



**COMPLAINT TO THE UTILITY REGULATOR
BY TCI RENEWABLES (ON BEHALF OF DUNMORE WIND FARM LIMITED) IN
RELATION TO NIE LTD'S CONNECTION OFFER FOR DUNMORE WIND FARM**

Determination

17 January 2012

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COMPLAINT TO THE UTILITY REGULATOR

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DETERMINATION

1 Section One - Introduction

- 1.1 The Northern Ireland Authority for Utility Regulation (referred to hereafter as the **Utility Regulator**)¹ received, by way of a letter dated 19 July 2011, a formal complaint from Dunmore Wind Farm Limited (**DWFL**) regarding a 'distribution connection' dispute between it and NIE Limited (**NIE**) (the **Complaint**).
- 1.2 DWFL is a subsidiary of TCI Renewables (**TCI**). TCI formally submitted the complaint (as DWFL's parent company). Therefore for ease and for the purposes of this determination all references are to TCI (rather than DWFL).
- 1.3 The dispute relates to the terms of the offer made by NIE (on 7 July 2011), following an application by TCI submitted on 16 November 2010, to connect Dunmore Wind Farm (the **Wind Farm**) to NIE's electricity distribution system.
- 1.4 The dispute between TCI and NIE (together, the **Parties**) falls to be determined by the Utility Regulator under Article 26 of the Electricity (Northern Ireland) Order 1992 (the **Electricity Order**), and in accordance with Article 37(11) of Directive 2009/72/EC of the European 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 Board of the Utility Regulator has appointed us - Christopher Le Fevre and Donald Henry - jointly to determine the dispute (together the **Decision-Makers**). We do so as delegates of the Utility Regulator and on its behalf.
- 1.6 The Utility Regulator has considered the Complaint in accordance with its Policy on the Resolution of Complaints, Disputes and Appeals and Guide for Applicants dated June

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

2011 (the **Procedure**), which has been supplemented as appropriate for reasons of good governance and fair process.

- 1.7 This document sets out our determination of the Complaint.
- 1.8 In writing this determination we have had the benefit of being able to consider the following materials relevant to the factual and legal background to the Complaint -
- (a) A Statement of Case (the **Statement**) prepared for us by a small team of skilled staff of the Utility Regulator. The Statement provides an overview of the background to the Complaint, the views of the Parties, and the issues that fall to be determined.
 - (b) A bundle of documents (the **Bundle**) which accompanied the Statement and contained the papers listed in an appendix to the Statement.
 - (c) A legal opinion written by our external legal advisers, Wragge & Co LLP, on the applicability of the March 2010 Statement.
- 1.9 The Parties have had the opportunity to comment on the Statement and Bundle and neither Party suggested that the Statement contained any inaccuracies or that the Bundle either failed to contain any relevant, or contained any irrelevant, documents.
- 1.10 The Parties also made written submissions to us both prior to and in response to our draft determination as circulated to the Parties on 24 October 2011 (the **Draft Determination**). We have fully considered all of the submissions made.
- 1.11 This determination adopts the following structure -
- (a) the Parties (at Section 2),
 - (b) the factual background to the dispute (at Section 3),
 - (c) the applicable legal framework (at Section 4),
 - (d) the respective views of the Parties (at Sections 5 and 6),

- (e) the issues falling to be determined (at Section 7),
- (f) our determination in relation to Issue 1 (at Section 8),
- (g) our determination in relation to Issue 2 (at Section 9),
- (h) our concluding observations (at Section 10), and
- (i) our order (at Section 11).

1.12 Where we use cross-references (e.g. Part A, Tab 1) these are to documents in the Bundle (including all documents received since the issue of the Bundle to the parties - which are shown in the updated Index to the Bundle at Annex A).

2 Section Two - The Parties

- 2.1 The following summary as to the status of the parties is predominantly derived from the Statement. Since no objection was taken to it by either Party, we take it to be accurate and adopt it for the purposes of this determination.

TCI

- 2.2 TCI is a UK-based renewable energy business, originally established in Australia in 1996, which develops, builds and operates wind projects across the UK and North America. The company develops both merchant wind projects for large clients and also medium to large scale green field sites, often in partnership with landowners.
- 2.3 Currently TCI has developed or is developing 21 wind farm sites across the United Kingdom, nearly two-thirds of which are found in Northern Ireland.
- 2.4 The company is based in Oxford and has established a subsidiary company - DWFL - in Belfast.
- 2.5 It has also established two North American subsidiaries; the first in Montreal, Canada - Air Energy TCI Inc - which has active wind projects in Quebec and Ontario; and the second in Delaware, USA - TCI Renewables LLC - which has over 1,500 MW of wind projects in development across several States.

NIE

- 2.6 NIE is a subsidiary of the Electricity Supply Board (ESB) - a vertically integrated undertaking operating primarily (but not solely) in the Republic of Ireland. It is the owner of the electricity transmission system in Northern Ireland, and the owner and operator of the electricity distribution system in Northern Ireland.
- 2.7 NIE is licensed in relation to the former activity, and the same licence regulates the latter activity. Although this position will shortly change, as distribution is now a licensable activity in its own right and NIE will be granted a distribution licence, for present purposes NIE's licence to participate in transmission (the **Licence**) continues to be the relevant licence for the purposes of this dispute. The conditions of the Licence which are relevant to the Complaint are at Part A; Tab 4 of the Bundle.

- 2.8 NIE is the only body in Northern Ireland entitled to offer terms to connect, or to modify an existing connection, to the electricity distribution system.

3 Factual Background

- 3.1 The following summary of the factual background is derived from the Statement. Since no objection was taken to it by either Party, we take it to be accurate and adopt it for the purposes of this determination.

Planning Permission for the Wind Farm

- 3.2 Planning permission is required for all wind farms in Northern Ireland from the Department of Environment (the **Department**).
- 3.3 A full planning application was received by the Department from TCI on 13 December 2007 for a wind farm, with a total installed capacity of 21MWs, to be located at land approximately 1500 metres east of Largantea Bridge (Windy Hill Road, Bolea Road), Dunmore, Limavady (the Wind Farm).
- 3.4 TCI's application was refused by the Department on 29 April 2009. On 19 May 2009, TCI appealed the Department's decision to the Planning Appeal Commission (the **Commission**). The appeal was heard on 23 May 2010 and on 25 October 2010 the Commission granted full planning permission for the Wind Farm (Part A; Tab 14).

Indicative Connection Studies

- 3.5 In anticipation of its application for planning permission, TCI had made enquiries of NIE with regard to the electricity connection. This is evident from a letter dated 20 June 2007 sent from NIE to TCI with details of its indicative connection study, together with approximate connection costs (Part B; Tab 16).
- 3.6 On 23 September 2010, TCI sent an e-mail to NIE asking it to re-validate the indicative grid connection quote for the Wind Farm and followed this up with a further e-mail dated 8 October 2010 (Part B; Tab 17).
- 3.7 On 25 October 2010, NIE wrote to TCI with an updated indicative connection study (Part B; Tab 18). The letter refers to the possibility of both a connection to Coleraine Main and a 'clustering approach' and states that -

“This wind farm will be considered both for connection to the Coleraine Main and to any cluster substation which may be in consideration at the time of connection application following receipt of planning permission”.

TCI's Application for Connection and NIE's Response

- 3.8 On 16 November 2010, TCI made its formal application for a grid connection offer from NIE (Part B; Tab 19). The application letter confirms that it is an application for -

“...the interconnection of [the Wind Farm] to the 33 kV NIE distribution network via Colerain [sic] Main substation, as outlined in your indicative grid connection study dated 25th October 2010”

- 3.9 On 15 December 2010, TCI sent an e-mail to NIE checking on progress of its Dunmore Connection Offer and asking whether ‘*it was still on target for mid to late January 2011 for receipt of an offer*’ (Part B; Tab 20).

- 3.10 NIE responded to this e-mail on 16 December 2010 advising that -

“it looks like the Dunmore offer will not be ready until early-mid February” (Part B; Tab 21).

- 3.11 On 8 February 2011 TCI sent an e-mail to NIE asking whether there was ‘*any update on the Dunmore grid connection offer*’ (Part B; Tab 25)

- 3.12 On 16 February 2011, NIE wrote to TCI (Part B; Tab 26) stating -

“Since another wind farm in the vicinity has also achieved planning permission, resulting in a total generation capacity of over 60 MW, this has driven the need to establish a cluster substation in the area. A proposal is being prepared for submission to the NIE Board and Utility Regulator for approval to commence pre-construction works for a cluster substation. Following the outcome of the Cluster Charging arrangements from the Utility Regulator, NIE will prepare a connection offer based on the above. Your position in the queue remains unaffected, and it is anticipated that the connection offer will be available in late May 2011.”

- 3.13 The Utility Regulator had not, at that stage, been notified by NIE that it [NIE] was considering or had determined the need for a cluster substation for the area.

- 3.14 The reference to ‘another wind farm’ in the letter is to Dunbeg Wind Farm.

Dunbeg Wind Farm

- 3.15 The company behind the development of Dunbeg Wind Farm is Gaelectric Developments Limited.
- 3.16 The location of Dunbeg Wind Farm is ‘Bolea Road (500 metres to the south east of picnic area on Windy Hill Road and directly to the north of the A37 Broad Road), Dunbeg Townland, Limavady.
- 3.17 Full planning permission for Dunbeg Wind Farm was granted (following an appeal by Gaelectric) by the Commission on 27 January 2011 (Part A; Tab 15). Gaeltric submitted its application for a connection offer from NIE for Dunbeg Wind Farm on 1 February 2011.

