

Single Electricity Market

TSO Certification under Article 10 of Directive 2009/72/EC

Moyle Interconnector Limited Application Preliminary Decision Qualified Approval of MIL Application

April, 2013

Table of Contents

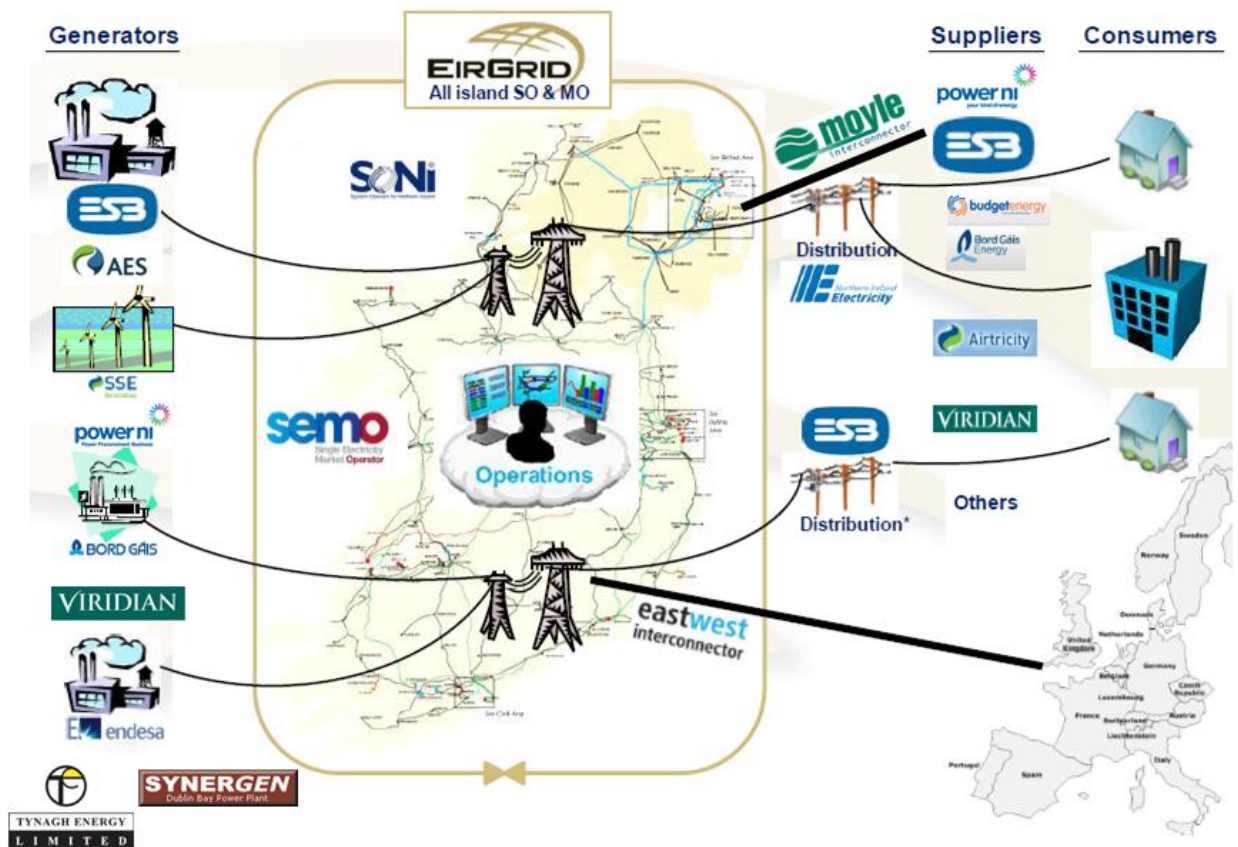
1	Executive Summary	3
2	Existing Arrangements and the Certification Process	4
	2.1 Northern Ireland Arrangements	4
	2.2 Assessment of application	6
3	European Commission Questionnaire	7
	3.1 General Information	7
	3.2 Ownership of Transmission System by the TSO – Article 9(1a) and 9(5)	8
	3.3 Control and ownership over the TSO – Article 9(1)b, c and d, 9(2) and 9(7)	9
	3.4 Tasks of the TSO – Article 12 of the Electricity Directive	11
4	SEM Committee Analysis	18
	4.1 Members of Mutual Energy Limited	18
	4.2 Director of MIL	19
	4.3 Moyle Energy Investments Limited	20
	4.4 Protection of information	21
	4.5 Non-discrimination	23
	4.6 Proposed improvements	23
	4.7 Overall assessment of application	25
	Annex 1	26

1 Executive Summary

- (1) The 3rd Internal Markets in Electricity Directive (Directive 2009/72/EC) requires that Transmission System Operators (TSOs) are unbundled from generation and supply interests. A TSO must be certified under the Directive and a number of grounds for certification are provided for. The Directive provides for three models of unbundling. Full ownership unbundling (FOU), Independent System Operator (ISO) and Independent Transmission Operator (ITO). In addition, where the existing arrangements provide for greater independence than the ITO model the Member State may apply the grounds stated in Article 9(9).
- (2) Moyle Interconnector Limited (MIL) has applied for certification under the grounds of full ownership unbundling (FOU), that the transmission system belongs to an undertaking that is independent from any supply and generation interests. An application for certification on the same grounds has also been made to Ofgem, which is the National Regulatory Authority for Great Britain.
- (3) The European Commission has determined that the System Operator for Northern Ireland (SONI) shall be the certified TSO in Northern Ireland and MIL has in place an agreement with SONI for SONI to use the Moyle interconnector and operate it on behalf of MIL. Moyle Interconnector Limited owns the Moyle Interconnector which links the electricity grids of Northern Ireland and Scotland.
- (4) The SEM Committee has undertaken an assessment of the application, which has had regard to the requirements of Article 9 of the Directive and its transposition into Northern Ireland law, in particular through Article 10G of The Gas and Electricity (Internal Markets) Regulations (Northern Ireland) 2011. It has followed the Guidance issued by the European Commission in SEC (2011) 1095 final in assessing the MIL application, considered additional issues arising from the application and therefore requested and reviewed additional information.
- (5) The SEM Committee has concluded that while the ownership arrangements and interests of MIL, and of the Mutual Energy Limited (MEL) group of companies, satisfies the ownership unbundling requirements of Article 9 of the Directive a number of measures are required to be implemented to assure maintenance of this independence in future. These qualification measures include an undertaking on future shareholder rights, provision of an audit opinion on non-discrimination and measures relating to the provision of, and access to, information.
- (6) On the basis of this assessment the preliminary decision of the SEM Committee is that the application of Moyle Interconnector Limited, subject to implementation of the proposed improvements and to the opinion of the Commission, should be granted.

