

# **SSE Code Modifications Appeal 2021**

**An appeal under section 173 of the Energy Act 2004**

**SSE Generation Limited v  
Gas and Electricity Markets Authority  
and National Grid Electricity System Operator  
Limited (Intervener) and Centrica plc/British  
Gas Trading Limited (Intervener)**

**New decision on Appeal Grounds 1 and 2**

**Notified: 20 May 2022**

© Crown copyright 2022

You may reuse this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence.

To view this licence, visit [www.nationalarchives.gov.uk/doc/open-government-licence/](http://www.nationalarchives.gov.uk/doc/open-government-licence/) or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: [psi@nationalarchives.gsi.gov.uk](mailto:psi@nationalarchives.gsi.gov.uk).

*Website:* [www.gov.uk/cma](http://www.gov.uk/cma)

**Members of the Competition and Markets Authority  
who conducted this appeal**

Kirstin Baker (*Chair of the Group*)

Colleen Keck

Frances McLeman

**Chief Executive of the Competition and Markets Authority**

Andrea Coscelli

## Contents

	<i>Page</i>
1. Introduction .....	3
The judicial review .....	3
Our decision.....	5
2. Ground 2 in the appeal .....	6
Background – the judicial review.....	6
Our decision on Ground 2 in the appeal .....	9
3. Ground 1 in the appeal .....	9
Background – the judicial review.....	9
Our decision on Ground 1 in the appeal .....	10
4. Relief.....	11
5. Order of the CMA.....	13

# 1. Introduction

- 1.1 This document sets out our decision and order following the outcome of a challenge brought by way of judicial review in relation to certain parts of our decision ‘SSE Code Modifications Appeal 2021’ dated 30 March 2021 (the **CMA 2021 Decision**).
- 1.2 The CMA 2021 Decision was made on an appeal to the CMA, brought under section 173 of the Energy Act 2004 (**EA04**), by SSE Generation Limited (**SSE**) and a number of separate companies within the SSE corporate group that are licensed electricity generators and/or generation asset owners (together, **the Appellants**).<sup>1</sup> The appeal was against decisions of the Gas and Electricity Markets Authority (**GEMA**) dated 17 December 2020 by which GEMA approved modifications to the Connection and Use of System Code (**CUSC**):
- (a) CUSC Modification Proposal (**CMP**) 317/327, which amalgamated:
    - (i) CMP317: ‘Identification and exclusion of Assets Required for Connection when setting Generator Transmission Network Use of System (**TNUoS**) charges’, and
    - (ii) CMP327: ‘Removing the Generator Residual from TNUoS Charges’;
  - (b) CMP339: ‘Consequential changes for CMP317 and CMP327’.

## The judicial review

- 1.3 On 11 April 2022, the Administrative Court (the **Court**) handed down judgment in *R (on the application of SSE Generation Limited and Others) v Competition and Markets Authority* [2022] EWHC 865 (Admin) (the **Judgment**).<sup>2</sup> The grounds of challenge in the application for judicial review were, as summarised in the Judgment, in relation to alleged errors of law in the CMA 2021 Decision as regards the following aspects of the decisions of GEMA:
- (a) Judicial review Ground 1: GEMA’s approval, in its decision on CMP 317/327, of a modification to the CUSC that did not accurately reflect the connection exclusion (i.e., paragraph 2(1) in Part B of the Annex to

---

<sup>1</sup> The Appellants were: SSE Generation Limited, Keadby Generation Limited, Medway Power Limited, Griffin Windfarm Limited, SSE Renewables (UK) Limited and Keadby Windfarm Limited (see paragraph 2.15 of the CMA 2021 Decision. The judicial review challenge was brought by the Appellants and an additional company within the SSE corporate group, namely Strathy Wind Farm Limited.

