



COMPLAINT TO THE UTILITY REGULATOR

**BY TCI RENEWABLES LTD (ON BEHALF OF PIGEON TOP WIND FARM LTD)
IN RELATION TO NORTHERN IRELAND ELECTRICITY LTD'S CONNECTION
ARRANGEMENTS FOR PIGEON TOP WIND FARM**

DETERMINATION

DET - 523

26 August 2014

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1 Section One - Introduction

- 1.1 The Northern Ireland Authority for Utility Regulation (referred to hereafter as the **Utility Regulator**)¹ received, by way of a letter dated 4 December 2013, a formal complaint from Pigeon Top Wind Farm Ltd (**PTWFL**) regarding a 'distribution connection' dispute between it and NIE Limited (**NIE**).
- 1.2 PTWFL is a subsidiary of TCI Renewables Limited (**TCI**). TCI formally submitted the complaint (as PTWFL's parent company). Therefore for ease and for the purposes of this determination all references are to TCI (rather than PTWFL).
- 1.3 The dispute relates to the connection offer proposed by NIE (on 7 July 2011 and subsequently revised²), following an application by TCI submitted on 17 December 2010, to connect Pigeon Top Wind Farm (the **Wind Farm**) to NIE's electricity distribution system.
- 1.4 TCI requests the Utility Regulator to make a determination of a complaint or a dispute regarding what TCI submits to be NIE's continued non-compliance with its legal obligations and that:
- (a) TCI be issued with a valid grid connection offer for the Wind Farm without further undue delay; and
 - (b) such connection offer must contain terms which are reasonable in all the circumstances of the case, having regard to all the material issues identified.
- 1.5 The complaint referred by TCI is a dispute between TCI and NIE (together, the **Parties**) which falls to be determined by the Utility Regulator (the **Dispute**). The Dispute falls to be determined under Article 26 of the Electricity (Northern Ireland) Order 1992 (the **Electricity Order**), and in accordance with Article 37(11) of Directive 2009/72/EC of the European

¹ Where legislative or licence provisions are quoted, the reference is to 'the Authority'.

² A further revised connection offer was issued by NIE on 5 December 2013, after TCI submitted a complaint to the Utility Regulator.

Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (the **Directive**).

- 1.6 The Utility Regulator has considered the Dispute in accordance with its Policy on the Resolution of Complaints, Disputes and Appeals and Guide for Applicants dated June 2011 (the **Procedure**).
- 1.7 The Board of the Utility Regulator has appointed us, Tanya Hedley and Brian McHugh (Directors within the Utility Regulator), jointly to determine the dispute (together the **Decision-Makers**). We do so as delegates of the Utility Regulator and on its behalf.
- 1.8 This document sets out our determination of the Dispute and includes the order we make in determining the Dispute.
- 1.9 In making and writing this determination, we have had the benefit of being able to consider the following materials relevant to the factual and legal background to the Dispute:
- (a) A Statement of Case (the **Statement**) prepared for us by a small team of skilled staff of the Utility Regulator. The Statement provides an overview of the background to the Dispute, the views of the Parties, and the issues that fall to be determined.
 - (b) A bundle of documents (the **Bundle**) which accompanied the Statement and contained the papers listed in an appendix to the Statement.
 - (c) All further documents and correspondence relating to the subject matter of the Dispute. All documents considered in the making of this determination are listed in Appendix 1 and have either already been shared with the Parties or are enclosed with the determination as further detailed in Appendix 1.
 - (d) A legal opinion written by our external legal advisers, Wragge Lawrence Graham & Co LLP, dated 18 August 2014.³
- 1.10 The Parties were given the opportunity to comment on a draft Statement and Bundle (and have had copies of the final Statement and Bundle) and on a draft determination dated 4 July 2014 (the **Draft Determination**). The Parties comments on the draft Statement and on the Draft Determination have been taken into account in our determination of the Dispute.
- 1.11 This determination adopts the following structure:
- (a) The Parties (at Section 2);

³ This legal opinion addresses the legal submissions made by TCI (in the form of a QC's legal opinion) to the legal opinion which accompanied the Draft Determination and NIE's response to TCI's legal submissions.

- (b) Applicable legal framework (at Section 3);
- (c) Factual background to the clustering approach (at Section 4);
- (d) Factual background to the dispute (at Section 5);
- (e) The respective views of the Parties (at Sections 6 and 7);
- (f) Issues falling to be determined (at Section 8);
- (g) Determination in relation to Issue 1 (at Section 9);
- (h) Determination in relation to Issue 2 (at Section 10);
- (i) Concluding observations (at Section 11); and
- (j) The Order (at Section 12).

1.12 Where we use cross-references (e.g. **A4**) these are to documents in the Bundle.

2 Section Two - The Parties

- 2.1 The following summary as to the status of the parties is predominantly derived from the Statement.

TCI

- 2.2 TCI is a UK-based independent renewable energy business, originally established in Australia in 1996 and latterly incorporated in the UK in 1997 with dedicated full-time operations in Great Britain, Northern Ireland and North America. The company's operations are primarily focused on the design, planning, development and operation of large-scale onshore wind farms, the UK majority of which are located in Northern Ireland.
- 2.3 Currently TCI has developed or is developing numerous wind farm sites across the United Kingdom, many of which are found in Northern Ireland.
- 2.4 The company is head-quartered in Oxford with a dedicated office of 15 years establishment in Belfast comprising seven specialist full-time Northern-Irish employees and one Northern-Irish shareholding Director. The company has attained planning consent for 122.8 MW of onshore generation in Northern Ireland, with 62 MW under consideration by the Planning Service and a further 100 MW in pre-planning development – 110.5 MW of which grid connection applications have been submitted to NIE to date, with 21 MW connected.
- 2.5 PTWFL is a wholly owned subsidiary of TCI.

NIE

- 2.6 NIE is a subsidiary of ESBNI Limited which is a member of the ESB Group of companies. It is the owner of the electricity transmission system in Northern Ireland, and the owner and operator of the electricity distribution system in Northern Ireland.
- 2.7 NIE holds a licence in relation to distribution activities (the **Licence**) and a separate licence in relation to transmission activities.
- 2.8 NIE is the only party in Northern Ireland entitled to offer terms to connect, or to modify an existing connection, to the electricity distribution system.

3 **Section Three – Law Applicable to the Dispute**

- 3.1 The applicable legal framework in determining the Dispute is summarised below. Copies of the relevant legislation are included in the Bundle for reference **(A)**. As part of our consideration of the Dispute, we have read the appropriate parts of the relevant legislation included in the Bundle.

The Electricity Order (A1)

- 3.2 Article 3 of the Electricity Order establishes a legal definition of distribution.
- 3.3 Specifically, it defines:
- (a) a distribution system as *"a system which consists (wholly or mainly) of low voltage lines and electrical plant and is used for conveying electricity to any premises or to any other distribution system"*; and
 - (b) a high voltage line as *"an electric line of a nominal voltage of or exceeding 110 kilovolts"* with a low voltage line to *"be construed accordingly"*.
- 3.4 The connection to the Wind Farm would be low voltage and therefore a distribution connection.
- 3.5 Articles 19 to 26 of the Electricity Order make provision in respect of distribution connections. In particular, they establish:
- (a) a duty to connect on request (Article 19(1));
 - (b) a procedure for applicants to require a connection (Article 20);
 - (c) a number of exceptions from the duty to connect (Article 21);
 - (d) a right for an electricity distributor to recover the reasonable costs of making a connection to such extent as is reasonable in all the circumstances (Article 22);
 - (e) a right for an electricity distributor to require reasonable security for payment (Article 23); and
 - (f) a right for an electricity distributor to impose certain additional terms of connection (Article 24).
- 3.6 Alternatively, Article 25 of the Electricity Order permits an electricity distributor and a connection applicant to enter into a connection agreement on agreed terms - which may be different to those specified in Articles 19 to 24 of the Electricity Order - and for those agreed

terms to determine the respective rights and liabilities of the parties. This is referred to as a 'special connection agreement'.

3.7 Under Article 26 of the Electricity Order, it is open to an electricity distributor and/or a connection applicant to refer any dispute arising under Articles 19 to 25 of the Electricity Order to the Utility Regulator for determination.

3.8 Specifically, Article 26 of the Electricity Order provides:

- “(1) A dispute arising under Articles 19 to 25 between an electricity distributor and a person requiring a connection,*
- (a) may be referred to the Authority by either party, and such a reference shall be accompanied by such information as is necessary or expedient to allow a determination to be made in relation to the dispute; and*
- (b) on such a reference, shall be determined by order made either by the Authority or, if the Authority thinks fit, by an arbitrator appointed by the Authority,*
- and, subject to paragraph (1A), the practice and procedure to be followed in connection with any such determination shall be such as the Authority may consider appropriate.*
- (1A) The procedures established under paragraph (1) shall provide for the determination of the dispute to be notified to the party making the reference within the requisite period or such longer period as the Authority may agree with that person.*
- (1B) For the purposes of paragraph (1A), the requisite period in any case means –*
- (a) the period of 2 months from the date when the dispute was referred to the Authority; or*
- (b) where the information sent to the Authority under paragraph (1)(a) was in its opinion insufficient to enable it to make a determination, the period of 4 months from when the date when the dispute was referred to the Authority.*
- (2) No dispute arising under Articles 19 to 25 which relates to the making of a connection between any premises and a distribution system may be referred to the Authority after the end of the period of 12 months beginning with the time when the connection is made.*
- ...*
- (7) An order under this Article –*
- (a) may include such incidental, supplemental and consequential provision (including provision requiring either party to pay a sum in respect of the costs or expenses incurred by the person making the order) as that person considers appropriate; and*
- (b) shall be final and shall be enforceable, in so far as it includes such provision as to costs or expenses, as if it were a judgment of the county court.*

- (8) *In including in an order under this Article any such provision as to costs or expenses as is mentioned in paragraph (7), the person making the order shall have regard to the conduct and means of the parties and any other relevant circumstances...*”.

The Directive (A2)

- 3.9 The Authority also has the duty to determine distribution connection charging (and other) complaints under the Directive. Article 37(11) of the Directive provides that:

“Any party having a complaint against a transmission or distribution system operator in relation to that operator’s obligations under this Directive may refer the complaint to the regulatory authority which, acting as dispute settlement authority, shall issue a decision within two months after receipt of the complaint. This period may be extended by two months where additional information is sought by the regulatory authority. That extended period may be further extended with the agreement of the complainant. The regulatory authority’s decision shall have binding effect unless and until overruled on appeal.”

- 3.10 This particular provision of the Directive is reflected in domestic legislation by Article 31A of the Order which provides for the resolution of disputes arising in respect of obligations imposed on, among others, licensed distributors (including therefore NIE in that capacity) where the subject matter of the complaint does not fall to be dealt with under Article 26 or Article 42A of the Order.

- 3.11 Article 32 of the Directive sets out certain requirements on Member States with regard to the implementation of third-party access to electricity networks. Article 32(1) provides that Member States shall ensure:

- (a) the implementation of a system of third party access to the transmission and distribution systems based on published tariffs which are applicable to all eligible customers, applied objectively and without discrimination between system users;
- (b) that those tariffs or the methodologies are approved and published prior to their entry into force.

The Licence (A5)

- 3.12 Condition 31 of the Licence relates to the *“Functions of the Authority – Distribution Disputes”*.

- 3.13 Paragraph 1 of Condition 31 provides as follows:

“1. If, after a period which appears to the Authority to be reasonable for the purpose, the Licensee has failed to enter into an agreement with any person entitled or claiming to be entitled thereto pursuant to a request under Condition 30, the Authority may... on the application of that person or the Licensee, settle any terms of the agreement in dispute... in such manner as appears to the Authority to be reasonable having (insofar as relevant) regard in particular to the following considerations...””.

3.14 Condition 30 of the Licence requires NIE to offer terms for connection to and use of the Distribution System.

3.15 More specifically, Condition 30 provides:

"2. On application made by any person the Licensee shall (subject to paragraph 5) offer to enter into an agreement for connection to the Distribution System or for modification to an existing connection, and such offer shall make detailed provision regarding.

...

(f) the connection charges to be paid to the Licensee, such charges (unless manifestly inappropriate): (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 8) of Condition 32 or any revision thereof; and (ii) to be set in conformity with the requirements of paragraph 5 of Condition 32 and (where relevant) of paragraph 4.

...

4. The Licensee shall offer terms for agreements in accordance with paragraphs 1 and 2 as soon as practicable and (save where the Authority consents to a longer period) in any event not more than the period specified in paragraph 6 after receipt by the Licensee of an application containing all such information as the Licensee may reasonably require for the purpose of formulating the terms of the offer.

...

6. For the purpose of paragraph 4, the period specified shall be:... (b) in the case of persons seeking connection... 3 months".

3.16 The relevant provisions of Condition 32 (i.e. those referred to in Condition 30) are:

(a) Paragraph 1 which reads:

"1. The Licensee shall...prepare a statement approved by the Authority setting out the basis upon which charges will be made, as part of the Distribution Business, for... (b) connection to the Licensee's distribution system..."

