



Neutral Citation Number: [2015] EWHC 2164 (Admin)

Case No: CO/4939/2014

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 23/07/2015

**Before:**

**MR JUSTICE LEWIS**

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**Between :**

<b>RWE Generation UK PLC</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>Gas and Electricity Markets Authority</b>	<b><u>Defendant</u></b>
<b>-and-</b>	

**(1) National Grid Electricity Transmission PLC**

**(2) Scottish and Southern Energy PLC**

<b>(3) Drax Power Limited</b>	<b><u>Interested Parties</u></b>
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**Nigel Fleming QC and Duncan Sinclair** (instructed by **RWE Generation UK PLC**) for the **Claimant**

**Daniel Beard QC, Alan Bates, Owain Draper and Daisy Mackersie** (instructed by **Office of Gas and Electricity Markets**) for the **Defendant**

**Richard Gordon QC and Gerard Rothschild** (instructed by **Shakespeare Martineau LLP**) for the **Interested Party (1)**

**Michael Fordham QC and Fraser Campbell** (instructed by **Addleshaw Goddard LLP**) for the **Interested Party (2)**

Hearing dates: 1 and 2 July 2015

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**Approved Judgment**

**Mr Justice Lewis:**

INTRODUCTION

1. This is a claim for judicial review of a decision of the Gas and Electricity Markets Authority (“the Authority”) dated 25 July 2014 approving a modification to the methodology for calculating the charges imposed to recover the cost of investment in infrastructure forming the transmission system for conveying electricity. The modification is referred to as WACM 2. The charges which it modifies in part are known as the Transmission Network Use of System (known by the acronym “TNUoS”) charges.
2. In brief, the TNUoS charges currently comprise two parts, a local tariff and a wider tariff. The wider tariff, in turn, comprises a locational element and a residual element. The decision relates only to the locational element. With effect from 1 April 2016, the locational element would be divided into two. One element would be a “Peak Security Tariff” and the other would be a “Year Round Tariff”.
3. The Peak Security Tariff would only be payable by conventional generators (such as generators fuelled by coal, oil, gas and other fuels) who are able to generate electricity at all times, including times of peak demand. This element of the TNUoS charges would not be payable by other generators, known as intermittent generators. These generators rely on fuel sources which are outside their control (such as wind or solar power) and they cannot be relied upon as being able to generate electricity at times of peak demand.
4. The Year Round Tariff would be payable by all generators. The charging mechanism involves a complex methodology described below.
5. In summary, the Claimant, RWE Generation UK plc, is a conventional generator of electricity. First, it contends that the decision involves unlawful discrimination in breach of the requirements of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity (“the Directive”) as it involves differential treatment of conventional generators and intermittent generators or otherwise involves a misinterpretation of the Directive. Secondly, it contends that the Authority has failed to have regard to relevant considerations, in particular, elements of the transmission charging system other than those comprised in the TNUoS charges and the fact that intermittent generators do in practice contribute to the meeting of demand at peak times. Thirdly, it contends that the decision would involve the provision of state aid to intermittent generators and so required to be notified to the European Commission pursuant to Article 108(3) of the Treaty on the Functioning of the European Union (“the TFEU”).
6. In brief, the Authority contends that the modification to the charging system reflects the relevant criteria governing decisions on investment in the transmission system. Those criteria require that the transmission system is capable of accommodating the generating capacity needed to meet demand at peak times. The criteria operate on the basis that conventional generators can be relied upon to generate electricity at times of peak demand but intermittent generators cannot. The Authority contends that the modification enables the transmission owners to recover the costs of investment decisions in a way that better reflects the impact that different classes of generators have on the transmission system. As such there is a material, relevant difference between the class of conventional generators and intermittent generators. The Authority, therefore, contends that there is no unlawful discrimination and no misinterpretation of the Directive. It contends that

it has not acted unreasonably and has not failed to have regard to matters that are relevant to the actual exercise that it undertook. Further, the Authority contends that the changes in the charging system did not involve state aid as they do not involve the conferring of any advantage on any particular class of generator. By the time of the hearing, the Claimant had accepted that if the Authority succeeded in establishing that the decision did not itself involve illegality, it would not amount to state aid. However, the Claimant sought to contend that, in those circumstances, other measures (affecting renewable energy producers) already notified to and approved by the European Commission would need to be re-notified as the economic assumptions on which those measures were approved would have changed in the light of the modification to the TNUoS charging system.

## THE FACTUAL BACKGROUND

### *The Transmission System*

7. The system governing the transmission of electricity is complex. Generators generate electricity which is sold to suppliers who, in turn, sell the electricity to homes and business. The electricity is conveyed over a transmission system. The transmission system comprises the infrastructure such as overhead lines, cables and substations that transports electricity from generators to a distribution network for onward transportation by suppliers to customers. The onshore transmission system in Great Britain is owned by three transmission owners, one of whom, National Grid Electricity Transmission Plc, known as NGET (the First Interested Party) operates the transmission system on behalf of itself and the other two transmission owners.

### *The Current TNUoS Charging System*

8. The costs incurred in investing in and maintaining the transmission system are recoverable by the transmission owners from generators and suppliers. It was recognised that it would not be practicably possible to apportion individual parts of the transmission system infrastructure (such as parts of cables or substations) to individual generators and suppliers. A methodology was therefore developed to approximate how costs were incurred by generators and suppliers to enable those costs to be recovered by the transmission owners. At present, generators pay 27% of the total charges recovered under the TNUoS charging system and suppliers pay the remaining 73%.
9. So far as generators are concerned, the TNUoS charges currently comprise two parts, a local tariff and a wider tariff. The wider tariff comprises a locational element and a residual element. The locational element varies according to which of the 27 zones the generator is situated in and is intended to reflect the fact that generators in different locations are expected to give rise to different investment costs. By way of example, electricity may need to be transported for greater distances in different parts of the country and costs relating to that aspect of the transmission system are likely to be greater. The wider tariff (that is, the sum of the appropriate locational element and the residual element) is then multiplied by what is known as the transmission entry capacity (essentially the maximum output of generators). Conventional generators and intermittent generators currently both pay the TNUoS charges.

