



**COMPLAINT TO THE UTILITY REGULATOR**

**BY MANUFACTURING NORTHERN IRELAND & POWERHOUSE GENERATION  
LIMITED (ON BEHALF OF SEVERFIELD (NI) LIMITED,  
DUNBIA (NORTHERN IRELAND), LGEN POWER LIMITED &  
READY EGG PRODUCTS LIMITED)  
IN RELATION TO NORTHERN IRELAND ELECTRICITY NETWORKS LIMITED'S  
TREATMENT OF MAXIMUM EXPORT CAPACITY**

**DETERMINATION**

**18 October 2017**

## CONTENTS

<u>Section</u>		<u>Page</u>
Section 1.	Introduction	3
Section 2.	The Parties	6
Section 3.	Applicable Law	8
Section 4.	Factual Background to AGU/DSU	13
Section 5.	Factual Background to the Dispute	17
Section 6.	Views of the Applicants	24
Section 7.	Views of NIE Networks	33
Section 8.	Issues to be Determined	40
Section 9.	Determination of the Dispute	41
Section 10.	Concluding Observations	57
Appendix 1.	Index of Documents	62

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(ON BEHALF OF SEVERFIELD (NI) LIMITED, DUNBIA (NORTHERN IRELAND),  
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IN RELATION TO NORTHERN IRELAND ELECTRICITY NETWORKS LIMITED'S  
TREATMENT OF MAXIMUM EXPORT CAPACITY

**DETERMINATION****1 Section One - Introduction**

- 1.1 On 22 March 2017, the Northern Ireland Authority for Utility Regulation (referred to hereafter as the **Utility Regulator**) received a formal complaint (the **Complaint**) from Manufacturing Northern Ireland (**MNI**) and Powerhouse Generation Ltd (**PG**) (as representatives) on behalf of: (i) Severfield (NI) Ltd; (ii) Dunbia (Northern Ireland); (iii) LGen Power Ltd; and (iv) Ready Egg Products Ltd (together, the **Applicants**) regarding a dispute (the **Dispute**) between the Applicants and Northern Ireland Electricity Networks Limited (**NIE Networks**).
- 1.2 MNI is a campaigning organisation acting on behalf of Northern Irish member companies. PG is a demand side response aggregator operating in both Northern Ireland (where it is licensed by the Utility Regulator) and the Republic of Ireland. The Applicants are individual demand site (**IDS**) customers.
- 1.3 The Dispute relates to the alleged treatment by NIE Networks in respect of the Applicants seeking to switch from trading as part of an Aggregated Generating Unit (**AGU**) to trading as part of a Demand Side Unit (**DSU**). In particular, the Dispute relates to Maximum Export Capacity, as defined under the Trading and Settlement Code, (**MEC**) and to NIE Networks' position that the MEC for a site which is applicable when the site is registered as an AGU site is not applicable where the site is re-registered as a DSU site (or is only available subject to conditions).
- 1.4 The Dispute between the Applicants and NIE Networks (together, the **Parties**) falls to be determined by the Utility Regulator under article 31A of the Electricity (Northern Ireland) Order 1992 (the **Electricity Order**), and in accordance with Directive 2009/72/EC of the

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

- 1.5 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 2013 (the **Procedure**).
- 1.6 The Complaint has been acknowledged and the Parties have been informed that the Utility Regulator has the jurisdiction to consider and determine the Dispute under article 31A<sup>1</sup> and of the timetable within which the Utility Regulator will make its determination.
- 1.7 NIE Networks responded to the Complaint on 19 June 2017 (the **Response**). On 25 July 2017, the Parties responded to a number of initial questions put to them by the Utility Regulator. On 22 August 2017, a reply to the Response (the **Reply**) was provided on behalf of the Applicants.
- 1.8 The Utility Regulator has appointed us, Alex Wiseman (Utility Regulator Board Member) and Andrew McCorriston (Utility Regulator Manager) jointly to determine the Dispute (together, the **Decision-Makers**). We do so as delegates of the Utility Regulator and on its behalf.
- 1.9 This document sets out our determination in relation to the Dispute.
- 1.10 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 of the Dispute –
  - (a) A draft 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, which are listed in Appendix 1 to this determination and include the submissions of the Parties.

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<sup>1</sup> In its letter dated 2 June 2017 accepting the Dispute for determination, the Utility Regulator noted that it was not proceeding to consider the Complaint under other provisions which had been raised, such as the Competition Act 1998.

- (c) NIE Networks' comments on the Statement<sup>2</sup>.
  - (d) The Applicants' comments on a provisional determination dated 22 September 2017 (the **Provisional Determination**)<sup>3</sup>.
- 1.11 The Parties were given the opportunity to comment on the Statement and the Provisional Determination. The comments received have been taken into account in our determination of the Dispute.
- 1.12 The determination adopts the following structure -
- (a) the Parties (at Section 2),
  - (b) the applicable legal framework (at Section 3),
  - (c) the factual background in relation to AGU/DSU (at Section 4),
  - (d) the factual background to the Dispute (at Section 5),
  - (e) the views of the Parties (at Sections 6 and 7),
  - (f) the issues for determination (at Section 8),
  - (g) our determination in relation to those issues (at Section 9), and
  - (h) our concluding observations (at Section 10).
- 1.13 Our determination references a number of documents and correspondence provided by the Parties. An index to these is set out at Appendix 1.

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<sup>2</sup> The Applicants were invited to comment on the Statement, but did not make any comment.

<sup>3</sup> NIE Networks was invited to comment on the Provisional Determination, but did not make any comment.

**2      Section Two - The Parties**

***The Applicants***

2.1    The Applicants are four IDS customers, each of which has onsite diesel generation with capability to export onto the distribution system. The Applicants are -

- (a)    Severfield (NI) Ltd,
- (b)    Dunbia (Northern Ireland),
- (c)    LGen Power Limited, and
- (d)    Ready Egg Products Limited.

2.2    Each of the Applicants has one site which is relevant to the Dispute. The Complaint stated that Dunbia (Northern Ireland) had two sites which were relevant to the Dispute, but the Applicants' response to the Provisional Determination confirmed that there has been a change of ownership of one site<sup>4</sup>.

***NIE Networks***

2.3    NIE Networks 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.

2.4    NIE Networks is licensed separately in relation to both activities. It holds an electricity transmission licence and an electricity distribution licence granted under articles 10(1)(b) and 10(1)(bb) of the Electricity Order respectively.

2.5    NIE Networks' distribution licence (also known as the successor distribution licence) (**the Licence**) is the relevant licence for the purposes of the Dispute.

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<sup>4</sup> Applicants' Response to Provisional Determination, para 50 - This relates to MPRN 81995998106. It is stated that there has been no change to the MPRN and that PG continues to contract with the site owner. However, our understanding is that the site is no longer owned by one of the Applicants or a company in its group. On this basis, this MPRN is no longer relevant to the Dispute.

- 2.6 NIE Networks is the only party in Northern Ireland entitled to offer terms to connect, or to modify an existing connection, to the electricity distribution system.
  
- 2.7 As from 22 September 2015 Northern Ireland Electricity Limited changed its name to Northern Ireland Electricity Networks Limited. For ease of reference and for the purposes of our determination, all references are to NIE Networks.

**3      Section Three - Applicable Law**

3.1    The legal framework applicable in determining the Dispute is summarised below.

***The Electricity Order***

3.2    Under article 31A(1) of the Electricity Order, any person may make a complaint to the Utility Regulator if –

- (a)    '*the subject matter of the complaint constitutes a dispute between the complainant and... the holder of a distribution licence*',
- (b)    '*it is wholly or mainly a complaint against that holder regarding an obligation imposed upon him pursuant to the Directive*', and
- (c)    '*the subject matter of the complaint - (i) does not fall to be dealt with under Article 26 or Article 42A; and (ii) is not capable of being determined pursuant to any other provision of this Order*'.

3.3    Article 31A goes on to state that –

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

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

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

*(5) For the purposes of paragraph (4) the requisite period in any case means—  
(a) the period of two months from the date when the complaint was received by the Authority; or (b) where the information sent to the Authority under paragraph (2) was in its opinion insufficient to enable it to make a determination, the period of four months from the date the complaint was received by the Authority.*

*(5A) Where the Authority makes a determination under this Article, it may include in the determination an order requiring any party to the dispute to pay such sum in respect of the costs or expenses incurred by the Authority in making the determination as the Authority considers appropriate and this order*

*shall be final and shall be enforceable as if it were a judgement of the county court.*

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

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

- 3.4 Article 19 of the Electricity Order places a duty on an electricity distributor to maintain a connection (including providing the necessary electric lines or electrical plant) between its distribution system and any premises, when required to do so by the owner or occupier of the premises. The connections between NIE Networks' network and the Applicants' premises would be low voltage and therefore a distribution connection.

### ***The Energy Order***

- 3.5 As noted above, a determination under article 31A of the Electricity Order is a determination about the exercise of any power or duty conferred or imposed on the Utility Regulator. In particular, the Complaint refers to the Utility Regulator's duty under article 42 of the Energy (Northern Ireland) Order 2003 (the **Energy Order**).
- 3.6 Article 42(1) provides that, subject to specified exceptions, where the Utility Regulator '*is satisfied that a regulated person is contravening, or is likely to contravene, any relevant condition or requirement, it shall by a final order make such provision as is requisite for the purpose of securing compliance with that condition or requirement*'.
- 3.7 For these purposes, article 41(2) of the Energy Order provides that a licence condition is a '*relevant condition*'.
- 3.8 Article 42 imposes a duty on the Utility Regulator to make a provisional order in some cases and sets out a procedure which must be followed before it makes a provisional order or a final order.
- 3.9 For completeness, we note that, in determining disputes, the principal objective and general duties of the Utility Regulator under article 12 of the Energy Order do not apply (see article 13(2) of the Energy Order).

### **The Directive**

- 3.10 The Utility Regulator also has a duty to determine distribution complaints under the Directive. In particular, article 37(11) of the Directive provides –

*'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 a period of two months after receipt of the complaint. That 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.'*

- 3.11 NIE Networks is a distribution system operator and the Complaint relates to obligations set out in article 25 of the Directive which relate to obligations imposed on distribution system operators. In particular –

- (a) article 25(2) of the Directive provides that a distribution system operator '*...must not discriminate between system users or classes of system users, particularly in favour of its related undertakings*', and
- (b) article 25(3) of the Directive provides that a distribution system operator '*...shall provide system users with the information they need for efficient access to, including use of, the system*'.

### **The Energy Efficiency Directive**

- 3.12 Directive 2012/27/EU (the **Energy Efficiency Directive**) imposes a number of obligations on the Utility Regulator in relation to energy efficiency. In particular, article 15(8) of the Energy Efficiency Directive provides that –

*'Member States shall ensure that national energy regulatory authorities encourage demand side resources, such as demand response, to participate alongside supply in wholesale and retail markets.*

*Subject to technical constraints inherent in managing networks, Member States shall ensure that transmission system operators and distribution system operators, in meeting requirements for balancing and ancillary services, treat demand response providers, including aggregators, in a non-discriminatory manner, on the basis of their technical capabilities.*

*Subject to technical constraints inherent in managing networks, Member States shall promote access to and participation of demand response in balancing,*

*reserve and other system services markets, inter alia by requiring national energy regulatory authorities or, where their national regulatory systems so require, transmission system operators and distribution system operators in close cooperation with demand service providers and consumers, to define technical modalities for participation in these markets on the basis of the technical requirements of these markets and the capabilities of demand response. Such specifications shall include the participation of aggregators'.*

### ***The Licence***

- 3.13 Condition 15 of the Licence relates to the "Non-Discrimination". In particular, the Condition provides that –

*'The Licensee shall not... unduly discriminate as between any persons, or any class or classes of person or persons, or unduly prefer itself (or any affiliate or related undertaking) over any other person or persons, or any class or classes of person or persons, in meeting its obligations under... Condition 19 (Distribution System Security and Planning Standards and Operation of the Distribution System)'.*

- 3.14 Condition 19 of the Licence relates, amongst other things, to the planning, developing, maintenance and operation of NIE Networks' distribution system.

- 3.15 Condition 16 of the Licence relates to the Trading and Settlement Code. In particular, Condition 16(1) provides that –

*'The Licensee shall accede to the Single Electricity Market Trading and Settlement Code and comply with it in so far as applicable to it in its capacity as the operator of the Distribution System'.*

### ***The Trading and Settlement Code***

- 3.16 The Dispute raises an issue in relation to MEC, which is defined in the Trading and Settlement Code, as follows -

<b>'Maximum Export Capacity'</b>	<i>means the maximum export capacity of a site in MW as defined under the site's Connection Agreement or equivalent, or in the case of an Aggregated Generator, the Aggregated Maximum Export Capacity of all sites containing Generators that form part of the Aggregated Generator</i>
	<i>means the maximum export capacity of a site in MW as defined under the site's Connection Agreement or equivalent<sup>5</sup>.</i>

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<sup>5</sup> The second paragraph here appears to be included in error.

- 3.17 Any party to the Trading and Settlement Code (including PG), may apply to register units and must do so by completing a '*Participation Notice*' in respect of the unit, which must include –

*'(10) evidence that the necessary Operational Readiness Confirmation is in place and is valid and effective where the Party wishes to register a Generator Unit as... a Variable Price Maker Generator Unit [or] a Variable Price Taker Generator Unit...'*

*(11) evidence that all necessary Connection Agreements are in place, valid and effective...*

*(18) such other Registration Data as is required by the Market Operator pursuant to Appendix H "Participant and Unit Registration and Deregistration" and Agreed Procedure 1 "Participant and Unit Registration and Deregistration"<sup>6</sup>.*

#### ***Practice and procedure***

- 3.18 The practice and procedure to be followed by the Decision-Makers in determining the Dispute on behalf of the Utility Regulator is set out in the Procedure<sup>7</sup>.
- 3.19 We understand that the Procedure may be supplemented or adapted as required in order to ensure good governance and best practice.

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<sup>6</sup> Clause 2.33 of the Trading and Settlement Code.

<sup>7</sup> *Policy on the Resolution of Complaints, Disputes and Appeals and Guide for Applicants* (June 2013)

#### **4      Section Four - Factual Background to AGU/DSU**

- 4.1 The following summary of the factual background is derived from relevant section of the Statement. We take it to be accurate and adopt it for the purposes of our determination.
- 4.2 The central issue in the Dispute is the switch of the Applicants' sites from being registered as part of an AGU to being registered as part of a DSU. This section details the differences between these types of units and sets out background regarding their use in Northern Ireland.

##### ***AGU***

- 4.3 Aggregated generation involves a company entering into contracts with the owners of small generators (under 10MW) (**AGU Operators**), for the purpose of acquiring the rights to their output, aggregating it and selling it into the Single Electricity Market (**SEM**). A company carrying out this activity is known as a Generator Aggregator and the generating unit which they collectively bid into the SEM is known as an AGU.
- 4.4 For a site forming part of an AGU (an **AGU Site**), SEM settlement is based on the output as determined at the terminals of the generator of the site. In practical terms, where an AGU is dispatched, the power generated may displace demand at the site, with excess power being exported to the distribution system.

##### ***DSU***

- 4.5 Aggregated demand side response involves a company entering into contracts with the owners of a number of sites (**DSU Operators**) to offer dispatchable demand reduction, which is aggregated and offered for sale in the SEM. DSU Operators are also known as Dispatchable Demand Customers and, where a number of such sites are aggregated, the aggregator is known as a Demand Response Aggregator. The demand reduction unit which they collectively bid into the SEM is known as a DSU.
- 4.6 For a site forming part of a DSU (a **DSU Site**), SEM settlement is based on the reduction of demand as measured at the terminals of the incoming supply to the site. As explained further below, where DSUs are dispatched, the demand reduction is achieved through controlled reduction in the usage of power at the site (for example, by turning off facilities for a short period), through onsite generation or through a combination of the two. Where

a DSU Site involves onsite generation, in certain circumstances excess power may be exported to the distribution system.

***Further background in relation to AGU & DSU***

- 4.7 In August 2008, the Trading and Settlement Code was modified to enable the participation of AGUs in the SEM<sup>8</sup>. A number of specific changes were introduced to enable this participation.
- 4.8 In particular, the modification required any Generator Aggregator to enter into a contract with the appropriate Regulatory Authority to ensure compliance with the suite of SEM documentation that the registrant of a licensed generator unit would have to comply with.
- 4.9 The Utility Regulator published a draft of the standard form contract it proposed for this purpose in 2008 and this was approved by the SEM Committee (with certain specific revisions) in a decision paper published in December 2008<sup>9</sup>. The SEM Committee acknowledged at the time that the use of these regulatory agreements was a short term remedy, pending the introduction of licensing arrangements for Generator Aggregators.
- 4.10 Participation of DSUs in the SEM was already allowed, provided that a DSU Site was not permitted to have a MEC (i.e. it could not export excess power from onsite generation onto the distribution network).
- 4.11 In January 2010, a modification to the Trading and Settlement Code was proposed to provide that a site may qualify as a DSU Site provided the MEC was under 10MW (in line with the position for AGUs)<sup>10</sup>. The modification was approved by the SEM Committee on 8 February 2012.
- 4.12 In September 2010, a further modification to the Trading and Settlement Code was proposed relating to DSUs<sup>11</sup>. In approving the modification in 2012, the SEM Committee amended the proposal to introduce a requirement for the registration of DSUs to be subject to regulatory approval<sup>12</sup>.

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<sup>8</sup> Mod\_05\_08

<sup>9</sup> SEM-08-178

<sup>10</sup> Mod\_04\_011

<sup>11</sup> Mod\_36\_10

<sup>12</sup> SEM Committee decision letter on Mod\_36\_10, dated 3 April 2012

- 4.13 In August 2014, the Utility Regulator consulted on proposals to introduce a more robust and sustainable regulatory framework for AGUs and DSUs. In particular, the Utility Regulator proposed that Generator Aggregators and Dispatchable Demand Customers would be required to hold a modified electricity generation licence, containing licence conditions suitable for regulating the particular activities. The proposal was facilitated by a further modification to the Trading and Settlement Code (taking effect in April 2014) making clear that the requirement to hold a licence may be a condition of regulatory consent to AGU/DSU registration<sup>13</sup>.
- 4.14 In January 2015, the Utility Regulator decided to proceed with its proposal and require the relevant market participants to apply for modified generation licences.
- 4.15 In March/April 2015, the Utility Regulator received representations from NIE Networks relating to congestion issues on its network which NIE Networks believed would be caused by the registration of further sites as part of a DSU. The Utility Regulator considered arguments and proposals which were put forward on the issue by a number of different stakeholders and met with a range of stakeholders, as well as discussing the issue with the Commission for Energy Regulation (**CER**) in the Republic of Ireland (to ensure equality of treatment and consistency of approach across the SEM).
- 4.16 The Utility Regulator set out its minded-to position in a letter dated 23 April 2015<sup>14</sup> and, following a further meeting of stakeholders at which the issues were discussed, set out its final position in a letter dated 30 April 2015<sup>15</sup>. In summary, the Utility Regulator's position (consistent with the position of CER) was that –
- (a) The transmission system operators (**TSOs**) should put in place measures to ensure that a DSU is still dispatchable up to the demand response not associated with a distribution system security issue.
  - (b) It would not be appropriate that a congestion issue that manifests itself under certain conditions should restrict the TSOs' ability to dispatch a demand response under all conditions. Distribution system operators (**DSOs**) should clearly identify the conditions under which a demand response may cause a congestion issue and develop a set of instructions which can be applied by the TSO to avoid dispatch under conditions where a potential risk to system security exists. The

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<sup>13</sup> MOD\_05\_14

<sup>14</sup> Exhibit 6.14

<sup>15</sup> Exhibit 6.15

Utility Regulator set out guiding principles to be followed in relation to instruction sets.

- (c) DSU Sites must comply with instructions from the TSO, including any instructions to limit or avoid the utilisation of demand response from specific sites.

4.17 Having become aware of a need to clarify the policy set out in its final position, on 1 October 2015, the Utility Regulator issued an e-mail<sup>16</sup> to stakeholders containing the following addendum to its final position –

*'With regard to the intended registration of an independent Demand Site for participation within a Demand Side Unit, we require that, where an on-site generator set is to be synchronised and operated to give effect to the delivery of load reduction, the existence of and technical characteristics of that generator set should be accurately reflected in the site connection agreement.'*

*'We would encourage the parties (SONI, NIE and the DRAI) to explore the inclusion of this requirement within either the NI Grid or D-Code'.*

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<sup>16</sup> Exhibit 6.16

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

5.1 The following summary of the factual background is derived from relevant section of the Statement, but has been adapted following comments received on the Statement and comments received on the Provisional Determination. We take the following summary to be accurate and adopt it for the purposes of our determination.

### ***The Applicants***

5.2 Each of the Applicants is the owner/occupier of an IDS, which has onsite diesel generation and capability to export onto the distribution network. Of the Applicants –

- (a) Severfield (NI) Limited and Ready Egg Products Limited currently trade in the SEM as part of an AGU, and
- (b) Dunbia (Northern Ireland) and LGen Power Limited previously traded in the SEM as part of an AGU but no longer do so<sup>17</sup>.

5.3 Prior to implementation of the SEM, a number of the Applicants exported power which they had generated onto the Northern Ireland distribution system under a peak-looping arrangement<sup>18</sup>.

5.4 It is important to note that it is agreed between the Parties that there does not currently exist a valid connection agreement between NIE Networks and any of the Applicants relating to the generator sets which operate (or have operated) as part of an AGU<sup>19</sup>. Ready Egg Products has a valid connection agreement permitting generation from a PV facility at the site, but this is not relevant to the generator which operates as part of an AGU<sup>20</sup>.

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<sup>17</sup> See Complaint, para 3.2.4

<sup>18</sup> Complaint, para 3.2.4

<sup>19</sup> Applicants' Responses to Clarification Questions, para 5.1 and NIE Networks' Responses to Clarification Questions, Answer 14

<sup>20</sup> NIE Networks' Responses to Clarification Questions, Answer 14

### ***Background to generation as part of an AGU***

- 5.5 During 2008, NIE Networks was approached by Viridian Energy Supply Limited (**VESL**)<sup>21</sup>, which wished to become a Generator Aggregator for a number of sites which had the capability to generate in parallel with NIE Networks' network. The generation capability was originally introduced for the purposes of load reduction only. VESL wished to register these sites as an AGU and trade their generation capacity in the SEM<sup>22</sup>.
- 5.6 NIE Networks held discussions with VESL in relation to the operation and protection requirements for AGUs. For the purpose of these discussions, VESL commissioned a discussion paper by ERA Technology Ltd (the **ERA Technology Report**), the purpose of which was '*to consider whether the proposed change in the mode of operation has an impact upon the protective measures applied at the interface with the utility network*'<sup>23</sup>. The ERA Technology Report contained a number of statements in relation to how the generators at each AGU Site would be operated.
- 5.7 Following consideration of the planning data provided to it (including the ERA Technology Report), NIE Networks agreed to the sites operating as an AGU. NIE Networks has stated that this agreement was provided in writing to VESL in respect of each AGU Site with a standard form letter<sup>24</sup> setting out the terms on which that agreement was provided - this confirmation was provided to the original list of sites in 2008 (which included LGen Power Limited), with individual written confirmation being provided for each subsequent request (including for the other Applicants)<sup>25</sup>.
- 5.8 The Applicants do not accept that such letters were issued to all of their sites<sup>26</sup>, However, NIE Networks has provided a number of signature pages relating to AGU member generators, signed by VESL on behalf of the generator<sup>27</sup> and referring to a letter with the same date as the standard letter which has been provided. These are stated to relate to Severfield (NI) Limited, Dunbia (Northern Ireland) (MPRN 81242568528) and Ready Egg Products Limited.

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<sup>21</sup> Correspondence also refers to 'Energia', but we refer to VESL throughout.

<sup>22</sup> Response, para 6.2

<sup>23</sup> Exhibit 6.22, para 1

<sup>24</sup> Exhibit 6.11

<sup>25</sup> Response, para 6.5

<sup>26</sup> Applicants' Response to Provisional Determination, para 45

<sup>27</sup> Exhibit 6.12

- 5.9 No signature pages have been provided for LGen Power Limited. NIE Networks has stated that L Gen Power Limited was included in the original list of sites and therefore does not have an individual letter.
- 5.10 NIE Networks has stated that the above confirmation of its agreement allowed the generator units to register as an AGU, without inspection of particular units or further protection equipment being fitted<sup>28</sup>.
- 5.11 Each of the Applicants' generators was registered as part of an AGU under the Trading and Settlement Code without the connection agreements in place between NIE Networks and the Applicant being varied to provide for this generation. NIE Networks has explained that, following a notification that a site generator would be joining an AGU, NIE Networks was required to manually set up an AGU MPRN and provide the supplier with meter details<sup>29</sup>.
- 5.12 NIE Networks has explained that it was also necessary<sup>30</sup> for it to provide details of the site to the Generator Aggregator for the purposes of registration, including providing a value for the MEC of the site<sup>31</sup>. The Applicants have provided a redacted copy of a letter from NIE Networks to VESL dated 12 November 2008<sup>32</sup>, which contains a redacted schedule of proposed MEC values. The letter states that –

*'As requested NIE can confirm that we have now completed our assessment of the Energia sites given in the attached schedule in respect of the embedded generation connection arrangements with the NIE network and can now provide the MEC figures for each of these sites. We understand that you require the MEC figures for registration of the Energia AGU with SEMO.'*

- 5.13 At some point following 2010, VESL's Generator Aggregator business was taken on by iPower Solutions Limited (**iPower**) and it became the Generator Aggregator for the Applicants' sites<sup>33</sup>.