(b) Paragraph 3 which reads:

"3. The statements referred to in paragraphs 1 and 2 shall be in such form and to 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 for the provision of such services, and (without prejudice to the foregoing) including such of the information set out in paragraphs 4 and 5 as is required by such paragraphs to be included in the statement."

(c) Paragraph 6 which reads:

"6. Connection charges for those items referred to in paragraph 5 shall be set at a level which will enable the Licensee to recover:

- (a) *the appropriate proportion of the costs directly or indirectly incurred in carrying out any works, the extension or reinforcement of the Distribution System and the provision and installation, maintenance and repair and, following disconnection, removal of any electric lines, electrical plant, meters, special metering, telemetry, data processing equipment or other items; and*
 - (b) *a reasonable rate of return on the capital represented by such costs."*
- (d) Paragraph 7 which requires NIE, where directed to do so by the Utility Regulator, to prepare a statement or statements approved by the Utility Regulator providing that charges for connection to NIE's distribution system will be made on such basis as shall be specified in the direction. It also provides that each statement prepared in accordance with the requirements of the paragraph shall, from the date it is approved by the Utility Regulator or such later date specified by the Utility Regulator, replace the previous corresponding statement prepared by NIE.

3.17 In determining disputes, the principal objective and general duties of the Utility Regulator under Article 12 of the Energy (Northern Ireland) Order 2003 (the **Energy Order**) do not apply (see Article 13(2) of the Energy Order for reference).

Practice and procedure (A3)

- 3.18 The practice and procedure to be followed by the Decision-Makers in determining this dispute on behalf of the Utility Regulator is set out in the Procedure **(A3)**.
- 3.19 We understand that the Procedure may be supplemented as required in order to ensure good governance and best practice.

4 Section Four - Factual Background to the Clustering Approach

- 4.1 The approach for connecting groups, or 'clusters', of generation projects to NIE's distribution system is of importance to the issues for determination and so a summary of the factual background to this is set out below. The following summary of the factual background is derived from the relevant section of the Statement. We take it to be accurate and adopt it for the purposes of our determination.

Background to Clustering Approach

- 4.2 On 16 March 2010 (**B4**), NIE issued a consultation paper entitled "*Charges for Connecting Groups of Generators to the Northern Ireland Distribution System*" (the **2010 Consultation**).

- 4.3 The 2010 Consultation:

- (a) outlined NIE's view that its distribution connection charging methodology as applicable for generation connections i.e. charges based on the Least Cost Technically Acceptable (**LCTA**) connection, was:

"impractical and inefficient when connecting a number of closely located projects to the system";

- (b) set out its proposals for connecting groups, or 'clusters', of generation projects to the distribution system – hence reference to 'clustering approach'; and
- (c) invited views on the proposals by 28 April 2010.

- 4.4 On 15 October 2010 (**B6**), NIE issued a consultation report on "*Charges for Connecting Groups of Generators to the Northern Ireland Distribution System*" (the **2010 Report**).

- 4.5 The 2010 Report:

- (a) discussed the views of respondents and points raised by them;
- (b) set out the criteria which NIE used to assess the responses and to develop a charging methodology proposal;
- (c) set out NIE's recommendations for changes required in connection charging policy; and
- (d) confirmed that NIE intended to take forward the clustering approach (and more specifically the proposals for a hybrid model) in discussions with the Utility Regulator with a view to incorporating it into the next distribution connection charging statement.

- 4.6 On 15 November 2010 (**B7**), the Utility Regulator issued a "*Consultation on Electricity Connection Policy to the Northern Ireland Distribution System*" (the **Connection Policy**

Consultation).

- 4.7 Chapter 10 of the Connection Policy Consultation explained that NIE had previously issued the 2010 Consultation and the 2010 Report, and invited respondents to make known any further views they may have on NIE's recommendations to the Utility Regulator.
- 4.8 The closing date for responses to the Connection Policy Consultation was 10 January 2011.
- 4.9 On 21 December 2010 (**B10**), the Utility Regulator had, notwithstanding the absence of an approved cluster charging methodology, given approval to NIE for expenditure on pre-construction works for four wind farm clusters at Killymallaght, Mid-Antrim, Pomeroy and Altahullion (none of which, for the avoidance of doubt, was in the vicinity of the Wind Farm). NIE did not seek approval from the Utility Regulator for pre-construction works for a cluster substation at Drumquin at that time.
- 4.10 On 25 February 2011, the Utility Regulator submitted a 'For Decision' paper to the Board of the Utility Regulator entitled *"Charges for Connecting Groups of Generators (Clustering) to the Northern Ireland Distribution System"* (the **Board Paper**).
- 4.11 More specifically the Board Paper explained:
- (a) the obligation on NIE (set out in Condition 32 of the Licence) to prepare a statement approved by the Utility Regulator setting out the basis upon which charges will be made for connection to the distribution system; and
 - (b) that the Utility Regulator had approved in principle the concept of clustering and agreed a process specifically for the Magherakeel cluster. (With regard to Magherakeel, what had been approved related to funding and cost recovery matters for two wind farms being in a cluster).
- 4.12 It also:
- (a) outlined the consultation and liaison with NIE that had taken place to date;
 - (b) identified some of the risks involved with the hybrid model based on clustering proposed by NIE;
 - (c) asked the Board to approve the development of a new connection charging methodology in line with the 'Option 3' Hybrid model (based on a clustering approach) proposed by NIE;
 - (d) stated that:

"While the charging methodology will be set within [NIE's] Statement of Charges each cluster will be subject

to individual approval from the Utility Regulator"; and

- (e) included the following paragraph:

"Any modification to the Statement of Charges for Connection to the Northern Ireland Distribution System requires Utility Regulator sign off. This is a final safety measure that will allow the Utility Regulator review [sic] all proposed methodologies".

- 4.13 On 21 April 2011 (**B14**), the Utility Regulator issued its "Decision Paper on the Charges for Connecting Groups of Generators (Clustering) to the Northern Ireland Distribution System" (the **Decision Paper**).

- 4.14 In this respect, the Decision Paper:

- (a) contained much of the information included in the Board Paper;
- (b) communicated that the Utility Regulator's decision was to approve the development of a new connection charging methodology in line with the 'Option 3' Hybrid model; and
- (c) explained that the Utility Regulator would instruct NIE to submit for approval its revised Statement of Charges for Connection to the Northern Ireland Distribution System.

Current Position on Clustering Methodology

- 4.15 The current Statement of Charges for Connection to the Northern Ireland Distribution System approved by the Utility Regulator and its predecessors including the dates on which they became effective are listed below.

Statement of Charges for Connection to the Northern Ireland Distribution System (B3)	March 2010
Statement of Charges for Connection to the Northern Ireland Distribution System (B27)	1 October 2012
Statement of Charges for Connection to the Northern Ireland Electricity Distribution System (B29)	9 May 2013
Statement of Charges for Connection to the Northern Ireland Electricity Distribution System (B39)	1 October 2013

- 4.16 The last Statement of Charges approved by the Utility Regulator and therefore in full force and effect is the Statement of Charges dated 1 October 2013 (**B39**).

- 4.17 The Statement of Charges dated 1 October 2012 (**B27**) included a section referred to as Annex 1 – Windfarm Clusters but was listed as for future use and was intentionally left blank.
- 4.18 On 9 May 2013 the Utility Regulator approved a new Statement of Charges for Connection to the Northern Ireland Electricity Distribution System. This Statement of Charges included:
- (a) Section 7 - Charging arrangements for Authorised Generators connecting to the network as part of a Generator Cluster; and
 - (b) Appendix 2 - Methodology for Connecting Groups of Generators to the Northern Ireland Distribution System using Cluster Substations.
- 4.19 The Statement of Charges dated 1 October 2013 also contains these provisions. The cluster methodology included in the Statement of Charges is underpinned by the principles agreed between the Utility Regulator and NIE dated 13 March 2013 (**B28**).

5 **Section Five - Factual Background to the Dispute**

- 5.1 The following summary of the factual background is derived from the relevant section of the Statement and from the Parties' responses to the Draft Determination. We adopt it as accurate for the purposes of our determination.

Planning Permission for the Wind Farm

- 5.2 Planning permission from the Department of Environment (the **Department**) is required for all wind farms in Northern Ireland. (In addition, NIE has stated that its policy is to require a person seeking connection of a wind farm to have received planning permission for that development before a connection application is accepted.)
- 5.3 A full planning application was received by the Department from TCI on 3 February 2009 for a wind farm, with a total installed capacity of 20.7 MW, to be located at land approximately 1800 metres north east of Cornavarrow Road, Dooish, Drumquin, Omagh (the Wind Farm).
- 5.4 TCI's application was refused by the Department on 3 December 2009. On 16 December 2009, TCI appealed the Department's decision to the Planning Appeal Commission (the **Commission**). The appeal was heard on 15 September 2010 and on 13 December 2010 the Commission granted full planning permission for the Wind Farm (**B8**).
- 5.5 The planning permission is subject to a number of conditions including, at paragraph 12 of the Conditions of approval (**B8**), a condition that:

"The development shall be begun before the expiration of five years from the date of this permission."

Indicative Connection Studies

- 5.6 In anticipation of its application for planning permission for the Wind Farm, TCI had made enquiries of NIE with regard to the electricity connection. In a letter to TCI dated 20 June 2007 (**B1**) NIE sent details of its indicative connection study for 30 MW of capacity, together with approximate connection costs for a 33 kV 30 MW direct connection to the Omagh Main substation (**Omagh Main**).
- 5.7 On 11 May 2009 (**B2**) TCI sought a re-validation of this indicative study (due to both the intervening time lapse and to account for the reduced capacity to 20.7 MW) and, on 13 September 2010, NIE wrote to TCI with an updated indicative connection study for the Wind Farm (**B5**).
- 5.8 NIE's letter dated 13 September 2010 refers to NIE's view that a 'clustering approach' is the proposed method of connection, stating that:

"Initial wind farm connections were taken to the nearest 110/33 kV substation source, which in this case would be Omagh Main. However, after careful consideration of the evolving renewable generation demands, and requirements of Northern Ireland to meet significant renewable targets, this has necessitated a change in connection methodology. NIE are of the view that the establishment of "cluster" substations specifically for wind generation is the most efficient way of connecting wind farms which can be grouped in a locality."

and

"I would propose to connect this Wind Farm to a new 110/33 kV substation, located in the vicinity of the wind farm. Then a short 33 kV line or cable would be required to connect to the wind farm."

and

"To assist in your project evaluation, (in the absence of per MW charges to cluster substations being finalised) you should allow for the following approximate connection costs

New build 33 kV overhead line	£880,000
Underground cable	£579,000
Substation works	£477,000
Operation & Maintenance	£443,000
TOTAL COST	£2,379,000"

- 5.9 The letter also referred to a consultation on the costing of connecting to a cluster substation the outcome of which was unknown at that time. NIE therefore stated:

"In the absence of this being finalised, the costing would be based on the theoretical connection to Omagh indicated in the previous diagram".

Connection application

- 5.10 On 17 December 2010 **(B9)**, TCI made its formal application for a grid connection offer from NIE which was accompanied by the £40,500 connection application fee as required pursuant to the March 2010 Statement. The application letter confirmed that it was an application for:

"...the interconnection of this 20.7MW maximum capacity wind farm to the 33 kV NIE distribution network via Omagh Main substation, as outlined in your indicative grid connection study dated 13th September 2010."

- 5.11 On 31 January 2011 NIE made a request to the Utility Regulator for an extension of time in which to issue connection offers for 9 wind farms, including the Wind Farm **(B11)**. The Utility Regulator responded to this request on 1 February 2011 agreeing to an extension of time until NIE's consultation had been signed off **(B12)**. (The consultation was signed off on 21 April 2011.)

- 5.12 On 18 February 2011 **(B13)**, NIE wrote to TCI stating that:

"It is anticipated to connect Pigeon Top wind farm to a proposed cluster substation in the Pigeon Top area, near Drumquin. This proposal is being prepared for submission to the NIE Board and Utility Regulator for approval to commence pre-construction works. Following the outcome of the Cluster Charging arrangements from the Utility Regulator, NIE will prepare a connection offer based on the above. Your position in the queue remains unaffected, and it is anticipated that the connection offer will be available in late May 2011."

The Connection Offer

- 5.13 On 7 July 2011 (**B16**), NIE sent TCI its offer for connecting the Wind Farm to NIE's electricity distribution system (the **Connection Offer**). The proposed method of connection was by means of a cluster substation between the Wind Farm and NIE's distribution system (**B16**), stating that it was:

"based on the connection of your wind farm to a proposed 110/33kV cluster substation"

- 5.14 The Connection Offer also states that:

"This connection proposal and the methodology for the calculation of your contribution are in accordance with the general principles approved by the Utility Regulator in its Decision Paper on the Charges for Connecting Groups of Generators (Clustering) to the NI Distribution System dated 21 April 2010. In advance of a revised NIE Statement of Charges for Connection being approved by the Utility Regulator we have been instructed by the Utility Regulator to proceed with the issue of this connection offer. However, the obligations on NIE under this connection offer are subject to and conditional upon approval by the Utility Regulator of the revised Statement of Charges for Connection as submitted by NIE, and the cluster substation being an Approved Generation Cluster Substation."

