

05 May 2022

Updated statement on Connection and Use of System Code Modification Proposals 317, 327 and 339.

On 17 December 2020, Ofgem¹ approved three changes² to the Connection and Use of System Code ("CUSC"), to:

- give effect to our Targeted Charging Review Significant Code Review Direction³ that residual Transmission Network Use of System ("TNUoS") charges should not be faced by generators; and
- move towards closer alignment to the correct interpretation of European Commission Regulation 838/2010 (now incorporated into domestic law and defined in the CUSC as "The Limiting Regulation"). We recognised at the time of these decisions that further work would be required to fully implement the correct interpretation of the Limiting Regulation.

On 30 March 2021, the Competition and Markets Authority ("CMA") upheld our decision⁴ to approve CUSC Modification Proposals ("CMPs") 317/327 and 339 on appeal by SSE Generation Limited ("SSE") (and affiliates).

In May 2021, SSE sought permission to judicially review the CMA's decision. That judicial review⁵, following hearings in November and December 2021, concluded on Monday 11 April 2022 with the High Court's finding⁶ that:

- The CMA should have partially allowed SSE's appeal on the basis that our decision to approve a modification proposal which did not ensure compliance with all aspects of the Regulation was incorrect; and

¹ 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.

² https://www.ofgem.gov.uk/sites/default/files/docs/2020/12/cmp317327_decision_171220.pdf and https://www.ofgem.gov.uk/sites/default/files/docs/2020/12/cmp339_decision_171220.pdf

³ [CJUC Direction \(ofgem.gov.uk\)](https://www.ofgem.gov.uk/cjuc-direction)

⁴ [SSE code modifications appeal 2021: Decision \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/97844/sse-code-modifications-appeal-2021-decision.pdf)

⁵ SSE Generation Ltd & Ors, R (On the Application Of) v Competition and Markets Authority [2022] EWHC 865 (Admin)

⁶ [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/ohr/2022/00001.html)

- The definition of “Charges for Physical Assets Required for Connection” as introduced by CMP339 should be quashed, with all other provisions of the relevant CMPs being retained. The definition was the aspect of the modification proposal which was not fully aligned with the Regulation.

Section 14 of CUSC calculates annual average TNUoS charges for Generators by reference to, “Charges for Physical Assets Required for Connection”, with that term no longer being defined in Section 11 (ibid). In practice, National Grid Electricity System Operator (“NGESO”) is required to interpret that term consistently with the terms of the Limiting Regulation and in so doing, ensure compliance.

We recognise that further changes to Section 11 of the CUSC are needed to insert a definition of, “Charges for Physical Assets Required for Connection” that is compliant with the Limiting Regulation. We will shortly take and publish a decision on CMPs 368 and 369, which were raised by NGESO to fully implement what we consider to be the correct interpretation of the Limiting Regulation (as upheld by the CMA). We have committed to the High Court that if no option available to us under CMP368 or CMP369 is appropriate, we will ensure a further CMP is brought forward to ensure full compliance with the Limiting Regulation.

We are now considering the full extent of changes or actions required as a result of the High Court’s decision, and what that decision means in the context of previous and future charging years. We do not currently intend to ask NGESO to change TNUoS tariffs for the 2022/23 charging year, we will update industry further as we work through the options available to us.

On 3 May 2022, we lodged an application to the Court of Appeal for permission to appeal the judgment of the High Court. We will publish an update in due course.