

## **SP 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, SP Transmission plc (SPT) 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 SPT 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 SPT's Notice of Appeal, to the submissions in response made by GEMA on 17 March 2021, to a further letter of 24 March 2021 from SPT's solicitors containing a number of representations and observations on GEMA's response, and to further submissions made by GEMA's solicitors in an email dated 29 March 2021.

#### **Decision on permission**

5. On 3 March 2021 SPT'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 SPT licence. I am therefore satisfied that SPT 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. SPT seeks permission to appeal the Decision on the following grounds:
  - (a) Ground 1: Cost of equity. SPT submitted that GEMA has under-assessed the cost of equity, as a result of (i) an overall error of approach which reflects a failure to take into account, or to give sufficient weight to, the sustainability objectives to which it was obliged to have regard and/or (ii) a series of specific errors. SPT splits this ground into three sub-grounds: Ground 1A (failure to 'aim up'), Ground 1B (capital asset pricing model evidence – failure to have adequate regard to the sustainability objectives and/or a series of errors of assessment), and Ground 1C (cross-checks – a number of the comparators used by GEMA were either inappropriate or, could be afforded very little weight).
  - (b) Ground 2: Outperformance wedge. SPT submitted that the outperformance wedge wrongfully departs from the rigour of the process undertaken to assess costs and set incentives, is arbitrary and unprecedented, and that GEMA has failed to recognise the existing regulatory mechanisms and tools available to it that are sufficient and appropriate to target and remedy any undeserved potential outperformance.
  - (c) Ground 3: Ongoing efficiency. SPT submitted that GEMA has made a series of errors in its analysis of the ongoing efficiencies which SPT is capable of achieving: i) an unjustified uplift for innovation funding allowances in RIIO-T1, ii) a failure to take into account the gross output productivity measure, iii) an incorrect assumption that regulated network companies can improve productivity faster than the wider economy and iv) a failure to take into account the downturn in productivity growth since 2008.
  - (d) Ground 4: Licence modification process. SPT submitted that GEMA has improperly sought to retain for itself the ability to amend significant

elements of the RIIO-T2 price control by way of future direction, rather than through the statutory licence modification process.

9. GEMA submitted that Ground 4 should be refused as the argument SPT 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. However, in its further submissions, GEMA indicated that, insofar as SPT accepts that GEMA has the power generally to make licence conditions providing for matters to be subject to subsequent direction, but objects to their use in respect of the particular identified Special Conditions, it is content for the CMA to determine this ground in the substantive appeal.
10. I have reviewed the submissions made by GEMA, SPT's reply dated 24 March 2021 and GEMA's further submissions of 29 March 2021. Previous decisions of the CMA are not binding on the group that will determine this appeal and, as such, I consider that the fact that the CMA rejected a vires argument in the SONI decision is not determinative of the issues raised by SPT in Ground 4. The grounds raised present respectable and credible arguments and I do not therefore consider that SPT's grounds would have no reasonable prospect for success.
11. I am satisfied that each of SPT'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**

12. 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).
13. 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.

14. I have decided to grant permission to SPT 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.
15. 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), Scottish Hydro Electric 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 Scottish Hydro Electric Transmission plc (Ground 2).
  - (c) Ground 3 (Ongoing efficiency) of this appeal shall be considered with the ongoing efficiency grounds pleaded by Cadent Gas Limited (Ground 1C), Northern Gas Networks Limited (Ground 3), Southern Gas Networks plc and Scotland Gas Networks plc (joint application) (Ground 3) and Wales & West Utilities Limited (Head E).
  - (d) Ground 4 (Licence modification process) of this appeal shall be considered with the licence modification process grounds pleaded by Scottish Hydro Electric Transmission plc (Ground 3) and Wales & West Utilities Limited (Head D).
16. 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