- 5.15 The reference to being 'instructed by the Utility Regulator' is a reference to an e-mail from the Utility Regulator (Albert Shaw) to NIE (Ashley Boggs) dated 22 June 2011 (**B15**), regarding a separate connection offer for Dunmore Wind Farm, which contains the following:

"...TCI Renewables have highlighted that a connection offer has not yet been made to them. The decision on the clustering methodology was published on 21 April 2011. The Utility Regulator therefore deems this date to be the date by which the extension granted to NIE on Licence Condition 30 Paragraph 6(b) expires. As a result the Utility Regulator expects that connection offers will now be made within the timescales detailed under Condition 30."

Drumquin cluster proposal

- 5.16 NIE forwarded an initial proposal to the Utility Regulator seeking approval to undertake pre-construction work at Drumquin cluster substation on 7 September 2011 (**B18a**).

Extension and revision of the Connection Offer

- 5.17 NIE wrote to TCI on 28 September 2011 (**B19**) extending the validity of the Connection Offer, which was valid for 90 days, to 31 October 2011, stating that:

"SONI intend to conduct a consultation on the generator connection process (including considerations for firm access and constraints). To allow generators to take account of that consultation in considering connection offers the Utility Regulator has requested that NIE extend the validity period for current offers until 31 January 2012 to allow developers sufficient time for consideration of the consultation outcome."

5.18 NIE sent four letters to TCI further extending the validity of the Connection Offer. These letters were dated 28 October 2011, 29 November 2011, 31 January 2012 and 29 February 2012 **(B20, 21, 23 and 24)**. The final letter extended the validity of the 2011 Connection Offer until 31 March 2012.

5.19 NIE wrote to TCI on 30 March 2012 **(B25)** to update and revise the Connection Offer to reflect the effect of the determination of the dispute brought by TCI in relation to Dunmore Wind Farm (the **Dunmore Determination**). The Dunmore Determination established that the charge applicable to the connection offer for that Wind Farm must be based on the LCTA charging mechanism described in the *Statement of Charges for Connection to the Northern Ireland Distribution System* dated March 2010 **(B3)**, which has been approved by the Utility Regulator.

5.20 NIE again wrote to TCI on 29 June 2012 **(B26)** in relation to the absence of information relating to firm access rights within the Connection Offer. In this letter NIE stated that:

"It is NIE's understanding, based on the feedback from the industry, that developers would prefer not to accept connection offers that did not include information about FAQ. On this basis, NIE is extending the above mentioned connection offer until this work with SONI is complete. A revised connection offer with a full 90 day acceptance period will then be issued."

Further correspondence on the Connection Offer

5.21 On 5 June 2013 TCI's lawyers, Pinsent Masons LLP, wrote to NIE **(B30)** requesting that NIE issue a revised connection offer to TCI within 21 days from the date of the letter, such a connection offer being capable of: (i) providing the Wind Farm with a grid connection prior to the expiry of the planning consent for the Wind Farm in December 2015; and (ii) being accepted by TCI, should it wish to accept.

5.22 On 25 June 2013 **(B32)** TCI notified NIE that it had been approached by other developers who sought to discuss and consider with NIE the implications of the late delivery of the Drumquin cluster (in particular in relation to the planning expiry) and that TCI was willing to engage in open forum discussions.

5.23 Pinsent Masons LLP also wrote to NIE on 5 July 2013, 11 July 2013 and 16 July 2013 **(B33 and 34)**, in each case requesting a grid connection offer for the Wind Farm within 7 days of the date of the letter.

5.24 NIE responded to Pinsent Masons LLP on 1 August 2013 **(B35)** stating that:

"NIE considers that the establishment of a cluster is the preferred method of connection of wind farms in the Drumquin area."

NIE also stated that the three developers in the Drumquin area had:

"tabled alternative options including the establishment of individual 33kV connection circuits. NIE are presently appraising these proposals and further engagement with these developers has been programmed."

5.25 The Parties had a call on 15 August 2013 to discuss the issues further.

5.26 A letter issued to TCI by NIE on 20 September 2013 **(B36)** noted that, on its preliminary analysis, a direct connection was possible. In this respect NIE stated that:

"Preliminary analysis of these requirements has concluded that, to make provision for Pigeon Top, would require an additional 110/33kV transformer and 33kV switchboard at Omagh Main along with the connecting underground cable from Omagh Main to Pigeon Top."

"This note has been prepared on this basis albeit any final position would require more detailed analysis."

5.27 However, NIE's preliminary conclusions in this letter stated that:

"Based on our current analysis, the work involved in providing a connection to Omagh Main, which would accommodate Pigeon Top Wind Farm, is heavy in content and would involve significant cost."

and:

"The main risks with this option relate to the uncertainties around the time taken for planning approval (and any other environmental consents) and, as discussed previously, gaining Regulatory agreement to depart from the Cluster approach as per the recently approved Statement of Charges."

5.28 In reaching its conclusions, NIE also stated that:

"It is our view therefore at this point, that there is unlikely to be any material time saving achieved by adopting this approach which would justify NIE departing from the established Cluster approach for connection."

5.29 In a letter to NIE dated 25 September 2013 **(B37)** TCI documented its recollection of the content of a telephone call recently held between it and NIE (on 15 August 2013). In this letter, TCI queried the extent of the works (namely, the introduction of an additional 110/33kV transformer) that NIE had claimed would now be required to accommodate a direct connection. TCI also queried why it had not yet received the estimated budget for the works promised by NIE to be provided by 23 August 2013. TCI specifically requested that NIE provide this by 26 September 2013. TCI stated that:

"This is an unsatisfactory state of affairs and one which continues to further jeopardise the timeline of our direct connection of Pigeon Top wind farm and its associated planning permission".

- 5.30 In this letter, TCI also asked NIE to provide a written explanation of the technical reasons why a new 110/33kV transformer bay was required together with outstanding indicative costs.
- 5.31 NIE provided TCI with a *"without prejudice"* note dated 8 October 2013 **(B40)** on the connection of the Wind Farm to Omagh Main.
- 5.32 This note was subsequently discussed by way of an all-parties conference call on 9 October 2013. TCI followed up this conference call by way of letter on 10 October 2013 **(B41)** in which TCI again reiterated the continued failure since December 2010 of NIE to issue a valid connection offer to TCI. TCI stated in this letter that NIE was in continuing breach of its obligations and that NIE could only require TCI to accept in the making of the connection:

"Any terms which are reasonable in all circumstances of the case for TCI to accept."

- 5.33 NIE and TCI met on 22 October 2013 and discussed the outstanding Wind Farm connection offer. In the Appendix to TCI's complaint **(B45)**, its view of the meeting was as follows:

"NIE were not prepared to share any detail to support their views and closed down any possibility of TCI obtaining a direct connection into Omagh Main on the basis that multiple applicants are likely to voice concerns regarding the same. TCI reminded NIE that (i) TCI applied for a direct connection offer under the March 2010 Statement, (ii) TCI has not wavered from such since inception whereas other applicants may have elected to connect via cluster connections or other nodes and (iii) NIE should consider TCI's request for a the direct connection into Omagh Main by reference to their licence obligations rather than choosing the path of least resistance."

- 5.34 Pinsent Masons LLP wrote to NIE on TCI's behalf on 25 October 2013 **(B42)** requesting disclosure of a statement of present and future circuit capacity, forecast power flows and loading on Omagh Main and the Magherakeel 33/110kV Substation together with grid connection queue information at both substations, under Condition 32(7) (a) and (b) of the Licence **(A5)**.
- 5.35 NIE responded to this letter on 22 November 2013 **(B43)**. TCI submits that this letter:

"only partially dealt with the information that is required to be disclosed pursuant to the Licence Condition."

Drumquin Cluster submission

- 5.36 NIE submitted a Drumquin Cluster Infrastructure Pre-Construction submission to the Utility Regulator on the 18 December 2013 **(B50)**, updating its proposal of 7 September 2011 **(B18b)**. It also requested for the Competition Commission on 29 November 2013 to make provision for Pre-Construction requirements in its Final Report (Cluster Substations - Page 159 of NIE's response to the PD - https://assets.digital.cabinet-office.gov.uk/media/5329de19ed915d0e600001dd/131212_nie.pdf).

The Complaint

- 5.37 TCI submitted a complaint to the Utility Regulator on 4 December 2013 **(B44)**. TCI has stated that NIE's response to Pinsent Masons LLP's letter of 25 October 2013 **(B42)** together with the time elapsed since making a connection application left it with no option but to seek intervention by the Utility Regulator.

Further revision of the Connection Offer in 2013

- 5.38 On 5 December 2013 **(B46 and B47)** NIE revised the Connection Offer further, including setting out its view on the method of connection and the appropriate connection costs. The revised Connection Offer was based on the current Statement of Charges approved by the Utility Regulator (dated 1 October 2013).

Drumquin Cluster approval

- 5.39 The Competition Commission determined that approval for the Drumquin Cluster fell within the remit of the Utility Regulator. This was therefore considered by the Utility Regulator after the Competition Commission Final Determination was published (26 March 2014) and approval to NIE for expenditure on pre-construction works for Drumquin was given on 9 May 2014 **(B74)**.

6 Section Six - Views of TCI

6.1 The views of TCI are set out in:

- (a) the complaint dated 4 December 2013 **(B44)**;
- (b) its letter and additional commentary dated 5 February **(B56)**;
- (c) its letter to the Utility Regulator dated 28 February 2014 **(B70)**;
- (d) its response to the draft Statement (as sent to both parties on 14 March 2014) dated 31 March 2014 **(B74)**;
- (e) its response to the draft Statement (as sent to both parties on 30 May 2014) dated 6 June 2014 **(B77)**;
- (f) its letter (and an opinion of Pinsent Masons LLP) dated 30 June 2014 **(B85 and 86)**;
- (g) its response (dated 18 July 2014) to the Draft Determination (as sent to both parties on 4 July 2014) **(B98 and 99)**; and
- (h) the legal opinion procured by it from William Orbinson QC dated 29 July 2014 (and submitted to the Utility Regulator on the same date) **(B101)**.

6.2 We have read all the above documents in full and have had full regard to all of these submissions. The following is a summary of the key elements of those submissions.

6.3 TCI's principal argument is that NIE has certain existing obligations in relation to distribution connections and connection offers and should comply with these obligations in making an offer to TCI with regard to the connection of the Wind Farm to its distribution system.

TCI's Key Points

6.4 TCI's complaint (as submitted on 4 December 2013 **(B45)**) can be summarised as follows:

- (a) NIE is subject to certain legal obligations under the Electricity Order and the Licence. TCI submits that NIE is in breach of both its Licence and the Electricity Order for the reasons explained below.
- (b) Condition 30 of the Licence requires NIE to offer terms for connection to its distribution system. The terms of agreement are to be offered as soon as practicable and (save where the Utility Regulator consents to a longer period) in any event not longer than 3 months after receipt of a valid application.

- (c) TCI applied for a grid connection on 17 December 2010 **(B9)** and submits that it has still not received a valid connection offer, nearly 3 years after its grid connection application, notwithstanding that it has received a number of connection offers.
- (d) TCI submits that NIE's stated clustering approach, considered for the Wind Farm on 18 February 2011 **(B13)** had not been approved by the Utility Regulator and thus had no legal force or effect.
- (e) Because the Connection Offer (made by NIE on 7 July 2011 and subsequently revised⁴), proposed a method of connection via a cluster, NIE was not acting in accordance with its Licence conditions and other legal obligations. The clustering approach adopted by NIE for the connection of the Wind Farm was incorrect and the concept of clustering has no relevance, legal force or effect in relation to the Wind Farm.
- (f) The only charging statement in full force and effect and approved by the Utility Regulator at the time of both TCI's grid connection application and when TCI was due to receive a grid connection offer for the Wind Farm in accordance with NIE's Licence obligations was the March 2010 Statement **(B3)**. TCI therefore submits that the connection offer for the Wind Farm needs to be strictly referable to the March 2010 Statement, which it submits makes no provision for a clustering approach.
- (g) TCI also submits that, as it is still awaiting a LCTA connection offer from NIE, NIE is in continuing breach of Condition 30 of the Licence **(A5)**.
- (h) Under Article 24(1)(b) of the Electricity Order, NIE can only require TCI to accept in the making of the revised connection offer for the Wind Farm *"any terms which it is reasonable in all the circumstances of the case for that person [(i.e. TCI)] to be required to accept"*. TCI submits that NIE has failed to meet this obligation.

6.5 TCI submits that *"reasonable in all the circumstances of the case"* in the context of the Wind Farm is as follows:

- (a) NIE has certain existing obligations in relation to distribution connections and connection offers and has an absolute requirement to meet such obligations at all times in dealing with TCI's grid connection application for the Wind Farm;
- (b) NIE is obliged to offer, within 3 months and present, in a connection offer, charges for a connection in a way that is referable to the connection charging statement approved by the Utility Regulator, namely the March 2010 Statement;

⁴ The Connection Offer was also revised on 5 December 2013, shortly after TCI made the complaint.

