

**APPLICATION BY NORTHERN IRELAND ELECTRICITY NETWORKS LIMITED TO THE UTILITY
REGULATOR TO DETERMINE A DISPUTE UNDER THE TRANSMISSION INTERFACE
ARRANGEMENTS IN RELATION TO A 'SECTION S' CONNECTION OFFER MADE BY SONI LTD**

DETERMINATION

28 March 2019

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1 SECTION ONE - INTRODUCTION

- 1.1 On 31 July 2018, the Northern Ireland Authority for Utility Regulation (referred to hereafter as the **Utility Regulator**) received an application¹ from Northern Ireland Electricity Networks Limited (**NIEN**) for it to determine a Dispute between it and SONI Limited (**SONI**) – the **Dispute**.
- 1.2 The Dispute relates to the terms of an offer made by SONI (the **Offer**)² under and in accordance with Section S of the document that is entitled the Transmission Interface Arrangements (the **TIA Document**).³
- 1.3 The TIA Document constitutes –
- (a) the arrangements (the 'Transmission Interface Arrangements') entered into between SONI and NIEN under and in accordance with Condition 17 of NIEN's electricity transmission licence and Condition 18 of SONI's electricity transmission licence; and
 - (b) the arrangements (the 'Distribution Interface Arrangements') entered into between SONI and NIEN under and in accordance with Condition 17 of NIEN's electricity distribution licence and Condition 18A of SONI's electricity transmission licence.
- 1.4 The Offer is in respect of a connection sought by NIEN (in its capacity as electricity distributor and therefore referred to for these purposes as **NIEN Distribution**) of the Agivey Cluster Substation (the **Agivey Substation**) to the Northern Ireland electricity transmission system (the **Transmission System**). The terms of the offer, which are the subject of the Dispute, relate to the charges proposed by SONI in respect of the connection of the Agivey Substation to the Transmission System.
- 1.5 The Dispute between NIEN Distribution and SONI (each a **Party** and together the **Parties**) falls to be determined by the Utility Regulator under paragraph 4.2 of Section Q of the TIA Document. Paragraph 4.3 of Section Q of the TIA Document provides that the Utility Regulator's determination of any dispute under paragraph 4 shall be conducted in accordance with its statutory powers under the Electricity (Northern Ireland) Order 1992 (the **Electricity Order**).⁴
- 1.6 By its letter dated 7 August 2018⁵, the Utility Regulator informed the Parties that it proposed to treat the application to determine the Dispute as a complaint made to it under Article 31A of the Electricity Order. No representations were received from either Party on this and the Utility Regulator confirmed its decision to treat the Dispute as a complaint under Article 31A of the

¹ Tab 9.

² Tab 9 - Exhibit 9.

³ Tab 5.

⁴ Tab 1.

⁵ Tab 12.

Electricity Order on 24 August 2018.

- 1.7 The Utility Regulator's *Policy on the Resolution of Complaints, Disputes and Appeals and Guide for Applicants*, dated June 2013 (the **Complaints Policy**)⁶ is also applicable in this respect.
- 1.8 SONI responded to NIEN's application for determination on 21 August 2018 (the **SONI Response**).⁷ On 10 September 2018, a reply to the Response was provided on behalf of NIEN (the **NIEN Reply**).⁸
- 1.9 The Utility Regulator has appointed us, Tony Doherty (Utility Regulator Manager) and Barbara Cantley (Utility Regulator Manager), jointly to determine the Dispute on its behalf (together, the **Decision-Makers**). We do so as delegates of the Utility Regulator and on its behalf.
- 1.10 This document is our determination in respect of the Dispute. It also includes the costs order we make under Article 31A of the Electricity Order.
- 1.11 In making this determination we have reviewed and considered the following materials and documents –
- (a) A Statement of Case prepared for us by the case management team – the Statement of Case sets out an overview of the background to the Dispute, the applicable statutory and regulatory framework, the views of the Parties in respect of the Dispute and the issues to be determined.
 - (b) The documents listed at Appendix 1 to this determination which are relevant to the Dispute, which include all of the submissions of the Parties.
- 1.12 The Parties were also afforded the opportunity to comment on –
- (a) a draft of the Statement of Case;
 - (b) a provisional determination dated 21 November 2018 (the **Provisional Determination**); and
 - (c) a supplementary provisional determination dated 5 March 2019 (the **Supplementary Provisional Determination**).
- 1.13 This document is structured as follows –
- (a) details of the Parties (at Section 2),

⁶ Tab 6.
⁷ Tab 10.
⁸ Tab 11.

- (b) the applicable legal framework (at [Section 3](#)),
- (c) the factual background to the Dispute (at [Section 4](#)),
- (d) the views of NIEN (at [Section 5](#));
- (e) the views of SONI (at [Section 6](#)),
- (f) the issues for determination (at [Section 7](#)),
- (g) determination in relation to Issue One (at [Section 8](#)),
- (h) determination in relation to Issue Two (at [Section 9](#));
- (i) other matters (at [Section 10](#));
- (j) recovery of the Utility Regulator's costs (at [Section 11](#)); and
- (k) the costs order (at [Section 12](#)).

1.14 This determination references a number of documents (including correspondence provided by the Parties) and these are included in the bundle accompanying this document. An index to these is attached at [Appendix 1](#).

2 SECTION TWO - THE PARTIES

NIEN

- 2.1 NIEN is a subsidiary of ESBNI Limited, which is a member of the ESB group of companies. It is the owner of the Transmission System (and therefore referred to as NIEN Transmission for these purposes), and the owner and operator of the electricity distribution system in Northern Ireland (i.e. NIEN Distribution).
- 2.2 NIEN is licensed separately in relation to both activities. It holds an electricity transmission licence (the **NIEN Transmission Licence**) and an electricity distribution licence (the **NIEN Distribution Licence**)⁹ granted under Articles 10(1)(b) and 10(1)(bb) of the Electricity Order respectively.

SONI

- 2.3 SONI is a subsidiary of EirGrid plc. It is the operator of the Transmission System and is licensed to undertake this activity by its electricity transmission licence (the **TSO Licence**).¹⁰ This licensed business of SONI is the Transmission System Operator Business (the **TSO Business**).
- 2.4 Among other things, SONI is required under the TSO Licence (Condition 25 refers), on application by any person, to offer to enter into a connection agreement for connection to the Transmission System.
- 2.5 The Transmission System operated by SONI is owned by NIEN.

⁹ Tab 8.
¹⁰ Tab 3.

3 SECTION THREE - APPLICABLE LAW

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

The Electricity Order

3.2 The following provisions of the Electricity Order are relevant for the consideration and determination of the Dispute.

Article 3

3.3 Article 3 of the Electricity Order provides a definition of a 'transmission system' as a system which –

- '(a) consists (wholly or mainly) of high voltage lines and electrical plant; and*
- (b) is used for conveying electricity –*
 - (i) from a generating station to a substation;*
 - (ii) from one generating station to another;*
 - (iii) from one substation to another;*
 - (iv) to a substation in Northern Ireland from a place outside Northern Ireland; or*
 - (v) from a substation in Northern Ireland to a place outside Northern Ireland.'*

Articles 10 and 11

3.4 Article 10(1)(b) of the Electricity Order provides for a transmission system operator to be licenced. It provides that:

- '(1) The Authority may grant a licence authorising any person –*
 - (a)...*
 - (b) to participate in the transmission of electricity for that purpose;'*

3.5 SONI is the holder of a licence under Article 10(1)(b) of the Electricity Order as the TSO for the Transmission System.

3.6 Conditions may be included in licences granted under Article 10(1)(b) of the Electricity Order by Article 11 of the Electricity Order.

Article 31A

3.7 The Utility Regulator has informed the Parties that the application to determine the Dispute is also to be treated as a complaint made to it under Article 31A of the Electricity Order and therefore Article 31A also applies to the Dispute.

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

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

3.9 Article 31A goes on to state that –

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

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

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

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

(5A) Where the Authority makes a determination under this Article, it may include in the determination an order requiring any party to the dispute to pay such sum in respect of the costs or expenses incurred by the Authority in making the determination as the Authority considers appropriate and this order shall be final and shall be enforceable as if it were a judgement of the county court.

