

**COMPLAINT BY ALTGOLAN WIND FARM LTD IN RELATION TO A CONNECTION TO
NORTHERN IRELAND ELECTRICITY NETWORKS LIMITED'S ELECTRICITY DISTRIBUTION
SYSTEM**

SUPPLEMENTAL ISSUE

DETERMINATION

14 DECEMBER 2020

1 Introduction and Background

- 1.1 On 7 September 2020, we the Decision Makers¹ determined, under and in accordance with Article 26 of the Electricity (Northern Ireland) Order 1992 (the **Electricity Order**) an issue that was in dispute between Altgolan Wind Farm Limited (**AWFL**) and NIE Networks Limited (**NIE Networks**) (together the **Parties**).
- 1.2 The issue in dispute – being a dispute arising under Articles 19 to 25 of the Electricity Order – in respect of which we gave our determination concerned the terms of a connection offer made by NIE Networks to AWFL on 23 October 2018 (the **Connection Offer**).
- 1.3 The issue in dispute which we determined was whether NIE Networks was entitled to request and recover the amount of the 'cluster charge' stated in the Connection Offer. Our determination in respect of this issue in dispute between the Parties was that NIE Networks was so entitled.
- 1.4 The background to the referral of the dispute and the Parties' respective submissions in respect of it are outlined in our determination of 7 September 2020 on the main issue in dispute and we do not therefore rehearse them again here.
- 1.5 AWFL had initially referred the dispute with NIE Networks to the Utility Regulator (the **UR**) for determination on 18 January 2019 but within that referral had also asked for a tri-partite meeting, which the UR facilitated. Accordingly, it was not until 25 April 2019 that the UR was formally asked to progress the process for the determination of the dispute.
- 1.6 In its initial referral, AWFL had also submitted that NIE Networks should extend the time given to AWFL for acceptance of the Connection Offer. The time period given by NIE Networks to AWFL for acceptance of the Connection Offer was 90 days, following which the Connection Offer (unless accepted within that period) expired.
- 1.7 The Connection Offer was not accepted by AWFL within the 90-day period.
- 1.8 Having fulfilled their role within the determination process, the case management team formally sent the dispute between the Parties to us for consideration and determination by way of

¹ Claire Williams (a member of the Authority) and Colin Broomfield (Director in Wholesale Markets).

sending us a 'Statement of Case' dated 18 June 2020 (together with all of the relevant documentation referred to in that Statement of Case).

- 1.9 The Parties had been given the opportunity to comment on a draft Statement of Case – which among other things described the issue for determination, sent to them on 14 May 2020. Neither Party made any comments of any significance in response to this draft Statement of Case. The Statement of Case was also sent to the Parties at the same time as the dispute was sent to us for determination.
- 1.10 Having reviewed the relevant documentation, including for the avoidance of doubt a superseded draft statement of case that had been sent to the Parties much earlier in the process (i.e. in June 2019 and their respective submissions to that superseded draft), and noted that neither Party had made comments of any significance to the draft Statement of Case of 14 May 2020, it was our considered view that the Parties were agreed that there was a single issue in dispute between them, namely whether NIE Networks was entitled to request and recover the amount of the 'cluster charge' stated in the Connection Offer.
- 1.11 On 31 July 2020, we issued to the Parties a provisional determination (**Provisional Determination**). The Provisional Determination included our provisional conclusion that the issue in dispute between the Parties and which we were therefore determining (provisionally at that stage) was whether NIE Networks was entitled to request and recover the amount of the 'cluster charge' stated in the Connection Offer.
- 1.12 Neither Party made any submissions to the Provisional Determination of the type or nature that either expressly or impliedly indicated that there was any other issue that was also in dispute between the Parties.
- 1.13 Accordingly, having fully considered each Party's submissions to the Provisional Determination, on 7 September 2020 we determined the issue in dispute.

2 Correspondence following our determination of 7 September 2020

- 2.1 Following our determination of the issue in dispute between the Parties, the UR has received various correspondence from the Parties². The further correspondence that we have seen is listed in Appendix One³ and is as follows.
- 2.2 On 8 September 2020, AWFL sent a letter (**A1**) to the UR asking for confirmation that the UR would instruct NIE Networks to re-issue the connection offer (made on 23 October 2018) to AWFL by taking account of the determination and updating the terms of the connection offer in respect of other important matters which may have altered in the period since the dispute was raised.
- 2.3 On 9 September 2020, AWFL sent another letter (**A2**) to the UR. In that letter it –

² We acknowledge that in respect of this supplemental issue AWFL is legally represented by Pinsent Masons Belfast LLP and therefore where we refer to correspondence sent by AWFL this includes correspondence sent on its behalf by Pinsent Masons Belfast LLP.