2 Existing Arrangements and the Certification Process

2.1 Northern Ireland Arrangements



- (9) This purpose of this section is to provide a brief overview of the structure of the Electricity Market in Northern Ireland and Ireland and the role of the Moyle Interconnector.
- (10) The wholesale market, the Single Electricity Market (the SEM), is a mandatory gross pool market for the island of Ireland (i.e. a single market including Northern Ireland and Ireland). This market is operated by an independent entity licensed by the Regulators in Northern Ireland (Utility Regulator) and Ireland (Commission for Energy Regulation) as the Market Operator, known as SEMO (the Single Electricity Market Operator). SEMO is a joint venture between the two licensed TSOs – SONI for Northern Ireland and EirGrid for Ireland. EirGrid and SONI are both part of the EirGrid Group.
- (11) The electricity market in Northern Ireland has been open to competition to domestic customers since 2007. Industrial customers became eligible to change supplier from 1999 and from 2005 this was also possible for small and medium sized businesses. Electric Ireland, a member of the ESB Group, has been active in the business market for over 10 years and in the domestic market since 2011. Airtricity entered the market for domestic credit customers in 2010 and Budget Energy entered in 2011.

- (12) In relation to all SEM matters decisions are taken by the SEM Committee. The Utility Regulator, CER and an independent member (with a deputy) make up the SEM Committee. The Utility Regulator, Commission for Energy Regulation (CER) and the independent member each have one vote. Generally speaking, all wholesale market issues relating to the SEM are “SEM matters” but there is also an increasing number of transmission issues which are being addressed on an all-island basis and as such can be considered SEM matters. An example of this is TSO Certification. Regulatory issues which are not SEM matters are determined solely by the Utility Regulator. The powers and duties of the Utility Regulator are set out in various pieces of legislation.
- (13) The Northern Ireland electricity grid comprises a number of interconnected networks of overhead lines and underground cables. There are approximately 2,100km (110kV and 275kV) of transmission network, of which some 80km are underground, and approximately 42,900km of the distribution system, of which some 13,100km are underground. There are more than 800,000 customers connected to the distribution system, which links the three power stations and external interconnectors to 30 main substations.
- (14) SONI directs the output of each generating unit on the NI system to match supply to demand taking into account exchanges with other interconnected systems and ensuring the availability of ancillary services. The transmission and distribution assets belong to NIE. NIE holds the NIE Transmission & Distribution licence and SONI holds the Transmission System Operator Licence under the Electricity (NI) Order 1992 as subsequently amended.
- (15) NIE has been a separate, wholly owned subsidiary company of a vertically integrated undertaking (VIU) with generation and supply interests, previously under the ownership of Viridian and currently under the ownership of ESB. SONI is a separate legal entity with no interests in generation or supply.
- (16) MIL owns the Moyle Interconnector which links the electricity grids of Northern Ireland and Scotland through submarine cables running between converter stations at Ballycronan More in Islandmagee, County Antrim and Auchencrosh in Ayrshire. The link has a maximum technical capacity of 500MW. The Moyle Interconnector transmission capacity is available for third party access, i.e. to anyone who wishes to trade in electricity in either direction between Ireland and Great Britain or beyond. The capacity is made available to third parties through capacity auctions which operate on a pay-as-cleared basis i.e. charges are only payable when congestion occurs. The interconnector also provides ancillary services to SONI, which operates the Moyle interconnector under contract from MIL, which allows SONI to use the interconnector and operate it on behalf of MIL. The European Commission has determined that SONI shall be the certified TSO in Northern Ireland.
- (17) Condition 14 of the MIL Licence requires that “The licensee shall not on its own account purchase or otherwise acquire electricity ... for the purpose of sale or other disposition to third parties in Northern Ireland unless such purchase or other acquisition or sale or other disposition is made as part of the Interconnector Business. The licensee shall not hold or acquire any interest in any generation sets (whether or not located in Northern Ireland) and shall not hold an accountable interest in any generation sets (whether or not

located in Northern Ireland), unless such generation sets are required for the purposes of carrying on the Interconnector Business. The licensee shall not hold or acquire shares or any other interest in any other person without the written consent of the Authority.” References to the ‘Interconnector Business’ are defined in the licence as “the business of the licensee as holder of this licence in making available for use the Moyle Interconnector and all activities and matters incidental thereto.” References to purchase of electricity or acquisition of interest in generation sets must be understood strictly within this stipulation. This means that interests in generation are permitted only in so far as they are necessary for operation of the interconnector business (such as standby generation for convertor stations) and does not denote the power to engage in commercial generation within any market or for electricity consumers.

2.2 Assessment of application

- (18) The SEM Committee has undertaken an assessment of the application having regard to the requirements of Article 9 of the Directive and the Guidance issued by the European Commission in SEC (2011) 1095 final. The ownership unbundling questionnaire within this Guidance is set out in section 2.2. The SEM Committee also made an assessment of particular features of Moyle Interconnector Limited and Mutual Energy group of companies and requested additional information in the course of its examination of the submission. This further assessment is contained in section 4.

3 European Commission Questionnaire

3.1 General Information

(19) Name and address of the undertaking to be certified as TSO:

Moyle Interconnector Limited ("MIL")

The Arena Building,

85 Ormeau Road,

Belfast,

BT7 1SH

Registered number: NI036562

(20) Internet address of the website of the TSO:

<http://www.mutual-energy.com>

(21) Name, address, telephone number, fax number and e-mail address of, and position held by, the appropriate contact person in the TSO:

Name: Stephen English

Address: Mutual Energy Limited,
The Arena Building,
85 Ormeau Road,
Belfast,
BT7 1SH

Telephone: +44 (0)28 9043 7580

Mobile: +44 (0)78 1114 2270

Fax: +44 (0)28 9024 9673

Email: Stephen.english@mutual-energy.com

Position: Contracts Manager

(22) name and address of the National Regulatory Authority to which Commission decision shall be delivered:

Utility Regulator
Queens House
14 Queen Street
Belfast

BT1 6ED

(23) Name, telephone number and e-mail address of a contact person at the National Regulatory Authority:

Name: Joe Craig

Telephone number: +44 (0) 28 9031 6321

joe.craig@uregni.gov.uk

3.2 Ownership of Transmission System by the TSO – Article 9(1a) and 9(5)

(24) Regarding the ownership of the transmission system present the analysis:

- a) Specifying all transmission systems owned by the TSO in the Member State concerned (also those under construction or not constructed before 3 September 2009), including interconnectors and separated transmission networks.
 - b) Specifying transmission systems, which the TSO owns (fully or partially) in other member states of the EU.
 - c) Indicating all other owners of the given transmission system specifying the shares of each owners, in case the TSO owns the transmission system only partially.
-
- a) *Moyle Interconnector Limited owns the Moyle Interconnector which links the electricity grids of Northern Ireland and Scotland.*
 - b) *Moyle Interconnector Limited does not own any other transmission systems in another member state of the EU.*
 - c) *Moyle Interconnector Limited is the sole owner of the Moyle Interconnector and there are no other owners of the transmission system.*

(25) Inform if the TSO leases or rents any transmission systems from or to any other parties.

