

Modification proposal:	<b>Connection and Use of System Code (“CUSC”) Modification Proposal CMP369, “Consequential changes to Section 14 of the CUSC”</b>		
Decision:	The Authority <sup>1</sup> has decided to reject this modification <sup>2</sup>		
Target audience:	National Grid Electricity System Operator (NGESO), Parties to the CUSC, the CUSC Panel and other interested parties		
Date of publication:	20 May 2022	Implementation date:	N/A

## Background

In December 2020, we approved the original proposal (“Original Proposal”) in both CUSC Modification Proposals (“CMP”) 317/327<sup>3</sup> and 339<sup>4</sup>. These modifications related to the provisions of the CUSC that seek to set charges in such a way as to achieve compliance with Commission Regulation (EU) No. 838/2010 (the “Limiting Regulation”)<sup>5</sup>; specifically, that annual average transmission charges paid by producers in Great Britain (“GB”) must fall within €0-2.50/MWh (“the Permitted Range”). In particular, these modifications<sup>6</sup> sought to update Section 14.14.5 of the CUSC (“the CUSC Calculation”) to reflect the correct interpretation of the so-called Connection Exclusion.<sup>7</sup>

Within our CMP317/327 decision, we indicated that further changes were required to the CUSC Calculation to fully reflect the Limiting Regulation, including specifically the Connection

<sup>1</sup> References to the “Authority”, “Ofgem”, “we” and “our” are used interchangeably in this document. The Authority refers to GEMA, the Gas and Electricity Markets Authority. The Office of Gas and Electricity Markets (Ofgem) supports GEMA in its day to day work. This decision is made by or on behalf of GEMA.

<sup>2</sup> This document is notice of the reasons for this decision as required by section 49A of the Electricity Act 1989.

<sup>3</sup> [https://www.ofgem.gov.uk/sites/default/files/docs/2020/12/cmp317327\\_decision\\_171220.pdf](https://www.ofgem.gov.uk/sites/default/files/docs/2020/12/cmp317327_decision_171220.pdf)

<sup>4</sup> [https://www.ofgem.gov.uk/sites/default/files/docs/2020/12/cmp339\\_decision\\_171220.pdf](https://www.ofgem.gov.uk/sites/default/files/docs/2020/12/cmp339_decision_171220.pdf)

<sup>5</sup> Following the end of the post-Brexit Transition Period, the relevant parts of the Limiting Regulation continue to apply in GB as retained EU law, pursuant to s.3 of the European Union (Withdrawal) Act 2018 (subject to non-material amendments).

<sup>6</sup> Our CMP317/327 decision letter provides a detailed overview of the background to these proposals and the provisions of the Limiting Regulation.

<sup>7</sup> The Limiting Regulation provides that, in calculating annual average transmission charges paid by producers, “transmission charges shall exclude...charges paid by producers for physical assets required for connection to the system or the upgrade of the connection”. We refer to this as the ‘Connection Exclusion’.

Exclusion. As a result, NGESO raised CMP368 and CMP369 (collectively referred to as CMP368/369 in this letter).

SSE Generation Ltd (and others related entities, referred to in this letter as “SSE”) appealed to the Competition and Markets Authority (the ‘CMA’) against the CMP317/327 and CMP339 decisions. The CMA dismissed that appeal.<sup>8</sup> SSE subsequently applied for judicial review of the CMA decision. Judgment in the judicial review proceedings<sup>9</sup> (the ‘Judgment’) was handed down on 11 April 2022 with the claim allowed on one ground (of three) only.<sup>10</sup>

We are publishing this decision alongside our decision on CMP368, which sets out further detail on the background to these proposals. For the reasons set out below, and in our CMP368 decision, we have decided to reject CMP368 and CMP369. As a result, a further CUSC Modification Proposal will be required. This is explained in more detail in the ‘Next Steps’ section of our CMP368 decision letter.

## **The modification proposal**

NGESO raised CMP369 (alongside CMP368) on 14 April 2021.