<sup>2</sup> The Judgment is available at [SSE Generation Ltd & Ors, R \(On the Application Of\) v Competition And Markets Authority \[2022\] EWHC 865 \(Admin\) \(11 April 2022\) \(bailii.org\)](https://www.bailii.org/uk/ew/cas/oct2022/20220411_sse.html)

Regulation 838/2010).<sup>3</sup> This ground of challenge reflected what was Ground 2 in the appeal to the CMA.<sup>4</sup>

(b) Judicial review Ground 2: the conclusion stated by GEMA in its decision on CMP 317/327 as to the correct meaning of the connection exclusion.<sup>5</sup> This ground of challenge reflected (a part of) what was Ground 1 in the appeal to the CMA.<sup>6</sup>

(c) Judicial review Ground 3: the decision of GEMA, in relation to CMP 317/327, on the scope of the ancillary services exclusion (paragraph 2(2) of Part B of the Annex to Regulation 838/2010) as encompassing the Balancing Services Code charge and the congestion management charge.<sup>7</sup> This ground of challenge reflected what was Ground 3 in the appeal to the CMA.

1.4 The outcome of the judicial review challenge was that it succeeded on Ground 1 of the judicial review, but failed on Grounds 2 and 3 of the judicial review.<sup>8</sup> However, the Court determined that the part of Ground 1 in the appeal to the CMA which formed the subject-matter of Ground 2 of the judicial review, namely SSE's challenge to GEMA's own construction of the Connection Exclusion, did not fall within the scope of appeals permitted under section 173 of the EA04. This was because GEMA's reasoning on what it considered to be the correct meaning of the Connection Exclusion was not a 'decision relating to a document by reference to which provision is made by a condition of a gas or electricity licence' (section 173(2)(a) of the EA04).<sup>9</sup> For that reason, the CMA 2021 Decision was quashed in relation to both Grounds 1 and 2 in the appeal to the CMA, notwithstanding that Ground 2 of the judicial review challenge (in respect of one part of Ground 1 in the appeal) failed.

1.5 By Order dated 11 April 2022 (the **Order**), the Court ordered the following (among other matters)<sup>10</sup>:

---

<sup>3</sup> Judgment, paragraphs 35 and 44. Regulation 838/2010 was referred to as the 'ITC Regulation' in the CMA 2021 Decision.

<sup>4</sup> Judgment, paragraph 36.

<sup>5</sup> Judgment, paragraph 35.

<sup>6</sup> Judgment, paragraphs 47 and 52.

<sup>7</sup> Judgment, paragraphs 30, 35 and 58.

<sup>8</sup> Judgment, paragraphs 46, 57, 67, 71 and 72.

<sup>9</sup> Judgment, paragraph 54. See also Judgment, paragraphs 52 and 56.

<sup>10</sup> Those other matters included the payment by the CMA of a proportion of the costs of the judicial review; and a quashing of the CMA decision dated 4 November 2021 in relation to the costs of the appeal, with directions to re-determine those costs (among other matters) taking account of the outcome of the judicial review proceedings. That re-determination will be the subject of a separate decision consequential on the decision set out in this document.

- (a) The application for judicial review was allowed on Ground 1 of the judicial review, but dismissed on Grounds 2 and 3 of the judicial review.<sup>11</sup>
- (b) The CMA 2021 Decision was quashed in relation to Ground 1 in the appeal (a part of which was covered by Ground 2 of the judicial review) and Ground 2 in the appeal (covered by Ground 1 of the judicial review).<sup>12</sup>
- (c) The CMA, by mandatory order, was directed:
  - (i) to allow the appeal to the CMA against GEMA's decisions dated 17 December 2020 in CMP317/327 and CMP 339 on Ground 2 in the appeal;<sup>13</sup> and
  - (ii) to quash GEMA's decision dated 17 December 2020 in relation to CMP 339 in so far as it relates to the definition given to Charges for Physical Assets Required for Connection, and remit that matter to GEMA for further consideration.<sup>14</sup>
- (d) GEMA's applications for permission to appeal and for a stay of any order for relief were refused.<sup>15</sup>

## **Our decision**

1.6 This new decision is structured as follows:

- (a) Ground 2 in the appeal;
- (b) Ground 1 in the appeal;
- (c) Relief; and
- (d) Order of the CMA.

1.7 Reference is made to all factual matters, the legal framework, submissions (including oral submissions), documents, witness statements and other materials provided or made in the appeal as set out or referred to in Chapters 1 to 7 of, and the Appendix to, the CMA 2021 Decision and to the Glossary of the CMA 2021 Decision. These are not set out in this document, but should be read together with it.