TCI’s Response to Connection Offer Delay

- 3.18 TCI responded to NIE’s letter of 16 February 2011 on the same date by asking for a meeting (Section B; Tab 27). NIE asked TCI for further information on the proximity between the Wind Farm and the Dunbeg Wind Farm which was provided to NIE on 18 February and a meeting was held on 23 February 2011 (see Part B; Tab 28).
- 3.19 Following this meeting, on 4 March 2011, TCI wrote to NIE explaining that it remained at a loss as to why its request ‘*for interconnection of [its] consented 21 MW Dunmore Wind Farm has been debarred from interconnection to the 33 kV network*’ (Part B: Tab 29).
- 3.20 The letter, which was copied to the Utility Regulator, also -
- (a) summarised TCI’s view of NIE’s licence obligations,
 - (b) stated that -

“...[the] Cluster Charging arrangements have no relevance to our application for connection to the distribution system and only the principles under the Current Statement of Connection Charges should have been applied by NIE”,

and also

“Aside from the issue that the Cluster Charging arrangements have no relevance to our application, I would also point out that NIE’s mapped assessment for proposed 110/33kV Cluster Substations across N. Ireland shows no prior provision for the proposed establishment of a cluster substation in the region of the Dunmore wind farm...”,

(c) claimed that -

“NIE has been in breach of Condition 30 of the NIE Licence as Dunmore Wind Farm Limited has not been offered terms for connection within the specified time period”, and

(d) requested NIE to reconsider -

“...its position in relation to our application for connection to the distribution system and offer us terms for connection based on a 33 kV connection via Coleraine Main substation on the basis that this is the least cost technically acceptable connection...”

3.21 NIE responded in writing on 18 March 2011 (Part B; Tab 30). Among other things the response notes the following -

“In January 2011 NIE identified 9 potential wind farm sites (including Dunmore...) which may be affected by the introduction of a cluster charging methodology. Each of those sites has been treated in the same way by NIE, in that Connection Offers have been delayed pending the introduction of a cluster charging methodology. The Utility Regulator was also advised by NIE of the delay in issuing Connection Offers to these sites and subsequently issued a derogation to NIE with respect to the requirement to issue Connection Offers to these sites within 3 months, as stated in Condition 30 of the NIE Licence”.

“We disagree with your assertion that the clustering approach has no relevance to the Connection Offer and believe that, given the grant of planning permission for Dunbeg Wind Farm, NIE is required by virtue of Condition 32 of the NIE Licence to apply the clustering charging methodology in this case once it is agreed with the Utility Regulator. For the reasons stated above NIE is not in a position to offer terms for connection based on 33 kV connection to Coleraine Main.”

3.22 There then followed at least one (but possibly more than one) meeting and further exchanges of correspondence and communication between the Parties.

- 3.23 This correspondence and communication included matters relating to the derogation referred to in NIE's letter of 18 March 2011.

Utility Regulator's Derogation/Consent

- 3.24 NIE's reference to the Utility Regulator issuing a derogation is not quite correct. The Utility Regulator did not issue a derogation. What happened was that, in response to a request from NIE, the Utility Regulator gave consent for the time within which NIE was required (in accordance with paragraphs 4 and 6 of Condition 30 of the Licence - see paragraph 4.16 below) to make a connection offer (in relation to certain wind farms) to be extended.

- 3.25 The background facts are as follows -

- (a) On 21 December 2010, following receipt of certain information from NIE, the Utility Regulator gave approval to NIE for expenditure on the development of four wind farm clusters at Killymallaght, Mid Antrim, Pomeroy and Altahullion - essentially for pre-construction works in relation to the cluster substations for each of these clusters. The letter indicates that ultimately the costs will be recovered from wind farm developers and, to the extent there is a shortfall, from NIE's allowed regulated revenue (Part B; Tab 22).
- (b) On 31 January 2011, NIE sent a letter to the Utility Regulator headed "Wind Farms awaiting connection offers which are due to be connected to proposed cluster substations" (Part B; Tab 23).
- (c) The following are some relevant extracts from the letter -

"Following on from the letter dated 21 December 2010, in which the Utility Regulator gave consent for four wind farm cluster substation pre-construction works, I have been working on producing connection offers for wind farms which will connect to these"

"Until the recommendation for the cluster charging methodology is known, NIE propose to delay the issuing of these connection offers"

"Please confirm if this offer time extension is acceptable until after the cluster charging decision is known".

“The wind farms in question are: [the letter listed nine wind farms of which Dunmore was one]”

“Please give an indication of when the likely sign off date [sic] of the cluster charging consultation, so that I can write formally to these developers to give them an indication of when they can expect their respective offers”.

(d) NIE made the request for an extension of time because it is, under paragraphs (4) and (6) of Condition 30 of the Licence, required to offer terms for connection to its distribution system, *‘as soon as practicable and (save where the Authority consents to a longer period) in any event not more than 3 months after receipt of the application [for connection] containing all such information as NIE may reasonably require for the purposes of formulating the terms of the offer’* (Part A; Tab 4).

(e) On 1 February 2011 the Utility Regulator replied to NIE’s request for an extension by giving consent as follows -

“Until NIE’s consultation has been signed off the Utility Regulator will extend NIE’s Licence Condition 30 paragraph 6(b) with regards to the timing of offering terms for agreements. This extension will only apply to the wind farms detailed in your letter.”

(f) The Utility Regulator did not send a copy of this letter (Part B; Tab 24) to any other party.

3.26 In giving its consent the Utility Regulator relied on the information provided in NIE’s letter, but the Wind Farm was not (and is not) going to be connected to any of the four cluster substations for which pre-construction works approval had been given by the Utility Regulator in its letter of 21 December 2010.

3.27 On 15 April 2011, TCI reiterated in writing its (previously verbal) request for a copy of the derogation [i.e. the consent letter of 1 February 2011] referred to in NIE’s letter of 18 March 2011 (Part B; Tab 31).

3.28 On 16 May 2011, having still not received a copy of the consent letter, TCI sent a letter to the Utility Regulator asking it to provide a copy of the derogation (see further below) (Part B; Tab 32).

- 3.29 The Utility Regulator did not respond directly to TCI but intervened by calling NIE and telling it to provide the relevant letter. NIE sent the Utility Regulator's letter to TCI on 18 May 2011 ([Part B; Tab 33](#)).
- 3.30 As the Utility Regulator's letter did not itself identify the relevant wind farms but referred to those wind farms detailed in NIE's letter (of 31 January 2011), TCI could not confirm that Dunmore was one of the relevant wind farms.
- 3.31 On 20 June 2011, TCI asked NIE for a copy of its 31 January 2011 letter to the Utility Regulator ([Part B; Tab 34](#)). On 22 June 2011 it also asked the Utility Regulator for a copy of the letter ([Part B; Tab 35](#)). Further 'chaser' e-mails were sent by TCI to both NIE and the Utility Regulator, before NIE sent a copy of the letter (redacted to exclude the names of the seven wind farms not relevant to TCI) to TCI on 5 July 2011 ([Part B; Tab 37](#)).

Extension Period

- 3.32 The consent letter states that the extension of time applies -

“Until NIE's consultation has been signed off...”

- 3.33 On 22 June 2011, the Utility Regulator informed NIE (by e-mail) that, as the decision on clustering methodology was published on 21 April 2011, it deemed this date to be the date by which the extension granted to NIE under Condition 30, paragraph 6(b) expired. The e-mail also states that as a result the Utility Regulator expects that connection offers will now be made within the timescales detailed under Condition 30 ([Part B; Tab 36](#)).
- 3.34 Following the Utility Regulator's notification that the extension of time expired on 21 April 2011, NIE made a connection offer to TCI (in respect of a connection between the Wind Farm and NIE's Distribution System) on 7 July 2011 ([Part C; Tab 38](#)).
- 3.35 The connection offer made by NIE is based on a clustering approach.

Background to Clustering Approach

- 3.36 The concept of a clustering approach has been the subject of discussions between NIE and the Utility Regulator since at least 2007. This is evident from a letter dated 21 December 2007 from the Utility Regulator to NIE (Part B; Tab 16A).
- 3.37 On 16 March 2010, NIE issued a consultation paper entitled “Charges for Connecting Groups of Generators to the Northern Ireland Distribution System” (the **2010 Consultation**) (Part A; Tab 6).
- 3.38 The 2010 Consultation followed circulation, and discussion, within NIE, of internal documents outlining a wind farm clustering approach. This is evident from an internal paper provided by NIE in response to the Utility Regulator’s request for information following its receipt of the Complaint. NIE submitted version 6 of the paper dated 4 February 2010 and entitled “Wind Farm Clustering Approach (for internal use only)” (the **Internal Paper**) (Part A; Tab 5).
- 3.39 The Internal Paper notes that -
- “the continued demand by wind developers to connect their wind farms to the NI electricity network has provided NIE with a significant challenge, to allow the connection without jeopardising the security or quality of supply to the NI consumer. This report attempts to outline basic proposals and costs associated with the future connection of renewable energy.”
- 3.40 It includes, among other things, sections on ‘Development of Clusters’ (section 8), ‘Methodology in Selection of Clusters’ (section 9), ‘Cluster Locations’ (section 10) and ‘Individually Connected Wind Farms’ (section 11).
- 3.41 The 2010 Consultation -
- (a) explained that the number of requests for wind farm connections being received by NIE were presenting major challenges for it because -
- (i) the planning and development of a power system to an optimal level of capacity and to a timescale that meets the needs of wind farm developers is demanding and particularly complex where the project

timescales are uncertain and future generation capacity requirements are not finalised, and

- (ii) discussions with the planning authorities have highlighted that the connection of all the proposed wind farms to the distribution system using individual overhead power lines is unlikely to be possible as to do so would have an unacceptable detrimental effect on the environment,
- (b) outlined NIE's view that its distribution connection charging methodology as applicable for generation connections i.e. charges based on the 'Least Cost Technically Acceptable' (LCTA) connection, was -

'impractical and inefficient when connecting a number of closely located projects to the system',

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

3.42 On 15 October 2010, NIE issued a consultation report on "Charges for Connecting Groups of Generators to the Northern Ireland Distribution System" (the **2010 Report**) (Part A; Tab 8).