Moyle Interconnector Limited does not lease or rent any transmission systems from or to any other parties.

(26) In case the TSO is a joint venture that belongs to two or more undertakings which own transmission systems in different Member States inform if all parts of this joint venture are TSO approved under an ISO or ITO model. Please name these companies and indicate the TSO status (article 9(5)).

This is not applicable. Moyle Interconnector Limited is not a joint venture that belongs to two or more undertakings which own transmission systems in different Member States

3.3 Control and ownership over the TSO – Article 9(1)b, c and d, 9(2) and 9(7)

(27) Article 9(1)-(3) of Electricity and Gas directives requires that the TSO is not controlled by any person involved in the production or supply of gas and electricity. In order to establish the ownership and control over the TSO it is required to establish list of all undertakings belonging to the same group. Therefore the following information is requested:

- a) List of all undertakings or persons controlling the TSOs, directly or indirectly;
- b) List of all undertakings active in any reportable market that are controlled, directly or indirectly:
 - by these parties
 - by the TSO
- c) List all companies performing any of the functions of generation or supply in case the same person directly or indirectly exercises control or any right over the TSO and such companies

For each entry listed above in points (a)-(c) the nature and means of control should be specified (e.g. voting rights, veto rights, holding of a majority share, powers to appoint members of the supervisory body, the administrative board or bodies legally representing the undertaking, de facto and de jure control, sole control or joint control).

The information sought in this section may be illustrated by the use of organisation charts or diagrams to show the structure of ownership and control of the undertakings. Please include the relevant legal provisions and indicate which information is confidential.

- a) *Moyle Interconnector Limited (MIL) was incorporated in Northern Ireland on 8th July 1999 as a private limited company. The directors of MIL are: Peter Warry, Paddy Larkin, Gerard McIlroy, Regina Finn, Gerry Walsh, Stephen Kirkpatrick and Clarke Black.*

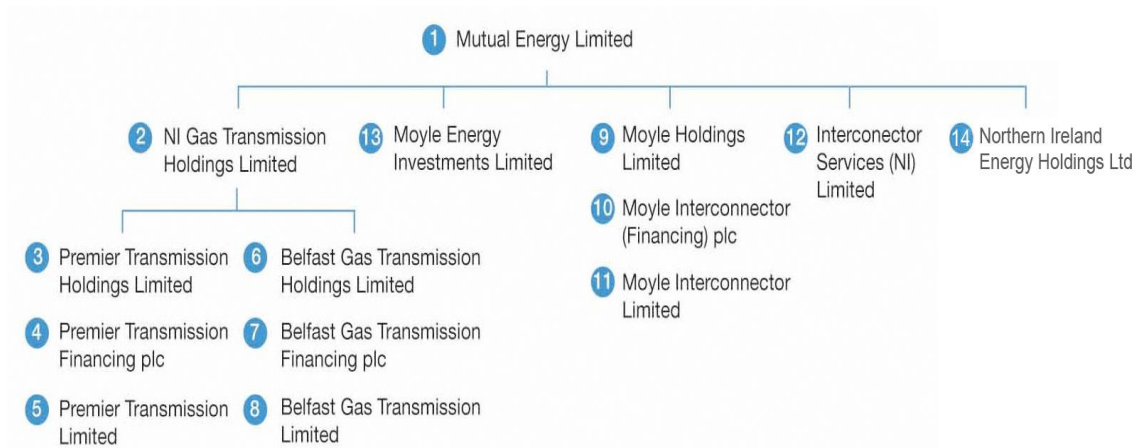
Moyle Interconnector (Financing) plc (MIF) was incorporated in Northern Ireland on 3rd March 2003 as a public limited company for the principal purposes of acquiring the entire issued share capital of MIL and issuing the bonds by which it is financed. It owns the entire issued share capital of MIL. The directors of MIF are: Gerard McIlroy and Paddy Larkin.

Moyle Holdings Limited (MHL) was incorporated in Northern Ireland on 8th March 2003 as a private company limited by guarantee. It owns the entire issued share capital of MIF. The directors of MHL are: Gerard McIlroy and Paddy Larkin.

Mutual Energy Limited (MEL), the ultimate parent company of MIL, is a company limited by guarantee, which means that it has no shareholders but has Members to whom the directors of MEL are accountable. (see section 4.1) MEL is registered in

Northern Ireland under the Companies (Northern Ireland) Order 1986 and formed on 31 January 2005. MEL is the direct holding company of the Moyle group of companies. MEL is the sole member of Moyle Holdings Limited (MHL), which owns the whole issued share capital of Moyle Interconnector (Financing) plc. (MIF). MIF owns MIL, the owner of the Moyle Interconnector infrastructure assets. The directors of MEL are: Peter Warry, Paddy Larkin, Gerry Walsh, Regina Finn, Gerard McIlroy Stephen Kirkpatrick and Clarke Black.

- b) The following organisation chart shows the structure and companies composed of Mutual Energy Limited:



Mutual Energy Limited controls all the companies within the MEL Group. None of the companies in the MEL Group listed above have any equity interests or voting rights held in any other company. MEL is not a producer or supplier of electricity and neither it nor any of its subsidiaries directly or indirectly exercise control over an undertaking performing any of the functions of electricity generation or supply. There are no shares held by Moyle Interconnector Limited and no companies controlled by MIL.

None of the senior officers or members of MEL have been or may be appointed by a person who controls a gas or electricity undertaking which is a relevant producer or supplier or who has a majority shareholding in a gas or electricity undertaking. No member of the board of directors, of any of the above-mentioned companies, is a member of a supervisory board, administrative board or a body legally representing the undertaking, of both an undertaking performing any of the functions of production and supply and a transmission system operator, as prohibited under article 9(d) of EU Directive 2009/73/EC.