³ Where the relevant correspondence or document listed in Appendix One has not previously been copied to the Parties it is enclosed with this Provisional Determination.

- (a) explained that it had been in contact with NIE Networks and had been informed by NIE Networks that because the determination of the issue in dispute was in NIE Networks' favour it was not possible for AWFL to accept the Connection Offer issued on 23 October 2018 as AWFL was not in receipt of valid terms for connection; and
 - (b) asked the UR to respond to a number of particular questions set out in the letter.
- 2.4 On 11 September 2020, the UR was copied into a letter (**A3**) sent by AWFL to NIE Networks which –
 - (a) asked NIE Networks to confirm that it would not effectively make a connection offer to any other party that had sought a distribution connection to the Drumquin Cluster prior to receiving further 'legal' correspondence from AWFL; and
 - (b) referred to the possibility of a legal challenge should NIE Networks make such a connection offer to a third party.
- 2.5 NIE Networks responded to AWFL's letter by email on 14 September 2020 (**A4**).
- 2.6 The UR acknowledged AWFL's letters of 8 and 9 September 2020 on 17 September (**A5**).
- 2.7 On 17 September 2020, the UR received a letter (**A6**) from Pinsent Masons informing the UR that –
 - (a) AWFL would be seeking leave to commence a judicial review against the UR in respect of what it contends to be decisions made in (a) in the Statement of Case dated 18 June 2020, and (b) the determination dated 7 September 2020; and
 - (b) pre-action correspondence would follow in the following week.
- 2.8 Also on 17 September 2020, Pinsent Masons sent a letter to NIE Networks (**A7**) seeking an undertaking that NIE Networks would not make a connection offer to a third party.
- 2.9 NIE Networks gave an undertaking to AWFL on 18 September 2020 (**A8**), namely that it would not make a connection offer to any other party for a distribution connection to the Drumquin Cluster before 14 December 2020.
- 2.10 On 18 September 2020, the UR was served with a copy of AWFL's application for judicial review in respect of a (purported) determination made by the UR on 18 June 2020 (**A9**).
- 2.11 However, because AWFL had not first sent any pre-action correspondence to the UR before lodging the application, it requested the court not to progress the application until it had sent and received the UR's response to the pre-action correspondence.
- 2.12 The UR received two separate pre-action protocol letters from AWFL – dated 24 September 2020 (**A10**) and 25 September 2020 (**A11**) respectively. It was also copied into a pre-action protocol letter sent by Pinsent Masons to NIE Networks on 14 October 2020 (**A12**). These letters provided further details relating to the matter of the supplemental issue relating to the connection offer.

- 2.13 On 1 December 2020, the UR sent a letter to the Parties setting out the timetable for the determination of this supplemental issue (A13). AWFL sent in a letter in response on 1 December 2020 (A14) to which the UR responded on 2 December (A15).
- 2.14 On 4 December 2020, the UR was served with a copy of AWFL's application for judicial review in respect of the determination made on 7 September 2020 (A16).
- 2.15 We understand that various 'without prejudice' correspondence has been exchanged between the UR, AWFL, and NIE Networks. However, that 'without prejudice' correspondence has not been disclosed to us, the Decision Makers.

3 Supplemental Issue for determination

- 3.1 We note that the judicial review applications and pre-action correspondence essentially characterise AWFL's grievance as follows –
- (a) that there was another issue in dispute between the Parties which had not been determined;
 - (b) that issue was whether the 90 day period for which the Connection Offer made by NIE Networks on 23 October 2018 was open for acceptance should be extended; and
 - (c) that we, the Decision Makers, should have also made a determination in respect of this issue in dispute between the Parties.
- 3.2 We also note that AWFL did not make any such submissions in response to either the draft Statement of Case or the Provisional Determination. In this respect AWFL states in its judicial review applications that the reason it did not submit any comments about the time period relating to the Connection Offer in response to the draft Statement of Case of 18 June 2020 or to the Provisional Determination of 31 July 2020 was because it believed that the necessary determination of the main issue would include a determination relating to the time period of the connection offer.
- 3.3 For completeness, we confirm that we, the Decision Makers, did not make any decision or determination as to whether or not we - acting for and on behalf of the UR in this respect – had the requisite *vires* to determine an issue concerning the period for which a connection offer is open for acceptance by the party to whom the offer is made.
- 3.4 We did not make any decision or determination on such a matter because there were no submissions either to the draft Statement of Case or to the Provisional Determination that this was a remaining issue that was in dispute between the Parties.
- 3.5 However, having reviewed the further correspondence (as referred to in Sections 2 and 4 of this document and listed in Appendix One) it is apparent to us that –
- (a) there remains a supplemental issue in dispute between the Parties with regard to the availability of a connection offer which can (should it so choose) be accepted by AWFL; and

- (b) given that we did not make any decision or determination in respect of this supplemental issue, we remain empowered to make a determination in respect of it.

