

# **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 Ground 3(i)**

**Issued: 12 December 2022**

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*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

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

Sarah Cardell

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# 1. Introduction

- 1.1 This document sets out our decision and order following the outcome of proceedings in the Court of Appeal. Those proceedings involved an appeal and a cross-appeal made against a decision of the Administrative Court on a challenge 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**). For the reasons set out below, this new decision should be read together with the CMA 2021 Decision.

## Background

- 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> That appeal is referred to in this decision as **SSE’s CMA Appeal**.
- 1.3 SSE’s CMA Appeal was against decisions of the Gas and Electricity Markets Authority (**GEMA**) dated 17 December 2020. In those decisions GEMA approved the following 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’; and
  - (b) CMP339: ‘Consequential changes for CMP317 and CMP327’.
- 1.4 In the CMA 2021 Decision, we dismissed SSE’s CMA Appeal on all of its six grounds and confirmed GEMA’s decisions.

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<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 and the subsequent cross appeal to the Court of Appeal were brought by the Appellants and an additional company within the SSE corporate group, namely Strathy Wind Farm Limited.

## The judicial review

- 1.5 SSE challenged certain parts of the CMA 2021 Decision by way of judicial review. On 11 April 2022, the Administrative Court handed down its judgment on that challenge (see *R (on the application of SSE Generation Limited and Others) v Competition and Markets Authority*<sup>2</sup> (the **JR Judgment**)).
- 1.6 There were three grounds of challenge in the judicial review, covering Grounds 1 to 3 in SSE's CMA Appeal. The outcome of the judicial review challenge was that SSE succeeded on only one of the grounds (Ground 1) of the judicial review.<sup>3</sup> The Administrative Court held that GEMA was wrong, in its decision on CMP 317/327, to approve a modification to the CUSC that did not accurately reflect the so-called Connection Exclusion (ie paragraph 2(1) in Part B of the Annex to Regulation 838/2010); and, in turn, that the CMA erred in law when it dismissed SSE's CMA Appeal on that matter.<sup>4</sup>
- 1.7 By Order dated 11 April 2022 (the **JR Order**), the Administrative Court quashed the CMA 2021 Decision in relation to Grounds 1<sup>5</sup> and 2 in SSE's CMA Appeal<sup>6</sup> and (among other matters) ordered the CMA:
- (a) To allow SSE's CMA Appeal against GEMA's decisions in CMP 317/327 and CMP 339 on Ground 2 in SSE's CMA Appeal;<sup>7</sup> and
  - (b) To quash GEMA's decision in relation to CMP 339 in so far as it related to the definition given to Charges for Physical Assets Required for Connection, and remit that matter to GEMA for further consideration.<sup>8</sup>
- 1.8 On 20 May 2022, the CMA made a new decision and order to give effect to the JR Order and JR Judgment– the 'New decision on Appeal Grounds 1 and 2' (the **CMA 2022 Decision**).

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<sup>2</sup> The JR Judgment is available at [SSE Generation Ltd & Ors, R \(On the Application Of\) v Competition And Markets Authority \[2022\] EWHC 865 \(Admin\) \(11 April 2022\) \(bailii.org\)](#).

<sup>3</sup> Ground 1 of the judicial review reflected what was Ground 2 in SSE's CMA Appeal.

<sup>4</sup> JR Judgment, paragraphs 35 and 44. Regulation 838/2010 was referred to as the 'ITC Regulation' in the CMA 2021 Decision.

<sup>5</sup> Ground 1 in SSE's CMA Appeal comprised a challenge against (a) the construction of the Connection Exclusion inherent in the approval of the Original Proposal and (b) GEMA's reasoning as to what GEMA saw as the correct interpretation of the Connection Exclusion (see, for example, CMA 2021 Decision, paragraph 6.5). Ground 2 of the judicial review concerned (b), but it failed because the Administrative Court held that the issue in Ground 2 of the judicial review did not arise as a legitimate ground of challenge. That was because it held that 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 (JR Judgment, paragraphs 52 and 54).

<sup>6</sup> JR Order, paragraph 2.

<sup>7</sup> JR Order, paragraph 3.1.

<sup>8</sup> JR Order, paragraph 3.2.