- (c) NIE's 2010 indicative feasibility study was for a 33 kV direct connection into Omagh Main substation in accordance with the March 2010 Statement which also had full legal force and effect at the time of TCI's grid connection application;
- (d) given that there is residual capacity available at Omagh Main for the connection of the Wind Farm, coupled with NIE's confirmation to TCI that a 33 kV direct method of connection was indeed possible, TCI considers that such a method of connection should have been offered to TCI in accordance with the Licence;
- (e) TCI is not aware of any other wind farm development within the vicinity actively pursuing or awaiting a direct 33 kV connection into Omagh Main substation; and
- (f) TCI should be offered a grid connection offer which proposes a method of connection which takes into account time limited nature of the planning permission of the Wind Farm to commence development, including but not limited to giving consideration of connecting the Wind Farm into other distribution system nodes where capacity has been allocated to applicants who were behind TCI in the connection queue.

6.6 TCI also submits that it is not reasonable in all circumstance of this case for it to accept a cluster connection (or any connection for that matter developed in accordance with the October 2013 Statement **(B39)**) for the Wind Farm on the basis that:

- (a) it is not reasonable to wait three years for a connection offer which will in turn not be delivered until some three plus years after planning consent for the Wind Farm expires;
- (b) NIE continue to be in breach of its licence conditions applicable at the date of the Wind Farm connection application which govern the connection application, i.e. the March 2010 Statement **(B3)**; and
- (c) TCI offered to bear the additional cost associated with NIE providing an underground direct connection for the Wind Farm so as to avoid needing consent from the Department of the Environment NI Planning Service and to avoid any potential detrimental effects on the environment associated with overhead lines.

6.7 TCI submits that NIE has not provided a detailed explanation as to its position on why the connection of the Wind Farm to a new cluster substation is reasonable in all the circumstances.

Consideration of cluster approach

6.8 In relation to the process followed by NIE, TCI submits the following:

- (a) NIE confirmed that a direct connection of the Wind Farm to Omagh Main was possible and that there was remaining sufficient capacity available at Omagh Main for the connection of the Wind Farm subject to the upgrade replacement of the existing 33 kV 60 MVA rated switchboard;
- (b) NIE strategically chose not to provide the Wind Farm with a direct connection to Omagh Main in order to pacify other parties. Additionally, TCI states that:

"It was apparent NIE wished to avoid accepting decision making responsibility and preferred to delegate such a decision to the Utility Regulator expecting TCI would submit a formal complaint."
- (c) NIE's actions in relation to connections have adversely impacted numerous wind generation businesses;
- (d) NIE is now seeking to make a connection offer in accordance with the October 2013 Statement **(B39)** (with disregard for the March 2010 Statement **(B3)**) and, for the reasons set out above, such a connection offer is null and void;
- (e) that NIE:

"believe it is reasonable to remain in breach of their licence conditions (to issue a connection offer to Pigeon Top within 90 days following expiry of the Utility Regulator's derogation) while NIE seek approval for the October 2013 Statement and endeavour to apply the same to the Wind Farm connection application."

6.9 In relation to clustering as the method of connection here, TCI submits the following:

- (a) Even if the October 2013 Statement **(B39)** was applicable to the connection application, the criteria for justifying a cluster connection in accordance with the same has not been satisfied given NIE are relying on projects where planning consent expires before the cluster connection can be delivered.
- (b) Its Drumquin Cluster Evaluation **(B57)** supports this submission. The Drumquin Cluster Evaluation was specifically based on the *"Projected MEC Weighting of Planning Consented and Planning Submitted Wind Farm Developments within the 10 km Geographical Extent of the Designated Drumquin Cluster in accordance with the 01 October 2013 Statement"*.
- (c) Even if the October 2013 Statement **(B39)** was applicable and even if the criteria for justifying a cluster was satisfied, the capacity of the cluster is limited.
- (d) Even if there was no capacity at Omagh Main, NIE should have considered how best to connect long standing projects making applications under the March 2010 Statement **(B3)** as part of their responsible transition from offering LCTA connections to offering cluster based connections.

- (e) By using cluster substations via NIE's revised statement of charges in October 2013 **(B39)** TCI submits that NIE has jeopardized the time limited validity of the planning consent of these wind farms.
- (f) During the cluster consultation process, NIE did not disclose its proposed standard 60 month Cluster Development Timeline nor did NIE expressly disclose that it fully intended to connect long standing projects making applications under the March 2010 Statement **(B3)** via cluster connections to be delivered after planning consent for the projects would expire.

6.10 In relation to the process to implement the introduction of a cluster approach for the connection of wind farms, TCI states that:

"It is clear that such a process has been legally defective (i.e. NIE's reliance on a change in policy without such a change in policy being appropriately enshrined within the Licence)".

6.11 TCI submit that, in the Decision Paper of 21 April 2011 (B14):

"The Utility Regulator approved "the development of a new connection charging methodology" i.e. recognising the need for NIE to develop a new charging methodology to allow it to facilitate cluster based connections where applicable. This is distinctly different from the Utility Regulator approving the general principle of clustering for future connection applications as interpreted by NIE to be the case. The background to the clustering approach at such time was specifically clarified in Section 3 of the Determination."

Relevance of planning consent

6.12 TCI provided NIE with a copy of the 13 December 2010 planning consent **(B8)** for the Wind Farm in its grid connection application to NIE of 17 December 2010 **(B9)**. TCI also notified NIE of its expected generation date for the Wind Farm being Q3/Q4 2012 in response to Question 1.7 of NIE's Grid Connection Application Generator Questionnaire.

6.13 TCI submits that:

- (a) NIE has an obligation to treat the planning permission provided as a material consideration to the preparation of its connection offer and not merely as a consideration to ensure *"that applications are bona fide"*.
- (b) While not the only consideration, planning permission and inherent planning conditions are a material consideration in the connection application process and subsequent preparation of a valid connection offer for the Wind Farm.
- (c) It would be remiss and unreasonable of NIE to accept a grid connection application and related £40,500 application fee and not notify an applicant or draw to an applicant's attention that NIE's anticipated connection date may fall outside the timing

of the applicant's time limited planning permission; particularly where NIE's anticipated connection date is envisaged to far exceed the applicant's response to Question 1.7 of NIE's Grid Connection Application Generator Questionnaire.

The Connection Offer

- 6.14 The Statement of Charges in legal force and effect at the time of the Wind Farm's grid connection application was the March 2010 Statement **(B3)**. TCI submits that a connection offer in keeping with the March 2010 Statement **(B3)** should have been provided in accordance with Condition 30 of NIE's Licence **(A4 and A5)**.
- 6.15 TCI does not dispute that a connection offer was received on 7 July 2011 **(B16)** but submits that the Connection Offer was not valid and in accordance with the legal framework subsisting at the time; namely, such offer was based on a clustering methodology that had not been approved by the Utility Regulator and had no legal force or effect as opposed to being based on the March 2010 Statement **(B3)** in a form capable of acceptance and containing terms which are reasonable in all the circumstances of the case for TCI to accept. The clustering approach adopted by NIE for the connection of the Wind Farm was therefore incorrect and the concept of clustering has no relevance, legal force or effect in relation to the Wind Farm.
- 6.16 TCI submits that it was not reasonable in all the circumstances of the case for it to accept a connection offer where the costs were to be updated at some future point when, in TCI's view, the terms of the statement of charges with legal force and effect at the date of application, namely the March 2010 Statement, do not make provision for this. TCI submits that such conditional offers are outside the scope of the said approved statement of charges and are thereby invalid.
- 6.17 TCI submits that NIE issued the Connection Offer in the knowledge that it was not acting in accordance with its Licence and other legal obligations. TCI states that:
- "NIE state that they did apply the approved charging methodology to the 7 July 2011 connection offer for the Wind Farm; namely the March 2010 Statement, this is factually incorrect. NIE applied a cluster based charging methodology and a cluster based method of connection in its 7 July 2011 connection offer for the Wind Farm."*
- 6.18 Furthermore, TCI submits that each of the 13 connection offers issued on 7 July 2011 were invalid on the basis that the cluster based method of connection used in the connection offers had no legal force or effect due to the absence of regulatory approval (and TCI submits that this view was upheld by the Dunmore Determination **(B22)**).
- 6.19 In the absence of any form of legally effective transition to NIE's cluster based methodology, TCI submits that as a minimum it would have been most efficient, economic and co-ordinated for NIE to issue offers utilising available residual capacity to connect those generators actively seeking a valid LCTA connection offer.

- 6.20 TCI accepts that other generators may have preferred to await cluster based connections once such a regime had legal force and effect.
- 6.21 TCI is aware that NIE may be able to exercise some discretion in determining the design of the connection. However, given that a direct connection into Omagh Main substation is indeed possible, TCI believes NIE has yet to explain why the Wind Farm is not entitled to a direct connection under the March 2010 Statement **(B3)**.
- 6.22 TCI submits that even the revised Connection Offer issued on 5 December 2013 **(B46 and 47)** is not a valid connection offer for the Wind Farm containing terms which are reasonable in all the circumstances of the case. The revised Connection Offer issued on 5 December 2013 **(B46 and 47)** has been erroneously prepared by NIE in accordance with the NIE *“Statement of Charges for Connection to the Northern Ireland Distribution System 1 Oct 2013”* **(B39)**. This statement has no legal force or effect in relation to the Wind Farm. By way of illustration, TCI have paid application fees for the connection of the Wind Farm based on the March 2010 Statement **(B3)**.
- 6.23 TCI submits that, in any case:
- (a) NIE’s connection offer of 5 December 2013 **(B46 and 47)** has completely ignored the rule approved under the May 2013 Statement of Charges that states that:
- “It is proposed that where the implementation of a cluster approach will severely delay an individual generator connection then consideration may need to be given to providing the generator with an individual connection”*
- and
- “any single generator should not be delayed by more than 18 months by the implementation of a cluster approach than would have been the case with an individual 33kV connection”.*
- (b) The 56 MW threshold for progressing a cluster will continue to be met even if the Wind Farm is not part of that cluster.

Indicative Studies

- 6.24 On 11 May 2009 **(B2)** TCI sought a re-validation of the indicative study received from NIE. TCI submits that this was merely a request for revalidation and not an acceptance that the original indicative study was out of date due to grid availability. TCI intended to receive a revalidation concerning the Wind Farm based on a reduced capacity for the Wind Farm from 30 MW to 20.7 MW.
- 6.25 TCI notes that the indicative study of 13 September 2010 **(B5)** from NIE again provided an LCTA based cost of connection. TCI states that:

"Whilst there were references within the same to the concept of clustering, TCI are of the clear view that no such concept had any legal force or effect, hence why they said indicative study prepared by NIE could only include LCTA based costings."

Background to Drumquin Cluster sub-station

6.26 TCI submits that:

"NIE were negligent in (i) only approaching the Utility Regulator seeking approval for a cluster substation at Drumquin on 7 September 2011 and (ii) making no material progress with the Drumquin cluster to date by comparison to the progress achieved on the aforementioned wind farm cluster substations as approved by the Utility Regulator on 21 December 2010, despite having alleged to have previously identified the business case for the same in September 2010. This delay in seeking funding approval has had an adverse impact on the timing of connections of all the wind farm projects within the vicinity of Drumquin."

Other wind farms

6.27 TCI submits that the Wind Farm is the only wind farm within the vicinity that has remained steadfast in its preference for a more timely direct connection into the residual available capacity at Omagh Main. TCI considers that the other developers within the vicinity have elected by preference to await an approved cluster based connection in keeping with their own individual business objectives.

6.28 TCI submits that the wind farm first entitled to the residual capacity available at Omagh Main to accommodate a direct 33kV connection by virtue of queue order (i.e. by way of grid connection application date) is the Wind Farm. With this capacity utilised, other developers would then be left with no option but to accept cluster based connections.

6.29 In relation to this, TCI submits that NIE has confirmed that all other wind farms in the vicinity have not sought a connection into Omagh Main, but instead elected to be connected to new cluster substations under the May 2013 Statement of Charges **(B29)**. TCI believes it is the only remaining applicant in the vicinity seeking a direct connection into Omagh Main and it is not therefore jumping the queue.

Delay of connection offers

6.30 TCI submits that it did not at any point condone the delay and delivery of a connection offer, but rather it was in the best interests of the business to simply reserve its position concerning its legal rights, pending receipt of NIE's connection offer for the Wind Farm, which it hoped would be in a form that contained terms that were reasonable in all the circumstances of the case for TCI to accept. When the Connection Offer was issued to TCI it could not have been accepted as the charging mechanism and method of connection was contrary to the March 2010 Statement **(B3)**.

6.31 TCI submits that:

"the Utility Regulator had requested that NIE extend the validity period for the connection offers dated 7 July 2011 until 31 January 2012. NIE are therefore in continuing breach of the Licence by delaying connection offers after this date in the absence of Utility Regulator approval to do so and despite the findings concluded in the Determination of 17 January 2012".

- 6.32 TCI submits that it has still not received a valid connection offer for the Wind Farm, notwithstanding that the Connection Offer was revised and re-issued on 5 December 2013 **(B46 and B47)**. TCI notes that this was 23 months after 31 January 2012 and one day after it made a complaint to the Utility Regulator.
- 6.33 TCI also submits that NIE remained undecided about the method of connection for the Wind Farm; hence why it did not provide the Wind Farm with a grid connection offer simultaneous to those connection offers it issued in October 2013.