3.6 The supplemental issue is whether, given that the Connection Offer made on 23 October 2018 expired on 21 January 2019, NIE Networks is or should be required to make a connection offer to AWFL, which reflects, and takes account of our determination made on 7 September 2020.

4 Views of the Parties

4.1 The views of the Parties can be summarised as follows.

NIE Networks

4.2 NIE Networks' position is that it cannot make a connection offer to AWFL for the reason that our determination of 7 September 2020 was in its favour and therefore AWFL has lost its place in the 'connection queue' – a policy process operated by NIE Networks' for managing connection applications - in respect of a connection to the Drumquin Cluster.

AWFL

4.3 AWFL's position is that our determination of 7 September 2020 does not have the effect stated by NIE Networks, i.e. such that AWFL has lost its place in the connection queue, and it is therefore entitled to a connection offer from NIE Networks.

4.4 In addition, in its response to our provisional determination on the supplemental issue (as sent to the Parties on 8 December 2020), AWFL made the following submissions –

- (a) that it has always maintained that the 90 day time period for acceptance of the Connection Offer was either preserved by AWFL's referral of its dispute to the UR and/or preserved by the UR as part of the dispute process and it therefore contends that Connection Offer has never expired and still extant;
- (b) that it did not further address the supplemental issue in its response to the draft Statement of Case of 14 May 2020 or the Provisional Determination of 31 July 2020 because it was under the understanding that the UR would deal appropriately with the issue;
- (c) that it had not received a satisfactory explanation from the UR with regard to the UR's *vires* to make a determination on the supplemental issue.

4.5 Also in response to our provisional determination on the supplemental issue, AWFL submitted copies of additional correspondence which it considered were not already referred to in Section 2 above. We confirm that the only further correspondence submitted by AWFL that we had not previously seen⁴ was -

⁴ In this respect paragraph 2.13 of our provisional determination inadvertently gave the wrong dates in relation to Tabs A14 and A15 which have been corrected in this document and we confirm therefore that we had already received copies of the other correspondence accompanying AWFL's response to the provisional determination. Also and for completeness, as AWFL appear to have missed it, our provisional determination confirmed that we had a copy of the claim documents relating to AWFL's JR leave application of 4 December 2020.

- (a) the letter from AWFL to the UR dated 3 December 2020 (A17); and
- (b) the letter from AWFL to NIE Networks' solicitors dated 2 December 2020 (A18).

5 Determination of Supplemental Issue

5.1 With regard to AWFL's submissions as to the UR's *vires* to determine the supplemental issue -

- (a) we have confirmed above (at paragraph 3.5(b)) that we, the Decision Makers, did not make any decision or determination in respect of the supplemental issue; and
- (b) we note, and refer the Parties to, the UR's letter of 2 December 2020 which –
 - (i) states that the UR is satisfied that it has the requisite *vires* to determine the issue remaining in dispute (namely the supplemental issue referred to in paragraph 3.6 above); and
 - (ii) outlines its reason for that being the case.

5.2 Accordingly, and to confirm, the supplemental issue, which remains to be determined, is whether NIE Networks is now required to make a connection offer to AWFL, which reflects and takes account of our determination of 7 September 2020.

5.3 NIE Networks contends that AWFL has lost its place in NIE Networks' 'connection queue' because our determination of 7 September 2020 was in its favour.

5.4 In this respect, NIE Networks confirms that its position is that had our determination of 7 September 2020 not been in favour of NIE Networks, AWFL would have retained its position in the 'connection queue'.

5.5 That our determination of 7 September 2020 was in favour of NIE Networks cannot, and does not, have the effect contended for by NIE Networks. That is, the outcome of the determination we made on 7 September has no impact, influence or consequence in respect of AWFL's position in NIE Network's 'connection queue'. AWFL's position in NIE Networks' 'connection queue' is not determined by the outcome of our determination.

5.6 We note also AWFL's contention that the Connection Offer did not expire on 21 January 2019 for the reason that it referred its dispute to the UR on 18 January 2019.

5.7 However, there is nothing within Article 26 of the Electricity Order – the statutory provision under which a dispute can be referred to the UR – which provides for or supports the effect contended for by AWFL. We do not therefore agree with or accept AWFL's contention that the Connection Offer did not expire on 21 January 2019.

5.8 But AWFL's application to NIE Networks for a distribution connection remains live and extant. This is evident from the following –

- (a) AWFL has not withdrawn its connection application of 19 June 2018.
- (b) There is nothing within –

- (i) NIE Networks' published policy statement – the Distribution Generation Application and Offer Process Statement effective from 18 May 2018 (A19); or
- (ii) any letter or document issued (or approved) by the UR,

which provides that where an issue in dispute between NIE Networks and a connection applicant is determined by the UR in favour of NIE Networks, the connection applicant loses its place in the connection queue.