3.43 The 2010 Report -

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

- 3.44 On 15 November 2010, the Utility Regulator issued a “Consultation on Electricity Connection Policy to the Northern Ireland Distribution System” (the **Connection Policy Consultation**) (Part A; Tab 9).
- 3.45 Chapter 10 of the Connection Policy Consultation explained that NIE had previously issued the 2010 Consultation and the 2010 Report, and invited respondents to make known any further views they may have, on NIE’s recommendations, to the Utility Regulator.
- 3.46 The closing date for responses to the Connection Policy Consultation was 10 January 2011.
- 3.47 In the meantime the Utility Regulator had, on 21 December 2010, given approval to NIE for expenditure on pre-construction works for four wind farm clusters (see paragraph 3.25(a) above).
- 3.48 On 25 February 2011, the Utility Regulator submitted a ‘For Decision’ paper to the Board of the Utility Regulator entitled “Charges for Connecting Groups of Generators (Clustering) to the Northern Ireland Distribution System” (the **Board Paper**) (Part A; Tab 10).
- 3.49 The Board Paper explained -
- (a) the obligation on NIE (set out in Condition 32 of the Licence) to prepare a statement approved by the Utility Regulator setting out the basis upon which charges will be made for connection to the distribution system, and
 - (b) that the Utility Regulator had approved in principle the concept of clustering and agreed a process specifically for the Magherakeel cluster. (With regard to Magherakeel, what had been approved related to funding and cost recovery matters for two wind farms being in a cluster.)
- 3.50 It also -
- (a) outlined the consultation and liaison with NIE that had taken place to date,

- (b) identified some of the risks involved with the hybrid model based on the clustering approach proposed by NIE,
- (c) asked the Board to approve the development of a new connection charging methodology in line with the 'Option 3' Hybrid model (based on the clustering approach) proposed by NIE,
- (d) stated that -

“While the charging methodology will be set within [NIE’s] Statement of Charges each cluster will be subject to individual approval from the Utility Regulator”, and

- (e) included the following paragraph -

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

3.51 On 21 April 2011, the Utility Regulator issued its “Decision Paper on the Charges for Connecting Groups of Generators (Clustering) to the Northern Ireland Distribution System” (the **Decision Paper**) (Part A; Tab 11).

3.52 In this respect, the Decision Paper -

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

Current Position on Clustering Methodology

- 3.53 The most recent Statement of Charges for Connection to the Northern Ireland Distribution System approved by the Utility Regulator is the statement dated March 2010 (the **March 2010 Statement**) (Part A; Tab 7).
- 3.54 NIE submitted a draft of its proposed changes to the March 2010 Statement to the Utility Regulator on 19 June 2011 (the **Proposed Revisions**) (Part A; Tab 12).
- 3.55 The Proposed Revisions have not yet been approved by the Utility Regulator. Discussions have been ongoing between the Utility Regulator and NIE on the matter - the latest discussion being via a meeting held between representatives from the Utility Regulator and NIE on 19 October 2011.
- 3.56 The Utility Regulator will also need a legal review of the Proposed Revisions (including any changes which may result from the ongoing discussions) before making any decision relating to the approval of changes to the March 2010 Statement.
- 3.57 At the present time, the March 2010 Statement continues therefore to be in full force and effect.

The Connection Offer

- 3.58 On 7 July 2011, NIE sent TCI its terms for facilitating connection of the Wind Farm to NIE's electricity distribution system (the **Connection Offer**) (Part B; Tab 38).
- 3.59 The Connection Offer confirms that the offer is -

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

- 3.60 It also states -

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

connection offer are subject to and conditional upon approval by the Utility Regulator of the revised Statement of Charges for Connection as submitted by NIE, and the cluster substation being an Approved Generation Cluster Substation.”

3.61 The wording of the above paragraph was confirmed by the Utility Regulator as being satisfactory for inclusion in the connection offer in an exchange of e-mail correspondence on 7 July 2011 between NIE and the Utility Regulator (Part B; Tab 38A).

3.62 The reference to being ‘*instructed by the Utility Regulator*’ is a reference to an e-mail from the Utility Regulator (Albert Shaw) to NIE (Ashley Boggs) dated 22 June 2011 (Part B; Tab 36), which contains the following -

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

3.63 TCI submitted the Complaint on 19 July 2011 (Part C; Tab 40).

3.64 TCI acknowledged the Connection Offer on 3 August 2011 (Part C; Tab 43).

3.65 NIE has submitted (on 7 September 2011) a request to the Utility Regulator for approval of pre-construction works for a cluster substation for the Dunmore/Dunbeg area (referred to as the Cam Cluster) (Part C: Tab 51)

4 Section Four - Law Applicable to the Complaint

4.1 The following summary of the applicable law is predominantly derived from the Statement. Since no objection was taken to it by either Party, we take it to be accurate and adopt it for the purposes of this determination.

4.2 As part of our consideration of the Complaint we have read the appropriate parts of the relevant legislation included in the Bundle (Part A; Tabs 1 and 2).

The Electricity Order

4.3 Article 3 of the Electricity Order establishes a legal definition of distribution (Part A; Tab 1).

4.4 Specifically, it defines -

(a) a distribution system as '*a system which consists (wholly or mainly) of low voltage lines and electrical plant and is used for conveying electricity to any premises or to any other distribution system*', and

(b) a high voltage line as '*an electric line of a nominal voltage of or exceeding 110 kilovolts*' with low voltage line to '*be construed accordingly*'.

4.5 The connection to the Wind Farm would be low voltage and therefore a distribution connection.

4.6 Articles 19 to 24 of the Electricity Order make provision in respect of distribution connections (Part A, Tab 1).

4.7 In particular, they establish -

(a) a duty to connect on request (Article 19(1)),

(b) a procedure for applicants to require a connection (Article 20),

(c) a number of exceptions from the duty to connect (Article 21),

- (d) a right for an electricity distributor to recover the reasonable costs of making a connection to such extent as is reasonable in all the circumstances (Article 22),
- (e) a right for an electricity distributor to require reasonable security for payment (Article 23), and
- (f) a right for an electricity distributor to impose certain additional terms of connection (Article 24).

4.8 Alternatively, Article 25 of the Electricity Order permits an electricity distributor and a connection applicant to enter into a connection agreement on agreed terms - which may be different to those specified in Articles 19 to 24 of the Electricity Order - and for those agreed terms to determine the respective rights and liabilities of the parties. This is referred to as a 'special connection agreement'.

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

4.10 Specifically, Article 26 of the Electricity Order provides -

“(1) A dispute arising under Articles 19 to 25 between an electricity distributor and a person requiring a connection,

(a) may be referred to the Authority by either party; and

(b) on such a reference, shall be determined by order made either by the Authority or, if the Authority thinks fit, by an arbitrator appointed by the Authority,

and the practice and procedure to be followed in connection with any such determination shall be such as the Authority may consider appropriate.

(1A) The procedures established under paragraph (1) shall provide for the determination of the dispute to be notified to the party making the reference within the requisite period or such longer period as the Authority may agree with that person.

(1B) For the purposes of paragraph (1A), the requisite period in any case means -

- (a) the period of 2 months from the date when the dispute was referred to the Authority; or
 - (b) where the information sent to the Authority under paragraph (1)(a) was in its opinion insufficient to enable it to make a determination, the period of 4 months from when the date when the dispute was referred to the Authority.
- (2) No dispute arising under Articles 19 to 25 which relates to the making of a connection between any premises and a distribution system may be referred to the Authority after the end of the period of 12 months beginning with the time when the connection is made.
-
- (7) An order under this Article -
- (a) may include such incidental, supplemental and consequential provision (including provision requiring either party to pay a sum in respect of the costs or expenses incurred by the person making the order) as that person considers appropriate; and
 - (b) shall be final and shall be enforceable, in so far as it includes such provision as to costs or expenses, as if it were a judgment of the county court.
- (8) In including in an order under this Article any such provision as to costs or expenses as is mentioned in paragraph (7), the person making the order shall have regard to the conduct and means of the parties and any other relevant circumstances.
- ...”

The Directive

- 4.11 The Utility Regulator also has a duty to determine distribution connection charging (and other) complaints under the Directive (Part A, Tab 3).
- 4.12 In this regard -
- (a) 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 two months after receipt of the complaint. This period may be extended by two months where additional information is sought by the regulatory authority. That extended period may be further extended with the agreement of the complainant. The regulatory authority’s decision shall have binding effect unless and until overruled on appeal.”

- (b) NIE is a distribution system operator and the Complaint relates to obligations set out in Article 32 of the Directive which relate to the provision of third party access to NIE’s distribution system.

The Licence

- 4.13 Condition 31 of the Licence relates to the “Functions of the Authority - Distribution Disputes” (Part A; Tab 4).

- 4.14 Paragraph 1 of Condition 31 provides as follows -

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

- 4.15 Condition 30 of the Licence requires NIE to offer terms for connection to and use of [its] Distribution System (Part A; Tab 4).

- 4.16 More specifically, Condition 30 provides -

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

- (f) the connection charges to be paid to the Licensee, such charges (unless manifestly inappropriate) (i) to be presented in such a way as to be referable to the statements prepared in accordance with paragraph 1 (or as

the case may be, paragraph 7) of Condition 32 or any revision thereof; and
(ii) to be set in conformity with the requirements of paragraph 4 of Condition 32 and (where relevant) of paragraph 3...