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

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

Directive 2009/72/EC

3.10 Article 32 of the Directive 2009/72/EC of the European Parliament and of the Council concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (the **Directive**)¹¹ provides –

'Third-party access

1. *Member States shall ensure the implementation of a system of third party access to the transmission and distribution systems based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users. Member States shall ensure that those tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force in accordance with Article 37 and that those tariffs, and the methodologies — where only methodologies are approved — are published prior to their entry into force.*
2. *The transmission or distribution system operator may refuse access where it lacks the necessary capacity. Duly substantiated reasons must be given for such refusal, in particular having regard to Article 3, and based on objective and technically and economically justified criteria. The regulatory authorities where Member States have so provided or Member States shall ensure that those criteria are consistently applied and that the system user who has been refused access can make use of a dispute settlement procedure. The regulatory authorities shall also ensure, where appropriate and when refusal of access takes place, that the transmission or distribution system operator provides relevant information on measures that would be necessary to reinforce the network. The party requesting such information may be charged a reasonable fee reflecting the cost of providing such information.'*

3.11 The Utility Regulator also has a duty to determine certain complaints made against either a distribution or transmission system operator under the Directive. In particular, Article 37(11) of the Directive provides –

'Any party having a complaint against a transmission or distribution system operator in relation to that operator's obligations under this Directive may refer the complaint to the regulatory authority which, acting as dispute settlement authority, shall issue a decision within two months after receipt of the complaint. That period may be extended by two months where additional information is sought by the regulatory authority. That extended

¹¹ Tab 2.

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.'

The NIEN Transmission Licence

3.12 Condition 17 of the NIEN Transmission Licence requires NIEN Transmission to have in force and implement the TIA.

3.13 Paragraph 1 of Condition 17 reads:

"1 The Licensee shall, in common with the Transmission System Operator, prepare, obtain the Authority's approval of, and at all times have in force and implement arrangements (the "Transmission Interface Arrangements") which:

(a) set out the terms and arrangements, as between the Licensee and the Transmission System Operator, referred to in paragraph 3..."

(b) ..."

3.14 Paragraph 2 essentially provides that the TIA Document contains the 'Transmission Interface Arrangements'.

3.15 Among others, paragraph 3(b)(iv) of Condition 17 provides that the terms and arrangements referred to in paragraph 1(a) are those which provide for matters which include –

"matters to enables responses to (and to progress any works necessitated by) applications received for...new connections (or modification of existing connections) to the [Transmission System] at an entry or exit point on the [Transmission System];"

The NIEN Distribution Licence

3.16 Condition 17 of the NIEN Distribution Licence requires NIEN Distribution, in common with SONI, to have in force, implement and comply with arrangements which are the Distribution Interface Arrangements.

3.17 Paragraph 1(a) of Condition 17 provides that these are arrangements which:

"(a) set out (to the extent not catered for in the Grid Code or the Distribution Code) the terms and arrangements for connection of the [Transmission System] to the Distribution System..."

3.18 Paragraph 2 of Condition 17 essentially provides that until such time as the Utility Regulator designates a document of the name 'Distribution Interface Arrangements', such parts of the TIA Document, as set out in the matters referred to in paragraph 1 (of Condition 17), is the relevant document for that purpose.

- 3.19 Paragraph 3 of Condition 17 provides that the 'Distribution Interface Arrangements' may provide for there to be referred to the Utility Regulator for determination such matters arising under the arrangements as may be specified in the arrangements.

The TSO Licence

Condition 15

- 3.20 Among other things, Condition 15 of the TSO Licence requires that in undertaking its TSO Business, SONI:

'...shall not unduly discriminate as between any persons, or class or classes of person or persons (including itself in undertaking any activity other than the Transmission System Operator Business).'

Condition 18

- 3.21 Condition 18 of the TSO Licence requires SONI to have in force and implement the TIA.

- 3.22 Paragraph 1 of Condition 18 reads:

"1 The Licensee shall, in common with the Transmission Owner, prepare, obtain the Authority's approval of, and at all times have in force and implement arrangements (the "Transmission Interface Arrangements") which:

(a) set out the terms and arrangements, as between the Licensee and the Transmission Owner, referred to in paragraph 3..."

(b)..."

- 3.23 Paragraph 2 essentially provides that the TIA Document contains the 'Transmission Interface Arrangements'.

- 3.24 Among others, paragraph 3(b)(iv) of Condition 18 provides that the terms and arrangements referred to in paragraph 1(a) are those which provide for matters which include –

"matters to enable responses to (and to progress any works necessitated by) applications received for...new connections (or modification of existing connections) to the [Transmission System] at an entry or exit point on the [Transmission System];"

Condition 18A

- 3.25 Condition 18A of the TSO Licence requires SONI to have in force, implement and comply with arrangements which are the Distribution Interface Arrangements.

- 3.26 Paragraph 1(a) of Condition 18A provides that these are arrangements which:
- "(a) set out (to the extent not catered for in the Grid Code or the Distribution Code) the terms and arrangements for connection of the [Transmission System] to the Distribution System..."
- 3.27 Paragraph 2 of Condition 18A essentially provides that until such time as the Utility Regulator designates a document of the name 'Distribution Interface Arrangements', such parts of the TIA Document, as set out the matters referred to in paragraph 1 (of Condition 18A), is the relevant document for that purpose.
- 3.28 Paragraph 3 of Condition 18A provides that the 'Distribution Interface Arrangements' may provide for there to be referred to the Utility Regulator for determination such matters arising under the arrangements as may be specified in the arrangements.

Condition 25

- 3.29 Condition 25 of the TSO Licence relates to 'Requirements to Offer Terms – Users and Connectees'.
- 3.30 Paragraph 2 of Condition 25 requires SONI, on request, to offer terms of connection to the Transmission System.
- 3.31 Paragraph 2(g) of Condition 25 provides that the connection offer shall make provision regarding:

- '(g) the connection charges to be paid to the Licensee, such charges:
- (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 30 or any revision of such statements; and
- (ii) to be set in conformity with the requirements of paragraph 5 of Condition 30 and where relevant of paragraph 3;'

Condition 30

- 3.32 Condition 30 of the TSO Licence relates to 'Charging Statements'.
- 3.33 Paragraph 1(b) of Condition 30 requires SONI to prepare and obtain the Utility Regulator's approval to, among other things, a statement setting out –
- 'the basis upon which charges will be made for connection to the All-Island Transmission Networks at entry or exit points on the transmission system.'*
- 3.34 This is essentially a connection charging statement. SONI fulfils this obligation through the

SONI Transmission Connection Charging Methodology Statement (the **TCCMS**).

The TCCMS

- 3.35 The TCCMS which is currently in full force and effect is the statement dated 1 September 2016.¹² This was also the statement that was in full force and effect on 14 February 2018 – the date on which the Offer was made.
- 3.36 The TCCMS includes, among other things, Cost Allocation Rules for Shared Assets. These are at paragraph 7 and read as follows:

'7 Cost Allocation Rules for Shared Assets

*7.1 Where a new **User** connects to the **All-Island Transmission Networks** by making use of existing **Connection Assets** which have been funded by an existing **User(s)** who connected within the preceding ten years the new **User** will be charged a proportion of the value of the shared **Connection Assets**, calculated in accordance with sub-paragraph 7.3.*

*7.2 If the existing **User(s)** connected within the preceding ten years then the existing **User(s)** will be entitled to receive a partial rebate of the original connection charge from SONI, calculated in accordance with sub-paragraph 7.3.*

*7.3 The charge to the new **User** and the rebate to the existing **User** will be derived using:*

7.3.1 the historic cost of the assets, including any decommissioning costs;

*7.3.2 the current cost accounting valuation of the assets, using the **Retail Price Index**;*

*7.3.3 any advanced contributions towards O&M charges in respect of the **Connection Assets**; and*

7.3.4 the per MW share of the utilisation of the shared assets.

*7.4 In addition to the charges for use of the shared **Connection Assets** the new **User** will be required to make a payment to SONI in respect of reasonable administrative expenses.*

7.5...'

Relevant Provisions of the TIA Document

- 3.37 The provisions of the TIA Document which are primarily relevant to and/or relate to the subject matter of the Dispute are in Section S, Section Q and Section U of the TIA Document.

¹² Tab 4.

Section S

- 3.38 Section S relates to Transmission/Distribution System Connection and Use of System.
- 3.39 Paragraph 1 of Section S is headed "Right to Be and Remain Connected and Energised" and paragraph 1.1 reads:

*"1.1 NIE Networks shall (subject to the provisions of the **Relevant Documents**) have the right for the **Distribution Connection Equipment** to be and remain connected to the Transmission System at the **Connection Point** and to be and remain **Energised** for the remainder of the **Term**."*

- 3.40 Paragraph 2 of Section S is headed "Applications for Distribution Connections Requiring Transmission Works". It includes the following paragraphs:

*"2.1 Where a person applies to NIE Networks for an offer to connect, or to modify an existing connection, to the **Distribution System** which, in NIE Networks' view may require a **Construction Project** were it to proceed, NIE Networks shall submit an application to SONI to provide any necessary transmission works.*

2.2 Should SONI receive such an application from NIE Networks then SONI shall submit an offer to NIE Networks to provide such works as may be chargeable to a connectee under SONI's [TCCMS].

2.3 Should NIE Networks accept SONI's offer then NIE Networks shall pay the charges as set out in SONI's offer and as recorded in a statement of account drawn up for that purpose. The offer provided by SONI shall be in accordance with the terms and methods of the calculation set out in SONI's [TCCMS]."