- 5.9 In this respect, we note also that NIE Networks has not made any submissions to the contrary in response to our provisional determination of 8 December 2020 (relating to this supplemental issue). The only submissions made by NIE Networks to our provisional determination of 8 December 2020 was to request that, given the internal work and processes that needs to be completed for NIE Networks to make a connection offer and given the upcoming Christmas holiday period, it has until 31 January 2021 to make the connection offer.
- 5.10 It is also relevant to the circumstances of this case that NIE Networks has not made a connection offer in response to any other connection application received by it after AWFL's connection application, which relates to a connection to the Drumquin Cluster. This is evidenced to us by way of the undertaking given by NIE Networks to AWFL on 18 September 2020.
- 5.11 Taking account of all of the above, we conclude that, in the circumstances of this case –
- (a) AWFL has not lost its place in NIE Networks' connection queue.
 - (b) It is appropriate for AWFL to be in receipt of a connection offer which reflects the determination of 7 September 2020 and is capable of being accepted by AWFL (should it choose to do so).
- 5.12 Our determination on the supplemental issue therefore is that NIE Networks is required to make a connection offer to AWFL pursuant to the application made by AWFL on 19 June 2018 - which offer is to reflect and takes account of the determination we made on 7 September 2020 in respect of the amount of the 'cluster charge'. We also accede to NIE Networks' request with regard to the time period it has to make that connection offer.

6 Order – Under Article 26 of the Electricity Order

- 6.1 We are in essence being asked by AWFL to make an order under Article 26(7) of the Electricity Order, which provides that NIE Networks shall make a connection offer to AWFL, which reflects and takes account of our determination of 7 September 2020 on the primary issue in dispute.
- 6.2 For the reasons given in section 5 above, we order that NIE Networks –
- (a) makes a connection offer to AWFL which shall reflect and take account of our determination of 7 September 2020;
 - (b) makes such a connection offer to AWFL such that it is:
 - (i) received by AWFL no later than 31 January 2021; and

- (ii) capable of being accepted by AWFL, should it wish to accept, without further delay.

6.3 We make no provision with regard to the recovery of costs in respect of the costs or expenses incurred by the UR in making this order.

Claire Williams and Colin Broomfield

Authorised on behalf of the Northern Ireland Authority for Utility Regulation

Appendix One

Index of Documents for Determination of the Supplemental Issue

Doc Ref	From	To	Date	Document Title
A1	AWFL	UR	08.09.20	Letter asking for clarity UR will instruct NIE Networks to re-issue the terms of connection
A2	AWFL	UR	09.09.20	Letter directing the UR to comments made by AWFL in respect of the first draft statement of case issued by UR in JU
A3	AWFL	NIEN	11.09.20	Letter asking NIEN to confirm that it will not make a connection offer to any other party
A4	NIEN	UR	14.09.20	Email confirming NIEN not taking steps re-allocation of capacity
A5	UR	AWFL and NIEN	17.09.20	Email to acknowledge receipt of correspondence dated 08.09.20 and 09.09.20
A6	Pinsent Masons Belfast LLP (Legal Representatives for AWFL)	UR	17.09.20	Letter advising that pre-action correspondence to follow
A7	Pinsent Masons	NIEN	17.09.20	Letter asking for an undertaking from NIEN
A8	NIEN	Pinsent Masons	18.09.20	Letter giving an undertaking
A9	Pinsent Masons	UR	18.09.20	Judicial Review Claim in respect of 18 June 2020 Statement of Case: "Order 53 Statement" and "Witness Statement".
A10	Pinsent Masons	UR	24.09.20	Pre-action Protocol Letter to UR
A11	Pinsent Masons	UR	25.09.20	Second Pre-action Protocol Letter to UR
A12	Pinsent Masons	NIEN	14.10.20	Pre-action Protocol Letter to NIEN
A13	UR	AWFL and NIEN	01.12.20	Letter with timetable
A14	Pinsent Masons	UR	01.12.20	Letter of response to timetable letter
A15	UR	Pinsent Masons	02.12.20	Response to PM letter of 2 December
A16	Pinsent Masons	UR	04.12.20	Judicial Review Claim in respect of 7 September 2020 determination: "Order 53 Statement" and "Witness Statement".

A17	Pinsent Masons	UR	03.12.20	Letter which provides advance notice of AWFL proposing to issue the JR claim it issued on 4 December 2020
A18	Pinsent Masons	NIE Networks' solicitors	02.12.20	Letter requesting NIE Networks to extend the undertaking given on 18.09.20 and requesting information.
A19			18.05.18	NIE Networks' Distribution Generation Application and Offer Process Statement