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

.....

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

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

- (a) Paragraph 1 which reads -

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

Such statement to be in such form and to contain such detail as shall be necessary to enable any person to make a reasonable estimate of the charges to which it would become liable for the provision of such services, and (without prejudice to the foregoing) including such of the information set out in paragraphs 2 and 3 as is required by such paragraph to be included in the statement.”

- (b) Paragraph 4 which reads -

“Connection charges for those items referred to in paragraph 3 shall be set at a level which will enable the Licensee to recover:

- (a) the appropriate proportion of the costs directly or indirectly incurred in carrying out any works, the extension or reinforcement of the Licensee’s distribution system and the provision and installation, maintenance and repair and, following disconnection, removal of any electric lines, electrical plant, meters, special metering, telemetry, data processing equipment or other items; and

- (b) a reasonable rate of return on the capital represented by such costs.”
- (c) Paragraph 7 which requires the Licensee, where directed to do so by the Utility Regulator, to prepare a statement or statements approved by the Utility Regulator providing that charges for connection to the Licensee’s distribution system will be made on such basis as shall be specified in the direction. It also provides that each statement prepared in accordance with the requirements of the paragraph shall, from the date it is approved by the Utility Regulator or such later date specified by the Utility Regulator, replace the previous corresponding statement prepared by the Licensee.

(Included at Part A; Tab 4)

- 4.18 We note that, in determining disputes, the principal objective and general duties of the Utility Regulator under Article 12 of the Energy (Northern Ireland) Order 2003 (the **Energy Order**) do not apply (see Article 13(2) of the Energy Order at Part A; Tab 2).

Practice and procedure

- 4.19 The practice and procedure which was followed by us in determining this dispute on behalf of the Utility Regulator - as it was followed by the staff of the Utility Regulator in the procedure prior to the Statement and Bundle being submitted to us - is as set out in the Procedure (Part C; Tab 41).
- 4.20 This procedure has been supplemented in order to ensure good governance and best practice.
- 4.21 In particular, given the scope and nature of TCI’s submissions to our Draft Determination, the Procedure was, as provided for in Article 26(1A) of the Electricity Order, supplemented to extend, with the agreement of TCI, the requisite period for the determination of the Complaint.

5 Section Five - Views of TCI

5.1 The views of TCI are set out in -

- (a) the Complaint (Part C; Tab 40),
- (b) its letter to NIE dated 4 March 2011 (Part B; Tab 29),
- (c) its letter to NIE dated 11 July 2011 (Part B; Tab 39),
- (d) the Appendix and Annex attached to its letter dated 16 September 2011 (sent following its receipt of information provided by NIE in response to the Utility Regulator's request) (Part B; Tab 50),
- (e) its response to the Utility Regulator's Draft Statement of Case (as sent to both parties on 20 September 2011) (Part C; Tab 52),
- (f) its response to the Draft Determination (as sent to both parties on 24 October 2011) (Part C; Tab 58), and
- (g) its response to NIE's response to the Draft Determination (Part C; Tab 61).

5.2 We have read all the above documents in full and have had full regard to all of these submissions.

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

5.4 TCI's views can be summarised as follows -

- (a) NIE holds the Licence as granted under or in accordance with Article 10(1)(b) of the Electricity Order,
- (b) it is therefore subject to certain legal obligations under the Electricity Order and the Licence,

- (c) in accordance with the provisions of Conditions 30 and 32 of the Licence, NIE is obliged to -
 - (i) offer, within 3 months (or, where the Utility Regulator has given consent to a longer period, within that longer period) of receiving an application, terms for connection to its distribution system,
 - (ii) prepare a 'connection charging statement' approved by the Utility Regulator which sets out the basis upon which connection charges will be made, and
 - (iii) present, in a connection offer, the charges for connection in a way that is referable to the connection charging statement,
- (d) NIE has a connection charging statement approved by the Utility Regulator, namely the **March 2010 Statement** (Part A; Tab 7),
- (e) NIE is obliged to make a connection offer to TCI in respect of the Wind Farm in accordance with the March 2010 Statement and TCI is therefore entitled to a connection offer which complies with the provisions of the March 2010 Statement,
- (f) paragraph 6.7.1 of the March 2010 Statement states that "*NIE will normally offer a customer the Least Cost Technically Acceptable (LCTA) connection*",
- (g) NIE has made a connection offer on the basis of 'clustering' but TCI is therefore entitled to a connection offer on the basis of the LCTA connection,
- (h) NIE has not considered all of the connection options available to it,
- (i) it is not reasonable in all the circumstances of the case for NIE to make a connection offer which includes terms that provide for the method of connection to be on the basis of a connection to a cluster substation,
- (j) it is reasonable in all the circumstances of the case for NIE to make a connection offer which includes terms that provide for the connection to be made by way of a 33kV dedicated connection to the Coleraine Main because:

- (i) the residual transformer capacity at the Coleraine Main is capable of handling the load of the Wind Farm,
 - (ii) NIE should take a sequential approach to the allocation of the residual transformer capacity,
 - (iii) it is the most efficient, economic and coordinated way to connect the Wind Farm, not least because it is a zero cost solution for the consumer,
 - (iv) the Planning Service has indicated that connection by way of 3 x 33 KV lines or a single 100 kV line to serve both the Wind Farm and the Dunbeg Wind Farm are likely to be approved,
 - (v) the requirement for a cluster substation and in particular the siting of the Cam Cluster within an Area of Outstanding Natural Beauty (AONB) is avoidable and non-essential, and
 - (vi) NIE has not considered the particular circumstances of the geographical vicinity in determining the most appropriate design solution and has not examined all potential connection options for the Wind Farm, and
- (k) there is a significant cost differential between a 33kV dedicated connection and a cluster design solution which represents a deficit of approximately £1.3m which would need to be recovered from consumers.

5.5 With regard to paragraph 5.4(c) above, TCI also claims that NIE was not actually given an extension of time for the making of a connection offer in respect of the Wind Farm.

5.6 This claim is based on TCI's view that NIE should not have included the Wind Farm in the list (of wind farms) set out in its letter of 31 January 2011 (Part B; Tab 23) as it was not a wind farm which would connect to a cluster substation for which the Utility Regulator had given consent for pre-construction works in the Utility Regulator's letter of 21 December 2010 (Part B; Tab 22). TCI believes that NIE had no reasonable grounds for requesting an extension of time for the Wind Farm.

5.7 In the Complaint, TCI also said that as it was still waiting a LCTA connection offer from NIE, NIE was in breach of Condition 30 of the Licence.

5.8 In responding to the Draft Determination, in addition to outlining its views which are summarised in paragraph 5.4(h) - (k) above, TCI-

- (a) submitted a technical study prepared by its technical advisers Irish Grid Solutions (the **Technical Study**), and
- (b) considered that the Decision-Makers should make an order as to costs and expenses in its favour and that NIE should therefore be responsible for discharging all of TCI's costs and expenses in relation to the Complaint.

5.9 The Technical Study -

- (a) clarifies that IGS was commissioned by TCI to review alternative connection options for the Wind Farm,
- (b) notes that the connection options examined are not an exhaustive list of all viable connection options and that the study is intended to illustrate that there are alternative connection options other than those already proposed by NIE,
- (c) confirms that the consultants considered six connection options for the purposes of the study, and
- (d) includes the following in its conclusions -

“From a review of available documentation it does not appear that NIE have to-date examined all potential connection options before determining a shared cluster connection as the appropriate connection method.”

“In this technical note we have identified some alternative connection options to a cluster connection which may meet the requirements of NIE, the two connecting parties and at the same time minimise any cost impact on the consumer.”

“Our initial review of connection options concludes that dedicated connections could provide the optimum solution from a cost and timeline basis.”

5.10 TCI has also commented on NIE's response to the Draft Determination. Its comments can be summarised as follows -

- (a) it disagrees with NIE's contention that there is a legal basis for NIE seeking to apply the Proposed Revisions to the connection offer for the Wind Farm,
- (b) it does not consider any of the other considerations noted by NIE in its response to the Draft Determination to be "*an excuse for non-compliance*", and
- (c) it requests that the Decision-Makers take into account TCI's representations on NIE's behaviour and performance when considering whether they should make any incidental or consequential provision in accordance with Article 26(7)(a) of the Electricity Order.

6 Section Six - Views of NIE

6.1 The views of NIE are set out in:

- (a) the Connection Offer (Part B; Tab 38),
- (b) its letter to TCI dated 16 February 2011 (Part B; Tab 26),
- (c) its letter to TCI dated 18 March 2011 (Part B; Tab 30),
- (d) a discussion paper entitled 'Connection of Wind Farms at Dunmore and Dunbeg, Coleraine' (which is undated but which it shared with TCI on 13 June 2011) (Part A; Tab 13),
- (e) its statement (submitted in response to the Utility Regulator's request for information dated 3 August 2011) summarising how it believes it has complied with the March 2010 Statement in its dealings with the Dunmore Wind Farm connection application (Part B; Tab 44),
- (f) its response to the Utility Regulator's Draft Statement of Case (as sent to both parties on 20 September 2011) (Part C; Tab 53),
- (g) its response to the Draft Determination (as sent to both parties on 24 October 2011) (Part C; Tab 57), and
- (h) its response to TCI's response to the Draft Determination (Part C; Tab 60).

