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| Modification proposal: | Connection and Use of System Code (CUSC): Re-introduction Of BSUoS on Interconnector Lead Parties (CMP396) | | |
| Decision: | The Authority ¹ has decided to reject ² this modification proposal | | |
| Target audience: | National Grid Electricity System Operator (NGESO), Parties to the CUSC, the CUSC Panel and other interested parties | | |
| Date of publication: | 19 July 2024 | Implementation date: | N/A |

Background

Balancing Services Use of System (BSUoS) charges are the means by which NGESO recovers the costs associated with balancing the electricity transmission system in Great Britain (GB). BSUoS charges are paid by Final Demand³ consumers in GB.⁴

On 15 August 2012, we approved CMP202⁵, which removed BSUoS charges for lead parties of interconnector Balancing Mechanism (BM) Units⁶ and Trading Units associated with interconnectors. This decision was largely based on the Third Package Electricity Regulation (EC) 714/2009⁷, which defined interconnectors as transmission lines, upon which use of system charges should not apply. On 6 March 2020, we similarly approved the Balancing and Settlement Code (BSC) P396⁸ which removed BSC charges from interconnectors flows, reducing their cost burden and contributing to market alignment.

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. This decision is made by or on behalf of GEMA.

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

³ Final Demand is defined as "electricity which is consumed other than for the purposes of generation or export onto the electricity network".

⁴ Generator liability for BSUoS charges was removed when the Authority approved CMP308 in April 2022. https://www.ofgem.gov.uk/sites/default/files/2022-04/CMP308%20Decision_0.pdf

⁵ CMP202 Decision letter - <https://www.nationalgrideso.com/document/129116/download>

⁶ All parties that participate in the Balancing Mechanism (BM) have one or more generation or consumption units, known as BM Units, which are used to trade within the BM.

⁷ Regulation (EC) No 714/2009 was repealed and recast as Regulation 2019/943, which now forms part of assimilated law in GB.

⁸ [P396-Authority-Decision-Letter.pdf \(elexon.co.uk\)](#)

Following this, on 25 April 2022, we approved CMP308⁹ which meant BSUoS charges are now recovered only from Final Demand¹⁰, removing liability from GB generators.

The modification proposal

On 12 August 2022, Saltend Cogeneration Company Ltd ('the Proposer') raised modification CMP396¹¹ ('the Proposal') seeking to charge interconnector Lead Parties BSUoS charges. The Proposer argues that Ofgem adopted a legal interpretation of the Electricity Regulation (EC) 714/2009 in CMP202 which appears to no longer be appropriate in light of (commercial) changes seen in the last decade.

The Proposer states that since CMP202 was implemented, cross border trade and market dynamics have shifted significantly and that it is unjustifiable for GB energy customers to bear the full cost of supplying electricity to interconnected markets. This would be the case as interconnector flows also contribute to GB balancing costs. The Proposer also argues that the current regulatory framework is discriminatory, as BSUoS charges are applied to Final Demand customers in GB, but this is not the case for those in interconnected markets. They believe that applying the treatment of interconnector flows and charges across all markets consistently will ensure that costs are distributed more appropriately, preventing GB customers from being treated unfairly, particularly in the context of increased costs associated with cross border flows.

Independent Legal Advice

At the CUSC Panel meeting on 26 August 2022, a majority of the CUSC Panel agreed that before the modification could be progressed further, independent legal advice needed to be commissioned as it was important to determine whether the Proposal was legally permissible. On 22 September 2022, NGESO identified a law firm (CMS Cameron McKenna Nabarro Olswang LLP) to provide independent advice. It was agreed that the law firm should consider the legality of a proposal which seeks to reintroduce BSUoS on "all interconnector lead parties ... when the interconnector flows are exporting power from the GB, thereby treating all Final Demand in the same manner irrelevant of where it is located."

⁹ https://www.ofgem.gov.uk/sites/default/files/2022-04/CMP308%20Decision_0.pdf

¹⁰ Final Demand is defined as "electricity which is consumed other than for the purposes of generation or export onto the electricity network".

¹¹ [CMP396: Re-introduction Of BSUoS on Interconnector Lead Parties | ESO \(nationalgrideso.com\)](https://www.nationalgrideso.com/cmp396-re-introduction-of-bsuos-on-interconnector-lead-parties)

On 28 March 2023, the independent legal advice was provided to NGESO. This advised that 'the amendment to the Connection and Use of System Code (the "CUSC") envisaged by [CMP396] would likely be unlawful.' The full advice is annexed to the Final Modification Report (FMR)¹² at Annex 3.