---

<sup>11</sup> Order, paragraph 1.

<sup>12</sup> Order, paragraph 2 which referred to Grounds 1 and 2 in the appeal as defined in paragraphs 1.5 and 4.94 of the CMA 2021 Decision.

<sup>13</sup> Order, paragraph 3.1.

<sup>14</sup> Order, paragraph 3.2.

<sup>15</sup> Order, paragraphs 6 and 7.

- 1.8 Reference is also made to all factual matters and the legal framework set out or referred to in the Judgment. These are not set out in this document, but should be read together with it.
- 1.9 Terms and expressions used in this document have the same meaning as they do, as applicable, in the CMA 2021 Decision, the Judgment and Order.
- 1.10 For the avoidance of doubt, the CMA 2021 Decision stands in relation to Ground 3 in the appeal (in respect of which the judicial review failed) and Grounds 4, 5 and 6 and other matters in that decision which were not the subject of the judicial review.
- 1.11 This decision, our order and directions have been published on our [case page](#), as required by the EA04 and the Energy Code Modification Rules 2005.<sup>16</sup>

## **2. Ground 2 in the appeal**

- 2.1 In this chapter, we address Ground 2 in the appeal (covered by Ground 1 of the judicial review) as directed by the Order.

### **Background – the judicial review**

- 2.2 As noted in paragraph 1.3(a) above, the judicial review challenge to the CMA 2021 Decision in relation to Ground 2 in the appeal concerned the alleged error of law in relation to GEMA's approval, in its decision on CMP 317/327, of a modification to the CUSC that did not accurately reflect the connection exclusion (i.e., paragraph 2(1) in Part B of the Annex to Regulation 838/2010).
- 2.3 In summary, the outcome of the judicial review was that, by Order, the CMA 2021 Decision was quashed in relation to Ground 2 in the appeal and the CMA was directed:
  - (a) to allow the appeal against GEMA's decisions in CMP317/327 and CMP 339 on Ground 2 in the appeal; and
  - (b) to quash GEMA's decision in relation to CMP 339 in so far as it relates to the definition given to Charges for Physical Assets Required for Connection, and remit that matter to GEMA for further consideration  
  
(see paragraph 1.5(b) and (c) above).

---

<sup>16</sup> Competition Commission, 2005, [The Energy Code Modification Rules](#) (CC10).



2.4 The Court's reasoning was, in summary, as follows:

(a) The Appellants' challenge was directed to GEMA's decision to modify the way in which the Use of System Charge is calculated.<sup>17</sup> The condition for a decision to modify the charging methodology at Section 14 of the CUSC is whether GEMA considers the proposal before it (or any counter proposal that has emerged from the workgroup process) is better than the status quo in terms of facilitating achievement of the 'Applicable CUSC Objectives'. The CUSC states that the 'Applicable CUSC Objectives' to be 'as defined in the Transmission Licence'. Condition C10 paragraph 1 of the Transmission Licence refers to CUSC objectives. So far as concerns the Use of System Charging Methodology, Condition C10, paragraph 1 points in turn to Condition C5. This provides that the methodology is to 'achieve the relevant objectives', which are stated at Condition C5, paragraph 5 as (among other matters):

"... (d) compliance with the Electricity Regulation and any relevant legally binding decisions of the European Commission and/or the Agency; and ..."<sup>18</sup>

(b) The relevant obligation on National Grid under the terms of the Transmission Licence is that the CUSC be 'calculated to facilitate the achievement' of the objective of 'compliance with ... any relevant legally binding decision of the European Commission'. Regulation 838/2010 was such a decision.<sup>19</sup>

(c) As regards the questions whether Part B of the Annex to Regulation 838/2010 contains only one obligation (the one at paragraph 1, that the annual average transmission charge be within the specified range<sup>20</sup>), or whether further distinct obligations arise (from what is said at paragraph 2 as to how the annual average transmission charge is required to be calculated):

(i) The CMA was correct to reject what it saw as GEMA's primary submission, that the only obligation imposed by Part B of the Annex to Regulation 838/2010 was an 'obligation of result' to ensure that charges remained within the specified range. However, there is no basis for the CMA's conclusion that the paragraph 1 obligation is the 'primary obligation' while the obligations arising from paragraph 2 of

---

<sup>17</sup> Judgment, paragraph 15.