6.2 We have read all the above documents in full and have had full regard to all of these submissions.

6.3 NIE's views can be summarised as follows -

- (a) In formulating any proposals to install electric lines NIE is required to have regard to the need to conserve the natural beauty and amenity of the countryside and do what it reasonably can to mitigate any effect which the proposals would have on that natural beauty (paragraph 1(1) of Schedule 9 to the Electricity Order - see Part A; Tab 1),

- (b) NIE's 'Guidelines for NIE Networks and the Environment' (Part A; Tab 15A) set out NIE's philosophy and policies for managing the environment. The development of the cluster approach reflects the Guidelines,
- (c) TCI was made aware of the possibility of 'clustering methodology' in the 25 October 2010 Indicative Connection Study for the Wind Farm (Part B; Tab 18),
- (d) the reference in the letter accompanying the 25 October 2010 Indicative Connection Study to "*at the time of connection application*" refers to the period of up to three months (subject to its extension by the Utility Regulator) within which NIE is required to make the connection offer and does not refer to the date of the connection application,
- (e) NIE was originally required to make a connection offer in response to TCI's application of 16 November 2010 by no later than 16 February 2011,
- (f) it was not practicable for NIE to prepare and issue a connection offer by 16 February 2011 given the uncertainty as to whether Dunbeg would also have its planning refusal overturned by the Commission and the ongoing consultation on cluster charging,
- (g) on 27 January 2011, the Commission granted full planning permission for Dunbeg Wind Farm. Therefore -
 - (i) NIE considered that the proximity between the Wind Farm and the Dunbeg Wind Farm drove the need for a cluster substation in the area, and
 - (ii) on 31 January 2011, NIE requested permission from the Utility Regulator to delay a connection offer until the cluster charging decision had been made,
- (h) the Utility Regulator consented to an extension with regard to the timing of offering terms for connection to TCI,
- (i) by consenting to the extension of time for the Wind Farm, the Utility Regulator appears to have agreed that the Wind Farm (and the other eight wind farms)

would be quoted under the new charging arrangements. This position is further reinforced by the Utility Regulator's acceptance that the connection offers issued for the relevant wind farms, including the Wind Farm, would be issued with a condition precedent relating to the approval by the Utility Regulator of the Proposed Revisions,

- (j) the extension of time expired on 21 April 2011 and by making a connection offer on 7 July 2011, it has therefore made a connection offer to TCI within 3 months of the expiry date,
- (k) NIE has made a connection offer in compliance with its charging statement because the Utility Regulator has approved the development of a new connection charging methodology and the Connection Offer is made on the basis of the Decision Paper,
- (l) NIE believes that for all new wind farms forming part of clusters it was obliged to make a connection offer in line with the Proposed Revisions and that connection offers made to date under the conditions of the Proposed Revisions (namely Annex 1 of the Proposed Revisions) are conditional upon approval of both the specific cluster involved and Annex 1 of the Proposed Revisions,
- (m) it would have been entirely inappropriate for NIE to have made, after the consultations and publication of the Decision Paper in April 2011, a connection offer to the Wind Farm (and to the other eight wind farms listed in its letter of 31 January 2011) under the March 2010 Statement. Such an approach would have ignored the views of all parties who responded to the consultation and would have defeated the objective of the charging principle that had been agreed with the Utility Regulator,
- (n) the Decision Paper gave unconditional approval for cluster charging and any modification of the March 2010 Statement (i) is a final safety measure to allow the Utility Regulator to review all proposed methodologies, and (ii) will be a direct consequence of the Decision Paper,
- (o) Condition 32 does not constrain the introduction and application of alternative charging methodologies which the Utility Regulator has consulted upon and

which the Utility Regulator has approved and published by virtue of the Decision Paper, and

- (p) it would therefore be open to the Utility Regulator to agree that any subsequent revision of the March 2010 Statement take retrospective effect from the date of the Decision Paper (which meets the requirements of Article 32 of the Directive).

6.4 In its submissions to the Draft Determination, in addition to outlining its views which are summarised in paragraph 6.4(n) - (p) above, the representations made by NIE can also be summarised as follows -

- (a) there will be very difficult issues to be addressed in seeking to develop a 33kV LCTA offer in respect of the Windfarm (as connection offers made to other third parties may also need to be revised and will be very time consuming for NIE),
- (b) applying a LCTA charging approach to a cluster connection will result in a two-tier charge for connection that is otherwise avoided using a cluster methodology,
- (c) the March 2010 Statement was not drafted to take account of the complexities involved in cluster charging, and
- (d) applying 33kV LCTA has the potential to result in a significant transfer of cluster recovery risk to consumers at large as a decision that requires NIE to base its offers on individual LCTA for early windfarm connections would mean those windfarms are not part funding the cluster and are unlikely to pay back their share to consumers. At best, under recovery will be transferred to later connecting wind farms.

6.5 NIE has also commented on TCI's submissions to the Draft Determination. Its comments can be summarised as follows -

- (a) TCI had not prior to 4 November 2011 (i.e. after the Draft Determination) -
 - (i) sought to advance the case that it is unreasonable for NIE to connect the Wind Farm to a cluster substation,

- (ii) raised with the Decision-Makers any detailed alternative proposals regarding the connection of the Wind Farm,
- (b) TCI had the opportunity of raising formally those matters which it raised in its letter of 4 November 2011 on a number of occasions and did not do so,
- (c) NIE does not accept the validity of TCI's technical submissions. In particular those submissions do not consider properly the environmental impacts of various connection options,
- (d) NIE has a duty to develop its system in an efficient, coordinated and economical way not just for TCI but for others in the vicinity. In adopting the 33kV connection approach NIE may end up with unachievable or uneconomic solutions for later developers,
- (e) there is the possibility of more than two wind farms being connected to the Cam cluster in the longer term and if that was to occur it would further challenge TCI's arguments for separate 33kV connections. The case for the Cam cluster therefore remains strong,
- (f) NIE has considered all of the connection options available in respect of the connection of the Wind Farm and outlined in the Technical Study. However, it does need to consider genuine options before applying for planning permission and therefore does not generally carry out detailed investigation of underground cabling options until it is convinced that overhead line options are unlikely to be feasible, and
- (g) it would be entirely unreasonable for the Decision-Makers to determine, as proposed by TCI, that NIE pays TCI's and the Utility Regulator's costs.

7 Section Seven - Issues to be Determined

7.1 The issues falling to be determined by us were set out in the Statement and confirmed in the Draft Determination.

7.2 Having considered the documentation we agree that the issues set out below are the correct issues for us to determine and we take the description of those issues in the Statement and Draft Determination to be accurate and adopt it for the purposes of this determination.

7.3 The Complaint outlines that TCI's concerns are about -

- (a) the methodology used by NIE as the basis for the connection charges, i.e. that it should be the methodology set out in the March 2010 Statement, and
- (b) the method of connection i.e. that it should be the LCTA connection.

7.4 The issues to be determined are therefore as follows.

Issue 1

7.5 The first issue to be determined by us is -

- (a) whether -
 - (i) NIE is required to make a connection offer in accordance with the principles set out in the March 2010 Statement - which is the charging statement that is, and has at all times from the date TCI's application been, in full force and effect (Part A; Tab 7), and
 - (ii) TCI is therefore entitled to a connection offer which sets out charges that are referable to, and therefore based on, the LCTA charging methodology set out in the March 2010 Statement, or
- (b) whether NIE is entitled, notwithstanding that the Proposed Revisions have not [yet] been approved by the Utility Regulator (which Proposed Revisions would revise the March 2010 Statement to the extent set out in them), to make a connection offer which sets out charges that are not referable to the March

2010 Statement but instead are based on a 'clustering' approach, the charging methodology for which is as set out in the Proposed Revisions.

Issue 2

- 7.6 The second issue to be determined by us is whether, in all the circumstances of the case, NIE is entitled to exercise the discretion available to it under paragraph 6.7.3 of the March 2010 Statement (which paragraph would remain unchanged if the Proposed Revisions are approved by the Utility Regulator) to design a connection for the Wind Farm that is not a LCTA connection but is a connection which is based on the need for a 'cluster substation'.

8 Section Eight - Determination in relation to Issue 1

8.1 There is essentially only one key question that arises in relation to Issue 1. That is whether the connection offer made by NIE to TCI has to reflect the provisions of the March 2010 Statement.

8.2 We consider that our determination in relation to this issue turns on the legal position. We have therefore sought and received advice on the matter from our legal advisers, both as to the applicable domestic and EU law. Our conclusions on this issue are informed by the advice we have received.

8.3 With regard to the applicable domestic law, we have been advised and conclude that the position is as follows -

- (a) NIE has a duty under Article 19 of the Electricity (Northern Ireland) Order 1992, subject to certain exceptions which do not apply to the circumstances of this case, to make a connection between its distribution system and any premises when it is required to do so.
- (b) The statutory duty is confirmed and expanded upon by the provisions of Condition 30 of the Licence which requires NIE, on application by any person, to offer to enter into a connection agreement and for that offer to make detailed provision, among other things, regarding the connection charges to be paid by the applicant. The charges are, unless manifestly inappropriate, to be presented in such a way as to be referable to the charging statement prepared in accordance with paragraph 1 of Condition 32 and to be set in conformity with paragraph 4 of Condition 32.
- (c) Condition 32 provides that the initial charging statement is to be approved by the Utility Regulator. It also provides for NIE periodically to revise the charging statement and requires it to do so at least once in every year, so that the information set out in it continues to be accurate in all material respects, and provides that *“each such revision shall require to be approved by the Authority and shall not become effective until approved by the Authority”*.
- (d) In consequence of Conditions 30 and 32 of the Licence, NIE is required to make a connection offer which is based on or referable to a charging statement approved by the Utility Regulator.