Section Q

- 3.41 Section Q of the TIA Document concerns Disputes, under paragraph 4.2 a party may:

'...refer any Dispute not falling under sub-paragraphs 4.5 or 4.6 to the Authority. If the Authority notifies either Party that it will not determine a Dispute referred to it under this sub-paragraph 4.2 then either Party may refer that Dispute in accordance with paragraph 5.'

Section U

- 3.42 Section U provides definitions of terms used in the TIA Document.

Practice and procedure

- 3.43 The practice and procedure to be followed by us in determining the Dispute on behalf of the

Utility Regulator is set out in the Complaints Policy.¹³

- 3.44 The Complaints Policy was updated on 20 August 2018¹⁴ - there are no material differences between the Procedure in place when the application to determine a dispute was received by the Utility Regulator and the latest version.
- 3.45 The Complaints Policy will be supplemented or adapted as required in order to ensure good governance and best practice.
- 3.46 For completeness, we note that in determining disputes (and therefore the Dispute), the principal objective and general duties of the Authority under Article 12 of the Energy (Northern Ireland) Order 2003 (the **Energy Order**) do not apply (see Article 13(2) of the Energy Order for reference).

¹³ Tab 6.

¹⁴ Tab 7.

4 SECTION FOUR - FACTUAL BACKGROUND

- 4.1 The central issues in the Dispute are the use and composition of proposed charges by SONI in the Offer. The Parties have detailed at length the factual background to the Dispute and there is no material disagreement in relation to that factual background. Accordingly, this document does not seek to replicate that detail – which can be found in the Dispute Application and the SONI Response.
- 4.2 Set out below is a brief summary of the role of the Parties under the TIA Document and the events leading to the Dispute.

TIA Document

- 4.3 As noted above, the TIA Document sets out:
- (a) the arrangements (the 'Transmission Interface Arrangements') entered into between SONI and NIEN under and in accordance with Condition 17 of the NIEN Transmission Licence and Condition 18 of the TSO Licence; and
 - (b) the arrangements (the 'Distribution Interface Arrangements') entered into between SONI and NIEN under and in accordance with Condition 17 of the NIEN Distribution Licence and Condition 18A of the TSO Licence.
- 4.4 Section S of the TIA Document is entitled 'Transmission/Distribution System Connection & Use of System'.
- 4.5 Paragraph 2.1 of Section S of the TIA Document provides that where NIEN Distribution receives an application from any person for an offer from it (NIEN Distribution) to connect to the Distribution System, which in its view may require a Construction Project¹⁵ were the connection [to the Distribution System] to proceed, it will make an application to SONI to provide any necessary transmission works.
- 4.6 Upon receiving such an application from NIEN Distribution, SONI is required to make an offer to NIEN Distribution to provide such works as may be chargeable to a connectee under SONI's Connection Charging Methodology Statement.

¹⁵ Section U of the TIA provides that the definition of Construction Project[s] is as defined in sub-paragraph 2.1.1. of Section D of the TIA Document. This sub-paragraph 2.1.1 provides that Construction Project refers (as appropriate) to a New Connection, a Modification or a System Construction whether required as a consequence of a development on the Transmission System or the Distribution System.

Background to the Dispute

- 4.7 The Parties engagement with each other under the parameters of the TIA Document resulted in the eventual submission of an application to the Utility Regulator to determine the Dispute.
- 4.8 The Parties have been engaging and interacting on matters relating to the Agivey Substation and the works required to the Transmission System in respect of it for a number of years. Two related matters have driven this engagement in particular. These are:
- (a) applications received by NIEN Distribution from a number of wind farm developers for the connection of their respective wind farms to the Distribution System, which connections are, if and when made, proposed to be made to the Agivey Substation (the **Distribution Connections**); and
 - (b) an application from Brockaghboy Wind Farm Limited (**BWFL**) for a direct connection to the Transmission System and its subsequent connection as made in August 2017 (the **BWFL Connection**).
- 4.9 Having determined that the Distribution Connections would be by means of the Agivey Substation, on 17 October 2014, NIEN Distribution made an application for a connection to the Transmission System of the Agivey Substation (the **Cluster Connection**).¹⁶ A revised application was submitted on 5 February 2016.
- 4.10 The Parties have engaged and corresponded with each other on various matters arising out of the BWFL Connection and the Cluster Connection.
- 4.11 At some point during this period of engagement and correspondence (but certainly before August 2016), SONI (with support from NIEN in either or both of its capacities of NIEN Distribution and NIEN Transmission) concluded that the connection assets to be constructed for the BWFL Connection should be enhanced in order to accommodate the Cluster Connection and other potential future transmission connections.
- 4.12 During this period NIEN Distribution has (with support from SONI as considered appropriate by the Parties) also made certain applications to the Utility Regulator for approval of costs in respect of the pre-construction and construction works associated with the Agivey Substation.¹⁷
- 4.13 On 4 November 2016, and in light of SONI's conclusions, NIEN Transmission applied to the Utility Regulator for approval of the additional construction costs it would incur¹⁸ (as the transmission system owner) in enhancing the assets being constructed for the BWFL

¹⁶ Tab 9 - Exhibit 3.

¹⁷ The Utility Regulator has to date only approved pre-construction works for the Agivey Substation.

¹⁸ Tab 9 - Exhibit 6.

Connection but which would be enhanced for the purposes concluded by SONI (as these costs are not costs of the BWFL Connection). The Utility Regulator approved these additional construction costs, referred to as 'incremental funding', and which are ultimately paid for by the generality of consumers, on 18 November 2016.¹⁹

- 4.14 On 14 February 2018, in response to NIEN Distribution application for the Cluster Connection, SONI made the Offer. The Offer is prepared under Section S of the TIA Document.
- 4.15 Clause 7 of the Offer sets out the indicative Connection Charge applicable under the Offer. Clause 7.4 states that the assumptions for the connection of the Agivey Substation include the use of Connection Assets that have been funded by an existing User (namely BWFL) and therefore in line with the TCCMS, the Connection Charge includes a "charge for the use of shared Connection Assets..." (the **Use of Shared Assets Charge**).
- 4.16 Clause 7.5, which outlines the Connection Charge, provides that the Use of Shared Assets Charge amounts to £[REDACTED]. This is calculated on the assumption that (i) the point of connection of the Agivey Substation to the Transmission System will be at some point on the 110 kV overhead line constructed for the BWFL Connection, and (ii) the date of the Cluster Connection will be [REDACTED].
- 4.17 On 9 March 2018, NIEN Distribution wrote to SONI questioning the appropriateness of the Use of Shared Assets Charge.²⁰ This resulted in a sequence of correspondence between the Parties concerning SONI's proposed charges culminating with the Parties meeting on 23 May 2018.²¹ At this meeting the Parties agreed that in order to seek a timely resolution, NIEN Distribution would refer the matter to the Utility Regulator for determination under the TIA Document's dispute settlement provisions.
- 4.18 The Dispute between the Parties is in respect of the inclusion of the Use of Shared Assets Charge in the Offer.

¹⁹ Tab 9 - Exhibit 8.

²⁰ Tab 9 - Exhibit 10.

²¹ Tab 9 - Exhibit 13.

5 SECTION FIVE - VIEWS OF NIEN

5.1 NIEN's views are set out in –

- (a) the dispute referred to the Utility Regulator dated 31 July 2018 (the **Dispute Application**);²²
- (b) the NIEN Reply (dated 10 September 2018);²³
- (c) its response to the Provisional Determination (dated 5 December 2018);²⁴
- (d) the NIEN Response (dated 15 January 2019);²⁵
- (e) its response to the Supplementary Provisional Determination (dated 12 March 2019).²⁶

5.2 We have read the above documents in full and in doing so have borne in mind that our role is to determine only the issues set out in Section 7 of this document.

5.3 This section therefore outlines the views which have been expressed by NIEN as relevant to the issues for determination.

5.4 The Utility Regulator has confirmed to the Parties that it will determine only those aspects of the Dispute which arise out of, or in connection with, the TIA Document.²⁷

5.5 In the Dispute Application NIEN expressed other views which relate to matters relating to NIEN Distribution's 'Statement of Charges for Connection to the NIEN Distribution System' and/or matters concerning how the Parties are funded and how the Parties might implement the final determination of the Dispute. The Utility Regulator has already confirmed to the Parties that these matters do not fall within the scope of the determination of the Dispute.

5.6 Notwithstanding this, NIEN continued to make reference to these and/or other matters – none of which are matters that are relevant to or can be taken into account in our determination of the Dispute - in its responses to the Provisional Determination and the Supplementary Provisional Determination. We do not outline or summarise NIEN's views or representations in respect of those matters that do not fall within the scope of our determination of the Dispute.

²² Tab 9.

²³ Tab 11.

²⁴ Tab 16.

²⁵ Tab 24.

²⁶ Tab 28.

²⁷ Tab 12.