### *The Other Charges*

10. There may be other situations where costs are incurred. There are times when the generators' demands for entry to the transmission system exceed the capacity of the system to receive electricity. In the industry parlance, these are referred to as constraints. They may arise from a variety of reasons including, for example, the fact that a number of different generators want access to the transmission system at the same time or because maintenance works are being carried out which have reduced the capacity of the transmission system to receive electricity. At these times, NGET agrees to make payment to compensate particular generators who cannot access the transmission system. The costs of the transmission operator in making payments to generators when they cannot access the transmission system due to constraints are recovered through a separate charging regime, known as the Balancing Services Use of System charges or BSUoS charges.

*The Criteria For Deciding to Incur Investment Costs*

11. Generators need to connect to the transmission system at a particular location to enable the system to transport energy for onward distribution to the generator's customers. Furthermore, as generating capacity expands, decisions need to be taken on where and when to incur capital investment costs for the purpose of expanding the capacity of the transmission system to accommodate additional electricity provided by generators. Such decisions are taken by reference to criteria set out in the Security and Quality of Supply Standards, known as the SQSS.
12. Amended criteria were established in 2011. Those criteria are aimed at ensuring that investment decisions are consistent with two objectives. First, the transmission system needs to be capable of ensuring that sufficient electricity can be conveyed over the transmission system to meet consumer needs even at times of peak demand. Secondly, and subject to the need to ensure security of supply, investment costs should only be incurred where it is more efficient to do so than pursuing other options (in particular, making payments to generators to reduce the amount of electricity they generate at particular times).
13. The first set of criteria, aimed at achieving the first objective, is known as the Demand Security Criterion. This criterion is intended to identify the minimum transmission capability required to ensure that the electricity required to meet demand at peak times can be conveyed over the transmission system. There is one significant feature, or assumption, involved in the application of the Demand Security Criterion. Intermittent generators are not taken into account for the purpose of planning investment in the transmission system to ensure security of supply under this criterion. Intermittent generators are not capable of being relied upon to generate electricity at all times as their ability to generate electricity depends upon environmental factors such as the wind or the sun. Whether a wind power generator is capable of generating electricity at any particular time will depend upon the wind. If the wind is not blowing at times of peak demand, for example, the intermittent generator will not be able to contribute to meeting peak demand at that time. Thus, intermittent generators cannot be relied upon to contribute to the Demand Security Criterion. In planning the investment in the transmission system needed to ensure security of supply therefore, regard is had only to those generators who are able to control the time of their generation so that they can be relied upon to be able to generate electricity at times of peak demand. Those generators are the conventional generators, fuelled by coal, gas, oil and the like. Consequently, the SQSS is not aimed at requiring the transmission owners to

provide infrastructure in relation to receiving electricity from intermittent generators for the purpose of meeting the Demand Security Criterion. Rather, the SQSS is intended to ensure that the transmission system has sufficient capacity to ensure that conventional generators are able to supply their electricity via the transmission system in order to meet demand at peak times.

14. The second set of criteria, known as the Economy Criterion, reflects the second objective and enables investment to occur when the transmission owners determine that it is more efficient to make changes to the infrastructure to deal with constraints as compared with making payments to operators who cannot access the transmission system. Costs may be incurred to meet investments considered necessary for these reasons both in relation to conventional and intermittent generators. The costs incurred for investment meeting the Demand Security Criterion and the Economy Criterion are included within the TNUoS charging system.

*The Decision-Making Process*

15. In September 2010, the Authority began a review of transmission charges. Potential options for change were identified and, in May 2011, a process, known as a Significant Code Review, was initiated by the Authority. This process involved the establishment of a Significant Code Review Working Group comprising 14 members drawn from the industry with relevant expertise. They published a report considering possible options in November 2011. The Authority then published a consultation document setting out the options for change. Following consideration of the consultation responses, the Authority then initiated the process for modifying the charges.
16. The system for modification is contained in a code known as the Connection and Use of System Code or CUSC. Standard conditions are attached to licences granted to electricity suppliers, generators and transmission owners pursuant to Part 1 of the Electricity Act 1989 (“the Act”). Standard condition 10 of the transmission owners’ licence provides for the licensee to establish arrangements, known as the CUSC, governing, amongst other things, charging methodologies. The standard conditions of generators’ licences (and suppliers’ licences) require those licensees to adhere to the CUSC.
17. There is provision in transmission owners’ licence for the making of modifications to the charging system. The relevant condition in this case was standard condition 10(6)(aa). Pursuant to that condition, the Authority directed the licensee (NGET) to propose a modification. A group referred to as the CMD Workgroup (“the Workgroup”), comprising 16 representatives from the industry with relevant expertise and experience, was established. The Workgroup considered held over 30 meetings and considered a number of possible options. NGET also carried out modelling on the impact of the options on generators’ decisions about new and existing capacity, and on consumers, as compared with the current charging system. A final report was submitted to the Authority in June 2013 and the Authority then carried out an impact assessment. Following this, the Authority indicated that it was minded to approve the WACM 2 modification and undertook a further consultation exercise. Further evidence was submitted by the Claimant as part of that exercise and a further consultation was undertaken in April 2014.

*The Decision*

18. On 25 July 2014, the Authority published its decision to modify the TNUoS charging system with effect from 1 April 2016. In essence, the modification will

modify one element of the TNUoS charging system as applied to generators. As described above, the system at present comprises a local element and a wider tariff which, in turn, comprises a locational element and a residual element. The decision relates only to the locational element of the wider tariff. With effect from 1 April 2016, the locational element will be divided into two. One element would be the Peak Security Tariff, the other would be the Year Round Tariff.