- (e) The March 2010 Statement is the latest charging statement which has been approved by the Utility Regulator. It is the charging statement which was in force and effect on:
- (i) the date of TCI's application for a connection (16 November 2010),
 - (ii) the date of NIE's letter requesting an extension of time for the making of connection offers to the wind farms listed in the letter (31 January 2011),
 - (iii) the date on which the Utility Regulator gave consent to NIE for an extension of time for the making of the connection offer to such wind farms (1 February 2011),
 - (iv) the publication date of the Utility Regulator's Decision Paper on the Charges for Connecting Groups of Generators (Clustering) to the Northern Ireland Distribution System (April 2011),
 - (v) the date on which NIE made its connection offer to TCI (7 July 2011), and
 - (vi) the date of the complaint (19 July 2011).
- (f) Although the process for revising the March 2010 Statement has been initiated, it is not complete. The factual position is that the Proposed Revisions are not yet approved. The legal position is that they are not effective.

8.4 With regard to the applicable EU law, we have been advised and conclude that the position is as follows -

- (a) Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal markets in electricity and repealing Directive 2003/54/EC (the **Directive**) contains the applicable law.
- (b) Article 32 of the Directive sets out the requirements relating to third-party access.
- (c) More specifically Article 32 provides that -

- (i) third-party access to “...distribution systems [shall be] based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users”, and
- (ii) “...[the published] tariffs or the methodologies underlying their calculation are approved [by the Utility Regulator] prior to their entry into force...and....where only the methodologies are approved [those methodologies] are published prior to their entry into force.”
- (d) The above provisions envisage a situation in which persons wanting to access a distribution system (including by way of a connection to that system) should be able to assess the charges for which they may be liable when they request a connection and should subsequently be liable only to charges which accord with the approved and published tariffs and/or methodologies.

8.5 In its response to the Draft Determination, NIE contends that -

- (a) any published notice of change to the methodology is acceptable,
- (b) the Decision Paper was a published notice of change, and
- (c) the requirements of Article 32 are therefore met by the Decision Paper.

8.6 For completeness, we have sought legal advice on NIE’s contentions and are advised that they are without substance and an incorrect interpretation of the legal position. The Decision Paper clearly envisaged the need for NIE to submit, and obtain approval for, a revised statement of charges (see paragraph 3.52(c) above). It was not itself the approval.

8.7 We therefore conclude that -

- (a) under EU law any connection offer made by NIE has to be one that is compliant with the published tariffs or methodologies which have been approved by the Utility Regulator,
- (b) the Utility Regulator has approved the methodologies by virtue of approving the March 2010 Statement, and

(c) NIE is therefore required to, and can only, make a connection offer which is based on the provisions contained in the March 2010 Statement.

8.8 The effect of these conclusions is that NIE is required to make a connection offer that complies with and reflects the principles of the March 2010 Statement, and we therefore so determine.

8.9 The effect of our determination in relation to Issue 1 is that TCI is entitled to a connection offer which sets out charges that are referable to and based on the LCTA charging methodology set out in the March 2010 Statement.

9 **Section Nine - Determination in relation to Issue 2**

9.1 Issue 2 is not concerned with the basis of the charges for connection (which has been determined under Issue 1) but with other terms relating to the connection, specifically terms which relate to the design of the connection.

9.2 The question that arises for determination is whether, in making its connection offer, NIE can determine that the method of connection is not that which is applicable to a LCTA connection but instead that which applies to an alternative method of connection - in this case to connection through a 'cluster' substation.

NIE's Position

9.3 NIE contends (Part C; Tab 53) that the existence of paragraph 6.7.3 in the March 2010 Statement -

“...legitimises under the March 2010 Statement the method of connection based on a connection to a cluster substation, detailed in NIE's connection offer of 7 July 2011.”

9.4 Paragraph 6.7 of the March 2010 Statement reads as follows -

“6.7 LCTA Principle

6.7.1 NIE will normally offer a customer the Least Cost Technically Acceptable (“LCTA”) connection.

6.7.2 Where a customer requests a connection design which is more expensive than the LCTA connection then, if that option is acceptable to NIE, the customer will be required to pay in full the estimated cost of providing the additional Connection Assets necessary to meet the customer's requirements, in addition to the connection charges levied under Section 4 or 5, as appropriate.

6.7.3 There may be occasions where NIE decides for its own reasons that the preferred design is not the LCTA connection. In that event, the customer, or group of customers, will only be required to pay the estimated cost of the LCTA connection.”

9.5 In submitting its representations to the draft Statement, NIE contends that -

“...the design of the network modifications and connection arrangements are always a matter for the Licensee. Where the design cost is not to be fully recoverable from the Applicant

because the Licensee wishes to future proof the development, then the Licensee needs approval from the Utility Regulator to recover the residual cost through tariffs. It is not appropriate for an Applicant to dictate the physical method of connection, however an Applicant may dispute whether the cost calculation is proper.” (Part C; Tab 53)

9.6 We do not agree with this statement in its entirety. We accept that in most cases the network licensee will be best placed to determine the design of the connection. However, we do not accept that such matters are ‘always a matter for the Licensee’.

9.7 We note that in responding to the Draft Determination NIE has accepted our position as correct.

9.8 Furthermore, while we accept that the Applicant cannot dictate the physical method of connection, in the vast majority of cases the parties will be able to discuss and agree upon an alternative (to the LCTA) design and method of connection. In the relatively few instances of non-agreement, it is open to either party to refer the matter to the Utility Regulator for determination. On such a dispute, the design and method of the connection would be a proper matter for determination by the Utility Regulator.

9.9 NIE also contends that -

“There is therefore a need for the issue for determination to be limited only to the quantum of charges that NIE applied and not the methodology of connection detailed in NIE’s connection offer”. (Part C; Tab 53)

9.10 Again we do not accept NIE’s contention in respect of this point. The Complaint does not relate to, and we are not being asked to determine, the quantum of charges.

9.11 Again we note that in responding to the Draft Determination, NIE has accepted the point. But even if we were being asked to determine the quantum of charges, there is no reason why we could not also be asked to determine matters relating to the design and method of the connection. Issue 2 is concerned with such matters and we are satisfied that they are properly before us.

9.12 In responding to TCI’s response to the Draft Determination, NIE has also stated that it reserves its position on whether or not Article 24(1)(b) can be applied to fetter its discretion (in paragraph 6.7.3 of the March 2010 Statement) regarding the method of connection.

- 9.13 It is not in dispute that paragraph 6.7.3 of the March 2010 Statement provides for NIE to decide that the connection design need not be on a LCTA basis. In other words NIE can exercise some discretion in determining the design of the connection.
- 9.14 However, by virtue of Article 24(1)(b) of the Electricity Order, NIE can only require TCI to accept, in the making of the connection, *“any terms which it is reasonable in all the circumstances of the case for [TCI] to accept”*.
- 9.15 Article 26(1) provides that “A dispute arising under Articles 19 to 25...may be referred to the Authority...” and that the dispute referred “shall be determined by the Authority”.
- 9.16 The Complaint is a dispute arising under Articles 19 to 25 and referred to the Utility Regulator for determination. The dispute is about the terms [of the connection offer] which it is reasonable in all the circumstances of the case for TCI to accept. The connection offer contains terms relating to the method of connection. The Utility Regulator is therefore required to determine whether it is reasonable in all the circumstances of the case for TCI to accept those terms.

TCI’s Position

- 9.17 In making its submissions TCI states that the process of connecting wind farms into shared substations *“will of course require the development of a new connection charging methodology to be approved by the Utility Regulator”*. (Paragraph 3.13 of the Complaint - Part C; Tab 40)
- 9.18 This is not the case. A wind farm can be connected into a shared substation without there being a new charging methodology. This is because paragraph 6.7.3 of the March 2010 Statement provides for flexibility as to the design of the connection, so long as in such cases the connection charges to be applied are always LCTA charges, i.e. as calculated in accordance with the LCTA charging methodology.
- 9.19 TCI also submits that NIE has “never raised any system reasons for not proceeding with a LCTA offer”.
- 9.20 In addition in responding to the Draft Determination, TCI submitted a Technical Study which considered some of the potential connection options for the Wind Farm. We make some observations on TCI’s approach in this respect in Section 10.

9.21 The Technical Study -

- (a) notes that connection options examined are not an exhaustive list of all viable connection options and that the study is intended to illustrate that there are alternative connection options other than those already proposed by NIE,
- (b) confirms that the consultants appointed by TCI considered six connection options for the purposes of the study, and
- (c) includes the following in its conclusions -

“From a review of the available documentation it does not appear that NIE have to-date examined all potential connection options before determining a shared cluster connection as the appropriate connection method.”

“In this technical note we have identified some alternative connection options to a cluster connection which may meet the requirements of NIE, the two connecting parties and at the same time minimise any cost impact on the consumer.”

“Our initial review of connection options concludes that dedicated connections could provide the optimum solution from a cost and timeline basis.”

Technical Matters

- 9.22 In light of TCI’s submission of a Technical Study, the Decision-Makers sought advice on the matters contained in it.
- 9.23 The Utility Regulator therefore commissioned technical consultants (Sinclair Knight Merz - **SKM**) to review and advise on the Technical Study.
- 9.24 SKM were asked to consider each of the six options outlined in the Technical Study and advise on -
 - (a) whether there is any connection method which is not feasible from a technical viewpoint and, if so, which one and why,
 - (b) which connection method would be most preferable from a technical viewpoint, and

- (c) which connection method would be the most resilient and robust from a technical viewpoint.