Summary

5.7 In summary, NIEN submits that –

- (a) it is not reasonable for SONI, and therefore it does not have the right, to impose a Use of Shared Assets Charge because:
 - (i) neither paragraphs 2.2 and 2.3 of Section S of the TIA Document provide that any offer made by SONI (in response to an application made by NIEN under paragraph 2.1) shall be in accordance with the terms and methods of calculation set out in the Connection Charging Methodology Statement;
 - (ii) NIEN is not a 'User' for the purposes of the appropriate provisions in the TCCMS;
 - (iii) the TCCMS does not specifically refer to imposition of a Use of Shared Assets Charge in relation to cluster infrastructure; and
 - (iv) NIEN Distribution cannot impose the costs of the Use of Shared Assets Charge on the applicants seeking the Distribution Connections.
- (b) if it is reasonable and SONI does have the right to impose a Use of Shared Assets Charge, it has calculated the charge incorrectly.²⁸

Right to levy a Use of Shared Assets Charge

NIEN is not a 'User' of the Transmission System

5.8 Paragraph 7.1 of the TCCMS makes provision for rules relating to cost allocation in relation to shared assets as follows:

*'7.1 Where a new **User** connects to the **All-Island Transmission Networks** by making use of existing **Connection Assets** which have been funded by an existing **User(s)** who connected within the preceding ten years the new **User** will be charged a proportion of the value of the shared **Connection Assets**, calculated in accordance with sub-paragraph 7.3.²⁹*

5.9 Paragraph 14 of the TCCMS provides a definition of 'User' as follows:

²⁸ Tab 9, section E(B) – page 9.

²⁹ Tab 4, para 7.1 – page 12.

*"User" means a person who has entered into an agreement with SONI in respect of connection to the **All-Island Transmission Networks** at entry or exit points on the [Transmission System].³⁰*

- 5.10 NIEN is of the view that it does not fall within the definition of 'User' and that paragraph 7.1 of the TCCMS does not therefore apply to it.³¹ This is because it does not enter into connection agreements with SONI at entry/exit points on the Transmission System as this is rendered unnecessary by Section S, Clause 1 of the TIA Document which states:

'1 Right To Be and Remain Connected and Energised

*1.1 NIE shall (subject to the provisions of the **Relevant Documents**) have the right for the **Distribution Connection Equipment** to be and remain connected to the [Transmission System] at the **Connection Point** and to be and remain Energised for the remainder of the **Term**.³²*

- 5.11 In addition, NIEN highlights that the TCCMS does not specifically refer to the imposition of a Use of Shared Assets Charge in relation to cluster infrastructure.³³
- 5.12 In response to SONI's argument that it must levy a Use of Shared Assets Charge in order to be compliant with Condition 15 (Non-Discrimination) of its Transmission Licence, NIEN submits that this seeks to treat NIEN Distribution the same as a party applying for connection to the Transmission System.
- 5.13 NIEN submits that, by taking this position, SONI ignores the content of Section S of the TIA Document, which has previously been agreed by SONI and NIEN and approved by the Utility Regulator. Section S of the TIA Document does not require NIEN to apply for connection or hold a connection agreement. NIEN is not therefore in the same position as a User under the TCCMS and should not be treated in the same way.
- 5.14 NIEN asserts that it is open to the Utility Regulator to determine that Condition 15 of SONI's Transmission Licence should only apply to those parties falling within the TCCMS definition of a User.³⁴

NIEN is not a 'connectee', nor does being a connectee confer 'User' status

- 5.15 NIEN disagrees with SONI's proposition that the TIA Document requires SONI to treat NIEN

³⁰ Tab 4, para 14 – page 23.

³¹ Tab 9, section E(A)(i) – page 8.

³² Tab 5, clause 1 of Section S.

³³ Tab 9, section E(A)(i) – page 8.

³⁴ Tab 11, para 10 – page 2.

Distribution as a 'connectee'.³⁵

- 5.16 NIEN contends that the TCCMS places no significance on the word connectee and that the appearance of the word in the TIA Document does not by itself permit SONI to charge NIEN Distribution in accordance with the TCCMS. In support of this position, NIEN contends that the word 'connectee' is used in paragraph 2.2 of Section S of the TIA Document to refer to a distribution connectee rather than NIEN Distribution being a connectee and is only used to ensure that the only transmission works SONI can include within any connection offer are those that SONI can charge for.³⁶ Paragraph 2.2 of Section S reads:

*2.2 Should SONI receive such an application from NIE then SONI shall submit an offer to NIE to provide such works as may be chargeable to a connectee under SONI's Connection Charging Methodology Statement.*³⁷

- 5.17 NIEN further contends that SONI's argument that the word 'connectee' in paragraph 2.2 of Section S of the TIA Document confers User status on NIEN Distribution is untenable. In support of this argument, NIEN points out that under both the TIA Document and the TCCMS a User is defined as a party that enters into a connection agreement, without the word connectee being used.³⁸ NIEN also states that there is no reference to User in Section S of the TIA, which is consistent with the requirement to treat NIEN in a different manner to a User.³⁹
- 5.18 NIEN does not consider that it is required to produce evidence as to why it should be treated differently to any other chargeable connectee, as proposed by SONI. NIEN is of the view that its position is consistent with the content of the TIA Document as previously agreed with SONI and approved by the Utility Regulator. NIEN further contends that SONI cannot now seek to unilaterally apply alternative charging arrangements which are inconsistent with the TIA Document, when NIEN Distribution has relied on the TIA Document to develop its own charging arrangements to applicants seeking connection to the Distribution System.

No legal basis to support imposition of Use of Shared Assets Charge

- 5.19 NIEN further submits that, even if paragraph 7.1 of the TCCMS does apply to NIEN notwithstanding that NIEN is not a User, there is no legal basis to support the imposition of the Use of Shared Assets Charge by SONI on NIEN because:⁴⁰

³⁵ Tab 11, para 3 – page 1.

³⁶ Tab 11, para 8 – page 2.

³⁷ Tab 5, para 2.2.

³⁸ The definition of 'User' in the TCCMS (Tab 4) is set out above at 5.10. Section U of the TIA (Tab 5) defines 'User' as 'any person who is a 'user' under particular sections of the Grid Code and has a Connection Agreement.'

³⁹ Tab 11, paras 8-9 – page 2.

⁴⁰ Tab 9, section E(A)(ii) – page 8.

- (a) SONI has not consulted on the application of a Use of Shared Assets Charge for cluster infrastructure as required by Article 32 of the Directive; and
- (b) the methodology for calculation of the charge has not been approved by the Utility Regulator as required by Article 37 of the Directive.⁴¹

5.20 NIEN states that it would expect SONI to consult on both of the following which may arise in relation to clusters:

- (a) charging NIEN in order to provide a rebate to a transmission connectee; and
- (b) charging a transmission connectee in order to provide a rebate to NIEN which it can pass on to a distribution connectee.

No evidence to support BWFL's legitimate expectation of a rebate

5.21 NIEN states that SONI has not presented any evidence to support its argument that BWFL has a legitimate expectation of a rebate. In the absence of this evidence, NIEN submits that it must assume that SONI is proposing to levy a charge on NIEN Distribution which it has no legal obligation to pay to BWFL.⁴²

Not reasonable to apply the Use of Shared Assets Charge

5.22 NIEN's view is that even if the imposition of a Use of Shared Assets Charge on it is legally justified, it is not reasonable for SONI to include the Use of Shared Assets Charge because –

- (a) the Utility Regulator has not approved the Use of Shared Assets Charge as part of the construction cost of the Agivey Substation;
- (b) it is unable to recover the amount of the proposed charge from the applicants seeking the Distribution Connections on the basis that its Statement of Connection Charges (SoCC) does not enable it to do so; and
- (c) if the Use of Shared Assets Charge is levied on it by SONI and it is unable to recover or pass through the charge to the applicants seeking the Distribution Connection, this potentially places NIEN Distribution in a position where it is unable to finance its operations.

Calculation of Use of Shared Assets Charge

5.23 NIEN submits that the amount of the Use of Shared Assets Charge which SONI has included

⁴¹ NIEN does not state which provision of Article 37 it is referring to here.

⁴² Tab 11, para 13 – page 3.

in the Offer is calculated on the wrong basis.

