

BEFORE THE COMPETITION AND

MARKETS AUTHORITY

BETWEEN:

- (1) SSE GENERATION LIMITED
(2) THE ENTITIES LISTED IN SCHEDULE 1

Appellants

- and -

THE GAS AND ELECTRICITY MARKETS AUTHORITY

Respondent

SUMMARY OF THE APPELLANTS' CASE

1. The Appellants seek permission from the Competition and Markets Authority ('CMA') pursuant to section 173(4) of the Energy Act 2004 ('EA 2004') to appeal against a decision of the Gas and Electricity Markets Authority ('GEMA') dated 17 December 2020 ('the contested Decision'). By the contested Decision, GEMA:
 - 1.1. approved an original proposal raised on 21 May 2019 for a modification to the Connection and Use of System Code ('the CUSC') which stipulates the Transmission Network Use of System ('TNUoS') charges levied by the Transmission System Operator ('TSO'), National Grid Electricity System Operator Ltd ('NGESO'). The proposal related to the *Identification and exclusion of Assets Required for Connection when setting Generator Transmission Network Use of System (TNUoS) Charges* ('CMP317', also known as the 'Original Proposal'); and
 - 1.2. approved the proposal raised on 28 November 2019 in *CMP327 Removing the Generator Residual from TNUoS Charges* ('CMP327').
2. SSE also seeks permission to appeal against the consequential decision of GEMA dated 17 December 2020 concerning *Consequential changes for CMP317 and CMP327 (TCR)*, ('CMP339'), which seeks to give effect to the contested Decision through the introduction

of relevant definitions, as well as amendments to existing definitions, in the CUSC. No free-standing grounds are advanced against the CMP339 Decision, which SSE accepts stands or falls with the contested Decision.

3. The effect of the acceptance of the Original Proposal is that the ‘Connection Exclusion’ found in Part B of the Annex of the Guidelines to Commission Regulation (EC) 2010/838¹ (‘the ITC Regulation’) has been construed by GEMA as extending to Local Charges associated with the use of Local Circuits and local network assets, rather than just assets associated with offshore Generation Only Spurs (‘GOS’). It has also construed the ‘Ancillary Services Exclusion’ in the ITC Regulation as encompassing: (i) charges for congestion management found in the Balancing Services Use of System charges (‘the relevant BSUoS charges’) paid by transmission connected Generators and (ii) some of the funding share costs associated with the Balancing Settlement Code (‘BSC’) which have to be paid by transmission connected Generators (‘the relevant BSC charges’). This has the intended result of avoiding a situation in which the permitted statutory range on the annual average transmission charges paid by Generators of €0.00-2.50 MWh (set by the ITC Regulation) is otherwise breached.
4. SSE advances the following grounds of appeal against the contested Decision:
 - 4.1. First, GEMA’s construction of the ‘Connection Exclusion’ in the ITC Regulation is wrong in law and/or based on clearly erroneous appraisals of fact as to the nature of charges incurred which are required for connection of a Generator to the relevant electricity transmission system.
 - 4.2. Secondly, GEMA’s decision is vitiated by its recognition that the Original Proposal does not apply the correct interpretation of the ‘Connection Exclusion’ regardless of whether or not SSE’s construction is the right one. The contested Decision infringes a number of principles of public law. It is internally inconsistent and/or procedurally flawed in being motivated by an improper purpose of avoiding a breach of the ITC Regulation at all costs, rather than applying the legally correct definition and making appropriate adjustments other than through the TGR. GEMA unlawfully excluded relevant considerations from its analysis of what could be done.

¹ Commission Regulation (EU) No 838/2010 of 23 September 2010 on laying down guidelines relating to the inter-transmission system operator compensation mechanism and a common regulatory approach to transmission charging, OJ [2010] L No 250, 24.9.2010, p. 5.

- 4.3. Thirdly, GEMA's construction of the Ancillary Services Exclusion and its treatment of: (i) the relevant BSUoS charges; and (ii) the relevant BSC Charges is wrong in law.
 - 4.4. Fourthly, GEMA made fundamental errors of appraisal which led to it overstating the consumer benefit and understating the Generator detriment, including the detriment to the long-term generation of renewable energy, arising from the contested Decision.
 - 4.5. Fifthly, GEMA should have followed a policy which aimed at achieving a level of annual average charging for Generators for transmission costs which tended towards €0.00/MWh, as a matter of good regulatory practice and in order to have proper regard and give due weight to its statutory objectives and the Applicable CUSC Objectives ('ACOs').
 - 4.6. Sixthly, GEMA erred in failing to put in place transitional arrangements for the introduction of the change to set the TGR at £zero. Some form of phasing of the introduction of the change would have ameliorated many of the financial disadvantages and economic disturbance suffered by Generators as a result of the contested Decision. In so doing, GEMA again failed to have proper regard and give due weight to its statutory objectives, including good regulatory practice, and the ACOs.
5. There has therefore been a consequential failure to deal with the likely breach of the ITC Regulation, which will arise from the setting of the TGR to £zero. This is not a discrete ground as such, but the likely consequence of the other errors of fact and/or law identified in Grounds 1 to 5 above. Ground 6 goes principally to the question of relief. SSE seeks the quashing of the contested Decision or other appropriate relief.