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<sup>28</sup> Response, [para 6.5](#)

<sup>29</sup> Response, [para 6.8](#)

<sup>30</sup> It appears to be agreed between the Parties that the MEC is required to be provided (see Complaint, [para 3.2.5](#) and Reply, [page 16](#)). The Applicants have stated that the MEC is required as part of the Operational Readiness Confirmation, referred to above (Applicants' Responses to Clarification Questions, [para 1.9.7](#)).

<sup>31</sup> Response, [para 6.8](#)

<sup>32</sup> Exhibit 6.10

<sup>33</sup> Reply, [page 5](#)

### ***The Applicants' transfer to DSU***

- 5.14 Each of the Applicants seeks to re-register as a part of a DSU with export use, appointing PG as their demand response aggregator. PG has held the relevant modified electricity generation licence since 27 May 2015.
- 5.15 The Applicants have confirmed that the demand reduction at their sites will be achieved through onsite generation (rather than through controlled reduction in the usage of power at the site)<sup>34</sup>. The Applicants seek to export excess power to the distribution system.
- 5.16 In an e-mail dated 3 August 2016<sup>35</sup>, PG requested confirmation from NIE Networks around the circumstances in which the MEC which was '*available for AGU*' could be utilised for '*alternative uses such as DSU... without making [sic] new application for MEC*'.
- 5.17 In an e-mail to PG dated 10 August 2016<sup>36</sup>, NIE Networks stated that –

*'with regards to MEC values, the MEC is attributed to the type of generation at the site ie AGU, Solar, Diesel, Wind etc. is not transferrable between the different types.'*

*'As previously advised If the AGU has been de-registered, the AGU MEC stated is no longer valid for that site and they must re-apply for the MEC again for Diesel operation. There have not been any sites where NIE Networks has allowed an MEC to be transferred from AGU to diesel for DSU operation without the new application...'.'*

- 5.18 In subsequent e-mail correspondence with iPower on 1 September 2016<sup>37</sup>, NIE Networks confirmed that it agreed with iPower that:
  - (a) '*MECs granted for AGU participation cannot be utilised for any other purpose*'.
  - (b) '*When an IDS deregisters from an AGU the AGU MEC will be withdrawn*'.
  - (c) '*The AGU designated MEC cannot be used for DSU participation*'.

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<sup>34</sup> Applicants' Responses to Clarification Questions, para 2.11.1

<sup>35</sup> Exhibit 6.6

<sup>36</sup> Exhibit 6.5

<sup>37</sup> Exhibit 6.6

- 5.19 In a letter to NIE Networks dated 16 September 2016<sup>38</sup>, PG set out in detail a number of concerns. In particular, PG set out its reasons for considering that the above position is flawed. PG set out the negative impact that NIE Networks' position was having on its customers. Representatives from PG and NIE Networks met to discuss this letter on 22 September 2016.
- 5.20 In a letter to PG dated 10 October 2016<sup>39</sup>, NIE Networks set out its detailed response. In particular, this was that –
- (a) In 2008, NIE Networks considered the ERA Technology Report provided on behalf of the generators that were seeking to operate as part of the AGU. The level of risk and network impact associated with operating these generators in this way was based on the mix of load and generation on the distribution system, the time at which the AGU would be dispatched and a theoretical maximum hours of operation. The ERA Technology Report concluded that there was a relatively low probability of an event occurring that would create an unacceptable risk to the network and affect the quality of supply to customers.
  - (b) On the basis of the ERA Technology Report, NIE Networks agreed that these sites could form part of an AGU and a MEC was agreed for each generator unit on the basis of the proposed mode of operation.
  - (c) NIE Networks did not agree that a generator operating as part of a DSU has the same impact on NIE Networks' network as operating as part of an AGU. The level of risk would be changed because the probability of higher levels of export for longer periods is increased for DSU operation. The agreement for operation of the AGU was on the basis of '*minimal*' export onto the system. It was this that allowed NIE Networks to waive the normal requirements for protection equipment.
  - (d) If the mode of operation were changed to DSU, NIE Networks would be required to undertake a review of the connection design, protection requirements and networks capability. This was in accordance with the Distribution Code and Regulation 23 of the Electricity, Safety, Quality and Continuity Regulations (Northern Ireland) 2012.

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<sup>38</sup> Exhibit 6.8

<sup>39</sup> Exhibit 6.3

- (e) Consequently, there were two options for generators of AGU Sites seeking to switch to DSU. They could register as part of a DSU without any ability to export onto NIE Networks' system. Alternatively, they could register in the DSU market with export capacity, but be issued with a zero dispatch instruction set until such time as NIE Networks has assessed the capability of the generator to safely export onto its network and any protection equipment has been upgraded where this is assessed to be appropriate.
- 5.21 NIE Networks concluded that '*...we cannot transfer AGU MECs to DSU operation without following the same process that was agreed by all industry participants for registering a new IDS in the DSU market*'.
- 5.22 NIE Networks also stated that –
- '... any embedded generator currently operating as an AGU should have a Connection Agreement confirming its MEC and in the absence of a Connection Agreement confirming MEC it will not be entitled to move to a DSU with export capacity. So far as technically possible it will however be permitted to retain its existing mode of operation as an AGU subject to any limitations imposed on the AGU mode of operation, and indeed move to other AGU Operators'.*
- 5.23 Representatives from PG and NIE Networks met to discuss this letter on 10 October 2016.
- 5.24 In an e-mail to NIE Networks dated 17 October 2016<sup>40</sup>, PG restated its position that it did not consider that a MEC could be linked to a particular market position and requested confirmation from NIE Networks' understanding of the differences between how an AGU Site and a DSU Site (with export) would manifest on its network.

#### ***Referral of the Dispute to the Utility Regulator***

- 5.25 The Complaint was made to the Utility Regulator on behalf of the Applicants on 22 March 2017. In the Complaint, it was stated that MNI/PG would welcome the opportunity to attend a meeting with NIE Networks, hosted by the Utility Regulator<sup>41</sup>.

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<sup>40</sup> Exhibit 6.9

<sup>41</sup> Complaint, para 3.2.17

- 5.26 The processing of the Complaint was put on hold pending a meeting taking place and the Utility Regulator arranged a meeting between MNI/PG and NIE Networks, which took place on 11 April 2017, but no satisfactory resolution of the Dispute was reached.
  
- 5.27 On 15 May 2017, the Utility Regulator was requested to proceed to determine the Dispute.

## **6      Section Six - Views of the Applicants**

- 6.1 The views of the Applicants are set out in –
- (a) the Complaint, dated 22 March 2017,
  - (b) the Applicants' response to the Utility Regulator's clarification questions of 11 July 2017, dated 25 July 2017,
  - (c) the Reply, dated 22 August 2017, and
  - (d) the Applicants' response to the Provisional Determination (as sent to the Parties on 22 September 2017), dated 6 October 2017.

6.2 We have read all the above documents in full and have had full regard to all of these submissions. The following summary of the key elements of those submissions is derived from the relevant section of the Statement, but has been adapted following comments received in response to the Provisional Determination. We adopt it as accurate for the purposes of this provisional determination.

### ***Summary***

- 6.3 The Applicants' principal arguments are that, by refusing to confirm the MEC for the Applicants' sites to facilitate their registration as DSU Sites (and by effectively blocking the registration of those sites with the relevant MEC), NIE Networks is –
- (a) unduly discriminating against generators seeking to be registered as DSU Sites, in favour of AGU Operators, in breach of its duty under article 25(2) of the Directive, and
  - (b) failing to provide generators seeking to be registered as DSU Sites with information they need for efficient access to, including use of, the system, in breach of its duty under article 25(3) of the Directive.

### ***SEM Registration and MEC***

- 6.4 The Applicants' position is that NIE Networks is seeking to prevent them from registering their sites as DSU Sites under the Trading and Settlement Code, because registration

requires them to confirm the MEC for the site and NIE Networks is refusing to confirm this, but is adopting the position that the MEC will be '*withdrawn*' on such registration<sup>42</sup>.

- 6.5 The Applicants' view is that NIE Networks has no right to determine how their generators are registered under the Trading and Settlement Code and to interfere in what they submit is simply a change in market position<sup>43</sup>. Only the Utility Regulator has the power to authorise registration as a DSU Site and the Utility Regulator has given such authority in this case through the granting of a licence to PG<sup>44</sup>.
- 6.6 The Applicants note that the definition of MEC in the Trading and Settlement Code is –

*'the maximum export capacity of a site in MW as defined under the site's Connection Agreement or equivalent, or in the case of an Aggregated Generator, the Aggregated Maximum Export Capacity of all sites containing Generators that form part of the Aggregated Generator'.*
- 6.7 The Applicants state that MEC has a discrete and binary value and that value cannot vary with the type of generator unit registered in the SEM (e.g. DSU or AGU)<sup>45</sup>. A maximum export capacity value is typically offered by NIE Networks following a technical study of the technical impact of the export onto the distribution network. If the connection offer is accepted, this value will be included in a connection agreement for the site, which will also include any necessary operational limits<sup>46</sup>.
- 6.8 There are no written and signed connection agreements relating to the generators at the Applicants' sites. However, in the Applicants' view NIE Networks confirmed in 2008 (and thereafter)<sup>47</sup> what the relevant MEC was for each site and those MECs have not changed<sup>48</sup>. NIE Networks was aware of the provisions of the Trading and Settlement Code and the above definition when it gave that confirmation<sup>49</sup>.

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<sup>42</sup> Complaint, para 3.2.7 and Applicants' Responses to Clarification Questions, para 1.9.8

<sup>43</sup> Complaint, para 4.3.36(b)

<sup>44</sup> Complaint, paras 4.3.12 – 4.3.14

<sup>45</sup> Applicants' Responses to Clarification Questions, para 1.9.4

<sup>46</sup> Applicants' Responses to Clarification Questions, para 1.9.5

<sup>47</sup> Exhibit 6.10

<sup>48</sup> Applicants' Responses to Clarification Questions, para 1.9.8

<sup>49</sup> Reply, page 4

- 6.9 In the Applicants' submission, the letter in which NIE Networks confirmed the relevant capacity values was '*equivalent*' to a connection agreement and so set the MECs for the relevant sites<sup>50</sup>.
- 6.10 In the alternative, the Applicants' submit that although there is no written connection agreement between them and NIE Networks, a '*deemed*' contract has arisen between them in which provisions are implied by the conduct of the parties<sup>51</sup>. This '*deemed*' contract entitles the Applicants to the allocated capacity value and that value, being defined under the '*deemed*' connection agreement, falls within the above definition of MEC. The Applicants set out a number of arguments in support of their submission that a '*deemed*' contract has arisen<sup>52</sup>.
- 6.11 The Applicants describe why, in their view, the '*deemed*' contracts referred to above do not prevent them from registering as DSU Sites or give NIE Networks the right to determine whether they should be so registered<sup>53</sup>.
- 6.12 For these reasons, the Applicants do not consider that the MEC should be withdrawn if they register as DSU Sites.

### ***Discrimination***

- 6.13 The Applicants state that NIE Networks is content to allow AGU Sites to retain their MEC, but is adopting the position that the MEC will be '*withdrawn*' on DSU registration. To retain an ability to export –
- (a) The Applicants would be required to enter into connection agreements with NIE Networks – this would mean that the Applicants would go to the back of the queue for network capacity and, given that the network is saturated, the resulting MEC is likely to be zero<sup>54</sup>.

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<sup>50</sup> Reply, pages 4 and 13

<sup>51</sup> Complaint, para 4.3.19

<sup>52</sup> Complaint, paras 4.3.15 – 4.3.21

<sup>53</sup> Complaint, paras 4.3.27 – 4.3.35

<sup>54</sup> Applicants' Responses to Clarification Questions, para 10.2

- (b) NIE Networks is likely to impose additional requirements, such as NVD protection, at considerable expense to the Applicants<sup>55</sup>.
- 6.14 The Applicants' view is that NIE Networks taking the above approach for DSU Sites, and not for AGU Sites, is discriminatory<sup>56</sup>. The Applicants accept that a generator at a demand site should not be paralleled to the distribution network without NIE Networks' agreement. However, NIE Networks should not take a different approach to giving its agreement on the basis of a generator being an AGU Site or a DSU Site<sup>57</sup>.
- 6.15 The Applicants have set out a number of reasons why different treatment is not warranted, including the following points –
- (a) In switching from AGU to DSU, the Applicants are not seeking any additional rights<sup>58</sup>.
  - (b) AGU and DSU are not different modes of operation or technology type. In both cases, the Applicants' generators are embedded diesel generators<sup>59</sup>. A Switch from AGU to DSU is merely a switch in market position.
  - (c) The switch from AGU to DSU will not involve any physical change to the connection configuration<sup>60</sup>. There will be different market settlement points, but this does not impact on network risk<sup>61</sup> and no physical change is required<sup>62</sup>.
  - (d) Contrary to NIE Networks' submissions and the report it has procured<sup>63</sup>, the switch would not lead to a change in the expected hours of operation of the generator<sup>64</sup> and generation will continue to typically serve any on-site demand first<sup>65</sup>. To the extent any increased network risk would follow from controlled

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<sup>55</sup> Applicants' Responses to Clarification Questions, [para 10.3](#)

<sup>56</sup> Complaint, [para 4.3.2](#)

<sup>57</sup> Reply, [page 17](#)

<sup>58</sup> Reply, [page 2](#)

<sup>59</sup> Complaint, [paras 3.2.10 and 4.3.4](#)

<sup>60</sup> Reply, [page 19](#) and Applicants' Responses to Clarification Questions, [para 4.1](#)

<sup>61</sup> Reply, [page 21](#)

<sup>62</sup> Applicants' Responses to Clarification Questions, [para 4.3](#)

<sup>63</sup> Exhibit 6.24

<sup>64</sup> Reply, [page 19](#)

<sup>65</sup> Applicants' Responses to Clarification Questions, [para 2.9](#)

reduction in the usage of power, as noted above none of the Applicants is planning to undertake controlled reduction as part of a DSU<sup>66</sup>.

- (e) Where NIE Networks has a network concern, this can be resolved through it issuing instruction sets to SONI to limit dispatch<sup>67</sup>.
  - (f) The Utility Regulator's final position, communicated in April 2015, was such that there should have been no further delay to DSU registration<sup>68</sup>.
- 6.16 The Applicants note the requirement for a generator operating in parallel with NIE Networks' network to have a connection agreement, but disagrees that there is any basis for AGU Sites to benefit from an '*alternative arrangement*'<sup>69</sup>. This applies similarly to any requirement for network protection<sup>70</sup>.
- 6.17 In particular, the Applicants make the following points in relation to NIE Networks' position that AGU Sites benefit from an alternative arrangement and the MEC for each site is limited by that arrangement:
- (a) Clause 2.33 of the Trading and Settlement Code requires the provision of evidence of a connection agreement on registration. This applies to both DSU Sites and AGU Sites<sup>71</sup>.
  - (b) It was never NIE Networks' role to consent to a generating unit operating in the SEM. NIE Networks' role is to offer terms for connection and confirm relevant data for the purpose of SEM registration<sup>72</sup>.
  - (c) NIE Networks states that the Applicants' sites (and other sites) only operate without connection agreements on the basis that they operate in accordance with the ERA Technology Report. However, until the processing of the Complaint, the Applicants were unaware of the terms of the ERA Technology Report<sup>73</sup>.

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<sup>66</sup> Applicants' Responses to Clarification Questions, [para 2.11](#)

<sup>67</sup> Reply, [pages 3 and 15](#)

<sup>68</sup> Reply, [page 2](#)

<sup>69</sup> Reply, [page 5](#)

<sup>70</sup> Reply, [page 21](#)

<sup>71</sup> Reply, [page 18](#)

<sup>72</sup> Reply, [page 9](#)

<sup>73</sup> Applicants' Responses to Clarification Questions, [para 9.1](#)

- (d) The Applicants are aware of no evidence that the AGU Sites agreed to being restricted to operate in accordance with the ERA Technology Report<sup>74</sup>, noting that neither NIE Networks' letter<sup>75</sup> setting out the MEC values for registration nor its standard form letter<sup>76</sup> mentions it<sup>77</sup>.
  - (e) To the extent NIE Networks has allowed the arrangement for AGUs as an '*interim solution*', this has now been in place for nine years<sup>78</sup>.
- 6.18 It follows from the above that the Applicants submit that there is no basis for different treatment of AGU Sites and DSU Sites<sup>79</sup> and NIE Networks is discriminating against applicant DSU Operators by failing to confirm the MEC for those sites<sup>80</sup>.

#### ***Provision of Information***

- 6.19 The Applicants state that NIE Networks has provided incomplete, incorrect and, in some cases, misleading information about the MEC allocated to their sites<sup>81</sup>. Specifically, NIE Networks has provided incorrect data about MEC values and their applicability to Severfield (NI) Ltd.
- 6.20 The Applicants' view is that NIE Networks has acted in breach article 25(3) of the Directive, by failing to provide generators seeking to be registered as part of a DSU with information they need for efficient access to, including use of, the system. The Applicants submit that the lack/inaccuracy of information provided by NIE Networks makes it extremely difficult for them to negotiate with aggregators, because they do not know what MEC has been allocated to their site<sup>82</sup>.

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<sup>74</sup> Applicants' Responses to Clarification Questions, para 8.3

<sup>75</sup> Exhibit 6.10

<sup>76</sup> Exhibit 6.11

<sup>77</sup> Reply, pages 9 - 10

<sup>78</sup> Reply, page 7

<sup>79</sup> Reply, page 5

<sup>80</sup> Reply, page 2

<sup>81</sup> Complaint, para 3.2.11 and paras 4.3.38 – 4.3.41

<sup>82</sup> Complaint, paras 3.2.12 – 3.2.13

### ***Enforcement Options***

- 6.21 The Applicants submit that the discrimination which it identified in the Complaint as a breach by NIE Networks of its obligations under the Directive also constitutes a breach of Condition 15 of the Licence<sup>83</sup>.
- 6.22 The Applicants submit that the Utility Regulator should make an enforcement order for the purpose of securing compliance with Condition 15, to contain such provision as the Utility Regulator deems necessary<sup>84</sup>.
- 6.23 In response to the Utility Regulator's clarification questions, the Applicants stated that an enforcement order could also relate to Conditions 16, 27 and 28<sup>85</sup>.

### ***Response to the Provisional Determination***

- 6.24 In responding to the Provisional Determination, the Applicants reiterated a number of the points outlined above. In addition, the Applicants make the following key points.
- 6.25 In relation to its allegation that NIE Networks has breached article 25(2) of the Directive, the Applicants made the following points –
  - (a) Following the Provisional Determination, the Applicants have requested confirmation of the capacity values which were previously set out in letters by NIE Networks. The value has only been provided for one site. However, in any case, even if this information is presented to SONI/SEMO for the purpose of DSU registration, NIE Networks will continue to frustrate that registration through the use of its discretionary powers<sup>86</sup>.
  - (b) The SEM registration process requires input from SONI in its role as TSO, and SONI consults with NIE Networks in its role as DSO<sup>87</sup>. In particular, in accordance with the provisions of the Trading and Settlement Code<sup>88</sup>, SONI provides the Operational Certificate to SEMO as part of a validation role. The Operational Certificate contains the MEC for the site, as well as other relevant information and

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<sup>83</sup> Complaint, paras 5.2.1 – 5.2.2

<sup>84</sup> Complaint, para 5.1

<sup>85</sup> Applicants' Responses to Clarification Questions, para 1.9.12

<sup>86</sup> Applicants' Response to Provisional Determination, para 9

<sup>87</sup> Applicants' Response to Provisional Determination, paras 10-14

<sup>88</sup> Agreed Procedure 1, paras 3.2.4 and 3.2.5

the effective registration of the MEC cannot be completed unless the MEC is accepted in this process<sup>89</sup>.

- (c) Prior to the issue of the Operational Certificate, an application process must be completed to collect the required planning data and this also includes a procedure to test compliance with the Connection Conditions<sup>90</sup>. The planning data required is set out in the Grid Code. In this process, the MEC values provided by the DSU Operator are checked by SONI with NIE Networks. This provides NIE Networks with an opportunity to object to the DSU registration.
- (d) This process has provided NIE Networks with the opportunity to inappropriately exercise discretionary powers – it was not given sufficient consideration in the Provisional Determination<sup>91</sup>.
- (e) Both NIE and SONI, in their respective roles, have a duty to ensure that the stability and the security of the network are not compromised<sup>92</sup>. However, the issue of the technical impact of DSUs on the distribution network has already been considered by the Utility Regulator (and CER) in its letter dated 30 April 2015<sup>93</sup>. A key point made by the regulators in that letter was that the network issues arising were not such as to prevent an IDS in Northern Ireland from registering as part of a DSU. Rather any concerns should be addressed in the dispatch process<sup>94</sup>.
- (f) The Applicants are appalled that, 2½ years after that letter, the approach adopted by the Utility Regulator is not being followed<sup>95</sup>. NIE Networks is continuing to insist that MEC values change to zero on DSU registration and this is an inappropriate use of its powers. This has caused, and continues to cause, discrimination against IDSs that wish to use their MEC for AGU registration and discrimination against Demand Response Aggregators in favour of Generator Aggregators<sup>96</sup>.

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<sup>89</sup> Applicants' Response to Provisional Determination, [para 15](#)

<sup>90</sup> Applicants' Response to Provisional Determination, [paras 16-18](#)

<sup>91</sup> Applicants' Response to Provisional Determination, [para 21](#)

<sup>92</sup> Applicants' Response to Provisional Determination, [paras 24 and 25](#)

<sup>93</sup> Exhibit 6.15

<sup>94</sup> Applicants' Response to Provisional Determination, [para 27](#)

<sup>95</sup> Applicants' Response to Provisional Determination, [para 28](#)

<sup>96</sup> Applicants' Response to Provisional Determination, [para 29](#)

6.26 The Applicants also make the following additional points in relation to its allegation that NIE Networks has breached article 25(3) of the Directive –

- (a) It was completely clear to NIE Networks what was being requested when the MEC values were being requested on behalf of the Applicants. It was always the MEC, as defined in the Trading and Settlement Code, which was being referred to. It is a well-established and understood industry term<sup>97</sup>.
- (b) To the extent that some of the correspondence may be confusing, it was NIE Networks which '*muddied the waters*', by insisting that MECs were only applicable to one type of market registration. Inexperienced staff of PG were required to respond to NIE Networks on this<sup>98</sup>.
- (c) Even though MEC is a pre-existing figure (or figures) defined in the relevant document, NIE Networks has deliberately provided a value of zero for IDSs which wish to register as part of a DSU or stated that the value was valid only for AGU registration<sup>99</sup>. This is clearly evidenced by the spreadsheet exhibited to the Complaint<sup>100</sup>, where it was clear what information was required to be provided<sup>101</sup> and also by the correspondence<sup>102</sup> exhibited to the Complaint<sup>103</sup>.
- (d) In conclusion, by providing these responses, NIE Networks has deliberately provided false information, in breach of article 25(3) of the Directive<sup>104</sup>.

6.27 Finally, the Applicants refer to the alleged breach of competition law by NIE Networks which was raised in the Complaint (but not referred to in the Provisional Determination) and anticipates that consideration of this allegation will be included in our determination<sup>105</sup>.

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<sup>97</sup> Applicants' Response to Provisional Determination, paras 32-34

<sup>98</sup> Applicants' Response to Provisional Determination, para 35

<sup>99</sup> Applicants' Response to Provisional Determination, paras 36, 37 and 41

<sup>100</sup> Exhibit 6.7

<sup>101</sup> Applicants' Response to Provisional Determination, paras 38 and 39

<sup>102</sup> Exhibit 6.5 and Exhibit 6.6

<sup>103</sup> Applicants' Response to Provisional Determination, paras 42 and 43

<sup>104</sup> Applicants' Response to Provisional Determination, para 44

<sup>105</sup> Applicants' Response to Provisional Determination, paras 4 and 46 - 48

## 7 Section Seven - Views of NIE Networks

- 7.1 The views of NIE Networks are set out in -
- (a) its letter to the Utility Regulator dated 8 March 2017,
  - (b) the Response, dated 19 June 2017,
  - (c) NIE Networks' response to the Utility Regulator's clarification questions of 11 July 2017, dated 25 July 2017, and
  - (d) NIE Networks' response to the Statement, dated 13 September 2017.
- 7.2 We have read all the above documents in full and have had full regard to all of these submissions. The following summary of the key elements of those submissions is derived from the relevant section of the Statement, as adapted following consideration of NIE Networks' response to the Statement. We adopt it as accurate for the purposes of our determination.
- 7.3 NIE Networks did not comment on the Provisional Determination. Our understanding is that its position remains as set out in its previous submissions.

### ***Summary***

- 7.4 NIE Networks' principal arguments can be summarised as follows –
- (a) While NIE Networks previously confirmed MEC values for the Applicants' generators to be registered as AGU Sites, this was solely for the purpose of that registration and the Applicants have no right to a particular MEC value in the absence of a connection agreement entitling the generator to a particular export capacity.
  - (b) There were valid reasons for NIE Networks allowing the Applicants' generators to be registered as AGU Sites in the absence of connection agreements. However, this was only allowed on the basis that the sites operated in accordance with the ERA Technology Report. To switch from AGU to DSU would be to operate on a different basis. The Applicants are perfectly entitled to switch, but (because they would no longer be operating in accordance with the ERA Technology Report),

they must enter into connection agreements if they are to export power onto NIE Networks' network. There are greater system risks linked with DSU operation and so further network protection may also be required.

- (c) Consequently the Applicants are not entitled to what they are requesting and the AGU Sites seeking DSU registration are subject to the same requirements as any other site seeking such registration.
- 7.5 NIE Networks submits that there is a lack of detail in relation to the allegations around its provision of information, but states that it does not believe that it has provided any misleading information.

