DISPUTE BETWEEN BROCKAGHBOY WINDFARM LIMITED AND SONI IN RELATION TO A PARTIAL REBATE ON CONNECTION CHARGES

DECISION/DETERMINATION

30 January 2023

CONTENTS

1 SECTION ONE: INTRODUCTION

1.1 On 2 February 2022[1] the Northern Ireland Authority for Utility Regulation (the **Authority**[2]) received an application (the **BWFL Application (B1)**) from Brockaghboy Windfarm Limited (**BWFL**) requesting that the Authority determine a dispute (the **Dispute**) between BWFL and SONI Limited (**SONI**): together **the Parties.**

1.2 The Dispute concerns a rebate (**the Partial Rebate**) payable by SONI to BWFL following the connection of the Agivey Cluster substation (the **ACSS**) - on 3 December 2021 - to that part of the all-island transmission networks located in Northern Ireland (the **NI Transmission System**).

1.3 The Partial Rebate is payable in respect of the charges (the **Connection Charges**) paid (originally) by BWFL to SONI pursuant to an agreement (the **Connection Agreement**: (**B32**)) between the Parties providing for the connection of BWFL's wind farm (the **BWFL Wind Farm**) to the NI Transmission System.

1.4 There is no dispute between the Parties about the appropriateness of the Connection Charges as originally levied.

1.5 SONI is the licensed transmission system operator (**TSO**) for Northern Ireland. It holds a licence - issued under Article 10(1)(b) of the Electricity (Northern Ireland) Order 1992 (**the Electricity Order: A1[3])** authorising its activities in this regard (**the SONI Licence: A2**). The SONI Licence includes various conditions.[4]

1.6 The Parties agree that ***a*** Partial Rebate (amount) is payable (by SONI) and due - upon the stated connection of the ACSS to the NI Transmission System - to

[1] A previous application (**the December 2021 BWFL Application**) - in terms like the BWFL Application – was received in December 2021. The December 2021 BWFL Application was superseded by the BWFL Application. The BWFL Application is constituted by a cover letter dated 2 February 2022 (signed by [redacted] of TCI Renewables Limited) together with an Appendix document supported by various Exhibits.

[2] In this, and all further documentation, we use the words "we" "us" "our" "UR" "Utility Regulator" and "Authority" interchangeably to refer to the Northern Ireland Authority for Utility Regulation.

[3] 2022-01-17-soni-tso-consolidated.pdf (uregni.gov.uk)

[4] Included pursuant to Article 11 of the Electricity Order.

BWFL, and that the (amount of) Partial Rebate is to be calculated by applying the provisions of paragraph 7 of SONI's published Transmission Connection Charging Methodology Statement (the **TCCMS: A11**[5]) entitled "*Costs Allocation Rules for Shared Assets*" (the **Rules**) to the factual circumstances involved in the connection of the BWFL Wind Farm and the ACSS to the NI Transmission System (the **given circumstances**).

1.7 However, the Parties disagree as to what *amount* of Partial Rebate results from the (proper) application of the Rules in the given circumstances.

1.8 BWFL contends that SONI has mis-applied the Rules in calculating the (amount of) the Partial Rebate and in doing so has under-calculated the Partial Rebate. SONI denies this.

1.9 The Partial Rebate paid to BWFL by SONI on 7 January 2022 is £[redacted] (the **SONI Partial Rebate Amount**). SONI's methodology for the calculation of the SONI Partial Rebate Amount (in the given circumstances) is explained in an information note prepared by SONI, sent to BWFL, and dated 12 January 2022 (**the January Information Note: B2**).

1.10 BWFL contends that the Partial Rebate – properly calculated in the given circumstances - is £[redacted] (the **BWFL Partial Rebate Amount**). BWFL's approach to the calculation of the amount of the Partial Rebate (which compares to that used by SONI in the January Information Note) is set out in a document entitled "*BWFL Rebate Calculation*" [**Exhibit 4** to the BWFL Application].

1.11 The application for connection of the ACSS[6] to the NI transmission system was made by NIE Networks Limited (**NIEN**) in its role as the licensed *distribution* network operator and owner in Northern Ireland (**NIEN Distribution or NIEN DNO**).

[5] TITLE (soni.ltd.uk)
[6] In so far as it comprises part of the distribution system.

1.12 The distribution system in Northern Ireland operates at voltages below the transmission level (110 kV). NIEN's distribution licence – granted under Art 10 of the Electricity Order - is at **A4**.

1.13 NIEN also *owns and maintains* the NI Transmission System (which is operated by SONI) under a licence to participate in *transmission* granted pursuant to Art 10 of the Electricity Order, and in this capacity, it is referred to as the Transmission Owner (**NIEN TO**). The NIEN transmission licence is at **A7**. It is appropriate to distinguish between the role of NIEN as NIEN Distribution and NIEN as NIEN TO.

1.14 By letter to the Parties dated 29 April 2022 (**B3**) the Authority confirmed that the BWFL Application (and with it the Dispute) was accepted for:

(a) *decision* under Condition 26 (3) of the SONI Licence; and

(b) *determination* under Article 31A of the Electricity Order (**Art 31A**).

1.15 The decision recorded in the 29 April letter confirmed a provisional decision – to the same effect – set out in a letter to the Parties dated 7 April 2022 (**B18**). The letter of 29 April therefore falls to be read with the letter of 7 April when determining the basis upon which the BWFL Application (and with it the Dispute) has been accepted for adjudication.

1.16 Reading the letters in that way confirms that

(a) the Condition 26(3) *decision* is to be restricted to resolving the Dispute in so far as it concerns the proper calculation of the amount of the Partial Rebate (in the given circumstances); the Authority considering that there is demonstrated a qualifying *proposal for variation* within the meaning of Condition 26(3) in the Parties' rival contentions as to the proper calculation of the Partial Rebate: a rebate that brings about a reduction (i.e. downward *variation*) to the Connection Charges (originally paid by BWFL on foot of the Connection Agreement and standing as a "*term*" of

that agreement) and is specifically provided for within the machinery of the Connection Agreement[7];

(b) the Art 31A *determinatio*n concerns – in the main – a complaint made about SONI's calculation of the Partial Renate, but also extends to a complaint made about an alleged lack of information from SONI (involving a claimed lack of transparency) in and about the interactions between SONI and BWFL concerning the arrangements for (future)[8] funding or payment of any Partial Rebate (against the Connection Charges as originally levied) due to BWFL upon (any future) connection of the ACSS to the NI Transmission System;[9] and

(c) there is considerable overlap between the subject of the C 26(3) decision and the Art 31A determination; namely, the proper calculation of the amount of the Partial Rebate in the given circumstances

1.17 We are the duly appointed joint decision makers (the **Decision-Makers**) on the Dispute. Our proposed appointment as the Decision-Makers was notified to the Parties in a letter of 29 April 2022 (**B3**) with the Parties invited to register any objection by close 3 May 2022. Neither party objected to the proposed appointment within the specified period.[10] We act as delegates (and on behalf) of the Authority.

1.18 In reaching this decision/determination, we have reviewed and considered the following materials –

(a) A Statement of Case (the **Statement**) prepared for us by the case management team (the **CMT**) which sets out: an overview of the background to the Dispute; the applicable statutory and regulatory

[7] Noting too the provisions of clause 6.2 of the Connection Agreement.
[8] To clarify, "future" means that period in (future) prospect at the time of the relevant interactions.
[9] As will be seen BWFL contends that this claim is "borne out" by a separate dispute (the **TIA dispute/Determination**) between SONI and NIEN Distribution as to the terms (offered by SONI) to NIEN Distribution for connection of the ACSS to the NI Transmission System.
[10] The letter of 29 April 2022 also stated that "*a failure to make any such submission [in objection to the proposed appointment] shall be read as an acceptance of the proposed appointment/s*".

framework; the views of the Parties in respect of the Dispute; and the issues to be adjudicated/resolved.

(b) The wider set of documents set out in Appendix 1 to the Statement, as now updated in Appendix 1 to this determination/decision (which includes the Parties' submissions on the Dispute).

1.19 The Parties were afforded the opportunity to comment on a draft of the Statement. The comments received were considered by the CMT in preparing the Statement.

1.20 The Parties were also afforded the opportunity to make written representations on our draft Decision/Determination as sent to them on 19 December 2022.

Submissions on the Draft Decision/Determination

1.21 Both Parties submitted a written response to the Draft Decision/Determination. Only BWFL made substantive representations. SONI confirmed that it had no substantive representations to make.

1.22 We have considered BWFL's response in full in reaching this final decision/determination. We address each substantive point made by BWFL in the requisite section of this final decision/determination. However, we deal now – as a preliminary matter – with a point made (in BWFL's response) in relation to independence/impartiality.

1.23 BWFL's response states that

"*the draft adjudication is, not surprisingly in BWFL's view, consistent with the same amount as the CCSA X_t value approved by the Authority in the December 2021 CCSA_t value decision. This is precisely why BWFL raised the impartiality and independence points earlier in the process which have not been adequately dealt with and/or addressed as part of this dispute process.*"

1.24 We do not accept BWFL's claim (first raised by email dated 22 July 2022 (**B 52**)). The Authority's letters of 1 August 2022 (**B 89**) and 17 August 2022 (**B 60**) properly address the points raised by BWFL about independence/impartiality.

1.25 Further, in determining/deciding the Dispute we have not considered ourselves bound (in any way) to make a decision/determination aligned to or "consistent" with either the December 2021 CCSA_t value decision or the reasons for that decision. We have reached our determination/decision on the evidence provided and submissions made in this Dispute.

2 SECTION TWO: THE PARTIES

BWFL

2.1 BWFL (NI067528) is a company involved in the generation of electricity at the BWFL Wind Farm. It is authorised in that regard by a generating licence granted under Art 10 of the Electricity Order.[11] It is a wholly owned subsidiary of Greencoat UK Wind Holdco Limited which is ultimately controlled by Greencoat UK Wind PLC.

2.2 BWFL's registered office is at –

Brockaghboy Windfarm Ltd

Unit 4

The Legacy Building

Queens Road, Belfast

BT3 9DT

2.3 The BWFL Wind Farm is a 19 turbine with a maximum export capacity (**MEC**) of [redacted]MW windfarm located in County Londonderry, Northern Ireland.

2.4 The BWFL Wind Farm has been connected (and has exported generated electricity) to the all-island transmission networks since 29 August 2017 (being the date of the Connection Agreement).

2.5 BWFL has authorised TCI Renewables (**TCI**) to act as its nominated representative *viz*. the BWFL Application. The nominated contact for TCI is a Mr [redacted], Director TCI. The Authority has accepted this authorisation arrangement.[12] Pinsent Masons Solicitors act as the instructed solicitors for BWFL/TCI.

[11] The BWFL generating licence is at **B41**
[12] Provision is made for this in the Disputes Policy.

SONI

2.6 SONI is – as noted in Section One above - the licensed electricity Transmission System Operator (**TSO**) for Northern Ireland. SONI is a subsidiary of EirGrid PLC.

2.7 SONI has been responsible for *planning* for the future of the NI Transmission System since 2014.

2.8 Among other things, SONI is required, under the SONI Licence (Condition 25 (2) refers), subject to stated exceptions, to offer to enter into a connection agreement for connection to the all-island transmission networks with exit or entry points on the NI Transmission System upon receipt of an application for same made by any person.

2.9 SONI is represented by Tughans solicitors, Belfast.

3 SECTION THREE: APPLICABLE LEGAL/REGULATORY FRAMEWORK

3.1 The legal/regulatory framework applicable (as derived from the Statement) in deciding/determining the Dispute is summarised below.[13]

The Electricity Order (A1)[14]

3.2 Article 3 of the Electricity Order provides a definition of a "*transmission system*" as a system which –

(a) *Consists (wholly or mainly) of high voltage[15] lines and electrical plant; and*

(b) *Is used for conveying electricity –*

(i) *From a generating station to a substation;*

(ii) *From one generating station to another;*

(iii) *From one substation to another;*

(iv) *To a substation in Northern Ireland from a place outside Northern Ireland; or*

(v) *From a substation in Northern Ireland to a place outside Northern Ireland;*

3.3 Article 10 (1)(b) of the Electricity Order provides (relevantly)

10. Licences authorising supply, etc.

(1) The Authority may grant a licence authorising any person—

[13] The Decision Makers are not constrained by this summary and are at liberty to examine any relevant instrument.
[14] It is noted that the BWFL Application references Article 26 of the Electricity Order. That provision is of no potential relevance to the resolution of the Dispute, being concerned with disputes as to distribution connections. The Dispute does not concern a distribution connection. It is solely concerned with connections to the NI Transmission System.
[15] Defined to be at or over 110KV.

(b) to participate in the transmission of electricity for that purpose[16]

3.4 Article 11 of the Electricity Order provides (relevantly)

11. Conditions of licences

(1) A licence may include—

(a) such conditions (whether or not relating to the activities authorised by the licence) as appear to the grantor to be requisite or expedient . . .

3.5 Article 12 (2) of the Electricity Order provides

(2) It shall be the duty of [SONI as] the holder of a licence under Article 10(1)(b), as appropriate having regard to the activities authorised by the licence, to—

(a) take such steps as are reasonably practicable to—

(i) ensure the development and maintenance of an efficient, co-ordinated and economical system of electricity transmission which has the long-term ability to meet reasonable demands for the transmission of electricity; and

(ii) contribute to security of supply through adequate transmission capacity and system reliability; and

(b) facilitate competition in the supply and generation of electricity.

Article 31A

3.6 Article 31A provides (relevantly):

31A. Dispute resolution

(1) Any person may make a complaint under this Article (hereinafter referred to as "a complaint") if—

[16] Again, SONI is the licenced TSO for NI.

(a) the subject matter of the complaint constitutes a dispute between the complainant and—

(i) [SONI as] the holder of a transmission licence;

. . .

(b) it is wholly or mainly a complaint against that holder regarding an obligation imposed upon him pursuant to the Directive or Directive 2009/72/EC of the European Parliament and of the Council of 13th July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC;[17] *and*

(c) the subject matter of the complaint—

(i) does not fall to be dealt with under Article 26 or Article 42A; and

(ii) is not capable of being determined pursuant to any other provision of this Order.

(2) A complaint shall be made in writing to the Authority and shall be accompanied by such information as is necessary or expedient to allow the Authority to make a determination in relation to the complaint.

(3) The Authority shall establish and publish such procedures as it thinks appropriate for the determination by it of a complaint

(4) The procedures established under paragraph (3) shall provide for the determination of the complaint to be notified to the complainant within the requisite period or such longer period as the Authority may agree with the complainant.

[17] The BWFL Application mentions (at section 2.9), correctly, that the 2019 Directive is a recast version of the now repealed 2009 Directive. It goes on to state that the 2019 Directive has effect by dint of the Ireland/NI Protocol (**the Protocol**): itself incorporated into domestic UK law by the terms of section 7A of the European (Withdrawal Agreement) Act 2020. That too is correct. However, there is no need to develop that point, or examine the provisions of the Protocol in making a decision/determination on the Dispute. The provisions of Art 31A – incorporating reference to the directives cited - stand as effective provisions of domestic law. Neither Party appears to dispute that basic proposition. Furthermore, the facility provided by Condition 26 (3) is not contingent on the Protocol.

(5) For the purposes of paragraph (4) the requisite period in any case means—

(a) the period of two months from the date when the complaint was received by the Authority; or

(b) where the information sent to the Authority under paragraph (2) was in its opinion insufficient to enable it to make a determination, the period of four months from the date the complaint was received by the Authority.

(5A) Where the Authority makes a determination under this Article, it may include in the determination an order requiring any party to the dispute to pay such sum in respect of the costs or expenses incurred by the Authority in making the determination as the Authority considers appropriate and this order shall be final and shall be enforceable as if it were a judgement of the county court.

(5B) In making an order under paragraph (5A), the Authority shall have regard to the conduct and means of the parties and other relevant circumstances.

(6) For the purposes of this Article "determination" in relation to any complaint means a determination about the exercise of any power or duty conferred or imposed on the Authority in relation to electricity under this Order or the Energy (Northern Ireland) Order 2003 insofar as that power or duty relates to the subject matter of the complaint.

(7) . . .

3.7 *"Directive" is defined – in Article 3 of the Electricity Order - as follows:*

*"**the Directive**" means Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU6*

The Directive (**the 2019 Directive**) is at **A3.**

3.8 *Directive 2009/72/EC* of the European Parliament and of the Council of 13th July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (**the 2009 Directive**) is at **A15**.

3.9 Relevant provisions of the 2009 Directive are repeated (recast) in cognate provisions of the 2019 Directive.[18] In what follows we set out the relevant provisions of the 2019 Directive with the corresponding provision of the 2009 Directive identified in brackets. The 2009 Directive and the 2019 Directive are referred to, together, as **the Directives**.

Provisions of the Directives cited by BWFL

A. Article 6 [Art 32(1) of the 2009 Directive]

Third-party access

1. Member States shall ensure the implementation of a system of third-party access to the transmission and distribution systems based on published tariffs, applicable to all customers and applied objectively and without discrimination between system users. Member States shall ensure that those tariffs, or the methodologies underlying their calculation, are approved in accordance with Article 59 prior to their entry into force and that those tariffs, and the methodologies — where only methodologies are approved — are published prior to their entry into force

. . .

Article 40 *[Art 12 of the 2009 Directive]*

1. Each transmission system operator shall be responsible for:

. . .

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

[18] It is noted that there is no material difference – as far as the Dispute is concerned – between the provisions of the corresponding parts of the Directives.

(g) providing system users with the information they need for efficient access to the system;

Article 46.2 *[Art 17(2) of the 2009 Directive]*

2. The activity of electricity transmission shall include at least the following tasks in addition to those listed in Article 40:

(c) granting and managing third-party access on a non-discriminatory basis between system users or classes of system users;

(d) the collection of all the transmission system related charges including access charges, energy for losses and ancillary services charges;

(e) the operation, maintenance and development of a secure, efficient and economic transmission system;

(f) investment planning ensuring the long-term ability of the system to meet reasonable demand and guaranteeing security of supply;

*. . .**Article 47.5*** *[Art 18(5) of the 2009 Directive]*

5. In fulfilling their tasks in Article 40 and Article 46(2) of this Directive [Art 12 and Art 17(2) of the 2009 Directive] and in complying with obligations set out in Articles 16, 18, 19 and 50 of Regulation (EU) 2019/943 [Article 14, 15 and 16 of Regulation 714/2009/EC], transmission system operators shall not discriminate against different persons or entities and shall not restrict, distort or prevent competition[19] in generation or supply.

Provisions of Regulation (EU) 2019/943 referenced in Article 47.5 of the 2019 Directive

3.10 Article 47(5) of the 2019 Directive references parts of Regulation (EU) 2019/943 (with corresponding provisions in Regulation 2009/714/EC]. Those parts are

[19] The Parties have been advised that the Authority is not treating the BWFL Application as a competition law complaint.

Articles 6, 18, 19 and 50. Only Article 18 is of any potential relevance to the Dispute and is set out as follows:

Regulation (EU) 2019/943

Article 18

Charges applied by network operators for access to networks, including charges for connection to the networks, charges for use of networks, and, where applicable, charges for related network reinforcements, shall be cost-reflective, transparent, take into account the need for network security and flexibility and reflect actual costs incurred insofar as they correspond to those of an efficient and structurally comparable network operator and are applied in a non-discriminatory manner. Those charges shall not include unrelated costs supporting unrelated policy objectives.