This legal advice was sent to the Panel on 20 April 2023. On 30 June, the Proposer attended the CUSC Panel meeting where they decided to progress the Proposal, despite being made aware that the legal advice obtained had stated it as likely to be unlawful. The Proposer decided not to seek any further legal advice.

In light of the legal advice indicating probable unlawfulness, the Panel saw no merit in convening a Workgroup, considering that it would waste time and resources, needlessly burdening the industry. This led to the Panel unanimously agreeing that CMP396 should proceed directly to Code Administrator Consultation under CUSC Section 8.19.2.

Proposer's views

The Proposer considers CMP396 better facilitates all Applicable CUSC Objectives (ACOs).

In respect of ACO (a)¹³ the Proposer states that CMP396 will better facilitate effective competition as charging BSUoS to interconnector flows will eliminate disparities between GB and interconnected markets, as all Final Demand customers will be treated equally, regardless of location.

The Proposer argues that CMP396 is positive with regards to ACO (b)¹⁴, as the Transmission Owner (TO) costs can still be covered by the System Operator Transmission Owner Code (STC), but the CUSC will charge the indirect costs of the energy flows to end users in line with Ofgem's decision on CMP308.

¹² [download \(nationalgrideso.com\)](https://www.nationalgrideso.com/download)

¹³ Applicable CUSC Objective (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

¹⁴ Applicable CUSC Objective (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 accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard licence condition C26 requirements of a connect and manage connection)

Regarding ACO (c)¹⁵, the Proposer states that CMP396 is positive as it takes account of significant changes in the market over the past decade, particularly in how transmission investments impact BSUoS charges.

In respect of ACO (d)¹⁶ the Proposer states that CMP396 is positive, as it aims to make cross-border trade more equitable between GB and EU customers. They argue that BSUoS charges are not an access charge but are part of energy balancing costs, which have evolved significantly over the past decade. Despite having seen the legal opinion suggesting potential unlawfulness, the Proposer chose not to seek further legal advice, maintaining their stance that BSUoS is not an access charge. They believe that this modification would better fulfil ACO (d) by addressing the changed market dynamics and ensuring fairer treatment in cross-border trade.

Finally, for ACO (e)¹⁷, the Proposer asserts that treating all Final Demand customers the same and charging BSUoS costs irrespective of location promotes efficiency in the implementation and administration of the system charging methodology.

The Proposer requested that CMP396 be treated as an Urgent CUSC Modification Proposal. The CUSC Modifications Panel¹⁸ ('the Panel') considered the CMP396 request for urgency on 16 August 2022 with reference to Ofgem Guidance on Code Modification Urgency Criteria.¹⁹ The majority view of the Panel was that CMP396 did not meet Ofgem's Urgency Criteria. On 19 August 2022, we decided that CMP396 should not be progressed on an urgent basis, considering that there was 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).²⁰

CUSC Panel²¹ recommendation

¹⁵ Applicable CUSC Objective (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

¹⁶ Applicable CUSC Objective (d): Compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency

¹⁷ Applicable CUSC Objective (e): Promoting efficiency in the implementation and administration of the system charging methodology

¹⁸ The CUSC Panel is established and constituted from time to time pursuant to and in accordance with section 8 of the CUSC.

¹⁹ Ofgem Guidance on Code Modification Urgency Criteria - <https://www.ofgem.gov.uk/sites/default/files/2022-08/Urgency%20Guidance%20-%20FINAL.pdf>

²⁰ See <https://www.nationalgrideso.com/document/265791/download>

²¹ The CUSC Panel is established and constituted from time to time pursuant to and in accordance with section 8 of the CUSC.

At the CUSC Panel meeting on 15 December 2023, the CUSC Panel met and voted on CMP396. Eight out of nine Panel members agreed that the Proposal would not better facilitate the ACOs when assessed against the existing provisions of the CUSC ('Baseline'), and therefore recommended that the Proposal should not be implemented. One Panel member abstained from voting.

The majority of Panel members cited the legal advice in their reasoning, while one Panel member considered that even 'applying these charges unilaterally, if it were lawful to do so, has the potential to do significant harm to interconnector trade with European energy partners, incurring increased transport costs and impacting a valuable service ESO use to ensure a stable energy system at least cost to the consumer.'