#### ***Comments on process***

- 7.6 NIE Networks has raised a number of concerns in relation to the Complaint<sup>106</sup>. In particular, in NIE Networks' view -
- (a) A complaint being brought by four applicants is contrary to the Procedure.
  - (b) A complaint being brought by two representatives is contrary to the Procedure.
  - (c) The Complaint did not meet the requirements for the making of a Complaint in the Procedure, which requires detailed information and supporting evidence regarding the basis of any complaint.

#### ***Jurisdiction***

- 7.7 In NIE Networks' view, there are a number of issues raised in the Complaint which are not proper issues for determination by the Utility Regulator under article 31A of the Electricity Order<sup>107</sup>. These include the Applicants' requests for determination whether NIE Networks has a right to determine whether a particular generator can be registered as an AGU Site or a DSU Site in the SEM and whether NIE Networks has a right to cancel a registered MEC<sup>108</sup>.

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<sup>106</sup> Response, para 2

<sup>107</sup> Response, para 3

<sup>108</sup> Complaint, para 3.1.1

- 7.8 In NIE Networks' view the Utility Regulator does not have jurisdiction to determine whether any '*deemed contract*' exists between NIE Networks and an Applicant in relation to the allocated export capacity for a site<sup>109</sup>.

### ***SEM Registration and MEC***

- 7.9 NIE Networks states that any Applicant is not prevented from registering its site as a DSU Site under the Trading and Settlement Code, provided it accepts that, pending a valid connection agreement being signed, it cannot export onto the distribution network<sup>110</sup>. NIE Networks issues a zero dispatch instruction set for this purpose<sup>111</sup>. Once a connection agreement is in place, the Applicant will be able to export power in line with a further instruction set issued by NIE Networks<sup>112</sup>. NIE Networks is not preventing DSU registration.
- 7.10 In NIE Networks' view, the Applicants are treating a MEC value used for the purposes of AGU registration as if that value amounted to a proprietary right to export onto its network<sup>113</sup>. NIE Networks' view is that this is not the case – only an AGU Site with a signed/valid connection agreement confirming a maximum export capacity value (which cannot be terminated) has an absolute right to export power to that capacity value<sup>114</sup>.
- 7.11 NIE Networks describes that it is a fundamental principle of network safety that any demand customer cannot connect parallel generation to the distribution network without its consent<sup>115</sup> (referring, for example, to regulation 23 of the Electricity Safety, Quality and Continuity Regulations (Northern Ireland) 2012).
- 7.12 NIE Networks states that its consent is evidenced by a valid connection agreement which confirms that the proposed generation facility has been inspected, that its technical characteristics are approved and that it has a defined maximum export capacity. In NIE Networks' view, the Complaint constitutes a rejection by the Applicants of the

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<sup>109</sup> Response, para 3.3

<sup>110</sup> Response, paras 6.9 and 8.7

<sup>111</sup> Response, paras 8.7

<sup>112</sup> Response, para 6.9

<sup>113</sup> Response, para 5.2

<sup>114</sup> Response, paras 5.3 and 5.4

<sup>115</sup> Response, para 5.4

requirements which NIE Networks imposes for generators to operate in parallel with its network<sup>116</sup>.

- 7.13 The Applicants operated as AGU Sites without connection agreements, because an '*alternative arrangement*' was put in place to allow them to operate in a limited manner (e.g. with limited running time)<sup>117</sup>. As part of this arrangement, NIE Networks confirmed MEC values for the sole purpose of allowing the AGU Sites to be registered in the SEM. This did not mean that local network conditions would accept unconditional and unrestricted export and did not constitute an agreement for a maximum export capacity which would be available in all circumstances<sup>118</sup>. NIE Networks submits that this arrangement is supported by the terms of the standard form letter setting out the terms on which that agreement was provided<sup>119</sup>.
- 7.14 NIE Networks' view is that, in the absence of a valid connection agreement permitting it, a MEC value cannot be transferred between different types of market operation (such as AGU and DSU)<sup>120</sup>. Further, NIE Networks submits that the arguments that the Applicants have a '*deemed contract*' with it giving them a legal right to export capacity up to the registered MEC values are entirely without merit<sup>121</sup>.
- 7.15 NIE Networks refers to its letter dated 17 October 2016 to all AGU/DSU Operators<sup>122</sup> in which NIE Networks agreed to hold the MEC for an agreed period to allow the AGU Site the opportunity to investigate necessary protection up-grade required for DSU operation and confirmed that if the site did not proceed with DSU operation it would retain its MEC for AGU operation only<sup>123</sup>.

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<sup>116</sup> Response, [paras 5.1 and 8.1](#)

<sup>117</sup> Response, [paras 5.4 and 6.8](#)

<sup>118</sup> Response, [para 6.8](#) and NIE Networks' Responses to Clarification Questions, [page 2](#)

<sup>119</sup> NIE Networks' Responses to Clarification Questions, [page 3](#)

<sup>120</sup> Response, [para 8.3](#)

<sup>121</sup> Response, [para 8.8](#)

<sup>122</sup> Exhibit 6.18

<sup>123</sup> Response, [para 8.5](#)

### ***Discrimination***

- 7.16 In NIE Networks' view, while the Applicants are not entitled to retain the MEC values registered for AGU Sites in registering as DSU Sites, the fact that these are different classes of system user explains the difference of treatment<sup>124</sup>.
- 7.17 NIE Networks describes the background behind the '*alternative arrangement*' in place for a number of AGU Operators, which have been able to operate without valid connection agreements being put in place<sup>125</sup>. In essence, the ERA Technology Report set out a number of limitations on how the AGU Sites would be operated (including a provision that the sites would be dispatched for less than 50 hours per annum)<sup>126</sup>.
- 7.18 This formed part of the planning data on which NIE Networks concluded that it would consent to these AGU Sites operating (as the operating conditions represented a low risk to the network). However, NIE Networks' consent was conditional on the operator acting in accordance with the ERA Technology Report<sup>127</sup>. The AGU Sites operate on a '*grace and favour basis*'<sup>128</sup>.
- 7.19 NIE Networks notes that the alternative to the above arrangement would mean that it would have been required to offer firm access capacity to each site for the requested maximum export capacity. This would have blocked capacity for other parties to connect to the network and NIE Networks submits that this would not have been efficient management of its network<sup>129</sup> and would have prejudiced the development of generation from renewable sources<sup>130</sup>.
- 7.20 NIE Networks submits that a transfer of a site from being registered as an AGU Site to being registered as a DSU Site does not fall within the alternative arrangement for which its consent was given. NIE Networks sets out a number of reasons for this, including the following –

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<sup>124</sup> NIE Networks' Response to the Statement, [para 2.16](#)

<sup>125</sup> Response, [para 6](#)

<sup>126</sup> Response, [para 6.4](#)

<sup>127</sup> Response, [para 6.5](#)

<sup>128</sup> NIE Networks' Responses to Clarification Questions, [page 4](#)

<sup>129</sup> In accordance with its duty under article 12 of the Electricity Order.

<sup>130</sup> Response, [para 6.6](#)

- (a) The assumptions set out in the ERA Technology Report will no longer be valid<sup>131</sup>. In particular, DSU operation will lead to the generator being operational on a frequent basis<sup>132</sup>. In any case, while the Applicants have indicated the proposed typical or anticipated mode of operation for their generation set, it is the potential of each set to operate on an increasing or indeed unlimited basis that must be taken into account<sup>133</sup>.
  - (b) An independent assessment<sup>134</sup> of the level of network risk associated with transferring AGU Sites to DSU Sites (conducted by EA Technology Ltd) has concluded that the level of network risk may be such that it could be advisable for NIE Networks to undertake a review of each site to determine appropriate connection and operational conditions<sup>135</sup>.
  - (c) The switch from AGU Site to DSU Site requires the generator metering to be moved due to a change of settlement point, and NIE Networks is required to review this modification pursuant to obligations on it in the Distribution Code<sup>136</sup>.
- 7.21 In NIE Networks' view, the above risks justify its requirement for operators to enter connection agreements prior to exporting onto its network as a part of a DSU. The risks may also justify NVD protection being required at the site<sup>137</sup>.
- 7.22 NIE Networks also sets out other reasons why a connection agreement is required if the Applicants wish to register as DSU Sites and export power onto its network. In particular, NIE Networks states that –
- (a) It is a requirement of the Grid Code<sup>138</sup> that a DSU Operator must hold a valid connection agreement for it to generate in parallel with the distribution network<sup>139</sup>.

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<sup>131</sup> Response, para 8.6.2

<sup>132</sup> NIE Networks' Responses to Clarification Questions, page 1

<sup>133</sup> NIE Networks' Response to the Statement, para 2.14

<sup>134</sup> Exhibit 6.24

<sup>135</sup> Response, para 8.6.3

<sup>136</sup> Response, para 8.6.1

<sup>137</sup> NIE Networks' Responses to Clarification Questions, page 5

<sup>138</sup> See PC.B3.3.3(xvi) of the Grid Code.

<sup>139</sup> Response, para 7.2

- (b) The requirement for issues relating to the operation of a DSU to be reflected in a connection agreement was acknowledged by the Utility Regulator in the addendum to its final position<sup>140</sup>.
- 7.23 It follows that, in NIE Networks' view, the alternative arrangement in place for AGU Sites does not subsist on a switch to registration as a DSU Site. There are valid reasons for the Applicants being required to enter into connection agreements to be able to export onto NIE Networks' network as part of a DSU. There is consequently no discrimination. Rather, the Applicants are seeking preferential treatment.

***Provision of Information***

- 7.24 NIE Networks has described the various actions which it has taken in response to requests for information<sup>141</sup>. In its view, it has not provided misleading information to any Applicants (although it accepts that information provided to LGen Power Limited was capable of being misinterpreted).
- 7.25 NIE Networks states that there is a lack of detail and supporting evidence in the Complaint to assist it in responding<sup>142</sup>. In addition, NIE Networks notes that some of the information referred to in the Complaint appears to be information which does not relate to the Applicants (and is therefore not relevant to the Dispute).

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<sup>140</sup> Response, paras 7.1 and 8.3

<sup>141</sup> Response, para 9

<sup>142</sup> Response, para 9.1

## **8      Section Eight - Issues to be Determined**

- 8.1    The following are the issues to be determined by the Utility Regulator, as set out in our Provisional Determination. The Parties have had an opportunity to comment on this list of issues, but made no comment on them.

### ***Issues for Determination***

- 8.2    The issues for determination by the Decision-Makers in respect of the Dispute are –

- (a)    whether the Dispute relates to the treatment of different system users or classes of system user, as referred to in article 25(2) of the Directive,
  - (b)    assuming the Dispute does relate to such treatment -
    - (i)    how AGU Operators are being treated, and
    - (ii)    how applicant DSU Operators are being treated,
- in relation to the matters which are the subject of the Dispute,
- (c)    whether NIE Networks is discriminating between system users or classes of system user, as referred to in article 25(2) of the Directive,
  - (d)    whether the Utility Regulator should exercise any power or duty in relation to the Dispute regarding article 25(2) of the Directive,
  - (e)    whether NIE Networks is breaching its duty to provide information needed for efficient access to the system, as referred to in article 25(3) of the Directive, and
  - (f)    whether the Utility Regulator should exercise any power or duty in relation to the Dispute regarding article 25(3) of the Directive.

## 9 Section Nine – Our Determination

- 9.1 To determine the Dispute, there are a number of issues for determination (as set out in Section Eight). We address each of these issues in turn.

### ***Preliminary Issues***

- 9.2 Before we do this, we deal with a number of preliminary issues. We acknowledge, as noted in Section Seven above, that NIE Networks raised a number of concerns in relation to the Complaint. In particular, NIE Networks expressed concern in relation to the number of applicants and the number of representatives. It submitted that, in its view, the Complaint did not meet the requirements of the Procedure<sup>143</sup>.
- 9.3 However, the Parties were informed that the Utility Regulator had accepted the Complaint for determination by means of a letter dated 2 June 2017, and we understand that these submissions by NIE Networks were fully considered before this decision was made. Therefore, while we take notice of the submissions, we make no further decision in relation to them. The Complaint was accepted, and the Utility Regulator is now required under article 31A of the Electricity Order to determine the Dispute.
- 9.4 It is important to reiterate the nature of the request for a determination which was set out in the Complaint and what the Utility Regulator accepted for determination. This is important because, in their response to the Provisional Determination<sup>144</sup> (and previously<sup>145</sup>), the Applicants have questioned why this process has not involved consideration of the allegations of breaches of competition law which were included in the Complaint<sup>146</sup>.
- 9.5 The complaint which has been accepted for determination is a complaint under article 31A of the Electricity Order. The Parties were informed of this in the Utility Regulator's letter dated 2 June 2017. That letter was clear that the complaint relating to competition law had not been accepted for determination. We have not been appointed to make any determination in relation to that complaint and so do not comment on it.

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<sup>143</sup> Response, para 2

<sup>144</sup> Applicants' Response to Provisional Determination, paras 4 and 46 - 48

<sup>145</sup> Applicants' Responses to Clarification Questions, paras 1.1 – 1.3

<sup>146</sup> Complaint, para 5.4

- 9.6 Article 31A of the Electricity Order implements article 37(11) of the Directive in domestic law. It provides a mechanism for a complaint to be brought against (among others) a distribution system operator in relation to that operator's obligations under the Directive. A complaint which can be brought must be '*wholly or mainly*' a complaint regarding an obligation under the Directive. In other words, there may be ancillary aspects of the complaint, but the core of the complaint must relate to the Directive.
- 9.7 The Directive imposes a number of obligations on distribution system operators, such as NIE Networks, and these obligations are related to the operation of its network, i.e. to the activity of the distribution system operator acting in its capacity as such.
- 9.8 In the Complaint, the Applicants allege that NIE Networks has breached its obligations under articles 25(2) and 25(3) of the Directive.

***Whether the Dispute relates to the treatment of different system users or classes of system user, as referred to in article 25(2) of the Directive.***

- 9.9 Article 25(2) of the Directive provides that '*...[the distribution system operator] must not discriminate between system users or classes of system users, particularly in favour of its related undertakings*'.<sup>147</sup>
- 9.10 Article 25(2) is therefore engaged in cases which concern the treatment by NIE Networks, acting in its capacity as a distribution system operator, of system users or classes of system user.
- 9.11 In the Complaint, the Applicants contended that NIE Networks is '*discriminating against a class of system user, being those who wish to utilise their existing allocated MEC for DSU purposes*'<sup>148</sup>.
- 9.12 It was also stated that:
- (a) '*[t]he SEM registration procedure as set out in the Trading and Settlement Code... requires that a Maximum Export Capacity ("MEC") is allocated to an IDS for the purposes of registering a Generator Unit*'<sup>148</sup>; and

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<sup>147</sup> Complaint, para 4.3.37

<sup>148</sup> Complaint, para 3.2.5

- (b) '*...[NIE Networks] has adopted a position... that the MECs allocated to such customers are only valid for operation as an AGU, and that the MEC will be withdrawn from any IDS customers who wish to operate in the DSU market...*'<sup>149</sup>.
- 9.13 In other words, the Applicants' objective, which in their contention is being frustrated by NIE Networks' treatment of them, is to secure the registration of their sites as part of a DSU with export capacity under the Trading and Settlement Code. This requires the DSU Operator to specify a MEC, but that MEC is relevant solely for the purposes of the Trading and Settlement Code.
- 9.14 The Applicants' objective is not to change the manner in which they use the system, but merely to secure for their sites a particular form of registration in the SEM (the wholesale market for electricity on the island of Ireland). This is stated clearly in the Complaint – '*...the switch from AGU to DSU operation is simply a change of market position...*'<sup>150</sup>. The subject-matter of the Complaint is the alleged treatment of the Applicants by NIE Networks which is preventing them from achieving that market registration.
- 9.15 It follows that, while the Complaint is brought (under article 31A) as an allegation that NIE Networks is breaching its obligations under the Directive in relation to the operation of its distribution network, the treatment involved in fact relates not to the distribution network but to access to the wholesale market.
- 9.16 This fact taken by itself led us to question whether the Complaint, insofar as it alleged discriminatory treatment, was a complaint that was properly capable of being determined under article 31A, in line with the Applicants' request. We would not generally expect that a complaint under article 31A would relate to wholesale market registration.
- 9.17 However, if the Trading and Settlement Code were drafted in such a way as to provide NIE Networks (in its capacity as distribution system operator) with a power to determine whether a site connected to its network could benefit from a particular category of wholesale market registration, or to determine the nature of such a registration, the use of that power may well constitute a form of treatment of system users such that article 25(2) of the Directive would be engaged.

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<sup>149</sup> Complaint, para 3.2.7

<sup>150</sup> Complaint, para 3.2.10

- 9.18 Notwithstanding this, it is agreed between the Parties that NIE Networks does not have a power to prevent the Applicants' sites from being registered as part of a DSU<sup>151</sup>.
- 9.19 In relation to the issue of a MEC, we note that the Applicants' summary of the Complaint was that it related to NIE Networks' '*refusal to allow the Applicants... to transfer Maximum Export Capacity*'<sup>152</sup>. The starting premise of the Complaint is that NIE Networks has a power to allow such a transfer, but that it is using that power inappropriately. As noted above, this relates to the allocation of MECs by NIE Networks for the purposes of SEM registration.
- 9.20 In addition, NIE Networks has stated that:

*'... In fact as previously stated NIE Networks is not determining SEM status since it permits DSU registration. It is however restricting power export pending the site being assessed and approved for unconstrained power export up to the MEC value and a valid connection agreement being signed'*<sup>153</sup>.

- 9.21 It appears from this that NIE Networks also considers that it has a power to control the registered MEC.
- 9.22 We note that NIE Networks has submitted that the issue of whether NIE Networks has a power to cancel a registered MEC is not a proper issue for the Utility Regulator to determine<sup>154</sup>. We do not agree with this submission, for the reasons set out above. It is proper for the Utility Regulator to consider this issue, because if a power had been given to NIE Networks as network operator, its exercise of that power could constitute treatment which engaged article 25(2) of the Directive.
- 9.23 Consequently, we have considered whether the provisions of the Trading and Settlement Code confer any such power on NIE Networks. Clause 5.151 of the Trading and Settlement Code provides that:

*'Any Demand Site associated with a Demand Side Unit must meet and continue to meet each of the following criteria... the Demand Site shall have a*

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<sup>151</sup> Complaint, para 4.3.36(b) and Response, para 8.9

<sup>152</sup> Complaint, covering letter dated 22 March 2017

<sup>153</sup> Response, para 8.9

<sup>154</sup> Response, para 3.4

*Maximum Import Capacity and shall not have a Maximum Export Capacity greater than the De Minimis Threshold'.*

9.24 In addition, clause 2.33 of the Trading and Settlement Code provides that:

*'A Party (or Applicant, as applicable) shall apply to register any Units by completing a Participation Notice in respect of such Units which shall include the following information... evidence that the necessary Operational Readiness Confirmation is in place and is valid and effective where the Party wishes to register a Generator Unit as... a Variable Price Maker Generator Unit [or] a Variable Price Taker Generator Unit...'.*

- 9.25 It is submitted on behalf of the Applicants that the Operational Readiness Confirmation includes a value for Registered Capacity and that, to confirm this, DSU Operators such as the Applicants must be aware of the MEC for their site<sup>155</sup>. In response to the Provisional Determination, it was added that the Operational Readiness Confirmation and Registration Data (as those terms are defined in the Trading and Settlement Code) are provided by SONI in an Operational Certificate, which contains a value for MEC, as well as other values<sup>156</sup>.
- 9.26 On the basis of the provisions of the Trading and Settlement Code referred to above, we understand that a DSU Operator must know the MEC for each of the sites it proposes to operate for the purposes of DSU registration.
- 9.27 However, for all relevant purposes, MEC is defined in the Trading and Settlement Code as '*the maximum export capacity of a site in MW as defined under the site's Connection Agreement or equivalent*'<sup>157</sup>. We have derived the following points from this definition:
- (a) The MEC is not a figure to be determined at the point of registration. We do not agree that there is any '*allocation*' for the purpose of SEM registration.
  - (b) Rather, the MEC is assumed to be a pre-existing figure (or figures) defined in the '*Connection Agreement or equivalent*'.

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<sup>155</sup> Applicants' Responses to Clarification Questions, para 1.97

<sup>156</sup> Applicants' Response to Provisional Determination, paras 12 - 14

<sup>157</sup> SEM Trading and Settlement Code Part A Glossary

- (c) The word '*defined*' is important. The clear expectation is that, to identify the MEC, an existing document should be located in which a statement of the MEC can be found.
  - (d) Where there is a connection agreement (as defined under the Trading and Settlement Code), the relevant document will be the connection agreement.
  - (e) Where there is no connection agreement, the question will be whether there is an '*equivalent*' document which defines the MEC.
  - (f) To be '*equivalent*' to a connection agreement, we consider that the document should share the essential characteristics of a connection agreement, or have substantially the same legal effect. It is difficult to envisage how this could be the case for any document other than one which is grounded in agreement between the generator and the network operator or in the exercise of a statutory power by the network operator.
  - (g) Whether any given document is '*equivalent*' to a connection agreement would be a question of legal interpretation having regard to all the facts of a particular case. However, we do not consider that a unilateral statement from a network operator purporting to specify the MEC could be sufficient.
- 9.28 On the basis of this definition, our provisional conclusion was that NIE Networks does not have any power under the Trading and Settlement Code to determine unilaterally what the MEC is for any site.
- 9.29 In response to the Provisional Determination, it was submitted on behalf of the Applicants that NIE Networks does have '*discretionary power*', which it has been using in an inappropriate way. This is explained by reference to the '*validation role*' which NIE Networks plays under the agreed procedures set out in the Trading and Settlement Code. This role, it is submitted, has allowed NIE Networks to state that the MEC values are applicable only to operation as part of an AGU.
- 9.30 We do not agree with this submission, for the following reasons:

- (a) We have been provided with no reason to change our view in relation to the definition of MEC set out in the Trading and Settlement Code. On the basis of the definition, what the MEC is for a site is a question of legal interpretation having

regard to all the facts of a particular case and not a matter for NIE Networks to determine unilaterally.

- (b) It is submitted that NIE Networks has discretionary power on the basis of the agreed procedures. Any such power would need to be clearly grounded and identified in the provisions of the Trading and Settlement Code; stating (in effect) that NIE Networks' determination of a MEC value will take priority for the purposes of DSU registration. This could provide the basis of a power which might engage article 25(2) of the Directive. However, no provision has been identified which has that effect.
- (c) It is explained that SONI consults NIE Networks to validate specified data, including MEC values, in accordance with the agreed procedures. However, being consulted for the purposes of validation is not the same as having a '*discretionary power*' of unilateral determination. If NIE Networks is validating a MEC value, it is required to confirm what that value is in accordance with the definition in the Trading and Settlement Code. What that value is not a matter of discretion. NIE Networks' role is merely that of a consultee in a fact-checking process.
- (d) Ultimately, if NIE Networks has provided a MEC value as part of its validation role which is incorrect as a matter of the proper interpretation of provisions of the Trading and Settlement Code, it is a matter for SONI and others to decline to adopt that incorrect value for the purposes of DSU registration. The value which should be adopted is the value which is factually correct and in accordance with the proper interpretation of those provisions.

- 9.31 It follows that our conclusion is that NIE Networks does not have any power under the Trading and Settlement Code to determine unilaterally what the MEC is for a site.
- 9.32 We consider that, prior to this Complaint and at points during the determination process, both the Applicants and NIE Networks have adopted a concept of MEC which does not appear to align with the Trading and Settlement Code. Both have referred to the '*allocation*' of MEC at the point of registration and to whether the Applicants are able to '*transfer*' MEC from AGU registration to DSU registration. For example:

- (a) the Applicants have stated that '*The refusal of [NIE Networks] to allow previously allocated MEC to transfer from AGU to DSU is causing serious commercial harm...*'<sup>158</sup> and
  - (b) NIE Networks has stated that '*...we cannot transfer AGU MECs to DSU operation without following the same process that was agreed by all industry participants for registering a new IDS in the DSU market*'<sup>159</sup>.
- 9.33 The concepts of allocating MEC for the purpose of SEM registration and transferring MEC for different uses appear to us to have no basis in the relevant provisions of the Trading and Settlement Code.
- 9.34 The MEC is set out in the connection agreement or equivalent document. Unless that document were to define the MEC as changing in particular circumstances, the MEC will remain the same regardless of a change in circumstances. That change of circumstances would include the re-registration of a site as part of a DSU.
- 9.35 On the basis that the Trading and Settlement Code does not convey any power on NIE Networks as distribution system operator to determine unilaterally what the MEC is for a site, we conclude that the Complaint, insofar as it alleges discriminatory treatment, does not relate to treatment of system users by NIE Networks in its capacity as distribution system operator such that article 25(2) of the Directive would be engaged.
- 9.36 As noted above, we do not consider that the validation role which NIE Networks performs under the Trading and Settlement Code changes the position, because no provision has been identified which gives NIE Networks any power to determine what the MEC value is. It is bound by the definition of MEC set out in the Trading and Settlement Code. We do not consider that any influence which NIE Networks might exert in practice by virtue of this validation role itself engages article 25(2) of the Directive.
- 9.37 In short, this part of the Complaint has been presented to the Utility Regulator as a complaint relating to NIE Networks' conduct in respect of its distribution network. However, we do not consider that the Complaint, properly construed, does relate to such conduct. Rather, it relates solely to registration in the wholesale market and to the ability

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<sup>158</sup> Complaint, para 3.2.8

<sup>159</sup> Exhibit 6.3, page 3

of an Applicant to evidence a MEC for the Applicants' sites (in accordance with the definition in the Trading and Settlement Code).