Additional Matters

- 6.34 TCI believes it has conducted itself in good faith in all its dealings with NIE in relation to the Wind Farm, expecting to ultimately receive a revised connection offer for the Wind Farm that would take into consideration the findings of the Dunmore Determination and provide TCI with a connection offer which was reasonable in all the circumstances of the case for TCI to accept.
- 6.35 TCI submits that its repeated requests to NIE at any level simply serve to highlight that the observations of the Utility Regulator in the Dunmore Determination concerning NIE's procedures for dealing with connection applications to ensure that they are dealt with in a systematic, transparent and consistent manner, have simply not been adhered to and implemented.
- 6.36 TCI states that its participation with other developers who were seeking connections was with a view to finding a pragmatic solution for all parties who all understood from the outset that TCI had ongoing engagement with NIE. Its without prejudice participation in such discussions should in no way be construed indicative of a connection preference for the Wind Farm. TCI contends that group discussion was primarily focused upon all parties attaining separate direct connections out of Omagh Main. Given NIE's acceptance on 15 August 2013 that a direct connection for the Wind Farm was indeed possible, TCI withdrew from this participation as its focus was primarily based on timely and direct connections into Omagh Main only.
- 6.37 TCI submits that it has had to expend an exceptional amount of time, resource and expense in the three years it has had to pursue NIE for a valid grid connection offer which should otherwise have been issued in accordance with NIE's legal obligations and duties subsisting at the time of its grid connection application.
- 6.38 TCI states it was left in no doubt that it was only the costing of the upgrade replacement works that needed to be considered and quantified to enable NIE to advise TCI of the same

before progressing to issue a valid connection offer. Despite requests, TCI submits that NIE never confirmed this cost.

- 6.39 Instead, NIE reverted on 20 September 2013 **(B36)** to introduce a previously undisclosed requirement for an additional 110/33 kV transformer. TCI submits that its independent technical assessment **(B58)** concluded that there is sufficient capacity of 41.7MW at Omagh Main to connect the Wind Farm without the requirement for any transformer reinforcement or indeed the addition of a new 110/33kV transformer bay.
- 6.40 TCI has highlighted that NIE has not responded in respect to the Pinsent Masons LLP letter of 25 October 2013 **(B42)** in relation to the Wind Farm's queue position ahead of Thornog Extension for available capacity at Magherakeel cluster substation.

The Directive

- 6.41 TCI submits it has clearly requested the Utility Regulator to consider the Dispute by reference to the Directive.

Response to the Draft Determination

- 6.42 In responding to the Draft Determination **(B98 and 99)**, TCI reiterates a number of the submissions outlined above.
- 6.43 In addition it submits that:
- (a) If NIE had not confirmed in its letter dated 30 March 2012 **[B25]** that LCTA connection would apply TCI would have referred the matter as a dispute to the Utility Regulator at that time (i.e. March 2012).
 - (b) NIE confirmed in writing that the applicable charging statement for the Wind Farm was the March 2010 Statement and therefore TCI entirely expected (which was a legitimate expectation) a connection offer to be issued based on the March 2010 Statement. Also that this confirmation effectively "*grandfathered*" its rights to a connection offer based on the March 2010 Statement.
 - (c) As set out in the opinion of its legal advisors Pinsent Masons LLP **(B86)**, it would be manifestly inappropriate for the Utility Regulator, as a best practice regulator, to determine that the terms as to charges are referable to and set in conformity with the October 2013 Statement and for the March 2010 statement not to apply.
 - (d) There is available capacity at Omagh Main sufficient to connect the Wind Farm, TCI's queue position entitles it to the available capacity and a connection to the Omagh

Main would be in line with NIE's statutory duties to develop and maintain an efficient, economic and co-ordinated network.

- (e) Other wind farms either chose cluster based connections based on their individual business case objectives or in the knowledge that the Wind Farm was higher in the connection queue than the remaining wind farms in the vicinity for the remaining capacity at Omagh Main rendering them with no alternative but to consider a cluster based method of connection.
- (f) It is NIE's negligence and mismanagement of the transition from LCTA to clustering based connection methodology that led to the delay between the time when TCI applied for the connection and the time when the Utility Regulator is asked to determine the Dispute.

6.44 In responding to the Draft Determination, TCI also contends that:

- (a) The Decision-Makers had not considered the applicable EU law as set out in Article 32 of the Directive.
- (b) The Draft Determination did not deal with the position that paragraph 2 of Condition 30 requires NIE to make a connection offer which makes detailed provision regarding certain matters as specified and that as the Connection Offer did not do so, the Decision Makers arguments were based on a connection offer that was not issued in accordance with the legal framework subsisting at the time.
- (c) The only reason it received a revised Connection Offer on 5 December 2013 was because it had advised NIE that it had been left with no alternative but to raise the matter with the Utility Regulator by way of a formal dispute.
- (d) The Decision-Makers have not had full regard to all of TCI's submissions.
- (e) The policy set out in the relevant licence conditions has not been followed by the Utility Regulator because NIE did not comply with such licence conditions and this non-compliance has gone unchallenged by the Utility Regulator.

Legal Opinion

6.45 The submissions made in TCI's legal opinion are referred to and addressed in the updated legal opinion written by our external legal advisors and enclosed with this determination.

7 Section Seven - Views of NIE

7.1 The views of NIE are set out in:

- (a) its response to TCI's complaint dated 5 February 2014 **(B60)**;
- (b) its letter dated 28 February 2014 **(B71)**;
- (c) its response to the draft Statement (as sent to both parties on 14 March 2014) 31 March 2014 **(B75)**;
- (d) its response to the draft Statement (as sent to both parties on 30 May 2014) dated 6 June 2014 **(B78)**;
- (e) its letter dated 30 June 2014 **(B84)**;
- (f) its response to the Draft Determination (as sent to both parties on 4 July 2014) **(B100)**; and
- (g) its response to the legal opinion procured by TCI from William Orbinson QC (as sent by the Utility Regulator to NIE on 30 July 2014)**(B102)**.

7.2 We have read all the above documents in full and have had full regard to all of these submissions. The following is a summary of the key elements of those submissions.

7.3 NIE does not accept that it is in breach of either its Licence or the Electricity Order.

The Directive

7.4 NIE submits that Article 37(11) of the European Directive 2009/72/EC **(A2)** as referred to by TCI is not applicable to the Dispute as TCI has not made any complaint that NIE is in breach of its obligations under Article 37(11) of the Directive.

Indicative Studies

7.5 NIE accepts that in June 2007 it issued an indicative connection study **(B1)** proposing connection of the Wind Farm by way of a 33kV direct connection to Omagh Main. NIE submits that this indicative study was undertaken prior to the development of a cluster substation approach in response to the significant number of wind farm connection applications received by NIE.

7.6 NIE refers to the content of the e-mail submitted by TCI on 11 May 2009 **(B2)** as evidence that TCI regarded this study as “*out of date in terms of grid availability*”. NIE submits that this e-mail indicated that TCI did not rely on 2007 indicative connection study **(B1)** nor was the indicative connection study intended to form part of any formal proposal.

7.7 NIE submits that:

- (a) a “*theoretical connection to Omagh*” was used in its 2010 indicative study (**B5**) to develop an approximate connection cost “*in the absence of per MW charges to cluster substations being finalised*”;
- (b) no indication was given in its 2010 indicative study (**B5**) that the connection would be “*via Omagh Main substation*”, even though that indication had been given in the indicative study of June 2007; and
- (c) it is not obliged to adopt the applicant’s preferred method of connection.

7.8 NIE refers to its 2010 indicative study (**B5**) and highlights the process that had been undertaken to implement the introduction of a cluster approach for the connection of wind farms including the consultations, stating that:

“By September 2010 there were sufficient wind farms at various stages of development in the vicinity of Drumquin to justify the establishment of a cluster substation at Drumquin. It was also not possible to physically develop Omagh Main substation to accommodate that number of connections. Therefore on 13 September 2010 NIE advised the Applicant that it proposed to connect the Pigeon Top Wind Farm to a new cluster substation at Drumquin”

Consideration of cluster approach

7.9 NIE submits its position that connection of the Wind Farm to the Drumquin cluster is permitted under the March 2010 Statement of Charges (**B3**), is reasonable in line with the Cluster Decision Paper issued by the Utility Regulator on 21 April 2011 (**B14**) and that the available capacity at Omagh Main is not the primary consideration in determining the method of connection of the Wind Farm.

7.10 On 7 September 2011 (**B18a**) NIE forwarded an initial proposal to the Utility Regulator seeking approval to undertake pre-construction work at Drumquin cluster substation. NIE states that, in submitting its proposal, it was anticipated that each new cluster substation to be constructed would require Utility Regulator approval. Connection offers issued to 13 applicants in July 2011 were prepared on this basis.

7.11 NIE submits that it is appropriate for it to propose a cluster as the method of connection under the March 2010 Charging Statement (**B3**). While the Connection Offer was issued to TCI on 7 July 2011 (**B16**) proposing a connection to a cluster substation, it was not appropriate to update this offer until an approved methodology became available. The methodology for clusters was approved by the Utility Regulator in May 2013.

7.12 NIE states that it has relied on the Utility Regulator paper of 21 April 2011 (**B14**) as supporting the cluster offers issued in July 2011. In particular, NIE states that:

"The Utility Regulator had clearly endorsed the clustering approach as a method of connection in its Decision Paper of 21 April 2011. It was anticipated that each new cluster substation to be constructed would require Utility Regulator approval. Connection Offers issued to 13 applicants in July 2011 were prepared on this basis."

and

"In any event, NIE relied on the Utility Regulator paper of 21 April 2011 as supporting the cluster offers issued in July 2011."

7.13 NIE therefore does not accept TCI's position that the clustering approach was not approved by the Utility Regulator and considers TCI's position to be incorrect from a legal and regulatory perspective.

7.14 The Dunmore Determination dealt with a 'distribution connection' dispute between TCI and NIE and was published on 17 January 2012 (**B22**). NIE submits that:

"the costs attributable to a Connection Offer issued prior to the approval of a revised charging statement by the Utility Regulator... must be based on existing approved charging methodology. Consequently the March 2010 Statement of Charges was deemed to apply to the Connection Offers issued by NIE on 7 July 2011 (including the two Connection Offers issued to TCI for Dunmore and Pigeon Top)"

and

"it was open to the Utility Regulator to consider whether it is reasonable in all the circumstances for NIE to make a Connection Offer which provides for the method of connection to be a cluster substation. In relation to the Dunmore Wind Farm, the Determination concluded that it was indeed reasonable for NIE to propose a connection to a cluster substation. Importantly, this validates NIE having issued a Connection Offer proposing connection to a cluster substation notwithstanding that (i) a revised charging statement confirming the charges applicable to cluster substations had not been approved by the Utility Regulator; (ii) the Utility Regulator had not designated the proposed cluster substation as an "approved" substation."

7.15 Further, NIE submits that neither the Dunmore Determination nor the March 2010 Statement of Charges (**B3**) requires direct connection. The Determination and March 2010 Statement of Charges require a LCTA connection but do not define the method of connection. NIE states therefore, for the avoidance of doubt, that TCI is not entitled to a "direct" connection under the March 2010 Statement. NIE refers to paragraph 6.7.3 of the March 2010 Statement as clearly allowing NIE to decide that the connection design need not be on a LCTA basis.

7.16 With regard to the application of the Dunmore Determination (**B22**) to this case, NIE states that:

"The view expressed by the Applicant... ignores the relevant conclusions of the Dunmore Determination, specifically paragraph 9.18 which states "a wind farm can be connected into a shared substation without there being a new charging methodology. This is because paragraph 6.7.3 of the March 2010 statement provided for flexibility as to the design of the connection.....". There is therefore no substance in the Applicant's allegations."

- 7.17 NIE does not accept TCI's statement in paragraph 4.18 of the Appendix to its complaint **(B45)** that:

"NIE failed to make a LCTA connection offer to TCI, pursuant to the Order and the Licence despite clear guidance from the Utility Regulator that any connection offer must be compliant with published tariffs or methodologies approved by the Utility Regulator"

NIE submits that this is not an accurate summary of the Dunmore Determination.

- 7.18 NIE submits that:

"There was nothing in Section Nine of the Determination which required NIE to revise its method of connection as described in the Connection Offer of 7 July 2011 for Pigeon Top Wind Farm since the Determination did not determine that a connection to a cluster substation is not a reasonable method of connection for Pigeon Top Wind Farm."

- 7.19 NIE contends that, similar to the Dunmore Determination, there are two issues to be resolved – the cost of the connection and the method of connection and that its position has been clearly set out in relation to each.

- 7.20 NIE states that, as part of the Dunmore Determination, it had indicated that it would be very difficult to develop a LCTA **(B22)** offer for a wind farm which was proposed to be connected to a cluster substation. Following the Dunmore Determination, an approved revised Statement of Charges was issued by NIE effective from 9 May 2013 **(B29)** which provided detailed information on the methodology for connecting groups of generators and the charging mechanism to be applied. Following the issue of this Statement of Charges, NIE sought to engage with a number of affected generators to review the connection offers made to them in July 2011.

