

## All interested parties

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## Open Letter regarding CUSC Modifications Proposals 317/327 and 339

Dear interested parties,

### Background<sup>1</sup>

In December 2020, we<sup>2</sup> approved the 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/MW. In particular, these modifications 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>6</sup>.

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>7</sup> SSE subsequently applied for judicial review of the CMA decision. Judgment in the judicial review proceedings<sup>8</sup> (the

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<sup>1</sup> Further background information is available in our CMP317/327 and CMP368 decision letters.

[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) and

<https://www.ofgem.gov.uk/sites/default/files/docs/2022-05/CMP368%20Decision%20200522.pdf> respectively

<sup>2</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>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> See CMP317/327 and CMP368 letters for further detail

<sup>7</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>8</sup> <https://www.bailii.org/ew/cases/EWHC/Admin/2022/865.pdf>

'Judgment') was handed down on 11 April 2022 with the claim allowed on one ground (of three) only.<sup>9</sup>

The relief granted by the court was to partially quash the CMA's decision and remit the appeal to them with mandatory directions. On 20 May 2022, the CMA published its updated order ("the CMA Order")<sup>10</sup> and decision ("the CMA Decision").<sup>11</sup>

As a result of the CMA Order, specific matters relating to our CMP317/327 and CMP339 decisions have been remitted to GEMA with a direction to reconsider and determine the same.

## **Our Decision**

We have reconsidered CMP317/327 and CMP339 in light of the Judgment, the CMA Order and the CMA Decision. We have determined that no further action is required as regards CMP317/327 and CMP339.

## **Reasons for our Decision<sup>12</sup>**

The matters remitted to GEMA relate to elements of our CMP317/327 and CMP339 decisions concerning the Connection Exclusion. No other elements of our CMP317/327 or CMP339 decisions are affected.

The CMA Order quashes one element of the modification made by CMP339, specifically the definition of "Charges for Physical Assets Required for Connection" that CMP339 had introduced into the CUSC. The effect of that quashing is to remove from the CUSC the provision that formed the basis of the CMA's decision to allow (albeit on limited grounds) the appeal against our CMP317/327 and CMP339 decisions.

We have separately taken steps to raise a CUSC Modification Proposal<sup>13</sup> to ensure there is a definition of "Charges for Physical Assets Required for Connection" within the CUSC which reflects the Limiting Regulation, in light of the conclusions in the Judgment about what is required to achieve compliance.

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<sup>9</sup> See our statement here <https://www.ofgem.gov.uk/sites/default/files/2022-04/Statement%20re%20JR%20conclusion.pdf>

<sup>10</sup> [https://assets.publishing.service.gov.uk/media/6286586a8fa8f556203eb44d/Order\\_SSE\\_.pdf](https://assets.publishing.service.gov.uk/media/6286586a8fa8f556203eb44d/Order_SSE_.pdf)

<sup>11</sup> [https://assets.publishing.service.gov.uk/media/628657bad3bf7f1f3d93345a/SSE\\_v\\_GEMA\\_CMA\\_Decision\\_2022\\_.pdf](https://assets.publishing.service.gov.uk/media/628657bad3bf7f1f3d93345a/SSE_v_GEMA_CMA_Decision_2022_.pdf)

<sup>12</sup> This document is notice of the reasons for this decision as required by section 49A of the Electricity Act 1989.

<sup>13</sup> Pursuant to powers afforded to us under CUSC 8.17A.1

In light of those separate steps that we are taking, we consider that no further action is required as regards CMP317/327 and CMP339 themselves.

Yours faithfully,

**Harriet Harmon**

**Head of Transmission Charging Policy**

Signed on behalf of the Authority and authorised for that purpose