***Assuming the Dispute does relate to such treatment: (i) how AGU Operators are being treated; and (ii) how applicant DSU Operators are being treated, in relation to the matters which are the subject of the Dispute.***

- 9.38 The Parties have made detailed submissions on the respective treatment of AGUs and DSUs. We have considered all of these submissions in detail. However, on the basis of our conclusion that the Complaint does not relate to treatment of system users such that article 25(2) of the Directive is engaged, it is not necessary for us to make any determination on these issues.
- 9.39 In response to the Provisional Determination, it is stated that the Applicants consider that the discrimination is taking place not only between those applying to be DSU Operators and AGU Operators, but also between Demand Response Aggregators and Generator Aggregators<sup>160</sup>. It does not appear to us that this discrimination was clearly raised in the Complaint; neither was this set out in the issues for determination. However it is not necessary of us to make any determination on this, because of our conclusion set out above that the Complaint does not relate to treatment of system users.

***Whether NIE Networks is discriminating between system users or classes of system user, as referred to in article 25(2) of the Directive.***

- 9.40 On the basis of our conclusion that the Complaint does not relate to treatment of system users such that article 25(2) of the Directive is engaged, we conclude that the Complaint does not evidence any discrimination between system users or classes of system user, such as would lead to a breach by NIE Networks of article 25(2) of the Directive.
- 9.41 To be clear, this is because the objective of the Applicants is to secure the registration of their sites as part of a DSU with export capacity under the Trading and Settlement Code, and we have concluded that NIE Networks does not have a power to prevent the Applicants from doing so.
- 9.42 In response to the Provisional Determination, it was submitted on behalf of the Applicants that the issue of the technical impact of DSUs on the distribution network was considered

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<sup>160</sup> Applicants' Response to Provisional Determination, para 45

by the regulators in their letter dated 30 April 2015<sup>161</sup>. A key point made was that the network issues arising should be addressed in the dispatch process and not the registration process<sup>162</sup>.

- 9.43 The regulators' final position set out in their letter dated 30 April 2015 does not focus specifically on DSU with export. However, the final position does envisage that network issues will be addressed through the use of instruction sets that restrict dispatch and that registration should not be prevented because of network issues. Our determination is consistent with this position – no provision has been identified which allows NIE Networks to prevent registration because of network concerns.
- 9.44 Our determination is that NIE Networks does not have the power to determine unilaterally what the MEC is for a particular site. NIE Networks cannot utilise a power in a discriminatory manner if it does not actually possess that power in the first place. That NIE Networks appears to have acted as if it does have such a power is regrettable, but we do not consider that this changes the position.
- 9.45 Consequently, our determination is that the Complaint does not evidence any breach by NIE Networks of article 25(2) of the Directive.

***Whether the Utility Regulator should exercise any power or duty in relation to the Dispute regarding article 25(2) of the Directive***

- 9.46 In light of our conclusion that the Complaint does not evidence any breach by NIE Networks of article 25(2) of the Directive, our determination is that the Utility Regulator should not exercise any power or duty in relation to this part of the Dispute.
- 9.47 As noted above, we consider that (in making a determination under article 31A of the Electricity Order) it is proper for the Utility Regulator to consider the provisions of the Trading and Settlement Code to determine whether they confer a power on NIE Networks such that article 25(2) of the Directive is engaged.
- 9.48 However, the question of what the MEC is for any of the Applicants' sites is ultimately a question of the interpretation of the Trading and Settlement Code. Neither party has suggested that there is any provision which empowers the Utility Regulator to give an

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<sup>161</sup> Exhibit 6.15

<sup>162</sup> Applicants' Response to Provisional Determination, para 27

authoritative and binding determination on the meaning of a provision in the Trading and Settlement Code. We do not consider that there is any such provision. In any event, no such provision would fall within the scope of an article 31A determination.

- 9.49 It is clear that, where a connection agreement sets out an unconditional value for maximum export capacity, that value will subsist irrespective of a switch from AGU to DSU. It will simply be a case of referring to the connection agreement to determine the MEC value.
- 9.50 Here, the position is more complex, because the connection agreements for the site do not contain provisions relating to the relevant generation. The Applicants submit that the MEC for each site was confirmed by NIE Networks in previous correspondence and that those MECs have not changed<sup>163</sup>. In the absence of connection agreements, they submit that the MEC which was confirmed is in a document which is '*equivalent*' to a connection agreement<sup>164</sup>. Whether or not this is the case is a matter for the Applicants (or PG, as a party to the Trading and Settlement Code) to determine, using the procedures set out in the Trading and Settlement Code. We conclude that this is not a matter which the Utility Regulator has a power or duty to resolve within the context of an article 31A determination.
- 9.51 In response to the Provisional Determination, it was submitted on behalf of the Applicants that even if they present the relevant MEC values to SONI and SEMO, NIE Networks will continue to frustrate DSU registration<sup>165</sup>. For the reasons set out above, SONI and SEMO will be required to consider what values should be registered in accordance with the Trading and Settlement Code. NIE Networks' view is not determinative.
- 9.52 We note that the provisions of the Trading and Settlement Code include a dispute resolution mechanism. However, ultimately, the proper interpretation of the Trading and Settlement Code is a question of law and a matter for the courts.

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<sup>163</sup> Applicants' Responses to Clarification Questions, [para 1.9.8](#)

<sup>164</sup> Reply, [pages 4 and 13](#)

<sup>165</sup> Applicants' Response to Provisional Determination, [para 9](#)

***Whether NIE Networks is breaching its duty to provide information needed for efficient access to the system, as referred to in article 25(3) of the Directive.***

- 9.53 Article 25(3) of the Directive provides that '*[t]he distribution system operator shall provide system users with the information they need for efficient access to, including use of, the system*'.
- 9.54 We consider that the duty on NIE Networks to provide system users with the information they need for efficient access to the system does encompass a duty on NIE Networks to provide system users with information which it holds which the system users need to register in the wholesale market. System users would not be able to have efficient access to NIE Networks' system if they are prevented from the market registration they seek because NIE Networks has not provided the relevant information. Whether or not the duty has been breached will depend upon the specific facts of the case.
- 9.55 The Applicants submit that NIE Networks has provided incomplete, incorrect and, in some cases, misleading information about the MEC allocated to their sites<sup>166</sup>. In particular, in the Complaint and accompanying materials –
- (a) it is stated that NIE Networks has provided incorrect MEC values in relation to the site operated by Severfield (NI) Ltd,
  - (b) a number of points are made regarding the provision of information in relation to sites which are not owned by the Applicants<sup>167</sup>, and
  - (c) it is stated that the Applicants continue to be materially adversely affected by the lack of transparency and clarity in relation to MEC values.
- 9.56 First, to the extent that the Applicants make reference to NIE Networks' responses to a number of requests for information which relate to sites which they do not own, very little information is provided. In any case, we agree with NIE Networks<sup>168</sup> that provision of information in relation to these sites is not relevant for the purposes of our determination of the Dispute – we do not consider this further.

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<sup>166</sup> Complaint, para 3.2.11 and paras 4.3.38 – 4.3.41

<sup>167</sup> See Exhibit 6.8

<sup>168</sup> See Response, para 9.1

- 9.57 Second, in relation to Severfield (NI) Ltd's site, it is submitted that there is a disparity between two MEC values, one confirmed by an '*industry stakeholder*' and one confirmed by NIE Networks<sup>169</sup>. However, no further detail is provided. This does not evidence a breach of article 25(3) of the Directive by NIE Networks.
- 9.58 Third, in relation to the more general statements around a lack of transparency, we agree with NIE Networks<sup>170</sup> that the Complaint is not supported by sufficient evidence for us to determine that NIE Networks has breached article 25(3) of the Directive due to its general approach to DSU Operators.
- 9.59 It appears to us that this leaves the Applicants' submission, given in response to the Utility Regulator's clarification questions, that the breach was due to NIE Networks '*not confirming the correct MEC values*'<sup>171</sup>.
- 9.60 We understand that the issue here is that, in response to requests for confirmation of the MEC for a site which the Applicant wishes to register as part of a DSU, NIE Networks has stated that the MEC is zero or has stated that the MEC applies only to AGU registration. The Applicants have provided evidence to show that NIE Networks has adopted this position. Indeed this was on the basis of NIE Networks' view, set out at Section Seven, that the Applicants are not entitled to retain MEC values registered for AGU Sites as DSU Sites.
- 9.61 As set out above in relation to our determination on the allegation of discriminatory treatment, MEC is a concept defined in the Trading and Settlement Code for the purposes of registration. We have concluded that NIE Networks has no power to determine what the MEC is, but rather the MEC is a pre-existing figure (or figures) defined in the relevant document. NIE Networks has provided no explanation to demonstrate that its position aligns with the definition of MEC as set out in the Trading and Settlement Code.
- 9.62 However, neither can it be said that the requests made on behalf of the Applicants were clearly framed by reference to this definition. To the contrary, from the correspondence provided to us it is often not clear whether the information being requested of NIE Networks relates to the MEC (under the Trading and Settlement Code) or whether the information being requested relates to some other concept of export capacity; one which

<sup>169</sup> Complaint, para 3.2.11

<sup>170</sup> Response, para 9.1

<sup>171</sup> Applicants' Responses to Clarification Questions, para 1.9.11

is not set out in a particular document agreed between the parties. Examples of where the position is not clear include –

- (a) PG's e-mail dated 24 June 2016, in which it requested; '*How can we transfer the MEC that is available on the network at the locations from the AGU operator to the customer who own the MPRN...*'<sup>172</sup>,
- (b) PG's e-mail dated 3 August 2016, where it was requested; '*is there any other way these sites can negotiate changes in the MEC for alternative uses*'<sup>173</sup>,
- (c) PG's letter dated 16 September 2016, where it was stated that '*[if] not defined in the C.A the MEC adopts a deemed status*'<sup>174</sup>, and
- (d) PG's e-mail dated 17 October 2016, where it was stated that '*[PG] believe a Maximum Export Capacity (MEC) relates to exported power onto the network (physical network access) and can be assigned to a technology type...*'<sup>175</sup>.

- 9.63 In response to the Provisional Determination, it is submitted on behalf of the Applicants that their requests for MEC values were completely clear and that MEC has one well-established meaning within the industry<sup>176</sup>. However, that is not borne out by the correspondence which has been provided to us, such as those examples set out above.
- 9.64 If we considered that the Applicants had requested factual information which was clearly intended to assist them in determining the MEC under the Trading and Settlement Code and NIE Networks refused to provide that information or deliberately or recklessly provided information which was false, we would determine that NIE Networks had breached its duty under article 25(3) of the Directive. For example, had a clear request been made for unredacted versions of the letter in which NIE Networks originally set out the MEC values for the Applicants' sites, this should have been provided by NIE Networks and a failure to do so would have been a breach.
- 9.65 We do not consider that the Applicants have evidenced such a breach in the Complaint. There appears to have been a significant amount of correspondence in which MEC has

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<sup>172</sup> Exhibit 6.4

<sup>173</sup> Exhibit 6.6

<sup>174</sup> Exhibit 6.8

<sup>175</sup> Exhibit 6.9

<sup>176</sup> Applicants' Response to Provisional Determination, paras 32 - 33

been discussed and in which neither party has clearly stated its position by reference to what MEC actually is as defined in the Trading and Settlement Code. Instead, NIE Networks and PG have exchanged broader statements around a concept of 'MEC' without reference to that definition. The correspondence on both sides shows a degree of confusion on the part of the Parties.

- 9.66 In addition, behind this confusion, there has been a dispute between the Parties as to the MEC values for these sites. It has been clear that there has been a dispute and NIE Networks did provide an explanation why it considered the MEC values to be what it did. This has enabled the Applicants to consider what action to take to resolve the Dispute. In our view, the Applicants have not provided evidence (and certainly not clear evidence) which suggests that the position adopted by NIE Networks was a deliberate attempt to misinform the Applicants. We would have required there to be clear evidence to determine that this was the case.
- 9.67 We consider it to be regrettable that the Parties did not express their positions by reference to the relevant provisions and, in particular, that NIE Networks has in our view '*muddied the waters*' in the various correspondence. However, while this is regrettable, we do not consider that the Applicants have evidenced a refusal to provide information or a deliberate or reckless provision of false information in this case. Our determination is that the Complaint does not evidence a breach by NIE Networks of article 25(3) of the Directive.

***Whether the Utility Regulator should exercise any power or duty in relation to the Dispute regarding article 25(3) of the Directive.***

- 9.68 In light of our determination that the Complaint does not evidence any breach by NIE Networks of article 25(3) of the Directive, our determination is that the Utility Regulator should not exercise any power or duty in relation to this part of the Dispute.
- 9.69 However, as noted above we consider that the duty on NIE Networks to provide system users with the information they need for efficient access to the system does encompass a duty on NIE Networks to provide system users with information which it holds which the system users need to register in the wholesale market.
- 9.70 On the basis of our determination, we anticipate that the Applicants may seek to secure the registration of their sites as part of a DSU. It is the Applicants' position that the MEC for each site was set out by NIE Networks in previous correspondence and has not

changed<sup>177</sup>. To the extent that the Applicants require information in relation to MEC values set out in that correspondence to seek to register, any such information requested from NIE Networks should be promptly provided. We note that a request for information was made on behalf of the Applicants on 25 September 2017 and that some information has been provided and some is still outstanding.

- 9.71 Similarly, NIE Networks should provide any other factual information held by it which the Applicants require to determine the MEC for the sites as they seek to secure the registration of their sites as part of a DSU.
- 9.72 The Applicants should make clear requests for any factual information which they require for this purpose. For the avoidance of doubt, it appears to us that the request made on behalf of the Applicants on 25 September 2017 was such a request.
- 9.73 Should NIE Networks fail to provide information promptly or provide false information in response to clear requests for information which the Applicants require for this purpose, we consider that this would be a breach of its duty under article 25(3) of the Directive. If any such breach is brought to the attention of the Utility Regulator, we conclude that it should at that point seek to exercise its statutory functions to address the breach.

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<sup>177</sup> Applicants' Responses to Clarification Questions, para 1.9.8

## 10 Section Ten – Concluding Observations

10.1 This Section Ten is not part of our formal determination.

### ***The Complaint and the Response***

- 10.2 The main issue raised in the Complaint was the allegation of discriminatory treatment by NIE Networks. As set out at Section Nine, we have provisionally concluded that no such discrimination has been evidenced, although not for the reasons given by NIE Networks.
- 10.3 Ultimately, we have determined that this part of the Complaint has been brought in an inappropriate forum – it is not an issue for the Utility Regulator to determine. In response to the Provisional Determination, it was submitted on behalf of the Applicants that, if it is not a matter for the Utility Regulator to determine, it is not clear who should determine it<sup>178</sup>. It was also noted that the SEM Committee did not consider the Complaint to fall within its jurisdiction.
- 10.4 Our determination is that article 25(2) of the Directive is not engaged and that this part of the Complaint is not a matter which the Utility Regulator has a power or duty to resolve within the context of an article 31A determination. The Utility Regulator can only act where it has an ability to do so. It is for the Applicants to seek to resolve the Dispute using the procedures set out in the Trading and Settlement Code and this is a matter on which the Applicants should seek their own advice as required. We note that the SEM Committee's decision was only that the request for a determination under article 31A of the Electricity Order did not fall within its jurisdiction.
- 10.5 It has taken us detailed consideration to reach the conclusion that this part of the Complaint has been brought in an inappropriate forum, at least in part due to the way the Dispute was explained.
- 10.6 The alleged discriminatory treatment relates to the MEC of a site, as defined in the Trading and Settlement Code. Given this, it is highly surprising that the Complaint made no reference at all to the definition. Rather, the Complaint made submissions by

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<sup>178</sup> Applicants' Response to Provisional Determination, para 45

reference to a separate concept of what a MEC was – a MEC which is '*allocated*'<sup>179</sup> for the purpose of registration and in relation to which '*transfer*'<sup>180</sup> was being refused.

- 10.7 Had the Complaint been made by reference to relevant provisions in the Trading and Settlement Code, the issues arising in the Dispute would have been much clearer from the outset. We note that the Applicants made reference to the definition in later submissions<sup>181</sup>, but this was following specific clarification questions being raised by the Utility Regulator to clarify the issues. Further, the Utility Regulator is required to determine the Complaint which is before it – the fact that issues relating to DSU operation have been considered in Northern Ireland for several years<sup>182</sup> does not change this point.
- 10.8 We appreciate that the issues in dispute between the Parties are complex and that they relate to complex parts of the regulatory regimes governing the wholesale market and use of the distribution network. However, the Applicants are commercial enterprises operating with the benefit of both specialist legal representatives and the regulatory knowledge of PG. We would have expected the Applicants to have properly considered the relevant provisions in the Trading and Settlement Code before bringing a complaint to the Utility Regulator and, if they still considered it necessary, bringing a complaint by reference to those provisions.
- 10.9 Nevertheless, we were equally surprised that the Response was not made by reference to the relevant provisions of the Trading and Settlement Code. Had NIE Networks responded in this way, it appears to us that NIE Networks may well have given a simple response to the allegation of discrimination - that it had no power to unilaterally control a MEC for the purposes of wholesale market registration and that what is the correct MEC value is a matter of interpretation of the Trading and Settlement Code. Alternatively, it could have sought to explain why it considered that it did have such a power. Instead, the Response was a detailed submission (accompanied by further documentation) on why the historical background and potential network issues meant that the Applicants should not be given what they are requesting.

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<sup>179</sup> Complaint, [para 3.2.5](#)

<sup>180</sup> Complaint, [para 3.2.8](#)

<sup>181</sup> Applicants' Response to Provisional Determination, [para 45](#)

<sup>182</sup> Applicants' Response to Provisional Determination, [para 45](#)

- 10.10 We do not consider that either the Complaint or the Response was as clear as it might have been, to enable the Utility Regulator to determine the Dispute as efficiently as possible. Both contained detail on issues which detracted from what we consider have been the key issues. The nature of the Complaint and the Response has led to the Utility Regulator being required to spend substantial time considering all of the submissions and identifying those key issues.

***NIE Networks' position in relation to switch from AGU to DSU***

- 10.11 As noted above, we consider that, prior to this Complaint and at points during the determination process, both the Applicants and NIE Networks have adopted a concept of MEC which does not appear to align with the Trading and Settlement Code. From the documents provided, it appears that the Applicants have (at least to a significant extent) adopted this concept from NIE Networks' explanations of the issues. We have two observations in relation to this.
- 10.12 First, where NIE Networks is informing parties connected to its network why they are not entitled to take a proposed course of action, we would expect it to clearly identify why this is the case by reference to the relevant contractual or regulatory framework. For example, we do not consider that NIE Networks' letter of 17 October 2016 met this expectation<sup>183</sup>. We agree with the Applicants that NIE Networks has '*muddied the waters*' in the various correspondence.
- 10.13 Second, there is clearly a dispute between the Parties in relation to whether the Applicants' sites switching from AGU Sites to DSU Sites (with no controlled reduction in the usage of power at the site), requires any physical alteration on the site. There is similarly a dispute in relation to whether such a switch will increase the risk posed by the Applicants' sites to NIE Networks' distribution network. For the reasons set out above, these are not matters for us to determine for the purpose of determining the Dispute which has been referred to us.
- 10.14 However, to the extent NIE Networks has concerns in relation to these network issues, it is entitled to take any action which is available to it by reference to the mechanisms set out in the regulatory regime governing its distribution network. In doing so, we would

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<sup>183</sup> Exhibit 6.18

expect NIE Networks to give appropriate consideration to the regulator's final position set out in their letter dated 30 April 2015<sup>184</sup>.

### ***Registration of the Applicants' sites***

- 10.15 In accordance with our determination, the value of the MEC for the Applicants' sites is not a matter for the Utility Regulator to determine. Therefore, in the absence of being able to refer to a connection agreement, the Applicants are entitled to seek to argue their case for registration under the provisions of the Trading and Settlement Code by reference to what they consider to be an '*equivalent*' document.
- 10.16 Alternatively, to the extent that the Parties consider that this is required, we note any person may propose a modification to the Trading and Settlement Code, which will be taken forward in accordance with its provisions.

### ***Connection Agreements***

- 10.17 Many of the difficulties which have arisen in this matter relate to the lack of connection agreements between NIE Networks and the Applicants in relation to electricity generation on their sites. We appreciate that there were reasons why this generation capability was originally permitted to be connected to NIE Networks' distribution network. We do not comment on this.
- 10.18 However, the relevant connection agreements have still not been varied to provide for this generation capability, over eight years later. We also note that the Utility Regulator's addendum to the regulators' final position, as long ago as October 2015, stated that synchronised generation should be acknowledged within the site connection agreement<sup>185</sup>. It appears to us that the Parties should seek to enter into connection agreements as a matter of priority.
- 10.19 In that regard, we note that the Electricity Order sets out a procedure for a person who is connected to the distribution network to require NIE Networks to offer terms in relation to the connection<sup>186</sup>. Where that procedure is followed and a dispute arises between NIE

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<sup>184</sup> Exhibit 6.15

<sup>185</sup> Exhibit 6.16

<sup>186</sup> Articles 19 to 25 of the Electricity Order

Networks and the applicant, that dispute may be referred to the Utility Regulator for determination<sup>187</sup>.

**Alex Wiseman**

**Andrew McCorriston**

**Authorised on behalf of the Utility Regulator**

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<sup>187</sup> Article 26 of the Electricity Order

Appendix 1
Index to Determination documents

Tab No	Document description	Date
<b>Relevant Legislation and background documents</b>		
1	The Electricity (Northern Ireland) Order 1992	11 February 1992
2	The Energy (Northern Ireland) Order 2003	27 February 2003
3	Directive 2009/72/EC of the European Parliament concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC	13 July 2009
4	Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC	25 October 2012
5	NIE Networks Distribution Licence	21 September 2016
6	Trading and Settlement Code v20.0	23 May 2017
7	Utility Regulator's Policy on the Resolution of Complaints, Disputes and Appeals and Guide for Applicants	June 2013

Tab No	Document description	Date
<b>Documents submitted with the Complaint</b>		
	Complaint	22 March 2017
Exhibit 6.1	Letters of Authorisation from the Applicants	
Exhibit 6.2	Applicants' Connection details currently held by NIE Networks	
Exhibit 6.3	Letter from NIE Networks to PG	10 October 2016
Exhibit 6.4	E-mail from Emma Finnegan (NIE Networks) to Denver Blemings (PG)	27 June 2016
Exhibit 6.5	E-mail from Emma Finnegan (NIE Networks) to Denver Blemings (PG)	10 August 2016
Exhibit 6.6	E-mail from Ian Baille (NIE Networks) to Peter MC Polin (iPower)	1 September 2016

Tab No	Document description	Date
	<b>Documents submitted with the Complaint</b>	
	E-mail from Denver Blemings (PG) to Emma Finnegan (NIE Networks)	3 August 2016
Exhibit 6.7	IDS Spreadsheet Powerhouse (29 July 2016) and Powerhouse DSU sites – NIE Networks supplied data (23 November 2016)	
Exhibit 6.8	Letter from PG to NIE Networks	16 September 2016
Exhibit 6.9	E-mail from Sam Alexander (PG) to Con Feeney (NIE Networks)	17 October 2016
Exhibit 6.10	Letter from PG to VESL	12 November 2008

Tab No	Document description	Date
	<b>Documents submitted with the Response</b>	
	Response	19 June 2017
Exhibit 6.11	Template letter of terms offered to individual iPower AGU sites	
Exhibit 6.12	Signed acceptance by aggregator acting on behalf of customer of terms stated to be offered to; (a) Severfield (NI) Limited, (b) Dunbia (NI), (c) Ready Egg Products Limited	10 February 2010
Exhibit 6.13	Letter from NIE Networks to Utility Regulator setting out proposals for instruction sets and requirement for valid CA	15 June 2015
Exhibit 6.14	Utility Regulator letter setting out ' minded to' position	23 April 2015
Exhibit 6.15	Utility Regulator letter setting out 'final' position	30 April 2015
Exhibit 6.16	Paul Bell (Utility Regulator) e-mail confirming addendum to final position	1 October 2015
Exhibit 6.17	Grid Code PC.B3.3.3 – Additional Data for Generator Aggregators	
Exhibit 6.18	Letter from NIE Networks to AGU/DSU industry detailing customer options for transferring	17 October 2016

Tab No	Document description	Date
	<b>Documents submitted with the Response</b>	
Exhibit 6.19	Letter from NIE Networks to IDSs with zero dispatch instruction	
Exhibit 6.20	NIE Networks – PG e-mail correspondence	
Exhibit 6.21	List of Applicants' Connection Agreement status	
Exhibit 6.22	ERA Technology report on network impact of transferring peak loop generation into the AGU market	16 June 2008
Exhibit 6.23	E-mail from Paul Bell (Utility Regulator) to Denis Kelly (NIE Networks) providing further policy clarification	26 October 2015
Exhibit 6.24	EA Technology Ltd Report	15 June 2017

Tab No	Document description	Date
	<b>Further Documents</b>	
	NIE Networks letter to the Utility Regulator	8 March 2017
	Applicants' responses to the Utility Regulator's clarification questions of 11 July 2017	25 July 2017
	NIE Networks' responses to the Utility Regulator's clarification questions of 11 July 2017	25 July 2017
	Reply	22 August 2017
	NIE Networks' response to the Utility Regulator's Statement	13 September 2017
	E-mail from Sam Alexander (PG) to Stephen Abram (Utility Regulator)	18 September 2017
	Provisional Determination of the Dispute	22 September 2017
	PG's letter to NIE Networks requesting MEC information	25 September 2017
	E-mail from Ian Bailie (NIE Networks) to Sam Thompson (PG) attaching certain requested information	29 September 2017
	Applicants' response to the Provisional	6 October 2017

Tab No	Document description	Date
	<b>Further Documents</b>	
	Determination issued on 22 September 2017	