Conditions of the SONI Licence

Condition 15. Non-Discrimination

1 In undertaking the Transmission System Operator Business, the Licensee shall not unduly discriminate as between any persons or class or classes of persons (including itself in undertaking any activity other than the Transmission System Operator Business).

3.11 Condition 25 (1) provides (relevantly):

Condition 25. Requirement to Offer Terms – Users and Connectees

Offer of terms for use of the All-Island Transmission Networks

1 On application by any eligible person, [SONI] shall (subject to paragraph 6) offer to enter into a Use of System Agreement:

(a) to accept into the All-Island Transmission Networks at such entry point or points on the transmission system, and in such quantities, as may be specified in the application, electricity to be provided by or on behalf of such person; and

(b) to deliver such quantities of electricity as are referred to in sub-paragraph (a) above (less any transmission losses on the All-Island Transmission Networks) to such exit point or points on the transmission system and to such person or persons as may be specified in the application; and

(c) specifying the use of system charges to be paid by the person seeking use of the All-Island Transmission Networks in respect of generation or supply in Northern Ireland, such charges (unless manifestly inappropriate) to be referable to the statement prepared in accordance with paragraph 1 (or, as the case may be, paragraph 7) of Condition 30 or any revision of such statement; and

(d) containing such further terms as are or may be appropriate for the purposes of the agreement.

In this paragraph references to "eligible person" shall be construed as references to persons licensed under Article 10 of the Order (or exempt from the requirement to be so licensed under Article 9 of the Order) or who have applied for a licence under Article 10 and whose application has not been withdrawn or rejected (including, for the avoidance of doubt, the Power Procurement Business in its capacity as such).

Condition 25 (2) of the SONI Licence provides relevantly) that

Offer of terms for connection to the All-Island Transmission Networks

2 On application by any person, [SONI] shall (subject to paragraph 6) offer to enter into a Connection Agreement (or amend an existing Connection Agreement) for connection (or modification of an existing connection) to the All Island Transmission Networks at entry or exit points on the transmission system, and such offer shall make detailed provision regarding . . .

(g) the connection charges to be paid to [SONI], such charges:

(i) to be presented in such a way as to be referable to the statements prepared in accordance with paragraph 1 (or as the case may be, paragraph 7) of Condition 30 or any revision of such statements; and

(ii) to be set in conformity with the requirements of paragraph 5 of Condition 30 and where relevant of paragraph 3; and

3.12 Condition 26 (3) provides that:

3 If either party to a Connection Agreement or Use of System Agreement entered into pursuant to Condition 25 or this Condition proposes to vary the contractual terms of such agreement in any manner provided for under such agreement, the Authority may, at the request of [SONI] or other party to such agreement, settle any dispute relating to such variation in such manner as appears to the Authority to be reasonable.

3.13 Condition 30 of the Licence relates to "Charging Statements".

3.14 Paragraph 1(g) of Condition 30 requires SONI to prepare and obtain the Authority's approval to, among other things, a statement setting out –

"the basis upon which charges will be made for connection to the All-Island Transmission Networks at entry or exit points on the [NI Transmission System]".

3.15 The referenced type of statement is essentially a *connection charging* statement.

3.16 Paragraph 3 of Condition 30 provides that the connection charging statement shall be in such form and contain such detail as shall be necessary to enable any person to make a reasonable estimate of the charges to which it would become liable upon connecting to the NI Transmission System.

3.17 Paragraph 5 of Condition 30 sets out the items that shall be included in the connection charging statement. Paragraph 6 provides that the connection charges for these items –

"shall be set at a level which will enable the recovery of;

(a) the appropriate proportion of the costs directly or indirectly incurred (or to be incurred) in carrying out the works, extension or reinforcement in question and in providing, installing, maintaining and repairing (and, following disconnection, removing) the electrical lines, electrical plant, meters, special metering, telemetry, data processing equipment or other items in question; and

(b) a reasonable rate of return on the capital represented by such costs."

3.18 Condition 30 obliges SONI to (i) publish the connection charging statement it prepares and (ii) send it to any person requesting it (see paragraphs 13 and 14 of the Condition 30 respectively).

3.19 SONI has prepared and published the TCCMS in pursuance of its obligations under Condition 30.

The TCCMS

3.20 The (Condition 30) TCCMS has gone through various iterations. The BWFL Application refers to the provisions of what it says is the "current" approved version of the TCCMS (effective post 1 September 2016)[20]. SONI rightly notes that BWFL is incorrect here. The current approved version of the TCCMS is the post 1 April 2019 version. However, apart from numbering changes, the provisions of the TCCMS relevant to the Dispute - to include, importantly, the Cost Allocation Rules - have not changed through the various (approved) versions of the TCCMS. It follows that the Authority is content to follow the Parties[21] and refer to the (numbered) provisions of (the post 2016) version of

[20] TCCMS issued in 2016 - SONI Transmission Connection Charging Methodology Statement
[21] SONI's response to the BWFL Application used the post 2016 TCCMS references employed by BWFL in the BWFL Application.

the TCCMS referenced in the BWFL Application. That TCCMS provides (relevantly) as follows

3 Charging Methodology Objectives

3.1 The connection charging methodology is designed to ensure:

3.1.1 the recovery of the appropriate proportion of the costs directly or indirectly incurred (or to be incurred) in carrying out the connection works, including any chargeable extension or reinforcement works, and in providing, installing, maintaining and repairing (and, following disconnection, removing) the electrical circuits, electrical plant, meters, special metering, telemetry, data processing equipment or any other items required. For ***Contestable Works***[22]*, this includes the design reviews, inspections and monitoring of the* ***Contestable Works****;*

3.1.2 the recovery of a reasonable rate of return on the capital represented by such costs;

3.1.3 that charges are based on clear and transparent rules; and

3.1.4 that SONI does not unduly discriminate between any persons or class or classes of persons.

3.2 For the avoidance of doubt and unless otherwise stated, the charging methodology objectives in sub-paragraph 3.1 applies for any connection charges that are contained in both a Contestable Offer and a Non-Contestable Offer

4 Connection Charging Methodology

*4.1 In order to calculate transmission charges, SONI categorises assets as either "****Connection Assets****" or "****System Assets****".*

[22] It will be noted that there are no issues concerning Contestable Works in the Dispute. The reference to Contestable Works is the main change between the previous (pre-2016) versions of the approved Condition 30 TCCMS and the post 2016 version.

*4.2 In connecting to the **All-Island Transmission Networks** a new **User** may connect to either **Connection Assets** or to **System Assets**, and the connection charge payable will vary in each circumstance.*

*4.3 Any person wishing to enter into a **Connection Agreement** (or to amend an existing **Connection Agreement**) for connection (or modification of an existing connection) to the **All-Island Transmission Networks** at entry or exit points on the Transmission System will be required to pay for:*

*4.3.1 either the estimated or the outturn cost of the works to deliver the new or modified **Connection Assets**, as defined in Section 5;*

*4.3.2 a proportion of the estimated or outturn cost of the works to deliver any new **Connection Assets** which are to be shared with others who are connecting simultaneously, if any;*

*4.3.3 a proportion of the cost of any existing **Connection Assets** to be shared with other Users who are already connected, if any, with this cost being estimated based on the assumption that the value of all connection works to deliver the Connection Assets were subject to a Non-Contestable Offer irrespective of whether or not this was the case;*

4.3.4 the estimated or outturn cost of decommissioning transmission assets resulting from the new or modified connection, if any; and

4.3.5 certain pass-through costs which will be set out in the Connection Offer. For example, this may include, but is not limited to, any environmental planning costs, any costs incurred in acquiring planning consents, any costs incurred in complying with any conditions of planning consents, any external legal costs, any costs incurred in seeking, obtaining and paying for wayleaves or easements and any costs relating to exceptional land conditions or exceptional civil works.

5 Connection Assets

*5.1 **Connection Assets** are:*

*5.1.1 those assets which are installed to enable the transfer of the **Maximum Export Capacity ("MEC")** or the **Maximum Import Capacity ("MIC")** of the **User** located at the **Connection Point**, to or from, as appropriate, the **All-Island Transmission Networks**, subject to sub-paragraph 5.2; and*

*5.1.2 those assets which are installed as a result of the **User's** effect on fault current levels on the **Transmission System**, but does not include any assets installed at any location other than the transmission node to which the User connects.*

*5.2 In deciding which assets are required to enable the **MEC** or the **MIC** transfers referred to in sub-paragraph 5.1.1, power flows other than those to or from the **User(s),** shall be disregarded.*

*5.3 Assets which are not **Connection Assets** are **System Assets** and the costs of these **System Assets** are recovered through use of system charges.*

*5.4 **Connection Assets** include, as appropriate:*

*5.4.1 the circuit(s), or those parts of the circuit(s), required to connect the User to the existing **All-Island Transmission Networks**;*

5.4.2 in addition to assets required under sub-paragraph 5.4.1, any new circuit(s) or enhancements to existing circuit(s) required pursuant to subparagraph 5.1.1;

*5.4.3 the circuit bay(s) required by the **User**;*

5.4.4 in addition to assets required under 5.1.2, any upgraded existing protection or communication equipment required as a direct result of the connection but not changes or additions to protection systems at remote substations (including the provision of communication channels); and

5.4.5 metering, telemetry or data processing equipment supplied by SONI and/or NIE Networks. 5.5 Figures 1 and 2 illustrate the standard boundary between the ***Connection Assets*** *and the* ***User's*** *assets, and the standard boundary between the* ***Connection Assets*** *and the* ***System Assets***

6 Least Cost Technically Acceptable Connection Design

6.1 SONI will evaluate a number of design and connection options to determine the ***Least Cost Technically Acceptable*** *("****LCTA****") connection arrangement for a new or modified connection to the* ***All-Island Transmission Networks****.*

6.2 There may be occasions where SONI will have reason to require that the design and connection option that is to be delivered may not be the ***LCTA*** *connection arrangement. Where SONI does not proceed with the* ***LCTA*** *connection, whether new or modified, to accommodate a* ***User****, or a group of* ***Users****, then that* ***User****, or group of* ***Users****, will only be required to pay for the estimated cost of the* ***LCTA*** *connection arrangement.*

7. Cost Allocation Rules for Shared Assets

7.1 Where a new ***User*** *connects to the* ***All-Island Transmission Networks*** *by making use of existing* ***Connection Assets*** *which have been funded by an existing* ***User(s)*** *who connected within the preceding ten years the new* ***User*** *will be charged a proportion of the value of the shared* ***Connection Assets****, calculated in accordance with sub-paragraph 7.3.*

7.2 If the existing ***User(s****) connected within the preceding ten years then the* ***User(s)*** *will be entitled to receive a partial rebate of the original connection charge from SONI, calculated in accordance with sub-paragraph 7.3.*

*7.3 The charge to the new **User** and the rebate to the existing **User** will be derived using:*

7.3.1 the historic cost of the assets, including any decommissioning costs;

7.3.2 the current cost accounting valuation of the assets, using RPI;

*7.3.3 any advanced contributions towards O&M charges in respect of the **Connection Assets**; and*

7.3.4 the per MW share of the utilisation of the shared assets.

*7.4 In addition to the charges for use of the shared **Connection Assets** the new User will be required to make a payment to SONI in respect of reasonable administrative expenses.*

*7.5 Where a number of **Users** connect simultaneously at a new **Connection Point** and jointly make use of **Connection Assets** each User will be charged a proportion of the estimated cost of the shared **Connection Assets**, calculated on a per MW share of the utilisation of the shared **Connection Assets**.*

3.21 The definition section of the TCCMS includes the following:

"User"** means a person who has entered into an agreement with [SONI] in respect of connection to the **All-Island Transmission Networks** at entry or exit points on the **Transmission System

***"Connection Assets"** as defined in sub-paragraph 5.1*

***"Connection Agreement"** an agreement between [SONI] and a **User** setting out the terms relating to a connection to the **All Island Transmission Networks**;*

"Connection Point" *means the point at which a* ***User's*** *plant connects to the* ***All Island Transmission Networks****, normally the busbar clamp on the busbar side of the busbar isolators on* ***User*** *circuit*

"System Assets" *as defined in sub-paragraph 5.3;*

"Transmission System" *means the system of electric lines owned by* ***[NIEN TO]*** *and comprising high voltage lines and electrical plant and meters used for conveying electricity from a generating station to a substation, from one generating station to another, and from one substation to another within the* ***Authorised Area*** *(including such part of the North/South Circuits as is owned by the Licensee) (except any such lines which the* ***Authority*** *may approve as being part of the Licensee's distribution system) and any other electric lines which the* ***Authorit****y may specify as forming part of the* ***Transmission System****, but shall not include any Interconnector;*

"All-Island Transmission Networks" *means the* ***Transmission System*** *and the* ***RoI Transmission System*** *taken together;*

"RoI Transmission System" *means the system of electric lines operated by the* ***Republic of Ireland Transmission System Operator*** *and comprising high voltage lines and electrical plant and meters used for conveying electricity from a generating station to a substation, from one generating station to another, and from one substation to another within the Republic of Ireland;*

The Connection Agreement (29 August 2017) (B32)

3.22 The Parties entered into a Connection Agreement on 29 August 2017.

3.23 The Connection Agreement relates to the connection of the BWFL Wind Farm to the NI Transmission System. Relevant provisions of the Connection Agreement are noted below.

3.24 Clause 1 which, among others, includes the following definitions –

*"“**Connection**” means connection to the Facility to the Transmission System in such way that subject to Energisation the Generator[23] may make or receive a supply of electricity to or from the NI System at the Connection Point, and “Connected”; “Connecting” and “Unconnected” shall be construed accordingly;*

*“**Connection Charges**” the charges (other than Use of System Charges) calculated in accordance with SONI’s [TCCMS];*

*“**Connection Offer**” means the offer for connection to the Transmission System made by SONI to the generator, a copy of which is set out at schedule 1 (B) of this Agreement and/or such replacement or variation thereto which is expressly permitted to be made by SONI without Generator consent in accordance with the terms of such offer, and/or any other such replacement, variation or additional offer(s) in relation to the Facility issued by SONI and accepted by the Generator;*

*“**Connection Point**” the point at which the Generators Connection Plant and Apparatus is connected to the NIE Connection Plant and Apparatus More particularly described in Schedule 1(A);*

*“**Facility**” means the Wind Farm Power Station (WFPS) situated at the Premises more detailed particulars of which are set out in Schedule 1(A);*

*“**Generator’s Connection Plant and Apparatus**” The Plant and Apparatus owned or operated by the Generator and used for the purpose of connecting the Generator’s Generator Unit(s) to the NIE Connection Plant and Apparatus as more particularly described in Schedule 3;*

*“**NIE Connection Plant and Apparatus**” The Plant and Apparatus owned by NIE and operated by SONI used for the purpose of connecting the Generators Connection Plant and Apparatus to the Transmission System as more*

[23] The ‘Generator’ is, by section 2 of the Connection Agreement, BWFL.

particularly described in Schedule 4. For the avoidance of doubt, the NIE Connection Plant and Apparatus does not include 11kV equipment;

*"**Transmission Connection Charging Methodology Statement**" or "**TCCMS**" means the document of this name published by SONI in accordance with Condition 30 of the TSO Licence which, for the avoidance of doubt, is the document dated December 2009, and approved by the Authority on 22 December 2010, insofar as it relates to Connection Charges that have arisen prior to energisation of the Facility;"*

3.25 The Connection Charging Methodology Statement [TCCMS] approved by the Authority, and therefore in full force and effect, at the date of the Connection Agreement, was the post (1 September) 2016 TCCMS[24] and not that approved by the Authority on 22 December 2010.

3.26 However, for all intents and purposes, the relevant provisions of the post 2016 TCCMS (to include, importantly, the Costs Allocation Rules) are the same (materially) as those in the earlier version TCCMS; to include that approved on 22 December 2010.

3.27 For that reason, when referring to the charging statement/TCCMS, this document refers to the provisions of the post 2016 TCCMS. That is the TCCMS to which the Parties refer.

3.28 Clause 6 which relates to the payment of charges and more particularly –

(a) Clause 6.1 which has the heading 'Connection Charges' and provides –

"Subject to the provisions of this clause 6, the Generator shall pay to SONI any outstanding Connection Charges in relation to the Generator's Facility".

(b) Clause 6.2 which has the heading **'Variation to Connection Charges'** and provides as follows -

[24] Referenced at **A11.**

"Any dispute as to the calculation of the Connection Charges shall be deemed to be a dispute over the terms for connection which the Generator may refer to the Authority for determination under Condition 26 of the TSO Licence (but without prejudice to any other right or remedy it may have hereunder or otherwise at law).

If upon the request of the Generator the Authority determines that the Connection Charges (including any variations thereof) payable by the Generator under this Agreement have not been calculated strictly in accordance with the terms of SONI's Statement of Connection Charges, SONI shall pay to the Generator an amount equal to the amount, if any, by which the Generator has been overcharged."

3.29 Schedule 1(A) which sets out the details of the connection of the BWFL Wind Farm and, among other things –

(a) provides that the Connection Point is the "*Bus bar clamps on the wind farm of the isolator MU99*"; and

(b) includes the facility drawing with the title "*Brockaghboy Wind Farm Power Station Site Layout As-Built Infrastructure*".

3.30 Schedule 1(B) which includes the various connection offers made by SONI in response to applications made by BWFL and subsequently accepted by BWFL. In this respect Schedule 1(B) includes –

(a) A connection offer from SONI to BWFL dated 26 May 2014 and accepted by BWFL on 4 June 2014.

(b) A further (revised) connection offer from SONI to BWFL dated 17 August 2015 and accepted by BWFL on 15 September 2015.

(c) A further (revised) connection offer from SONI to BWFL dated 29 October 2015 and accepted by BWFL on 29 October 2015.

(d) A letter from SONI, dated 19 December 2016, which acknowledges BWFL's confirmation, given on 24 October 2016 that the MEC for the Wind Farm was to be [redacted]MW.

(e) A connection offer variation letter from SONI to BWFL dated 24 August 2017 and accepted by BWFL on 29 August 2017 (which results in the Connection Agreement).

3.31 The Connection Agreement provides that the point at which the BWFL Wind Farm is connected to the NI Transmission System is the NIEN substation situated within the site of the BWFL Wind Farm.

Previous dispute resolution determinations of the Authority

The First BWFL Determination

3.32 On 16 October 2018 the Authority published a determination (**the First BWFL Determination: A9**[25])) in respect of a previous dispute raised by BWFL (against SONI) with regards to the connection charges payable by BWFL to SONI – under the Connection Agreement (as read with the TCCMS) – for the connection of the BWFL Wind Farm to the NI Transmission System.

3.33 The First BWFL Determination was the subject of a legal challenge raised by BWFL by which BWFL sought to challenge the Authority's adjudication (**the relevant adjudication**) in the First BWFL Determination that the BWFL Wind Farm was not connecting *simultaneously* with the ACSS within the meaning of the Costs Allocation Rules part of the TCCMS. The relevant adjudication remains undisturbed and BWFL does not seek to contend in the Dispute that the BWFL Wind Farm is or has connected *simultaneously* with the ACSS for the purposes of the Cost Allocation Rules (part of the TCCMS).

