

SCOTTISH HYDRO ELECTRIC TRANSMISSION PLC

-and-

GAS AND ELECTRICITY MARKETS AUTHORITY

Decision on Permission to Appeal

1. Under cover of a Notice of Appeal received by the Competition and Markets Authority (CMA) on 3 March 2021, Scottish Hydro Electric Transmission plc (trading as SSEN Transmission) (SHE-T) sought permission to bring an appeal under section 11C of the Electricity Act 1989 against the decision by the Gas and Electricity Markets Authority (GEMA), dated 3 February 2021, under section 11A of the Electricity Act 1989 to modify the conditions of the SHE-T licence to give effect to the RIIO-ET2 price control determination (the Decision).

Requirement for permission to appeal

2. Under section 11C(3) of the Electricity Act 1989, the CMA's permission is required before such an appeal may be brought.
3. I make this decision on permission to appeal in my capacity as an authorised member of the CMA (see paragraph 1(8) of Schedule 5A to the Electricity Act 1989).
4. In making this decision I have had regard to SHE-T's Notice of Appeal, as well as to the submissions in response made by GEMA on 17 March 2021, and to a further letter of 24 March 2021 from SHE-T's solicitors containing a number of representations and observations on GEMA's response.

Decision on permission

5. On 3 March 2021 SHE-T's Notice of Appeal was received by the CMA within the period prescribed by paragraph 1(3) of Schedule 5A to the Electricity Act 1989.

6. Section 11C(2)(a) of the Electricity Act 1989 provides that an appeal may be brought by a relevant licence holder (within the meaning of section 11A(10) of the Electricity Act 1989). The Decision relates to the modification of the conditions of the SHE-T licence. I am therefore satisfied that SHE-T is a relevant licence holder affected by the Decision.
7. Under section 11C(4) of the Electricity Act 1989, the CMA may refuse permission to bring an appeal only on one of a number of specified grounds. The potentially relevant grounds in the present case are *(i)* that the appeal is brought for reasons that are trivial or vexatious, or *(ii)* that the appeal has no reasonable prospect of success.
8. SHE-T seeks permission to appeal the Decision on the following grounds:
 - (a) Ground 1: Cost of equity. SHE-T submitted that GEMA has made methodological errors in its calculation of the cost of equity, which it splits into five sub-grounds: Ground 1A (errors in the risk-free rate), Ground 1B (errors in setting the total market return), Ground 1C (errors in setting the beta), Ground 1D (failure to 'aim up') and Ground 1E (errors in the cross-checks carried out regarding the cost of equity).
 - (b) Ground 2: Outperformance wedge. SHE-T submitted that GEMA's decision to introduce the outperformance adjustment *i)* fundamentally undermines the principles of the RIIO framework and fails to achieve the effect stated by GEMA, *ii)* is based on unreliable evidence that does not support the adjustment and is particularly ill-suited in the context of RIIO-T2's already challenging price control and *iii)* the expected outperformance adjustment will have an adverse impact on incentives and investments in RIIO-T2 and in subsequent price reviews.
 - (c) Ground 3: Licence modification process. SHE-T submitted that in the Decision, GEMA seeks to reserve to itself the ability to modify very substantial parts of its price control decision after the event by way of 'directions' without following the prescribed statutory process and which are not subject to any statutory right of appeal.
 - (d) Ground 4: Cash-flow risk concerning Transmission Network Use of System Charges (TNUoS). SHE-T submitted that GEMA's approach to the revenue collection cash-flow risk relating to TNUoS has been taken in the absence of any substantiating evidence or analysis to support its principal rationale, and that the consultation was deficient in numerous fundamental respects.

9. GEMA submitted that Ground 3 should be refused as the argument SHE-T advance has already been considered and rejected by the CMA in *SONI vs NIAUR* in 2017, and therefore there is no realistic prospect of success.
10. GEMA submitted that Ground 4 should be dismissed as any cash flow risk is remunerated elsewhere in the price control, and to the extent there is any shortfall (which GEMA does not accept) it would be insufficiently material in terms of its impact on the overall level of SHE-T's allowance to merit further consideration by the CMA.
11. I have reviewed the submissions made by GEMA and the letter from SHE-T's solicitors, dated 24 March 2021. The CMA is not bound by its previous decisions in regulatory appeals and I consider that the fact that the CMA rejected a vires argument in the SONI decision is not determinative of the issues raised by SHE-T in Ground 3. It furthermore appears to me that there are issues raised by SHE-T that were not addressed in that case. I do not consider that SHE-T's Ground 3 is trivial, vexatious, or that it would have no reasonable prospect of success.
12. As regards Ground 4, I consider that SHE-T has raised concerns regarding an important and material part of GEMA's decision. I do not consider that the CMA can come to a decision on whether this is an error without a substantive review of the evidence. I cannot therefore conclude at this stage that the concerns raised have no reasonable prospect of success.
13. I am satisfied that each of SHE-T's other grounds of appeal are substantive arguments that are clearly not trivial or vexatious. At permission stage, I am not able to conclude that any of the grounds have no reasonable prospect of success. These issues will be determined as part of the appeal.

Grant of permission and conditions

14. Under paragraph 1(11) of Schedule 5A to the Electricity Act 1989, the CMA's grant of permission may be made subject to conditions, which may include:
 - (a) conditions which limit the matters that are to be considered on the appeal in question;
 - (b) conditions for the purpose of expediting the determination of the appeal; and
 - (c) conditions requiring that appeal to be considered together with other appeals (including appeals relating to different matters or decisions and appeals brought by different persons).

15. I have therefore considered whether, in granting permission to appeal, any grant of permission should be subject to particular conditions. The CMA received seven other applications for permission to appeal the Decision, and sought representations from the appellants and the respondent in this regard.
16. I have decided to grant permission to SHE-T to bring the appeal on all grounds set out in its Notice of Appeal, pursuant to section 11C and paragraph 1 of Schedule 5A to the Electricity Act 1989.
17. Pursuant to paragraph 1(11)(c) of Schedule 5A to the Electricity Act 1989, this grant of permission is conditional upon the following:
 - (a) Ground 1 (Cost of equity) of this appeal shall be considered with the cost of equity grounds pleaded by Cadent Gas Limited (Ground 2), National Grid Electricity Transmission plc (Ground 1), National Grid Gas plc (Ground 1), Northern Gas Networks Limited (Ground 1), Southern Gas Networks plc and Scotland Gas Networks plc (joint application) (Ground 1), SP Transmission plc (Ground 1) and Wales & West Utilities Limited (Head B).
 - (b) Ground 2 (Outperformance wedge) of this appeal shall be considered with the outperformance wedge grounds pleaded by Cadent Gas Limited (Ground 3), National Grid Electricity Transmission plc (Ground 2), National Grid Gas plc (Ground 2), Northern Gas Networks Limited (Ground 2), Southern Gas Networks plc and Scotland Gas Networks plc (joint application) (Ground 2), and SP Transmission plc (Ground 2).
 - (c) Ground 3 (Licence modification process) of this appeal shall be considered with the licence modification process grounds pleaded by SP Transmission plc (Ground 4) and Wales & West Utilities Limited (Head D).
18. Ground 4 will be considered as a separate appeal to those grounds that are joined with others.
19. I consider that the above conditions will enable the CMA to dispose of the appeals fairly and efficiently and at proportionate cost.

Kirstin Baker
Authorised Member of the CMA
31 March 2021