**COMPLAINT TO THE UTILITY REGULATOR**

**BY MANUFACTURING NORTHERN IRELAND & POWERHOUSE GENERATION  
LIMITED (ON BEHALF OF SEVERFIELD (NI) LIMITED,  
DUNBIA (NORTHERN IRELAND), LGEN POWER LIMITED &  
READY EGG PRODUCTS LIMITED)  
IN RELATION TO NORTHERN IRELAND ELECTRICITY NETWORKS LIMITED'S  
TREATMENT OF MAXIMUM EXPORT CAPACITY**

**DETERMINATION**

**18 October 2017**

## CONTENTS

<u>Section</u>		<u>Page</u>
Section 1.	Introduction	3
Section 2.	The Parties	6
Section 3.	Applicable Law	8
Section 4.	Factual Background to AGU/DSU	13
Section 5.	Factual Background to the Dispute	17
Section 6.	Views of the Applicants	24
Section 7.	Views of NIE Networks	33
Section 8.	Issues to be Determined	40
Section 9.	Determination of the Dispute	41
Section 10.	Concluding Observations	57
Appendix 1.	Index of Documents	62

## COMPLAINT TO THE UTILITY REGULATOR

BY MANUFACTURING NORTHERN IRELAND & POWERHOUSE GENERATION LIMITED  
(ON BEHALF OF SEVERFIELD (NI) LIMITED, DUNBIA (NORTHERN IRELAND),  
LGEN POWER LIMITED & READY EGG PRODUCTS LIMITED)

IN RELATION TO NORTHERN IRELAND ELECTRICITY NETWORKS LIMITED'S  
TREATMENT OF MAXIMUM EXPORT CAPACITY

**DETERMINATION****1 Section One - Introduction**

- 1.1 On 22 March 2017, the Northern Ireland Authority for Utility Regulation (referred to hereafter as the **Utility Regulator**) received a formal complaint (the **Complaint**) from Manufacturing Northern Ireland (**MNI**) and Powerhouse Generation Ltd (**PG**) (as representatives) on behalf of: (i) Severfield (NI) Ltd; (ii) Dunbia (Northern Ireland); (iii) LGen Power Ltd; and (iv) Ready Egg Products Ltd (together, the **Applicants**) regarding a dispute (the **Dispute**) between the Applicants and Northern Ireland Electricity Networks Limited (**NIE Networks**).
- 1.2 MNI is a campaigning organisation acting on behalf of Northern Irish member companies. PG is a demand side response aggregator operating in both Northern Ireland (where it is licensed by the Utility Regulator) and the Republic of Ireland. The Applicants are individual demand site (**IDS**) customers.
- 1.3 The Dispute relates to the alleged treatment by NIE Networks in respect of the Applicants seeking to switch from trading as part of an Aggregated Generating Unit (**AGU**) to trading as part of a Demand Side Unit (**DSU**). In particular, the Dispute relates to Maximum Export Capacity, as defined under the Trading and Settlement Code, (**MEC**) and to NIE Networks' position that the MEC for a site which is applicable when the site is registered as an AGU site is not applicable where the site is re-registered as a DSU site (or is only available subject to conditions).
- 1.4 The Dispute between the Applicants and NIE Networks (together, the **Parties**) falls to be determined by the Utility Regulator under article 31A of the Electricity (Northern Ireland) Order 1992 (the **Electricity Order**), and in accordance with Directive 2009/72/EC of the

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

- 1.5 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 2013 (the **Procedure**).
- 1.6 The Complaint has been acknowledged and the Parties have been informed that the Utility Regulator has the jurisdiction to consider and determine the Dispute under article 31A<sup>1</sup> and of the timetable within which the Utility Regulator will make its determination.
- 1.7 NIE Networks responded to the Complaint on 19 June 2017 (the **Response**). On 25 July 2017, the Parties responded to a number of initial questions put to them by the Utility Regulator. On 22 August 2017, a reply to the Response (the **Reply**) was provided on behalf of the Applicants.
- 1.8 The Utility Regulator has appointed us, Alex Wiseman (Utility Regulator Board Member) and Andrew McCorriston (Utility Regulator Manager) jointly to determine the Dispute (together, the **Decision-Makers**). We do so as delegates of the Utility Regulator and on its behalf.
- 1.9 This document sets out our determination in relation to the Dispute.
- 1.10 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 of the Dispute –
  - (a) A draft 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, which are listed in Appendix 1 to this determination and include the submissions of the Parties.

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<sup>1</sup> In its letter dated 2 June 2017 accepting the Dispute for determination, the Utility Regulator noted that it was not proceeding to consider the Complaint under other provisions which had been raised, such as the Competition Act 1998.

- (c) NIE Networks' comments on the Statement<sup>2</sup>.
  - (d) The Applicants' comments on a provisional determination dated 22 September 2017 (the **Provisional Determination**)<sup>3</sup>.
- 1.11 The Parties were given the opportunity to comment on the Statement and the Provisional Determination. The comments received have been taken into account in our determination of the Dispute.
- 1.12 The determination adopts the following structure -
- (a) the Parties (at Section 2),
  - (b) the applicable legal framework (at Section 3),
  - (c) the factual background in relation to AGU/DSU (at Section 4),
  - (d) the factual background to the Dispute (at Section 5),
  - (e) the views of the Parties (at Sections 6 and 7),
  - (f) the issues for determination (at Section 8),
  - (g) our determination in relation to those issues (at Section 9), and
  - (h) our concluding observations (at Section 10).
- 1.13 Our determination references a number of documents and correspondence provided by the Parties. An index to these is set out at Appendix 1.

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<sup>2</sup> The Applicants were invited to comment on the Statement, but did not make any comment.

<sup>3</sup> NIE Networks was invited to comment on the Provisional Determination, but did not make any comment.

**2      Section Two - The Parties**

***The Applicants***

2.1    The Applicants are four IDS customers, each of which has onsite diesel generation with capability to export onto the distribution system. The Applicants are -

- (a)    Severfield (NI) Ltd,
- (b)    Dunbia (Northern Ireland),
- (c)    LGen Power Limited, and
- (d)    Ready Egg Products Limited.

2.2    Each of the Applicants has one site which is relevant to the Dispute. The Complaint stated that Dunbia (Northern Ireland) had two sites which were relevant to the Dispute, but the Applicants' response to the Provisional Determination confirmed that there has been a change of ownership of one site<sup>4</sup>.

***NIE Networks***

2.3    NIE Networks 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.

2.4    NIE Networks is licensed separately in relation to both activities. It holds an electricity transmission licence and an electricity distribution licence granted under articles 10(1)(b) and 10(1)(bb) of the Electricity Order respectively.

2.5    NIE Networks' distribution licence (also known as the successor distribution licence) (**the Licence**) is the relevant licence for the purposes of the Dispute.

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<sup>4</sup> Applicants' Response to Provisional Determination, para 50 - This relates to MPRN 81995998106. It is stated that there has been no change to the MPRN and that PG continues to contract with the site owner. However, our understanding is that the site is no longer owned by one of the Applicants or a company in its group. On this basis, this MPRN is no longer relevant to the Dispute.

- 2.6 NIE Networks is the only party in Northern Ireland entitled to offer terms to connect, or to modify an existing connection, to the electricity distribution system.
  
- 2.7 As from 22 September 2015 Northern Ireland Electricity Limited changed its name to Northern Ireland Electricity Networks Limited. For ease of reference and for the purposes of our determination, all references are to NIE Networks.

**3      Section Three - Applicable Law**

3.1    The legal framework applicable in determining the Dispute is summarised below.

***The Electricity Order***

3.2    Under article 31A(1) of the Electricity Order, any person may make a complaint to the Utility Regulator if –

- (a)    '*the subject matter of the complaint constitutes a dispute between the complainant and... the holder of a distribution licence*',
- (b)    '*it is wholly or mainly a complaint against that holder regarding an obligation imposed upon him pursuant to the Directive*', and
- (c)    '*the subject matter of the complaint - (i) does not fall to be dealt with under Article 26 or Article 42A; and (ii) is not capable of being determined pursuant to any other provision of this Order*'.

3.3    Article 31A goes on to state that –

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

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

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

*(5) For the purposes of paragraph (4) the requisite period in any case means—  
(a) the period of two months from the date when the complaint was received by the Authority; or (b) where the information sent to the Authority under paragraph (2) was in its opinion insufficient to enable it to make a determination, the period of four months from the date the complaint was received by the Authority.*

*(5A) Where the Authority makes a determination under this Article, it may include in the determination an order requiring any party to the dispute to pay such sum in respect of the costs or expenses incurred by the Authority in making the determination as the Authority considers appropriate and this order*

*shall be final and shall be enforceable as if it were a judgement of the county court.*

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

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

- 3.4 Article 19 of the Electricity Order places a duty on an electricity distributor to maintain a connection (including providing the necessary electric lines or electrical plant) between its distribution system and any premises, when required to do so by the owner or occupier of the premises. The connections between NIE Networks' network and the Applicants' premises would be low voltage and therefore a distribution connection.

### ***The Energy Order***

- 3.5 As noted above, a determination under article 31A of the Electricity Order is a determination about the exercise of any power or duty conferred or imposed on the Utility Regulator. In particular, the Complaint refers to the Utility Regulator's duty under article 42 of the Energy (Northern Ireland) Order 2003 (the **Energy Order**).
- 3.6 Article 42(1) provides that, subject to specified exceptions, where the Utility Regulator '*is satisfied that a regulated person is contravening, or is likely to contravene, any relevant condition or requirement, it shall by a final order make such provision as is requisite for the purpose of securing compliance with that condition or requirement*'.
- 3.7 For these purposes, article 41(2) of the Energy Order provides that a licence condition is a '*relevant condition*'.
- 3.8 Article 42 imposes a duty on the Utility Regulator to make a provisional order in some cases and sets out a procedure which must be followed before it makes a provisional order or a final order.
- 3.9 For completeness, we note that, in determining disputes, the principal objective and general duties of the Utility Regulator under article 12 of the Energy Order do not apply (see article 13(2) of the Energy Order).

### **The Directive**

- 3.10 The Utility Regulator also has a duty to determine distribution complaints under the Directive. In particular, article 37(11) of the Directive provides –

*'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 a period of two months after receipt of the complaint. That 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.'*

- 3.11 NIE Networks is a distribution system operator and the Complaint relates to obligations set out in article 25 of the Directive which relate to obligations imposed on distribution system operators. In particular –

- (a) article 25(2) of the Directive provides that a distribution system operator '*...must not discriminate between system users or classes of system users, particularly in favour of its related undertakings*', and
- (b) article 25(3) of the Directive provides that a distribution system operator '*...shall provide system users with the information they need for efficient access to, including use of, the system*'.

### **The Energy Efficiency Directive**

- 3.12 Directive 2012/27/EU (the **Energy Efficiency Directive**) imposes a number of obligations on the Utility Regulator in relation to energy efficiency. In particular, article 15(8) of the Energy Efficiency Directive provides that –

*'Member States shall ensure that national energy regulatory authorities encourage demand side resources, such as demand response, to participate alongside supply in wholesale and retail markets.*

*Subject to technical constraints inherent in managing networks, Member States shall ensure that transmission system operators and distribution system operators, in meeting requirements for balancing and ancillary services, treat demand response providers, including aggregators, in a non-discriminatory manner, on the basis of their technical capabilities.*

*Subject to technical constraints inherent in managing networks, Member States shall promote access to and participation of demand response in balancing,*

*reserve and other system services markets, inter alia by requiring national energy regulatory authorities or, where their national regulatory systems so require, transmission system operators and distribution system operators in close cooperation with demand service providers and consumers, to define technical modalities for participation in these markets on the basis of the technical requirements of these markets and the capabilities of demand response. Such specifications shall include the participation of aggregators'.*

### ***The Licence***

- 3.13 Condition 15 of the Licence relates to the "Non-Discrimination". In particular, the Condition provides that –

*'The Licensee shall not... unduly discriminate as between any persons, or any class or classes of person or persons, or unduly prefer itself (or any affiliate or related undertaking) over any other person or persons, or any class or classes of person or persons, in meeting its obligations under... Condition 19 (Distribution System Security and Planning Standards and Operation of the Distribution System)'.*

- 3.14 Condition 19 of the Licence relates, amongst other things, to the planning, developing, maintenance and operation of NIE Networks' distribution system.

- 3.15 Condition 16 of the Licence relates to the Trading and Settlement Code. In particular, Condition 16(1) provides that –

*'The Licensee shall accede to the Single Electricity Market Trading and Settlement Code and comply with it in so far as applicable to it in its capacity as the operator of the Distribution System'.*

### ***The Trading and Settlement Code***

- 3.16 The Dispute raises an issue in relation to MEC, which is defined in the Trading and Settlement Code, as follows -

<b>'Maximum Export Capacity'</b>	<i>means the maximum export capacity of a site in MW as defined under the site's Connection Agreement or equivalent, or in the case of an Aggregated Generator, the Aggregated Maximum Export Capacity of all sites containing Generators that form part of the Aggregated Generator</i>
	<i>means the maximum export capacity of a site in MW as defined under the site's Connection Agreement or equivalent<sup>5</sup>.</i>

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<sup>5</sup> The second paragraph here appears to be included in error.

- 3.17 Any party to the Trading and Settlement Code (including PG), may apply to register units and must do so by completing a '*Participation Notice*' in respect of the unit, which must include –

*'(10) evidence that the necessary Operational Readiness Confirmation is in place and is valid and effective where the Party wishes to register a Generator Unit as... a Variable Price Maker Generator Unit [or] a Variable Price Taker Generator Unit...'*

*(11) evidence that all necessary Connection Agreements are in place, valid and effective...*

*(18) such other Registration Data as is required by the Market Operator pursuant to Appendix H "Participant and Unit Registration and Deregistration" and Agreed Procedure 1 "Participant and Unit Registration and Deregistration"<sup>6</sup>.*

#### ***Practice and procedure***

- 3.18 The practice and procedure to be followed by the Decision-Makers in determining the Dispute on behalf of the Utility Regulator is set out in the Procedure<sup>7</sup>.
- 3.19 We understand that the Procedure may be supplemented or adapted as required in order to ensure good governance and best practice.

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<sup>6</sup> Clause 2.33 of the Trading and Settlement Code.

<sup>7</sup> *Policy on the Resolution of Complaints, Disputes and Appeals and Guide for Applicants* (June 2013)

#### **4      Section Four - Factual Background to AGU/DSU**

- 4.1 The following summary of the factual background is derived from relevant section of the Statement. We take it to be accurate and adopt it for the purposes of our determination.
- 4.2 The central issue in the Dispute is the switch of the Applicants' sites from being registered as part of an AGU to being registered as part of a DSU. This section details the differences between these types of units and sets out background regarding their use in Northern Ireland.

##### ***AGU***

- 4.3 Aggregated generation involves a company entering into contracts with the owners of small generators (under 10MW) (**AGU Operators**), for the purpose of acquiring the rights to their output, aggregating it and selling it into the Single Electricity Market (**SEM**). A company carrying out this activity is known as a Generator Aggregator and the generating unit which they collectively bid into the SEM is known as an AGU.
- 4.4 For a site forming part of an AGU (an **AGU Site**), SEM settlement is based on the output as determined at the terminals of the generator of the site. In practical terms, where an AGU is dispatched, the power generated may displace demand at the site, with excess power being exported to the distribution system.

##### ***DSU***

- 4.5 Aggregated demand side response involves a company entering into contracts with the owners of a number of sites (**DSU Operators**) to offer dispatchable demand reduction, which is aggregated and offered for sale in the SEM. DSU Operators are also known as Dispatchable Demand Customers and, where a number of such sites are aggregated, the aggregator is known as a Demand Response Aggregator. The demand reduction unit which they collectively bid into the SEM is known as a DSU.
- 4.6 For a site forming part of a DSU (a **DSU Site**), SEM settlement is based on the reduction of demand as measured at the terminals of the incoming supply to the site. As explained further below, where DSUs are dispatched, the demand reduction is achieved through controlled reduction in the usage of power at the site (for example, by turning off facilities for a short period), through onsite generation or through a combination of the two. Where

a DSU Site involves onsite generation, in certain circumstances excess power may be exported to the distribution system.

***Further background in relation to AGU & DSU***

- 4.7 In August 2008, the Trading and Settlement Code was modified to enable the participation of AGUs in the SEM<sup>8</sup>. A number of specific changes were introduced to enable this participation.
- 4.8 In particular, the modification required any Generator Aggregator to enter into a contract with the appropriate Regulatory Authority to ensure compliance with the suite of SEM documentation that the registrant of a licensed generator unit would have to comply with.
- 4.9 The Utility Regulator published a draft of the standard form contract it proposed for this purpose in 2008 and this was approved by the SEM Committee (with certain specific revisions) in a decision paper published in December 2008<sup>9</sup>. The SEM Committee acknowledged at the time that the use of these regulatory agreements was a short term remedy, pending the introduction of licensing arrangements for Generator Aggregators.
- 4.10 Participation of DSUs in the SEM was already allowed, provided that a DSU Site was not permitted to have a MEC (i.e. it could not export excess power from onsite generation onto the distribution network).
- 4.11 In January 2010, a modification to the Trading and Settlement Code was proposed to provide that a site may qualify as a DSU Site provided the MEC was under 10MW (in line with the position for AGUs)<sup>10</sup>. The modification was approved by the SEM Committee on 8 February 2012.
- 4.12 In September 2010, a further modification to the Trading and Settlement Code was proposed relating to DSUs<sup>11</sup>. In approving the modification in 2012, the SEM Committee amended the proposal to introduce a requirement for the registration of DSUs to be subject to regulatory approval<sup>12</sup>.

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<sup>8</sup> Mod\_05\_08

<sup>9</sup> SEM-08-178

<sup>10</sup> Mod\_04\_011

<sup>11</sup> Mod\_36\_10

<sup>12</sup> SEM Committee decision letter on Mod\_36\_10, dated 3 April 2012

- 4.13 In August 2014, the Utility Regulator consulted on proposals to introduce a more robust and sustainable regulatory framework for AGUs and DSUs. In particular, the Utility Regulator proposed that Generator Aggregators and Dispatchable Demand Customers would be required to hold a modified electricity generation licence, containing licence conditions suitable for regulating the particular activities. The proposal was facilitated by a further modification to the Trading and Settlement Code (taking effect in April 2014) making clear that the requirement to hold a licence may be a condition of regulatory consent to AGU/DSU registration<sup>13</sup>.
- 4.14 In January 2015, the Utility Regulator decided to proceed with its proposal and require the relevant market participants to apply for modified generation licences.
- 4.15 In March/April 2015, the Utility Regulator received representations from NIE Networks relating to congestion issues on its network which NIE Networks believed would be caused by the registration of further sites as part of a DSU. The Utility Regulator considered arguments and proposals which were put forward on the issue by a number of different stakeholders and met with a range of stakeholders, as well as discussing the issue with the Commission for Energy Regulation (**CER**) in the Republic of Ireland (to ensure equality of treatment and consistency of approach across the SEM).
- 4.16 The Utility Regulator set out its minded-to position in a letter dated 23 April 2015<sup>14</sup> and, following a further meeting of stakeholders at which the issues were discussed, set out its final position in a letter dated 30 April 2015<sup>15</sup>. In summary, the Utility Regulator's position (consistent with the position of CER) was that –
- (a) The transmission system operators (**TSOs**) should put in place measures to ensure that a DSU is still dispatchable up to the demand response not associated with a distribution system security issue.
  - (b) It would not be appropriate that a congestion issue that manifests itself under certain conditions should restrict the TSOs' ability to dispatch a demand response under all conditions. Distribution system operators (**DSOs**) should clearly identify the conditions under which a demand response may cause a congestion issue and develop a set of instructions which can be applied by the TSO to avoid dispatch under conditions where a potential risk to system security exists. The

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<sup>13</sup> MOD\_05\_14

<sup>14</sup> Exhibit 6.14

<sup>15</sup> Exhibit 6.15

Utility Regulator set out guiding principles to be followed in relation to instruction sets.

- (c) DSU Sites must comply with instructions from the TSO, including any instructions to limit or avoid the utilisation of demand response from specific sites.

4.17 Having become aware of a need to clarify the policy set out in its final position, on 1 October 2015, the Utility Regulator issued an e-mail<sup>16</sup> to stakeholders containing the following addendum to its final position –

*'With regard to the intended registration of an independent Demand Site for participation within a Demand Side Unit, we require that, where an on-site generator set is to be synchronised and operated to give effect to the delivery of load reduction, the existence of and technical characteristics of that generator set should be accurately reflected in the site connection agreement.'*

*'We would encourage the parties (SONI, NIE and the DRAI) to explore the inclusion of this requirement within either the NI Grid or D-Code'.*

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<sup>16</sup> Exhibit 6.16

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

5.1 The following summary of the factual background is derived from relevant section of the Statement, but has been adapted following comments received on the Statement and comments received on the Provisional Determination. We take the following summary to be accurate and adopt it for the purposes of our determination.

### ***The Applicants***

5.2 Each of the Applicants is the owner/occupier of an IDS, which has onsite diesel generation and capability to export onto the distribution network. Of the Applicants –

- (a) Severfield (NI) Limited and Ready Egg Products Limited currently trade in the SEM as part of an AGU, and
- (b) Dunbia (Northern Ireland) and LGen Power Limited previously traded in the SEM as part of an AGU but no longer do so<sup>17</sup>.

5.3 Prior to implementation of the SEM, a number of the Applicants exported power which they had generated onto the Northern Ireland distribution system under a peak-looping arrangement<sup>18</sup>.

5.4 It is important to note that it is agreed between the Parties that there does not currently exist a valid connection agreement between NIE Networks and any of the Applicants relating to the generator sets which operate (or have operated) as part of an AGU<sup>19</sup>. Ready Egg Products has a valid connection agreement permitting generation from a PV facility at the site, but this is not relevant to the generator which operates as part of an AGU<sup>20</sup>.

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<sup>17</sup> See Complaint, [para 3.2.4](#)

<sup>18</sup> Complaint, [para 3.2.4](#)

<sup>19</sup> Applicants' Responses to Clarification Questions, [para 5.1](#) and NIE Networks' Responses to Clarification Questions, [Answer 14](#)

<sup>20</sup> NIE Networks' Responses to Clarification Questions, [Answer 14](#)

### ***Background to generation as part of an AGU***

- 5.5 During 2008, NIE Networks was approached by Viridian Energy Supply Limited (**VESL**)<sup>21</sup>, which wished to become a Generator Aggregator for a number of sites which had the capability to generate in parallel with NIE Networks' network. The generation capability was originally introduced for the purposes of load reduction only. VESL wished to register these sites as an AGU and trade their generation capacity in the SEM<sup>22</sup>.
- 5.6 NIE Networks held discussions with VESL in relation to the operation and protection requirements for AGUs. For the purpose of these discussions, VESL commissioned a discussion paper by ERA Technology Ltd (the **ERA Technology Report**), the purpose of which was '*to consider whether the proposed change in the mode of operation has an impact upon the protective measures applied at the interface with the utility network*'<sup>23</sup>. The ERA Technology Report contained a number of statements in relation to how the generators at each AGU Site would be operated.
- 5.7 Following consideration of the planning data provided to it (including the ERA Technology Report), NIE Networks agreed to the sites operating as an AGU. NIE Networks has stated that this agreement was provided in writing to VESL in respect of each AGU Site with a standard form letter<sup>24</sup> setting out the terms on which that agreement was provided - this confirmation was provided to the original list of sites in 2008 (which included LGen Power Limited), with individual written confirmation being provided for each subsequent request (including for the other Applicants)<sup>25</sup>.
- 5.8 The Applicants do not accept that such letters were issued to all of their sites<sup>26</sup>, However, NIE Networks has provided a number of signature pages relating to AGU member generators, signed by VESL on behalf of the generator<sup>27</sup> and referring to a letter with the same date as the standard letter which has been provided. These are stated to relate to Severfield (NI) Limited, Dunbia (Northern Ireland) (MPRN 81242568528) and Ready Egg Products Limited.

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<sup>21</sup> Correspondence also refers to 'Energia', but we refer to VESL throughout.

<sup>22</sup> Response, para 6.2

<sup>23</sup> Exhibit 6.22, para 1

<sup>24</sup> Exhibit 6.11

<sup>25</sup> Response, para 6.5

<sup>26</sup> Applicants' Response to Provisional Determination, para 45

<sup>27</sup> Exhibit 6.12

- 5.9 No signature pages have been provided for LGen Power Limited. NIE Networks has stated that L Gen Power Limited was included in the original list of sites and therefore does not have an individual letter.
- 5.10 NIE Networks has stated that the above confirmation of its agreement allowed the generator units to register as an AGU, without inspection of particular units or further protection equipment being fitted<sup>28</sup>.
- 5.11 Each of the Applicants' generators was registered as part of an AGU under the Trading and Settlement Code without the connection agreements in place between NIE Networks and the Applicant being varied to provide for this generation. NIE Networks has explained that, following a notification that a site generator would be joining an AGU, NIE Networks was required to manually set up an AGU MPRN and provide the supplier with meter details<sup>29</sup>.
- 5.12 NIE Networks has explained that it was also necessary<sup>30</sup> for it to provide details of the site to the Generator Aggregator for the purposes of registration, including providing a value for the MEC of the site<sup>31</sup>. The Applicants have provided a redacted copy of a letter from NIE Networks to VESL dated 12 November 2008<sup>32</sup>, which contains a redacted schedule of proposed MEC values. The letter states that –

*'As requested NIE can confirm that we have now completed our assessment of the Energia sites given in the attached schedule in respect of the embedded generation connection arrangements with the NIE network and can now provide the MEC figures for each of these sites. We understand that you require the MEC figures for registration of the Energia AGU with SEMO.'*

- 5.13 At some point following 2010, VESL's Generator Aggregator business was taken on by iPower Solutions Limited (**iPower**) and it became the Generator Aggregator for the Applicants' sites<sup>33</sup>.