19. The Peak Security Tariff will be paid only by conventional generators and not by intermittent generators. The language of the decision is opaque but, in essence, the intention is that this element of the charging system will reflect the fact that, under the SQSS, investment planning decisions are based on the need to ensure that the transmission system has the capability of conveying sufficient electricity to meet demand at peak times. As only conventional generators can be relied upon to meet demand at peak times, the Demand Security Criterion provides that investment decisions are based on the necessity to ensure sufficient conventional generation capacity can be conveyed over the transmission system at peak times. The Peak Security Tariff is intended to reflect the investment costs incurred by the transmission owners in ensuring that the transmission system is capable of conveying that capacity. That is intended, in turn, to ensure that, if conventional generators seek to provide additional capacity to meet demand at peak times, they do so in the most economically efficient manner as they will be liable for the costs of the infrastructure required to enable them to have their electricity carried via the transmission system at times of peak demand.
20. The Year Round Tariff is intended to reflect the costs of investment incurred to deal with constraints in the system in circumstances where it is economically more efficient to make improvements to the transmission system rather than make payments to generators who cannot gain access to the system at particular times (the Economy Criterion under the SQSS). The Year Round Tariff is payable both by conventional and intermittent generators according to the prescribed formula. In summary, the Year Round Tariff is divided into a “shared” and “non-shared” element. The non-shared element involves basing the amount charged on a generator’s transmission entry capacity (effectively, the generating capacity of the generator). It applies where there is a high concentration of generators in an area receiving low carbon support subsidies (a high concentration is above 50%). The shared element is more complex. The formula involves calculation of the generator’s annual load factor (or “ALF”). That involves taking five years of generation, discounting the year with the highest output and the year with the lowest output and then taking the average of the three remaining years. The use of the annual load factor reflects an assessment that generators that operate more frequently tend to increase the likelihood of causing constraints and leading to costs to address such constraints. The intention underlying both elements of the Year Round Tariff is to relate the costs incurred in investing to deal with constraints to the generators whose activities are giving rise to the need for investment.
21. As appears from the decision itself, the Authority considers that such an approach will better reflect the costs incurred by transmission owners in making investments in the transmission system (referred to in the decision as cost reflectivity). The approach should also facilitate effective competition and satisfy other relevant goals.

22. The decision itself should be read in its entirety. For convenience, key parts of the decision are set out below. The decision begins with an executive summary describing the change in the following way:

*The change under WACM 2*

“WACM 2 would split the TNUoS tariff for generators into two parts: the Peak Security tariff and the Year Round tariff. Only conventional generators would be charged the former but all generators, including intermittent ones, would be subject to the latter. This aligns to the transmission planning standard and reflects the fact that intermittent generators are not assumed to contribute to meeting peak security. In its power flow model used to calculate tariffs, National Grid would split the circuits between the two tariffs using similar assumptions to those in the transmission planning standard.

There would also be two further adjustments to the Year Round tariff. The first of these is to split the tariff into two elements: ‘shared’ and ‘non shared.’ This refers to generators’ ability to ‘share’ transmission capacity which depends on the concentration of types of generators in a particular area. It recognises that it is efficient to build more transmission capacity for areas with a high concentration of low carbon generation because this type of plant is likely to be generating at the same time (ie when the wind blows) and is expensive to constrain off. Once the proportion of a low carbon generation in an area exceeds 50%, then part of the Year Round tariff will be classed as ‘non-shared.’ The proportion of the Year Round tariff that is non-shared will increase as the percentage of low carbon generation increases.”

23. The summary of the Authority’s assessment states, amongst other things, that:

“WACM 2 is a better proxy of the drivers of transmission investment than the status quo, or other options presented, because it is more closely aligned to the transmission investment decision making criteria. Tariffs are therefore more cost reflective and better reflect the impact a generator has on the transmission system than the status quo. We recognise that in reality the impact of individual generators may differ from that estimated by WACM 2. However, this is a feature of the investment cost related pricing methodology. This brings other benefits for example through smoothing the lumpy nature of transmission investment and making tariffs more stable and transparent. These are important aspects to reducing barriers to entry and facilitating effective competition.”

and

“We also consider that WACM 2 better meets our wider duties and principle objective to protect the interests of existing and future consumers than the status quo and other options presented.”

24. The decision then sets out the background to the change and describes the modification process. It describes the changes under WACM 2 as summarised above. Section 2 of the decision sets out the Authority’s reasons for approving the decision. First, under the heading “cost reflectivity”, the decision notes that the first objective referred to in condition 5 of the standard conditions attached to licences is that transmission charges should:

“reflect, as far as is reasonably practicable, the costs.....incurred by transmission licensees in their transmission business...”

25. The decision explains that the Authority considers that that objective is better met by the charging methodology included in WACM 2 as:

“[I]t better reflects the impacts different users have on the costs incurred by the owners of the transmission network. This is because it is a closer approximation of the transmission investment decision-making process. Our reasons for reaching this decision are explained below, taking into account responses to both our consultations.”

26. The decision then explains in detail the transmission investment decision process described above and says this:

“2.6 For charges to be cost-reflective the calculation of the incremental impact that a generator has on the system used in the charging methodology should reflect the transmission investment decision-making process and the drivers of transmission investment. This is governed by the Security and Quality of Supply Standards (SQSS) which sets out the minimum criteria that the Transmission Owners (TOs) must comply with when determining the required capability of the transmission network (known as the Main Interconnector Transmission System (MITs)).

“2.7 The growth in intermittent generation connecting to the transmission system has changed the nature of investment planning. Traditionally, this has been driven by the need to ensure peak security in an environment dominated by conventional generators. However, intermittent generators cannot be relied upon to be operating at peak demand. In addition, increasing intermittent generation has given rise to investment planning now being driven to efficiently managing constraint costs. The SQSS was updated to reflect this shift in 2011 to include two sets of criteria setting out the assumptions to be used when assessing the required level of capacity. TOs must build transmission capacity determined by the following two conditions:

- Demand Security criterion – the minimum transmission capacity required to ensure that conventional generators can meet demand at times when intermittent generators cannot run (ie there is no wind).
- Economy criterion – the additional transmission capacity needed above that to meet peak demand to efficiently manage the system taking into account the need to manage constraint costs in an effective and economic manner.

“2.8 As well as these two criteria, the SQSS also recognises that in reality, a full cost benefit analysis (CBA) will be required as part of the decision-making process for major investments. This may drive a different level of investment from that resulting from either of the two criteria above.

“2.9 Currently there is a mismatch between the investment planning requirements which drive actual transmission investment costs and the charging methodology which only considers peak demand as the driver of investment costs. WACM 2 seeks to address this defect and more closely align charges for generators to the costs they impose on the system. It updates the charging methodology by splitting the locational tariff into two components:

- Peak Security tariff – only conventional generators will be charged this component. This is because, under the SQSS Demand Security criteria, it is assumed that intermittent generators do not contribute to peak security and therefore do not drive investment for this reason.
- Year Round tariff – all generators will receive the year round tariff adjusted for their output. This is designed as a proxy for the impact a



generator has on investment to manage constraint costs in an economic way. The reasoning for the use of annual load factor (ALF) in this calculation is discussed in the next section.