## The Court of Appeal proceedings

1.9 GEMA appealed to the Court of Appeal in respect of the JR Judgment relating to Ground 1 in the judicial review (which was Ground 2 in SSE's CMA Appeal). SSE and other of the Appellants cross-appealed in respect of the part of the JR Judgment relating to Ground 3 in the judicial review and in SSE's CMA Appeal.<sup>9</sup>

1.10 Specifically:

- (a) The issue raised by GEMA's appeal, which was described as 'Issue I' in the CA Judgment (as defined in the following paragraph), was summarised as being whether, in adopting the Original Proposal, as far as the Connection Exclusion in Regulation (EU) 838/2010 was concerned, as a non-compliant stop gap, GEMA had acted lawfully.<sup>10</sup>
- (b) SSE's and the other Appellants' cross-appeal concerned the meaning of the phrase 'congestion management' for the purposes of the Ancillary Services Exclusion in Regulation (EU) 838/2010. In particular, whether the costs of managing certain aspects of network congestion must be taken into account in the calculation of transmission charges.<sup>11</sup> SSE and the other Appellants contended that in the JR Judgment the Administrative Court was wrong on this ground. They said that (CMA **emphasis** for clarity):
  - (i) the relevant BSUoS Charges **are** charges for congestion management;
  - (ii) such charges **did not** therefore fall within the Ancillary Services Exclusion in Regulation 838/2010;
  - (iii) those charges **must** accordingly be taken into account in the calculation of transmission charges;
  - (iv) GEMA erred in law in deciding otherwise in CMP317/327 and CMP339; and
  - (v) the CMA erred in law in upholding GEMA's decisions and dismissing SSE's CMA Appeal on this point.<sup>12</sup>

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<sup>9</sup> Ground 3 concerned the decision of GEMA, in relation to CMP 317/327, on the scope of the so-called Ancillary Services Exclusion (paragraph 2(2) of Part B of the Annex to Regulation 838/2010).

<sup>10</sup> CA Judgment (as defined in paragraph 1.11 of this decision), paragraph 5.

<sup>11</sup> CA Judgment, paragraphs 6 and 7.

<sup>12</sup> Reflected in CA Judgment, paragraph 80.

This issue, which was described as ‘Issue II’ in the CA Judgment (as defined in the following paragraph), thus covered the same ground as part of Ground 3 in both SSE’s CMA Appeal and the judicial review (namely, Ground 3(i) in SSE’s CMA Appeal and Ground 3(b) in the judicial review).

1.11 On 8 November 2022, the Court of Appeal handed down its judgment (see *R (SSE Generation Limited & Others) v The Competition and Markets Authority and The Gas and Electricity Markets Authority & Others* [2022] EWCA Civ 1472) (the **CA Judgment**).<sup>13</sup> The Court of Appeal allowed GEMA’s appeal and SSE’s cross appeal.

1.12 As to GEMA’s appeal (on Issue I before the Court), the Court of Appeal concluded that:

The issue in this case concerns the exercise of a power conferred upon GEMA as to the methodology it selected to bring a non-observant charging methodology into a state of observance. The decision is susceptible to public law challenge. GEMA enjoys a relatively broad margin of discretion and judgment in identifying a solution. On the facts of this case the GEMA Decision was lawful, even though it contained as part of the transition to observance the temporary adoption of a methodology which might have created a transient risk of non-observance.<sup>14</sup>

1.13 As to SSE’s cross-appeal (on Issue II before the Court), the Court of Appeal concluded that:

..... When the GEMA Decision was taken the governing definitions were to be found in the 2019 Recast Regulation. [<sup>15</sup>] That provided that congestion was not limited to problems arising across international interconnectors, and that ancillary services excluded congestion management. That had the result that, under Annex B, charges for congestion management fell outside the Ancillary Services Exclusion, and hence were required to be included in the calculation of the average annual transmission charge for the purposes of compliance with the Permitted Range. The Ancillary Services Exclusion in Annex B is not, on its face and in accordance with the usual methods of construction, limited

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<sup>13</sup> The CA Judgment is available at [R \(SSE Generation Limited & Others\) v The Competition and Markets Authority and The Gas and Electricity Markets Authority & Others](#) [2022] EWCA Civ 1472 (bailii.org).

<sup>14</sup> CA Judgment, paragraph 79.