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<sup>28</sup> Response, [para 6.5](#)

<sup>29</sup> Response, [para 6.8](#)

<sup>30</sup> It appears to be agreed between the Parties that the MEC is required to be provided (see Complaint, [para 3.2.5](#) and Reply, [page 16](#)). The Applicants have stated that the MEC is required as part of the Operational Readiness Confirmation, referred to above (Applicants' Responses to Clarification Questions, [para 1.9.7](#)).

<sup>31</sup> Response, [para 6.8](#)

<sup>32</sup> Exhibit 6.10

<sup>33</sup> Reply, [page 5](#)

### ***The Applicants' transfer to DSU***

- 5.14 Each of the Applicants seeks to re-register as a part of a DSU with export use, appointing PG as their demand response aggregator. PG has held the relevant modified electricity generation licence since 27 May 2015.
- 5.15 The Applicants have confirmed that the demand reduction at their sites will be achieved through onsite generation (rather than through controlled reduction in the usage of power at the site)<sup>34</sup>. The Applicants seek to export excess power to the distribution system.
- 5.16 In an e-mail dated 3 August 2016<sup>35</sup>, PG requested confirmation from NIE Networks around the circumstances in which the MEC which was '*available for AGU*' could be utilised for '*alternative uses such as DSU... without making [sic] new application for MEC*'.
- 5.17 In an e-mail to PG dated 10 August 2016<sup>36</sup>, NIE Networks stated that –

*'with regards to MEC values, the MEC is attributed to the type of generation at the site ie AGU, Solar, Diesel, Wind etc. is not transferrable between the different types.'*

*'As previously advised If the AGU has been de-registered, the AGU MEC stated is no longer valid for that site and they must re-apply for the MEC again for Diesel operation. There have not been any sites where NIE Networks has allowed an MEC to be transferred from AGU to diesel for DSU operation without the new application...'.'*

- 5.18 In subsequent e-mail correspondence with iPower on 1 September 2016<sup>37</sup>, NIE Networks confirmed that it agreed with iPower that:
- (a) '*MECs granted for AGU participation cannot be utilised for any other purpose*'.
- (b) '*When an IDS deregisters from an AGU the AGU MEC will be withdrawn*'.
- (c) '*The AGU designated MEC cannot be used for DSU participation*'.

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<sup>34</sup> Applicants' Responses to Clarification Questions, para 2.11.1

<sup>35</sup> Exhibit 6.6

<sup>36</sup> Exhibit 6.5

<sup>37</sup> Exhibit 6.6

- 5.19 In a letter to NIE Networks dated 16 September 2016<sup>38</sup>, PG set out in detail a number of concerns. In particular, PG set out its reasons for considering that the above position is flawed. PG set out the negative impact that NIE Networks' position was having on its customers. Representatives from PG and NIE Networks met to discuss this letter on 22 September 2016.
- 5.20 In a letter to PG dated 10 October 2016<sup>39</sup>, NIE Networks set out its detailed response. In particular, this was that –
- (a) In 2008, NIE Networks considered the ERA Technology Report provided on behalf of the generators that were seeking to operate as part of the AGU. The level of risk and network impact associated with operating these generators in this way was based on the mix of load and generation on the distribution system, the time at which the AGU would be dispatched and a theoretical maximum hours of operation. The ERA Technology Report concluded that there was a relatively low probability of an event occurring that would create an unacceptable risk to the network and affect the quality of supply to customers.
  - (b) On the basis of the ERA Technology Report, NIE Networks agreed that these sites could form part of an AGU and a MEC was agreed for each generator unit on the basis of the proposed mode of operation.
  - (c) NIE Networks did not agree that a generator operating as part of a DSU has the same impact on NIE Networks' network as operating as part of an AGU. The level of risk would be changed because the probability of higher levels of export for longer periods is increased for DSU operation. The agreement for operation of the AGU was on the basis of '*minimal*' export onto the system. It was this that allowed NIE Networks to waive the normal requirements for protection equipment.
  - (d) If the mode of operation were changed to DSU, NIE Networks would be required to undertake a review of the connection design, protection requirements and networks capability. This was in accordance with the Distribution Code and Regulation 23 of the Electricity, Safety, Quality and Continuity Regulations (Northern Ireland) 2012.

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<sup>38</sup> Exhibit 6.8

<sup>39</sup> Exhibit 6.3

- (e) Consequently, there were two options for generators of AGU Sites seeking to switch to DSU. They could register as part of a DSU without any ability to export onto NIE Networks' system. Alternatively, they could register in the DSU market with export capacity, but be issued with a zero dispatch instruction set until such time as NIE Networks has assessed the capability of the generator to safely export onto its network and any protection equipment has been upgraded where this is assessed to be appropriate.
- 5.21 NIE Networks concluded that '*...we cannot transfer AGU MECs to DSU operation without following the same process that was agreed by all industry participants for registering a new IDS in the DSU market*'.
- 5.22 NIE Networks also stated that –
- '... any embedded generator currently operating as an AGU should have a Connection Agreement confirming its MEC and in the absence of a Connection Agreement confirming MEC it will not be entitled to move to a DSU with export capacity. So far as technically possible it will however be permitted to retain its existing mode of operation as an AGU subject to any limitations imposed on the AGU mode of operation, and indeed move to other AGU Operators'.*
- 5.23 Representatives from PG and NIE Networks met to discuss this letter on 10 October 2016.
- 5.24 In an e-mail to NIE Networks dated 17 October 2016<sup>40</sup>, PG restated its position that it did not consider that a MEC could be linked to a particular market position and requested confirmation from NIE Networks' understanding of the differences between how an AGU Site and a DSU Site (with export) would manifest on its network.

#### ***Referral of the Dispute to the Utility Regulator***

- 5.25 The Complaint was made to the Utility Regulator on behalf of the Applicants on 22 March 2017. In the Complaint, it was stated that MNI/PG would welcome the opportunity to attend a meeting with NIE Networks, hosted by the Utility Regulator<sup>41</sup>.

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<sup>40</sup> Exhibit 6.9

<sup>41</sup> Complaint, para 3.2.17

- 5.26 The processing of the Complaint was put on hold pending a meeting taking place and the Utility Regulator arranged a meeting between MNI/PG and NIE Networks, which took place on 11 April 2017, but no satisfactory resolution of the Dispute was reached.
  
- 5.27 On 15 May 2017, the Utility Regulator was requested to proceed to determine the Dispute.

## **6      Section Six - Views of the Applicants**

- 6.1 The views of the Applicants are set out in –
- (a) the Complaint, dated 22 March 2017,
  - (b) the Applicants' response to the Utility Regulator's clarification questions of 11 July 2017, dated 25 July 2017,
  - (c) the Reply, dated 22 August 2017, and
  - (d) the Applicants' response to the Provisional Determination (as sent to the Parties on 22 September 2017), dated 6 October 2017.

6.2 We have read all the above documents in full and have had full regard to all of these submissions. The following summary of the key elements of those submissions is derived from the relevant section of the Statement, but has been adapted following comments received in response to the Provisional Determination. We adopt it as accurate for the purposes of this provisional determination.

### ***Summary***

- 6.3 The Applicants' principal arguments are that, by refusing to confirm the MEC for the Applicants' sites to facilitate their registration as DSU Sites (and by effectively blocking the registration of those sites with the relevant MEC), NIE Networks is –
- (a) unduly discriminating against generators seeking to be registered as DSU Sites, in favour of AGU Operators, in breach of its duty under article 25(2) of the Directive, and
  - (b) failing to provide generators seeking to be registered as DSU Sites with information they need for efficient access to, including use of, the system, in breach of its duty under article 25(3) of the Directive.

### ***SEM Registration and MEC***

- 6.4 The Applicants' position is that NIE Networks is seeking to prevent them from registering their sites as DSU Sites under the Trading and Settlement Code, because registration

requires them to confirm the MEC for the site and NIE Networks is refusing to confirm this, but is adopting the position that the MEC will be '*withdrawn*' on such registration<sup>42</sup>.

- 6.5 The Applicants' view is that NIE Networks has no right to determine how their generators are registered under the Trading and Settlement Code and to interfere in what they submit is simply a change in market position<sup>43</sup>. Only the Utility Regulator has the power to authorise registration as a DSU Site and the Utility Regulator has given such authority in this case through the granting of a licence to PG<sup>44</sup>.
- 6.6 The Applicants note that the definition of MEC in the Trading and Settlement Code is –
 

*'the maximum export capacity of a site in MW as defined under the site's Connection Agreement or equivalent, or in the case of an Aggregated Generator, the Aggregated Maximum Export Capacity of all sites containing Generators that form part of the Aggregated Generator'.*
- 6.7 The Applicants state that MEC has a discrete and binary value and that value cannot vary with the type of generator unit registered in the SEM (e.g. DSU or AGU)<sup>45</sup>. A maximum export capacity value is typically offered by NIE Networks following a technical study of the technical impact of the export onto the distribution network. If the connection offer is accepted, this value will be included in a connection agreement for the site, which will also include any necessary operational limits<sup>46</sup>.
- 6.8 There are no written and signed connection agreements relating to the generators at the Applicants' sites. However, in the Applicants' view NIE Networks confirmed in 2008 (and thereafter)<sup>47</sup> what the relevant MEC was for each site and those MECs have not changed<sup>48</sup>. NIE Networks was aware of the provisions of the Trading and Settlement Code and the above definition when it gave that confirmation<sup>49</sup>.

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<sup>42</sup> Complaint, para 3.2.7 and Applicants' Responses to Clarification Questions, para 1.9.8

<sup>43</sup> Complaint, para 4.3.36(b)

<sup>44</sup> Complaint, paras 4.3.12 – 4.3.14

<sup>45</sup> Applicants' Responses to Clarification Questions, para 1.9.4

<sup>46</sup> Applicants' Responses to Clarification Questions, para 1.9.5

<sup>47</sup> Exhibit 6.10

<sup>48</sup> Applicants' Responses to Clarification Questions, para 1.9.8

<sup>49</sup> Reply, page 4

- 6.9 In the Applicants' submission, the letter in which NIE Networks confirmed the relevant capacity values was '*equivalent*' to a connection agreement and so set the MECs for the relevant sites<sup>50</sup>.
- 6.10 In the alternative, the Applicants' submit that although there is no written connection agreement between them and NIE Networks, a '*deemed*' contract has arisen between them in which provisions are implied by the conduct of the parties<sup>51</sup>. This '*deemed*' contract entitles the Applicants to the allocated capacity value and that value, being defined under the '*deemed*' connection agreement, falls within the above definition of MEC. The Applicants set out a number of arguments in support of their submission that a '*deemed*' contract has arisen<sup>52</sup>.
- 6.11 The Applicants describe why, in their view, the '*deemed*' contracts referred to above do not prevent them from registering as DSU Sites or give NIE Networks the right to determine whether they should be so registered<sup>53</sup>.
- 6.12 For these reasons, the Applicants do not consider that the MEC should be withdrawn if they register as DSU Sites.

### ***Discrimination***

- 6.13 The Applicants state that NIE Networks is content to allow AGU Sites to retain their MEC, but is adopting the position that the MEC will be '*withdrawn*' on DSU registration. To retain an ability to export –
- (a) The Applicants would be required to enter into connection agreements with NIE Networks – this would mean that the Applicants would go to the back of the queue for network capacity and, given that the network is saturated, the resulting MEC is likely to be zero<sup>54</sup>.

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<sup>50</sup> Reply, pages 4 and 13

<sup>51</sup> Complaint, para 4.3.19

<sup>52</sup> Complaint, paras 4.3.15 – 4.3.21

<sup>53</sup> Complaint, paras 4.3.27 – 4.3.35

<sup>54</sup> Applicants' Responses to Clarification Questions, para 10.2

- (b) NIE Networks is likely to impose additional requirements, such as NVD protection, at considerable expense to the Applicants<sup>55</sup>.
- 6.14 The Applicants' view is that NIE Networks taking the above approach for DSU Sites, and not for AGU Sites, is discriminatory<sup>56</sup>. The Applicants accept that a generator at a demand site should not be paralleled to the distribution network without NIE Networks' agreement. However, NIE Networks should not take a different approach to giving its agreement on the basis of a generator being an AGU Site or a DSU Site<sup>57</sup>.
- 6.15 The Applicants have set out a number of reasons why different treatment is not warranted, including the following points –
- (a) In switching from AGU to DSU, the Applicants are not seeking any additional rights<sup>58</sup>.
  - (b) AGU and DSU are not different modes of operation or technology type. In both cases, the Applicants' generators are embedded diesel generators<sup>59</sup>. A Switch from AGU to DSU is merely a switch in market position.
  - (c) The switch from AGU to DSU will not involve any physical change to the connection configuration<sup>60</sup>. There will be different market settlement points, but this does not impact on network risk<sup>61</sup> and no physical change is required<sup>62</sup>.
  - (d) Contrary to NIE Networks' submissions and the report it has procured<sup>63</sup>, the switch would not lead to a change in the expected hours of operation of the generator<sup>64</sup> and generation will continue to typically serve any on-site demand first<sup>65</sup>. To the extent any increased network risk would follow from controlled

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<sup>55</sup> Applicants' Responses to Clarification Questions, [para 10.3](#)

<sup>56</sup> Complaint, [para 4.3.2](#)

<sup>57</sup> Reply, [page 17](#)

<sup>58</sup> Reply, [page 2](#)

<sup>59</sup> Complaint, [paras 3.2.10 and 4.3.4](#)

<sup>60</sup> Reply, [page 19](#) and Applicants' Responses to Clarification Questions, [para 4.1](#)

<sup>61</sup> Reply, [page 21](#)

<sup>62</sup> Applicants' Responses to Clarification Questions, [para 4.3](#)

<sup>63</sup> Exhibit 6.24

<sup>64</sup> Reply, [page 19](#)

<sup>65</sup> Applicants' Responses to Clarification Questions, [para 2.9](#)

reduction in the usage of power, as noted above none of the Applicants is planning to undertake controlled reduction as part of a DSU<sup>66</sup>.

- (e) Where NIE Networks has a network concern, this can be resolved through it issuing instruction sets to SONI to limit dispatch<sup>67</sup>.
  - (f) The Utility Regulator's final position, communicated in April 2015, was such that there should have been no further delay to DSU registration<sup>68</sup>.
- 6.16 The Applicants note the requirement for a generator operating in parallel with NIE Networks' network to have a connection agreement, but disagrees that there is any basis for AGU Sites to benefit from an '*alternative arrangement*'<sup>69</sup>. This applies similarly to any requirement for network protection<sup>70</sup>.
- 6.17 In particular, the Applicants make the following points in relation to NIE Networks' position that AGU Sites benefit from an alternative arrangement and the MEC for each site is limited by that arrangement:
- (a) Clause 2.33 of the Trading and Settlement Code requires the provision of evidence of a connection agreement on registration. This applies to both DSU Sites and AGU Sites<sup>71</sup>.
  - (b) It was never NIE Networks' role to consent to a generating unit operating in the SEM. NIE Networks' role is to offer terms for connection and confirm relevant data for the purpose of SEM registration<sup>72</sup>.
  - (c) NIE Networks states that the Applicants' sites (and other sites) only operate without connection agreements on the basis that they operate in accordance with the ERA Technology Report. However, until the processing of the Complaint, the Applicants were unaware of the terms of the ERA Technology Report<sup>73</sup>.

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<sup>66</sup> Applicants' Responses to Clarification Questions, [para 2.11](#)

<sup>67</sup> Reply, [pages 3 and 15](#)

<sup>68</sup> Reply, [page 2](#)

<sup>69</sup> Reply, [page 5](#)

<sup>70</sup> Reply, [page 21](#)

<sup>71</sup> Reply, [page 18](#)

<sup>72</sup> Reply, [page 9](#)

<sup>73</sup> Applicants' Responses to Clarification Questions, [para 9.1](#)

- (d) The Applicants are aware of no evidence that the AGU Sites agreed to being restricted to operate in accordance with the ERA Technology Report<sup>74</sup>, noting that neither NIE Networks' letter<sup>75</sup> setting out the MEC values for registration nor its standard form letter<sup>76</sup> mentions it<sup>77</sup>.
  - (e) To the extent NIE Networks has allowed the arrangement for AGUs as an '*interim solution*', this has now been in place for nine years<sup>78</sup>.
- 6.18 It follows from the above that the Applicants submit that there is no basis for different treatment of AGU Sites and DSU Sites<sup>79</sup> and NIE Networks is discriminating against applicant DSU Operators by failing to confirm the MEC for those sites<sup>80</sup>.

#### ***Provision of Information***

- 6.19 The Applicants state that NIE Networks has provided incomplete, incorrect and, in some cases, misleading information about the MEC allocated to their sites<sup>81</sup>. Specifically, NIE Networks has provided incorrect data about MEC values and their applicability to Severfield (NI) Ltd.
- 6.20 The Applicants' view is that NIE Networks has acted in breach article 25(3) of the Directive, by failing to provide generators seeking to be registered as part of a DSU with information they need for efficient access to, including use of, the system. The Applicants submit that the lack/inaccuracy of information provided by NIE Networks makes it extremely difficult for them to negotiate with aggregators, because they do not know what MEC has been allocated to their site<sup>82</sup>.

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<sup>74</sup> Applicants' Responses to Clarification Questions, para 8.3

<sup>75</sup> Exhibit 6.10

<sup>76</sup> Exhibit 6.11

<sup>77</sup> Reply, pages 9 - 10

<sup>78</sup> Reply, page 7

<sup>79</sup> Reply, page 5

<sup>80</sup> Reply, page 2

<sup>81</sup> Complaint, para 3.2.11 and paras 4.3.38 – 4.3.41

<sup>82</sup> Complaint, paras 3.2.12 – 3.2.13

### ***Enforcement Options***

- 6.21 The Applicants submit that the discrimination which it identified in the Complaint as a breach by NIE Networks of its obligations under the Directive also constitutes a breach of Condition 15 of the Licence<sup>83</sup>.
- 6.22 The Applicants submit that the Utility Regulator should make an enforcement order for the purpose of securing compliance with Condition 15, to contain such provision as the Utility Regulator deems necessary<sup>84</sup>.
- 6.23 In response to the Utility Regulator's clarification questions, the Applicants stated that an enforcement order could also relate to Conditions 16, 27 and 28<sup>85</sup>.

### ***Response to the Provisional Determination***

- 6.24 In responding to the Provisional Determination, the Applicants reiterated a number of the points outlined above. In addition, the Applicants make the following key points.
- 6.25 In relation to its allegation that NIE Networks has breached article 25(2) of the Directive, the Applicants made the following points –
  - (a) Following the Provisional Determination, the Applicants have requested confirmation of the capacity values which were previously set out in letters by NIE Networks. The value has only been provided for one site. However, in any case, even if this information is presented to SONI/SEMO for the purpose of DSU registration, NIE Networks will continue to frustrate that registration through the use of its discretionary powers<sup>86</sup>.
  - (b) The SEM registration process requires input from SONI in its role as TSO, and SONI consults with NIE Networks in its role as DSO<sup>87</sup>. In particular, in accordance with the provisions of the Trading and Settlement Code<sup>88</sup>, SONI provides the Operational Certificate to SEMO as part of a validation role. The Operational Certificate contains the MEC for the site, as well as other relevant information and

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<sup>83</sup> Complaint, paras 5.2.1 – 5.2.2

<sup>84</sup> Complaint, para 5.1

<sup>85</sup> Applicants' Responses to Clarification Questions, para 1.9.12

<sup>86</sup> Applicants' Response to Provisional Determination, para 9

<sup>87</sup> Applicants' Response to Provisional Determination, paras 10-14

<sup>88</sup> Agreed Procedure 1, paras 3.2.4 and 3.2.5

the effective registration of the MEC cannot be completed unless the MEC is accepted in this process<sup>89</sup>.

- (c) Prior to the issue of the Operational Certificate, an application process must be completed to collect the required planning data and this also includes a procedure to test compliance with the Connection Conditions<sup>90</sup>. The planning data required is set out in the Grid Code. In this process, the MEC values provided by the DSU Operator are checked by SONI with NIE Networks. This provides NIE Networks with an opportunity to object to the DSU registration.
- (d) This process has provided NIE Networks with the opportunity to inappropriately exercise discretionary powers – it was not given sufficient consideration in the Provisional Determination<sup>91</sup>.
- (e) Both NIE and SONI, in their respective roles, have a duty to ensure that the stability and the security of the network are not compromised<sup>92</sup>. However, the issue of the technical impact of DSUs on the distribution network has already been considered by the Utility Regulator (and CER) in its letter dated 30 April 2015<sup>93</sup>. A key point made by the regulators in that letter was that the network issues arising were not such as to prevent an IDS in Northern Ireland from registering as part of a DSU. Rather any concerns should be addressed in the dispatch process<sup>94</sup>.
- (f) The Applicants are appalled that, 2½ years after that letter, the approach adopted by the Utility Regulator is not being followed<sup>95</sup>. NIE Networks is continuing to insist that MEC values change to zero on DSU registration and this is an inappropriate use of its powers. This has caused, and continues to cause, discrimination against IDSs that wish to use their MEC for AGU registration and discrimination against Demand Response Aggregators in favour of Generator Aggregators<sup>96</sup>.

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<sup>89</sup> Applicants' Response to Provisional Determination, [para 15](#)

<sup>90</sup> Applicants' Response to Provisional Determination, [paras 16-18](#)

<sup>91</sup> Applicants' Response to Provisional Determination, [para 21](#)

<sup>92</sup> Applicants' Response to Provisional Determination, [paras 24 and 25](#)

<sup>93</sup> Exhibit 6.15

<sup>94</sup> Applicants' Response to Provisional Determination, [para 27](#)

<sup>95</sup> Applicants' Response to Provisional Determination, [para 28](#)

<sup>96</sup> Applicants' Response to Provisional Determination, [para 29](#)

6.26 The Applicants also make the following additional points in relation to its allegation that NIE Networks has breached article 25(3) of the Directive –

- (a) It was completely clear to NIE Networks what was being requested when the MEC values were being requested on behalf of the Applicants. It was always the MEC, as defined in the Trading and Settlement Code, which was being referred to. It is a well-established and understood industry term<sup>97</sup>.
- (b) To the extent that some of the correspondence may be confusing, it was NIE Networks which '*muddied the waters*', by insisting that MECs were only applicable to one type of market registration. Inexperienced staff of PG were required to respond to NIE Networks on this<sup>98</sup>.
- (c) Even though MEC is a pre-existing figure (or figures) defined in the relevant document, NIE Networks has deliberately provided a value of zero for IDSs which wish to register as part of a DSU or stated that the value was valid only for AGU registration<sup>99</sup>. This is clearly evidenced by the spreadsheet exhibited to the Complaint<sup>100</sup>, where it was clear what information was required to be provided<sup>101</sup> and also by the correspondence<sup>102</sup> exhibited to the Complaint<sup>103</sup>.
- (d) In conclusion, by providing these responses, NIE Networks has deliberately provided false information, in breach of article 25(3) of the Directive<sup>104</sup>.

6.27 Finally, the Applicants refer to the alleged breach of competition law by NIE Networks which was raised in the Complaint (but not referred to in the Provisional Determination) and anticipates that consideration of this allegation will be included in our determination<sup>105</sup>.

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<sup>97</sup> Applicants' Response to Provisional Determination, paras 32-34

<sup>98</sup> Applicants' Response to Provisional Determination, para 35

<sup>99</sup> Applicants' Response to Provisional Determination, paras 36, 37 and 41

<sup>100</sup> Exhibit 6.7

<sup>101</sup> Applicants' Response to Provisional Determination, paras 38 and 39

<sup>102</sup> Exhibit 6.5 and Exhibit 6.6

<sup>103</sup> Applicants' Response to Provisional Determination, paras 42 and 43

<sup>104</sup> Applicants' Response to Provisional Determination, para 44

<sup>105</sup> Applicants' Response to Provisional Determination, paras 4 and 46 - 48

## 7 Section Seven - Views of NIE Networks

- 7.1 The views of NIE Networks are set out in -
- (a) its letter to the Utility Regulator dated 8 March 2017,
  - (b) the Response, dated 19 June 2017,
  - (c) NIE Networks' response to the Utility Regulator's clarification questions of 11 July 2017, dated 25 July 2017, and
  - (d) NIE Networks' response to the Statement, dated 13 September 2017.
- 7.2 We have read all the above documents in full and have had full regard to all of these submissions. The following summary of the key elements of those submissions is derived from the relevant section of the Statement, as adapted following consideration of NIE Networks' response to the Statement. We adopt it as accurate for the purposes of our determination.
- 7.3 NIE Networks did not comment on the Provisional Determination. Our understanding is that its position remains as set out in its previous submissions.

### ***Summary***

- 7.4 NIE Networks' principal arguments can be summarised as follows –
- (a) While NIE Networks previously confirmed MEC values for the Applicants' generators to be registered as AGU Sites, this was solely for the purpose of that registration and the Applicants have no right to a particular MEC value in the absence of a connection agreement entitling the generator to a particular export capacity.
  - (b) There were valid reasons for NIE Networks allowing the Applicants' generators to be registered as AGU Sites in the absence of connection agreements. However, this was only allowed on the basis that the sites operated in accordance with the ERA Technology Report. To switch from AGU to DSU would be to operate on a different basis. The Applicants are perfectly entitled to switch, but (because they would no longer be operating in accordance with the ERA Technology Report),

they must enter into connection agreements if they are to export power onto NIE Networks' network. There are greater system risks linked with DSU operation and so further network protection may also be required.

- (c) Consequently the Applicants are not entitled to what they are requesting and the AGU Sites seeking DSU registration are subject to the same requirements as any other site seeking such registration.
- 7.5 NIE Networks submits that there is a lack of detail in relation to the allegations around its provision of information, but states that it does not believe that it has provided any misleading information.