“2.10 To determine how generators in different areas impact on investment in that area, NGET must determine which requirements would drive investment under the SQSS. They will do this by allocating the transmission circuit routes in the power flow model used to calculate the tariffs to either the Peak tariff or the Year Round tariff. This is based on which drives the maximum flows on that circuit using assumptions that are consistent with the two criteria in the SQSS.

“2.11 We therefore consider that, in principle, splitting the tariff into two components more closely aligns the charging methodology to the investment decision making process than the status quo. It is therefore more cost reflective. Our view is that the way NGET determines the allocation of circuits to each tariff is appropriate. It reflects that, under the SQSS, intermittent plant do not drive investment for the purposes of peak security. It also realises that managing constraints efficiently is becoming increasingly important in driving transmission investment. This is an improvement on the existing methodology which only considers one driver of investment with all plant contributing equally to this.”

27. The decision then continues with an assessment of the use of the annual load factor or ALF, and other issues, in terms of cost reflectivity in the sense in which that phrase is used in the decision. Next, the decision considers competition, noting that standard condition 5 provides that transmission charges should facilitate:

“effective competition in the generation and supply of electricity and (so far as is consistent therewith) ... competition in the sale, distribution and purchase of electricity.”

28. The essential reasoning on this aspect is that WACM 2 will reduce barriers to entry and discrimination and that should facilitate competition. The decision explains that in the following terms:

“In addition, our view is that the current methodology could be discriminatory. Discrimination can inhibit competition and can arise not just from treating like cases differently without objective justification, but also from unjustifiably treating different cases alike. Currently, all generators receive the same tariff in a zone but this does not reflect how different generators may drive transmission investment in that location according to the investment planning process. WACM 2 would reduce this discrimination as different generators would be treated differently according to the impact they have on the network. This is an objective justification to charging users differently and is therefore not in itself discriminatory, as suggested by some respondents to our consultation.”

29. The decision then considers whether the changes contained in WACM 2 will facilitate two other relevant objectives, namely properly taking into account developments in the transmission licensees’ business and considerations arising under European Union law. It concludes that WACM 2 did take account of and was consistent with these objectives. Finally in this section of the decision, it considers whether WACM 2 meets the Authority’s principal objectives under section 3A of the Act, that is to protect the interests of existing and future consumers and concludes that it does. The Authority’s conclusion is that:

“We have concluded that WACM 2 better facilitates the relevant CUSC objectives than the status quo because it results in more cost reflective charges increases effective competition compared to the status quo and better incorporates developments in the transmission licencees’ transmission business. It also better facilitates the Authority’s principle objective of protecting the interests of existing and future consumers. Of all the proposals put to us under CMP213, our view is that WACM 2 best meets these objectives. We have therefore decided to implement WACM 2.”

30. The decision then considers the appropriate implementation date. It explains why it has been decided to implement the proposed modification with effect from 1 April 2016.

#### THE LEGAL FRAMEWORK

31. In view of the challenge to the legality of the decision, it is necessary to set out, briefly, the relevant legal framework.

#### *The Relevant Provisions of European Union Law*

32. The relevant provisions of EU law are principally contained in the Directive. Recitals 32 and 36 of the Directive provide that:

“(32) Further measures should be taken in order to ensure transparent and non-discriminatory tariffs for access to networks. Those tariffs should be applicable to all system users on a non-discriminatory basis.

.....

(36) National regulatory authorities should be able to fix or approve tariffs, or the methodologies underlying the calculation of the tariffs, on the basis of a proposal by the transmission system operator or distribution system operator(s), or on the basis of a proposal agreed between those operators(s) and the users of the network. In carrying out those tasks, national regulatory authorities should ensure that transmission and distribution tariffs are non-discriminatory and cost-reflective, and should take account of the long-term, marginal avoided network costs from the distributed generation and demand-side management measures.”

33. Article 12 of the Directive deals with the tasks of transmission systems operators and provides, so far as material, that:

“Each transmission system operator shall be responsible for:

(a) ensuring the long-term ability of the system to meet reasonable demands for the transmission of electricity, operating, maintaining and developing under economic conditions secure, reliable and efficient transmission systems with due regard to the environment.

.....

(f) ensuring non-discrimination as between system users of classes of system users, particularly in favour of its related undertakings.”

34. Article 32 deals with access to transmission systems and provides that Member States shall ensure the implementation of a system of access applicable to all eligible customers “applied objectively and without discrimination”.
35. Chapter IX of the Directive deals with the obligations of national regulatory authorities such as the Authority. Article 36 sets out the general objectives of regulatory authorities in carrying out the regulatory tasks specified in the Directive. Article 36(d) to (g) of the Directive provides that the Authority is to take all reasonable measures in pursuit of the following objectives, among others:
- “(d) helping to achieve, in the most cost-effective way, the development of secure, reliable and efficient non-discriminatory systems that are consumer

orientated, and promoting system adequacy and, in line with general energy policy objectives, energy efficiency as well as the integration of large and small-scale production of electricity from renewable energy sources and distributed generation in both transmission and distribution networks;

(e) facilitating access to the network for new generation capacity, in particular removing barriers that could prevent access for new market entrants and of electricity from renewable energy sources;

(f) ensuring that system operators and system users are granted appropriate incentives, in both the short and the long term, to increase efficiencies in system performance and foster market integration;

(g) ensuring that customers benefit through the efficient functioning of their national market, promoting effective competition and helping to ensure consumer protection.”

36. Article 37.1 of the Directive provides that regulatory authorities have certain duties including:

“(a) fixing or approving, in accordance with transparent criteria, transmission or distribution tariffs or their methodologies”.

*The Act*

37. Section 3A of the Act provides as follows:

**“3A.— The principal objective and general duties of the Secretary of State and the Authority.**

“(1) The principal objective of the Secretary of State and the Gas and Electricity Markets Authority (in this Act referred to as “the Authority”) in carrying out their respective functions under this Part is to protect the interests of existing and future consumers in relation to electricity conveyed by distribution systems or transmission systems.

“(1A) Those interests of existing and future consumers are their interests taken as a whole, including—

- (a) their interests in the reduction of electricity-supply emissions of targeted greenhouse gases;
- (b) their interests in the security of the supply of electricity to them; and
- (c) their interests in the fulfilment by the Authority, when carrying out its functions as designated regulatory authority for Great Britain, of the objectives set out in Article 36(a) to (h) of the Electricity Directive.

“(1B) The Secretary of State and the Authority shall carry out their respective functions under this Part in the manner which the Secretary of State or the Authority (as the case may be) considers is best calculated to further the principal objective, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the generation, transmission, distribution or supply of electricity or the provision or use of electricity interconnectors.