Our decision

We have considered the issues raised by the Proposal and the FMR dated 05 January 2024. This includes taking into account the responses to the industry consultation on the Proposal which are attached to the FMR as well as the votes and voting statements of the Panel. We have also considered and taken into account the independent legal advice on the modification proposal, obtained by the NGESO. We have concluded that:

- Implementation of the Proposal will not better facilitate the achievement of the ACOs;²² and
- Implementation of the Proposal would not be consistent with our principal objective and statutory duties.

Reasons for our decision

We consider the Proposal will not better facilitate ACOs (a) and (d) and has a neutral impact on ACOs (b), (c) and (e). We have decided to reject CMP396 for the reasons set out below.

(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

²² Applicable CUSC Objectives (ACOs) are defined in paragraph 15 of SLC C10 of NGESO's Transmission Licence. There are charging and non-charging objectives. They are contained in SLC C10(5) and SLC C5(5) respectively of NGESO's Transmission Licence. For the purposes of this decision, ACOs are referring to the non-charging objectives.

consistent therewith) facilitates competition in the sale, distribution and purchase of electricity;

The Proposer asserts that the current regulatory framework is discriminatory as Final Demand customers in GB bear BSUoS charges, while those in interconnected markets are exempt. They advocate for consistent charges across interconnected markets and GB to prevent GB consumers from bearing the full effect of these costs and to ensure fairness in cost distribution. The Proposer argues that this change would foster effective competition by creating a level playing field for all market participants. One Panel member considered that the Proposal would result in better competition between GB and interconnected markets as they would face similar charges and that it is possible that the benefits to competition would outweigh the impacts on balancing costs. However, four Panel members voted that this proposal would have a negative impact on this objective, indicating that it would not improve competition.

Our view

We do not consider that applying BSUoS charges to interconnected markets' Final Demand will necessarily create a level playing field. Different markets operate under varying conditions, including energy mix, pricing structures, and regulatory frameworks. Applying BSUoS charges to interconnected flows could distort competition between markets rather than foster effective competition.

Secondly, this proposal would apply BSUoS charges to parties importing GB-generated electricity across interconnectors, potentially discouraging such imports. This may disrupt energy trade dynamics, negatively impacting cross-border energy flows and the competitiveness of GB generators in European markets.

The Proposal also overlooks existing mechanisms that already reflect energy costs, such as the inter-transmission system operator compensation (ITC) mechanism and other market-based approaches. These mechanisms help to ensure fair competition by balancing costs and benefits between interconnected markets. We believe the Proposer's arguments fail to account for the complexities of cross-border energy flows, potentially distorting competition and undermining the goal of a level playing field. Further analysis is needed to ensure fair competition and effective market dynamics.

Therefore, we conclude that CMP396 would result in a negative outcome for ACO (a)

(d) compliance with the Electricity Regulation and any relevant legally binding decisions of the European Commission and/or the Agency;

The Proposer asserts that the proposal has a positive impact on ACO (d) because it aims to make cross-border trade more equitable between GB and EU customers. They argue that BSUoS charges are not an access charge but are part of energy balancing costs, which have evolved significantly over the past decade. Despite having seen the legal opinion suggesting unlawfulness, the Proposer chose not to seek further legal advice, maintaining their stance that BSUoS is not an access charge. They believe that this modification would better fulfil ACO (d) by addressing the changed market dynamics and ensuring fairer treatment in cross-border trade.

Our view

Consistent with previous Ofgem decisions which removed charges from interconnectors, and the independent legal advice sought by the Panel, we do not consider that the Proposal is lawful, nor that it better facilitates achievement of compliance with the Electricity Regulation. It is therefore negative in respect of ACO (d).

Other issues

One of our key concerns surrounding CMP396 is its legal status. Legal advice provided to the CUSC Panel concluded that the proposal is likely to be unlawful. Despite this, the Proposer chose to proceed, disregarding the legal advice and failing to seek its own legal counsel to validate the legality of the Proposal or submit a robust counter legal argument. This decision to continue with the Proposal highlights the importance of addressing legal matters upfront and has led to a waste of time and resources for numerous parties and unnecessary costs being incurred by the NGESO, which are ultimately passed to consumers, resulting in an avoidable negative impact.

Decision notice

In accordance with Standard Condition C10 of the Transmission Licence, the Authority hereby directs that modification proposal CUSC CMP396: Re-introduction Of BSUoS on Interconnector Lead Parties is not made.

Pedro Arcain

Head of Electricity Network Charging, Energy Systems Management & Security

The Office of Gas and Electricity Markets

10 South Colonnade, Canary Wharf, London, E14 4PZ Tel 020 7901 7000 <http://www.ofgem.gov.uk/>

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Signed on behalf of the Authority and authorised for that purpose.