[25] A redacted published version of the First BWFL Determination: Determination of Brockaghboy Wind Farm Ltd dispute with SONI (redacted)_0.pdf (uregni.gov.uk)

The TIA Determination

3.34 On 18 April 2019 the Authority published a (redacted) determination (**the TIA Determination[26]: B39)** of a dispute (**the TIA Dispute**) between NIEN (as DNO) and SONI as to the connection charges payable by NIEN DNO for the connection of the ACSS to the NI Transmission System.

3.35 The TIA Determination (which is referenced in the Parties submissions on the Dispute) adjudicated that

(a) SONI was bound to include a UOSCAC as part of the connection charges payable by NIEN DNO to SONI under the Section S[27] Offer made by SONI to NIEN DNO for the connection of the ACSS to the NI Transmission System

(b) the amount of the UOSCAC was to be calculated in accordance with the methodology set out in the Cost Allocation Rules.[28]

(c) that part of the length of the over-head line (**OHL**) between the BWFL Wind Farm and the Rathsharkin Main substation shared between NIEN DNO and BWFL - following connection of the ACSS to the NI Transmission System - was a *composite asset* comprised of a Connection Asset (as that term is used in the Cost Allocation Rules) and a System Asset (as that term is used in the TCCMS).

The December 2021 CCSA_t value decision

3.36 On 3 December 2021 the Authority published a decision (**the December 2021 CCSA_t value decision: A10[29]**) to approve a value for the CCSA_t term of the NIE transmission licence for the regulatory reporting year 2021/22.

[26] TIA Final Determination - March 2019 | Utility Regulator (uregni.gov.uk)
[27] Section S is part of the TIA agreement between SONI and NIE. The TIA is published on the SONI and NIEN website: It is at **A12:** Transmission Interface Arrangements | Northern Ireland Electricity Networks (nienetworks.co.uk)
[28] What is now section 7 of the post 2016 TCCMS (quoted above).
[29] Decision on Use of Shared Asset Charge Approval for Agivey Cluster | Utility Regulator (uregni.gov.uk)

3.37 The December 2021 CCSA_t value decision facilitated NIEN DNO in making a payment to SONI for the UOSCAC part of the connection charges payable by NIEN DNO to SONI *viz*. the Section S Offer (made by SONI to NIEN DNO) for connection of the ACSS to the NI Transmission System. That payment (by NIEN DNO to SONI) of the UOSCAC facilitated SONI in making payment of the Partial Rebate to BWFL. Calculation of that Partial Rebate is in contention in the Dispute.

Practice and Procedure

3.38 The practice and procedure being followed by the Authority for the purposes of the decision and determination on the Dispute is that set out in the Authority's published 2018 *Disputes Policy* (**A6**) – supplemented/adapted as required to ensure good administration.

3.39 In adjudicating disputes – such as the Dispute - the principal objective and general duties of the Authority under Article 12 of the Energy (Northern Ireland) Order 2003 (**the Energy Order**) do not apply (see Article 13(2) of the Energy Order) (**A1**).

Costs

3.40 In so far as there is any issue as to costs in respect of the decision/determination on the Dispute, the Authority proceeds upon the basis of: (a) Art 31A (5A) and Art 31A (5B) of the Electricity Order, (b) the proper interpretation of the powers afforded by Condition 26(3), (c) the relevant parts of the 2018 Disputes Policy[30] and (d) the related information and guidance provided in the published **Costs Information Note** of November 2017 (**B 40)**.[31]

[30] See for example Section D at paragraph 25.
[31] Information Note - Cost Recovery for Dispute Settlement Role.pdf (uregni.gov.uk)

4 SECTION FOUR: FACTUAL BACKGROUND

4.1 The following summary of the factual background is derived from the relevant section of the Statement. We consider it accurate and adopt it for the purposes of this decision/determination.

4.2 What follows is a summary only. Regard should be had to the BWFL Application[32] and the subsequent submissions from the Parties for a more detailed explanation of the factual background.

4.3 It does not appear that the Parties dispute the relevant factual circumstances.

4.4 The physical connection of the BWFL Wind Farm to the NI Transmission System (in August 2017) involved what SONI has described as a "*System Operator Preferred Connection Method*" (**SOPCM**). That SOPCM was detailed in a SOPCM paper dated 3 November 2016 (**the SOPCM Paper**: **B8**), relating to the connection of the Wind Farm.

4.5 The SOPCM outlined a connection arrangement that used assets over and above those that would have been required had the connection arrangement only involved a LCTA type connection arrangement as per the TCCMS. The SOPCM involved assets that were "up-rated" (or "enhanced") so as to accommodate the connection of the then anticipated ACSS and/or other potential options for the use of the BWFL connection.

4.6 The Connection Charges payable by BWFL to SONI under the Connection Agreement (dated 29 August 2017) were applied based on the LCTA connection arrangement. The remaining costs associated with implementing the SOPCM – the "*incremental funding/costs*" - were the subject of an application by NIEN TO to the Authority for requisite funding approval.

4.7 That SOPCM funding application was subsequently approved by the Authority.

4.8 On 19 June 2017, SONI issued BWFL with a *Transmission Use of System Agreement for A Generator Connected to the Northern Ireland Transmission*

[32] As constituted by the cover letter and attached various exhibits.

System **(the TUOSA**) (**B37**). The TUOSA document reflects the requirements of Condition 25 (1) of the SONI Licence. The TUOSA is a separate agreement to the Connection Agreement.[33] A Connection Agreement is offered pursuant to Condition 25 (2) of the SONI Licence.

4.9 The TUOSA provides for use[34] of (and not connection to) the all-island transmission networks by a connected generator like BWFL.

4.10 On 29 August 2017, the Parties entered into the Connection Agreement providing for the connection of the BWFL Wind Farm with a Maximum Export Capacity (**MEC**) of [redacted]MW.[35]

4.11 In November 2021, SONI made NIEN Distribution a revised Section S Offer (**the November Offer**) for connection of the ACSS (to the NI Transmission System) which included connection charges incorporating a UOSCAC element calculated with reference to the Rules (part of the TCCMS).

4.12 By that time the Authority had issued the TIA Determination determining that SONI was obliged to include – in any requisite Section S Offer for connection of the ACSS - a UOSCAC element in the connection charges payable by NIEN Distribution for that connection.

4.13 The November Offer assumed the connection date for the ACSS to be 3 December 2021: a date within 10 years of the connection of the BWFL Wind Farm, and, accordingly, within the stipulated period (set out in the Rules) for the payment of a Partial Rebate to BWFL as first User.

4.14 The UOSCAC part of the connection charges payable by NIEN Distribution under the Section S Offer were calculated by SONI in accordance with its interpretation of the Rules.

[33] Albeit accepting that entry into a TUOSA is a pre-requisite to energisation of the connection made under the Connection Agreement.
[34] TUOSA charges are levied on all connected generators with a capacity of more than [redacted]MW.
[35] This means that BWFL was permitted to export up to [redacted] MW through the connection point provided for in the Connection Agreement.

4.15 On 17 November 2021, Pinsent Masons (on behalf of BWFL) contacted SONI seeking out a confirmation of the amount of the Partial Rebate to be paid to BWFL in accordance with the Rules.

4.16 On 3 December 2021, the Authority published the December 2021 CCSA_X_t value decision. That decision also assumed the ACSS Connection Date (3 December 2021).

4.17 The CCSA_X_t value determined in the December 2021 CCSA_X_t value decision was £[redacted].

4.18 The ACSS connected - as assumed in the November Offer – on 3 December 2021

4.19 SONI paid over the amount of £[redacted] as the Partial Rebate to BWFL on **7 January 2022** (**B38**). SONI calculated (in accordance with its interpretation and application of the Rules) the amount of the Partial Rebate as being £[redacted]. This is the SONI Partial Rebate Amount.

4.20 The SONI Partial Rebate Amount paid by SONI to BWFL is in the same amount as the CCSA_X_t value determined by the Authority in the December 2021 CCSA_X_t value decision. The value so determined reflected the UOSCAC then included in the November Offer.

4.21 The Parties were in communication and exchanged correspondence about their respective views as to how the "correct" Partial Rebate amount was to be calculated in the period prior to the payment of the SONI Rebate Calculation Amount. That interaction continued after payment of the SONI Partial Rebate Amount. This correspondence is to be discerned from the wider set of documents.

4.22 As has been noted in the earlier parts of this decision/determination, the Authority has previously decided (in accepting the BWFL Application)[36] that it accepts that the interactions between the Parties as to the "correct" calculation of the Partial Rebate due to BWFL (on the connection of the ACSS to the NI

[36] See the letters of 7 (**B18**) and 29 April 2022 (**B3**).

Transmission System) reflects a dispute as to a proposed variation (of the Connection Charges[37] (these Charges being a term of the Connection Agreement)) of the terms of the Connection Agreement within the meaning of Condition 26(3).[38] It is, however, right to note that SONI's Submission (**B11**) on the BWFL Application does not accept that BWFL has proposed a variation of the Connection Charges, and SONI has not indicated a change in that position (whilst specifically accepting that the Authority has jurisdiction to determine the dispute as to the proper calculation of the Partial Rebate under Condition 26(3)).

4.23 BWFL has consistently challenged SONI's approach to the calculation of the amount of the Partial Rebate. That challenge has been raised at times prior to and after the provision of the January Information Note. Similarly, SONI has consistently argued that its calculations are correct and are compliant with the Rules (part of the TCCMS).

4.24 The ongoing dispute as to the "correct" calculation of the Partial Rebate due to BWFL (on connection of the ACSS to the Ni Transmission System) is now the main subject of the Dispute recorded in the BWFL Application.

4.25 BWFL's Application includes its own calculation of the "correct" amount of the Partial Rebate it considers due to it. This is the BWFL Partial Rebate Amount (**B6**). The BWFL Partial Rebate Amount states a Partial Rebate (due on connection of the ACSS on 3 December 2021) amount of £[redacted].

4.26 BWFL wrote to SONI on 21 March 2022 (**B88)** highlighting issues with the approach adopted by SONI in the January Information Note (**B2)** for the calculation of the Partial Rebate. BWFL highlighted the depreciation costs applied by SONI and the share of utilisation of shared assets, as being especially problematic.

[37] The Connection Charges originally payable by BWFL have been paid. There is no dispute about that. Payment of the Partial Rebate works a variation to the Connection Charges (as originally charged and paid). The payment of a Partial Rebate is provided for in the Rules (part of the TCCMS). The Connection Agreement incorporates the TCCMS and thus the Rules. Variation of the Connection Charges (by the payment of the Partial Rebate) is thus provided for in the machinery of the Connection Agreement.

[38] Noting and having regard to the provisions of Clause 6.2 of the Connection Agreement.

4.27 SONI reaffirmed its position on the amount and calculation of the Partial Rebate on 25 March 2022 (**B7**) by referring BWFL to the January Information Note and stating that the amount it had calculated, i.e. £[redacted], was correct.

4.28 Both Parties have agreed in their respective Partial Rebate calculations that the amount of the relevant part of the original Connection Charges paid by BWFL in respect of which there is to be applied the Partial Rebate methodology set out in the Rules is **£**[redacted]. The overall figure is made up by adding relevant figures attributable to (i) part of the overhead line (**OHL**) and (ii) relevant assets installed at Rasharkin Main substation.

5 SECTION FIVE: VIEWS OF BWFL

5.1 BWFL's views – in support of its case on the Dispute - are set out in the wider set of documents, to specifically include:

(a) the BWFL Application (**B1**) (to include the associated Exhibits thereto),

(b) the BWFL response (dated 26 May 2022: **the BWFL Response: B12**) to the SONI submission dated 18 May 2022 (**the SONI Submission: B11**) on the BWFL Application,

(c) the letter from Pinsent Masons dated 24 March 2022 (**B16**) in response to the letter from the Authority dated 16 March 2022 (**B14**).

(d) BWFL's comments on the draft report provided by *EY*[39] (**B82**), and

(e) BWFL's response to the Draft Decision/Determination (**B 92**).

5.2 These documents (and the wider set of documents) have been considered by the Decision-Makers. In doing so, the Decision-Makers recognise that their role is to decide upon the issues set out in Section 7 of this document.

5.3 This section therefore (only) outlines a summary of the views expressed by BWFL in support of its case on the Dispute.

Misapplication of Cost Allocation Rules

5.4 BWFL's central contention is that SONI has misapplied the Cost Allocation Rules part of the TCCMS in calculating the Partial Rebate due to BWFL on connection of the ACCS resulting in an underpayment of the Partial rebate properly due.

5.5 BWFL's case is (effectively) that SONI's misapplication of the Cost Allocation Rules has left BWFL paying *net* connection charges (for the connection of the BWFL Wind Farm) that are excessive. It contends that the rebate paid needs to be adjusted (i.e., uplifted) to reflect what it contends to be the *proper*

[39] The draft (**B81**) and final *EY* reports (**B87**) were commissioned by the Authority and are discussed later in this document.

calculation of the Partial Rebate. This higher rebate will bring about a greater downward variation of the (net) connection charges payable by BWFL.

5.6 BWFL asks the Authority to accept this BWFL case by (requisite) *decision* under Condition 26 (3) of the SONI Licence.

5.7 BWFL further argues that the alleged misapplication of the TCCMS demonstrates infringement of cited provisions of the Directives (as to non-discrimination/information provision) and the Authority should resolve the Dispute by making a *determination* (in its favour) under Art 31A.

5.8 BWFL also contends that the Authority should make a similar Art 31A type *determination* in respect of what it claims to be the lack of information provision on SONI's part in and about interactions between the Parties on the arrangements for the future payment of any future Partial Rebate upon connection of the ACSS. It is argued that this justifies an Art 31A type *determination*.

5.9 BWFL's case is that if SONI's application of the Costs Allocation Rules is left to stand then it will be left to contribute [redacted]% of the costs of (what it defines as) the *shared assets* despite only utilising [redacted]% of the capacity of those same assets. BWFL contends that this is not and cannot be right.

5.10 BWFL has – as noted - agreed (with SONI) that BWFL's historic cash contribution figure to the shared assets stands at £[redacted].

5.11 BWFL contends that a proper application of the Cost Allocation Rules to the factual circumstances is such that the Partial Rebate due and owing to BWFL (from SONI) is £[redacted] (**the BWFL Partial Rebate Amount**) (**B6**). Calculation of the BWFL Partial Rebate Amount is set out in Exhibit 4 to the BWFL Application.[40]

[40] See **B6**

5.12 BWFL contends that SONI's approach to the application of sub-paragraph 7.3.2 of the Cost Allocation Rules (as evidenced in the January Information Note) is to apply the following valuation methodology:

(a) the historic cost of the assets referred to in sub-paragraph 7.3.1 of the TCCMS is used;

(b) a depreciation profile (based on a straight-line depreciation at 3% per annum) is then applied to such costs from and including the date of connection of the existing User (BWFL) [29 August 2017] up to the date of connection of the new User (NIEN DNO) [3 December 2021]; and

(c) this value is then adjusted for inflation, using the percentage increase in the Retail Price Index (**RPI**), over the same period referenced at (b).

5.13 BWFL contends that this approach is wrong.

5.14 BWFL argues that the TCCMS only refers to one method of valuation - provided for in sub-paragraph 7.3.2 of the Cost Allocation Rules (part of the TCCMS) - in relation to the assets.

Current Cost Accounting Valuation

5.15 BWFL contends that the Partial Rebate (referenced in the Cost Allocation Rules) must be derived using the current cost accounting valuation of assets employing the RPI. Exhibit 4 to the BWFL Application (setting out the BWFL Partial Rebate Amount calculation) makes no contest[41] to the measure of RPI (what BWFL labels the "RPI Adjustment") for the period between connection of the BWFL Wind Farm and the connection of the ACCS applied by SONI in calculating the SONI Partial Rebate Amount.

5.16 BWFL defines (referring to a definition stated in the Collins English Dictionary) the "current cost account valuation" to be "*a method of accounting that values assets at their current replacement cost rather than their original cost*"; asserting that SONI must (in proper adherence to the correct reading of the Cost

[41] Exhibit 4 (**B6**) states that the RPI adjustment is "presumed to be correct"

Allocation Rules) value the assets funded by BWFL at their current replacement cost. BWFL asserts that the words "current cost accounting" is a "generally accepted industry term and method of accounting". No further elaboration of this reference to a "*generally accepted industry term*" is offered by BWFL. BWFL contends that "there can be no ambiguity as to the meaning of "current cost accounting"[42]

5.17 BWFL considers that the correct way to determine the current replacement cost is to apply the indexation (using the RPI) to the historical cost. Effectively, BWFL contends that the Cost Allocation Rules apply so that the current cost accounting valuation of the relevant assets (for the purposes of sub-paragraph 7.3.2 of the Cost Allocation Rules) is derived by identifying the historic cost contribution to those assets (previously) made by BWFL in paying connection charges to SONI for connection of the BWFL Wind Farm and applying the "RPI Adjustment" (for the relevant period between the relevant connections). Put another way, the current cost accounting valuation of the relevant assets is, so BWFL contends, obtained by applying the increase in RPI to the historic cash contribution paid by BWFL (as connection charges) toward (i) the cost of the single enhanced (or uprated) OHL (this being identified as the relevant asset for rebate calculation purposes) and (ii) the assets Rathsharkin substation) that BWFL identifies as being "shared" with NIEN DNO.

5.18 BWFL contends (in the BWFL Response) that SONI's Submission does not offer a counter position to its argument on depreciation; further asserting that there is what it argues to be a clear absence of a defined term within the TCCMS for "current cost accounting valuation of assets". BWFL describes this as a key issue for adjudication.

5.19 In the BWFL Response, BWFL refutes any claim by SONI that it does not contest SONI's computation of depreciation

5.20 BWFL argues that there is no legal basis in the TCCMS for SONI to take depreciation (as a concept) into account in calculating the current cost accounting valuation of the relevant assets; contending that if it were otherwise

[42] See section 4.4 of the BWFL Application.

(and depreciation were “intended”) the word “depreciation” would have been explicitly included in sub-paragraph 7.3.2 of the TCCMS and the “rate” of (applicable) depreciation specified. Inclusion of such wording in the Rules part of the TCCMS, would – BWFL argues – provide clarity as to the application and measure of depreciation.

5.21 BWFL’s comments (**B 82**) on the draft EY report argued that its case on “intention” was further supported by the fact that the cost allocation part of the *2008 EirGrid TCCMS* contained – unlike the Rules part of the *(SONI) TCCMS* – the word “depreciation”.

5.22 BWFL contends that SONI is (wrongly) relying on the application of a rate of depreciation found in another industry/licence document [the NIE price control document/s] not provided for under the TCCMS.

5.23 BWFL submits that the Partial Rebate should (in accordance with its interpretation of the Cost Allocation Rules) be derived/calculated using the *current cost accounting valuation* principle it identifies as being involved in the proper interpretation of the Cost Allocation Rules.

5.24 BWFL’s case as to the alleged mis-application of the Cost Allocation Rules also involves contest as to the (proper) identification of the (requisite) *shared assets* used in the January Information Note.

5.25 BWFL notes that paragraph 5.1 of the TCCMS provides a definition of Connection Assets as follows:

> 5.1.1 those assets which are installed to enable the transfer of the **Maximum Export Capacity (MEC)** or the **Maximum Import Capacity (MIC)** of the **User(s)** located at the **Connection Point**, to or from, as appropriate, the **All-Island Transmission Networks**, subject to sub-paragraph 5.2; and
>
> 5.1.2 those assets which are installed as a result of the **User's** effect on fault current levels on the **Transmission System**, but does not include

any assets installed at any location other than the transmission node to which the **User** connects."