- c) Neither MEL nor any of the subsidiary companies of MEL is a producer or supplier of electricity or gas.

- (28) In case a public body is exercising the rights described in paragraph (b), (c) and (d) of Article 1 of the Electricity and Gas directives, the unbundling provisions require ensuring independence between the public body exercising those rights over transmission and over generation, production or supply activities. Therefore in case one or different

central, regional or local governmental bodies (e.g. Ministries) exercise those rights, it is necessary to introduce mechanisms ensuring such independence. In this respect please answer the following questions:

- a) Please describe if public bodies directly or indirectly exercise control or any right over transmission, production and supply
- b) In case the central, regional or local governmental bodies exercise those rights for undertakings involved in transmission systems, generation, production and supply, please:
 - describe in detail which part of the governmental bodies exercise those rights over which undertakings.
 - describe briefly the constitutional (legal, financial) interdependencies between those parts of the governmental bodies
 - describe briefly how it is ensured that the rights described in paragraph (b), (c) and (d) of Article 1 of the electricity and Gas directives respectively in respect to transmission systems are exercised independently from generation, production or supply activities.

Mutual Energy Limited (MEL), the ultimate parent company of MIL, is a company limited by guarantee, registered in Northern Ireland under the Companies (Northern Ireland) Order 1986. MEL is the direct holding company of the Moyle group of companies. No public bodies therefore directly or indirectly exercise control or any right over transmission, production and supply.

- (29) In case the TSO was part of a vertically integrated undertaking in line with Article 9(7) it needs to be ensured that no commercially sensitive information is transferred to the production, generation or supply undertakings and that the TSOs staff is not being transferred to those undertakings. In view of this provision please describe briefly procedures which ensure that no commercially sensitive information is being transferred to the production, generation or supply undertakings. Please submit the relevant provisions.

Neither MEL nor any of the subsidiary companies of MEL is a producer or supplier of electricity. Moyle Interconnector Limited was therefore not part of a vertically integrated undertaking.

3.4 Tasks of the TSO – Article 12 of the Electricity Directive

- (30) The TSO is required to operate the network in line with the Article 12 of the Electricity Directive and Article 13 of the Gas Directive. Please:
- a) describe briefly all tasks the TSO fulfils and conclude on compliance with Article 12 (electricity) or Article 13 (gas). Submit all relevant parts of all relevant regulatory provisions (laws, network codes, agreements between companies, statutes)

showing that the TSO has full responsibility to fulfil the above listed tasks and clearly mark the relevant parts supporting the analysis.

- b) show on the basis of applicable regulation that the NRA concerned is equipped with powers, including ability to impose dissuasive fines which it is able to apply when the TSO is not fulfilling or not fully fulfilling the tasks and obligations specified in Article 12 of the Electricity Directive and 13 of the Gas Directive.

- a) *Moyle Interconnector Limited holds a licence “to participate in the operation of the electricity interconnector” granted by the Department of Enterprise, Trade and Investment in Northern Ireland under the Energy (Northern Ireland) Order 1992 as amended. Under Schedule 2 of this licence the Utility Regulator may revoke the Licence of Moyle Interconnector Limited by giving no less than 30 days notice under the conditions set out in Schedule 2. This Licence sets out the Conditions under which MIL is required “to participate in the transmission of electricity for the purpose of giving a supply to any premises or enabling a supply to be given.”*

Moyle Interconnector Limited is responsible for management of the operation and maintenance of the Interconnector and any investment decisions relating to the facility. It has subcontracted out administration of the interconnector to SONI, which is a licensed TSO in Northern Ireland but MIL remains responsible through its licence for the tasks set out in Article 12 of the Directive. SONI is contractually bound not to do anything which may contravene the conditions of any relevant licence or obligations under any industry document which apply to MIL. MIL’s relationship with SONI is under instruction of the Utility Regulator, established in Condition 12 of the MIL Licence, in order to practically facilitate the coordination of the transmission system in Northern Ireland.

MIL also contracts with Siemens Transmission and Distribution Limited (STDL) as its principal operational contractor but MIL remains responsible for the availability of the interconnector, mode of operation, changes to the asset, and control parameters

The Directive does not prevent MIL from exercising its right to sub-contract physical tasks in terms of operating the system to a third party so long as MIL retains overall control of the activities sub-contracted and responsibility for them, which continues to be the case.

The Licensed responsibilities of MIL are mapped to the tasks of transmission system operators set out in Article 12 of the Directive below:

Moyle Interconnector Limited Licence obligations mapped against Article 12 tasks

<i>Article 12</i>	<i>Moyle participation in Transmission Licence</i>
<p><i>(a) ensuring the long-term ability of the system to meet reasonable demands for the transmission of electricity, operating, maintaining and developing under economic conditions secure, reliable and efficient transmission systems with due regard to the environment;</i></p>	<p><i>Part 1 (1) Terms of Licence gives MIL “a licence to participate in the transmission of electricity.”</i></p> <p><i>Condition 2 requires securing the objectives of “optimising the efficiency, reliability, availability and operational life of Moyle Interconnector.”</i></p> <p><i>Condition 12 requires that “The licensee shall:-</i></p> <p><i>(c) through an agreement with the transmission system operator in terms approved by the Authority ... make arrangements for the transmission system operator to operate the Moyle Interconnector in conjunction with its operation of the transmission system and for the transmission system operator to make arrangements for the entering into by the licensee of agreements for use of the Moyle Interconnector with third parties; and</i></p> <p><i>(d) maintain the Moyle Interconnector, in each case, in accordance with such standard of operation and maintenance as the licensee may, after consultation with the transmission system operator and with the approval of the Authority, adopt from time to time.” The transmission system operator at 3 September 2009 and at date of application is SONI.</i></p>
<p><i>(b) ensuring adequate means to meet service obligations;</i></p>	<p><i>Condition 9 provides for restrictions on the disposal of assets of the Licensee.</i></p> <p><i>Condition 12 makes provision for the licensee to ... “make arrangements for the</i></p>