<sup>18</sup> Judgment, paragraph 37.

<sup>19</sup> Judgment, paragraph 40.

<sup>20</sup> The 'specified range' was referred to as the 'Permitted Range' in the CMA 2021 Decision.

Part B are in some sense lesser, so that non-compliance with them is not a breach of Regulation 838/2010.<sup>21</sup>

- (ii) Properly construed, Part B of the Annex to Regulation 838/2010 sets requirements both: (a) as to the lower and higher limit of the annual average transmission charge (paragraph 1 read with paragraph 3); and (b) on how the annual average transmission charge is to be calculated (paragraph 2). There is no hierarchy within these obligations. Generators should pay annual average transmission charges that are both calculated in the prescribed way (requiring proper application of both the connection exclusion and ancillary services exclusion) and fall within the specified range. Failing to give effect to the connection exclusion is as much a breach of Regulation 838/2010 as failing to give effect to the requirement that charges fall within the specified range.<sup>22</sup>
- (d) As noted in sub-paragraphs (a) and (b) above, the relevant 'Applicable CUSC Objective' was compliance with Regulation 838/2010. GEMA's decision to approve CMP 317/327, so far as it included in the CUSC the new paragraph 14.14.5(vi) rested on an application of the criterion at paragraph 8.23.7 of the CUSC that was wrong in law. Therefore, GEMA's decision did not secure compliance with Regulation 838/2010. In turn, the CMA erred in law when it dismissed SSE's appeal on this matter.<sup>23</sup>
- (e) The position was not rescued by the CMA's proposition that GEMA was satisfied (and was entitled to be satisfied) that paragraph 14.14.5 of the CUSC, as modified, would better achieve the Applicable CUSC Objectives, including the objective of compliance with Regulation 838/2010.<sup>24</sup> The Court accepted the factual premise that the modification proposal that GEMA approved made things better insofar as the amendment made to the CUSC prevented transmission charges outside the specified range. It was, in that regard, an improvement on the unamended provisions of paragraph 14.14.5 of the CUSC. The Court also accepted that the criterion at paragraph 8.23.7 of the CUSC, for approval of a modification, is whether GEMA is satisfied that what is proposed 'would better facilitate achievement of the Applicable CUSC Objectives'. In many circumstances that criterion will bring with it a practical margin of judgement for GEMA as expert regulator. This may be particularly significant when assessment of a modification proposal requires a

---

<sup>21</sup> Judgment, paragraphs 42 and 44.

<sup>22</sup> Judgment, paragraph 42.

<sup>23</sup> Judgment, paragraph 44.

<sup>24</sup> Judgment, paragraphs 39 and 45.

balance to be struck between overlapping or competing practical considerations. But that was not this case. The relevant objective was compliance with a legal standard and in that context a miss is as good as a mile. In the circumstances of this case, it is immaterial that the amendment to the CUSC improved the situation, making for a situation that better complied with Regulation 838/2010. Actual compliance with Regulation 838/2010 was what was required to permit GEMA to approve this aspect of modification proposal CMP 317/327.<sup>25</sup>

## **Our decision on Ground 2 in the appeal**

2.5 In view of the above and in order to give effect to the Order's directions, we allow the appeal against GEMA's decisions in CMP317/327 and CMP 339 on Ground 2 in the appeal on the basis that GEMA was wrong in law in approving the Original Proposal, being a modification to the CUSC, which did not apply the correct interpretation of the Connection Exclusion.