.....

“(2) In performing the duties under subsections (1B) and (1C), the Secretary of State or the Authority shall have regard to—

- (a) the need to secure that all reasonable demands for electricity are met;

- (b) the need to secure that licence holders are able to finance the activities which are the subject of obligations imposed by or under this Part; and
- (c) the need to contribute to the achievement of sustainable development.

.....

“(5) Subject to subsections (1B) and (2), and to section 132(2) of the Energy Act 2013 (duty to carry out functions in manner best calculated to further delivery of policy outcomes) the Secretary of State and the Authority shall carry out their respective functions under this Part in the manner which he or it considers is best calculated—

- (a) to promote efficiency and economy on the part of persons authorised by licences or exemptions to distribute, supply or participate in the transmission of electricity to participate in the operation of electricity interconnectors or to provide a smart meter communication service and the efficient use of electricity conveyed by distribution systems or transmission systems;

- (b) to protect the public from dangers arising from the generation, transmission, distribution or supply of electricity or the provision of a smart meter communication service;

- (c) to secure a diverse and viable long-term energy supply, and shall, in carrying out those functions, have regard to the effect on the environment of activities connected with the generation, transmission, distribution or supply of electricity or the provision of a smart meter communication service.

“(5A) In carrying out their respective functions under this Part in accordance with the preceding provisions of this section the Secretary of State and the Authority must each have regard to—

- (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and

- (b) any other principles appearing to him or, as the case may be, it to represent the best regulatory practice.”

38. Section 6 of the Act provides for the Authority to grant a licence authorising, among other things, the generation of electricity, participation in the transmission of electricity or the supply of electricity. The unlicensed pursuit of such activities is prohibited by section 4 of the Act. As indicated above, there are standard conditions inserted into the licences granted to generators, transmission owners and suppliers. Standard condition 10 of the transmission owners’ licence requires the establishment of the CUSC which will include, amongst other things, the charging methodologies. Standard condition 10(6) provides, amongst other things, for the licensee to establish and operate procedures for modification of the charging methodologies “so as to better facilitate achievement of the applicable CUSC objectives”. In the present case, the relevant objective is that contained in paragraph 5 of condition 5 of the transmission owner’s licence in relation to the use of system charging methodology which is in the following terms:

“In paragraphs 1 and 2 “the relevant objectives” shall mean the following objectives:

- (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; and

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

### THE ISSUES

36 It is against that background that this claim is brought. There are three grounds of claim, namely (1) that the differential treatment of differential classes of generators, in that conventional generators but not intermittent generators pay the Peak Security Tariff, involves unlawful discrimination (2) in deciding to approve the proposed WACM 2 modification, the Authority failed to have regard to relevant considerations and acted irrationally or disproportionately (3) the decision to approve the WACM 2 modification involved state aid within the meaning of Article 107 of the TFEU which had to be notified to the European Commission prior to implementation pursuant to Article 108 of the TFEU. The first two grounds were developed, in written and oral submissions, as encompassing five essential issues:

(1) the list of matters that constitute objective justification for differential treatment of different classes of generators under the Directive is exhaustive and does not include differential treatment on the basis provided for in the decision, including, in particular, cost-reflectivity in the sense that that phrase is used in the decision;

(2) the Authority has misinterpreted the term “cost-reflective” in the recitals to the Directive as that phrase only ensures that the charges levied by the transmission owners are not excessive and does not permit a system of charges intended to achieve cost reflectivity between different classes of generators in the way described in the decision;

(3) the Authority failed to have regard to a relevant element of the system of transmission charges, namely the BSUoS charges, and acted in a way that amounted to discrimination by altering only those parts of the charging system reflected in the TNUoS charging system not the BSUoS charging system;

(4) the Authority assumed that intermittent generators were making no contribution to meeting demand at peak times when in fact, and as known by the Authority, intermittent generators were contributing (and increasingly so) to meeting demand at peak times;

(5) the Authority wrongly elided the obligation to meet the policy aim of ensuring security of supply with the assumption that conventional generators can be more reliable in meeting demand at peak times and wrongly, and irrationally sought to allocate transmission costs as if they were caused by conventional generation.

- 37 In relation to the third ground, the Claimant accepts that if it fails in relation to grounds 1 and 2 of its claim, then the decision to modify the TNUoS by adopting WACM 2 will not constitute state aid. In those circumstances, however, the Claimant contends that the United Kingdom must re-notify certain other decisions concerning the grant of subsidies in relation to the generation of energy from renewable sources to the European Commission.

### THE FIRST AND SECOND GROUNDS – DISCRIMINATION AND RELEVANT CONSIDERATIONS

#### *The First Issue – Unlawful Discrimination*

- 38 The Claimant essentially contends that the decision involves differential treatment between different classes of generators which, unless objectively justified, constitutes unlawful discrimination prohibited by the Directive. The principal differential treatment relied upon is the fact that conventional generators will pay the Peak Security Tariff element of the modified TNUoS charging system but intermittent generators will not. The Claimant contends that the Directive contains an exhaustive list of matters that may constitute objective discrimination for differential treatment and that list does not include seeking to achieve cost-reflectivity in the sense that that phrase is used in the decision.
- 39 The principle of non-discrimination is a general principle of European Union law. It finds specific expression in the Directive in respect of particular obligations. Transmission owners, for example, must ensure non-discrimination as between system users or classes of system users (see Article 12(f) of the Directive). Member States must ensure the implementation of a system of third party access to the transmission and distribution system which is applicable to all eligible customers and is “applied objectively and without discrimination between system users”: see Article 32 of the Directive.
- 40 In the present case, in carrying out their functions under the Directive, national regulatory authorities, such as the Authority, have a duty to help achieve “in the most cost-effective way, the development of secure, reliable and efficient non-discriminatory systems”: see Article 36(d) of the Directive. The relevant function here is the fixing or approving of transmission or distribution tariffs or their methodologies (see Article 37(1)(a) of the Directive). The Defendant, and the Interested Parties, accept that the obligation to ensure non-discrimination applies to the process of the modification of the charging system that emerges through the licensing system and approval by the Authority. The real issue is whether the proposed modification involves any unlawful discrimination.
- 41 The content of the principle of non-discrimination and the appropriate method of analysing situations to determine whether a situation does involve unlawful discrimination has been considered on numerous occasions by the courts. For present purposes, it is sufficient to refer to the discussion in the judgment of Lord Sumption in *R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills* [2015] PTSR 322 at paragraphs 26 to 27. The general principle requires that comparable situations are not to be treated differently, or different situations treated in the same way, without objective justification. On occasions, the focus is on a two-stage process: are two situations comparable and if so, is any differential treatment objectively justifiable? On other

occasions, the two questions tend to be merged into a single issue, that is, is there a relevant difference between the two situations sufficient to justify the differential treatment?