Terms Relating to Method of Connection

- 9.25 We have therefore considered whether it is reasonable in all the circumstances of the case for NIE to make a connection offer which includes terms that provide for the method of connection to be on the basis of a connection to a cluster substation (which for the avoidance of doubt we note would not be a LCTA connection).
- 9.26 Having considered the relevant issues, it is our view that it was and remains reasonable in all the circumstances of the case for NIE to make a connection offer including terms that provide for the connection to be made through a cluster substation, and we therefore so determine.
- 9.27 Our reasons are as follows -
- (a) NIE has a statutory duty as an electricity distributor to develop and maintain an efficient, coordinated and economical system of electricity distribution (Article 12(1)(a) of the Electricity Order).
 - (b) As noted in NIE's and the Utility Regulator's consultations, the number and nature of generation connections to the distribution system has changed in the recent past, and this trend is expected to continue as a result of government targets and incentives for renewable and embedded generation.
 - (c) This change in the number and type of connections requiring to be made to the distribution system is likely to have an impact on the actions that NIE will need to take in order to discharge its Article 12(1)(a) duty.
 - (d) In order to connect a wind farm to its distribution system by way of overhead lines NIE requires the consent of the relevant planning authority for the installation of those lines.
 - (e) The 2010 Consultation notes (Part A; Tab 8) at page 1 that NIE's discussions with the planning authorities suggest that the connection to the distribution system using individual overhead lines of all wind farms that are presently being

proposed or developed is unlikely to be possible, since to do so would create detrimental effects on the environment.

- (f) This could constrain the future development of new wind farm generation and frustrate government targets for renewable and embedded generation.
- (g) It is possible to mitigate at least some of the planning authorities' concerns with regard to the impact on the landscape by connecting some wind farms through shared higher capacity overhead lines ('clustering').
- (h) Adopting a clustering approach, in circumstances where it may be possible to do so, will allow more generation capacity to be connected to the distribution system.
- (i) As a matter of first principle, it is also likely to result in the maintenance of a more efficient, coordinated and economical system of electricity distribution.
- (j) The alternative is a system based on individual connections carried out without reference to each other, even when they are closely proximate in time and in location. This is unlikely to be the most efficient, economical or coordinated way to proceed.
- (k) For these reasons, as noted in the Decision Paper (Part A; Tab 11 - see paragraph 5 for reference), the Utility Regulator has approved the principle of clustering.
- (l) The particular circumstances in which adopting a clustering approach is most suitable arise where two or more wind farms are located in close geographical proximity to each other and in particular where they are being developed to a similar timetable.
- (m) There is, at the present time, at least one other wind farm (Dunbeg Wind Farm) which is being developed in close geographical proximity to the Wind Farm. We understand that the two wind farms are roughly within 10 miles of each other.
- (n) Both Dunbeg Wind Farm and the Wind Farm are being developed to a similar timetable. This is evident from (i) each having been granted planning permission within approximately three months of the other, and (ii) a

connection application being made in respect of Dunbeg to NIE within the period for which NIE was required to provide a connection offer for the Wind Farm.

(o) The Technical Assessment -

- (i) notes that whilst all of the connection methods are feasible from a technical viewpoint some of them require considerably more planning and design,
- (ii) scores each of the options against three particular technical criteria, namely Reliability and Security of Supply, Technical and Practicality and Environmental Impact, and
- (iii) states that overall the preferred connection method is the 'cluster approach', as this scores consistently low across each of the three criteria.

9.28 Given all of the above, we believe it was and remains reasonable in all the circumstances for NIE to make a connection offer including terms that provide for the connection to be designed on the basis of a connection to a cluster substation.

9.29 We acknowledge that, should NIE decide to proceed with connection through a cluster substation, this may delay the timetable for the eventual connection of the Wind Farm. We also appreciate that, given the length and nature of the process to date, TCI may feel frustrated by the possibility of further delay; although we note that at an early stage, in its indicative study of 25 October 2010 (Part A; Tab 18), NIE did alert TCI to the possibility of the connection being made by way of clustering.

9.30 We note TCI's contention that it will *"suffer significant financial loss and damage if the terms of the connection for the Wind Farm are based on a cluster substation design."* We also note that this contention is based primarily (but not solely) on DETI's proposals (on which it is presently consulting) to decrease the number of NIROCs available for each MWh of renewable electricity generated by projects commissioned after April 2013.

- 9.31 We have some sympathy with TCI's position. However, it is likely that there will be an element of delay in any process of clustering in order to facilitate the coordination of system development that is one of the desirable features of the approach.
- 9.32 It is also the case that government/departmental policy is subject to change at any stage and not within the control of the Utility Regulator. Such change can have both positive and/or adverse impacts on current and future market participants and any such impact is one of the factors taken into consideration by the government/department in setting the policy.
- 9.33 We would not regard it as sufficient, in a typical case, for the above factors to override the benefits that are capable of being obtained from the cluster approach. There is no reason to conclude, based on the evidence before us in this case, that any delay is sufficient to render unreasonable an offer of terms based on a cluster substation design.
- 9.34 We have also considered TCI's submissions in relation to cost recovery and potential impact of costs on consumers. It is our view that the nature and extent of any such costs is impossible to predict at this stage given the number of unknowns, not least the number of additional connections that might yet be sought in that area and it is entirely possible that in the long term the costs to consumers is neutral.
- 9.35 In any event, and in particular with regard to matters relating to costs, we wish to draw attention to the fact that our determination in relation to Issue 2 does not constitute (and shall not be taken as constituting) -
- (a) Anything that would over-ride our determination in relation to Issue 1. In other words, although NIE may make a connection offer which provides for the method of connection to be by way of a cluster substation, the connection charges must be calculated on the basis of the connection being the LCTA connection.
 - (b) An approval by the Utility Regulator of NIE's request (Part C; Tab 51) for the approval of 'capital expenditure' to enable NIE to undertake pre-construction activities leading to the submission of planning applications and reliable cost estimates for the construction of a wind farm cluster substation at Cam.

(c) An approval by the Utility Regulator for NIE to incur any expenditure in the expectation that such expenditure can be recovered through NIE's allowed regulated revenue.

(d) An approval by the Utility Regulator of the Proposed Revisions.

9.36 Nor does our determination mean (or should it be taken as meaning) that the Utility Regulator has considered or determined any of the matters mentioned in 9.35(b)-(d) above for which its approval has been or may be sought by NIE.

10 Section Ten - Concluding Observations

- 10.1 In making the Complaint, TCI asked for certain matters to be clarified as ‘preliminary points’ within the determination process.
- 10.2 These matters are not for our formal determination but we are invited to give our views. We both agree that it may be helpful and appropriate for us to provide our views on such matters.
- 10.3 We also consider it appropriate to comment in this section on the manner in which the Parties have stated their case. In particular set out below our views on the scope and type of submissions made by TCI in relation to the Draft Determination and its subsequent handling of the Decision-Makers’ proposal that, in order to enable its late submissions in the form of the Technical Study to be taken into account, it would be necessary for TCI to agree to an extension of time for making the determination.
- 10.4 Finally, we also wish also to make some further observations which we hope will be of assistance to the Parties and the Utility Regulator in the future and will provide some useful guidance to others who may have similar disputes.
- 10.5 This Section Ten is not therefore part of our formal determination.

Preliminary Points

- 10.6 The points on which TCI sought clarification are -
- (a) On what basis did the Utility Regulator consent to an extension of time for the making of a connection offer to TCI in respect of the Wind Farm given the absence of any cluster substation proposals within the vicinity of the Wind Farm?
 - (b) As the Utility Regulator has, by virtue of the Decision Paper, appeared to reach a decision on NIE’s consultation paper, can the Utility Regulator confirm that the extension of time for the making of a connection offer for the wind farms detailed in NIE’s letter of 31 January 2011 no longer applies?

- (c) Can the Utility Regulator confirm that no approval has been given for the construction of a cluster substation for the Wind Farm and the neighbouring Dunbeg Wind Farm?
- 10.7 The Parties have, in accordance with the Procedure, received a copy of the Statement. TCI has therefore already received the clarification it sought in respect of the matters outlined in paragraphs 10.6 (b) and (c) above.
- 10.8 Nonetheless we reaffirm the position as follows -
 - (a) The Utility Regulator confirms that the consent for an extension of time for the making of connection offers for the wind farms detailed in NIE's letter of 31 January no longer applies - it expired on 21 April 2011.
 - (b) The Utility Regulator confirms that it has not at the present time given approval for NIE to incur expenditure on the construction of a cluster substation for the Wind Farm and the neighbouring Dunbeg Wind Farm.
- 10.9 The factual background relating to the matter outlined in paragraph 10.6(a) was set out in the Statement. Since no objection was taken to it by either Party, we take it to be accurate. This is that -
 - (a) The Utility Regulator gave consent to NIE for an extension of time for the making of connection offers to the nine wind farms listed in NIE's request dated 31 January 2011.
 - (b) In giving its consent, the Utility Regulator relied on the information given by NIE in its request.
 - (c) NIE's letter stated that it *"followed on from the letter...in which the Utility Regulator gave consent for four wind farm cluster substation pre-construction works"*; that NIE had been *"working on producing connection offers for wind farms which will connect to these"*; and that NIE proposes to delay the issues of *"these connection offers"*.
 - (d) The letter went on to ask the Utility Regulator to *"confirm if this offer time [sic] extension is acceptable..."*, and stated that *"the wind farms in question are... Dunmore..."*.

- (e) The Utility Regulator therefore considered that all of the nine wind farms listed in NIE's request were wind farms which would connect to a cluster substation (for which it had given consent for pre-construction works on 21 December 2010 - see 3.25(a)) and accordingly gave consent for an extension of time for the wind farms listed in the letter.

10.10 The question of whether or not consent should have been given for an extension of time for the Wind Farm is now academic given that the extension of time no longer applies and that NIE has made a Connection Offer.