#### ***Comments on process***

- 7.6 NIE Networks has raised a number of concerns in relation to the Complaint<sup>106</sup>. In particular, in NIE Networks' view -
- (a) A complaint being brought by four applicants is contrary to the Procedure.
  - (b) A complaint being brought by two representatives is contrary to the Procedure.
  - (c) The Complaint did not meet the requirements for the making of a Complaint in the Procedure, which requires detailed information and supporting evidence regarding the basis of any complaint.

#### ***Jurisdiction***

- 7.7 In NIE Networks' view, there are a number of issues raised in the Complaint which are not proper issues for determination by the Utility Regulator under article 31A of the Electricity Order<sup>107</sup>. These include the Applicants' requests for determination whether NIE Networks has a right to determine whether a particular generator can be registered as an AGU Site or a DSU Site in the SEM and whether NIE Networks has a right to cancel a registered MEC<sup>108</sup>.

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<sup>106</sup> Response, para 2

<sup>107</sup> Response, para 3

<sup>108</sup> Complaint, para 3.1.1

- 7.8 In NIE Networks' view the Utility Regulator does not have jurisdiction to determine whether any '*deemed contract*' exists between NIE Networks and an Applicant in relation to the allocated export capacity for a site<sup>109</sup>.

### ***SEM Registration and MEC***

- 7.9 NIE Networks states that any Applicant is not prevented from registering its site as a DSU Site under the Trading and Settlement Code, provided it accepts that, pending a valid connection agreement being signed, it cannot export onto the distribution network<sup>110</sup>. NIE Networks issues a zero dispatch instruction set for this purpose<sup>111</sup>. Once a connection agreement is in place, the Applicant will be able to export power in line with a further instruction set issued by NIE Networks<sup>112</sup>. NIE Networks is not preventing DSU registration.
- 7.10 In NIE Networks' view, the Applicants are treating a MEC value used for the purposes of AGU registration as if that value amounted to a proprietary right to export onto its network<sup>113</sup>. NIE Networks' view is that this is not the case – only an AGU Site with a signed/valid connection agreement confirming a maximum export capacity value (which cannot be terminated) has an absolute right to export power to that capacity value<sup>114</sup>.
- 7.11 NIE Networks describes that it is a fundamental principle of network safety that any demand customer cannot connect parallel generation to the distribution network without its consent<sup>115</sup> (referring, for example, to regulation 23 of the Electricity Safety, Quality and Continuity Regulations (Northern Ireland) 2012).
- 7.12 NIE Networks states that its consent is evidenced by a valid connection agreement which confirms that the proposed generation facility has been inspected, that its technical characteristics are approved and that it has a defined maximum export capacity. In NIE Networks' view, the Complaint constitutes a rejection by the Applicants of the

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<sup>109</sup> Response, para 3.3

<sup>110</sup> Response, paras 6.9 and 8.7

<sup>111</sup> Response, paras 8.7

<sup>112</sup> Response, para 6.9

<sup>113</sup> Response, para 5.2

<sup>114</sup> Response, paras 5.3 and 5.4

<sup>115</sup> Response, para 5.4

requirements which NIE Networks imposes for generators to operate in parallel with its network<sup>116</sup>.

- 7.13 The Applicants operated as AGU Sites without connection agreements, because an '*alternative arrangement*' was put in place to allow them to operate in a limited manner (e.g. with limited running time)<sup>117</sup>. As part of this arrangement, NIE Networks confirmed MEC values for the sole purpose of allowing the AGU Sites to be registered in the SEM. This did not mean that local network conditions would accept unconditional and unrestricted export and did not constitute an agreement for a maximum export capacity which would be available in all circumstances<sup>118</sup>. NIE Networks submits that this arrangement is supported by the terms of the standard form letter setting out the terms on which that agreement was provided<sup>119</sup>.
- 7.14 NIE Networks' view is that, in the absence of a valid connection agreement permitting it, a MEC value cannot be transferred between different types of market operation (such as AGU and DSU)<sup>120</sup>. Further, NIE Networks submits that the arguments that the Applicants have a '*deemed contract*' with it giving them a legal right to export capacity up to the registered MEC values are entirely without merit<sup>121</sup>.
- 7.15 NIE Networks refers to its letter dated 17 October 2016 to all AGU/DSU Operators<sup>122</sup> in which NIE Networks agreed to hold the MEC for an agreed period to allow the AGU Site the opportunity to investigate necessary protection up-grade required for DSU operation and confirmed that if the site did not proceed with DSU operation it would retain its MEC for AGU operation only<sup>123</sup>.

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<sup>116</sup> Response, [paras 5.1 and 8.1](#)

<sup>117</sup> Response, [paras 5.4 and 6.8](#)

<sup>118</sup> Response, [para 6.8](#) and NIE Networks' Responses to Clarification Questions, [page 2](#)

<sup>119</sup> NIE Networks' Responses to Clarification Questions, [page 3](#)

<sup>120</sup> Response, [para 8.3](#)

<sup>121</sup> Response, [para 8.8](#)

<sup>122</sup> Exhibit 6.18

<sup>123</sup> Response, [para 8.5](#)

### ***Discrimination***

- 7.16 In NIE Networks' view, while the Applicants are not entitled to retain the MEC values registered for AGU Sites in registering as DSU Sites, the fact that these are different classes of system user explains the difference of treatment<sup>124</sup>.
- 7.17 NIE Networks describes the background behind the '*alternative arrangement*' in place for a number of AGU Operators, which have been able to operate without valid connection agreements being put in place<sup>125</sup>. In essence, the ERA Technology Report set out a number of limitations on how the AGU Sites would be operated (including a provision that the sites would be dispatched for less than 50 hours per annum)<sup>126</sup>.
- 7.18 This formed part of the planning data on which NIE Networks concluded that it would consent to these AGU Sites operating (as the operating conditions represented a low risk to the network). However, NIE Networks' consent was conditional on the operator acting in accordance with the ERA Technology Report<sup>127</sup>. The AGU Sites operate on a '*grace and favour basis*'<sup>128</sup>.
- 7.19 NIE Networks notes that the alternative to the above arrangement would mean that it would have been required to offer firm access capacity to each site for the requested maximum export capacity. This would have blocked capacity for other parties to connect to the network and NIE Networks submits that this would not have been efficient management of its network<sup>129</sup> and would have prejudiced the development of generation from renewable sources<sup>130</sup>.
- 7.20 NIE Networks submits that a transfer of a site from being registered as an AGU Site to being registered as a DSU Site does not fall within the alternative arrangement for which its consent was given. NIE Networks sets out a number of reasons for this, including the following –

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<sup>124</sup> NIE Networks' Response to the Statement, [para 2.16](#)

<sup>125</sup> Response, [para 6](#)

<sup>126</sup> Response, [para 6.4](#)

<sup>127</sup> Response, [para 6.5](#)

<sup>128</sup> NIE Networks' Responses to Clarification Questions, [page 4](#)

<sup>129</sup> In accordance with its duty under article 12 of the Electricity Order.

<sup>130</sup> Response, [para 6.6](#)

- (a) The assumptions set out in the ERA Technology Report will no longer be valid<sup>131</sup>. In particular, DSU operation will lead to the generator being operational on a frequent basis<sup>132</sup>. In any case, while the Applicants have indicated the proposed typical or anticipated mode of operation for their generation set, it is the potential of each set to operate on an increasing or indeed unlimited basis that must be taken into account<sup>133</sup>.
  - (b) An independent assessment<sup>134</sup> of the level of network risk associated with transferring AGU Sites to DSU Sites (conducted by EA Technology Ltd) has concluded that the level of network risk may be such that it could be advisable for NIE Networks to undertake a review of each site to determine appropriate connection and operational conditions<sup>135</sup>.
  - (c) The switch from AGU Site to DSU Site requires the generator metering to be moved due to a change of settlement point, and NIE Networks is required to review this modification pursuant to obligations on it in the Distribution Code<sup>136</sup>.
- 7.21 In NIE Networks' view, the above risks justify its requirement for operators to enter connection agreements prior to exporting onto its network as a part of a DSU. The risks may also justify NVD protection being required at the site<sup>137</sup>.
- 7.22 NIE Networks also sets out other reasons why a connection agreement is required if the Applicants wish to register as DSU Sites and export power onto its network. In particular, NIE Networks states that –
- (a) It is a requirement of the Grid Code<sup>138</sup> that a DSU Operator must hold a valid connection agreement for it to generate in parallel with the distribution network<sup>139</sup>.

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<sup>131</sup> Response, para 8.6.2

<sup>132</sup> NIE Networks' Responses to Clarification Questions, page 1

<sup>133</sup> NIE Networks' Response to the Statement, para 2.14

<sup>134</sup> Exhibit 6.24

<sup>135</sup> Response, para 8.6.3

<sup>136</sup> Response, para 8.6.1

<sup>137</sup> NIE Networks' Responses to Clarification Questions, page 5

<sup>138</sup> See PC.B3.3.3(xvi) of the Grid Code.

<sup>139</sup> Response, para 7.2

- (b) The requirement for issues relating to the operation of a DSU to be reflected in a connection agreement was acknowledged by the Utility Regulator in the addendum to its final position<sup>140</sup>.
- 7.23 It follows that, in NIE Networks' view, the alternative arrangement in place for AGU Sites does not subsist on a switch to registration as a DSU Site. There are valid reasons for the Applicants being required to enter into connection agreements to be able to export onto NIE Networks' network as part of a DSU. There is consequently no discrimination. Rather, the Applicants are seeking preferential treatment.

***Provision of Information***

- 7.24 NIE Networks has described the various actions which it has taken in response to requests for information<sup>141</sup>. In its view, it has not provided misleading information to any Applicants (although it accepts that information provided to LGen Power Limited was capable of being misinterpreted).
- 7.25 NIE Networks states that there is a lack of detail and supporting evidence in the Complaint to assist it in responding<sup>142</sup>. In addition, NIE Networks notes that some of the information referred to in the Complaint appears to be information which does not relate to the Applicants (and is therefore not relevant to the Dispute).

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<sup>140</sup> Response, paras 7.1 and 8.3

<sup>141</sup> Response, para 9

<sup>142</sup> Response, para 9.1

## **8      Section Eight - Issues to be Determined**

- 8.1    The following are the issues to be determined by the Utility Regulator, as set out in our Provisional Determination. The Parties have had an opportunity to comment on this list of issues, but made no comment on them.

### ***Issues for Determination***

- 8.2    The issues for determination by the Decision-Makers in respect of the Dispute are –

- (a)    whether the Dispute relates to the treatment of different system users or classes of system user, as referred to in article 25(2) of the Directive,
  - (b)    assuming the Dispute does relate to such treatment -
    - (i)    how AGU Operators are being treated, and
    - (ii)    how applicant DSU Operators are being treated,
- in relation to the matters which are the subject of the Dispute,
- (c)    whether NIE Networks is discriminating between system users or classes of system user, as referred to in article 25(2) of the Directive,
  - (d)    whether the Utility Regulator should exercise any power or duty in relation to the Dispute regarding article 25(2) of the Directive,
  - (e)    whether NIE Networks is breaching its duty to provide information needed for efficient access to the system, as referred to in article 25(3) of the Directive, and
  - (f)    whether the Utility Regulator should exercise any power or duty in relation to the Dispute regarding article 25(3) of the Directive.

## 9 Section Nine – Our Determination

- 9.1 To determine the Dispute, there are a number of issues for determination (as set out in Section Eight). We address each of these issues in turn.

### ***Preliminary Issues***

- 9.2 Before we do this, we deal with a number of preliminary issues. We acknowledge, as noted in Section Seven above, that NIE Networks raised a number of concerns in relation to the Complaint. In particular, NIE Networks expressed concern in relation to the number of applicants and the number of representatives. It submitted that, in its view, the Complaint did not meet the requirements of the Procedure<sup>143</sup>.
- 9.3 However, the Parties were informed that the Utility Regulator had accepted the Complaint for determination by means of a letter dated 2 June 2017, and we understand that these submissions by NIE Networks were fully considered before this decision was made. Therefore, while we take notice of the submissions, we make no further decision in relation to them. The Complaint was accepted, and the Utility Regulator is now required under article 31A of the Electricity Order to determine the Dispute.
- 9.4 It is important to reiterate the nature of the request for a determination which was set out in the Complaint and what the Utility Regulator accepted for determination. This is important because, in their response to the Provisional Determination<sup>144</sup> (and previously<sup>145</sup>), the Applicants have questioned why this process has not involved consideration of the allegations of breaches of competition law which were included in the Complaint<sup>146</sup>.
- 9.5 The complaint which has been accepted for determination is a complaint under article 31A of the Electricity Order. The Parties were informed of this in the Utility Regulator's letter dated 2 June 2017. That letter was clear that the complaint relating to competition law had not been accepted for determination. We have not been appointed to make any determination in relation to that complaint and so do not comment on it.

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<sup>143</sup> Response, para 2

<sup>144</sup> Applicants' Response to Provisional Determination, paras 4 and 46 - 48

<sup>145</sup> Applicants' Responses to Clarification Questions, paras 1.1 – 1.3

<sup>146</sup> Complaint, para 5.4

- 9.6 Article 31A of the Electricity Order implements article 37(11) of the Directive in domestic law. It provides a mechanism for a complaint to be brought against (among others) a distribution system operator in relation to that operator's obligations under the Directive. A complaint which can be brought must be '*wholly or mainly*' a complaint regarding an obligation under the Directive. In other words, there may be ancillary aspects of the complaint, but the core of the complaint must relate to the Directive.
- 9.7 The Directive imposes a number of obligations on distribution system operators, such as NIE Networks, and these obligations are related to the operation of its network, i.e. to the activity of the distribution system operator acting in its capacity as such.
- 9.8 In the Complaint, the Applicants allege that NIE Networks has breached its obligations under articles 25(2) and 25(3) of the Directive.

***Whether the Dispute relates to the treatment of different system users or classes of system user, as referred to in article 25(2) of the Directive.***

- 9.9 Article 25(2) of the Directive provides that '*...[the distribution system operator] must not discriminate between system users or classes of system users, particularly in favour of its related undertakings*'.<sup>147</sup>
- 9.10 Article 25(2) is therefore engaged in cases which concern the treatment by NIE Networks, acting in its capacity as a distribution system operator, of system users or classes of system user.
- 9.11 In the Complaint, the Applicants contended that NIE Networks is '*discriminating against a class of system user, being those who wish to utilise their existing allocated MEC for DSU purposes*'<sup>148</sup>.
- 9.12 It was also stated that:
- (a) '*[t]he SEM registration procedure as set out in the Trading and Settlement Code... requires that a Maximum Export Capacity ("MEC") is allocated to an IDS for the purposes of registering a Generator Unit*'<sup>148</sup>; and

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<sup>147</sup> Complaint, para 4.3.37

<sup>148</sup> Complaint, para 3.2.5

- (b) '*...[NIE Networks] has adopted a position... that the MECs allocated to such customers are only valid for operation as an AGU, and that the MEC will be withdrawn from any IDS customers who wish to operate in the DSU market...*'<sup>149</sup>.
- 9.13 In other words, the Applicants' objective, which in their contention is being frustrated by NIE Networks' treatment of them, is to secure the registration of their sites as part of a DSU with export capacity under the Trading and Settlement Code. This requires the DSU Operator to specify a MEC, but that MEC is relevant solely for the purposes of the Trading and Settlement Code.
- 9.14 The Applicants' objective is not to change the manner in which they use the system, but merely to secure for their sites a particular form of registration in the SEM (the wholesale market for electricity on the island of Ireland). This is stated clearly in the Complaint – '*...the switch from AGU to DSU operation is simply a change of market position...*'<sup>150</sup>. The subject-matter of the Complaint is the alleged treatment of the Applicants by NIE Networks which is preventing them from achieving that market registration.
- 9.15 It follows that, while the Complaint is brought (under article 31A) as an allegation that NIE Networks is breaching its obligations under the Directive in relation to the operation of its distribution network, the treatment involved in fact relates not to the distribution network but to access to the wholesale market.
- 9.16 This fact taken by itself led us to question whether the Complaint, insofar as it alleged discriminatory treatment, was a complaint that was properly capable of being determined under article 31A, in line with the Applicants' request. We would not generally expect that a complaint under article 31A would relate to wholesale market registration.
- 9.17 However, if the Trading and Settlement Code were drafted in such a way as to provide NIE Networks (in its capacity as distribution system operator) with a power to determine whether a site connected to its network could benefit from a particular category of wholesale market registration, or to determine the nature of such a registration, the use of that power may well constitute a form of treatment of system users such that article 25(2) of the Directive would be engaged.

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<sup>149</sup> Complaint, para 3.2.7

<sup>150</sup> Complaint, para 3.2.10

- 9.18 Notwithstanding this, it is agreed between the Parties that NIE Networks does not have a power to prevent the Applicants' sites from being registered as part of a DSU<sup>151</sup>.
- 9.19 In relation to the issue of a MEC, we note that the Applicants' summary of the Complaint was that it related to NIE Networks' '*refusal to allow the Applicants... to transfer Maximum Export Capacity*'<sup>152</sup>. The starting premise of the Complaint is that NIE Networks has a power to allow such a transfer, but that it is using that power inappropriately. As noted above, this relates to the allocation of MECs by NIE Networks for the purposes of SEM registration.
- 9.20 In addition, NIE Networks has stated that:

*'... In fact as previously stated NIE Networks is not determining SEM status since it permits DSU registration. It is however restricting power export pending the site being assessed and approved for unconstrained power export up to the MEC value and a valid connection agreement being signed'*<sup>153</sup>.

- 9.21 It appears from this that NIE Networks also considers that it has a power to control the registered MEC.
- 9.22 We note that NIE Networks has submitted that the issue of whether NIE Networks has a power to cancel a registered MEC is not a proper issue for the Utility Regulator to determine<sup>154</sup>. We do not agree with this submission, for the reasons set out above. It is proper for the Utility Regulator to consider this issue, because if a power had been given to NIE Networks as network operator, its exercise of that power could constitute treatment which engaged article 25(2) of the Directive.
- 9.23 Consequently, we have considered whether the provisions of the Trading and Settlement Code confer any such power on NIE Networks. Clause 5.151 of the Trading and Settlement Code provides that:

*'Any Demand Site associated with a Demand Side Unit must meet and continue to meet each of the following criteria... the Demand Site shall have a*

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<sup>151</sup> Complaint, para 4.3.36(b) and Response, para 8.9

<sup>152</sup> Complaint, covering letter dated 22 March 2017

<sup>153</sup> Response, para 8.9

<sup>154</sup> Response, para 3.4

*Maximum Import Capacity and shall not have a Maximum Export Capacity greater than the De Minimis Threshold'.*

9.24 In addition, clause 2.33 of the Trading and Settlement Code provides that:

*'A Party (or Applicant, as applicable) shall apply to register any Units by completing a Participation Notice in respect of such Units which shall include the following information... evidence that the necessary Operational Readiness Confirmation is in place and is valid and effective where the Party wishes to register a Generator Unit as... a Variable Price Maker Generator Unit [or] a Variable Price Taker Generator Unit...'.*

- 9.25 It is submitted on behalf of the Applicants that the Operational Readiness Confirmation includes a value for Registered Capacity and that, to confirm this, DSU Operators such as the Applicants must be aware of the MEC for their site<sup>155</sup>. In response to the Provisional Determination, it was added that the Operational Readiness Confirmation and Registration Data (as those terms are defined in the Trading and Settlement Code) are provided by SONI in an Operational Certificate, which contains a value for MEC, as well as other values<sup>156</sup>.
- 9.26 On the basis of the provisions of the Trading and Settlement Code referred to above, we understand that a DSU Operator must know the MEC for each of the sites it proposes to operate for the purposes of DSU registration.
- 9.27 However, for all relevant purposes, MEC is defined in the Trading and Settlement Code as '*the maximum export capacity of a site in MW as defined under the site's Connection Agreement or equivalent*'<sup>157</sup>. We have derived the following points from this definition:
- (a) The MEC is not a figure to be determined at the point of registration. We do not agree that there is any '*allocation*' for the purpose of SEM registration.
  - (b) Rather, the MEC is assumed to be a pre-existing figure (or figures) defined in the '*Connection Agreement or equivalent*'.

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<sup>155</sup> Applicants' Responses to Clarification Questions, para 1.97

<sup>156</sup> Applicants' Response to Provisional Determination, paras 12 - 14

<sup>157</sup> SEM Trading and Settlement Code Part A Glossary

- (c) The word '*defined*' is important. The clear expectation is that, to identify the MEC, an existing document should be located in which a statement of the MEC can be found.
  - (d) Where there is a connection agreement (as defined under the Trading and Settlement Code), the relevant document will be the connection agreement.
  - (e) Where there is no connection agreement, the question will be whether there is an '*equivalent*' document which defines the MEC.
  - (f) To be '*equivalent*' to a connection agreement, we consider that the document should share the essential characteristics of a connection agreement, or have substantially the same legal effect. It is difficult to envisage how this could be the case for any document other than one which is grounded in agreement between the generator and the network operator or in the exercise of a statutory power by the network operator.
  - (g) Whether any given document is '*equivalent*' to a connection agreement would be a question of legal interpretation having regard to all the facts of a particular case. However, we do not consider that a unilateral statement from a network operator purporting to specify the MEC could be sufficient.
- 9.28 On the basis of this definition, our provisional conclusion was that NIE Networks does not have any power under the Trading and Settlement Code to determine unilaterally what the MEC is for any site.
- 9.29 In response to the Provisional Determination, it was submitted on behalf of the Applicants that NIE Networks does have '*discretionary power*', which it has been using in an inappropriate way. This is explained by reference to the '*validation role*' which NIE Networks plays under the agreed procedures set out in the Trading and Settlement Code. This role, it is submitted, has allowed NIE Networks to state that the MEC values are applicable only to operation as part of an AGU.
- 9.30 We do not agree with this submission, for the following reasons:

- (a) We have been provided with no reason to change our view in relation to the definition of MEC set out in the Trading and Settlement Code. On the basis of the definition, what the MEC is for a site is a question of legal interpretation having

regard to all the facts of a particular case and not a matter for NIE Networks to determine unilaterally.

- (b) It is submitted that NIE Networks has discretionary power on the basis of the agreed procedures. Any such power would need to be clearly grounded and identified in the provisions of the Trading and Settlement Code; stating (in effect) that NIE Networks' determination of a MEC value will take priority for the purposes of DSU registration. This could provide the basis of a power which might engage article 25(2) of the Directive. However, no provision has been identified which has that effect.
- (c) It is explained that SONI consults NIE Networks to validate specified data, including MEC values, in accordance with the agreed procedures. However, being consulted for the purposes of validation is not the same as having a '*discretionary power*' of unilateral determination. If NIE Networks is validating a MEC value, it is required to confirm what that value is in accordance with the definition in the Trading and Settlement Code. What that value is not a matter of discretion. NIE Networks' role is merely that of a consultee in a fact-checking process.
- (d) Ultimately, if NIE Networks has provided a MEC value as part of its validation role which is incorrect as a matter of the proper interpretation of provisions of the Trading and Settlement Code, it is a matter for SONI and others to decline to adopt that incorrect value for the purposes of DSU registration. The value which should be adopted is the value which is factually correct and in accordance with the proper interpretation of those provisions.

- 9.31 It follows that our conclusion is that NIE Networks does not have any power under the Trading and Settlement Code to determine unilaterally what the MEC is for a site.
- 9.32 We consider that, prior to this Complaint and at points during the determination process, both the Applicants and NIE Networks have adopted a concept of MEC which does not appear to align with the Trading and Settlement Code. Both have referred to the '*allocation*' of MEC at the point of registration and to whether the Applicants are able to '*transfer*' MEC from AGU registration to DSU registration. For example:

- (a) the Applicants have stated that '*The refusal of [NIE Networks] to allow previously allocated MEC to transfer from AGU to DSU is causing serious commercial harm...*'<sup>158</sup> and
  - (b) NIE Networks has stated that '*...we cannot transfer AGU MECs to DSU operation without following the same process that was agreed by all industry participants for registering a new IDS in the DSU market*'<sup>159</sup>.
- 9.33 The concepts of allocating MEC for the purpose of SEM registration and transferring MEC for different uses appear to us to have no basis in the relevant provisions of the Trading and Settlement Code.
- 9.34 The MEC is set out in the connection agreement or equivalent document. Unless that document were to define the MEC as changing in particular circumstances, the MEC will remain the same regardless of a change in circumstances. That change of circumstances would include the re-registration of a site as part of a DSU.
- 9.35 On the basis that the Trading and Settlement Code does not convey any power on NIE Networks as distribution system operator to determine unilaterally what the MEC is for a site, we conclude that the Complaint, insofar as it alleges discriminatory treatment, does not relate to treatment of system users by NIE Networks in its capacity as distribution system operator such that article 25(2) of the Directive would be engaged.
- 9.36 As noted above, we do not consider that the validation role which NIE Networks performs under the Trading and Settlement Code changes the position, because no provision has been identified which gives NIE Networks any power to determine what the MEC value is. It is bound by the definition of MEC set out in the Trading and Settlement Code. We do not consider that any influence which NIE Networks might exert in practice by virtue of this validation role itself engages article 25(2) of the Directive.
- 9.37 In short, this part of the Complaint has been presented to the Utility Regulator as a complaint relating to NIE Networks' conduct in respect of its distribution network. However, we do not consider that the Complaint, properly construed, does relate to such conduct. Rather, it relates solely to registration in the wholesale market and to the ability

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<sup>158</sup> Complaint, para 3.2.8

<sup>159</sup> Exhibit 6.3, page 3

of an Applicant to evidence a MEC for the Applicants' sites (in accordance with the definition in the Trading and Settlement Code).