- 42 In the present case, the differential treatment involves the fact that only certain classes of generators, the conventional generators, are liable to pay one element of the TNUoS charges, the Peak Security Tariff (which in turn, forms one element of the system of transmission charges). In order to determine if there is unlawful discrimination, the question can be phrased either as whether the two classes of generators are in a truly comparable situation (and if so, whether the differential treatment is objectively justified) or whether there is a sufficient, relevant difference between the two classes of generators as to justify differential treatment in terms of liability to pay the Peak Security Tariff.
- 43 In my judgment, there is a material, relevant difference between the two classes of generators or, put differently, the two classes of generators are not in a comparable position so far as the Peak Security Tariff is concerned. The fact is that the arrangements governing investment planning in the transmission system, set out in the SQSS, seek to ensure that the system has the minimum transmission capability required to convey sufficient electricity at times of peak demand. Furthermore, intermittent generation cannot be relied upon to be able to generate electricity at particular times: their ability to generate electricity at any particular time is dependent on environmental factors such as wind or sun. Intermittent generation cannot, therefore, be relied upon to generate electricity at times of peak demand. Thus, ensuring the minimum transmission capability to convey sufficient electricity at times of peak demand necessarily at present involves the assumption that intermittent generators may not be able to contribute to meeting demand at peak times. The transmission system, therefore, has to ensure that it has the minimum capability to convey electricity from conventional generators at times of peak demand. Those arrangements are rational, lawful arrangements. Indeed, the Claimant has expressly asserted that it does not seek to challenge the lawfulness of the SQSS and the criteria governing investment planning in the transmission system.
- 44 Thereafter, aligning the charging system with the criteria governing investment planning reflects a relevant, material difference between conventional generators and intermittent generators. It reflects the fact that, so far as investment costs arise out of ensuring the Demand Security Criterion is met, those investment costs arise out of the need to upgrade or expand the transmission system to ensure that that system is capable of accommodating the generation of electricity to meet demand at peak times. It is the activities of conventional generators that are relevant to that decision as the generating capacities of intermittent generators is not taken into account in planning the investment necessary to ensure demand at peak times.
- 45 Assessed in that light, the decision in relation to the Peak Security Tariff does not involve unlawful discrimination between classes of users in a way precluded by the Directive or, indeed, any general principle of EU law prohibiting discrimination. Any differential treatment is based on a material, relevant difference arising out of the system relating to the making of investment decisions.
- 46 The Claimant in its skeleton argument (read with the grounds and its reply) and oral submissions approaches the issue on the basis that, where there is differential treatment, that needs to be objectively justified and the Directive contains a

limited set of justifications which do not include or permit of differential treatment for the reasons relied upon by the Authority as justifying the decision (cost reflectivity as that phrase is used in the decision). In my judgment, however, the matter can properly be approached in this context either by considering if the position of the two classes of generators are comparable, or alternatively, by considering if there is a relevant, material difference between the two classes of generators which justifies the differential treatment of the two classes. The EU principle of non-discrimination, reflected in the Directive, does not preclude consideration of whether there is a material difference between the situation of one group of economic operators as compared with another group in order to see whether or not particular differential treatment is intended to be prohibited.

- 47 Furthermore, the Claimant relies upon a number of specific provisions of the Directive as indicating firstly what matters amount to objective justification for differential treatment and secondly as indicating that only those matters amount to an exhaustive list. Those provisions appear most clearly from paragraph 58 of its reply dated 24 March 2015. The first provision, Article 3.15 of the Directive, relates to the general rules for the organisation of the sector and the imposition of public service obligations and consumer protection. The second relates to the adoption of technical rules. Neither provision is, or is intended to be, a description of the circumstances in which differential treatment in respect of charging methodologies concerning the transmission system is permissible. Nor does the fact that such provisions exist in these areas indicate that the absence of specific provisions in relation to charging methodologies demonstrates that relevant, material differences between classes of user must be ignored. The Claimant further relies in this context on Article 32 of the Directive which deals with third-party access to the transmission system. Article 32.2 provides that access may be refused where the transmission system lacks the necessary capacity. That is not specifically relevant to charging methodologies nor, again, does the presence of a specific provision dealing with a specific issue in relation to third-party access justify the inference that relevant, material differences between different classes of user must be ignored when considering charging methodologies. Similar observations apply to the other two examples given by the Claimant which deal with the approval of generation capacity (Article 7.2(j) and (k) of the Directive) and priority access for connection for renewable resources in Directive 2009/28/EC.

*The Second Issue – The Interpretation of the Directive*

- 48 The second issue advanced by the Claimant is that the Authority has misinterpreted the term “cost-reflective” in the recitals to the Directive or as part of the meaning of “non-discrimination” as the concept is used in the Directive. The Claimant essentially contends that the Directive intends the phrase “cost-reflectivity” to mean that the charges levied by transmission owners (who are natural monopolies) should not be excessive, that is the charges recovered should reflect the total costs incurred by transmission owners. The Claimant relies, in this context, on recital 36 of the Directive in particular as indicating the proper meaning and use of the concept of “cost-reflectivity” in the context of the Directive.
- 49 The Claimant contends that the Authority is wrong to use a different concept of cost-reflectivity as described in section 2 of the decision (the essential parts of which are set out at paragraph 24 above) where the Authority focuses on the impact of different classes of generators on the costs incurred in providing the



minimum necessary transmission capability to ensure electricity can be conveyed to meet demand at peak times. Cost reflectivity in the latter sense refers to the impact that different classes of user have on the system, and provides for differentiation on that basis, rather than focussing on the overall costs levied by the transmission owner to ensure that those costs are not excessive. The Claimant, in its skeleton argument, further contends that the Authority is now adopting an ex post facto rationalisation of its decision and taking the view that it has a duty to ensure cost reflectivity as that phrase is used in the decision.