- 5.24 NIEN submits that there are two generic approaches that might be applied when calculating the Use of Shared Assets Charge in circumstances where the Agivey Substation will connect to transmission infrastructure which has been funded by both (i) a transmission connectee (in this case BWFL), and (ii) the general customer base (this refers to the 'incremental funding' approved by the Utility Regulator for NIEN Transmission).
- 5.25 In this respect it refers to charges being referenced to the allocation of capacity between 'developer funded LCTA capacity' and 'Utility Regulator funded 'enhanced specification' capacity'.⁴³
- 5.26 It refers to the two approaches as Approach X and Approach Y respectively and submits that Approach X is the preferred approach.
- 5.27 It describes the two approaches as follows -
- (a) Under Approach X, the next applicant for connection would first be allocated the Utility Regulator funded enhanced specification capacity, even where there was remaining developer funded LCTA capacity.
 - (b) Under Approach Y, the next applicant would first be allocated the remaining developer funded LCTA capacity in preference to the Utility Regulator funded enhanced specification capacity.
- 5.28 The Offer is based on Approach Y, however, NIEN contends that Approach X is to be preferred.⁴⁴

Approach X: Allocation of available system asset capacity first

- 5.29 NIEN submits that in circumstances where there is a single section of physical transmission infrastructure (to which connections are made or to be made) which has been funded in part by transmission connection charges paid by a transmission connectee and in part by the NI consumer (via NIEN Transmission's Regulated Asset Base (RAB)), for charging purposes there are two distinct categories of asset. These are (i) connection assets, and (ii) system assets.
- 5.30 NIEN submits that, given that the TCCMS does not specifically deal with charging in respect of cases where there is composite infrastructure, i.e. comprising connection asset capacity and system asset capacity, the next comer (in this case NIEN Distribution) should avail (and be charged for) of system asset capacity first (as it submits apply to any subsequent connectees

⁴³ Tab 9, section C – page 7.

⁴⁴ Tab 11, para 23 – page 4.

using the same composite infrastructure) until all of the system asset capacity has been exhausted. It argues that it is only once the system asset capacity is exhausted that any unused connection asset capacity is to be considered as 'shared'.

- 5.31 NIEN further submits that SONI's argument that the system capacity exists to support wider system needs and is not specific to the Agivey Substation is misleading and contradicts the Utility Regulator's approval of funding for the same system asset capacity in November 2016. In support of this view, NIEN refers to the SONI document⁴⁵ on which the Utility Regulator's approval was based, which made the case for additional NI consumer funding justified by future generation in the Brockaghboy area – including generation allocated to the Agivey Substation.⁴⁶

Least Cost Technically Acceptable Principles

- 5.32 NIEN contends that the SONI Response oversimplifies the nature of the composite infrastructure from a charging perspective. In support of its position NIEN states that, from a charging perspective, the asset is a composite asset which is funded by different methods: the connection asset component (developer funded, with charges recovered under the TCCMS) and a system asset component (funded by the Northern Ireland consumer via NIEN's Regulated Asset Base).
- 5.33 NIEN submits that this is important because the TCCMS only makes provision on cost sharing in relation to connection asset infrastructure, but not for a scenario where the infrastructure comprises both a connection asset component and system asset component. NIEN contends that in the absence of a documented charging methodology for the latter scenario, where there is system asset capacity available that is funded by the Northern Ireland consumer, it should be allocated first in line with Least Cost Technically Acceptable (LCTA) principles.⁴⁷
- 5.34 NIEN submits that where SONI is allocating capacity within composite transmission infrastructure comprising of both connection assets and system assets then SONI must decide from a charging perspective, which capacity to allocate first (that is, system asset capacity or connection asset capacity).⁴⁸ NIEN submits that SONI is subject to this requirement regardless of whether the works are for a transmission User application or, as in this case, a distribution network operator application for transmission works to support the Distribution Connections by means of the Agivey Substation (or any other arrangement). NIEN states that there are two approaches, for charging purposes, when allocating capacity (Approach X and Approach Y)

⁴⁵ Tab 9, Exhibit 7.

⁴⁶ Tab 11, para 15 – page 3.

⁴⁷ Tab 11, paras 4-5 – page 1.

⁴⁸ Tab 11, para 22 and 32 – pages 4 and 5.

which lead to fundamentally different charging outcomes.⁴⁹

- 5.35 NIEN contends that SONI fails to consider properly which component should be allocated first to the Agivey Substation connection. In the light of this, NIEN submits that SONI's view that the connection charge in the Offer was calculated in accordance with the TCCMS is incorrect.⁵⁰

NIEN's response to the Provisional Determination

- 5.36 In its response to the Provisional Determination, NIEN reiterated a number of its previous submissions – which are outlined above.

- 5.37 It also made certain new submissions with regard to the text of paragraphs 2.2 and 2.3 of the TIA Document.

- 5.38 In essence, the new submissions made by NIEN are that the text of paragraphs 2.2 and 2.3 do not, after the word 'SONI's', include the words 'Connection Charging Methodology Statement' but that in each case they include empty square brackets (i.e. '[]') at the relevant place.

- 5.39 Accordingly, NIEN submits that paragraphs 2.2 and 2.3 of Section S of the TIA Document read as follows –

"2.2 Should SONI receive such an application from NIE Networks then SONI shall submit an offer to NIE Networks to provide such works as may be chargeable to a connectee under SONI's [].

2.3 Should NIE Networks accept SONI's offer then NIE Networks shall pay the charges as set out in SONI's offer and recorded in a statement of account drawn up for that purpose. The offer provided by SONI shall be in accordance with the terms and methods of calculation set out in SONI's []."

- 5.40 In support of its new submissions NIEN –

- (a) stated that the last version of the TIA Document submitted to and approved by the Utility Regulator in June 2016 has only empty square brackets at the end of the sentence and any inclusion of the words TCCMS⁵¹ within those square brackets has never been agreed by NIEN; and
- (b) attached the June 2016 version of Section S which it submitted to the Utility Regulator for approval.

- 5.41 In addition it submitted that –

- (a) it would be good regulatory practice for the Utility Regulator to make a judgment on whether the Use of Shared Asset Charge proposed by SONI in the Offer is

⁴⁹ Tab 9, Section C and Appendix 3.

⁵⁰ Tab 11, para 18 – page 4.

⁵¹ The Provisional Determination uses the abbreviation TCCMS to refer to SONI's 'Connection Charging Methodology Statement'.

reasonable, notwithstanding that the applicable legal framework does not provide for the Utility Regulator to determine the issues in dispute on the basis of reasonableness or fairness. In support of this submission, NIEN refers to the legal frameworks that apply to certain other types of disputes where the reasonable test is or may be applicable and contends that there is no reason why the Utility Regulator should not apply the same test for this Dispute;

- (b) the right under paragraph 1.1 of Section S of the TIA Document for NIEN's "*Distribution Connection Equipment to be and remain connected to the Transmission System...*" should not be interpreted by reference to the definition of 'Distribution Connection Equipment';
- (c) the Provisional Determination ignores the special status that NIE Networks enjoys as the Transmission Asset Owner (TAO), provided for in Section S of the TIA;
- (d) the Provisional Determination proposed a method for calculation of the Use of Shared Asset Charge that had not previously been approved by the Utility Regulator and in doing so had determined that SONI has applied the TCCMS incorrectly;
- (e) the Overhead Line cannot be treated as a Connection Asset because it is a composite asset; and
- (f) where paragraph 7.1 of the TCCMS refers to the 'value' to be given to that part of an existing Connection Asset which is shared, the reference to 'value' is to the capacity used.

The 'NIEN Response'

5.42 The NIEN Response responds to SONI's letter of 7 January 2019.

5.43 With regard to the text of paragraphs 2.2 and 2.3, NIEN states that –

- (a) following the development of cluster substations, it became apparent that the references to the TCCMS in Section S paragraphs 2.2 and 2.3 were incorrect;
- (b) discussions about the references took place with SONI from April 2016 and the opportunity was taken in June 2016 to delete the references to 'Connection Charging Methodology Statement' to facilitate further discussion regarding alternative wording;
- (c) a revised version of Section S was issued to SONI for review on 14 April 2016 with empty square brackets and was discussed with SONI on 15 April 2016;

- (d) the version submitted to the Utility Regulator by SONI on 14 June 2016 was accompanied by a letter confirming that the revised draft had been jointly developed between SONI and NIEN issues for determination.

5.44 With regard to the interpretation of paragraphs 2.2 and 2.3 (with square brackets included), NIEN submits that as SONI has acknowledged that the revisions to the TIA Document had been jointly developed the *Contra Preferentem* rule has no application, but makes no other submissions on their interpretation.

Response to the Supplementary Provisional Determination

5.45 In responding to the Supplementary Provisional Determination, NIEN firstly questions the issue of the Supplementary Provisional Determination on the basis that such an approach is not referred to in the Complaints Policy. We summarise and respond to these submissions of NIEN in the section ten entitled 'Other Matters'.

5.46 With regard to the substantive issues it submits that –

- (a) whether or not the text of paragraphs 2.2 and 2.3 of Section 2 of the TIA Document include the words 'Connection Charging Methodology Statement' should be determined solely by reference to the version of the document submitted (separately by NIEN and SONI) to the Utility Regulator for approval on 14 June 2016 and not on whether or not agreement was reached between NIEN and SONI on the deletion of these words;
- (b) in reaching the provisional conclusion that both parties did not agree to change the text of paragraphs 2.2 and 2.3, we (the Decision Makers) have not given sufficient weight to the fact that SONI failed to raise any disagreement with the changes made by NIEN to these paragraphs;
- (c) all changes made to Section S of the TIA Document were necessary for the introduction of contestability; and
- (d) it should be our determination that paragraphs 2.2 and 2.3 (as currently in effect) contain empty square brackets and on that basis we should accordingly determine how the paragraphs are to be interpreted in this context (i.e. in containing empty square brackets).