2.6 The matter of relief is addressed in Chapter 4.

## **3. Ground 1 in the appeal**

3.1 In this chapter, we address Ground 1 in the appeal (a part of which was covered by Ground 2 of the judicial review).

### **Background – the judicial review**

3.2 Ground 1 in the appeal directed a challenge against GEMA's construction of the Connection Exclusion. As originally advanced in the NoA, the Appellants' challenge was directed to the construction of the Connection Exclusion inherent in the approval of the Original Proposal.<sup>26</sup> In response to GEMA's reliance on its own construction of the Connection Exclusion, the Appellants noted that they were challenging both GEMA's reasoning as to what GEMA saw as the correct interpretation of the Connection Exclusion, as well as GEMA's adoption of the Original Proposal.<sup>27</sup>

3.3 Ground 2 of the judicial review concerned the part of Ground 1 in the appeal that was directed at the conclusion stated by GEMA in its decision on CMP 317/327 as to the correct meaning of the Connection Exclusion (see paragraph 1.3(b) above). Ground 2 of the judicial review failed, yet the CMA 2021 Decision was, by Order, quashed in relation to Ground 1 in the appeal

---

<sup>25</sup> Judgment, paragraph 45.

<sup>26</sup> See, for example, NoA, paragraphs 115.1 and 117.

<sup>27</sup> Response, paragraph 22. See also Appellants' Skeleton, paragraph 25.

(see paragraphs 1.4 and 1.5(a) and (b) above). In summary, as held by the Court, Ground 2 of the judicial review failed because the issue in Ground 2 of the judicial review did not arise as a legitimate ground of challenge in the application for judicial review,<sup>28</sup> since (as explained in paragraph 1.4 above) GEMA's reasoning on what it considered to be the correct meaning of the Connection Exclusion was not a decision falling within the scope of appeals permitted under section 173 of the EA04.

- 3.4 However, by way of an *obiter* comment, the judge agreed with GEMA's reasoning on the scope of the connection exclusion as far as it goes, subject to the qualification that what is meant by the connection exclusion as stated at paragraph 2(1) of Part B of the Annex to Regulation 838/2010 ('charges paid by producers for physical assets required for connection to the system or the upgrade of the connection') will self-evidently depend on the facts of any specific case.<sup>29</sup>

## **Our decision on Ground 1 in the appeal**

- 3.5 We have carefully considered the Judgment in respect of Ground 2 of the judicial review, which covered part of Ground 1 in the appeal.
- 3.6 As explained in paragraphs 1.4 and 3.3 above, the Court held that the part of Ground 1 in the appeal that was directed to GEMA's own construction of the Connection Exclusion does not fall within the scope of appeals permitted under section 173 of the EA04. It follows from the Judgment that this part of Ground 1 is not permitted under section 173 of the EA04.
- 3.7 As regards the part of Ground 1 in the appeal that was directed to the construction of the Connection Exclusion inherent in the approval of the Original Proposal, we note that it was common ground that the Original Proposal was based on an incorrect construction of the Connection Exclusion.<sup>30</sup> It follows from the outcome of Ground 1 of the judicial review (which covered Ground 2 in the appeal) that, to this extent, Ground 1 in the appeal is well-founded and must succeed: GEMA was wrong in law to approve the Original Proposal, thereby modifying the CUSC, because GEMA did not apply the correct interpretation of the Connection Exclusion.

---

<sup>28</sup> Judgment, paragraph 52.

<sup>29</sup> Judgment, paragraph 57.

<sup>30</sup> List of Issues, Issue 12. See also [Reply](#), paragraph 51.

3.8 We therefore allow the appeal on Ground 1 in the appeal in so far as it relates to the construction of the Connection Exclusion inherent in the approval of the Original Proposal.

3.9 The matter of relief is addressed in Chapter 4.

## **4. Relief<sup>31</sup>**

4.1 As directed by the Order (see paragraph 1.5(c) above), we allow the appeal against GEMA's decisions dated 17 December 2020 in CMP317/327 and CMP339 on Ground 2 in the appeal.

4.2 As further directed by the Order, by way of relief, we quash GEMA's decision dated 17 December 2020 in relation to CMP339 in so far as it relates to the definition given to Charges for Physical Assets Required for Connection, and remit that matter to GEMA for further consideration. Our remittal is expressed in our order in terms of 'reconsideration and determination' as that is an express requirement in section 175(6) of the EA04.

4.3 We also allow the appeal against GEMA's decision dated 17 December 2020 in CMP317/327 on Ground 1 in the appeal in so far as it relates to the construction of the Connection Exclusion inherent in the approval of the Original Proposal.