5.26 BWFL considers that SONI's definition of "Connected Assets" - per the Partial Rebate calculation described in the January Information Note - does not align with the definition in paragraph 5.1 of the TCCMS (**A11**). BWFL does not consider that shared connection assets are being fully taken into full account.

5.27 BWFL states that the BWFL Wind Farm shares 17.191 km out of 17.443 km of the length of a [redacted] MW rated OHL with NIEN (DNO).

5.28 BWFL asserts that SONI (with the apparent support of NIEN (TO)) concluded that the connection assets constructed for the BWFL Farm connection should be enhanced (or uprated) to accommodate the anticipated ACSS connection, with 17.191km of the OHL used to service the connection of the ACSS. This is a reference to the SOPCM.

Per MW Share

5.29 In the BWFL Response BWFL disputes the principles adopted by SONI in determining the "*per MW share of the utilisation of the shared assets*".

5.30 BWFL considers the shared assets allocation to be incorrect. It notes that SONI has stated that the capacity of the shared OHL is limited to [redacted] MW and that the [redacted] MW is then apportioned based on usage, with BWFL's usage pegged at [redacted] MW per the Connection Agreement. That apportions the respective usage as [redacted]% to BWFL with the remaining [redacted]% allocated to NIEN DNO.

5.31 In the BWFL Response BWFL submits that the denominator used by SONI ([redacted] MW) in the SONI Submission to provide a determination of the *per MW share* of the utilisation of the shared assets is incorrect.

5.32 BWFL calculates that the *proper* application of the TCCMS results in an apportionment of the cost of the OHL - as a shared asset under sub-paragraph 7.3.4 of the TCCMS - as [redacted]% to BWFL and [redacted]% to NIEN DNO.

5.33 This BWFL (apportionment) calculation factors into account the usage of the entirety of the enhanced shared OHL (17.191 km) using a capacity figure of [redacted]MW representative of the MW figure generated across the entire enhanced OHL connection (following uprating/enhancement for ACSS) rather than [redacted]MW which was the maximum capacity funded by BWFL in 2017 for the LCTA element.

5.34 BWFL notes that its apportionment of shared assets calculation differs greatly to the current apportionment used by SONI in the January Information Note calculations of the Partial Rebate. Again, that SONI apportionment is [redacted]% to BWFL and [redacted]% to NIEN DNO.

5.35 BWFL refers to paragraph 4.2 of the TCCMS which states that a new User may connect to either Connection Assets or to System Assets. BWFL contends that this definition envisages that all Transmission System assets fall neatly and clearly into one of two categories. As such – argues BWFL - the enhanced OHL, as a single asset to which the ACSS is connecting, is - by dint of paragraph 4.3.3 of the TCCMS - an existing Connection Asset (as defined in the TCCMS) to be (or being) shared with NIEN DNO, given that the BWFL Wind Farm is already connected by utilisation of the enhanced OHL.

5.36 In the BWFL Response BWFL contends that SONI (together with NIEN (TO)) considered the single enhanced OHL as a *Connection Asset* under the TCCMS in respect of which additional costs could be charged to parties connecting to the network within the stipulated 10-year period as per application of the provisions of the TCCMS. BWFL states that this is clearly established in the SOPCM Paper. (**B8**).

5.37 BWFL primary case is that the OHL is a single Connection Asset, as that term is used in paragraph 7.1 of the Cost Allocation Rules. It asserts that to contend that the OHL is a “composite” asset made up of a Connection Asset and a System Asset is “untenable”. However, it contends that this “untenable” position does not (if adopted) detract from its case (which it says would still be

"accommodated")[43] as to the (proper) calculation of the Partial Rebate because sub-paragraph 7.3.4 of the TCCMS does not use the defined term of "Connection Assets" unlike sub-paragraph 7.3.3 which precedes it. BWFL considers that if the defined term ("Connection Assets") needed to be listed at sub-paragraph 7.3.4 (for clarity) then the term would be included there. It follows – BWFL argues – that there can be no real dispute as to whether the (single enhanced) OHL is a shared asset for the purpose of sub-paragraph 7.3.4 of the Cost Allocation Rules: it is.

5.38 BWFL emphasises that it considers that the Partial Rebate must be calculated based on the *per MW share* of the utilisation of the *entire* shared assets (as it defines those assets).

5.39 BWFL refers to the SOPCM: a method of connection that – BWFL notes – involved a connection method with an asset specification above what would be required to service (i.e., connect) only the BWL Wind Farm.

5.40 BWFL accepts that it paid connection charges relatable (only) to the (hypothetical) LCTA connection method; with SONI (and NIEN as TO) implementing the SOPCM at no further charge to BWFL.

5.41 BWFL asserts that this means that there is a difference between the charge applied to BWFL and the total cost of delivering the actual connection method. BWFL records its understanding that the additional investment representing the difference between the (connection) charges applied to BWFL and the cost of delivering the SOPCM has been funded by NIEN (TO) and added to its regulated asset base (**RAB**) in accordance with the terms of its price control.

5.42 BWFL records that it is not seeking to recover any (connection charges) costs it has not funded (originally). It construes its historic cash contribution to the historic costs of the (BWFL) identified/defined shared "asset" (being the enhanced (single) asset OHL) to stand as what it calls a "*value boundary*" or "*ceiling*".

[43] See sections 4.33 to 4.37 of the BWFL Application.

5.43 BWFL notes that no provision is mentioned in the TCCMS for a rated capacity test *viz*. any shared assets where an alternative method of connection such as the SOPCM is utilised. BWFL considers that it is disadvantaged in the calculation of the per MW share of the utilisation of the shared assets (it identifies).

BWFL's Methodology

5.44 BWFL refers to paragraph 7.3 of the TCCMS and asserts that the Partial Rebate needs to be properly calculated using:

(a) the historic costs of BWFL's cash contribution to the identified assets: in other words, this must be limited to only those Connection Assets (or shared assets as per the language of sub-par 7.3.4 of the Cost Allocation Rules) as and to the extent funded by BWFL, to include decommissioning costs (if applicable) which are to be shared with NIEN DNO.

This (says BWFL) amounts to a £[redacted] cash contribution from BWFL that must be recognised as the value boundary/ceiling to apply to the existing Connection Assets under paragraph 7.1 of the TCCMS (or shared assets as per the language of sub-paragraph 7.3.4 of the Cost Allocation Rues) which determines what partial rebate is due to BWFL, regardless of how the SOPCM contribution is treated under the TCCMS.

For the avoidance of doubt, this cash contribution relates to both the shared section of the (single asset enhanced) OHL and the shared assets at the Rasharkin Main Substation;

(b) the *current cost accounting valuation* of such assets referred to in (a) above as per sub-paragraph 7.3.2 of the TCCMS with assets valued based on their *current replacement costs*, equal to the historic costs (subject to the BWFL historic cash contribution "ceiling" or "boundary") with RPI/inflation added.

(c) BWFL opted to pay annual Operation and Maintenance (**O&M**) charges and therefore the provisions of sub-paragraph 7.3.3 of the TCCMS should not form part of the calculation of the rebate due to BWFL; and

(d) BWFL's per MW share of the utilisation of the shared assets, being [redacted] / [redacted] MW (as the NIEN DNO MEC capacity, as the new User, is [redacted] MW) share of a [redacted] MW rated (single asset enhanced) OHL. The only test under this specific provision of the TCCMS is, so BWFL contends, whether such assets are shared; and, as is demonstrated, 17.191 km of the (single asset enhanced) OHL qualifies as *shared* (in addition to the shared assets at the Rathsharkin Main substation).

5.45 BWFL contends that the alleged misapplication of the Cost Allocation Rules (in calculation of the Partial Rebate) is to the benefit of NIEN DNO and, as a corollary, to the commensurate disadvantage of BWFL.

5.46 It is to the benefit of NIEN DNO (so says BWFL) because, if BWFL is right as to the proper application of the Partial Rebate in accordance with the Cost Allocation Rules, then NIEN DNO has escaped what should have been a much higher connection charge for its ACSS: the UOSCAC part of the connection charges for the (NIEN DNO) ACSS being *under calculated* by the same amount as the Partial Rebate has been (wrongly, on BWFL's case) *under calculated*.

5.47 The (correlative) disadvantage to BWFL is that it has been required to pay (net) connection charges (for the connection of the BWFL Wind Farm) after variation that do not take account of (i.e., are not offset by) a commensurately higher value (i.e., properly calculated) Partial Rebate.

Discrimination

5.48 BWFL contends that this results in it being *discriminated* against in the application of the TCCMS as compared to NIEN DNO.

5.49 BWFL argues that this "discrimination" is such that it demonstrates infringement by SONI of its obligations under the cited provisions of the Directives, providing

a proper foundation for a *determination* pursuant to Art 31A on BWFL's assertion that it is a different class of system User compared to NIEN DNO.

5.50 In making its case in "*discrimination*" BWFL states that NIEN DNO stands as another "*class of system user*" within the meaning of Art 40 (1) of the 2019 Directive. BWFL also founds upon Art 46.2 and Art 47(5) of the 2019 Directive which prohibits discrimination by a TSO (like SONI) "*against different persons or entities*". It further relies upon the terms of Article 6 of 2019 Directive. In each case it cites the corresponding provision of the 2009 Directive.

5.51 BWFL further supports its case in discrimination by referring to Condition 15 of the SONI Licence

5.52 BWFL argues that the "discrimination" it alleges (arising out of the alleged misapplication of the Cost Allocation Rules in calculation of the Partial Renate) acts as an infringement of SONI's obligation (pursuant to Condition 15 of the SONI Licence) not to "*unduly discriminate*" [44] as between persons or classes of persons in conducting the TSO business, further demonstrating infringement of the related directive obligations placed on SONI (see above) so as to found a determination pursuant to Art 31A.

5.53 We should record here that we are – as decision makers - exercising dispute resolution functions, and it is not part of our function – in resolving the Dispute – to adjudicate on potential/alleged licence breaches. The reference to Condition 15 (and all other conditions of the SONI licence) is considered in that context.

5.54 BWFL further founds its discrimination complaint upon the provisions of Condition 25 (2) (g) (i) and (ii) of the SONI Licence. BWFL contends that these provisions reflect domestic implementation of the key requirements of the Directives relating to non-discrimination, *viz*. access to the (NI) Transmission System.

[46] See **A2**

5.55 BWFL asserts that the connection charges for the connection of the BWFL Wind Farm have not (given the alleged under calculation of the offsetting Partial Rebate working a downward variation of the connection charges (as originally paid)) been applied in accordance with such requirements. BWFL contends that this infraction demonstrates a relevant *directive type* infringement within the meaning of Art 31A.

Lack of Information/Transparency

5.56 BWFL further argues that its interactions with SONI – in the period prior to the connection of the ACSS - as to the potential application of the Cost Allocation Rules upon the anticipated connection of the ACSS within 10 years of the connection of the BWFL Wind Farm (and how any Partial Rebate might be funded from NIEN DNO through SONI to BWFL) are such as to exhibit infringement by SONI of its directive obligations (as submitted by BWFL) concerning information provision regarding the applicable arrangements viz. connection charges for the BWFL Wind Farm so as to facilitate *efficient access* for BWFL to the NI Transmission System.

5.57 BWFL submits this information provision case represents a further basis upon which the Authority should make a determination pursuant to Art 31A.

5.58 It appears that this (information basis) petition for an Art 31A determination (founded upon a relevant directive infringement by SONI) is not reliant upon BWFL establishing that SONI has miscalculated the Partial Rebate in breach of directive type obligations or otherwise.

5.59 BWFL's case on information provision involves an assertion that it has not been provided with the necessary information to allow efficient access to the NI Transmission System.

5.60 BWFL points – in further support of its case as to information provision – to

(a) the occurrence of the TIA Dispute and the making of the TIA Determination

(b) the making of the subsequent licence modifications that led to the introduction of the CCSA_Xt term in the NIEN licences.

5.61 BWFL makes the case that these occurrences evidence a lack of information (with an associated alleged lack of "transparency" adduced as evidence of a relevant failure of information provision) provision on SONI's part as to the charging arrangements for the BWFL Wind Farm concerning the arrangements for any *payment* of any Partial Rebate due to BWFL upon (requisite) connection of the (NIEN DNO) ACSS. BWFL alleges that it has not thereby had the information "needed" for "efficient access" to the NI Transmission System.

5.62 The BWFL Response makes clear that BWFL considers that SONI's reliance (in its submission on the Dispute) on previous interactions with the Authority as to the UOSCAC and/or the CCSA_Xt "value" decision are of no bearing to the decision/determination on the Dispute and should be discounted.

5.63 BWFL has asked the Authority to find in its favour on the Dispute and make what it says are appropriate consequential **directions** to SONI regarding the *proper* application of the Cost Allocation Rules.[45] These directions would require SONI to recalculate (what BWFL contends is) the proper Partial Rebate due to BWFL and pay what needs to be paid to make up the present shortfall in the receipted Partial Rebate.

5.64 BWFL submits that the overall circumstances of its interactions with SONI (which are described more fully in the wider set of documents) on the Partial Rebate are such that any award for costs made in favour of the Authority in connection with the making of a decision/determination on the Dispute should be borne solely by SONI.

5.65 BWFL's comments on the *EY* draft report noted that the NIEN audited accounts apply a straight-line 2.5% per annum depreciation charge to transmission assets. The BWFL Response had "noted" that EirGrid - as the ROI TSO - works to a straight-line depreciation charge of 2.5% per annum *viz*. transmission assets.

[45] See paragraph 4.49 of the BWFL Application and point 10 of the Pinsents letter dated 24 March 2022.

Response to the Draft Decision/Determination

5.66 In its response to the Draft Decision/Determination, BWFL states that it disagrees with -

(a) our provisional conclusion that the SONI Partial Rebate Amount correctly calculates the amount of the Partial Rebate due to BWFL; and

(b) our provisional conclusion that it would be appropriate to make a costs order against (and only against) BWFL under Article 31A of the Electricity Order.

5.67 Regarding our provisional decision as to the calculation of the amount of the Partial Rebate due to BWFL, BWFL essentially reiterates several of its earlier submissions and states that it has identified "gaps" and "deficiencies" in the TCCMS which have not been properly addressed as part of the dispute process, namely that –

(a) the relevant provisions of the TCCMS have not been updated since inception;

(b) depreciation is not specifically included (nor intended) (as set out in BWFL's response to the draft EY report)[46];

(c) there is no specific provision for composite assets within the terms of the TCCMS and the Draft Decision/Determination includes no detailed and supporting rationale for the provisional conclusion that the OHL is a composite asset.

5.68 BWFL also contends that there has been a failure to properly consider the earlier consultation materials - as to the purpose and intent of the provisions of the Cost Allocation Rules part of the TCCMS – in construing those same provisions.

[46] BWFL comments on the draft EY report were set out in document **B 82**. Those comments were provided to EY for consideration prior to EY providing its final report.

5.69 With regard to our provisional conclusion as to the making of an Art 31A costs order against (and only against BWFL), BWFL submits that a costs order is not "appropriate" on the basis that –

(a) the circumstances of the Dispute are, in its view, exceptional, novel, and complex, because -

(i) of the "contents" and "length" of the Draft Decision/Determination

(ii) the points of "contentions" include interpretation of a section of the TCCMS ("an industry approved document") not containing defined terms in respect of important pricing/rebate provisions

(iii) there are different charging statements in a single all-island electricity market

(iv) a single overhead line is considered a composite asset, which is extremely unusual

(v) it has taken almost a year for the Dispute to be determined, requiring the involvement of an expert and the grant of numerous extensions to the Authority

(vi) the matter included the Authority involving an expert to deal with "ambiguity in the TCCMS".

(b) to fail to consider the circumstances (as above) other than exceptional novel and complex would be to fail to treat BWFL in a fair and proportionate way.

(c) BWFL has co-operated fully throughout the dispute process (to include meeting "challenging" timelines (without asking for extensions) and agreeing to extensions requested by the Authority).

5.70 BWFL further submits that if the Authority does proceed to make a costs order against BWFL then BWFL should not bear more than 50% of the costs.

6 SECTION SIX: VIEWS OF SONI

6.1 SONI's view on the Dispute is outlined in the wider set of documents to specifically include its response (**the SONI Response**: **B11**) to the BWFL Application and its comments on the draft EY report.[47] The SONI Response is dated 18 May 2022.[48]

6.2 SONI also made various comments in the letter from Tughans to the Authority dated 15 April 2022 (**B22**). Those comments were made in response to the Authority's letter to the Parties (signalling a provisional decision on *vires*) dated 7 April 2022 (**B18**).

6.3 All SONI's submissions have been considered in full. In doing so the Decision Makers recognise that their role is to adjudicate upon the issues set out in Section 7 of this decision/determination.

6.4 This section therefore only outlines a summary of the views expressed by SONI in support of its case on the Dispute.

Summary

6.5 SONI has stated that its approach to the calculation of the SONI Partial Rebate Amount – as articulated in the January Information Note (**B2**) – is correct as being in accordance with the Rules. It makes the case that its calculation is right in law and makes commercial sense.

6.6 SONI denies that it has misapplied the Rules part of the TCCMS in calculating the SONI Partial Rebate Amount.

6.7 Again, SONI and BWFL have agreed that BWFL's Connection Charges include an amount relating to the shared asset which stands at £[redacted]. This is the agreed starting point for the calculation of the Partial Rebate.

[47] See **B82**

[48] Again, SONI made no substantive comment on the Draft Decision/Determination sent to the Parties.

6.8 SONI considers the central issue in the Dispute is revealed in paragraph 3.47 of the BWFL Application which records that:

> *3.47: A rebate of £[redacted] was received by BWFL from SONI on 7 January 2022. SONI has provided BWFL with the calculations used to determine the rebate amount in a January Information Note included at exhibit 3.*
>
> *For the reasons set out in detail at section 4 of this application, BWFL considers that the rebate due to BWFL has not been calculated in accordance with the proper application of the [Rules] for shared assets as provided for in subparagraph 7.3 of the TCCMS. BWFL calculate (through the proper application of the [Rules] Rules) that the variation to the connection charges in the form of a partial rebate should be for an amount of £[redacted]. BWFL's calculation is included at Exhibit 4 for the Authority's benefit. This matter has been raised extensively with SONI through correspondence detailed at section 5 of this application"*.

6.9 SONI notes that the TCCMS is a connection and charging *methodology* statement and does not exhaustively set out the charges to be applied to connection applicants in each and every circumstance, but, rather, sets out the basis, or methodology, that SONI adopts when calculating such charges.

6.10 SONI notes the importance (on its case) of differentiating between a rebate which only becomes applicable at a particular point in time (as per Section 7.3 in the TCCMS) and a variation to connection charges as referred to in paragraph 3.47 of BWFL's application.[49]

6.11 SONI notes that BWFL has made several assertions (SONI points to paragraphs 2.13 and 2.14 of the BWFL Application) relating to SONI's approach to the application of the Cost Allocation Rules part of the TCCMS. SONI contends that those assertions by BWFL are irrelevant to what SONI considers

[49] This document (and the Statement) has already described how the Authority has decided to accept the Dispute for determination under Condition 26 (3) and how it is satisfied that there is demonstrated a relevant qualifying proposal for a variation within the meaning of Condition 26(3). Again, SONI does not dispute that the Authority has *vires* (or jurisdiction), under Condition 26(3) to resolve the dispute as to the proper calculation of the Partial Rebate.

to be the central issue involved in the Dispute (as per paragraph 3.47 of the BWFL Application).

