

NORTHERN POWERGRID (NORTHEAST) PLC and

NORTHERN POWERGRID (YORKSHIRE) 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 2 March 2023, Northern Powergrid (Northeast) Plc (NPgN) and Northern Powergrid (Yorkshire) Plc (NPgY) (collectively NPg) 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 2023, under section 11A of the Electricity Act 1989 to modify the electricity distribution licences of NPgN and NPgY (the Decision) to give effect to the RIIO-ED2 price control determinations.

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 NPg's Notice of Appeal, as well as to the submissions in response made by GEMA on 16 March 2023, and to a further letter dated 20 March 2023 from NPg's solicitors.

Decision on permission

5. On 2 March 2023, NPg'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 of the Electricity Act 1989). The Decision relates to the modification of the electricity distribution licences of NPgN and NPgY. I am therefore satisfied that each of NPgN and NPgY is a relevant licence holder.
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. NPg seeks permission to appeal the Decision on the following grounds:
 - (a) Ground 1: GEMA's misallocation of allowances between cost categories. NPg has submitted that GEMA relied on electricity distribution network operators' (DNOs) submitted cost proportions when allocating DNOs' efficient modelled costs; and that GEMA's decision to do so was irrational and illogical because DNOs' submitted costs were based on decarbonisation planning scenarios that were manifestly different from the one that GEMA intended to fund.
 - (b) Ground 2: GEMA's failure to grant NPgY a Business Plan Incentive (BPI) Stage 4 reward. NPgY has submitted that GEMA failed to compare costs on a rational and consistent basis when determining eligibility for a reward; and as a result, NPgY was not granted a BPI Stage 4 reward when it should have been.
9. GEMA submitted that Ground 1 is a challenge to the allocation of certain cost allowances within the overall total expenditure allowance. GEMA contends that there is no arguable error of fact or law with a reasonable prospect of success. It adds that the allocation of costs between different cost categories, and/or the nature of the conditionality attached to certain costs, are matters of regulatory judgement, for which the threshold for interference is high and is not met by NPg. Accordingly, GEMA contends that Ground 1 has no reasonable prospect of success.
10. As regards Ground 2, GEMA submitted that NPgY's key contention is that GEMA wrongly considered that workload adjustments (which were applied to the disaggregated modelled costs used in the BPI Stage 4 analysis) were predominantly reflective of differences in efficiency rather than differences in the scenarios assumed by DNOs when submitting costs. GEMA contends that NPgY has no reasonable prospect of establishing that GEMA's judgement on

this issue was wrong. Further and in any event, GEMA contends that Ground 2 is insufficiently material to merit the attention of the CMA in a full appeal.

11. I have reviewed GEMA's submissions and the letter dated 20 March 2023 from NPg's solicitors. I have concluded that NPgN and NPgY should be granted permission on their grounds of appeal for the reasons set out below.
12. Ground 1: I consider that the appeal raises arguable points of substance in relation to GEMA's approach to the allocation of costs between different cost categories, and in particular the relationship between GEMA's 'Common Scenario' (of levels of decarbonisation and associated costs) and the scenarios used by the DNOs, and the ability of NPg to recover total efficient modelled costs as set out in GEMA's Final Determinations.
13. Ground 2: I consider that the appeal raises arguable points of substance in relation to GEMA's application of the BPI Stage 4 reward, including as regards the comparison of the relevant costs when determining eligibility for a reward, which resulted in NPgY not receiving a BPI Stage 4 reward.
14. I am therefore satisfied that each of NPg's grounds of appeal is not brought for reasons that are trivial or vexatious. Each ground raises arguable points of substance which will require detailed consideration and therefore it is not the case that the appeal, in relation to any of the grounds, has no reasonable prospect of success. The question of materiality (to which GEMA referred in relation to Ground 2) is a matter to be considered in the course of an appeal.
15. I accordingly grant permission to NPgN and NPgY to bring the appeal on the grounds set out in the Notice of Appeal, pursuant to section 11C and paragraph 1 of Schedule 5A to the Electricity Act 1989.

Kirstin Baker

Authorised Member of the CMA

30 March 2023