6 SECTION SIX - VIEWS OF SONI

6.1 The views of SONI are set out in –

- (a) the SONI Response, dated 21 August 2018;⁵²
- (b) its response to the Provisional Determination (dated 5 December 2018);⁵³ and
- (c) the SONI Reply (dated 7 January 2019).⁵⁴

6.2 SONI also responded, on 12 March 2019, to the Supplementary Provisional Determination to state that it had no comments on it and concurred in full with it.

6.3 We have read these documents in full. In doing so, we have borne in mind that our role is to determine the issues set out in Section 7 of this document.

6.4 This section therefore outlines the views which have been expressed by SONI as relevant to the issues for determination.

Summary

6.5 SONI's principal argument is that paragraph 2 of Section S of the TIA Document requires it to treat NIEN Distribution as a 'connectee' under the TCCMS for the purposes of making an offer for connection to the Transmission System, including for the purposes of the calculation of the connection charge.⁵⁵

6.6 SONI's position is that a connectee under Section S of the TIA Document is equivalent to a 'User' under the TCCMS and it is required under the TIA Document to treat NIEN Distribution the same as any other party connecting to the Transmission System,⁵⁶ and that to do otherwise would be discriminatory.⁵⁷

6.7 In the event that the Utility Regulator finds that SONI has the right to apply the Use of Shared Assets Charge, SONI contends that Approach Y is the only equitable solution for calculating this charge.⁵⁸

Right to levy a Use of Shared Assets Charge

6.8 SONI considers that the only relevant arguments put forward by NIEN in relation to this Dispute

⁵² Tab 10.

⁵³ Tab 17.

⁵⁴ Tab 22.

⁵⁵ Tab 10, para 1.1.1(b) – page 2.

⁵⁶ Tab 10, para 1.1.1(b) – page 2.

⁵⁷ Tab 10, para 1.1.1(d) – page 2.

⁵⁸ Tab 10, para 1.1.2 – page 2.

are that NIEN is not a User for the purposes of the TCCMS, and that the TCCMS does not specifically allow for a Use of Shared Assets Charge to be levied in respect of a cluster connection. The SONI Response therefore does not address the other arguments raised by NIEN which relate to the allocation of charges between customers connecting to the distribution system.

Treatment of NIEN Distribution as a User

- 6.9 SONI states that there is no doubt that the BWFL LCTA constitutes a Connection Asset as defined in the TCCMS, and that the LCTA and customer preferred connection portion of this Connection Asset was funded by BWFL (an existing User).⁵⁹ SONI submits that BWFL has a legitimate expectation that when a new User connects to this asset (in this case, NIEN Distribution), the latter will pay a proportion of the value of the shared Connection Assets⁶⁰ and that existing User will receive a rebate accordingly. SONI submits that this is consistent with the SEM Committee decision on connection harmonisation (discussed below) and paragraph 7.1 of the TCCMS.⁶¹
- 6.10 In response to NIEN's contention that it is not a User, SONI refers to the paragraph 2.2 of Section S of the TIA Document which uses (but does not define) the term 'connectee':
- 2.2 *Should SONI receive such an application from NIE then SONI shall submit an offer to NIE to provide such works as may be chargeable to a connectee under SONI's Connection Charging Methodology Statement.*⁶²
- 6.11 SONI submits that, from the context of paragraph 2.2 of Section S of the TIA Document, it is clear that 'connectee' means a person who wishes to connect its premises to the Transmission System. SONI's position is that a connectee under Section S of the TIA Document is broadly equivalent to a 'User' under the definition in paragraph 14 of the TCCMS.⁶³
- 6.12 It submits that whether or not NIEN Distribution would be a User for the purposes of the TCCMS is irrelevant as the important point is that the TIA Document requires SONI to treat NIEN Distribution as if it were a connectee (thus a User) for the purposes of preparing the Offer and calculating the connection charges under Section S of the TIA Document because NIEN Distribution's premises (the Agivey Substation) are connecting to the Transmission System.
- 6.13 SONI is of the view that, when it receives an application under Section S of the TIA Document, it must treat NIEN Distribution the same as any other party connecting to the Transmission

⁵⁹ Tab 10, para 3.8.1(g) – page 6.

⁶⁰ Tab 10, para 3.8.1(h) – page 6.

⁶¹ Tab 10, para 3.13.1(b) – page 9.

⁶² Tab 5, Section S, para 2.2.

⁶³ Tab 10, para 3.8.1(j) – page 6 and Appendix 1.

System⁶⁴ - that is, by levying the Use of Shared Assets Charge on NIEN Distribution. SONI asserts that NIEN has not produced any evidence as to why it should be treated differently than any other connectee under Section S of the TIA nor it is aware of any provision to this effect.⁶⁵

- 6.14 SONI considers that its view is supported by Condition 15 (Non-Discrimination) of SONI's Transmission Licence, which provides:

'In undertaking the Transmission System Operator Business, the Licensee shall not unduly discriminate as between any persons or class or classes of persons...'

- 6.15 SONI also submits that non-discrimination between any class or classes of person was a fundamental principle of the Electricity Directive⁶⁶ which states at Article 32 that:

'Member States shall ensure that the implementation of a system of third party access to the transmission and distribution systems based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users.'

Existence of Special Status for Cluster Connections

- 6.16 In response to NIEN's contention that the TCCMS does not refer, and therefore does not apply, to cluster infrastructure SONI acknowledges that the TCCMS does not specifically refer to the imposition of a Use of Shared Assets Charge in relation to cluster infrastructure. SONI submits that this is not surprising because the cluster connection policy relates only to connections to the distribution system, while the TCCMS relates to charges for assets at 110kV and above required to connect to Transmission System. SONI strongly refutes any implication by NIEN that SONI and/or the Utility Regulator wrongly omitted to include reference to cluster connections in the TCCMS. Rather, SONI submits that the TCCMS correctly reflects its obligations under its Transmission Licence, domestic and EU law.⁶⁷
- 6.17 Having regard to the non-discrimination provisions in the Transmission Licence and the Electricity Directive outlined above, SONI considers that all persons connecting to (or being charged for assets that are required to connect to) the Transmission System constitute a single class and should therefore be treated the same. SONI is of the view that the TCCMS reflects this and does not therefore confer special status on the connection of a cluster substation. The TIA Document does however include provisions to ensure equal treatment between transmission and distribution customers. SONI submits that by suggesting that special status should be afforded to cluster connections in the TCCMS, NIEN is inviting the Utility Regulator

⁶⁴ Tab 10, para 3.8.1(k) – page 6.

⁶⁵ Tab 10, para 3.8.1(m) – page 6.

⁶⁶ Tab 10, para 3.8.2(e) – page 7.

⁶⁷ Tab 10, para 3.8.2(c)-(d) – page 7.

and SONI to breach Northern Ireland, UK and EU law.⁶⁸

- 6.18 SONI also states that under Condition 30 of the Transmission Licence, the only means by which it is allowed to charge for connection to the Transmission System is in accordance with the TCCMS, which accords with the relevant provisions in the TIA Document.⁶⁹
- 6.19 In response to NIEN's submissions that SONI should have consulted on the application of the 'use of shared assets charges' to distribution connections, SONI highlights that consultation on harmonising the shallow connection charging policy was undertaken by the SEM Committee and that the TCCMS continues to reflect the Generator Connection Policy consulted on by the Utility Regulator and the Commission for Energy Regulation (as it then was) in the Republic of Ireland which resulted in decision paper AIP/SEM/114/06 issued in September 2006. That decision confirmed that the connection policies in both jurisdictions would be harmonised to implement a shallow connection charging policy to ensure a level playing field.⁷⁰
- 6.20 The TCCMS was then approved by the Utility Regulator on behalf of the SEM Committee in December 2007 and any change to the harmonised sections of it would be a SEM matter.⁷¹
- 6.21 SONI submits that the introduction of a cluster connection policy at lower voltages does not overrule the fundamental need for a level playing field in the SEM and accordingly SONI does not believe that any change to the TCCMS would be required. SONI further submits that the TCCMS is not inconsistent with the clustering policy at distribution level in Northern Ireland as if so, the Utility Regulator would not have been able to approve the latter without changing the TCCMS (which would have required approval from the SEM Committee).⁷²

Calculation of Use of Shared Assets Charge

- 6.22 SONI states that the requirement under paragraph 2 of Section S of the TIA Document to treat NIEN Distribution as a connectee under the TCCMS for the purposes of making an offer for connection to Transmission System includes for the purposes of the calculation of the connection charge.
- 6.23 SONI considers that Approach Y should be followed to calculate the Use of Shared Assets Charge and asserts that it has calculated the connection charge in accordance with the TCCMS.⁷³ Approach Y is a 'rebate first' approach so that when a party connects to a shared asset they should be required to pay a proportion of the cost of the customer funded connection

⁶⁸ Tab 10, para 3.8.2(c)-(d) and (f) – page 7.