***Assuming the Dispute does relate to such treatment: (i) how AGU Operators are being treated; and (ii) how applicant DSU Operators are being treated, in relation to the matters which are the subject of the Dispute.***

- 9.38 The Parties have made detailed submissions on the respective treatment of AGUs and DSUs. We have considered all of these submissions in detail. However, on the basis of our conclusion that the Complaint does not relate to treatment of system users such that article 25(2) of the Directive is engaged, it is not necessary for us to make any determination on these issues.
- 9.39 In response to the Provisional Determination, it is stated that the Applicants consider that the discrimination is taking place not only between those applying to be DSU Operators and AGU Operators, but also between Demand Response Aggregators and Generator Aggregators<sup>160</sup>. It does not appear to us that this discrimination was clearly raised in the Complaint; neither was this set out in the issues for determination. However it is not necessary of us to make any determination on this, because of our conclusion set out above that the Complaint does not relate to treatment of system users.

***Whether NIE Networks is discriminating between system users or classes of system user, as referred to in article 25(2) of the Directive.***

- 9.40 On the basis of our conclusion that the Complaint does not relate to treatment of system users such that article 25(2) of the Directive is engaged, we conclude that the Complaint does not evidence any discrimination between system users or classes of system user, such as would lead to a breach by NIE Networks of article 25(2) of the Directive.
- 9.41 To be clear, this is because the objective of the Applicants is to secure the registration of their sites as part of a DSU with export capacity under the Trading and Settlement Code, and we have concluded that NIE Networks does not have a power to prevent the Applicants from doing so.
- 9.42 In response to the Provisional Determination, it was submitted on behalf of the Applicants that the issue of the technical impact of DSUs on the distribution network was considered

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<sup>160</sup> Applicants' Response to Provisional Determination, para 45

by the regulators in their letter dated 30 April 2015<sup>161</sup>. A key point made was that the network issues arising should be addressed in the dispatch process and not the registration process<sup>162</sup>.

- 9.43 The regulators' final position set out in their letter dated 30 April 2015 does not focus specifically on DSU with export. However, the final position does envisage that network issues will be addressed through the use of instruction sets that restrict dispatch and that registration should not be prevented because of network issues. Our determination is consistent with this position – no provision has been identified which allows NIE Networks to prevent registration because of network concerns.
- 9.44 Our determination is that NIE Networks does not have the power to determine unilaterally what the MEC is for a particular site. NIE Networks cannot utilise a power in a discriminatory manner if it does not actually possess that power in the first place. That NIE Networks appears to have acted as if it does have such a power is regrettable, but we do not consider that this changes the position.
- 9.45 Consequently, our determination is that the Complaint does not evidence any breach by NIE Networks of article 25(2) of the Directive.

***Whether the Utility Regulator should exercise any power or duty in relation to the Dispute regarding article 25(2) of the Directive***

- 9.46 In light of our conclusion that the Complaint does not evidence any breach by NIE Networks of article 25(2) of the Directive, our determination is that the Utility Regulator should not exercise any power or duty in relation to this part of the Dispute.
- 9.47 As noted above, we consider that (in making a determination under article 31A of the Electricity Order) it is proper for the Utility Regulator to consider the provisions of the Trading and Settlement Code to determine whether they confer a power on NIE Networks such that article 25(2) of the Directive is engaged.
- 9.48 However, the question of what the MEC is for any of the Applicants' sites is ultimately a question of the interpretation of the Trading and Settlement Code. Neither party has suggested that there is any provision which empowers the Utility Regulator to give an

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<sup>161</sup> Exhibit 6.15

<sup>162</sup> Applicants' Response to Provisional Determination, para 27

authoritative and binding determination on the meaning of a provision in the Trading and Settlement Code. We do not consider that there is any such provision. In any event, no such provision would fall within the scope of an article 31A determination.

- 9.49 It is clear that, where a connection agreement sets out an unconditional value for maximum export capacity, that value will subsist irrespective of a switch from AGU to DSU. It will simply be a case of referring to the connection agreement to determine the MEC value.
- 9.50 Here, the position is more complex, because the connection agreements for the site do not contain provisions relating to the relevant generation. The Applicants submit that the MEC for each site was confirmed by NIE Networks in previous correspondence and that those MECs have not changed<sup>163</sup>. In the absence of connection agreements, they submit that the MEC which was confirmed is in a document which is '*equivalent*' to a connection agreement<sup>164</sup>. Whether or not this is the case is a matter for the Applicants (or PG, as a party to the Trading and Settlement Code) to determine, using the procedures set out in the Trading and Settlement Code. We conclude that this is not a matter which the Utility Regulator has a power or duty to resolve within the context of an article 31A determination.
- 9.51 In response to the Provisional Determination, it was submitted on behalf of the Applicants that even if they present the relevant MEC values to SONI and SEMO, NIE Networks will continue to frustrate DSU registration<sup>165</sup>. For the reasons set out above, SONI and SEMO will be required to consider what values should be registered in accordance with the Trading and Settlement Code. NIE Networks' view is not determinative.
- 9.52 We note that the provisions of the Trading and Settlement Code include a dispute resolution mechanism. However, ultimately, the proper interpretation of the Trading and Settlement Code is a question of law and a matter for the courts.

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<sup>163</sup> Applicants' Responses to Clarification Questions, [para 1.9.8](#)

<sup>164</sup> Reply, [pages 4 and 13](#)

<sup>165</sup> Applicants' Response to Provisional Determination, [para 9](#)

***Whether NIE Networks is breaching its duty to provide information needed for efficient access to the system, as referred to in article 25(3) of the Directive.***

- 9.53 Article 25(3) of the Directive provides that '*[t]he distribution system operator shall provide system users with the information they need for efficient access to, including use of, the system*'.
- 9.54 We consider that the duty on NIE Networks to provide system users with the information they need for efficient access to the system does encompass a duty on NIE Networks to provide system users with information which it holds which the system users need to register in the wholesale market. System users would not be able to have efficient access to NIE Networks' system if they are prevented from the market registration they seek because NIE Networks has not provided the relevant information. Whether or not the duty has been breached will depend upon the specific facts of the case.
- 9.55 The Applicants submit that NIE Networks has provided incomplete, incorrect and, in some cases, misleading information about the MEC allocated to their sites<sup>166</sup>. In particular, in the Complaint and accompanying materials –
- (a) it is stated that NIE Networks has provided incorrect MEC values in relation to the site operated by Severfield (NI) Ltd,
  - (b) a number of points are made regarding the provision of information in relation to sites which are not owned by the Applicants<sup>167</sup>, and
  - (c) it is stated that the Applicants continue to be materially adversely affected by the lack of transparency and clarity in relation to MEC values.
- 9.56 First, to the extent that the Applicants make reference to NIE Networks' responses to a number of requests for information which relate to sites which they do not own, very little information is provided. In any case, we agree with NIE Networks<sup>168</sup> that provision of information in relation to these sites is not relevant for the purposes of our determination of the Dispute – we do not consider this further.

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<sup>166</sup> Complaint, para 3.2.11 and paras 4.3.38 – 4.3.41

<sup>167</sup> See Exhibit 6.8

<sup>168</sup> See Response, para 9.1

- 9.57 Second, in relation to Severfield (NI) Ltd's site, it is submitted that there is a disparity between two MEC values, one confirmed by an '*industry stakeholder*' and one confirmed by NIE Networks<sup>169</sup>. However, no further detail is provided. This does not evidence a breach of article 25(3) of the Directive by NIE Networks.
- 9.58 Third, in relation to the more general statements around a lack of transparency, we agree with NIE Networks<sup>170</sup> that the Complaint is not supported by sufficient evidence for us to determine that NIE Networks has breached article 25(3) of the Directive due to its general approach to DSU Operators.
- 9.59 It appears to us that this leaves the Applicants' submission, given in response to the Utility Regulator's clarification questions, that the breach was due to NIE Networks '*not confirming the correct MEC values*'<sup>171</sup>.
- 9.60 We understand that the issue here is that, in response to requests for confirmation of the MEC for a site which the Applicant wishes to register as part of a DSU, NIE Networks has stated that the MEC is zero or has stated that the MEC applies only to AGU registration. The Applicants have provided evidence to show that NIE Networks has adopted this position. Indeed this was on the basis of NIE Networks' view, set out at Section Seven, that the Applicants are not entitled to retain MEC values registered for AGU Sites as DSU Sites.
- 9.61 As set out above in relation to our determination on the allegation of discriminatory treatment, MEC is a concept defined in the Trading and Settlement Code for the purposes of registration. We have concluded that NIE Networks has no power to determine what the MEC is, but rather the MEC is a pre-existing figure (or figures) defined in the relevant document. NIE Networks has provided no explanation to demonstrate that its position aligns with the definition of MEC as set out in the Trading and Settlement Code.
- 9.62 However, neither can it be said that the requests made on behalf of the Applicants were clearly framed by reference to this definition. To the contrary, from the correspondence provided to us it is often not clear whether the information being requested of NIE Networks relates to the MEC (under the Trading and Settlement Code) or whether the information being requested relates to some other concept of export capacity; one which

<sup>169</sup> Complaint, para 3.2.11

<sup>170</sup> Response, para 9.1

<sup>171</sup> Applicants' Responses to Clarification Questions, para 1.9.11

is not set out in a particular document agreed between the parties. Examples of where the position is not clear include –

- (a) PG's e-mail dated 24 June 2016, in which it requested; '*How can we transfer the MEC that is available on the network at the locations from the AGU operator to the customer who own the MPRN...*'<sup>172</sup>,
- (b) PG's e-mail dated 3 August 2016, where it was requested; '*is there any other way these sites can negotiate changes in the MEC for alternative uses*'<sup>173</sup>,
- (c) PG's letter dated 16 September 2016, where it was stated that '*[if] not defined in the C.A the MEC adopts a deemed status*'<sup>174</sup>, and
- (d) PG's e-mail dated 17 October 2016, where it was stated that '*[PG] believe a Maximum Export Capacity (MEC) relates to exported power onto the network (physical network access) and can be assigned to a technology type...*'<sup>175</sup>.

- 9.63 In response to the Provisional Determination, it is submitted on behalf of the Applicants that their requests for MEC values were completely clear and that MEC has one well-established meaning within the industry<sup>176</sup>. However, that is not borne out by the correspondence which has been provided to us, such as those examples set out above.
- 9.64 If we considered that the Applicants had requested factual information which was clearly intended to assist them in determining the MEC under the Trading and Settlement Code and NIE Networks refused to provide that information or deliberately or recklessly provided information which was false, we would determine that NIE Networks had breached its duty under article 25(3) of the Directive. For example, had a clear request been made for unredacted versions of the letter in which NIE Networks originally set out the MEC values for the Applicants' sites, this should have been provided by NIE Networks and a failure to do so would have been a breach.
- 9.65 We do not consider that the Applicants have evidenced such a breach in the Complaint. There appears to have been a significant amount of correspondence in which MEC has

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<sup>172</sup> Exhibit 6.4

<sup>173</sup> Exhibit 6.6

<sup>174</sup> Exhibit 6.8

<sup>175</sup> Exhibit 6.9

<sup>176</sup> Applicants' Response to Provisional Determination, paras 32 - 33

been discussed and in which neither party has clearly stated its position by reference to what MEC actually is as defined in the Trading and Settlement Code. Instead, NIE Networks and PG have exchanged broader statements around a concept of 'MEC' without reference to that definition. The correspondence on both sides shows a degree of confusion on the part of the Parties.

- 9.66 In addition, behind this confusion, there has been a dispute between the Parties as to the MEC values for these sites. It has been clear that there has been a dispute and NIE Networks did provide an explanation why it considered the MEC values to be what it did. This has enabled the Applicants to consider what action to take to resolve the Dispute. In our view, the Applicants have not provided evidence (and certainly not clear evidence) which suggests that the position adopted by NIE Networks was a deliberate attempt to misinform the Applicants. We would have required there to be clear evidence to determine that this was the case.
- 9.67 We consider it to be regrettable that the Parties did not express their positions by reference to the relevant provisions and, in particular, that NIE Networks has in our view '*muddied the waters*' in the various correspondence. However, while this is regrettable, we do not consider that the Applicants have evidenced a refusal to provide information or a deliberate or reckless provision of false information in this case. Our determination is that the Complaint does not evidence a breach by NIE Networks of article 25(3) of the Directive.

***Whether the Utility Regulator should exercise any power or duty in relation to the Dispute regarding article 25(3) of the Directive.***

- 9.68 In light of our determination that the Complaint does not evidence any breach by NIE Networks of article 25(3) of the Directive, our determination is that the Utility Regulator should not exercise any power or duty in relation to this part of the Dispute.
- 9.69 However, as noted above we consider that the duty on NIE Networks to provide system users with the information they need for efficient access to the system does encompass a duty on NIE Networks to provide system users with information which it holds which the system users need to register in the wholesale market.
- 9.70 On the basis of our determination, we anticipate that the Applicants may seek to secure the registration of their sites as part of a DSU. It is the Applicants' position that the MEC for each site was set out by NIE Networks in previous correspondence and has not

changed<sup>177</sup>. To the extent that the Applicants require information in relation to MEC values set out in that correspondence to seek to register, any such information requested from NIE Networks should be promptly provided. We note that a request for information was made on behalf of the Applicants on 25 September 2017 and that some information has been provided and some is still outstanding.

- 9.71 Similarly, NIE Networks should provide any other factual information held by it which the Applicants require to determine the MEC for the sites as they seek to secure the registration of their sites as part of a DSU.
- 9.72 The Applicants should make clear requests for any factual information which they require for this purpose. For the avoidance of doubt, it appears to us that the request made on behalf of the Applicants on 25 September 2017 was such a request.
- 9.73 Should NIE Networks fail to provide information promptly or provide false information in response to clear requests for information which the Applicants require for this purpose, we consider that this would be a breach of its duty under article 25(3) of the Directive. If any such breach is brought to the attention of the Utility Regulator, we conclude that it should at that point seek to exercise its statutory functions to address the breach.

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<sup>177</sup> Applicants' Responses to Clarification Questions, para 1.9.8

## 10 Section Ten – Concluding Observations

10.1 This Section Ten is not part of our formal determination.

### ***The Complaint and the Response***

- 10.2 The main issue raised in the Complaint was the allegation of discriminatory treatment by NIE Networks. As set out at Section Nine, we have provisionally concluded that no such discrimination has been evidenced, although not for the reasons given by NIE Networks.
- 10.3 Ultimately, we have determined that this part of the Complaint has been brought in an inappropriate forum – it is not an issue for the Utility Regulator to determine. In response to the Provisional Determination, it was submitted on behalf of the Applicants that, if it is not a matter for the Utility Regulator to determine, it is not clear who should determine it<sup>178</sup>. It was also noted that the SEM Committee did not consider the Complaint to fall within its jurisdiction.
- 10.4 Our determination is that article 25(2) of the Directive is not engaged and that this part of the Complaint is not a matter which the Utility Regulator has a power or duty to resolve within the context of an article 31A determination. The Utility Regulator can only act where it has an ability to do so. It is for the Applicants to seek to resolve the Dispute using the procedures set out in the Trading and Settlement Code and this is a matter on which the Applicants should seek their own advice as required. We note that the SEM Committee's decision was only that the request for a determination under article 31A of the Electricity Order did not fall within its jurisdiction.
- 10.5 It has taken us detailed consideration to reach the conclusion that this part of the Complaint has been brought in an inappropriate forum, at least in part due to the way the Dispute was explained.
- 10.6 The alleged discriminatory treatment relates to the MEC of a site, as defined in the Trading and Settlement Code. Given this, it is highly surprising that the Complaint made no reference at all to the definition. Rather, the Complaint made submissions by

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<sup>178</sup> Applicants' Response to Provisional Determination, para 45

reference to a separate concept of what a MEC was – a MEC which is '*allocated*'<sup>179</sup> for the purpose of registration and in relation to which '*transfer*'<sup>180</sup> was being refused.

- 10.7 Had the Complaint been made by reference to relevant provisions in the Trading and Settlement Code, the issues arising in the Dispute would have been much clearer from the outset. We note that the Applicants made reference to the definition in later submissions<sup>181</sup>, but this was following specific clarification questions being raised by the Utility Regulator to clarify the issues. Further, the Utility Regulator is required to determine the Complaint which is before it – the fact that issues relating to DSU operation have been considered in Northern Ireland for several years<sup>182</sup> does not change this point.
- 10.8 We appreciate that the issues in dispute between the Parties are complex and that they relate to complex parts of the regulatory regimes governing the wholesale market and use of the distribution network. However, the Applicants are commercial enterprises operating with the benefit of both specialist legal representatives and the regulatory knowledge of PG. We would have expected the Applicants to have properly considered the relevant provisions in the Trading and Settlement Code before bringing a complaint to the Utility Regulator and, if they still considered it necessary, bringing a complaint by reference to those provisions.
- 10.9 Nevertheless, we were equally surprised that the Response was not made by reference to the relevant provisions of the Trading and Settlement Code. Had NIE Networks responded in this way, it appears to us that NIE Networks may well have given a simple response to the allegation of discrimination - that it had no power to unilaterally control a MEC for the purposes of wholesale market registration and that what is the correct MEC value is a matter of interpretation of the Trading and Settlement Code. Alternatively, it could have sought to explain why it considered that it did have such a power. Instead, the Response was a detailed submission (accompanied by further documentation) on why the historical background and potential network issues meant that the Applicants should not be given what they are requesting.

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<sup>179</sup> Complaint, [para 3.2.5](#)

<sup>180</sup> Complaint, [para 3.2.8](#)

<sup>181</sup> Applicants' Response to Provisional Determination, [para 45](#)

<sup>182</sup> Applicants' Response to Provisional Determination, [para 45](#)

- 10.10 We do not consider that either the Complaint or the Response was as clear as it might have been, to enable the Utility Regulator to determine the Dispute as efficiently as possible. Both contained detail on issues which detracted from what we consider have been the key issues. The nature of the Complaint and the Response has led to the Utility Regulator being required to spend substantial time considering all of the submissions and identifying those key issues.

***NIE Networks' position in relation to switch from AGU to DSU***

- 10.11 As noted above, we consider that, prior to this Complaint and at points during the determination process, both the Applicants and NIE Networks have adopted a concept of MEC which does not appear to align with the Trading and Settlement Code. From the documents provided, it appears that the Applicants have (at least to a significant extent) adopted this concept from NIE Networks' explanations of the issues. We have two observations in relation to this.
- 10.12 First, where NIE Networks is informing parties connected to its network why they are not entitled to take a proposed course of action, we would expect it to clearly identify why this is the case by reference to the relevant contractual or regulatory framework. For example, we do not consider that NIE Networks' letter of 17 October 2016 met this expectation<sup>183</sup>. We agree with the Applicants that NIE Networks has '*muddied the waters*' in the various correspondence.
- 10.13 Second, there is clearly a dispute between the Parties in relation to whether the Applicants' sites switching from AGU Sites to DSU Sites (with no controlled reduction in the usage of power at the site), requires any physical alteration on the site. There is similarly a dispute in relation to whether such a switch will increase the risk posed by the Applicants' sites to NIE Networks' distribution network. For the reasons set out above, these are not matters for us to determine for the purpose of determining the Dispute which has been referred to us.
- 10.14 However, to the extent NIE Networks has concerns in relation to these network issues, it is entitled to take any action which is available to it by reference to the mechanisms set out in the regulatory regime governing its distribution network. In doing so, we would

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<sup>183</sup> Exhibit 6.18

expect NIE Networks to give appropriate consideration to the regulator's final position set out in their letter dated 30 April 2015<sup>184</sup>.

### ***Registration of the Applicants' sites***

- 10.15 In accordance with our determination, the value of the MEC for the Applicants' sites is not a matter for the Utility Regulator to determine. Therefore, in the absence of being able to refer to a connection agreement, the Applicants are entitled to seek to argue their case for registration under the provisions of the Trading and Settlement Code by reference to what they consider to be an '*equivalent*' document.
- 10.16 Alternatively, to the extent that the Parties consider that this is required, we note any person may propose a modification to the Trading and Settlement Code, which will be taken forward in accordance with its provisions.

### ***Connection Agreements***

- 10.17 Many of the difficulties which have arisen in this matter relate to the lack of connection agreements between NIE Networks and the Applicants in relation to electricity generation on their sites. We appreciate that there were reasons why this generation capability was originally permitted to be connected to NIE Networks' distribution network. We do not comment on this.
- 10.18 However, the relevant connection agreements have still not been varied to provide for this generation capability, over eight years later. We also note that the Utility Regulator's addendum to the regulators' final position, as long ago as October 2015, stated that synchronised generation should be acknowledged within the site connection agreement<sup>185</sup>. It appears to us that the Parties should seek to enter into connection agreements as a matter of priority.
- 10.19 In that regard, we note that the Electricity Order sets out a procedure for a person who is connected to the distribution network to require NIE Networks to offer terms in relation to the connection<sup>186</sup>. Where that procedure is followed and a dispute arises between NIE

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<sup>184</sup> Exhibit 6.15

<sup>185</sup> Exhibit 6.16

<sup>186</sup> Articles 19 to 25 of the Electricity Order

Networks and the applicant, that dispute may be referred to the Utility Regulator for determination<sup>187</sup>.

**Alex Wiseman**

**Andrew McCorriston**

**Authorised on behalf of the Utility Regulator**

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<sup>187</sup> Article 26 of the Electricity Order

Appendix 1
Index to Determination documents

Tab No	Document description	Date
<b>Relevant Legislation and background documents</b>		
1	The Electricity (Northern Ireland) Order 1992	11 February 1992
2	The Energy (Northern Ireland) Order 2003	27 February 2003
3	Directive 2009/72/EC of the European Parliament concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC	13 July 2009
4	Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC	25 October 2012
5	NIE Networks Distribution Licence	21 September 2016
6	Trading and Settlement Code v20.0	23 May 2017
7	Utility Regulator's Policy on the Resolution of Complaints, Disputes and Appeals and Guide for Applicants	June 2013

Tab No	Document description	Date
<b>Documents submitted with the Complaint</b>		
	Complaint	22 March 2017
Exhibit 6.1	Letters of Authorisation from the Applicants	
Exhibit 6.2	Applicants' Connection details currently held by NIE Networks	
Exhibit 6.3	Letter from NIE Networks to PG	10 October 2016
Exhibit 6.4	E-mail from Emma Finnegan (NIE Networks) to Denver Blemings (PG)	27 June 2016
Exhibit 6.5	E-mail from Emma Finnegan (NIE Networks) to Denver Blemings (PG)	10 August 2016
Exhibit 6.6	E-mail from Ian Baille (NIE Networks) to Peter MC Polin (iPower)	1 September 2016

Tab No	Document description	Date
	<b>Documents submitted with the Complaint</b>	
	E-mail from Denver Blemings (PG) to Emma Finnegan (NIE Networks)	3 August 2016
Exhibit 6.7	IDS Spreadsheet Powerhouse (29 July 2016) and Powerhouse DSU sites – NIE Networks supplied data (23 November 2016)	
Exhibit 6.8	Letter from PG to NIE Networks	16 September 2016
Exhibit 6.9	E-mail from Sam Alexander (PG) to Con Feeney (NIE Networks)	17 October 2016
Exhibit 6.10	Letter from PG to VESL	12 November 2008

Tab No	Document description	Date
	<b>Documents submitted with the Response</b>	
	Response	19 June 2017
Exhibit 6.11	Template letter of terms offered to individual iPower AGU sites	
Exhibit 6.12	Signed acceptance by aggregator acting on behalf of customer of terms stated to be offered to; (a) Severfield (NI) Limited, (b) Dunbia (NI), (c) Ready Egg Products Limited	10 February 2010
Exhibit 6.13	Letter from NIE Networks to Utility Regulator setting out proposals for instruction sets and requirement for valid CA	15 June 2015
Exhibit 6.14	Utility Regulator letter setting out ' minded to' position	23 April 2015
Exhibit 6.15	Utility Regulator letter setting out 'final' position	30 April 2015
Exhibit 6.16	Paul Bell (Utility Regulator) e-mail confirming addendum to final position	1 October 2015
Exhibit 6.17	Grid Code PC.B3.3.3 – Additional Data for Generator Aggregators	
Exhibit 6.18	Letter from NIE Networks to AGU/DSU industry detailing customer options for transferring	17 October 2016

Tab No	Document description	Date
	<b>Documents submitted with the Response</b>	
Exhibit 6.19	Letter from NIE Networks to IDSs with zero dispatch instruction	
Exhibit 6.20	NIE Networks – PG e-mail correspondence	
Exhibit 6.21	List of Applicants' Connection Agreement status	
Exhibit 6.22	ERA Technology report on network impact of transferring peak loop generation into the AGU market	16 June 2008
Exhibit 6.23	E-mail from Paul Bell (Utility Regulator) to Denis Kelly (NIE Networks) providing further policy clarification	26 October 2015
Exhibit 6.24	EA Technology Ltd Report	15 June 2017

Tab No	Document description	Date
	<b>Further Documents</b>	
	NIE Networks letter to the Utility Regulator	8 March 2017
	Applicants' responses to the Utility Regulator's clarification questions of 11 July 2017	25 July 2017
	NIE Networks' responses to the Utility Regulator's clarification questions of 11 July 2017	25 July 2017
	Reply	22 August 2017
	NIE Networks' response to the Utility Regulator's Statement	13 September 2017
	E-mail from Sam Alexander (PG) to Stephen Abram (Utility Regulator)	18 September 2017
	Provisional Determination of the Dispute	22 September 2017
	PG's letter to NIE Networks requesting MEC information	25 September 2017
	E-mail from Ian Bailie (NIE Networks) to Sam Thompson (PG) attaching certain requested information	29 September 2017
	Applicants' response to the Provisional	6 October 2017

Tab No	Document description	Date
	<b>Further Documents</b>	
	Determination issued on 22 September 2017	