	<p><i>transmission system operator to operate the Moyle Interconnector” and to “maintain the Moyle Interconnector ... in accordance with such standard of operation and maintenance as the licensee may, after consultation with the transmission system operator and with the approval of the Authority, adopt from time to time.”</i></p> <p><i>Condition 12 requires that no revision to the standard of operation and maintenance shall be made without the consent of the Authority which “may issue directions requiring the licensee to revise the standard . . . and the licensee shall forthwith comply with any such directions.” “The licensee shall not make or agree to any amendment or variation . . . to the agreement [with SONI]. . . without the consent of the Authority.”</i></p> <p><i>“The licensee shall within three months after the date of grant of this licence and thereafter whenever requested to do so by the Authority, draw up and submit to the Authority for the Authority’s approval a statement setting out criteria by which the performance of the licensee in maintaining the availability of the Moyle Interconnector and the quality of service which it provides may be measured.” It shall “within 2 months after the end of each financial year submit to the Authority a report providing details of the performance of the licensee during the previous financial year.”</i></p> <p><i>Condition 15 allows for the charging of fees for use of the Moyle Interconnector.</i></p>
<p><i>(c) contributing to security of supply through adequate transmission capacity and system reliability;</i></p>	<p><i>Condition 2 requires securing the objectives of “maintaining the capacity and functionality of the Moyle Interconnector”.</i></p> <p><i>Condition 12 (see above) provides for the transmission system operator to operate and maintain the Moyle Interconnector in accordance with standards approved by the Authority and for a statement setting out</i></p>

	<p>criteria by which the maintenance and availability of the Interconnector, and the quality of service it provides, may be measured. It provides that MIL shall submit annually to the Authority a report providing details of the performance of the licensee during the previous financial year.</p>
<p>(d) managing electricity flows on the system, taking into account exchanges with other interconnected systems. To that end, the transmission system operator shall be responsible for ensuring a secure, reliable and efficient electricity system and, in that context, for ensuring the availability of all necessary ancillary services, including those provided by demand response, insofar as such availability is independent from any other transmission system with which its system is interconnected;</p>	<p>Condition 11 requires that MIL comply with the Grid Code.</p> <p>The Grid Code is designed to permit the development, maintenance and operation of an efficient, co-ordinated and economical Transmission System, to facilitate the Transmission System being made available to persons authorised to supply or generate electricity and in conjunction with the arrangements in place in the Republic of Ireland generally to facilitate competition in the generation and supply of electricity on the Island of Ireland and is conceived as a statement of what is optimal (particularly from a technical point of view) for all Users in relation to the planning, operation and use of the Transmission System. It seeks to avoid any undue discrimination between Users and categories of Users.</p> <p>Operation of the interconnector has been contracted to SONI, which is a company with no generation or supply interests, but overall control and responsibility continues to rest with MIL.</p>
<p>(e) providing to the operator of any other system with which its system is interconnected sufficient information to ensure the secure and efficient operation, coordinated development and interoperability of the interconnected system;</p>	<p>Condition 7 requires that the Licensee "shall provide ... to any other transmission system operator or distribution system operator ... with whose system the Moyle Interconnector is connected:</p> <p>(a) sufficient information to ensure the secure and efficient operation, co-ordinated development and interoperability of, the Moyle Interconnector and such other system; and</p>

	<p><i>(b)... such other information as such transmission system operator or distribution system operator requires in order to enable it to comply with its obligations under its licence or under any enactment.</i></p>
<p><i>(f) ensuring non-discrimination as between system users or classes of system users, particularly in favour of its related undertakings;</i></p>	<p><i>Condition 16 requires that In the provision of use of the Moyle Interconnector, the licensee shall not unduly discriminate between any person or class or classes of persons.</i></p> <p><i>Condition 14 requires that “the licensee shall procure that the Interconnector Business does not give any cross-subsidy to, or receive any cross-subsidy from, any other business of the licensee or of an affiliate or related undertaking of the licensee.”</i></p> <p><i>Condition 3 requires an audit opinion</i></p> <p><i>“verifying whether the obligation to avoid discrimination and cross-subsidies ... has been respected.”</i></p> <p><i>Condition 19 sets out the requirement of MIL to accede to the Single Electricity Market Trading and Settlement Code. It makes provision that MIL nominate SONI to perform the functions of Interconnector Administrator.</i></p> <p><i>The aims of the Code include promotion of competition in the single electricity wholesale market on the island of Ireland and ensuring no undue discrimination between persons who are parties to the Code.</i></p>
<p><i>(g) providing system users with the information they need for efficient access to the system; and</i></p>	<p><i>Condition 17 sets out the requirements of MIL to provide access and the role of the national regulatory authority in reviewing and approving such access.</i></p> <p><i>MIL’s user agreement is publicly available and sets out the eligibility requirements to be satisfied in order for a user to access</i></p>

	<p><i>the Interconnector.</i></p> <p><i>Condition 18 sets out the powers of the national regulatory authority to determine any dispute over access to the system.</i></p>
<p><i>(h) collecting congestion rents and payments under the inter-transmission system operator compensation mechanism, in compliance with Article 13 of Regulation (EC) No 714/2009, granting and managing third-party access and giving reasoned explanations when it denies such access, which shall be monitored by the national regulatory authorities; in carrying out their tasks under this Article transmission system operators shall primarily facilitate market integration.</i></p>	<p><i>Not relevant to MIL</i></p>

- b) The Utility Regulator is the National Regulatory Authority and has regulatory oversight and legally enforceable powers of direction over the companies, their duties, their contractual relationships and interactions.*

The powers and duties of the Utility Regulator are set out in various pieces of legislation. The main legislative basis for the electricity industry is The Electricity (Northern Ireland) Order 1992 and the Utility Regulator draws its powers from this legislation as amended by The Energy (Northern Ireland) Order 2003, the Electricity (Single Wholesale Market) (Northern Ireland) Order 2007 and The Gas and Electricity (Internal Markets) Regulations (Northern Ireland) 2011. It should be noted that the Utility Regulator has a strong degree of independence in the discharge of its powers including direction under legislation in addition to its licensing powers.

Paragraph 42 of Part VI of The Energy (Northern Ireland) Order 2003 gives the Utility Regulator the power, where it is satisfied that a licence holder is contravening or is likely to contravene any relevant condition or requirement of its Licence to make a final order which makes such provision as is requisite for the purpose of securing compliance with a Licence condition or requirement.

Paragraphs 45 to 50 of Part VI of The Energy (Northern Ireland) Order 2003 set out the powers of the Utility Regulator to issue financial penalties on Licence holders. Where the Utility Regulator is satisfied that a licence holder has contravened or is contravening any relevant condition or requirement of its Licence it may impose on the licence holder a penalty of such amount as is reasonable in all the circumstances of the case.

4 SEM Committee Analysis

- (31) The SEM Committee considered that aspects of the MIL arrangements raised further issues which required analysis in addition to that contained in the EC Ownership Unbundling Questionnaire. These are addressed in this section.