⁶⁹ Tab 10, para 3.8.2(g) – page 7.

⁷⁰ Tab 10, para 3.8.2(h)-(i) – pages 7 and 8.

⁷¹ Tab 10, para 3.8.2(j) – page 8.

⁷² Tab 10, para 3.8.2(k) – page 8.

⁷³ Tab 10, para 3.8.1(n) – page 6.

asset first before using any capacity relating to a system asset.⁷⁴

6.24 This is in contrast to NIEN's preferred Approach X which is a 'first come first served' approach under which a party connecting to a shared asset should be free to avail of the 'free' capacity of the system asset before being required to pay a proportion of the cost of a customer funded asset. SONI submits that this Approach X is unfair as the shared asset in question would not exist unless the original party had connected to the Transmission System and paid for the connection asset and that it is not the original party's fault that SONI took the opportunity to add additional capacity at the time of construction of the asset.⁷⁵

6.25 SONI believes that Approach Y is the only equitable solution for the following reasons.

Fairness of Approach Y

6.26 SONI submits that neither the TIA Document nor the TCCMS specify how shared asset charges are to be calculated where a User connects to an asset which comprises both capacity funded by another User and capacity funded by the NIEN Regulated Asset Base (essentially the Northern Ireland consumer). SONI therefore submits that its starting point, pursuant to its Transmission Licence, is that it is not permitted to discriminate between classes of persons and must strive to treat all customers fairly.⁷⁶

6.27 Where a User has paid for a connection asset at 110kV or above they will have a legitimate expectation that the next party to connect will be required to pay a proportion of the cost of the connection asset and that the original User will receive a rebate. This is consistent with the TCCMS.⁷⁷

6.28 SONI submits that NIEN's position is that a party which connects to the Transmission System and pays for an LCTA connection should not be entitled to a rebate where a cluster subsequently connects and shares the connection asset, but that it should be entitled to a rebate if a different party (i.e. not a cluster) connects.⁷⁸

6.29 SONI submits that the logical extension of NIEN's argument would be discriminatory, in that all customers connecting at 33 kV to existing assets should be exempt from paying for shared assets at 110 kV, but that customers connecting at 33 kV to new connection assets should be required to pay.⁷⁹

⁷⁴ Tab 10, para 3.12.2 – page 8.

⁷⁵ Tab 10, para 3.13.1(f) – page 9.

⁷⁶ Tab 10, para 3.13.1(a) – page 8.

⁷⁷ Tab 10, para 3.13.1(b) – page 9.

⁷⁸ Tab 10, para 3.13.1(c) – page 9.

⁷⁹ Tab 10, para 3.13.1(d) and 4 – pages 9, 10 and 11.

6.30 SONI further submits that –

- (a) it would be unfair for NIEN Distribution, having made an application for a chargeable connection on behalf of its customers under Section S of the TIA Document, to be permitted to connect to the 'free' capacity in the form of the system asset rather than pay to connect to the connection asset. SONI states that these assets would not exist unless BWFL (the original User) had requested and had paid for the majority of the costs of the assets (i.e. only not paid for their enhancement).
- (b) had SONI not constructed the higher-rated line, the cost of connecting the Agivey Substation may have been significantly greater as NIEN Distribution would have needed to pay for a separate transmission connection.⁸⁰
- (c) NIEN's customers have therefore already had the benefit of the new asset in that without it connection may not have been possible at all.⁸¹

Conflict with SEM Committee decision of locational charging

6.31 SONI submits that Approach X contradicts the principle of harmonised connection charging decided by the SEM Committee.⁸²

6.32 In support of this submission it states that in December 2010 the SEM Committee approved the locational use of system charging methodology. In this paper, the SEM Committee stated that *'each generator's TUoS charge should be reflective of transmission investment costs linked to its own use of the system'*. SONI confirms that the approved 'all-island GTUoS tariff calculation' methodology cannot distinguish between the BWFL use of the circuit (which it has paid for through connection charges) in question and the cluster generators' use of the circuit (which they would not have funded under NIEN's proposals). SONI submits therefore that in the absence of a Use of Shared Assets Charge, SONI would be unable to fully reflect the SEM Committee decisions relating to use of system charging in charges applied to these cluster generators.⁸³

6.33 SONI submits that the determination of the Dispute should be mindful of the knock-on effects of their decision on the application of the SEM Committee's determination on locational charging for the assets that the Agivey cluster generators are using.⁸⁴

⁸⁰ Tab 10, para 3.13(e)-(h) – page 9.

⁸¹ Tab 10, para 3.13(e)-(h) – page 9.

⁸² Tab 10, para 3.13(i) – page 9.

⁸³ Tab 10, para 3.13.2(b) – page 10.

⁸⁴ Tab 10, para 3.13.2(c) – page 10.

The logical extension of NIEN's argument

- 6.34 SONI submits that the logical extension of accepting NIEN Distribution's position would be to say that:
- (a) the TCCMS and the TIA Document incorrectly fail to make a special case for the connection of clusters to the Transmission System;⁸⁵
 - (b) a party connecting to the transmission system and which pays for an LCTA connection should not be entitled to a rebate where a cluster connects and shares the connection asset, but would be entitled if a different party (i.e. not a cluster) connects;
 - (c) allowing a generator to connect via a newly constructed cluster substation where the connection of the substation to the Transmission System is funded by the Northern Ireland consumer (through the NIEN Regulated Asset Base) would be consistent with EU State Aid law, where this asset would be charged to another user that cluster generators are competing with in the Single Electricity Market, even though they will both pay the same use of system charges and be subject to the same constraints and curtailment;
 - (d) the subsequent introduction by NIEN Distribution of the cluster connection policy at distribution level somehow overrules one of the fundamental principles of the SEM;⁸⁶
 - (e) all customers connecting at 33kV to existing assets should be exempt from paying for shared assets at 110kV, but customers connecting at 33kV to new connecting assets should be required to pay;⁸⁷

and that cannot be correct.⁸⁸

- 6.35 SONI also effectively submits that Article 12 of the Energy Order applies to the determination of the Dispute.⁸⁹

Additional comments on the NIEN Dispute Application

- 6.36 SONI provides a list of comments and additions to NIEN's description of the factual background to the Dispute in Appendix 2 to the SONI Response, as well as a series of incidental points in Appendix 3.

⁸⁵ Tab 10, para 4.1.1 – page 10.

⁸⁶ Tab 10, para 4.1.5 – page 11.

⁸⁷ Tab 10, para 4.1.6 – page 11.

⁸⁸ Tab 10, para 4.2 – page 11.

⁸⁹ Tab 10, para 4.1.3 – page 11.

SONI's response to the Provisional Determination

- 6.37 SONI's submissions in response to the Provisional Determination are as follows -
- (a) it agrees absolutely that the Offer it made must include a Use of Shared Assets Charge and that this is the only credible interpretation;
 - (b) it absolutely agrees that the Use of Shared Assets Charge must be calculated in accordance with paragraphs 7.1 and 7.3 of the TCCMS; and
 - (c) the Use of Shared Asset Charge set out in Clause 7.5 and 7.5 of the Offer was calculated entirely in accordance with paragraphs 7.1 and 7.3 of the TCCMS.
- 6.38 With regard to the calculation of the Use of Shared Assets Charge set out in the Offer, SONI submits that it has –
- (a) first identified and determined the connection charges relating to the existing Connection Asset that is to be to shared;
 - (b) then calculated the current accounting valuation of the shared Connection Asset at the estimated date of connection (which valuation will be adjusted, using the Retail Price Index, to reflect the actual connection date when known);
 - (c) then calculated the MW share of utilisation of the Connection Asset by the Agivey Substation and on this basis concluded that ■% of the current accounting valuation is the Use of Shared Asset Charge.

The SONI Reply

- 6.39 The SONI Reply responds to the submission made by NIEN in its response to the Provisional Determination in respect of the text of paragraphs 2.2 and 2.3 of Section S of the TIA Document.
- 6.40 With regard to the text of paragraphs 2.2 and 2.3 in Section S, SONI states that –
- (a) the TIA Document has since 2007 referred to charging under Section S being made in accordance with the TCCMS and it is not aware of any specific decision by the Utility Regulator, nor any agreement between NIEN and SONI, to depart from this longstanding position;
 - (b) these paragraphs included the words 'Connection Charging Methodology Statement' in the penultimate version of the draft changes to the TIA Document submitted by SONI to the Utility Regulator on 18 May 2016;

- (c) the final draft versions were collated by NIEN on behalf of both parties and it would seem that in these versions (as provided by NIEN to SONI on 14 June 2016) the words 'Connection Charging Methodology Statement' were replaced with empty square brackets;
- (d) this was not drawn to SONI's attention and it was contrary to previous drafts of changes to Section S which had been formally agreed.