<sup>15</sup> [Regulation \(EU\) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity \(recast\)](#).



to charges for the costs attributable to managing congestion on interconnectors between states.<sup>16</sup>

1.14 By Order dated 8 November 2022 (the **CA Order**), the Court of Appeal ordered the following (among other matters):

- (a) GEMA's appeal against the JR Order was allowed and so SSE's application for judicial review was dismissed on Grounds 1 and 2 in the judicial review.<sup>17</sup>
- (b) SSE's cross appeal against the JR Order was allowed and so SSE's application for judicial review was allowed on Ground 3(b) in the judicial review but dismissed on Ground 3(a) in the judicial review.<sup>18</sup>
- (c) The CMA 2021 Decision and accompanying order were quashed in relation to the CMA's decision on Ground 3(i) in SSE's CMA Appeal.<sup>19</sup>
- (d) The CMA 2022 Decision was quashed and paragraphs 1 and 3 of the accompanying order were set aside.<sup>20</sup>
- (e) The CMA is to:
  - (i) allow SSE's CMA Appeal against GEMA's decisions in CMP 317/327 and CMP 339 on Ground 3(i) in SSE's CMA Appeal;
  - (ii) quash GEMA's decision in CMP 317/327 in so far as it purported to exclude charges relating to the costs of congestion management (as referred to in the CA Judgment) from the calculation of average annual transmission charges under Regulation 838/2010; and
  - (iii) remit the matter to GEMA for further consideration in the light of the Court of Appeal's conclusions.<sup>21</sup>

## Our decision

1.15 This new decision is structured as follows:

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<sup>16</sup> CA Judgment, paragraph 128.

<sup>17</sup> CA Order, paragraphs 1 and 3.

<sup>18</sup> CA Order, paragraphs 2 and 3.

<sup>19</sup> CA Order, paragraph 4. See the description of Ground 3(i) in SSE's CMA Appeal in paragraph 1.10(b) above.

<sup>20</sup> CA Order, paragraphs 5 and 6. Paragraph 1 of the CMA's order had allowed SSE's CMA Appeal against GEMA's decisions approving CUSC proposals CMP317/327 and CMP339 on Ground 2 in that appeal; and paragraph 3 had allowed SSE's CMA Appeal against GEMA's decision approving CUSC proposals CMP317/327 on Ground 1 in that appeal in so far as it related to the construction of the Connection Exclusion inherent in the approval of the Original Proposal. Both of those matters were remitted to GEMA with a direction to reconsider and determine each matter.

<sup>21</sup> CA Order, paragraph 7.

- (a) Ground 3(i) in SSE's CMA Appeal;
  - (b) Relief; and
  - (c) Order of the CMA.
- 1.16 For completeness, we then summarise the outcome of all the proceedings in respect of SSE's CMA Appeal.
- 1.17 Save as indicated, reference is made to all factual matters, the legal framework, submissions (including oral submissions), documents, witness statements and other materials provided or made in SSE's CMA 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.
- 1.18 Reference is also made to all factual matters and the legal framework set out or referred to in the CA Judgment. These are not set out in this document but should also be read together with it.
- 1.19 Terms and expressions used in this document have the same meaning as they do, as applicable, in the CMA 2021 Decision, the CA Judgment and the CA Order.
- 1.20 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>22</sup>

## 2. Ground 3(i) in SSE's CMA Appeal

- 2.1 In its decisions in CMP317/327 and CMP339, GEMA decided that the Ancillary Services Exclusion in Regulation 838/2010 included certain BSUoS Charges (which were consequently excluded from the calculation of the transmission charges which must fall within the Permitted Range set by that Regulation). That was because, in GEMA's view (CMA **emphasis** for clarity):
- (a) those BSUoS Charges were **not** charges for congestion management;
  - (b) such charges therefore fell **within** the exclusion; and
  - (c) accordingly those charges were **not** limited by the Permitted Range in the relevant Regulation.<sup>23</sup>

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<sup>22</sup> Competition Commission, 2005, [The Energy Code Modification Rules](#) (CC10).

<sup>23</sup> GEMA decision CMP317/327, pages 12 – 13 and Legal Annex One paragraphs 15 – 21.