6.12 SONI considers and responds to BWFL's allegations of discrimination and lack of information provision (involving a claimed lack of transparency). Those allegations are not accepted by SONI.

6.13 SONI also considers that the methodology adopted by it was indirectly or tacitly approved by the Authority when it made its December 2021 CCSA_X_t value decision.

6.14 SONI also submits that the conduct of BWFL in its approach to the Dispute is such that BWFL should be required to pay the Authority's costs in making its decision/determination on the Dispute and that, to the extent the Authority has *vires* to do so, the Authority should also require BWFL to pay SONI's costs.

Approach to the Rules

6.15 SONI contends that the purpose of the Rules is to ensure that the *existing User* secures appropriate reimbursement (i.e., a partial rebate) of the original connection charge it paid, where that existing/first User funded Connection Assets shared with a *new/second User* and that new/second User connects within 10 years of the connection of the existing/first User.

6.16 SONI submits that the Rules have been designed to ensure that new and existing Users make proportionate contributions based upon the original cost of the shared Connection Assets. The contribution figures take into account the current cost accounting value of the shared Connection Assets and any proportionate up-front contributions to the cost paid by the existing user for maintenance of the shared Connection Assets.

6.17 SONI contends that the Paragraph/Section 7 Rules relate exclusively to Connection Assets, as the only assets directly funded by the existing User and that where sub-paragraph 7.3.4 of the TCCMS refers to the "*per MW share of the utilisation of the shared assets*" it must necessarily be referring to the use

of any Connection Assets which are shared between (in this case) BWFL and NIEN Distribution.

6.18 SONI also states that although the SOPCM arrangement increased the capacity of the OHL, the SOP(CM) OHL does not fall within the definition of Connection Assets and was not funded by BWFL. SONI submits that the SOP(CM) OHL is a System Asset which was subject to a separate funding mechanism.

6.19 As such, in terms of the per MW share of utilisation, SONI asserts that only the [redacted]MW attributed to the **LCTA** OHL should be considered, given that the additional capacity of the OHL was not funded by BWFL in its payment of connection charges for the BWFL Wind Farm. Therefore, SONI submits, the appropriate denominator to be employed for the per MW share utilisation must be [redacted]MW.

6.20 Regarding the per MW share of the utilisation of the shared connection assets, SONI contends that the allocation to each User - or their "share" - must be assessed by reference to (a) the capacity that they each have authorisation to use and go on to use, and (b) the total capacity of the designated assets.

6.21 In terms of what this means, SONI submits that:

(a) Where any of the elements of the LCTA shared connection assets are rated to enable both the full MEC of the existing user (in this case BWFL) and the new user (in this case NIEN Distribution) to be facilitated, then the denominator for calculating the per MW share costs of those assets is based on the summation of the MECs of each of the parties,

(b) Where any of the elements of the LCTA shared connection assets are not rated to enable both the full MEC of the existing user and the full MEC of the new user to be facilitated, the denominator for calculating the per MW share costs of those assets is based on only the MW rating of those shared assets,

(c) Where some elements of the LCTA shared connection assets fall within paragraph (a) and others within paragraph (b), the apportionment is done on a separate basis for each element and then summated.

6.22 SONI also submits that the above propositions apply irrespective of whether any assets which are constructed or upgraded for the purposes of connecting the new User (in this case NIEN Distribution) are constructed or upgraded to a higher specification than the assets of the LCTA connection arrangement for the existing User and sets out some (non-exhaustive) examples for illustration.

6.23 SONI makes the case that it is industry practice to depreciate both the connection assets and system assets. SONI has (correctly, it contends, and using the approach taken by NIEN TO in the valuation of its assets) calculated depreciation at 3% per annum over the first 20 years of the asset life cycle and 2% for the following 20 years. Therefore, given that the connection of the BWFL Wind Farm took place in 2017, and the ACSS connected on 3 December 2021, the figure of 3% would be applicable. SONI therefore disagrees with BWFL's assertion in paragraph 4.4 of the BWFL Application: noting that (in SONI's view) no evidence has been provided by BWFL that its interpretation of "*current cost accounting*" is correct.

6.24 SONI notes that the same methodology used in the January Information Note has been previously reviewed by the Authority without objection. (See paragraphs 6.53 to 6.55 below). It refers to correspondence on 9 June 2020 (**B9**).

6.25 SONI states that its position on the issue of "current cost accounting valuation" of the shared Connection Assets is based upon the historic cost of those assets, with depreciation being factored in and subsequently adjusted in line with RPI. It also submits that: its approach to depreciation and valuation is referenced in the RP6 model (for NIEN TO); that BWFL does not engage with this; and that it is not necessary for the Authority to look for any other definition of 'current cost accounting value' where the Authority is satisfied that the factual position accords with the plain and ordinary language in the Rules.

6.26 SONI notes that the case advanced by BWFL on the Dispute is that the "current cost accounting basis" means "current replacement cost": noting that BWFL asserts (wrongly in SONI's view) that the correct approach is to uplift the historic cash cost of the Connection Assets to reflect inflation over the relevant period in line with the RPI without applying depreciation.

6.27 SONI does not accept this BWFL approach. It considers it to be contrary to the ordinary meaning and purpose of sub-paragraph 7.3.2. of the Rules. SONI's understanding - per industry practice - is that the current cost accounting valuation of the shared (LCTA) Connection Assets is based upon the historic cost of those assets, taking into account depreciation, and adjusted in line with RPI.

6.28 Further, SONI, does not consider that the current wording within the Rules should be replaced with the wording "current replacement cost". SONI has highlighted that such a change would result in the reference to the "historic cost" in sub-paragraph 7.3.1 being effectively deleted or disregarded. SONI does not consider that the TCCMS/Rules should be amended to suit what SONI considers to be BWFL's commercial purpose.

6.29 SONI asserts that, over time, the value of any Connection Assets paid for by an existing User depreciate as the assets degrade. SONI considers that it does not make sense for a rebate to be paid based on the value of the Connection Assets as new, when the new User is connecting to Connection Assets whose value will have depreciated over their operational lifespan – (i.e., between the period of original installation and connection of the new User) - and which will, as and when they reach the end of their "economic life", have to be replaced.

6.30 SONI asserts that a new User can connect and benefit from the Connected Assets for the remainder of their operational life. In such circumstances it would not, SONI says, make sense for that second/new User to pay for use of Connection Assets as new. Rather they should pay on the factual basis that they are depreciated.

6.31 SONI contends that it is illogical (as SONI claims BWFL to contend) for the value of any such Connection Assets and the UOSCAC charge and any

associated (Rules based) Partial Rebate calculated in relation to them to indefinitely remain static; subject only to uplift in line with RPI.

6.32 Overall, SONI contends that it has adopted the right approach in calculating the SONI Partial Rebate Amount.

6.33 The SONI comments on the draft EY report stated that SONI viewed the draft report as providing support to SONI's position as to the proper application of the Cost Allocation Rules.

Discrimination

6.34 SONI contends that BWFL's allegation of *discrimination* in SONI's application of the Rules and the calculation of the SONI Partial Rebate Amount is groundless.

6.35 SONI claims that the only basis for BWFL's claim of discrimination appears to rest on BWFL's assertion that NIEN Distribution and BWFL are in "different class(es) of system user".

6.36 SONI notes that the TIA Determination (**B39**) states that any (Section S) offers made by SONI to NIEN Distribution must treat NIEN Distribution as an applicant User under the TCCMS. SONI asserts that there is no evidence that it has treated NIEN Distribution differently from any other User in the application of the Rules.

6.37 SONI explains that this is the first time it has calculated a UOSCAC (or Partial Rebate) in similar situations. SONI contends that its approach to the Rules and the consequent calculation of the SONI Partial Rebate Amount was in no way influenced by the status of either NIEN Distribution or BWFL. SONI contends that the methodology applied would not differ from the approach used when dealing with any other User/s.

6.38 SONI refutes the claim that it has discriminated against BWFL in its application of the Rules/the calculation of the SONI Partial Rebate Amount.

6.39 SONI asserts that it looks like the BWFL Application fails to properly differentiate between the different roles that NIEN plays, and, in particular the different roles played by NIEN Distribution (i.e., as licenced owner and operator of the distribution system) and NIE TO (i.e., as licensed owner and maintainer of the NI Transmission System).

6.40 Overall, SONI does not accept that it has failed to act in accordance with its directives obligations concerning (non) discrimination.

Transparency/Information provision

6.41 SONI asserts that it has been transparent and has operated in accordance with the TCCMS. It does not accept a directive type failure in this regard. It does not accept that the alleged miscalculation of the Partial Rebate denotes any failure to meet obligations in regard to transparency/information provision.

6.42 SONI has noted that the TCCMS are of longstanding publication. It also notes that the Authority has approved the TCCMS. SONI asks why that approval would be offered if the TCCMS was in some way discriminatory or failed to offer the requisite information.

6.43 SONI asserts that it has been co-operative in responding to queries/concerns raised by BWFL as to the calculation of any Partial Rebate under the Cost Allocation Rules part of the TCCMS.

6.44 SONI claims that it has been proactive in its dealings with BWFL on the issue of the calculation of the Partial Rebate. It claims to have sought to assist and clarify where necessary.

6.45 SONI points to discussions beginning in 2015 with more detailed discussions developing from 4 March 2020: involving exchange of detailed correspondence addressing specific BWFL queries or complaints related to the Partial Rebate (on a without prejudice basis).

6.46 Noting paragraph 2.14 of the BWFL Application (and the reference therein to the TIA Dispute) SONI asserts that any licence modifications that emerged from the TIA Dispute were matters for NIEN and the Authority and as such are (says

SONI) irrelevant to any allegations in relation to a lack of information, transparency and/or discrimination on SONI's part.

6.47 SONI further submits that the licence modification complained about in paragraph 2.14 refers to a mechanism enabling NIEN to recover the relevant UOSCAC under its price control/tariff-arrangements so placing it in a position to pay SONI an amount that would facilitate payment of the Partial Rebate to BWFL by SONI.

6.48 SONI notes that the said modifications were consulted upon publicly and that TCI (BWFL's immediate parent company at the date of connection) responded to the consultation prior to the decision on the modifications being published.

6.49 SONI contends that the fact that BWFL does not agree with SONI's approach to the calculation of the SONI Partial Rebate Amount does not ground/substantiate allegations of discrimination or a lack of transparency/information provision on SONI's part.

6.50 SONI notes that it communicated in both 2020 and 2021 with the Authority as to the UOSCAC. (**B9, B10**). SONI considers this further evidence of an open and transparent approach concerning the charging methodology implemented as part of the partial rebate process.

6.51 Overall, SONI does not accept that it has in any way breached its directive obligations concerning information provision. It notes that BWFL has had full access to the all-island transmission networks since connection in August 2017.

6.52 SONI submits that the circumstances are such that any costs award should be made against BWFL.

Authority's December 2021 CCSA_X_t value decision

6.53 SONI also submits that its proposed methodology has been indirectly or tacitly approved by the Authority by referring to the Authority's December 2021 CCSA_X_t value decision (whereby the Authority determined a value for the CCSA_X_t term for the NIE transmission licence for the regulatory reporting year 2021/2022).

6.54 In support of its contentions, SONI states that –

(a) It understands that an 'information note' prepared by SONI for NIEN DNO setting out SONI's methodology for calculation of the UOSCAC was shared by NIEN DNO with the Authority on or around April/May 2020.

(b) The Authority raised some detailed queries with SONI regarding SONI's calculation methodology (as set out in that 'information note') and confirmed that it was content for SONI to proceed on this basis.

(c) In November 2021, SONI sent a more detailed version of the information note to NIEN DNO (the **NIEN Information Note – B42**) and that the NIEN Information Note adopts exactly the same methodology as the January Information Note.

(d) The NIEN Information Note was shared by NIEN DNO with the Authority on 17 November 2021.

(e) On 24 and 26 November 2021, the Authority raised some queries with SONI as to its approach to the calculation of the UOSCAC. SONI responded to these queries on 25 and 26 November 2021 and no further queries were raised by the Authority.

6.55 SONI believes that if the Authority had any concerns with the accuracy of the calculation of the UOSCAC (and as a consequence, in its view, with the accuracy of the calculation for the amount of the Partial Rebate to/for BWFL) it would have raised those concerns before making its December 2021 decision.

6.56 SONI's Submission asks for any directions made as to the recalculation of the amount of the Partial Rebate (the need for which is not accepted) to be configured to take account of specific provision of the terms of the Section S agreement between NIEN DNO and SONI.

6.57 SONI's comments on the draft EY report asked that BWFL be required to pay the costs of the EY report, given SONI's view that the contents of the draft EY report support its position on the Dispute.

6.58 In its response to the Draft Decision/Determination, SONI highlights, for completeness, that its position is that the EY report supports SONI as regards the proper application of the Cost Allocation Rules only in the context of the issues around depreciation and current cost accounting forming part of the Dispute. We do not consider that we need to comment on that submission.

7 SECTION SEVEN: ISSUES FOR ADJUDICATION

7.1 We are appointed and authorised to:

(a) make a decision in exercise of the dispute resolution powers contained in Condition 26 (3) of the SONI Licence, and

(b) make a determination pursuant to Art 31A.

7.2 We consider the issues for adjudication to be as follows.

Issue One

7.3 Does the SONI Partial Rebate Amount correctly calculate the amount of the Partial Rebate due to BWFL (from SONI) - on connection of the ACSS to the NI Transmission System on 3 December 2021- in accordance with the application of the Rules[50] (as properly construed) in/to the given circumstances.

Issue Two (which only falls for consideration if the answer to Issue One is "no")

7.4 Does the BWFL Partial Rebate Amount correctly calculate the amount of the Partial Rebate due to BWFL (from SONI) - on connection of the ACSS to the NI Transmission System on 3 December 2021- in accordance with the application of the Rules (as properly construed) in/to the given circumstances.

Issue Three (which only falls for consideration if the answer to Issue Two is "no")

7.5 How is the amount of the Partial Rebate due to BWFL (from SONI) – on connection of the ACSS to the NI Transmission System on 3 December 2021 – to be properly calculated in accordance with the application of the Rules in/to the given circumstances.

[50] Being the provisions of Paragraph/Section 7 of the TCCMS. The earlier sections of this Statement explain how the Authority considers that the payment of the Partial Rebate works a variation of the terms of the Connection Agreement (the Connection Charges as originally levied and paid). The Issues should be considered in conjunction with that prior holding.

Issue Four

7.6 What consequential directions or orders (as to costs or otherwise), if any, should be made (in exercise of the facility set out in Condition 26(3)) in light of the findings/adjudications on the above issues.

Issue Five

7.7 What type of Art 31A "*determination*" should be made (to include any order in relation to costs in exercise of the power contained in Art 31A (5A and Article 5B)[51] of the Electricity Order) in respect of the (accepted) Art 31A complaint made by BWFL (alleging non fulfilment by SONI of its Directives obligations in respect of (non) discrimination and/or transparency/information provision) having regard to

(a) The findings/adjudications on the above issues

(b) a finding/adjudication (which the decision makers should make) as to that element of the (accepted) Art 31A complaint that does not concern the actual calculation of the amount of the Partial Rebate but instead concerns the interactions between SONI and BWFL in relation to the arrangements for (future) funding or payment of any Partial Rebate (against the Connection Charges as originally levied) due to BWFL upon (any future) connection of the ACSS to the NI Transmission System.

Clarification on the O&M point raised by SONI

7.8 We should clarify that we do not accede to SONI's invitation to make observation/findings as to the O&M issue. We do not consider this an issue for adjudication in dealing with the Dispute.

[51] The decision makers have corrected the omitted reference to Art 31A (5B) in the Statement "Issues" section.

8 SECTION EIGHT: ADJUDICATION ON ISSUE ONE

8.1 The first issue for adjudication is whether the SONI Partial Rebate Amount correctly calculates the amount of the Partial Rebate due to BWFL (from SONI) - on connection of the ACSS to the NI Transmission System on 3 December 2021 - in accordance with the application of the Rules (as properly construed) in the given circumstances.

SONI's Methodology

8.2 The SONI Partial Rebate Amount is the amount calculated by SONI as the amount of the Partial Rebate due to BWFL from SONI.

8.3 The January Information Note confirms that SONI calculated the SONI Partial Rebate Amount on the basis that –

(a) The Connection Assets that have (since 3 December 2021) been shared by BWFL and NIEN DNO comprise –

(i) A section of the Overhead Line (the **OHL**) running between the BWFL Wind Farm and the Rasharkin substation falling within the 'Least Cost Technically Acceptable' (**LCTA**) connection and design option delivered by SONI, and paid for by BWFL, in order to connect the BWFL Wind Farm to the transmission system (the **LCTA OHL**); and

(ii) The transmission connection assets at the Rasharkin substation (the **Substation Assets**).

(b) The overall length of the LCTA OHL is 17.443 kilometres but only 17.191 kilometres is shared by BWFL and NIEN DNO. This is because the connecting line from the ACSS only intersects with the LCTA OHL once the latter has travelled out 0.252 kilometres from the point at which the BWFL Wind Farm connects to the LCTA OHL.

(c) The Connection Assets shared by BWFL and NIEN DNO therefore comprise of –

(i) The 17.191 kilometres section of the LCTA OHL which BWFL funded by way of connection charges (the **Shared LCTA OHL**); and

(ii) The Substation Assets which BWFL funded by way of connection charges (the **Shared Substation Assets**),

(SONI refers to these assets as the s*hared Connection Assets* but for the purposes of this Section Eight we refer to them as the **Shared Connection Assets**).

(d) Where sub-paragraph 7.3.1 of the TCCMS refers to the historic costs of the assets this means the historic costs of the Shared Connection Assets and this amounts to £[redacted] - and of this £[redacted] relates to the Shared LCTA OHL and £[redacted] relates to the Shared Substation Assets.

(e) Where sub-paragraph 7.3.2 of the TCCMS refers to the current cost accounting valuation of the assets using the Retail Price Index (RPI), this means the current cost accounting valuation of the Shared Connection Assets using the RPI and that the 'current cost accounting valuation' of the Shared Connection Assets is a valuation which is to be ascertained by applying a straight line depreciation of 3% per annum to the 'historic costs' for the period from 29 August 2017 (being the date on which the BWFL Wind Farm connected to the transmission system) to 3 December 2021 (being the date the ACSS connected to the transmission system).

(f) Applying such depreciation results in an amount of £[redacted] - of which £[redacted] relates to the Shared LCTA OHL and £[redacted] to the Shared Substation Assets.

(g) The figures in (f) are then adjusted by the increase in RPI derived from the OBR's then forecast figure of 309.6 (as actual RPI figures were not available at the date of the calculation) resulting in a total amount – for the relevant current cost accounting valuation (using RPI) - of £[redacted]-

of which £[redacted] relates to the Shared LCTA OHL and £[redacted] to the Shared Substation Assets.

(h) Where sub-paragraph 7.3.4 of the TCCMS refers to the per MW share of the utilisation of the shared assets this means the per MW share of the Shared Connection Assets and that as there are two different types of Connection Assets which together comprise the Shared Connection Assets, the MW share utilisation is calculated separately for each type of Connection Asset as follows –

(i) The MW share of the utilisation of the Shared LCTA OHL which has a total capacity of [redacted] MW; and

(ii) The MW share of the utilisation of the Shared Substation Assets which have a total capacity of [redacted] MW.

