



Making a positive difference
for energy consumers

Trisha McCauley
C/O National Grid

Direct Dial: 020 7901 1879
Email: harriet.harmon@ofgem.gov.uk

Date: 7 June 2022

Dear Trisha,

Decision on CUSC Modification Panel's recommendation for CMP392 'Transparency and legal certainty as to the calculation of TNUoS in conformance with the Limiting Regulation' to not be treated as an Urgent CUSC Modification Proposal

On 27 May 2022, SSE ('the Proposer') raised Connection and Use of System Code ('CUSC') Modification Proposal CMP392 ('the Proposal'). The Proposal concerns which charges fall within the Connection Exclusion¹ following the judgment² of the High Court in the judicial review proceedings³.

The Proposer requested that CMP392 be treated as an Urgent CUSC Modification Proposal.

The CUSC Modifications Panel (the 'Panel') considered the Proposer's urgency request at its meeting on 30 May 2022. The majority of the Panel agreed that CMP392 does not meet the Ofgem Code Modification Urgency Criteria⁴ and recommended, in its letter to us of 30 May 2022 that CMP392 should not be treated as an Urgent CUSC Modification Proposal. We

¹ 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'. Note that, following the end of the post-Brexit Transition Period, the relevant parts of the Limiting Regulation continue to apply in Great Britain as retained EU law, pursuant to s.3 of the European Union (Withdrawal) Act 2018 (subject to non-material amendments)

² [SSE Generation Ltd & Ors, R \(On the Application Of\) v Competition And Markets Authority \[2022\] EWHC 865 \(Admin\) \(11 April 2022\) \(bailii.org\)](#)

³ For the background to the judicial review proceedings please see our [CMP368 decision letter](#).

⁴ [Ofgem Guidance on Code Modification Urgency Criteria | Ofgem](#)

OFFICIAL

The Office of Gas and Electricity Markets

10 South Colonnade, Canary Wharf, London, E14 4PU Tel 020 7901 7000

www.ofgem.gov.uk

have considered both the Panel's and the Proposer's arguments. We have decided that CMP392 should not be progressed on an urgent basis. We have set out our reasons below.

Background

The Authority approved the Original Proposal in CMP339⁵, inserting new definitions into Section 11, in conjunction with another CUSC modification proposal, CMP317/327⁶.

SSE Generation Ltd (and others related entities, 'SSE') appealed to the Competition and Markets Authority (the 'CMA') against the CMP317/327 and CMP339 decisions. The CMA dismissed all grounds of appeal⁷.

SSE subsequently applied for judicial review of the CMA decision. Judgment in the judicial review proceedings ('the Judgment') was handed down on 11 April 2022 with the claim allowed on one ground (of three) only.

The relief granted by the court was to direct the CMA to partially quash one element of the modification made by CMP339, specifically to remove a definition: "Charges for Physical Assets Required for Connection".

The Judge held at paragraphs 42-45 of the Judgment that the Limiting Regulation requires more than just that "annual average transmission charges" fall within the Permitted Range, and that the Authority cannot lawfully approve a proposal that does not fully and correctly reflect the Connection Exclusion. Further, the Judgment states at paragraph 57 that which charges fall within the Connection Exclusion "will self-evidently depend on the facts of any specific case" and accordingly: "[a]ttempts at generic definition are necessary and useful, but only up to a point. The possibility will always remain that any generic definition might need to yield in the face of the circumstances of the case in hand."

CMP368, which was proposed prior to the Judgment and sought inter alia to expand the definition of "Charges for Physical Assets Required for Connection", was rejected by the Authority⁸. In the absence of an appropriate replacement for the CMP339 definition of, "Charges for Physical Assets Required for Connection", we raised and have subsequently approved CMP391, which aligns the definition in CUSC to the wording of the Limiting Regulation. The Proposer of CMP392 believes there is a lack of detail beyond the words of the Limiting Regulation (as retained) which is relevant to identifying whether or not particular charges fall within the Connection Exclusion.

⁵ [CMP339 Decision letter \(nationalgrideso.com\)](https://www.nationalgrideso.com/cmp339-decision-letter)

⁶ [CMP317/CMP327 Decision letter \(nationalgrideso.com\)](https://www.nationalgrideso.com/cmp317/cmp327-decision-letter)

⁷ CMA dismiss SSE appeal <https://www.gov.uk/cma-cases/sse-code-modifications-appeal>

⁸ [CMP368 and CMP369 Decisions | Ofgem](#)

OFFICIAL

The Office of Gas and Electricity Markets

10 South Colonnade, Canary Wharf, London, E14 4PU Tel 020 7901 7000

www.ofgem.gov.uk

The Proposer believes that the Proposal enables further case-by-case assessment ...[as] required in order to undertake the 'CUSC Calculation'. No direct solution is proposed with the Proposer stating that the appropriate legal text will be developed by the Workgroup.

