Decision is predicated on the contention that charges in respect of Offshore Generation-Only Spurs fall outside the Connection Exclusion, on the grounds that current domestic practice in GB is to label such charges as "*Transmission Network Use of System Charges*", rather than "*Connection Charges*". The Appellants' contention is incorrect. As a harmonising EU law measure, the Regulation needs to be interpreted and applied consistently across all Member States. The domestic labelling of particular charges is consequently immaterial. Rather, it is necessary to consider the nature of the assets in respect of which a charge is paid, and whether or not those assets are *"physical assets required for connection to the system"*. For the reasons summarised at §5 above, and the fuller reasons in the Decision and the Reply, Offshore Generation-Only Spurs answer to that description.

7. The Appellants seek to characterise the Decision as involving a retrospective change to the transmission charging arrangements in GB. They are wrong to do so. CMP261 was a proposal to change the contractual charging framework. The effect of the Decision is to reject that proposal for change. The existing charging framework therefore remains unchanged.

8. In summary, the Authority responds to the Grounds of Appeal as follows:

   8.1. By Ground 1, the Appellants allege that the Authority erred in law in its construction of the Regulation. This argument is wrong for the reasons set out in Section 4 of the Reply. The Authority's construction of the Regulation: (i) accords with the natural and ordinary meaning of the Connection Exclusion; and (ii) is consistent with the context and purpose of the Regulation, viewed in the light of the *travaux préparatoires*.

   8.2. By Ground 2, the Appellants allege that the Authority erred in fact. This argument is wrong for the reasons set out in Section 5 of the Reply. The Appellants fail to identify any error of fact on the Authority's part.

   8.3. By Ground 3, the Appellants allege: (i) that the Authority had previously concluded that a narrow interpretation of the Connection Exclusion is correct; and (ii) that the Decision is therefore an abuse of process and/or infringes the principle of regulatory consistency. This argument is wrong for the reasons set out in Section 6 of the Reply. As a matter of fact, the Authority had not previously expressed a concluded view as to the correct interpretation of the Connection Exclusion. Even if the Authority had previously expressed a concluded view, it would not as a matter of law be precluded from taking a different view now.

   8.4. By Ground 4, the Appellants allege that the Decision infringes one or more general principles of EU law. This argument adds nothing to the Appellants' other grounds, and is wrong for the reasons set out in Section 7 of the Reply.

9. For the reasons summarised above (and set out more fully in the Reply), the Authority submits that the appeal should be dismissed.

10. If (contrary to the submissions summarised above and set out more fully in the Reply) there has been a breach of the €2.5 Cap, the Authority accepts: (i) that the Decision would fall to be quashed; and (ii) that the breach should be remedied by seeking to ensure that such element of the charges paid by generators as exceeded the €2.5 Cap should be paid back to the right generators in the right amounts. The Authority's submissions as to the appropriate form of any relief are set out in Section 8 of the Reply.

29 December 2017