- 2.2 In SSE's CMA Appeal, SSE contended that GEMA erred in law in so deciding. In the CMA 2021 Decision, the CMA decided that GEMA's interpretation was correct and so dismissed SSE's appeal on this Ground (which formed Ground 3(i) in SSE's CMA Appeal).<sup>24</sup>
- 2.3 SSE sought to challenge the CMA 2021 Decision on this ground by judicial review, on the basis that in so deciding the CMA had also made an error of law.<sup>25</sup> The Administrative Court held that the CMA had not erred in law and the judicial review failed on this ground.<sup>26</sup> The Court of Appeal has, however, upheld SSE's cross-appeal on the point and reversed the Administrative Court's decision on this ground.
- 2.4 The Court of Appeal held that, when GEMA took the decisions in CMP317/327 and CMP339, the relevant governing definitions (of 'ancillary service' and 'congestion') were those contained in the Recast Electricity Regulation.<sup>27</sup> Those definitions, and the latter in particular, require that the charges for congestion management that fall outside the Ancillary Services Exclusion should be construed more broadly than GEMA had done in the relevant decisions. In particular, they include charges for the management of congestion occurring within an electricity transmission network. Such charges include the relevant BSUoS charges. They should therefore be included in (rather than excluded from) the calculation of transmission charges that must fall within the Permitted Range.<sup>28</sup>
- 2.5 On the basis described in the preceding paragraph, we allow SSE's CMA Appeal against GEMA's decisions in CMP317/327 and CMP339 on Ground 3(i) in that appeal. The further relief granted in accordance with the CA Order is set out in Chapter 3 below.

### **3. Relief <sup>29</sup>**

- 3.1 As directed by the CA Order (see paragraph 1.14 above) and set out in paragraph 2.5 of this decision, we allow SSE's CMA Appeal against GEMA's decisions in CMP317/327 and CMP339 on Ground 3(i) of that appeal. As further directed by the CA Order, by way of relief, we:

- (a) quash GEMA's decision in CMP317/327 in so far as it purported to exclude charges relating to the costs of congestion management (as

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<sup>24</sup> CMA 2021 Decision, paragraphs 8.62 – 8.63.

<sup>25</sup> JR Judgment, paragraphs 58 and 70.

<sup>26</sup> JR Judgment, paragraphs 61 and 71.

<sup>27</sup> Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity, Articles 2(4) and 2(60).

<sup>28</sup> CA Judgment paragraph 128.

<sup>29</sup> List of Issues, C5, Issue 26.

referred to in the CA Judgment) from the calculation of average annual transmission charges under Regulation 838/2010; and

- (b) remit the matter to GEMA for further consideration in light of the Court of Appeal's conclusions in the CA Judgment. 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. Order of the CMA**

- 4.1 By way of an order of the CMA published on its website on 12 December 2022:

- (a) SSE's CMA Appeal is allowed against GEMA's decisions dated 17 December 2020 in CMP317/327 and CMP339 on Ground 3(i) in that appeal; and
- (b) GEMA's decision dated 17 December 2020 in CMP317/327 is quashed in so far as it purported to exclude charges relating to the costs of congestion management (as referred to in the CA Judgment) from the calculation of average annual transmission charges under Regulation 838/2010 and that matter is remitted to GEMA for reconsideration and determination.

## **5. Outcome of all the proceedings**

- 5.1 In this chapter, for completeness, we summarise the outcome of all the proceedings in respect of SSE's CMA Appeal.
- 5.2 The outcome of the proceedings before the Court of Appeal is as follows:
  - (a) As regards Grounds 1 and 2 of SSE's CMA Appeal, the CMA 2021 Decision, which dismissed SSE's CMA Appeal, stands in relation to those grounds;<sup>30 31</sup> and

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<sup>30</sup> The CMA 2021 Decision on Ground 1 of SSE's CMA Appeal should also be read alongside the *obiter* comment in the JR Judgment in which the Administrative Court agreed with GEMA's reasoning on the scope of the Connection Exclusion as far as it went, 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') would self-evidently depend on the facts of any specific case (JR Judgment, paragraph 57).

<sup>31</sup> The CMA 2021 Decision on Ground 2 of SSE's CMA Appeal should also be read alongside the CA Judgment, which addressed supplementary points that were raised in the proceedings before the Court of Appeal.

(b) As regards Ground 3(i) of SSE's CMA Appeal, by the present decision, SSE's CMA Appeal is allowed on Ground 3(i).

5.3 As regards the remaining grounds of SSE's CMA Appeal, namely Grounds 3(ii), 4, 5 and 6, the CMA 2021 Decision, which dismissed SSE's CMA Appeal, stands in relation to those grounds.<sup>32</sup>

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<sup>32</sup> The CMA 2021 Decision on Ground 3(ii) of SSE's CMA Appeal should also be read alongside those parts of the JR Judgment which concern Ground 3(a) in the judicial review (which was Ground 3(ii) in SSE's CMA Appeal).