Urgency

The Proposer has requested urgency on the basis that this is a current issue which gives rise to 'a significant commercial impact on parties, consumers or other stakeholders' and concerns that the ESO will 'be in breach of any relevant legal requirements'.

The arguments put forward are that legal certainty and transparency is required as to the process followed by the ESO when performing the CUSC Calculation (in respect of measuring compliance with the range set out in the Limiting Regulation) in terms of which charges are within or outwith the Connection Exclusion.

The Proposer argues that without this modification giving legal certainty and transparency, it will give rise to a significant commercial impact on parties, consumers or other stakeholder(s). The Proposer states that the assessment of whether (or not) transmission charges paid by generators in GB fall within (or outwith) the range prescribed in the Limiting Regulation) will be uncertain. No evidence is produced for this argument.

The Proposer also argues that, without this modification being treated as urgent, it gives "rise to concerns that the ESO will 'be in breach of any relevant legal requirements' when seeking to perform the CUSC Calculation; absent of the legal certainty and transparency of [CMP392]; as to how to practically treat, on a case by case basis, the requisite physical assets (and charges) required for connection of each generator to the system in light of the Judgment".

Panel discussion – urgency / Panel view

The Panel, at its meeting on 30 May 2022, agreed by majority that CMP392 should not be treated as an Urgent CUSC Modification Proposal.

Some Panel Members noted that the issue had been raised by the ESO previously and communicated at industry forums such as the TCMF (Transmission Charging Methodology Forum). In their view, this was therefore a known issue.

OFFICIAL

The Office of Gas and Electricity Markets

10 South Colonnade, Canary Wharf, London, E14 4PU Tel 020 7901 7000

www.ofgem.gov.uk

On Urgency Criteria (a), that not addressing this matter would have a significant commercial impact on parties, consumers or other stakeholder(s), Panel Members disagreed with the Proposer. Arguments included that the materiality was small when compared to the total £3bn of TNUoS charges.

On Urgency Criteria (c), the majority view was that analysis would be required before determining that any party may be in breach of any relevant legal requirements. Whilst it was noted that there is a risk of breach, the Panel was not satisfied that Urgency Criteria (c) was fulfilled.

Our views / Our decision

In reaching our decision on urgency, we have considered the details within the Proposal, the justification for requesting urgency, and the views of the Panel. We have assessed the request against each of the urgency criteria set out in our published guidance, and in particular, whether the Proposal is linked to an imminent or current issue that, if not urgently addressed, may cause a significant commercial impact on users or a breach of any relevant legal requirements.

We have decided that CMP392 should not be progressed on an urgent basis.

Whilst we appreciate that CUSC Parties may want the CUSC to indicate principles (beyond the words of the Limiting Regulation itself) which may be relevant to identifying whether particular charges fall within the Connection Exclusion, we do not believe that this is a current issue that, if not addressed, could lead to either 'a significant commercial impact on parties, consumers or other stakeholder(s)' or 'a party to be in breach of any relevant legal requirements'.

We consider that there is insufficient evidence to support the argument that not addressing the issue urgently may lead to a significant commercial impact on parties, consumers or other stakeholder(s). No explanation as to the significant commercial impact has been provided. It is unclear to us, in the context of the extensive history of this matter, the views expressed by the CMA, the Court and by us on the proper construction of the Connection Exclusion at law, that the financial difference between the current CUSC arrangements and any new appropriate definition of, "Charges for Physical Assets Required for Connection" would be expected to result in any material difference. National Grid Electricity System Operator is required to interpret the definition introduced by CMP391 consistently with the law, consistent with the findings of the CMA and the Authority's CMP

OFFICIAL

The Office of Gas and Electricity Markets

10 South Colonnade, Canary Wharf, London, E14 4PU Tel 020 7901 7000

www.ofgem.gov.uk

317/327 decision letter (and to, the relevant extent, the Judgment). Any more detailed definition would need to be equally consistent with those views.

The definition of the Connection Exclusion in the CUSC is fully aligned with the terms of the regulation and as noted above, the ESO is required to apply the terms consistently with the legal requirement. As such, we do not consider that there is a risk of breach of a legal requirement.

When requesting a formal decision on a request for urgency, as in this case, it is important that evidence and a fully articulated rationale for the request is made. A stated impact should be justified with evidence and should clearly articulate how the request satisfies the Authority's Urgency Criteria.

For the avoidance of doubt, in rejecting the request for urgency, we have made no assessment of the merits of the Proposal and nothing in this letter in any way fetters our discretion in respect of the Proposal.

Yours sincerely,

Harriet Harmon

Head of Transmission Charging

Duly authorised on behalf of the Authority

OFFICIAL

The Office of Gas and Electricity Markets

10 South Colonnade, Canary Wharf, London, E14 4PU Tel 020 7901 7000

www.ofgem.gov.uk