(i) BWFL's MW share of the utilisation of the Shared LCTA OHL is [redacted]MW as it is utilising all of its available MEC (relating to the connection of the BWFL Wind Farm) in respect of the Shared LCTA OHL and in percentage terms this equates to MW share utilisation of [redacted]% of the Shared LCTA OHL.

(j) As the total capacity of the Shared LCTA OHL is [redacted] MW this means that NIEN is utilising the remaining [redacted] MW of the Shared LCTA OHL, and in percentage terms this equates to MW share utilisation of [redacted]% of the Shared LCTA OHL.

(k) Apportioning the current cost account valuation using RPI of the Shared LCTA OHL (the amount £[redacted]) to –

(i) BWFL's MW share of the utilisation of the Shared LCTA OHL gives an amount of £[redacted];

(ii) NIEN's MW share utilisation of the Shared LCTA OHL gives an amount of £[redacted].

(l) BWFL's MW share of the utilisation of the Shared Substation Assets is [redacted] MW as it is utilising all of its available MEC (relating to the connection of the BWFL Wind Farm) in respect of the Shared Substation Assets and in percentage terms this equates to MW share utilisation of [redacted]% of the Shared Substation Assets.

(m) NIEN's MW share of the utilisation of the Shared Substation Assets is [redacted]MW as it utilising all of its available MEC (relating to the connection of the ACCS) in respect of the Shared Substation Assets and in percentage terms this equates to MW share utilisation of [redacted]% of the Shared Substation Assets.

(n) Apportioning the current cost account valuation using RPI of the Shared Substation Assets (the amount £[redacted]) to –

(i) BWFL's MW share of the utilisation of the Shared Substation Assets gives an amount of £[redacted];

(ii) NIEN DNO's MW share utilisation of the Shared Substation Assets gives an amount of £[redacted].

(o) This results in NIEN DNO's contribution (with regard to the connection of the ACSS making use of existing assets, namely the Shared Connection Assets, funded by BWFL) amounting to £[redacted] (i.e. the sum of paragraphs (k)(ii) and (n)(ii) above) and that is therefore the amount of the Partial Rebate due to BWFL.

8.4 SONI has therefore calculated the Partial Rebate due to BWFL as being £[redacted].

8.5 SONI also submits that the methodology it has used (as above) for calculating the Partial Rebate due to BWFL has indirectly or tacitly been approved by the Authority when the Authority made its December 2021 CCSA_X_t decision, as the same methodology was applied for the purposes of that decision.

BWFL's Position

8.6 BWFL disagrees with SONI's methodology (as outlined above) with regard to the following key areas.

8.7 Firstly, BWFL's view is that the OHL, and not only the LCTA OHL, is a Connection Asset and that paragraph 7.1 of the TCCMS only creates a valuation boundary/ceiling in relation to the value of the shared Connection Assets that can be charged so that the existing User is not recouping costs that it has not contributed to or paid for.

8.8 BWFL's position is that paragraph 4.2 of the TCCMS provides that a new User connects to either Connection Assets or to System Assets, that a single continuous transmission line (such as the OHL) can only be either a Connection Asset or a System Asset and not both, and that the OHL is a Connection Asset and only a Connection Asset.

8.9 It is BWFL's position therefore that where paragraph 7.1 refers to 'making use of existing Connection Assets' it is (with regard to the circumstances of this case) referring to the OHL and not to the LCTA OHL but that because paragraph 7.1. refers to 'which have been funded by an existing User(s)' there is a valuation boundary/ceiling created which ensures that any rebate due to the existing User, i.e., BWFL, does not exceed the amount by which BWFL funded the OHL, being the existing Connection Asset.

8.10 Secondly, BWFL's view is that where sub-paragraph 7.3.1 refers to the historic costs of the assets it is referring to the historic costs of the existing User's cash contribution to the transmission assets.

8.11 In this respect, BWFL's position is that sub-paragraph 7.3.1 is not referring to the costs of any particular transmission assets but rather is referring to the amount by which the existing User, i.e., BWFL, funded those transmission assets.

8.12 Thirdly, BWFL's view is that where sub-paragraph 7.3.2 of the TCCMS refers to the current costs accounting valuation of the assets (using RPI), it means the

current replacement costs of the assets and that this is determined by applying RPI to the amount by which BWFL funded the transmission assets.

8.13 BWFL's position is that the 'current costs accounting valuation' of the assets is an amount which is equal to (i) the amount by which BWFL funded the transmission assets (which it submits is what is meant by historic costs), plus (ii) RPI for the period from 29 August 2017 (being the date on which the BWFL Wind Farm connected to the transmission system) to 3 December 2021 (being the date the ACSS connected to the transmission system).

8.14 More specifically, BWFL's position is that 'current cost accounting valuation' is not an amount that is derived by applying depreciation to the historic costs, i.e., no depreciation is to be applied to the historic costs. Again, BWFL claims that the absence of the word "depreciation" from sub paragraph 7.3.2 of the TCCMS (and any specified rate for any depreciation) means that depreciation is not "intended" to be part of the "current cost accounting valuation". BWFL points[52] to the fact that the word "depreciation" is included in the cost allocation rules part of the 2008 EirGrid TCCMS (but not in the Rules part of the (SONI) TCCMS) in further support of the same claim.

8.15 In making this contention, BWFL submits that –

(a) the term 'current costs accounting' is a generally accepted industry term and method of accounting but that as the term is not defined in the TCCMS, it is therefore to be given its ordinary dictionary meaning; and

(b) the ordinary dictionary meaning (taken from the Collins English dictionary) of the term is that means "*a method of accounting that values assets at their current replacement cost rather than their original cost*".

8.16 BWFL therefore calculates the current cost accounting valuation of the assets, using the RPI "rate" used by SONI in its calculations (which RPI rate BWFL does not dispute), as amounting to £[redacted], of which £[redacted] relates

[52] In its comments on the draft EY report. Those comments also re-iterate the "intention" contention in so far as it relies on the absence of the word "depreciation" in sub paragraph 7.3.2 of the TCCMS.

to the OHL and £[redacted] relates to the shared assets at the Rasharkin Substation (Exhibit 4 of the BWFL Application).

8.17 Fourthly, BWFL's view is that where sub-paragraph 7.3.4 of the TCCMS refers to the per MW share of the utilisation of the shared assets this means the per MW share of the utilisation of all transmission assets (i.e. both Connection Assets and System Assets, as each is defined in the TCCMS) which are shared by NIEN DNO and BWFL with regard to their respective connections and it is not limited to only those assets which are shared and which BWFL has funded.

8.18 Accordingly, BWFL's view is that –

(a) the entirety of the 17.119 km length of the OHL shared between NIEN DNO and BWFL is a shared asset for the purposes of the calculation of the Partial Rebate and not just that part of the OHL classified by SONI as the LCTA OHL;

(b) the total MW capacity which is shared by BWFL and NIEN DNO in relation to the OHL and the transmission connection assets at Rasharkin Substation is therefore [redacted] MW;

(c) BWFL's per MW share utilisation of (both) the shared length of OHL and the shared assets at the Rasharkin Substation is [redacted] MW from a total of [redacted] MW which in percentage terms equates to [redacted]%;

(d) NIEN DNO's per MW share utilisation of (both) the shared length of OHL and the shared assets at the Rasharkin Substation is [redacted] MW from a total of [redacted] MW which in percentage terms equates to [redacted]%.

8.19 It is BWFL's position that apportioning BWFL's calculated amount of the current cost accounting valuation using RPI, namely £[redacted], by [redacted]% to BWFL and [redacted]% to NIEN DNO (i.e., their respective per MW utilisation of all shared assets) results in NIEN DNO's contribution (with regard to the connection of the ACCS by making use of existing assets funded by BWFL) amounting to £[redacted] and that is the amount of the Partial Rebate due to BWFL.

8.20 BWFL also states that SONI's submissions as to the relevance of the Authority's December 2021 CCSA_X_t decision have no bearing on this dispute and should not be considered.

Connection Assets

8.21 We have carefully considered but do not accept BWFL's submission that it is the OHL and not the LCTA OHL that (together with the Substation Assets) constitutes the existing Connection Assets for the purposes of paragraph 7.1 of the TCCMS.

8.22 The term Connection Assets is defined in paragraph 5.1 of the TCCMS as follows –

> *"5.1 Connection Assets are:*
>
> *5.1.1 those assets which are installed to enable the transfer of the **Maximum Export Capacity** ("**MEC**") or the **Maximum Import Capacity** ("**MIC**") of the **User** located at the **Connection Point**, to or from, as appropriate, the **All-Island Transmission Networks**, subject to sub-paragraph 5.2[53]; and*
>
> *5.1.2 those assets which are installed as a result of the **User**'s effect on fault current levels on the **Transmission System**, but does not include any assets installed at any location other than the transmission node to which the **User** connects."*

8.23 It is therefore those assets which are installed to enable the transfer of BWFL's MEC which are the existing Connection Assets for the purposes of paragraph 7.1 of the TCCMS.

8.24 We acknowledge that the OHL is essentially a single continuous line and that in that context it is a single piece of infrastructure and can be seen as a single asset. However, that the OHL is a single continuous line does not mean that

[53] Paragraph 5.2 of the TCCMS reads "In deciding which assets are required to enable the MEC or the MIC transfers referred to in sub-paragraph 5.1.1, power flows other than those to or from the User(s), shall be disregarded".

the whole line (asset) must be either a Connection Asset or a System Asset, as those terms are defined in the TCCMS.

8.25 It is our view, taking into consideration the relevant provisions of the TCCMS, including in this case sections 4 and 5 of the TCCMS, that a single continuous line can be both a Connection Asset, i.e. because a section/part of it is installed to enable the transfer of a User's MEC, and a System Asset, i.e. because a section/part of it installed for other purposes and not for the purposes of enabling the transfer of a User's MEC.

8.26 It may be that the scenarios and circumstances in which a single asset comprises in part a Connection Asset and in part a System Asset are infrequent and unusual. However, that does not mean that such a position is “untenable” as submitted by BWFL.

8.27 It is therefore our view that the OHL is not only and solely a Connection Asset (as that term is defined in the TCCMS) but that it is both a Connection Asset and a System Asset.

8.28 While we have reached the above view based on our own assessment of the provisions of the TCCMS and the facts of this case, we do note that it accords with the decision in the TIA Determination, which also found that the OHL was both a Connection Asset and a System Asset.

8.29 We do not therefore agree with BWFL that where paragraph 7.1 of the Rules refers to Connection Assets it is, for the purposes of this case, referring to the OHL and not to the LCTA OHL. Nor do we agree that paragraph 7.1 essentially creates a valuation boundary/ceiling in relation to the value of the OHL that can be charged so that the existing User is not recouping costs that it has not contributed to or paid for.

8.30 In the circumstances of this case, the references in paragraph 7.1 to Connection Assets are to those assets which have been installed to enable the transfer of the MEC of the BWFL Wind Farm to the NI transmission system. These are the LCTA OHL and the Substation Assets.

8.31 In its response to the Draft Decision/Determination, BWFL contends that our conclusion on the 'asset status' of the OHL, namely that it comprises of both a Connection Asset and System Asset, is made without any detailed and supporting rationale being provided (it being contended that we simply referred to the TIA Determination).

8.32 We do not accept that to be the case. The paragraphs above set out our reasons for reaching our conclusion on this issue. The reasoning is clear. We also note that BWFL says that it does not accept that the OHL "was built for wider system needs". Again, our conclusion is that the OHL is a composite asset. It was not built solely for the purpose of the transfer of the BWFL Wind Farm MEC.

Historic costs of the assets

8.33 As noted above, it is BWFL's contention that where sub-paragraph 7.3.1 refers to the historic costs of the assets, it is not referring to any assets as such but is referring to BWFL's cash contribution to the installation of the OHL and the Substation Assets.

8.34 We do not agree with BWFL's contention – noting also that we consider it is a contention that BWFL is effectively 'compelled' to make given its submissions that the OHL and not the LCTA OHL is (part of) the existing Connection Assets to which paragraph 7.1 applies.

8.35 There is nothing in sub-paragraph 7.3.1 which can be read such that it is referring to any cash contribution which has been made by the existing User: it is clearly referring to the costs of assets.

8.36 While it is noted that sub-paragraph 7.3.1 does not specifically use the term 'Connection Assets', it is also clear that paragraph 7.3 applies only where paragraph 7.1 applies. Therefore, when sub-paragraph 7.3 refers to assets it is referring to those Connection Assets which are referred to in paragraph 7.1 which the new connecting User is sharing – which is in this case is the Shared LCTA OHL and the Shared Substation Assets.

8.37 We do not therefore accept that sub-paragraph 7.3.1 is to be read as referring to BWFL's cash contribution.

Current Cost Accounting Valuation – Depreciation/No Depreciation

8.38 Sub-paragraph 7.3.2 of the TCCMS reads "the current cost accounting valuation of the assets, using the Retail Price Index".

8.39 BWFL submits that 'current cost accounting' is a generally accepted industry term and method of accounting but does not explain or elaborate on what that is, i.e., what is the generally accepted industry term and method of accounting.

8.40 Instead, it proceeds only to state that because the term is not defined in the TCCMS it is to be given its ordinary dictionary meaning and refers to the Collins English dictionary defining it as "*a method of accounting that values assets at their current replacement cost rather than their original cost*".

8.41 It is BWFL's submission that this means the assets which have been funded by BWFL need to be valued at their current replacement costs and that applying depreciation to the historical costs of the assets originally constructed before applying the RPI is not provided for in sub-paragraph 7.3.2 of the TCCMS.

8.42 It is not clear to us why, in circumstances where 'current cost accounting' is said by BWFL to be a generally accepted industry term and method of accounting, it is necessary or appropriate for BWFL to refer to a dictionary for its meaning.

8.43 In any event, we do not consider that the dictionary definition highlighted by BWFL assists it in the circumstances of the case given that the definition refers to it being '*a method of accounting that*…'

8.44 The 'method' of accounting is therefore of key and particular relevance for the purposes of considering and determining how the current cost accounting valuation of the assets is ascertained and more specifically, which is at the heart of BWFL's case with regard to sub-paragraph 7.3.2, whether or not there is an adjustment for depreciation.

8.45 Given that SONI and BWFL adopt a different position as to whether or not the 'method of accounting' (methodology) for valuing the assets in question involves an adjustment for depreciation, we sought and received advice from one of the leading accountancy firms (Ernest & Young - **EY**) on –

(a) Whether the phrase 'current cost accounting valuation of the assets, using RPI' involves a particular accepted methodology or acceptable range of methodologies, explaining, as appropriate any such methodology/methodologies with specific regard to the role (if any) for depreciation and identifying the percentage or range of percentages for depreciation if applicable.

(b) Whether the context in which term is located within section 7, namely at sub-paragraph 7.3.2, of the TCCMS has any potential influence in ascertaining the methodology (or range of acceptable methodologies) with regard to the role (if any) of depreciation and/or the value/percentage of depreciation.

EY Report

8.46 The report from EY is at **B87** of the updated Bundle. It includes in full the questions on which their advice was sought.

8.47 Both Parties took the opportunity to consider and make submissions in respect of a draft report from EY (**B81**) (as sent to the Parties on 26 November 2022). The Parties' respective submissions were sent (by the Authority) to EY for consideration in preparation of the (final) EY Report. EY confirms in the EY Report that it has given due consideration to any aspects of the Parties' responses which fall within the remit of the Terms of Reference (i.e., the scope of EY's instructions which are also set out in full in the EY Report). We have read in full and considered the Parties' respective comments on the draft report from EY.

8.48 We have duly and fully considered the EY Report and note the following –

(a) There are a number of accounting frameworks which apply to companies incorporated in the UK which contemplate the use of current cost accounting valuation;

(b) Each of these frameworks set out accepted methodologies for calculating current cost;

(c) Each of the accepted methodologies include adjustment for deprecation.

(d) Each of the accounting frameworks applicable to companies incorporated in the UK that contemplate the use of current cost accounting valuation requires adjustment for depreciation unless the asset in question is Land.

(e) The calculation of depreciation requires judgment based on the experience of entities with similar assets and on an ongoing basis in relation to residual amount, useful life and depreciation method.

(f) The possible depreciation methods include: the straight-line method; the diminishing balance method; and a method based on usage (such as units of production method).

8.49 We also note EY's advice that the context in which the term is situated in the TCCMS does not influence the acceptable methodology for applying current cost accounting valuation.

8.50 SONI is a company incorporated in the UK. Accordingly, any one or more of the accounting frameworks discussed in the EY Report, which contemplate and set out acceptable methodologies for determining the 'current cost accounting valuation' (of relevant assets), as highlighted in the EY Report, would be relevant and applicable to SONI. The EY Report also confirms that each of these acceptable methodologies includes adjustment for depreciation.

8.51 In this respect, it is evident that the EY Report –

(a) Does not lend support to BWFL's contention that current cost accounting valuation is a method of accounting that values assets at their current replacement cost such that there is no adjustment for depreciation.

(b) Does lend support to SONI's contention that current cost accounting valuation is a method of accounting which includes an adjustment for depreciation.

TCCMS Provisions

8.52 In assessing BWFL's submissions, we have also considered the provisions of sub-paragraphs 7.3.1 and 7.3.2 which read as follows –

> "*7.3.1 the historic costs of the assets, including any decommissioning costs;*"

> "*7.3.2 the current cost accounting valuation of the assets, using the Retail Price Index;*"

8.53 It can be seen that the terminology and drafting of each is quite different from the other.

8.54 However, BWFL's approach to the interpretation of sub-paragraphs 7.3.1 and 7.3.2 is that it considers the only discernible difference between the two is the inclusion of decommissioning costs in sub-paragraph 7.3.1 and the use of RPI in sub-paragraph 7.3.2. In other words that in both sub-paragraphs the words up to the comma have the same meaning.

8.55 But if that were the case the same drafting would have been used in both sub-paragraphs. It is not.

8.56 That sub-paragraph 7.3.2 does not use the same wording as sub-paragraph 7.3.1 means that 'current costs accounting valuation' has a different meaning to 'the historic costs'; otherwise, there is no reason to introduce this form of wording in sub-paragraph 7.3.2.

8.57 In responding to the Draft Decision/Determination, BWFL submits that that decision does not properly address the “gap” or “deficiency” it considers to be

inherent in the TCCMS, namely that "depreciation is not specifically included (nor intended)" and refers to its response to the draft EY report.

8.58 We agree that the word 'depreciation' is not expressly included in the relevant part of the TCCMS. However, we do not consider that to be determinative of the question of whether depreciation is applicable.

8.59 We have set out above, in considerable detail, the process we have followed and the analysis we have undertaken with regard to the question of depreciation. We do not therefore accept that the matter has not been properly addressed by us. Depreciation is – for the reasons given - a relevant factor in calculating the 'current cost accounting valuation' [of an asset] and in essence, is embedded within the meaning of current cost accounting valuation.

8.60 For the same reason, we do not agree with BWFL's contention that because the 2008 EirGrid TCCMS specifically refers to depreciation and the [SONI] TCCMS does not, depreciation is not “intended” (within the NI provisions). Depreciation is “intended”: it is, as we have outlined above, essentially embedded within the meaning of the term 'current cost accounting valuation'. In this respect, the difference between the 2008 EirGrid TCCMS and the [SONI] TCCMS is one of drafting and not one of “intent”. The intent is the same in each case, namely that deprecation is applicable.