10.11 Nonetheless, we are of the view that the Utility Regulator's decision to give an extension of time for the Wind Farm was an error which was based on incorrect information provided to it by NIE.

10.12 NIE's letter of 31 January 2011 clearly stated that it was working on connection offers for wind farms which would connect to one of the four clusters for which the Utility Regulator had on 21 December 2010 given consent for pre-construction works and sought an extension of time in relation to those wind farms. It then listed nine wind farms. There is a clear implication from the letter that each of the nine listed wind farms would connect to one of the four clusters.

10.13 However, it is not and never has been the case that the Wind Farm would connect to one of the four clusters for which pre-construction works approval had been given. In our view NIE would, or at the very least event should, have known that the Wind Farm would not connect to any one of the four clusters. There was no reason for the Utility Regulator to doubt the veracity of the information being provided by NIE (although with the benefit of hindsight it would clearly have been desirable to check that information).

Late Submissions/Extension of Time

10.14 As noted elsewhere in this determination, both Parties submitted further representations in response to the Draft Determination. The representations from TCI included the submission of technical information in the form of a Technical Study in support of its position with regard to our Draft Determination on Issue 2.

- 10.15 It is not clear why TCI did not submit such information prior to the issue of the Draft Determination. There is no reason why it could not have done so. This suggests that TCI had not previously stated its case fully.
- 10.16 The Procedure is very clear in about the purpose of issuing a draft determination - it is to enable the parties to draw to the attention of the Decision-Makers any statements within the draft that they consider incorrect, and to make representations in respect of any conclusions with which they disagree.
- 10.17 That this is the case was effectively re-iterated in the Draft Determination, paragraph 1.10 of which stated that the Decision-Makers did not expect to receive fresh evidence or new grounds of dispute being advanced in response to the draft.
- 10.18 It follows that making detailed representations, and submitting new technical evidence recently commissioned from technical consultants, was in our view not an appropriate response to the Draft Determination.
- 10.19 It is important to be clear as to the context in which we must make determinations. In accordance with law, we are required to determine complaints within two months, capable of being extended by us to no more than four months where (as here) we require further information. Any further extensions are only possible with the consent of the complainant, which we would not normally expect to seek and on the affording of which we are clearly not able to rely.
- 10.20 In many cases, given the nature of the issues in dispute and the amount of information to be considered, this will constitute a very tight timetable. But we must abide by it. Moreover, we must also do so while preserving fairness of procedure in which (for instance) each party has the opportunity to make representations on the case made by the other.
- 10.21 In these circumstances we must emphasise, for the benefit of parties to disputes raised before the Utility Regulator in the future, that we regard it as incumbent on them - and in particular on the complainant, as the party which raises a dispute and therefore effectively defines its scope - to ensure that their cases are fully stated and supported by evidence at the earliest possible stage of proceedings. The Utility Regulator must rely on the parties to provide it with the information and evidence that they consider relevant, and will reach its determinations on that basis.

- 10.22 It will therefore not usually be either possible or appropriate for the Utility Regulator to accept the introduction of new issues or the late submission of evidence in the light of the timetable to which it must operate. And this is not a new issue. The Procedures already outline this background, which was therefore known to TCI.
- 10.23 In these circumstances, we were surprised by TCI's representations to us in its letter of 16 November 2011 (Part C; Tab 59) after we had requested an agreed extension of time for the purpose of considering its new evidence. By doing so we were seeking to make sure that we could have proper regard to that evidence. It would have been proper for us to have refused to consider it at that stage, and we were under no duty to seek to extend time by agreement. We consider TCI's criticism of our approach to have been wholly misplaced.
- 10.24 In our view it was not necessary for TCI to have waited until the Draft Determination before commissioning any technical information to advance its case. In its role as the complainant in the matter, had it considered that submitting technical information was appropriate to support its case, it should have done so at the earliest opportunity. It had ample opportunity to do so prior to the Draft Determination.
- 10.25 Contrary to its letter, TCI had no reason to believe that technical evidence was placed before us, since it had complete transparency through the Statement of Case and the Bundle of the evidence we had seen.
- 10.26 Moreover, we note that in its letter of 16 November 2011, TCI states that "*it did not have an opportunity until this late stage of the process to respond to the inclusion of further information (Guidelines) disclosed by NIE during their response to the Draft Statement*".
- 10.27 This is incorrect. The Statement (in its final form) was sent to the Parties at the same time as it was sent to the Decision-Makers and a copy of the Guidelines was sent to TCI at that time. In any event the Guidelines are published on NIE's web-site and are thereby readily available to TCI.
- 10.28 In the event, the late submission of evidence not only delayed the making of the final determination - a position that is unsatisfactory for all concerned - but it has also increased the costs of the Authority in terms of handling, managing and determining the complaint.

10.29 We would not expect in future cases to seek an extension of time to consider evidence submitted for the first time at such a late point in the process.

Other General Observations

10.30 There are lessons to be learned from the way in which NIE handled this matter.

10.31 We would therefore encourage NIE to review its internal procedures to ensure that -

(a) requests for consents sought by virtue of provisions contained in the Licence are made on a timely basis and at the earliest opportunity, and

(b) the information it provides to the Utility Regulator is complete and accurate in all respects.

10.32 In addition, although we have not seen any specific evidence which indicates discrimination in the way in which TCI's application for a connection was processed by NIE, we have found that there was unnecessary delay in certain information being communicated by NIE to TCI.

10.33 In particular we note that there was a lengthy delay by NIE in dealing with TCI's request for a copy of the Utility Regulator's letter giving an extension of time for connection offers (i.e. dated 1 February 2011). Furthermore, when the letter was eventually sent (following intervention by the Utility Regulator at the request of TCI), it was not accompanied by NIE's letter of 31 January 2011 (as referred to in the Utility Regulator's letter). This led to considerable delay in TCI being able to ascertain the reason for NIE adopting its position and not making the connection offer.

10.34 We would therefore encourage NIE to review its procedures for dealing with connection applications and ensure that they are dealt with in a systematic, transparent and consistent manner.

10.35 We have also observed that NIE did not provide TCI with regular and up-to-date information about the status of TCI's connection application. Understanding what is happening with their connection applications and knowing when they might expect a connection offer is clearly of paramount importance to applicants.

- 10.36 We would therefore also encourage NIE to review its processes for informing connection applicants of the status of their applications. We suggest that this should include consideration of publishing regular updates on the status of all wind farm connection requests. This would allow the industry to have a clear picture of the likely developments as well as facilitating the Utility Regulator's monitoring of NIE's compliance with its legal obligations.
- 10.37 Finally, in light of the correspondence we have seen, it seems to us that there was nothing to prevent NIE from resolving the matter easily and quickly by making a connection offer which reflected the March 2010 Statement.
- 10.38 While it is recognised that dealing with connection applications during periods of review of methodologies may introduce certain complexities, licensees should remain mindful of the absolute requirement to meet their legal obligations at all times.

11 Section Eleven - The Order

11.1 TCI has effectively asked us to make an order under Article 26(1) of the Electricity Order to the effect that TCI should receive a connection offer which -

- (a) provides that the method of connection is the LCTA connection, and
- (b) provides that the connection charges shall be those which reflect the charging methodology for the LCTA connection as set out in the March 2010 Statement.

11.2 For all the reasons given above, we are not making an order in relation to 11.1 (a), but make the following order in relation to 11.1(b).

11.3 We order that NIE -

- (a) revises the terms of its connection offer such that it provides for the connection charges to be paid by TCI on the basis of the LCTA charging methodology as set out in the March 2010 Statement,
- (b) does not need to revise the terms of its connection offer to provide that the method of connection shall be the LCTA connection but is not precluded from doing so should it so wish, and
- (c) sends its revised connection offer to TCI no later than **15 working days from the date of this Determination** such that it is capable of being accepted by TCI, should it wish to accept, without further delay.

11.4 We invited submissions from the Parties as to whether we should make any incidental, supplemental or consequential provision - in particular any order as to our costs - in accordance with Article 26(7)(a) of the Electricity Order. However, in the light of the representations made, we do not consider that we should do so.

11.5 As to the issue of costs, we have had regard to the matters referred to at Article 26(8) of the Electricity Order. The Procedures refers to the possibility of a costs order and therefore the Parties have been on notice to this effect. We also believe it unlikely that either of the Parties would be precluded by limited means from meeting any costs order that may be made.

- 11.6 However, in this particular case, we believe that it is appropriate in this case to exercise our discretion not to make a costs order.
- 11.7 This should not be regarded as setting any precedent as to the future. We expressly reserve the right to order the payment of costs in the context of subsequent complaints. In doing so, we will consider each case on its own merits and circumstances.
- 11.8 In addition to the factors set out in the Electricity Order, we recommend (but without any intention of being either prescriptive or exhaustive) that the Utility Regulator, in considering any order as to costs, take into account additional matters such as -
- (a) the extent to which a party could have resolved the issues in dispute at an earlier stage or via alternative means,
 - (b) the manner of conduct and clarity of the communications between the parties when dealing both with each other prior to a complaint arising, and also with the Utility Regulator and each other after a complaint has been made,
 - (c) any value/benefit of the complaint to the wider utility industry to which it relates,
 - (d) the merits of the arguments raised by the parties, and
 - (e) the extent to which the parties have taken cognisance of the lessons arising from any previous determinations made by the Utility Regulator especially where the issues to be determined are similar in nature to those addressed in such previous determinations.

Christopher Le Fevre
Donald Henry

Authorised on behalf of the Utility Regulator

Annex A - Updated Index of Case Bundle

Redacted for publication

Annex B - Part C; Tab 62 of Bundle

Redacted for Publication