- 50 In my judgment, the proper approach to this aspect of the case is, again, to determine the scope of the obligation upon the Authority and then to consider whether the decision involves a breach of that obligation. The obligation is, in essence, to perform its duty to fix or approve charging methodologies in a way that has regard to its obligations under Article 36 of the Directive. That includes helping to achieve “in the most cost-effective way”, secure, reliable efficient and “non-discriminatory” systems. (see Article 36(d) of the Directive). It is also right to bear in mind the obligations in Article 36(e) to (g) of the Directive.
- 51 There is no basis, in my judgment, for interpreting the obligations of the Authority, including its obligations in relation to non-discrimination, as precluding an ability to differentiate between different classes of users on the basis of the different impact that those different classes of users have on the costs incurred by the transmission owners. The provisions of the Directive, properly analysed, do not preclude such differentiation. The obligations in Article 36, by way of example, are consistent with permitting the Authority to differentiate between classes of user, provided that there is a relevant, material reason for doing so. Such differentiation is compatible, as explained above, with the principle of non-discrimination. Such differentiation is capable of contributing to a cost-effective system and promoting effective competition in the way explained in the decision itself. The Claimant is, therefore, wrong in my judgment in contending that such differentiation is precluded by the provisions of the Directive. The Directive does not require that in all contexts, including approving the charging methodology for transmission charges, the Authority must treat cost-reflectivity as meaning that the overall charges levied by the transmission owners do not exceed their costs. The use of other methods, including a methodology which relates the charges levied on classes of user to the impact that such users have on the transmission system (described in the decision as “cost-reflectivity”) is also compatible with the Directive. There has, therefore, been no misinterpretation by the Authority of the requirements of the Directive. The decision of the Authority, based as it is on a charging methodology which is considered better to reflect the costs incurred in respect of the transmission system, and which is considered to facilitate other legitimate objectives, such as the promotion of effective competition, is compatible with the obligations placed upon the Authority. The Authority is not relying upon an ex post facto rationalisation of the reasons for its decision. The reasons for the decision appear from the text of the decision itself.

*The Third Issue – The BSUoS Charges*

- 52 The third issue concerns a claim that the Authority has ignored an element of transmission charging, namely the BSUoS charges. The complaint is put in different ways. The complaint in part is that conventional generators are being charged the Peak Security Tariff element (and other elements of) the TNUoS charges but are then also being charged BSUoS charges (levied on a different basis). It is said that the conventional generators are therefore paying charges to

reflect the need to ensure that the transmission system can carry sufficient electricity to meet demand at peak times and are being asked to pay again when there are constraints on the system. It is variously said to be irrational, arbitrary or formalistic also to consider the TNUoS charges in isolation from the BSUoS charges.

- 53 This judicial review claim is a challenge to a decision approving a modification to the methodology of the TNUoS charging system. The charges covered by that aspect of the system relate to the costs incurred in investing in the transmission system to ensure that it can convey sufficient electricity to meet demand at peak times (the Peak Security Tariff) and investment in infrastructure which is considered more efficient to deal with constraints (as opposed to paying generators not to exercise their right of access to transmission system) which is reflected in the Year Round Tariff. They, therefore, reflect the charges involved in paying for investment in the transmission system infrastructure. The question in this judicial review is whether the proposed modification to the charging methodology, which will determine who is liable to pay for those investment costs, is lawful.
- 54 The BSUoS charges deal with different costs: these are costs incurred by the transmission operator and include the cost of paying generators not to use the system when there are constraints which prevent all those wishing to have access to the transmission system from being able to do so. The fact that one set of costs has not been the subject of review and modification does not demonstrate that there is any legal flaw in the modification proposed for a different set of costs. It is not irrational, arbitrary or formalistic to deal with the costs of investment in infrastructure separately from other types of costs that arise in connection with the system. For the reasons given above, there is nothing discriminatory in the way that the TNUoS charges are levied. The TNUoS charges do not become unlawful or discriminatory because a different set of costs is levied by reference to a different formula. This court is not dealing with a challenge to the BSUoS charging system and is not asked to rule on whether or not that system, based as it is on a different charging methodology, is lawful.

*The Fourth Issue – Contribution to Meeting Demand at Peak Times*

- 55 The fourth issue is said to be the fact that the Authority ignored the evidence of the contribution made by intermittent generators to meeting demand at peak times. The Claimant contends that, in fact, intermittent generators do contribute (and increasingly so) to meeting demand at peak times. The Claimant invites the court to conclude, on the evidence, that wind generation produces in the region of 23% of its capacity at peak times (see, for example, the first witness statement of Mr Druce at paragraph 24 and annex 1). There has been debate between the parties as to precisely what the figures referred to mean, how the figures are to be described and what their significance is. In my judgment, it is not necessary for the court to reach a conclusion on that debate, nor is a judicial review court, with limited expertise, capable of reaching conclusions on matters involving complex technical and economic judgment on the basis of limited evidence and submissions.
- 56 The reason why it is not necessary to reach a conclusion on the contribution made by intermittent generation such as wind power is this. The basis for the proposed charging modification is the alignment of the charging methodology with the system for investment planning in relation to transmission system infrastructure, that is the SQSS. That system, the SQSS, is not challenged in these proceedings. The system requires that the transmission system must be capable of conveying

sufficient electricity at times of peak demand. The system proceeds on the basis that intermittent generators cannot be relied upon to contribute to meeting that demand. The reason is clear. Even if intermittent generation generates electricity in some places at some times during the period of peak demand, it cannot be relied upon as doing so at all times, or indeed, at any particular time. Such generation is dependent on environmental factors such as whether the wind is blowing or the sun shining. Thus intermittent generation cannot be relied upon to meet the demand security criterion. For that reason, the transmission owners will need to ensure that the transmission infrastructure is capable of carrying sufficient generation from conventional generators. In those circumstances, the Authority determined that the charges should be recovered from the conventional generators as investment decisions result from the provision of sufficient transmission capacity for those generators to meet demand at peak time. Intermittent generation may use the infrastructure created to convey electricity generated by it at times of peak demand. The purpose of the Peak Security Tariff element of the TNUoS charging system, however, is intended to enable the transmission owners to recover the charges incurred in investing in infrastructure to ensure security of supply during times of peak demand (investments decisions which, under the current system, will be based upon the capacity of conventional generators). It is not based upon the use of the transmission system and is not intended to reflect the actual use made of the transmission system by particular generators.