8.61 BWFL's response to the Draft Decision/Determination also states that it failed to address the fact that the relevant provisions of the TCCMS had not been updated since inception. However, whether or not the relevant provisions have been updated since inception is irrelevant to the adjudication of this Issue One. It is the provisions of the current TCCMS in force which are relevant.

8.62 For all the reasons given above, it is our conclusion that ascertaining the 'current cost accounting valuation' of the relevant assets, involves an adjustment for depreciation.

<u>Earlier Consultation Materials</u>

8.63 We have also seen and reviewed the various consultation materials that were provided to the Parties by way of a letter dated 25 August 2022 (**B68**). These documents related to the consultation and decision making surrounding the SEM Committee[54] decision of 2008 approving the introduction of a 2008 version TCCMS for SONI and a TCCMS for EirGrid (the **2008 EirGrid TCCMS**).

8.64 In responding to the Draft Decision/Determination, BWFL contends that we have not given

" *. .proper consideration of the earlier consultation materials as to the purpose and intent of the provisions of Section 7 of the TCCMS (in order to properly construe)"*

8.65 We reject that proposition. We have properly considered the relevant materials in order to assess whether they carry the matter any further. Our assessment is that they do not. We consider that there is nothing in the consultation materials which affects the relevant provisions of the TCCMS. We further consider that there is nothing in the materials which could lead us to properly conclude that the term 'current cost accounting' (in the Rules) does not include an adjustment for depreciation. We have already explained why we consider that the inclusion of the word "depreciation" in the 2008 EirGrid TCCMS does not cause us to consider otherwise.

Depreciation Rate/Percentage

8.66 In applying its methodology and ascertaining the current cost accounting valuation of the relevant assets, SONI has made an adjustment for depreciation on a straight-line basis at 3% per annum.

8.67 SONI confirms in its submissions that it applied a 3% per annum rate on the basis that –

(a) the assets in question are electricity transmission assets; and

[54] The SEM C is technically two separate committees: one for the Authority (NI) and one for the Commission for the Regulation of Utilities (Ireland): For NI see the Electricity (Single Wholesale Market) NI) Order 2007 (**A14**)

(b) the owner of these transmission assets – which is NIEN (TO) as the entity authorised under and holding an electricity transmission licence - is subject to a regulated price control which sets a 3% depreciation rate for the first twenty years of the economic life of the assets and a 2% depreciation rate for the remaining 20 years of the economic life.

8.68 BWFL has not made any specific submissions as to the percentage rate of depreciation.

8.69 It does, however, state that it is incorrect for SONI to submit that BWFL does not take issue with SONI's computation of depreciation, but BWFL does not elaborate or expand on what specific issue it does take with the '*computation'* of depreciation other than to say the following –

(a) SONI refers to a rate of depreciation in a separate industry/regulatory document and there is no reference to its incorporation within the provisions of the TCCMS;

(b) the reference to the accounting treatment of assets within the NIEN transmission licence is of no relevance and should have no bearing on the issues for determination in this case;

(c) the industry/regulatory documents referred to by SONI are selective in nature as BWFL “notes” for example that EirGrid policy is to depreciate cables on a straight-line basis at 2.5% over 40 years.

8.70 It is evident, given our conclusion at paragraph 8.62 above, that we do not accept BWFL's submissions that calculating the 'current cost accounting valuation' does not involve any adjustment for depreciation.

8.71 The EY Report notes there is no single standard depreciation method which can or must be applied to electricity assets but that in most cases the straight-line method is considered relevant and appropriate.

8.72 The straight-line method of depreciation is to apply a depreciation percentage rate, annually, as a percentage of the original asset cost, by reference to the economic life of the assets in question. Both Parties, in their respective

responses to a draft of the EY Report, agree that the economic life of the Shared Connection Assets is 40 years.

8.73 We understand the reasons for SONI applying a deprecation rate of 3% for the first twenty years of the economic life of the Shared Connection Assets given that –

(a) the assets in question are electricity transmission assets in Northern Ireland; and

(b) electricity transmission assets in Northern Ireland, i.e., those which form part of NIEN's (in its capacity as transmission licensee) regulatory asset base are subject, within the NIEN transmission price control, to a depreciation rate of 3% for the first twenty years of their economic life.

8.74 BWFL has not contested SONI's submissions with regard to the rate of depreciation set for the first twenty years of their economic life within NIEN DNO's transmission price control for electricity transmission assets in Northern Ireland.

8.75 BWFL does not make any submission that, if depreciation is to apply, it should apply at a specific rate specified by BWFL. We do note, however, that BWFL refers to EirGrid's policy of applying 2.5% annual straight-line depreciation to its assets.

8.76 We are not aware of any reason why it would be right and appropriate for SONI to apply EirGrid's policy, which applies in respect of assets in another jurisdiction, in circumstances where there is an 'allowed' depreciation rate in respect of the electricity transmission assets within the Northern Ireland regulatory framework. In commenting on the EY's draft report BWFL stated that 'NIE[N] depreciates infrastructure assets such as cables at 2.5% on a straight-line basis over 40 years' but does not provide a reference for that statement. In any event, it is the case that the regulatory price control for NIEN framework allows a 3% rate for the first twenty years.

8.77 Our conclusion on the rate/percentage of depreciation is that we see no reason as to why it is wrong or inappropriate for SONI to apply the same rate/percentage as is allowed for those same assets under the applicable Northern Ireland regulatory framework.

The per MW share of the utilisation of the shared assets

8.78 In determining BWFL's and NIEN DNO's respective *per MW* share of the utilisation of the shared assets, SONI's methodology takes account of the *per MW* share of the utilisation only of those Connection Assets which have been funded by BWFL and which are subsequently shared by both BWFL and NIEN DNO.

8.79 BWFL agrees and accepts that its per MW share of the utilisation of the shared assets is [redacted] MW.

8.80 BWFL's contention is that because the drafting of sub-paragraph 7.3.4 refers to 'shared assets' this means 'the per MW share' utilisation relates to all (shared) assets and not only to (shared) 'Connection Assets'. In other words that the 'per MW share utilisation' is not determined by reference to BWFL's and NIEN DNO's respective per MW share utilisation of the 'existing Connection Assets which have been funded by BWFL' (as paragraph 7.1 provides) but by reference to all assets which are shared and utilised by BWFL and NIEN DNO and thereby includes the OHL in its entirety, i.e., the enhanced/uprated OHL. BWFL also submits even if sub-paragraph 7.3.4 can be read as referring to Connection Assets, the OHL, in its entirety, is a Connection Asset.

8.81 In support of its contention, BWFL submits (as also noted earlier) that –

(a) paragraph 4.2 of the TCCMS essentially provides that all transmission system assets are either Connection Assets or System Assets;

(b) the enhanced OHL is (and is solely) an 'existing Connection Asset';

(c) both BWFL and NIEN share utilisation of the enhanced OHL; and

(d) therefore the 'per MW share utilisation' referred to in sub-paragraph 7.3.4 is to be determined by reference to the per MW utilisation of the enhanced OHL and not by reference to the LCTA OHL.

8.82 We do not agree with or accept BWFL's contentions for the following reasons.

8.83 Firstly, we have concluded, (see paragraph 8.27 above) that the OHL is not only and solely a Connection Asset but that it is essentially and conceptually a composite asset meaning that it is in part a Connection Asset and in part a System Asset.

8.84 Secondly, also as discussed above, sub-paragraph 7.3.4 is not to be, and cannot be, read in isolation. It has to be read in the context of Section 7 as a whole and more specifically in the context of paragraph 7.1.

8.85 Paragraph 7.1 of the TCCMS reads "*where a new User connects…by making use of existing Connection Assets which have been funded by an existing User…the value of the shared Connection Assets calculated in accordance with sub-paragraph 7.3*."

8.86 We acknowledge that sub-paragraphs 7.3.1 to 7.3.4, refer interchangeably to 'assets', 'shared assets', and 'Connection Assets' but that does not negate or effect the circumstance that –

(a) sub-paragraph 7.3 only applies where paragraph 7.1 applies; and

(b) that paragraph 7.1 and all four sub-paragraphs 7.3.1 to 7.3.4 are therefore referring to the same set of assets.

8.87 It is relevant to note here that, notwithstanding the way in which it has sought to interpret sub-paragraphs 7.3.1 and 7.3.2, BWFL effectively agrees sub-paragraphs 7.3.1 to 7.3.4 are referring to the same set of assets.

8.88 We have confirmed above our conclusions as to which assets are being referred to in sub-paragraphs 7.3.1 and 7.3.2, namely the LCTA OHL and the Shared Substation Assets as together these are the Connection Assets and are the existing Connection Assets which have been funded by BWFL.

8.89 In light of all of the above, our conclusion on the application of sub-paragraph 7.3.4 of the TCCMS is that –

(a) the 'per MW share utilisation' is to be calculated in respect of the 'MW share utilisation' of the existing Connection Assets which have been funded by BWFL;

(b) in this case the existing Connection Assets that have been funded by BWFL are the LCTA OHL and the Substation Assets;

(c) the shared Connection Assets that have been funded by BWFL are the Shared LCTA OHL and the Shared Substation Assets; and

(d) it is the MW share utilisation of BWFL and NIEN DNO of each of these shared Connection Assets which is to be calculated.

The December 2021 CCSA_X_t value decision

8.90 We agree with BWFL's submissions that in considering the issues in dispute between the Parties we should not place any reliance on the December 2021 CCSA_X_t value decision.

Connecting Simultaneously

8.91 We also note that –

(a) SONI has made submissions to the effect that –

(i) BWFL's approach, with regard to calculation of the Partial Rebate due to it (expressed in the BWFL Partial Rebate Amount), ultimately results in the same apportionment of connection charges (as between BWFL and NIEN Distribution) that would have resulted if paragraph 7.5 had applied (i.e., both had 'connected simultaneously');

(ii) On 6 October 2018 the Authority decided the First BWFL Determination which found that BWFL and the ACCS had not “connected simultaneously”; and

(iii) The Authority's determination was subject to high court litigation commenced by BWFL which was subsequently settled.

(b) BWFL did not comment on or make any counter submissions in response to SONI's above submissions.

8.92 In this regard, for the purposes of adjudicating on this Issue One we do not need to and have not given any consideration to SONI's submissions in terms of whether or not BWFL's approach and its proposed methodology for the calculation of the Partial Rebate, would ultimately have the same outcome (in financial terms) for BWFL as if it had been the case that BWFL and NIEN DNO had connected simultaneously.

8.93 However, we do observe that in circumstances where the TCCMS has different provisions, and therefore calculations, which are to apply in respect of the different circumstances where (a) two (or more) Users connect simultaneously, and (b) where the new User connects at a later date than the existing User, we would not expect there to be the same outcome for each of them.

Adjudication – Issue One

8.94 We have fully considered all of the Parties' submissions for the purposes of reaching our adjudication on Issue One.

8.95 Having done so, and for all of the reasons given above, our determination on Issue One is that the SONI Partial Rebate Amount correctly calculates the amount of the Partial Rebate due to BWFL (from SONI) - on connection of the ACSS to the NI Transmission System on 3 December 2021 - in accordance with the application of the Rules (as properly construed) in the given circumstances.

8.96 In light of the above determination on Issue One, we do not need to determine Issues Two and Three and the next section therefore relates to Issue Four.

9 SECTION NINE: ADJUDICATION ON ISSUE FOUR

9.1 The fourth issue for us to adjudicate is what consequential directions or orders (as to costs or otherwise), if any, should be made (in exercise of the facility set out in Condition 26(3)) as a consequence of our findings/adjudications on the above issues.

9.2 Condition 26(3) of the SONI Licence provides for a dispute relating to a proposal to vary a Connection Agreement to be settled by the Authority at the request of either party to that Connection Agreement. BWFL referred the Dispute relating to the Partial Rebate for settlement by the Authority.

9.3 In this respect, the Dispute relates to a proposal by SONI to vary the amount of the Connection Charges payable by BWFL under the Connection Agreement such that they are reduced by the amount of the SONI Partial Rebate Amount.

9.4 In light of our determination on Issue One, we consider it reasonable (which is the way the Condition 26(3) facility is expressed) to settle the referred dispute as to the calculation of the Partial Rebate under Condition 26(3) by simply recording that SONI has, in our opinion – as we have found in relation to Issue One - calculated the Partial Rebate (and thus varied the connection charges) *in accordance with the terms of the TCCMS* so that no consideration need be given to any of the consequential "directions" sought by the Parties (each prefaced on an alternate finding that the Partial Rebate had *not* been calculated in accordance with the TCCMS).

9.5 Our determination on this Issue Four is that no consequential directions need to be made.

10 SECTION TEN: DETERMINATION ON ISSUE FIVE

10.1 The fifth issue for adjudication is what type of Art 31A (6) *"determination"* should be made (to include any order in relation to costs[55] in exercise of the power contained in Art 31A (5A)) in respect of the (accepted) Art 31A complaint made by BWFL (alleging non fulfilment by SONI of its Directives obligations in respect of (non) discrimination and/or transparency/information provision) having regard to -

(a) the findings/adjudications on Issues One through to Four (above)[56];

(b) a finding/adjudication (which the decision makers should make) as to that element of the (accepted) Art 31A complaint that does not concern the actual calculation of the amount of the Partial Rebate but instead concerns the interactions between SONI and BWFL in relation to the arrangements for (future) funding or payment of any Partial Rebate (against the Connection Charges as originally levied) due to BWFL upon (any future) connection of the ACSS to the NI Transmission System.

Article 31A Complaint

10.2 The complaint made by BWFL under Article 31A of the Electricity Order is that SONI -

(a) contrary to Articles 40(1)(f) and 47(5) of the 2019 Directive[57], discriminated as between BWFL and NIE Networks in its application of the Cost Allocation Rules; and

(b) contrary to Article 40(1)(g) of the 2019 Directive, failed to provide BWFL with the information it needed for efficient access to the transmission system.

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[55] We note that Article 31A (5A) uses the words "costs *or expenses*". Our use of the word "costs" – when we discuss a potential "costs" order to be included in the Art 31A (6) determination under Art 31A (5A) - is intended to cover both "costs" and/or "expenses". That is how this document should be read. We use "costs" for brevity.

[56] Please note the small adjustment to the words used in the Statement.

[57] Or the sister provisions in the 2009 Directive. We have already pointed out that there is no material difference between the directives in so far as it concerns BWFL's Art 31A complaint.

Discrimination

10.3 BWFL's contention is that SONI has discriminated between BWFL and NIEN Distribution in its application of the Cost Allocation Rules and therefore has failed to comply with Articles 40(1)(f) and 47(5) of the 2019 Directive.

10.4 Again, (and to prevent the reader from having to return to the earlier parts of this document)

(a) Article 40(1)(f) of the 2019 Directive reads –

"1. Each transmission system operator shall be responsible for:

…

(f) ensuring non-discrimination as between system users or classes of system users,"

(b) Article 47(5) of the 2019 Directive reads –

"5. In fulfilling their tasks in Article 40 and Article 46(2) of this Directive [Article 12 and Article 17(2) of the 2009 Directive], and in complying with Articles 16, 18, 19 and 50 of Regulation (EU) 2019/943 [Articles 14, 15 and 16 of Regulation (EC) No 714/2009], transmission system operators shall not discriminate against different persons or entities and shall not restrict, distort or prevent competition in generation or supply."

10.5 In this regard, the basis of BWFL's complaint on *discrimination* is that –

(a) NIEN Distribution and BWFL are different classes of system users (within the meaning of the directives); and

(b) SONI's has discriminated between NIEN Distribution and BWFL (as system users) by misapplying the Cost Allocation Rules and thus erroneously (under) calculated both the amount of the Partial Rebate due to BWFL and the (matching) UOSAC payable by NIEN Distribution.

10.6 We propose to take the second limb [(b): "*erroneous calculation*"] of BWFL's discrimination complaint first. We then turn to the first limb [(a) "*different class*

of system user"]. Each limb is, we note, an essential ingredient of BWFL's discrimination complaint (as presented).

Erroneous calculation

10.7 We have regard here to our key adjudication/finding on Issue One. That adjudication is that SONI has not failed to properly apply the Cost Allocation Rules in calculating the Partial Rebate due to BWFL (or the matching UOSCA). It has not erroneously calculated the Partial Rebate. It follows, therefore, that we do not accept the second limb of BWFL's discrimination complaint.

10.8 This conclusion is sufficient to reject BWFL's discrimination complaint; given that *each limb* of BWFL discrimination complaint is essential to that complaint. We need not, and therefore do not, propose to adjudicate the *first limb* of BWFL's discrimination complaint. However, we do propose to make some observations in that regard that the Parties[58] might find helpful. Before doing so we will make some further observations on BWFL's discrimination complaint. These observations concern the concept of differential treatment.

10.9 It seems to us that a claim of discrimination (under the directives) must – to be considered well founded - contain an allegation of *differential treatment*. At its core, discrimination involves treating persons *differently* (in similar circumstances) or failing to treat persons *differently* in dissimilar circumstances. BWFL's discrimination complaint makes no such allegation.

10.10 Indeed, it appears that BWFL accepts that SONI has - in calculating the UOSAC for NIEN Distribution - applied the Cost Allocation Rules in the *same* manner as it has applied those same provisions in calculating the Partial Rebate for BWFL, and *vice versa*. That is, SONI has applied the Cost Allocation Rules in the *same way* for *both* NIEN Distribution and BWFL.

10.11 There is no evidence before us which supports a contention that SONI applied the Cost Allocation Rules in one way for BWFL and in a different way for NIEN Distribution. Nor is there submission made (nor evidence adduced) that SONI

[58] If this part of the document carries over to the published final determination. We have still to hear the Parties comments in response to this document.

would have calculated the Partial Rebate or the UOSAC in a different way had it not been dealing with either BWFL and/or NIEN Distribution.

10.12 Further, it would not appear to be the case that BWFL submits that SONI should apply the Cost Allocation Rules in one way for BWFL and in a different way for NIEN Distribution on the basis that they are (as BWFL submits) different classes of system user.

10.13 Rather, BWFL's discrimination complaint is that: (a) SONI has misapplied the Cost Allocation Rules in the same way for both BWFL and NIEN Distribution; (b) that doing so gives NIEN Distribution a benefit because the UOSCAC payable by NIEN Distribution is of a lesser amount than BWFL contends it should be (asserting that the UOSAC should be the BWFL Partial Rebate Amount); and (c) that because NIEN Distribution gets the benefit (as BWFL describes it) of a lower UOSCAC than BWFL considers it should be, it follows that SONI is discriminating as between BWFL and NIEN Distribution contrary to the directive obligation/s cited.

10.14 None of this involves an allegation of *differential treatment* by SONI. Even a finding adverse to SONI on Issue One would not therefore - without more – ground a claim of differential treatment. A necessary component of "discrimination" would still, it seems to us, be missing.

10.15 We now return to the first limb of BWFL's discrimination complaint.

Different classes of system user

10.16 We accept that NIEN Distribution and BWFL do not undertake the same activities. However, we do not consider that it necessarily follows that they are each a different class of system user. We note that the definition of *'system user'* in the 2019 Directive reads "*means a natural or legal person who supplies to, or is supplied by, a transmission system or a distribution system*" and that in the circumstances of this case both NIEN Distribution and BWFL supply to a transmission system.