- 7.21 NIE states that:

"As a result of these engagements those generators with whom NIE engaged accepted that connection of their wind farm to a cluster substation was appropriate and should be charged for on the basis of the May 2013 charging statement rather than the March 2010 charging statement."

and

"Following verbal acceptance of that proposed cluster approach by other wind farms (apart from TCI) a number of updated cluster Connection Offers were issued in October 2013. NIE advised the TCI on 15 November 2013 that an updated cluster Connection Offer would be issued for Pigeon Top by 5 December 2013."

Omagh Main Connection

- 7.22 A preliminary analysis of capacity at Omagh Main was verbally given by NIE to TCI on 15 August 2013 as supplemented by a NIE letter of 20 September 2013 **(B36)**. That letter presented TCI with a preliminary analysis of the practicality of a connection for the Wind Farm

to Omagh Main, highlighting the various issues involved and the impact of those issues. NIE states that this was intended as an open and transparent assessment of the challenges/difficulties associated with a connection to Omagh Main for TCI's benefit. It was not a connection offer.

- 7.23 NIE explained the technical reasons for the requirement for a new 110/33kV transformer at Omagh Main in its note of 8 October 2013 **(B40)**. This note also provided a detailed explanation of NIE's position on why the connection of the Wind Farm to a new cluster substation is reasonable in all the circumstances.
- 7.24 NIE does not consider a direct connection to Omagh Main to be acceptable, whether by way of overhead line or underground cable.

Other wind farms and queue position

- 7.25 NIE submits that TCI appears to argue that it is entitled to a connection into Omagh Main because it is the only applicant seeking such a connection. NIE does not agree.
- 7.26 NIE states that there were six other wind farms earmarked for connection to the Gort, Tremoge and Drumquin Clusters which otherwise may have required a connection to Omagh Main. Four of these wind farms were ahead of the Wind Farm in the queue. Five of these were earmarked for connection to the Gort and Tremoge clusters.
- 7.27 Of the connection offers issued in July 2011, there were three applicants ahead of the Wind Farm in the connection queue who may have preferred a connection to Omagh Main. There was a further wind farm ahead of all these parties which had previously accepted a cluster connection and that this party may have preferred a direct connection into Omagh Main.
- 7.28 NIE submits that if those other applicants had also insisted on connection to Omagh Main, TCI's queue position would have resulted in it not getting such a connection offer as any remaining access would have been offered to applicants higher up in the queue. It submits that any increase in capacity at Omagh Main would have required very significant investment.
- 7.29 NIE also submits that should TCI be connected to Omagh Main, it would have effectively jumped the queue in front of other bona fide applicants. NIE submits that if it was now to voluntarily offer TCI a connection to Omagh Main, once the other wind farms higher up in the queue have indicated agreement to a cluster connection, NIE would be discriminating against these wind farms in favour of TCI. This position is expressed by NIE in its note to TCI dated 8 October 2013 **(B40)**.
- 7.30 NIE submits that since TCI is one of potentially seven generators to connect to the Drumquin cluster, it would be manifestly inappropriate for NIE to propose a LCTA charge for connection of the Applicant when the other generators have accepted the need for connection to a new

cluster substation and a per MW charge based on the 9 May 2013 Statement of Charges **(B29)**.

7.31 NIE stated in its letter of 5 December 2013 **(B46)** that in developing a cluster substation NIE is required to consider the legitimate aspirations of a number of generators rather than one generator in isolation.

7.32 NIE submits that the relevance of the comment in this letter that:

“other generators with some proximity to Omagh have accepted that connection to Omagh is not an option and we expect those generators to proceed on the basis of the cluster methodology adopted in the NIE Statement of Charges for Connection dated 9 May 2013”

is that there are other parties who applied for connection before TCI who would have had claim to capacity at Omagh Main if a direct connection into Omagh Main had been available.

Obligation not to discriminate

7.33 NIE submits that it must balance its obligations under Condition 30 of its Licence (the requirement to offer terms for connection) with those in Condition 15 (the requirement not to discriminate) and Article 12(1) of the Electricity Order (the duty to develop an efficient, coordinated and economic system of electricity distribution).

7.34 On this point, NIE submits further that:

- (a) the decision to offer a cluster connection to the Wind Farm was taken following wider consideration of a number of factors as above;
- (b) it indicated to TCI during the summer of 2013 that a wider consideration of factors would be required in arriving at a final decision as is evident in the communications from NIE to TCI on 20 September 2013 **(B36)** and 8 October 2013 **(B40)**;
- (c) providing access to a direct connection to a later applicant is discriminatory and would lead to claims of discrimination from a number of developers; and
- (d) it is not correct to argue, as TCI appears to, that the opinions of other developers who might have aspired to a direct connection into Omagh Main but have accepted a Cluster connection are not relevant.

Connection Offer made in 2013

7.35 A revised Connection Offer based on the 1 October 2013 Statement of Charges was issued to TCI on 5 December 2013 **(B46)**. NIE submits that this Connection Offer was:

- (a) in line with undertakings provided to TCI on 15 November 2013;

- (b) accompanied by a letter setting out NIE's position with respect to the method of connection and cost of connection for the Wind Farm; and
 - (c) compliant with NIE's regulatory and statutory obligations.
- 7.36 NIE notes that the updated offer remains subject to the Drumquin cluster being approved by the Utility Regulator and that, even if the cost of connection was acceptable to TCI, this condition would need to be fulfilled before NIE could confirm the proposed method of connection.
- 7.37 NIE submits that any delay caused by it issuing this updated offer has had no material adverse effect on TCI.
- 7.38 NIE highlights that the revised Connection Offer dated 5 December 2013 (**B46 and 47**) makes reference to the October 2013 Charging Statement (**B39**) as this was the Statement of Charges in force on 5 December 2013 dealing with cluster connections and is directly relevant to a cluster as the method of connection in this case.
- 7.39 Condition 30 paragraph 2(f) of the NIE Licence (**A5**) makes provision for connection charges to be otherwise than in accordance with an approved Statement of Charges where that Statement of Charges is "*manifestly inappropriate*". NIE submits that the March 2010 Statement of Charges has been manifestly inappropriate in relation to the charging methodology for cluster substations since the introduction of the May 2013 Statement of Charges.
- 7.40 Further, NIE submits that it would be manifestly inappropriate for NIE to issue a Connection Offer based on anything other than the most recently approved Statement of Charges.

Delay of connection offers

- 7.41 NIE acknowledges that the Connection Offer was issued approximately six months after receipt of application, but notes that TCI was advised of the position regarding preparation of the offer by the NIE letter dated 18 February 2011 (**B13**) and raised no complaint at that stage to the delay.
- 7.42 NIE submits that the timeline for cluster construction is dependent on a number of factors outside NIE's control including the requirement for various environmental, planning and regulatory approvals.
- 7.43 Further, NIE refers to the case for the pre-construction development of the Drumquin cluster to which NIE proposes to connect the Wind Farm was submitted by NIE to the Utility Regulator on 18 December 2013 (**B50**). NIE submits that this submission addresses the 56

MW threshold capacity issue and identifies the potential wind farms to be connected to the Drumquin cluster.

Extending the validity of the 2011 connection offers

- 7.44 NIE states that it agreed to extend the validity period of connection offers following stakeholder engagement and that this was to the benefit of generators who may otherwise be unwilling to accept issued Connection offers which would lapse after the expiry of their validity period. NIE submits that the Connection Offer of 7 July 2011 **(B16)** remained open for acceptance by TCI, albeit that the costs were to be updated at some future point.

Relevance of planning consent

- 7.45 NIE's policy is to require a person seeking connection of a wind farm to have received planning permission for that development before a connection application is accepted. This is confirmed in the Utility Regulator's clarification paper dated 17 January 2014 **(B54)**.

- 7.46 NIE's response to TCI's complaint (dated 5 February 2014 **(B60)**) states that:

"On receipt of a connection application accompanied by a grant of planning permission NIE will allocate access to the electricity network to the applicant. However while Condition 30 of the NIE Licence imposes obligations on NIE with respect to issuing an offer for connection to the electricity distribution network (a "Connection Offer") the actual date of connection may depend on the fulfilment of certain conditions as identified in the Connection Offer."

- 7.47 In relation to the issue of planning consent, NIE further submits that:

- (a) it cannot guarantee that a connection will be undertaken prior to the expiry of planning permission obtained for the development;
- (b) it understands that it is open to a person seeking connection who is in receipt of planning permission to commence enabling works on site in advance of connection to the electricity network so as to meet any time limits applied in the grant of planning permission; and
- (c) it is aware of wind farms having taken this course of action to maintain the validity of their planning permission beyond the five year period.

Magherakeel Substation

- 7.48 With regard to TCI referring to information in relation to Magherakeel, NIE submits that Magherakeel has never been considered as a connection point for the Wind Farm with the Drumquin Cluster being the appropriate point for connection. NIE submits that discussion around Magherakeel and its associated connectees is not relevant to this dispute.

Drumquin Cluster Evaluation

7.49 With regard to the TCI Drumquin Cluster Evaluation, NIE submits that:

"Since the Evaluation does not consider those sites outside the 10km radius that may potentially connect to the proposed Drumquin cluster (as advised in the NIE submission to the Utility Regulator dated 18 December 2013) the three conclusions reached are fundamentally flawed."

"NIE submission addresses the 56MW threshold capacity issue and identifies the potential wind farms to be connected to the Drumquin cluster based on applications for planning permission."

"it should not be open to individual generators to query the viability of a proposed cluster using the Utility Regulator's complaints process and that the approval of each proposed cluster substation is a matter for the Utility Regulator in accordance with the relevant Statement of Charges."

"TCI, appears to adopt rules relating to the expiry of planning permission which are not part of the approved cluster methodology and therefore do not apply."

Omagh Main Technical Assessment

7.50 With regard to the TNEI Independent Technical Assessment of available connection capacity at Omagh Main Substation provided by TCI, NIE submits the following:

"TNEI have assessed the connection of the Wind Farm to Omagh from the perspective of electrical capacity only and have not taken into account the other factors to which NIE must have due regard"

"TNEI have not considered the physical constraints at Omagh... nor have they considered the rights of other applicants for connection... or the need for the development of a cluster approach to connecting multiple wind farms which was the subject of full consultation with industry stakeholders and endorsed by formal regulatory approval in 2011."

"TNEI have approached their assessment as if TCI were the only potential connectee to Omagh, an approach which NIE regards as incorrect... Accordingly their assessment is flawed; being an unbalanced and one dimensional view which, importantly, ignores legitimate discriminatory concerns."

Additional Matters

7.51 NIE submits that TCI's reason for pursuing a direct connection into Omagh Main is purely to arrive at the shortest timeline rather than a reflection of a concern held by TCI as to whether this is the least cost connection method or the most appropriate overall connection solution for related wind farms in the vicinity.

7.52 NIE believes it would have been clear to TCI following the issue of the Dunmore Determination that the Utility Regulator would consider a complaint with regard to the reasonableness of a proposed connection by NIE to a cluster substation. That complaint could have been made by TCI with regard to the Wind Farm from that date.

Draft Determination

- 7.53 In responding to the Draft Determination **(B100)**, NIE's key additional submission noted that the critical path for the connection of the Wind Farm is driven by the timeline to complete the Drumquin cluster and therefore the ongoing deliberations have, to date, not delayed the energisation of the Wind Farm.

TCI's Legal Opinion

- 7.54 NIE's comments **(B102)** on TCI's legal opinion are referred to and addressed in the updated legal opinion written by our external legal advisors and enclosed with this determination.

8 Section Eight - Issues to be Determined

8.1 The issues falling to be determined by us in respect of TCI's application to NIE for a connection to be made between the Wind Farm and NIE's electricity distribution system, were set out in our Draft Determination and are as follows.

Issue 1

8.2 The first issue to be determined by us is:

- (a) whether TCI is entitled to a connection offer which sets out charges that are referable to the March 2010 Statement of Charges **(B3)**; or
- (b) whether NIE can make a connection offer which sets out charges that are not referable to the March 2010 Statement of Charges **(B3)** but instead are based on the October 2013 Statement of Charges, even though the October 2013 Statement of Charges had not been approved by the Utility Regulator at the time TCI made its application for a connection or received its initial connection offer.

Issue 2

8.3 The second issue to be determined by us is:

- (a) whether TCI is entitled to a connection offer which is based on the LCTA connection methodology set out in the March 2010 Statement of Charges **(B3)** and is entitled to a direct connection into Omagh Main or elsewhere; or
- (b) whether NIE can make a connection offer which is based on a clustering methodology.

9 Section Nine – Determination in relation to Issue 1

9.1 There is essentially only one key question that arises in relation to Issue 1. That is whether TCI is entitled to a connection offer which is based on the LCTA connection methodology set out in the March 2010 Statement of Charges **(B3)**.

9.2 We consider that our determination in relation to this issue turns on the legal position of:

- (a) whether, for the purposes of determining the terms as to charges, which it is reasonable in all the circumstances of the case for a complainant to be required to accept, the Utility Regulator should apply the same tests as would ordinarily be applied by NIE under its licence conditions, including for example that the charges are, unless manifestly inappropriate, referable to and set in conformity with the applicable charging statement, and
- (b) if so, which charging statement is the applicable charging statement for the purposes of determining the terms which need to apply to the making of the connection.