4.4 As regards GEMA's decision dated 17 December 2020 in CMP317/327 so far as it relates to Ground 2 in the appeal and relevant parts of Ground 1 in the appeal, we must consider the appropriate form of relief. That is because, for present purposes, section 175(6) of the EA04 provides that where the CMA allows the appeal, it must quash and/or remit the matter to GEMA for reconsideration and determination.

4.5 In that connection, we take into account the following:

(a) As directed by the Order, we quash GEMA's decision dated 17 December 2020 in relation to CMP339 in so far as it relates to the definition given to Charges for Physical Assets Required for Connection, and remit that matter to GEMA for further consideration.

(b) The Judgment notes that since the decisions in issue in the judicial review proceedings, GEMA has prompted and obtained a further modification proposal from National Grid (CMP 368/369) which, the Court was told, will

---

<sup>31</sup> List of Issues, C5, Issue 26.

seek to modify the CUSC by defining the phrase ‘Charges for Physical Assets Required for Connection’ in the manner GEMA considers to meet the correct meaning of the Connection Exclusion (i.e. as explained by it in its further reasoning in its decision on CMP 317/327).<sup>32</sup>

- (c) As noted in paragraph 3.4 above, by way of an *obiter* comment, the judge agreed with GEMA’s reasoning on the scope of the Connection Exclusion as far as it goes, subject to the qualification that what is meant by the Connection Exclusion as stated at paragraph 2(1) of Part B of the Annex to Regulation 838/2010 (‘charges paid by producers for physical assets required for connection to the system or the upgrade of the connection’) will self-evidently depend on the facts of any specific case.<sup>33</sup>
- (d) The Decision on Relief and Other Consequential Matters, pursuant to which the Order directed the CMA to quash only GEMA’s decision in relation to CMP339 to the extent set out in sub-paragraph (a) above, stated that quashing the relevant definition within CMP339 would remove the inconsistency between the requirements of Regulation 838/2010 and the definition in the CUSC that was meant to (but did not) reflect the notion of the Connection Exclusion within Regulation 838/2010. It went on to state that although the words that formally comprise the defined term would continue to exist within the CUSC, they would be words that would need to be applied at large rather than by reference to any prescribed definition. In the context of the remaining provisions in the CUSC, it would be clear to National Grid that the words that remain, no longer defined, would need to be interpreted to give effect to the Connection Exclusion within Regulation 838/2010. The Decision added that that position would be tolerably clear for the short period of time before the remedial action that GEMA had already put into process would itself crystallise, perhaps to provide a final resolution of the inconsistency that existed between the provisions of the CUSC and the requirements of Regulation 838/2010.<sup>34</sup>

4.6 In view of the above, we have decided that in the circumstances the most appropriate form of relief is not to quash GEMA’s decision dated 17 December 2020 in CMP317/327, but instead to remit the matter to GEMA for reconsideration and determination.

---

<sup>32</sup> Judgment, paragraph 55.

<sup>33</sup> Judgment, paragraph 57.

<sup>34</sup> *R (on the application of SSE Generation Limited and Others) v Competition and Markets Authority* [2022] EWHC 987 (Admin), at paragraph 11.

## **5. Order of the CMA**

5.1 By way of an order of the CMA published on the CMA's website on 20 May 2022:

- (a) the appeal is allowed against GEMA's decisions dated 17 December 2020 approving Connection and Use of System Code proposals CMP317/327 and CMP339 on Ground 2 in the appeal and that matter is remitted to GEMA for reconsideration and determination;
- (b) GEMA's decision dated 17 December 2020 in relation to CMP339 is quashed in so far as it relates to the definition given to Charges for Physical Assets Required for Connection, and that matter is remitted to GEMA for reconsideration and determination; and
- (c) the appeal is allowed against GEMA's decision dated 17 December 2020 approving Connection and Use of System Code proposals CMP317/327 on Ground 1 in the appeal in so far as it relates to the construction of the Connection Exclusion inherent in the approval of the Original Proposal, and that matter is remitted to GEMA for reconsideration and determination.