10.17 Again, our conclusion on the second limb of BWFL's discrimination complaint (see above) means that we need not make any finding as to whether NIEN Distribution and BWFL are different classes of system user for the purposes of Article 40(1) and/or Article 47(5) of the 2019 Directive

10.18 We acknowledge that Article 47(5) of the 2019 Directive refers to "different persons or entities" and not (merely) different classes of system user. However, we do not consider that this assists BWFL's discrimination complaint in any material way. BWFL discrimination complaint is advanced on the basis that it is a different class of user compared to NIEN Distribution. Further, the obligation in Article 47(5) refers to the obligation in Art 40 and the (only) relevant obligation (cited by BWFL) is Art 40(1)(f) which itself refers to different "classes of system user" (not different persons or entities).

10.19 Moreover, our adjudication on the second limb of BWFL's discrimination complaint still counts as dispositive of BWFL's discrimination complaint (for the reasons offered above) so relieving us of the necessity to make any further finding as to the precise meaning or effect of Art 47(5).

Determination on the BWFL discrimination complaint

10.20 Our adjudication on Issue One is determinative in respect of our determination on this Issue Five. There is no evidential foundation for BWFL's discrimination complaint. We have found – on Issue One – that SONI has <u>not</u> misapplied the Cost Allocation Rules. There is, because of that finding, no need to adjudicate as to whether NIEN DNO and BWFL are different classes of system user for the purposes of the directives.

10.21 Furthermore, we observe that there is no claim by BWFL of differential treatment by SONI leaving BWFL's discrimination complaint bereft of what we consider to be an essential component of a claim of discrimination.

10.22 Accordingly, the determination we make under Article 31A (6) of the Electricity Order is that this (discrimination) part of the Art 31A complaint is not well founded and there is no need to exercise any power or duty that is conferred or

imposed on the Authority under the Electricity Order or the Energy Order in so far as that power or duty relates to the subject matter of the complaint.

10.23 We deal with the question of a “costs” order which is included in the overall Art 31A (6) determination (separately) later in this document.

Lack of information provision (transparency) needed for efficient access to the transmission system

10.24 BWFL's contention is that there has been a lack of transparency (both prior to the date on which the BWFL Wind Farm was connected to the transmission system and also prior to the date the ACSS was so connected) from SONI which has meant that it has not been provided with the information needed for efficient access to the transmission system and this means SONI has failed to comply with Article 40(1)(g) of the 2019 Directive.

10.25 Again, (to avoid the reader having to circle back to the earlier parts of this document) Article 40(1)(g) of the 2019 Directive reads –

> *"1. Each transmission system operator shall be responsible for:*
>
> *…*
>
> *(g) providing system users with the information they need for efficient access to the system"*

10.26 It is right to observe that this directive provision does not oblige the TSO (SONI) to be transparent. There is no freestanding obligation to be transparent. However, we understand BWFL to contend that the complained of lack of transparency on SONI’s part represents and evidences a failure (by SONI) to meet the stated (directive) obligation to provide *system users with the information needed for efficient access to the (transmission) system*.

10.27 Neither the 2019 Directive nor domestic legislation elaborate or opine on what constitutes *efficient access* to the transmission system, and BWFL has not made any submissions, with supporting evidence, as to what constitutes *efficient* access.

10.28 It is, however, relevant to note that 'access to the system' is not the same thing as 'connection' to the system. That this is the case is confirmed by EU case law - C-239/07 *Julius Sabatauskas* [2008] ECR I-07523 – which case law continues to apply[59] notwithstanding that the UK has left the EU.

10.29 Given that BWFL's contentions and submissions relate to connection charges and therefore *connection* to the system, it is not evident that the requirements of Article 40(1)(g) are applicable to the circumstances of the case.

10.30 In any event, BWFL has neither identified nor elaborated on what information it did not receive, or has not received, as *a system user* (i.e., *following* the *connection* of the BWFL Wind Farm) from SONI which it needed or needs for *access* to the system. Nor has it identified which information it has received from SONI which relates to access to the system which lacks transparency.

10.31 It has however asserted that the "*lack of transparency is borne out by the practical workings of the TIA Document between SONI as the TSO and NIEN as the distribution network owner and operator in relation to charging arrangements for connections to the transmission system resulting in the TIA Dispute and subsequent licence modifications*".

10.32 That there was a dispute between SONI and NIEN Distribution about the TIA or that there have been 'subsequent licence modifications' does not, we consider, demonstrate a lack of transparency from SONI concerning information which BWFL contends that it needs or needed for (efficient) *access* to the system.

10.33 We also note that –

(a) BWFL accepts that the requirement for SONI to publish a connection charging statement implements the key requirements relating to non-discrimination, provision of information (and transparency) for efficient access to the transmission system. In this regard we note that SONI has

[59] *Sabatauskas* was decided in relation to a previous electricity directive but continues to apply to the Directives by analogy.

published a (UR approved) connection charging statement, i.e., the TCCMS.

(b) The BWFL Wind Farm has been connected to, and thereby 'using' the transmission system, since 29 August 2017.

(c) Sections 3 and 5 of BWFL's complaint details the considerable engagement between BWFL and SONI (both before and after the connection of the Wind Farm to the transmission system) whereby information would have been provided by SONI to BWFL on relevant matters.

10.34 In light of all of the above, there is, we conclude, no evidence to support BWFL's contentions that SONI has failed to meet its obligation under Article 40(1)(g) of the 2019 Directive such that it failed to provide BWFL with information that BWFL needs or needed for efficient access to the transmission system.

Determination on BWFL's Art 31A information provision (transparency) complaint

10.35 Accordingly, the determination we make under Article 31A (6) of the Electricity Order is that this (information provision/transparency) part of the BWFL Art 31A complaint is <u>not</u> well founded and there is no need to exercise any power or duty that is conferred or imposed on the Authority under the Electricity Order or the Energy Order in so far as that power or duty relates to the subject matter of the complaint.

10.36 We shall now deal with the question of a "costs" order to be included in the Art 31A determination.

Costs Order part of the Article 31A (6) determination

10.37 What follows represents our conclusion as to an Art 31A (5A) costs order to be included in the Article 31A (6) determination on the BWFL Art 31A complaint made. It proceeds upon the conclusions just outlined in respect of both aspects of BWFL's Article 31A complaint.

The power to make a costs order

10.38 Article 31A (5A) and Article (5B) of the Electricity Order provide as follows:

(5A) Where the Authority makes a determination under [Article 31A] it may include in the determination an order requiring any party to the dispute to pay such sum in respect of the costs or expenses incurred by the Authority in making the determination as the Authority considers appropriate and this order shall be final and shall be enforceable as if it were a judgement of the county court.

(5B) In making an order under paragraph (5A), the Authority shall have regard to the conduct and means of the parties and other relevant circumstances.

10.39 Each Party is aware of the power to make an Article 31A (5A) type costs[60] order. They have each made submissions that the other should pay all the costs *incurred by the Authority* in adjudicating on the Dispute. SONI has gone further and asked the Authority to order that BWFL pay the costs *incurred by SONI* to the extent that the Authority enjoys the legal power to do so.

Can an Article 31A costs order include an order for costs between the Parties

10.40 We confirm that we have no power to make an *inter partes* costs order of the type sought by SONI.

Should we make a costs order

10.41 Here we look to the express terms of Art 31A (5A) and Article 31A (5B) of the Electricity Order, as read with the contents of our published November *2017 Information Note on Costs Recovery* (the **Information Note**).[61] We also have regard to paragraph 25 of Section D of the 2018 Disputes Policy.

[60] We use “costs” to include “costs and expenses”.
[61] See **A13**

10.42 Paragraph 25 of Section D of the 2018 Policy[62] states that where the Authority is considering whether to make a provision for payment of incurred costs (and if so on what terms), it will have regard to –

(a) the nature and complexity of the complaint or dispute;

(b) the resources of the parties;

(c) the conduct of the parties in relation to the complaint or dispute (whether before or after the date of the application);

(d) the outcome of the complaint or dispute; and

(e) what is fair and proportionate in all the circumstances of the case.

10.43 Article 31A of the 1992 Order confirms that the Authority "may" make an Art 31A (5A) costs order. It doesn't have to. It makes such order as it considers "appropriate" having regard to the means of the parties; their conduct; and all relevant circumstances. In deciding whether to make a costs order (and if so the type of any costs order made) the Authority is exercising a broad judgement/discretion.

10.44 The Information Note sets out that the Authority's general approach (or policy) is to make a costs order where we have the legal power to do so; although the Information Note also confirms that there might be "exceptional" cases where it is considered that no costs order need be made (even though we have the legal power to do so).

10.45 So, we have first to consider whether there is any feature of this case (focusing on the Art 31A complaint made by BWFL) that should persuade us not to make a costs order. We do not consider there is.

10.46 We recognise that this case is not a simple one by nature. It has its own complexity. We also recognise that there are specific aspects of the case that are novel (for example the meaning/application the CCAV phrase). However,

[62] The Draft Decision/Determination should have here referred to the paragraph 25 provisions of Section D of the 2018 Disputes Policy. This has (now) been corrected.

we also note that this is not the first time that the Authority has had to deal with a complaint/dispute concerning the proper application of the Cost Allocation Rules. For instance, the published *First BWFL Determination* (between the same Parties) cited in the wider set of documents involved examination of the same Cost Allocation Rules.

10.47 In its response to the Draft Decision/Determination, BWFL submits that the case should be considered exceptional, novel and complex – for the reasons given (and as already set out above) - and to consider otherwise would not be fair and appropriate treatment of BWFL. We disagree.

10.48 We have explained above that there is some complexity in the case and some aspects of the case are novel. However, we do not consider that these features - either taken alone or in conjunction with the matters set out in the BWFL comments to the Draft Decision/Determination – makes this case exceptional such that the making of a Cost Order (against BWFL) would not be appropriate (or fair/proportionate).

10.49 BWFL refers to the fact that we are interpreting (and applying) an industry approved document. We do not think this makes the case exceptional (or otherwise inappropriate/unfair/disproportionate) such that we should not make a costs order. Dispute determination often involves examination of provisions within Charging Statements.

10.50 The fact that the provisions of the TCCMS under examination are considered to contain "defined terms in important pricing/rebate provisions" does not appear to us to make any difference to our general assessment. It does not make the matter exceptional. Nor does the reference to the fact that the Dispute involves "different charging statements" in an "all island single electricity market". Neither factor causes us to consider a costs order against BWFL (only) as otherwise inappropriate/unfair/disproportionate).

10.51 The fact that the Draft Determination/Decision is of some "length" does not change our assessment as to the making (or terms of) a Cost Order (against BWFL). The length of the decision documents is an incidence of the nature of the Dispute and our (careful) examination of the issues. The same

considerations apply to the reference to the extensions of time granted by BWFL.

10.52 Nor do we consider the involvement of the expert (EY) in the process such as to demonstrate “exceptionality” or cause us to consider the case one in which a costs order should not be made (against BWFL only).

10.53 BWFL refers to the “extremely unusual” examination of the asset “status” of the “single” OHL. But this is in no way novel. It was examined in the TIA Determination. The OHL consideration is not, we consider, an exceptional feature persuading us not to make a costs order.

10.54 We have reviewed and given careful consideration to the factors listed by BWFL in support of its submission that the case is an 'exceptional' (and novel and complex) one such that a costs order against it should not be made. Having done so we do not accept that the threshold of 'exceptionality' or ‘novelty’ or ‘complexity’ are met.

10.55 Taking all relevant matters into account we therefore conclude that there are no exceptional features in this case such as to warrant not making a costs order (in this case against BWFL alone). Put another way, we are satisfied that *a* costs order (against BWFL alone) is fair, appropriate and proportionate in all the circumstances. We do not consider that a cost order should not be made having regard to any exceptionality, novelty and complexity as may be exhibited in this Dispute.

10.56 We recognise that the “means” (or “resources”) of a Party might be an exceptional circumstance justifying the absence of a costs order. That is specifically recognised in the Information Note and the Disputes Policy. We are obliged to have regard to the resources of the Parties by the terms of Art 31A (5B). However, neither party in this case appears to lack the means to meet a costs order. The consideration of the Parties’ “resources” is, accordingly, not a relevant consideration in our assessments. We are dealing with two commercial actors.

10.57 Article 31A (5B) refers to the "conduct" of the Parties. So too does the Information Note and para 25 of Section D of the 2018 Disputes Policy. We take this into account. However, we see nothing in the conduct of the Parties (either before or after submission of the Application) that causes us to consider it unfair and inappropriate (or disproportionate) to make a Costs Order (against BWFL only)

10.58 We note the "conduct" submission made by BWFL in its response to the Draft Decision/Determination. We do not consider that these factors are relevant to our Costs Order. Parties are expected to co-operate with the Authority in any dispute determination process. They are expected to meet timescale set by the Authority. Provision is made for the Parties to ask for extensions of time where this is required. We can see nothing to justify any finding of inappropriate behaviour by SONI (or BWFL) in the period before or after the Application. The fact that BWFL granted extensions (of time) to the Authority has been welcomed. However, it soes not change the assessment as to the making (or terms of) a Costs Order against BWFL.

10.59 We recognise that Art 31A (5B) obliges us to have regard to all the "relevant circumstances" when deciding on the making of a Costs Order. Similar provision is made in the 2018 Disputes Policy and the Information Note. Again, we discern nothing in the "circumstances" that would render it unfair or inappropriate (or disproportionate) to make a Costs Order (against BWFL only).

Against which party (or parties) should a costs order be made

10.60 Article 31A (5B) states that we can make a costs order against one of the Parties or both. In deciding how to proceed we look to the considerations expressed in Article 31A (5B) to assess what is appropriate in all the circumstances (having regard to the conduct of the Parties and their means). We also have regard to the contents of the Information Note and paragraph 25 of Section D of the 2018 Policy.

10.61 Our conclusion is that it is "appropriate" (in all the circumstances) to make a costs order against, and only against, BWFL.

10.62 It is an important consideration that BWFL has “lost” the “case”. That is the “outcome” that the Information Note and paragraph 25 of the 2018 Dispute Policy talks about. It is plainly a “relevant circumstance” (in the language of Art 31A (5B)) of the Electricity Order).

10.63 We see nothing in the “circumstances” - to include the resources of the Parties and/or any of their conduct (either before the submission of the BWFL Application or after) and/or their apparent resources which means it is appropriate to not make a cost order against, and only against, BWFL.

10.64 In so concluding we have had regard to the submissions of BWFL (in response to the Draft Decision/Determination) that it should not face a Costs Order. We have already explained why those submissions do not cause us to consider it inappropriate to make a Costs Order, and to make it only against BWFL.

10.65 Accordingly, we conclude that a costs order against (only) BWFL is – in the circumstances appropriate.

What are the costs incurred by the Authority in making the Art 31A determination

10.66 We consider that these costs are represented by –

(a) The (external) costs payable to EY for the EY report (**EY’s costs**)

(b) Our external legal consultant costs (in so far as they do not relate only to the Condition 26 (3) matter)

10.67 We should further explain why EY’s costs are recoverable under Art 31A. Paragraph 1.16 of Section One of this document explains the basis upon which an Article 31A *determination* is being made. It further explains the considerable “overlap” between the “decision” required to resolve the (accepted) reference (by BWFL) under Condition 26(3) and BWFL’s (accepted) Article 31A complaint. The overlap is constituted by BWFL’s central contention that SONI has *failed to properly apply* the Cost Allocation Rules (part of the TCCMS) in calculating the Partial Rebate due to BWFL in all the circumstances.

10.68 The EY report provides information used in meeting the central contention. It therefore provides information used in meeting the Art 31A complaint (as it was articulated by BWFL). The EY costs therefore stand as costs incurred in the making of the Art 31A determination.

Do we include the internal costs of the Authority

10.69 We note that, to date, the Authority has not sought (in resolving disputes) to recover its *internal staff costs* as part of costs orders made in previous determinations. We adopt the same approach here, but that should not be seen as demonstrating a precedent.

10.70 It follows that we conclude that only the external costs incurred by the Authority are to be recovered under the costs order (to be made only against BWFL). The external costs of the Authority incurred are made up of the costs incurred in securing the support of our external legal consultants and the cost incurred in sourcing the EY Report.

What is the total amount of the (external) costs incurred

10.71 The total external costs incurred up to the date of the making of this determination is the aggregate of:

(a) €[63] [redacted] (VAT not chargeable) for the EY costs (which works out at a sum of £[redacted] as a sterling equivalent)[64], and

(b) £[redacted] (which is exclusive of VAT) for external legal costs of our legal consultants (not including the costs only referrable to Condition 26(3)).

All or part of the costs incurred

10.72 We recognise that we have the power to order the paying party to only pay *a proportion* of the (external) costs incurred by the Authority. Again, we look to all the relevant circumstances in considering what is appropriate: to include

[63] The Draft Determination indicated (wrongly) that the figure for EY costs was in sterling. It should have been euros. The error is in BWFL's favour and is now corrected.
[64] Calculated by reference to a payment date to EY of 21 December 2022.

those set out in the Information Note and paragraph 25 of Section D of the 2018 Policy.

10.73 We note the points made by BWFL about its "conduct" (co-operation and agreement to extensions of time sought by the Authority). We do not consider that this is a "circumstance" that should weigh in favour of BWFL so far as the terms of a Costs Order (against BWFL) is concerned. Our reasons are the same as those underpinning our decision to make a costs order.

10.74 We note that BWFL (in its response to the Draft Decision/Determination) states that it should "bear no more than 50% of such costs in any circumstances". We disagree. We see nothing in the relevant circumstances that makes it appropriate that the "terms" of the Costs Order against BWFL should require it to only pay "no more than 50%" of the specified costs. We consider that the relevant circumstances are such that it is appropriate that BWFL pay **all** of the specified costs.

10.75 We do not consider that any adjustment should be made having regard to the "nature" and "complexity" or "novelty" of the Dispute (noting the BWFL response to the Draft Decision/Determination) or the "means" of the Parties. We have already commented on how we view these considerations (see above)

10.76 We conclude therefore that BWFL (and BWFL only) should be liable to a costs order requiring it to pay **all** of the recoverable costs as outlined above as the costs incurred in the making of the Art 31A determination.

Time to Pay

10.77 We conclude it is appropriate for BWFL to be allowed **28 days** from the date of this determination to make payment required under the costs order.

VAT

10.78 The Authority is VAT registered. The costs order is therefore exclusive of VAT.

Fairness and proportionality

10.79 We have considered whether the costs order against BWFL is fair and proportionate in all the circumstances. We have concluded – having considered all of the points made by BWFL (including its response to the Draft Decision/Determination) - that it is. We note that the amount of money at stake in this case is in the order of £[redacted], being the difference between the SONI Partial Rebate Amount and the BWFL Partial Rebate Amount. The amount of the costs order is a small percentage of the amount at stake in the BWFL Application.

Costs Order

10.80 Brockaghboy Windfarm Limited [NI067528] is hereby ordered to pay the sum of £[redacted] by 28 February 2023 which amount is exclusive of VAT (VAT not being payable under this costs order) and represents the Authority's assessed external costs (and/or expenses) incurred (exclusive of VAT) in making the determination on the complaint made by Brockaghboy Windfarm Limited under Article 31A of the Electricity (NI) Order 1992 on 2 February 2022.

Dated: **30 January 2023**

Alex Wiseman

Claire Williams

For and duly authorised by the Northern Ireland Authority for Utility Regulation