*The Fifth Issue – The Alignment of the TNUoS Charging System with the SQSS Criteria*

- 57 The fifth issue involves the contention that the Authority has elided what the Claimant recognises is the legitimate and appropriate policy aim of ensuring security of supply, as reflected in the SQSS and the Demand Security Criterion, with the fact that conventional generators are more reliable in meeting demand at peak times. It is said that this is irrational and unlawful. Reference is made to comments made at the time that the SQSS was amended indicating that the changes to the investment criteria were not thought to have implications for the charging methodology (see, for example, paragraph 59 of the first witness statement of Mr Reed).
- 58 The decision to align the charging methodology with the criteria governing the making of investment decisions on infrastructure is, in my judgment, a rational decision. The Authority is entitled, following extensive review and consultation on the charging system, to take the view that it is appropriate to modify the charging methodology so that the allocation of costs better reflects the reasons why particular investment decisions have been taken. In relation to the Peak Security Tariff, those investment costs are incurred to meet the demand security criterion which is based on the need to ensure the transmission system has the minimum capacity necessary to convey sufficient electricity from conventional generators to meet demand at peak times. The Year Round Tariff element is intended to reflect a different set of investment decisions, namely those taken to provide additional infrastructure over and above that required to meet demand at peak times. That investment is considered a more efficient means of dealing with constraints within the transmission system. Different generators, broadly, have a different impact on constraints depending on their output. The Year Round Tariff, therefore, reflects different investment decisions, and operates on the basis of output, adjusted in the case of “shared capacity” by historic annual load factors. That too, is a rational means of providing for the recovery of transmission costs.

Comments made at the time of the amendment to the SQSS do not render the decision irrational. Following extensive review and consideration, the Authority has formed the view, which it is entitled to do, that aligning part of the charging system with the criteria for investment in the transmission system will further a number of relevant objectives. It is entitled, on the material before it, to reach that conclusion.

- 59 For all those reasons, the first two grounds of challenge fail. The decision does not involve unlawful discrimination and does not involve any illegality or unreasonableness, in the sense in which that word is used in public law. There was no failure to take account of relevant considerations.

#### THE THIRD GROUND – STATE AID

- 60 The Claimant recognised in its written and oral submissions that if it failed to establish that the decision to approve the proposed modification to the charging methodology was unlawful on either the first or second ground of challenge, then the decision would not involve the provision of state aid within the meaning of Articles 107 and 108 of the TFEU. Consequently, there would be no requirement to notify the decision to the European Commission pursuant to Article 108(3) of the TFEU and no obligation to refrain from implementing the decision pending a final decision. In my judgment, the Claimant was correct in that concession. The decision to approve a charging methodology which reflected the impact that different generators, or classes of generators, have on investment decisions relating to transmission system infrastructure does not involve state aid within the meaning of Article 107 TFEU. As a minimum, it confers no advantage upon any generator or class of generators and, for that reason alone, the decision would not amount to state aid.
- 61 The Claimant, however, sought to advance a different challenge in reliance on Article 108(3) of the TFEU. The Claimant wishes to contend that another scheme (not the decision under challenge) had to be re-notified to the European Commission. The other scheme is a scheme, referred to as the renewables obligations scheme, relating to the provision of subsidies in connection with the production of energy from renewable sources. The Claimant wished to contend that the approval of the renewables obligations scheme would have been based on certain costs assumptions and, if those assumptions have changed as a result of the decision, then the renewables obligations scheme needs to be re-notified to the European Commission. Further, it was implied that the decision cannot be implemented until the outcome of the re-notification of the renewables obligations scheme is known.
- 62 This newly formulated ground of challenge is not one that this court should, in my judgment, entertain. First, the claim forms no part of the current judicial review. The grounds set out in the claim form do not, on any fair reading, involve any claim that the renewable obligations scheme needs to be re-notified to the European Commission. As is clear from the claim form, read fairly and as a whole, the challenge was based on the allegation that the decision to approve a modification in the charging methodology of the TNUoS charges had to be notified in accordance with Article 108(3) of the TFEU, not that other schemes needed to be notified. See, for example, the description of the grounds of challenge in paragraph 40(4) and paragraph 102 of the Statement of Facts and grounds in the claim form. Secondly, and even more fundamentally, the court has not been provided with the evidence that it would need to have in order to consider whether or not there was an obligation to notify the renewables

obligations scheme. The scheme itself is not included in the evidence before the court and there was not even a description of the renewables obligations scheme included in the material before the court. In those circumstances, it could not be right for this court, or fair to the other parties, to seek to adjudicate on the question of whether the renewables obligations scheme did, or did not, need to be re-notified.

### ANCILLARY MATTERS

63 The Claimant has relied upon a large body of evidence. A large number of legal points were made by counsel for all parties in their written documents and skeleton arguments, oral submissions and in unsolicited submissions (and evidence) submitted by some parties after the conclusion of the hearing. I have sought in this judgment to deal with what I consider to be the principal points raised and the principal evidence relating to those matters. I have not sought to deal with each point made or each and every item of evidence referred to. Rather, this judgment focuses on the principal issues that need to be considered to determine if the decision under challenge is lawful. All the parties, however, can be assured that I have carefully considered all the points made and all the documents relied upon. Further, the Claimant has also expressed its view, in the concluding remarks of its skeleton, of the way in which the issues should be phrased. As will be seen from the above, I have considered the grounds of claim, other documents and the substance of five issues identified in the Claimant's skeleton argument and developed in oral submission on its behalf. However, the issues that arise have been described, and analysed, in the way that this court considers appropriate rather than in the way described by the Claimant.

### CONCLUSION

64 The decision of the Authority to approve the modification known as WACM 2 to the charging methodology relating to the recovery of costs incurred in connection with investment in the transmission system for electricity is lawful. The decision establishes a charging methodology which reflects the impact that different classes of generators are anticipated to have on investment costs in terms of providing the infrastructure necessary to ensure demand at peak times is met and, broadly, the impact that particular generators have on investment decisions taken to address constraints within the system. That does not involve any unlawful discrimination and is not based upon a misinterpretation of the Directive. The decision to modify the charging methodology in the way proposed in the modification is rational and the Authority has not failed to take account of any relevant considerations in reaching its decisions. The decision itself does not involve the conferring of state aid within the meaning of Articles 107 and 108 of the TFEU. The claim for judicial review is, therefore, dismissed.