Legal Opinion

9.3 The opinion of our external legal advisers (as enclosed with the Draft Determination) **(B89)** said that:

- (a) in determining connection disputes, the Utility Regulator is required to consider the relevant licence conditions and, unless there are justifiable reasons for not doing so, follow the policy set out in those conditions;
- (b) this means that when determining the terms which it is reasonable in all the circumstances for TCI to be required to accept, the Utility Regulator should determine those terms in respect of charges which are, unless manifestly inappropriate, referable to and in conformity with the applicable Statement of Charges;
- (c) where the Utility Regulator is determining the terms which are to apply to the making of connection and does so by reference to a Statement of Charges, the applicable Statement of Charges is the Statement of Charges in force at the time the Utility Regulator makes its determination; and
- (d) accordingly, for the purposes of the Dispute, the applicable Statement of Charges is the October 2013 Statement of Charges.

9.4 The legal opinion enclosed with the Draft Determination **(B89)** had considered and addressed the submissions made by or on behalf of the Parties to a preliminary opinion **(B83)** provided by Wragge Lawrence Graham & Co LLP and sent to the Parties on 23 June 2014.

- 9.5 Following the of the Draft Determination, TCI submitted a legal opinion procured by it from William Orbinson QC (**B101**) and NIE submitted comments in response to that legal opinion (**B102**).
- 9.6 We note that the legal opinion of William Orbinson QC (**B101**) states that two issues arise for analysis but that the second issue is not concerned with the subject matter of the Dispute and therefore not a matter in respect of which we are making our determination.
- 9.7 With regard to the first issue we note that William Orbinson QC disagrees with the opinion of our external legal advisors and reaches a different conclusion. We also note that, in commenting on the QC's opinion, NIE considers that the opinion does not take account of certain issues and accordingly disagrees with the conclusions reached in it.
- 9.8 In their formal advice to us, our external legal advisers have considered and addressed these submissions. The view of our external legal advisers as set out in their final advice to us (and enclosed with this determination) remains as set out in the opinion enclosed with the Draft Determination.
- 9.9 Having considered and had full regard to the legal advice and responses from the parties, we accept the legal advice of our external legal advisers.
- 9.10 The effect of that advice is that, in making a determination in relation to the Dispute, the Utility Regulator should follow its policy unless there are justifiable reasons for not doing so – that policy being that it should, unless manifestly inappropriate, determine the terms in respect of charges which are referable to and in conformity with the October 2013 Statement of Charges.
- 9.11 We have given detailed consideration to the issue of whether or not there are justifiable reasons for not following our policy or whether it would be manifestly inappropriate for the October 2013 Statement of Charges to apply.

Following UR Policy

- 9.12 Having considered the submissions of the Parties, we consider that there are no justifiable reasons for departing from the Utility Regulator's policy in making our determination in relation to the Dispute. We do not consider that any of the submissions put forward by TCI justify departing from the uniform application of the policy, particularly where the policy itself provides for exceptions to ensure that it is not of overly rigid application.
- 9.13 The Utility Regulator's policy is not inconsistent with Article 32 or any other provision of the Directive. The policy clearly provides for charging methodologies to be approved and published before they come into effect and for connection offers and charges to be referable

to such approved and published charging methodologies. Accordingly no justifiable reasons for departing from the policy have been made out by TCI.

Manifestly Inappropriate

- 9.14 We have received and accept legal advice that applying a particular Statement of Charges would be manifestly inappropriate if it is clearly and obviously wrong or inappropriate, and that this test has a higher threshold than the test of unreasonableness.
- 9.15 In its response to the Draft Determination (**B98 and 99**) TCI contends it would be manifestly inappropriate for the Utility Regulator to determine the terms as to charges such that they are referable to and set in conformity with the October 2013 Statement of Charges.
- 9.16 In doing so TCI refers to the reasons given in the opinion of its legal advisors (Pinsent Masons LLP) dated 30 June 2014 (**B86**).
- 9.17 The reasons given in this opinion are that essentially NIE had informed TCI that the effect of the Dunmore Determination was that the charge applicable to the connection offer for the Wind Farm must be based on LCTA and therefore on the March 2010 Statement of Charges.
- 9.18 In addition we note, as highlighted in the legal opinion written by our external legal advisers, that Counsel for TCI has also set out an argument why it would be manifestly inappropriate for the October 2013 Statement of Charges to apply. In summary this argument is that: (i) there was a delay between TCI's application and NIE making the Connection Offer, (ii) the Connection Offer stated that it was conditional upon the Utility Regulator's approval of a revised statement of charges, (iii) in making the Connection Offer NIE was not therefore compliant with its licence obligations, (iv) had NIE complied with its licence obligations the March 2010 Statement of Charges would then have applied. Counsel for TCI concludes that NIE applying the October 2013 Statement of Charges would allow NIE to take advantage of its own default in not complying with its licence obligations.
- 9.19 Finally, we note TCI's contention that any delay that occurred in referring the dispute to the Utility Regulator was caused by NIE's negligence and mismanagement of the connection process.
- 9.20 We have considered the above submissions. We have also considered NIE's response to the preliminary legal opinion (**B84**) in which it made a number of submissions on why it would be manifestly unreasonable for us to apply the March 2010 Statement of Charges. It submitted that it is clearly and obviously wrong or appropriate for the March 2010 Statement of Charges to apply as (i) the terms of the Connection Offer confirmed that it was subject to approval of a revised charging statement, (ii) in revising the Connection Offer (which had not been accepted) in December 2013 it was updating it to reflect the new charging regime, and (iii) the

terms of the Connection Offer permitted the revision and it would be manifestly inappropriate not to make the revision on that the basis of the October 2013 Statement of Charges.

- 9.21 It is evident from the information before us that there was considerable delay on the part of NIE in terms of the time that it took for it to make a connection offer to TCI following TCI's application. We are also conscious that the Connection Offer contained conditional terms, and on that basis it could therefore be said not to be compliant with NIE's licence obligations.
- 9.22 Although these matters which relate to NIE's potential non-compliance with licence obligations are formally outside the scope of our determination, such that we reach no formal conclusions at this stage as to whether any breach of those obligations took place, there is little doubt that they indicate certain failures of good practice throughout the whole connection process.
- 9.23 In addition when NIE revised the Connection Offer in March 2012 (following and in light of the Dunmore Determination) the revisions did not provide details of the applicable charges (i.e. the LCTA charges). A state of affairs in which NIE said it was unable to provide details of the applicable LCTA charges persisted for some considerable time.
- 9.24 Further having written to TCI in June 2012, NIE made no further attempt to keep TCI informed of progress or to inform it of its options. It waited until it received correspondence from TCI's legal advisors before again progressing the matter. It would have been appropriate for NIE to have reviewed its files for outstanding connection matters on a regular basis.
- 9.25 In summary, therefore, it is clear that NIE did not progress the connection application with the speed and efficiency that TCI may have expected. In that respect we have some sympathy with TCI's arguments.
- 9.26 However, we note that NIE was not alone in this respect. TCI also played its part in the long period of time that was taken to bring this matter to a conclusion.
- 9.27 TCI voluntarily participated in the lengthy and protracted discussions and negotiations with NIE. Its reasons for doing so appear to be because it did not want the method of connection to be on a cluster basis (although NIE had from the outset offered a method of connection through the cluster approach).
- 9.28 TCI states that because it had been informed by NIE in March 2012 that the March 2010 Charging Statement applied for the purposes of determining the charges, it had a right to have the March 2010 Statement of Charges applied at all times going forward. However, we are advised (and accept) that there is nothing in the legislation or licence conditions which supports TCI's belief, and TCI should have correctly informed itself as to the law and been aware of that fact.

- 9.29 Moreover, it was known from April 2011 that the Utility Regulator approved the development of a new connection charging methodology and that a new charging statement reflecting this position would be forthcoming in the not-too-distant future. Even prior to that date, it was clear from public consultations that this was a real possibility. TCI should therefore have anticipated the need to obtain a firm connection offer from NIE as soon as possible if it wanted that offer to be based on the charging statement then in force.
- 9.30 Finally, TCI did not take any initiative to progress the matter between July 2012 and June 2013. It had received a letter from NIE on 29 June 2012 (B26) but did not then take any action until June 2013, allowing almost a full year to pass. There appears to be no good reason for this failure to act to move the process forward during this time.
- 9.31 Ultimately, if the commercial discussions had reached a genuine impasse that could not be resolved by action on its part, TCI had ample opportunity to refer the matter to the Utility Regulator as a dispute sooner than it did, since it was clearly aware of the jurisdiction of the Utility Regulator in respect of the matter. TCI has not put forward any reason as to why it did not do so.
- 9.32 In conclusion, therefore, it appears to us that the process related to the connection application in this case was unreasonably prolonged, and that the parties could have done much more to bring the matter to finality – or, if they could not do so, to refer it to the Utility Regulator – at a much earlier stage. NIE's approach was not a model of good process. However, TCI also did not do what it might reasonably have been expected to do in order to progress the matter; it had every reason to understand that the charging statement was likely to be amended before the matter was concluded if the lengthy delay continued, and yet itself contributed to that delay.
- 9.33 We conclude therefore that the lengthy period of time over which the application proceeded was attributable to the actions and the inaction of both parties, and that it cannot simply be characterised, as TCI has submitted, as a matter delay by NIE on which it has later sought to rely to its own benefit.
- 9.34 On balance, having taken into account (i) the Parties' submissions, (ii) the matters noted above, and (ii) the legal advice on the test for what is manifestly inappropriate, including that it is a high threshold, we do not consider that there is sufficient reason for us to depart from the usual approach of giving effect to the applicable charging statement (in this case the October 2013 Statement of Charges) in all the circumstances of the case. Although we have concerns as to the progress of this matter over its long history, they are concerns relating to the conduct of both parties, and are not sufficient in our view to displace the normal approach to the use of charging statements. We do not consider them to render it manifestly inappropriate for us to apply the October 2013 Statement of Charges.

Conclusion

- 9.35 In conclusion, in relation to Issue 1, we determine that TCI is not entitled to a connection offer which is based on the LCTA connection methodology set out in the March 2010 Statement **(B3)**.

10 Section Ten – Determination in relation to Issue 2

- 10.1 Issue 2 is not concerned with the basis of the charges for connection (which has been determined under Issue 1) but with other terms relating to the connection, specifically terms which relate to the design of the connection.
- 10.2 NIE submits that it can make a connection offer which is based on a clustering methodology. TCI submits that it is entitled to a LCTA connection (direct into Omagh Main or elsewhere).
- 10.3 Having considered the relevant issues, it is our view that it was and remains reasonable in all the circumstances of the case for NIE to make a connection offer including terms that provide for the connection to be made through a cluster substation, and we therefore so determine.
- 10.4 While the Parties have made many detailed submissions on the issue of reasonableness, each of which we have considered, we set out our particular reasons below (noting that many of our reasons were also reasons given by the Utility Regulator in the Dunmore Determination).

Connection Methodology and Statement of Charges

- 10.5 As a preliminary point, we have determined under Issue 1 that (for the purposes of charging) the applicable Statement of Charges is the October 2013 Statement of Charges, which clearly makes provision for clustering as the connection methodology.
- 10.6 However, even if we had determined that the applicable Statement of Charges is the March 2010 Statement of Charges, this would not have precluded us from determining that it was reasonable in all the circumstances of the case for NIE to make a connection offer including terms that provide for clustering as the connection methodology.
- 10.7 A wind farm can be connected into a shared substation even if the applicable Statement of Charges is the March 2010 Statement of Charges. This is because paragraph 6.7.3 of the March 2010 Statement provides for flexibility as to the design of the connection.

Efficient, coordinated and economical system of electricity distribution

- 10.8 NIE has a statutory duty as an electricity distributor to develop and maintain an efficient, coordinated and economical system of electricity distribution (Article 12(1)(a) of the Electricity Order).
- 10.9 Both the 2010 Consultation (issued by NIE) **(B4)** and the Connection Policy Consultation (issued by the Utility Regulator) **(B7)** noted that the number and nature of generation connections to the distribution system has changed in the recent past, and this trend is expected to continue as a result of government targets and incentives for renewable and embedded generation.

- 10.10 This change in the number and type of connections requiring to be made to the distribution system is likely to have an impact on the actions that NIE will need to take in order to discharge its Article 12(1)(a) duty.
- 10.11 Adopting a clustering approach, in circumstances where it may be possible to do so, will allow more generation capacity to be connected to the distribution system. As a matter of first principle, it is also likely to result in the maintenance of a more efficient, coordinated and economical system of electricity distribution.
- 10.12 The alternative is a system based on individual connections carried out without reference to each other, even when they are closely proximate in time and in location. This is unlikely to be the most efficient, economical or coordinated way to proceed (and we do not consider that TCI has put forward evidence to suggest otherwise in relation to the Dispute).
- 10.13 For these reasons, as noted in the Decision Paper, the Utility Regulator has approved the principle of clustering.
- 10.14 In relation to the Wind Farm, NIE's proposal to base the connection on a clustering methodology appears to us to be consistent with the discharge of its Article 12(1)(a) duty.
- 10.15 TCI contends that a direct connection to the Omagh Main would be in line with NIE's statutory duties to develop and maintain an efficient, economic and co-ordinated network but does not submit any reasons for this other than to state that there is available capacity at Omagh Main sufficient to connect the Wind Farm. That there is available capacity in a particular location does not mean that making a direct connection leads to an efficient, economic and co-ordinated system.