4.1 Members of Mutual Energy Limited

- (32) Mutual Energy Limited is the ultimate owner of Moyle Interconnector Limited and is a private company limited by guarantee. It is governed by a Board of Directors, which takes strategic and operational decisions and is ultimately responsible for the management and governance of the MEL group of companies, including MIL. As a company limited by guarantee, MEL has no share capital and therefore no shareholders.
- (33) The Directors are accountable to the Members of MEL, including at the annual general meetings and extraordinary general meetings that may be called. Individuals appointed as Members of MEL do not receive dividends nor do they have any other financial interest in MEL. Accordingly, any financial surpluses generated will be retained by MEL. Members will scrutinise the performance of MEL as the holding company of the Moyle groups of companies. Performance will be scrutinised against commercial and other targets, as well as against energy industry benchmarks for quality of service and cost efficiency. In this respect the role of Members is similar to that of shareholders in a public limited company, save that Members have no financial interest in the Company. Members' role includes approving certain changes to MEL's constitution and the appointment, re-appointment and removal of directors. They are to ensure that the board and management of MEL and associated companies operate on a sound commercial footing in energy consumers' interests.
- (34) Given the roles and powers of members it was necessary to ensure that they were subject to the requirements of Article 9(1) of the Directive. Moyle has confirmed that to the best of its knowledge and belief no member is able to exercise control or exercise any right over an undertaking performing any of the functions of generation or supply and no member is entitled to be a member of the supervisory board, the administrative board or bodies legally representing the undertaking, of both an undertaking performing any of the functions of generation or supply and a transmission system operator or a transmission system. An undertaking shall be required from Moyle Energy Limited and from Moyle Interconnector Limited that they shall ensure that this continues to be the case.
- (35) The Membership Policy of MEL requires that Members are selected in particular to represent effectively energy consumers' interests. They must exercise their rights and powers to further the objectives of MEL and are required by the Policy and Procedures for the Selection and Appointment of Members to declare to the Board any private interests relevant to their membership or the activities of the company. Members will be appointed by the Board on the recommendation of a six person Membership Selections Committee, which shall include two Members who are not directors, two non-executive Directors and two independent representatives of the Utility Regulator.

- (36) The Board of MEL is required by its Articles of Association to periodically review its Membership Policy, including upon the request of the Utility Regulator. The Board is required to send to the Utility Regulator a report on the outcome of such review and any proposed revisions. Following such review, the Board shall be entitled to make revisions to the Membership Policy provided always that they have previously been approved by the Utility Regulator.
- (37) The SEM Committee considers that the particular governance arrangements within the Mutual Energy Group of companies and in particular Moyle Interconnector Limited, including the role of Members of MEL, do not currently compromise the independence of ownership and control required under Article 9 of the Directive. The SEM Committee considers that strong controls exercised by the Utility Regulator shall ensure that the Membership policy of MEL will not cause the independence so required to be impaired and that to copper fasten these controls an undertaking shall be required from MEL and MIL regarding the independence of members.

4.2 Director of MIL

- (38) In order to avoid undue influence arising from vertical relations between gas and electricity markets, Article 9(3) clarifies that ownership unbundling applies across the gas and electricity markets, thereby prohibiting joint influence over an electricity TSO and a gas supplier. This rule applies to the core requirements of Article 9(1)(b) only, which relates to the prohibition of control by persons of a transmission system operator and also an undertaking performing the functions of generation or supply,
- (39) One non-executive director of MIL and MEL, Gerry Walsh, is also a non executive director of Vermillion Energy Ireland Limited and Vermillion Energy Holding Limited. The Vermillion Energy Trust is a Canadian-based international oil and gas producer with assets in Canada, Australia, France and the Netherlands. In Ireland Vermillion has a stake in the Corrib gas field, which is expected to produce its first gas in late 2014 or 2015 but is not currently operational. The shareholding of Vermillion in the Corrib project is a minority one of 18.5 per cent. As a non-executive Director in Vermillion Gerry Walsh is not involved in the day to day operations of the company.
- (40) There are no gas supply companies within the MEL group of companies and there is no infrastructure which would make it possible for any party in Northern Ireland to access gas from the Corrib field. Vermillion has no contracts with the MEL group of companies. MEL's Articles of Association set out the permitted interests and voting rights of Directors, which state that a Director shall not vote on, or be counted in the quorum in relation to, any resolution of the Board in respect of any contract in which he has an interest which is to his knowledge a material interest, and if he shall do so, his vote shall not be counted. The SEM Committee does not therefore believe that the relationship of Gerry Walsh with Vermillion would lead MIL to discriminate in favour of Vermillion.
- (41) In relation to Article 9(1)(b), Article 2 of the Directive defines the concept of 'control' and the Interpretative Note states that the key consideration is that it involves decisive influence on the undertaking. The SEM Committee does not consider that the role of Gerry Walsh constitutes such decisive influence in terms of ownership rights, contracts

or voting by which the level of control stated in the Directive is to be judged. It thereby considers that Moyle Interconnector Limited's satisfaction of the requirements of Article 9 in respect of ownership unbundling is not impaired by the role of Gerry Walsh as non-executive Director of MIL and MEL and also with Vermillion.

4.3 Moyle Energy Investments Limited

- (42) Mutual Energy Limited is the sole owner of Moyle Energy Investments Limited, which MEL states is intended to be the vehicle for acquiring and holding other energy assets and investments. The SEM Committee requested additional information in order to clarify the nature of these investments.
- (43) MEL reported that investments are valued at £10.436m (cost) according to its latest set of financial statements. This mainly comprises amounts contributed to the European Renewable Energy Fund Limited Partnership. This fund is managed at an arms-length basis by Platina Finance Ltd and MEL's share is just below 7% of the fund's total value. This fund invests in renewable energy projects/assets but this does not give MEL ownership rights in any of these investments. MEL also holds a 35% stake in Islandmagee Storage Ltd valued at £35 (cost), which is neither a producer nor supplier of electricity or gas. Moyle Energy Investments Ltd does not directly or indirectly exercise any voting rights in the running of any generation or supply company, all such rights being exercised by Platina Finance Ltd; Moyle Energy Investments Ltd does not directly or indirectly exercise the power to appoint members of bodies legally representing any generation or supply company and Moyle Energy Investments Ltd does not directly or indirectly have any form of control over any generation or supply company.
- (44) The SEM Committee notes that MIL's licence requires that it shall not conduct any business or carry on any activity other than the Interconnector Business without the written consent of the Utility Regulator. It also requires that it shall not hold or acquire any interest in any generation sets (whether or not located in Northern Ireland) and shall not hold an accountable interest in any generation sets (whether or not located in Northern Ireland), unless such generation sets are required for the purposes of carrying on the Interconnector Business. The SEM Committee also notes that these restrictions on ownership apply to MIL only, as the licensed company; that MIL is a wholly owned subsidiary whose ultimate owner is MEL and that the directors of MIL are also directors of MEL. The objects of MEL set out in its Memorandum of Association include, among others, that it may own, finance, manage and operate plant in Northern Ireland and/or Republic of Ireland involved in the generation of electricity and carry out the business of supplier of electricity.
- (45) In its Interpretative Note on Directive 2009/72/EC the European Commission provides guidance on how the requirements of Article 9(1) should be understood and applied. In relation to part (b) of the Article 9(1) it states that a transmission network operator may keep a direct or indirect shareholding in a supplier, provided that the following conditions are met:
- a) The shareholding is not a majority share