Whilst CMP368 would introduce new definitions to Section 11 of CUSC, CMP369 seeks to update Section 14 of CUSC to utilise these revised definitions. Specifically, CMP369 would change: (i) the provisions of 14.14.5 to introduce the terms “GB Generation Output” and “Forecast Transmission Generator TNUoS Charges” into the CUSC Calculation; and (ii) the provisions of 14.17.37 to introduce the terms “GB Generation Output” and “Actual Transmission Generator TNUoS Charges” into the ex post assessment of whether annual average transmission charges have fallen within the Permitted Range. In addition, CMP369 would create a new set of provisions in CUSC 14.29A, detailing how ‘pre-existing’ assets are identified for the purposes of establishing which charges fall within the Connection Exclusion, and create a new obligation on NGESO (at 14.14.6) to publish relevant information in respect

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<sup>8</sup> [https://assets.publishing.service.gov.uk/media/60632cd6d3bf7f0c8c97d9f2/SSE\\_v\\_GEMA\\_-\\_pdf](https://assets.publishing.service.gov.uk/media/60632cd6d3bf7f0c8c97d9f2/SSE_v_GEMA_-_pdf)

<sup>9</sup> <https://www.bailii.org/ew/cases/EWHC/Admin/2022/865.pdf>

<sup>10</sup> See our statement here <https://www.ofgem.gov.uk/sites/default/files/2022-04/Statement%20re%20JR%20conclusion.pdf>

of its assessment of compliance with the Limiting Regulation. No Workgroup Alternative CUSC Modifications were raised under CMP369.

### **CUSC Panel recommendation**

At the CUSC Panel meeting on 14 September 2021, the CUSC Panel unanimously agreed that the Original Proposal would overall better facilitate the Applicable CUSC Objectives (ACOs) than the Baseline, although there was not consensus as to which ACOs were better facilitated. Panel members cited ACOs (a), (c), (d) and (e) as being better facilitated in their assessments. No Panel member considered any of the ACOs to be negatively impacted by the proposal, rather considering that the proposal was neutral against any ACO which they did not consider to be better facilitated.

### **The Applicable CUSC Objectives**

The ACOs against which CMP369 is to be assessed are set out in paragraph 5 of Standard Licence Condition ('SLC') C5 of NGENSO's licence:

- (a) that compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity;
- (b) that compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and in accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard condition C26 (Requirements of a connect and manage connection);
- (c) that, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses;

- (d) compliance with the Electricity Regulation and any relevant legally binding decisions of the European Commission and/or the Agency; and
- (e) promoting efficiency in the implementation and administration of the system charging methodology.

## **Our Decision**

We have considered the issues raised by the modification proposal and the Final Modification Report (FMR) dated 21 September 2021. We have considered and taken into account the responses to the Code Administrator consultation which are attached to the FMR. We have concluded that:

1. CMP369 cannot lawfully be approved, in light of the Judgment;
2. implementation of the modification proposal will not overall better facilitate the achievement of the ACOs; and
3. rejection of the modification is consistent with our principal objective and statutory duties (especially in light of the Judgment's conclusions as to what is required for it to be lawful for the Authority to approve a modification).

## **Reasons for our Decision**

As set out in more detail in our CMP368 decision, we consider that the Connection Exclusion is unlikely to be capable of prescriptive definition (beyond the words of the Limiting Regulation itself) within the CUSC, without some provision that enables further case-by-case assessment when required. CMP369, and specifically the proposed text at 14.29A, seeks to ascribe a generic gloss to the Connection Exclusion and does not provide for case-by-case assessment by reference to the words of the Connection Exclusion itself. On that basis, we consider that (in light of the conclusions reached in the Judgment) we cannot lawfully approve any option under CMP369.

In view of the above (in light of the Judgment), we consider that CMP369 does not facilitate ACO (d) on the basis that it does not fully reflect the terms of the Limiting Regulation.

For completeness, we have considered the proposal against the remaining ACOs. We agree with Panel members that elements of the proposal would be positive against ACO (e). For example, the introduction of an obligation on NGENSO to publish relevant information would likely improve clarity and transparency as to how any assessment of compliance with the Limiting Regulation has been undertaken, and this could be the subject of a separate proposal should any Party consider it would better facilitate the ACOs, which we would consider on its merits. Otherwise, we consider the proposal neutral against the remaining objectives. Overall, we consider that implementation of the modification proposal will not better facilitate the achievement of the relevant objectives of the CUSC.

### **Legal Text**

We consider that the draft legal text for CMP369 was unnecessarily complicated and raises questions of interpretation, in particular in relation to classification of assets as pre-existing/non pre-existing, which spans across Section 11 and Section 14 of the CUSC, leading to ambiguity and inconsistencies. In addition, we have identified potential issues with the proposed methodology, specifically in relation to the calculation of the Adjustment Tariff, which is intended to ensure compliance with the Limiting Regulation.

In light of this, and notwithstanding our assessment above, we consider that it is unlikely that the legal text provided by NGENSO was sufficiently clear, or robust, so as to be capable of implementation or Authority approval.

**Harriet Harmon**

**Head of Transmission Charging Policy**

Signed on behalf of the Authority and authorised for that purpose