Substantial consultation and acceptance by developers

- 10.16 The adoption of a clustering methodology has, as noted above, been the subject of substantial consultation and was approved by the Utility Regulator on 21 April 2011 (**B14**).
- 10.17 We understand that the adoption of a clustering methodology has been met with substantial acceptance by developers. TCI submits that the Wind Farm is the only wind farm in the vicinity that has remained steadfast in its preference for a more timely direct connection into the residual capacity at Omagh Main, and that other developers have elected to await an approved cluster based connection.
- 10.18 If all other developers in the vicinity have accepted or plan to accept a connection offer based on a clustering methodology, this strongly supports the position that it is reasonable in all the circumstances of the case for NIE to make such a connection offer, absent specific reasons which apply only to the Wind Farm.

- 10.19 TCI has not submitted that there are, and we do not consider there to be, any such specific reasons.
- 10.20 TCI refers to its queue position as being a potential reason why other developers may have accepted connection offers based on a clustering methodology but this is not a reason as to why it is reasonable in all the circumstances of the case for the Wind Farm connection offer not to be based on a clustering methodology. In respect of its queue position we note NIE's submissions that there were four other wind farms that were ahead of the Wind Farm in the queue.

Discrimination

- 10.21 NIE is subject to an obligation, under Condition 15 of the Licence, not unduly to discriminate as between any persons, or any class or classes of person or persons. This obligation applies where NIE is meeting its obligations under Condition 30 of the Licence to offer terms for the connection to its distribution system. It will always be important for NIE to consider this obligation where it has a number of wind farms which have applied for connections in a particular area.
- 10.22 Having considered the available evidence and the submissions of the Parties, we agree with NIE that if it were to offer a LCTA connection (direct into Omagh Main or elsewhere), there would be a risk that it would have breached its obligation under Condition 15 of its Licence.
- 10.23 TCI submits that issuing it with such a connection offer would not be discriminatory, since the Wind Farm is the only wind farm which has remained steadfast in its preference for a direct connection. Even though other developers may have agreed to accept a cluster based connection, we do not consider that the evidence available to us supports the submission that this was ultimately their preferred option.
- 10.24 In any case, the test of whether or not there is discrimination is whether or not developers which are substantively in the same position are getting the same outcome. Where the connection for the Wind Farm is based on a clustering methodology, the outcome is not discriminatory. If the connection were a LCTA connection, there would appear to be an unduly discriminatory outcome.

Planning permission

- 10.25 NIE's policy is to require a person seeking a connection of a wind farm to have received planning permission for that development before a connection application is accepted.
- 10.26 TCI submits that it is not reasonable in the circumstances of the case for NIE to issue a connection offer based on a clustering approach due to the date on which planning permission for the Wind Farm is due to expire. NIE submits that it is open to a person seeking

a connection to commence enabling works on site in advance of the connection to meet any time limits applied by the grant of planning permission.

- 10.27 On the basis of the submissions of the Parties and the available evidence, we do not consider that the planning permission for the Wind Farm makes it unreasonable in all the circumstances of the case for NIE to issue a connection based on a clustering methodology. In particular, this consideration needs to be balanced against the consideration of NIE's statutory duty to develop and maintain an efficient, coordinated and economical system of electricity distribution.

Conclusions

- 10.28 Given all of the above, we believe it is reasonable in all the circumstances for NIE to make a connection offer including terms that provide for the connection to be designed on the basis of a connection to a cluster substation.
- 10.29 We acknowledge that, should NIE decide to proceed with connection through a cluster substation, this may delay the timetable for the eventual connection of the Wind Farm. We also appreciate that, given the length and nature of the process to date, TCI may feel frustrated by the possibility of further delay; although we note that at an early stage, on 18 February 2011 **(B13)**, NIE did alert TCI to the proposal that the connection would be made by way of clustering. Further, the Connection Offer made on 7 July 2011 **(B16)** clearly stated that it was based on a clustering approach.
- 10.30 In any event, and in particular with regard to matters relating to costs, we wish to draw attention to the fact that our determination in relation to Issue 2 does not constitute (and shall not be taken as constituting):
- (a) an approval by the Utility Regulator for NIE to incur any expenditure in relation to the Drumquin cluster substation or any other substation; or
 - (b) an approval by the Utility Regulator for NIE to incur any expenditure in the expectation that such expenditure can be recovered through NIE's allowed regulated revenue,
- nor does our determination mean (or should it be taken as meaning) that the Utility Regulator has considered or determined any of such matters.

11 Section Eleven – Concluding Observations

11.1 In making the Complaint and responding to the Draft Determination, TCI asked for certain matters to be clarified within the determination process. It also made some contentions in respect of which we wish to respond. We also wish to make some further observations.

11.2 This Section Eleven is not therefore part of our formal determination.

Requests made by TCI

11.3 In its submissions, TCI noted that NIE first proposed a cluster substation connection for the Wind Farm on 18 February 2011 (**B13**) and that, as far as it is aware, the Utility Regulator had not, at that stage, been notified by NIE that it (NIE) was considering or had determined the need for a cluster substation within the vicinity and/or relevant to the connection of the Wind Farm. TCI requested that, as part of the process of making the determination, the Utility Regulator confirm whether or not this was the case.

11.4 NIE first identified the need for a cluster in the Drumquin area in its paper to the Utility Regulator on 11 October 2010 titled *"Pre-Construction Work to Establish Four Wind Farm Cluster Substations"*. While the cluster was not the main subject of this paper, the Cluster Plan Diagram included within the paper clearly showed a proposal for a cluster in the vicinity of Drumquin.

11.5 In its submissions, TCI requested that the Utility Regulator satisfy itself as part of this process as to whether or not the three applicants to which NIE refer as being ahead of the Wind Farm in the connection queue for Omagh Main have by this stage (i) been issued with connection offers (ii) have accepted connection offers, or (iii) have been connected to the network, and thereby are no longer in a queue for connection to Omagh Main.

11.6 The Utility Regulator understands that each of these applicants has been issued with a connection offer. So far as the Utility Regulator is aware, these applicants have not yet been connected to the network. However, in light of our conclusions in this determination, we do not consider it necessary to identify whether or not these applicants have accepted offers or have been connected to the network.

11.7 In its submissions to the Draft Determination, TCI asked the Utility Regulator to confirm whether it has enquired of NIE if it obtained external legal advice on the appropriate charging statement at the time of the issue of the Connection Offer or whether the Utility Regulator approved the form of the Connection Offer.

11.8 The Utility Regulator has not made any enquiries of NIE as to whether it obtained such external legal advice. The Utility Regulator has no role in approving the forms of connection offers and accordingly the form of the Connection Offer was not approved by it.

- 11.9 In its submissions to the Draft Determination, TCI also asked the Utility Regulator to confirm when it will decide whether it is necessary or appropriate for it to exercise its enforcement functions. This request is not related to the subject matter of the Dispute and therefore it is not necessary or appropriate for the Utility Regulator to respond to it within the determination. It will do so outside of the determination process.

TCI's Contentions in respect of the Draft Determination

- 11.10 We also consider it necessary and appropriate to respond to the following contentions made by TCI in its submissions to the Draft Determination.
- 11.11 TCI contends that in making the Draft Determination the Decision-Makers have not considered the applicable EU law as set out in Article 32 of the Directive. This is incorrect and unsubstantiated by the evidence. The legal opinion enclosed with the Draft Determination **(B89)**, which opinion was considered by us, clearly refers to matters concerning the application of Article 32 of the Directive. We considered fully the applicable EU law referred to by TCI.
- 11.12 TCI contends that in making the Draft Determination the Decision-Makers have not had full regard to all of TCI's submissions. Again this is incorrect and unsubstantiated by the evidence. We have reviewed all of the submissions made by TCI (and those made by NIE), summarised these submissions in both our Draft Determination and this determination (which summaries have not been disputed as to their accuracy or completeness by either Party) and taken legal advice in respect of the legal matters raised by such submissions.

Further comments

- 11.13 We note that there have been significant delays relating to the progressing of the connection for the Wind Farm and that NIE's actions contributed to the delays. In that and other respects we consider that NIE's processes have not been as transparent as they could have been. We do therefore have some sympathy with TCI's position in this respect.
- 11.14 In respect of previous determinations, NIE has been encouraged to review its procedures for dealing with connection applications and ensure that they are dealt with in a systematic, transparent and consistent manner. Given the delay and prolonged correspondence in relation to the Wind Farm, we encourage NIE to undertake the suggested reviews at the earliest opportunity.
- 11.15 In its response to the Draft Determination, NIE has confirmed that it is currently undertaking a full review of the connection processes and arrangements for generation connections and is expecting to bring forward proposals for consultation by late summer.
- 11.16 We strongly encourage NIE to meet its proposed timescales in respect of this project.

Potential breaches of statutory and/or licence obligations

- 11.17 Many of the issues raised by TCI in its submissions refer to potential breaches by NIE of its statutory and/or licence obligations. At the present time the investigation team has not investigated and we have not considered the question of whether or not NIE was or is in breach of any statutory or licence obligation. These are matters relating to the Utility Regulator's enforcement functions and the Utility Regulator will consider separately whether it is necessary or appropriate for it to investigate the complaints made and/or consider exercising its enforcement functions.

12 Section Twelve –The Order

- 12.1 TCI has effectively asked us to make an order under Article 26(1) of the Electricity Order to the effect that TCI should receive a connection offer which:
- (a) provides that the connection charges shall be those which reflect the charging methodology for the LCTA connection as set out in the March 2010 Statement, and
 - (b) provides that the method of connection is the LCTA connection.
- 12.2 For the reasons given in Section Ten we decline making an order in relation to either paragraph 12.1(a) or 12.1(b).
- 12.3 We note that the Connection Offer issued by NIE on 5 December 2013 **(B46)** stated (at paragraph 7.6 of the offer) that it was open for acceptance for a period of 90 days from that date, unless extended. So far as we are aware, this connection offer has not been extended. Accordingly that connection offer is no longer open.
- 12.4 We therefore order that NIE:
- (a) makes a connection offer to TCI which offer:
 - (i) shall include terms which provide for the connection charges to be paid by TCI on the basis of the charging methodology as set out in the October 2013 Statement of Charges;
 - (ii) does not need to include terms which provide that the method of connection shall be the LCTA connection, but it is not precluded from doing so should NIE wish to include such terms; and
 - (b) makes such a connection offer to TCI such that it is:
 - (i) received by TCI no later than 21 working days from the date of this determination; and
 - (ii) capable of being accepted by TCI, should it wish to accept, without further delay.

Costs

- 12.5 The Procedures refer to the possibility of a costs order and therefore the Parties have been on notice to this effect. We also believe it unlikely that either of the Parties would be precluded by limited means from meeting any costs order that may be made.
- 12.6 In addition we invited submissions from the Parties as to whether we should make any

incidental, supplemental or consequential provision, including provision requiring either party to pay the costs or expenses incurred by the Utility Regulator in making the order

- 12.7 NIE's submissions on the question of costs are that it should not bear any of the costs incurred by the Utility Regulator on the basis that the Utility Regulator has declined to make the order that was effectively sought by TCI
- 12.8 TCI's submissions on costs are that it would be entirely appropriate for us to make an order as to costs and expenses in its favour, such that NIE should be responsible for discharging all of TCI's costs and expenses reasonably by it, as it was through no fault of its own that it was left with no alternative but to refer the dispute for determination. TCI sets out a number of reasons for this submission.
- 12.9 It further submits that we may also wish to consider whether NIE should be responsible for all or part of the costs incurred by the Utility Regulator but without any particular supporting reasons.
- 12.10 We should note that we can only make provisions with regard to the Utility Regulator's costs. We cannot as submitted by TCI make provision for the costs of either Party to be borne (whether in whole or in part) by the other Party.
- 12.11 Having considered the relevant submissions and having had regard to the matters referred to in Article 26(8) of the Electricity Order, in this particular case we exercise our discretion not to make a costs order. However, this should not be regarded as setting any precedent as to the future.
- 12.12 The Utility Regulator expressly reserves the right to order the payment of costs in any other dispute and will consider each case on its own merits and circumstances.

Tanya Hedley

Brian McHugh

Authorised on behalf of the Utility Regulator

**COMPLAINT TO THE UTILITY REGULATOR BY TCI RENEWABLES LIMITED (ON BEHALF OF
PIGEON TOP WIND FARM LTD) IN RELATION TO NORTHERN IRELAND ELECTRICITY
LIMITED'S CONNECTION ARRANGEMENTS FOR PIGEON TOP FARM**

Section A - Relevant legislation and background documents

Redacted for Publication

Section B - Documents and correspondence relevant to the Complaint

Redacted for Publication