- b) The network operator does not directly or indirectly exercise any voting rights as regards its shareholding
- c) The network operator does not directly or indirectly exercise the power to appoint members of bodies legally representing the supplier such as the supervisory board or the administrative board, and
- d) The network operator does not directly or indirectly have any form of control over the supplier

The Interpretative Note states that similar rules apply in the case of a parent or holding company that exercises control or any right over a TSO or transmission system. Part (c) of Article 9(1) aims to avoid a situation where a parent company that holds a majority share, or has the power to appoint board members or exercise voting rights in a supplier, can appoint board members of a TSO. In relation to this Article the SEM Committee notes that Moyle Energy Investments Limited has no voting rights in the underlying investee companies. Article 9(1)(d) addresses the issue of conflict of interest for board members by prohibiting the same person from being a member of the board of both a supplier and a TSO. To avoid undue influence arising from vertical relations between gas and electricity markets, Article 9(3) of the Electricity and Gas Directives clarify that ownership unbundling applies across the gas and electricity markets, thereby prohibiting joint influence over an electricity supplier and a gas TSO or a gas supplier and an electricity TSO. The rule only applies to the core requirements of ownership unbundling of Article 9(1)(b).

- (46) In relation to Article 9(1)(b), Article 2 of the Directive defines the concept of 'control' and the Interpretative Note states that the key consideration is that it involves decisive influence on the undertaking. The SEM Committee considers that the relationship between MEL and its interests in renewable energy undertakings does not constitute decisive influence. It is not comprised of a majority shareholding and does not entail voting rights or the power to appoint members of bodies legally representing the undertakings. MEL does not also directly or indirectly exercise control over a gas supplier. The SEM Committee considers that for these reasons the ownership of Moyle Energy Investments Limited and its investments in Platina Finance Ltd do not compromise the independence of MIL.
- (47) The SEM Committee therefore considers that Moyle Interconnector Limited's satisfaction of the requirements of Article 9 in respect of ownership unbundling is not impaired by the activity of Moyle Energy Investments Limited. It considers however that it is necessary in order to ensure that this continues to pertain that MIL and MEL provide the undertaking set out in Annex 1. Such undertaking would provide assurance that the requirements of certification on the grounds of full ownership unbundling are sustained in future.

4.4 Protection of information

- (48) Article 9(7) of the Directive requires that neither commercially sensitive information, as referred to in Article 16, nor staff belonging to the transmission system operator shall be

transferred to undertakings performing any of the functions of generation and supply. MIL is not part of a vertically integrated undertaking and the group of companies to which it belongs do not include any undertakings performing functions of generation or supply. The SEM Committee therefore considers that the ownership of the Moyle Interconnector by MIL provides protection that information acquired in the process of electricity transmission will not be used for the purpose of obtaining any unfair commercial advantage by related interests in electricity generation and supply.

- (49) The SEM Committee wished to assure itself that sub-contracting of services by MIL to other parties did not infringe the protection of information. MIL subcontracts more routine functions to other companies including to SONI in order to maximise the coordination of systems. This involves an agreement with SONI to administer the interconnector on terms and conditions set out by MIL staff so that MIL retains ultimate control. SONI is contractually bound to not to do anything which may contravene the conditions of any relevant licence or MIL's obligations under any industry document. MIL's licence includes, at Condition 20, a requirement that neither it nor any other person obtain unfair competitive or commercial advantage from protected information. The SEM Committee notes that SONI is not part of a vertically integrated undertaking with generation or supply interests.
- (50) To assure the confidentiality of information MEL has a legally binding agreement with SONI. This includes provision that:

"...Subject to... the provisions of this Agreement and all information disclosed thereunder will, until two years after the termination of this Agreement or any extension thereof, be treated by the Parties as confidential and until the expiry of such period the provisions of this Agreement and the information so disclosed and any commercially confidential information which may come to a Party's knowledge in the course of negotiating this Agreement or otherwise concerning the operations, contracts, commercial or financial arrangements or affairs of any other Party will not be disclosed by the Party receiving the same to any other person, without in either case the prior written consent of the other Party (which consent will not be unreasonably withheld or delayed)...Each Party will ensure that its employees and agents, to whom any of the provisions of this Agreement or information hereunder is disclosed, are instructed to keep the same confidential."

- (51) MIL also employs a contractor, currently Siemens Transmission and Distribution Limited (STD L), which is the principal operational contractor for Moyle. SONI is responsible for day to day co-ordination with STD L to ensure the interconnector system integrates correctly to the connected system. SONI as the Interconnector Administrator determines a load transfer schedule based upon aggregate demand, which is transferred to STD L. The schedule contains no details of individual users and the requirements of the schedule are delivered automatically. Controls built into the contract include penalties on STD L if the Interconnector does not meet availability criteria, which are determined by MIL. MIL also carries out an annual assessment of STD L's performance and performs site and operational behavioural and safety audits. Siemens do not hold a supply or generation licence and do not trade on the interconnector. MIL control access to the Moyle Interconnector and users have to go through an approval

process and sign up to the Access Rules. MIL has stated that as long as SDTL were the principle operational maintenance contractor for Moyle it would not be accepted as a user.

- (52) MIL has a legally binding agreement with Siemens, which includes a confidentiality clause covering how information is protected. This provides that:

“...except in the proper performance of its duties the Receiving Party shall not during or after the Term disclose or suffer or permit its officers, employers, agents, contractors or subcontractors to disclose to any person whatsoever or otherwise make use of the Information or any of it or of any trade secret or any other confidential information which it has or of which it becomes possessed concerning the business or finance of the Disclosing Party or in connection with the Interconnector.”

4.5 Non-discrimination

- (53) Moyle Interconnector Limited is required by its licence that it shall not unduly discriminate between any person or class or classes of persons in the provision of use of Moyle Interconnector. It shall also not make charges for use of the Interconnector that restrict, distort or prevent competition in the transmission, distribution, generation or supply of electricity. The licence at condition 3 (4) also requires that the licensee shall take all appropriate steps within its power to procure a report by the Auditors and addressed to the Authority verifying whether the obligation to avoid discrimination and cross-subsidies has been respected.
- (54) In its application for certification MIL has reported that it has been unable to procure a report in satisfaction of licence condition 3 (4) due to the unwillingness of its auditors (and auditors in general) to do so. MIL has suggested that it may be possible for the auditors to produce a report stating that in their opinion it appears that the obligation to avoid discrimination and cross subsidies has been respected.
- (55) The SEM Committee considers that the nature of MIL and the MEL group of companies means that there are no undertakings involved in the generation or supply of electricity and therefore no incentive to discriminate in favour of such related undertakings. However it is also considered that measures are required to assure protection against discrimination against any market participant. This shall include new requirements by auditors to report on the anti-discrimination obligations of MIL and increased powers of the Utility Regulator to monitor and enforce compliance with such obligations. These improvement measures are set out in section 4.6.

4.6 Proposed improvements

- (56) The SEM Committee has assessed the application of Moyle Interconnector Limited against the requirements of Article 9 of Directive 2009/72/EC. It has concluded that MIL meets the requirements of independence set out in the Directive but that measures are

required to assure this independence in future. These improvement measures are set out in this section.

- (57) The SEM Committee considers that while the ownership and interests of MIL and the MEL group of companies satisfies the ownership unbundling requirements of Article 9 of the Directive maintenance of this position shall be protected by an undertaking by MIL **and** MEL. This shall provide assurance that there will be no change in shareholder rights by MIL or within the MEL group of companies that would materially alter satisfaction of the requirements of the Directive. The text of this undertaking is set out at Annex 1. The undertakings shall be underpinned by conditions inserted into the MIL licence that shall allow the Utility Regulator to request changes to the undertakings and take enforcement action if the undertakings are breached.
- (58) The SEM Committee considers that while the members of the MEL group of companies currently satisfy the ownership unbundling requirements of Article 9(1) of the Directive maintenance of this position shall be protected by an undertaking by MIL and MEL. These undertakings shall provide that no member is able to exercise control or exercise any right over an undertaking performing any of the functions of generation or supply and no member is entitled to be a member of the supervisory board, the administrative board or bodies legally representing the undertaking, of both an undertaking performing any of the functions of generation or supply and a transmission system operator or a transmission system.
- (59) The SEM Committee has concluded that while the ownership interests of MIL and the MEL group of companies do not provide grounds for discrimination in favour of related undertakings it is necessary to strengthen the measures protecting against discrimination generally. This shall include strengthening the powers of the Utility Regulator to monitor compliance with anti-discrimination obligations within the MIL licence. The MIL licence will therefore be amended to require that it take all appropriate steps to procure a report from its auditors whether in their opinion MIL has sufficient processes and procedures in place to give reasonable assurance that it has in its activities complied with its obligation to avoid discrimination and cross subsidies. This will have the effect of removing from the licence a condition that cannot be applied to be replaced by one which will achieve its intent. The licence shall include a provision that will ensure that the Utility Regulator can verify that accounting records, policies and statements are kept in a manner which avoids discrimination, cross subsidies and distortion of competition. The licence will be modified to ensure that the licensee shall, on request, give the Utility Regulator or Department access to the Licensee's accounting records, policies and statements in order to allow it to do so.
- (60) In order that the arrangements supporting certification are maintained in future, modification to the licence shall ensure that the licensee shall furnish to the Utility Regulator, in such manner and at such times as the Utility Regulator may require, such information and procure and furnish such reports as are considered necessary, or as it may require, for the purpose of performing any functions given to it or under any legislation provided that such information:
- (a) is in the certified person's possession or control; or

(b) is information which the certified person could reasonably be expected to obtain.

4.7 Overall assessment of application

- (61) The SEM Committee has assessed the MIL application against the European Commission questionnaire on ownership unbundling and in relation to particular issues arising from the MIL arrangements. These include the role of Members in the governance of MIL, Moyle Energy Investments Limited, subcontracting of interconnector services by MIL and measures to ensure non-discrimination, including provision of and access to information.
- (62) The SEM Committee has concluded that while the ownership arrangements and interests of MIL, and of the MEL group of companies, satisfies the ownership unbundling requirements of Article 9 of the Directive the arrangements in place give rise to the need for qualification measures that will provide assurance that the independence of the TSO is maintained in future. These arise in particular from the specific issues brought up in the MIL application. The qualification measures identified include an undertaking on future shareholder rights, modification of the existing requirement for provision of an audit opinion on non-discrimination and measures relating to the provision of, and access to, information. Subject to these improvement measures the preliminary decision of the SEM Committee is that Moyle Interconnector Limited should be certified on the grounds of full ownership unbundling.
- (63) On the basis of this assessment the preliminary decision of the SEM Committee is that the application of Moyle Interconnector Limited, subject to implementation of the proposed improvements and to the opinion of the Commission, should be granted.

Annex 1

Draft form of undertaking for electricity TSOs – Applicants under Article 10G of the Electricity (NI) Order 1992

1. This undertaking is given by [] to the Northern Ireland Authority for Utility Regulation (NIAUR) pursuant to article 10G(2)(c) of the Electricity (NI) Order 1992.

2. [] undertakes that it will not exercise, or cause to be exercised on its behalf, any shareholder rights in relation to a relevant producer or supplier.

3. For the avoidance of doubt this undertaking applies not only to shareholder rights held by [] at the date of this undertaking but also to shareholder rights acquired by [] during the currency of this undertaking.

4. This undertaking:

(A) shall come into effect on the relevant date; and

(B) shall continue in force until [] ceases to hold an interconnector licence and participate in the operation of an electricity interconnector.

5. For the purpose of this undertaking:

(A) “relevant date” shall have the meaning given to that phrase in article 10B(3) of the Electricity (NI) Order 1992; and

(B) “shareholder right” and “relevant producer or supplier” shall have the meaning given to those phrases in article 10L(1) and (2) of the Electricity (NI) Order 1992.

FOR AND ON BEHALF OF []

..... Signature

.....

Signature

..... Name

.....

Name

..... Title

.....

Title

..... Date

.....

Date

(Director)

(Director/Company Secretary)