6.41 With regard to the interpretation of paragraphs 2.2 and 2.3 (with empty square brackets included) SONI submits that –

- (a) as the drafting which is now in debate, i.e. the inclusion of the square brackets, was introduced by NIEN the *Contra Proferentem* rule applies; and
- (b) it is quite clear in paragraphs 2.2 and 2.3 that SONI is required to calculate the charges in the same manner as may be chargeable to a 'connectee' under some methodology of SONI's and given that the only methodology which exists is in the Connection Charging Methodology Statement then this is the only logical meaning of these paragraphs.

7 SECTION SEVEN - ISSUES FALLING TO BE DETERMINED

- 7.1 There are two issues that fall to be determined by us, as set out below.
- 7.2 We are required to determine the Dispute by reference to the applicable legal framework. With regard to the two issues for determination the applicable legal framework is found within the TIA Document and the TCCMS.
- 7.3 The TIA Document is a contractual agreement entered into between the Parties. It is therefore a document by which both Parties have agreed to be bound. The Parties have agreed, through paragraph 2.3 of Section S of the TIA Document, that any offer made by SONI to NIEN Distribution pursuant to paragraph 2.2 of Section S shall be in accordance with the terms and methods of calculation set out in the TCCMS.
- 7.4 Accordingly, our role is to apply the law as set out in the relevant provisions of the TIA Document and the TCCMS to the facts and circumstances of the case.
- 7.5 There is nothing within the applicable legal framework which provides for us to determine the issues on the basis of separate tests of reasonableness or fairness. Accordingly these are not tests that are applicable for the purposes of our determination on the issues falling to be determined.
- 7.6 In its response to the Provisional Determination, NIEN rejects this to be the case. Its reasoning for doing so is that –
- (a) it is, when making distribution connection offers, subject to the application of reasonableness;
 - (b) disputes referred to the Utility Regulator under Condition 26 of SONI's TSO licence relating to a variation to a transmission connection agreement are to be determined by the Utility Regulator in such manner as appears to be reasonable; and
 - (c) it would therefore be good practice for the Utility Regulator to make a judgement, through this determination, on whether the Use of Shared Asset Charge proposed by SONI in the Offer is reasonable.
- 7.7 That NIEN is subject to the test of reasonableness with regard to distribution connection agreements or that there may be cases where the applicable legal framework provides for a dispute to be determined by reference to a reasonableness factor, are irrelevant in this respect.
- 7.8 We are required to determine the Dispute in accordance with, and within the remits of, the legal framework that is applicable to it, as confirmed in paragraph 7.3 above.

7.9 The issues falling to be determined by us in respect of the Dispute are as follows.

Issue One

7.10 The first issue to be determined is whether the Offer, made by SONI pursuant to paragraph 2.2 of Section S of the TIA Document to NIEN Distribution for the connection of the Agivey Substation to the Transmission System, can include a Use of Shared Assets Charge.

Issue Two

7.11 The second issue will only need to be determined where the determination on Issue One is that the Offer can include a Use of Shared Assets Charge.

7.12 If required, the second issue for determination is the basis on which the Use of Shared Assets Charge is to be calculated.

8 SECTION EIGHT – DETERMINATION ON ISSUE ONE

8.1 The first issue for determination by us is whether the Offer, made by SONI pursuant to paragraph 2.2 of Section S of the TIA Document to NIEN Distribution for the connection of the Agivey Substation to the Transmission System, can include a Use of Shared Assets Charge.

Text of Paragraphs 2.2 and 2.3 of Section S

8.2 In the Provisional Determination we referred to the text of -

- (a) paragraph 2.2 of Section S of the TIA Document as stating that where SONI receives an application, under paragraph 2.1 of Section S of the TIA Document, from NIEN Distribution it shall submit an offer to NIEN Distribution to provide such works as may be chargeable to a connectee under the TCCMS; and
- (b) paragraph 2.3 of Section S as stating that any such offer made by SONI shall be in accordance with the terms and methods of calculation set out in the TCCMS.

8.3 That this was the text of paragraphs 2.2 and 2.3 was set out in the Statement of Case (draft and final versions) and also in a certain of the submissions of the Parties. At no point prior to the Provisional Determination being issued did either Party submit, state, highlight or contend that the text of paragraphs 2.2 and 2.3 was stated incorrectly.

8.4 However, in its response to the Provisional Determination, NIEN made certain new submissions on the text of paragraphs 2.2 and 2.3 of Section S of the TIA Document. It submitted (for the first time) that these paragraphs do not, after the word 'SONI's', include the words 'Connection Charging Methodology Statement' but that in each case they include empty square brackets (i.e. '[']) at the relevant place.

8.5 With regard to the text of the TIA Document, the relevant licence conditions⁹⁰ provide that where SONI and NIEN carry out a review of the TIA Document and its implementation, each has an obligation to send to the Utility Regulator any revisions which they both agree should be made to the TIA Document.

8.6 Therefore, with regard to the text of paragraphs 2.2 and 2.3, we need to make a finding of fact based on the evidence before us as to whether both Parties had, in June 2016 when submitting their proposed changes to the Utility Regulator for approval, agreed that the words 'Connection Charging Methodology Statement' were to be replaced with empty square brackets.

⁹⁰ Conditions 18 and 18A of the SONI TSO Licence, Condition 17 of NIEN's transmission licence and Condition 17 of NIEN's distribution licence.

- 8.7 It is only if the Parties agreed to these changes that the changes can be in effect and that paragraphs 2.2 and 2.3 of Section S can include empty square brackets. In this context, it is appropriate for us to note that the Utility Regulator does not have the *vires* to approve changes to the TIA Document that are not agreed by both of the Parties. Accordingly, any approval that the Utility Regulator may otherwise have purported to give to changes submitted to it for approval by either or both of NIEN and SONI, but which are not agreed by both Parties, is not a valid approval.
- 8.8 The evidence before us is as follows -
- (a) In 2015/2016, SONI and NIEN were progressing changes required to the TIA Document in order to facilitate the introduction of contestability in connections.
 - (b) On 18 May 2016 both SONI and NIEN (separately) submitted their proposed 'modifications for contestability'⁹¹ to the TIA Document. SONI's accompanying letter states that the modifications submitted "*have been jointly drafted by SONI and NIEN*" and NIEN's accompanying letter states "*these documents are working drafts until all the supporting processes/documentation have been agreed with SONI*".
 - (c) The 18 May 2016 draft of Section S continued to have the words 'Connection Charging Methodology Statement' in paragraphs 2.2 and 2.3. The only changes proposed to Section S were to add the word 'Networks' after the word 'NIE' in each place it occurred.
 - (d) On 14 June 2016 both SONI and NIEN (separately) submitted final versions of the TIA Document changes for contestability to the Utility Regulator for approval.
 - (e) In its covering email and accompanying letter⁹² NIEN states that the revised draft had been "*jointly developed with NIEN and SONI*", that "*all changes made are with respect to the introduction of contestability, with the exception of some other minor updates and/or clarifications*" and draws the UR's attention to a "*new Schedule 9*".
 - (f) In its covering email SONI refers to its "*submission of the contestability modifications*" and in the accompanying letter it also states that the "*revised draft has been jointly developed between SONI and NIE Networks*" and that "*with the exception of some minor corrections and clarifications, all changes made are directly driven by the introduction of contestability*".

⁹¹ SONI letter of 18 May 2016 (from [REDACTED] to [REDACTED] at the UR) and NIEN letter of 18 May 2016 (from [REDACTED] to [REDACTED]).

⁹² From Sinead Ferris to Tanya Hedley dated 14 June 2016.

- (g) On 17 June 2016, the Utility Regulator gave its approval. The covering email confirms that the approval is for the *"TIA drafting with respect to the introduction of contestability"* and the covering letter acknowledges that the changes are made *"with respect to the introduction of contestability (with the exception of some minor updates and/or clarifications)"*.
- (h) In its response to NIEN's new submissions SONI states that -
- (i) it is *"not aware of any agreement between NIEN and SONI"* to change the references;
 - (ii) what had been *"formally agreed"*⁹³ was Section S of the 18 May 2016 draft that had been submitted to the UR; and
 - (iii) NIEN was responsible for collating, on behalf of both companies, the June 2016 draft and the change NIEN made to these paragraphs from the 18 May 2016 draft was not drawn to its attention⁹⁴.
- (i) In its reply to SONI's response NIEN states that –
- (i) *"discussions about these references"*⁹⁵ (that is the references to 'Connection Charging Methodology Statement' in paragraphs 2.2 and 2.3 of Section S) took place with SONI from April 2016;
 - (ii) *"the revised version"* of Section S with the empty square brackets (in place of the words 'Connection Charging Methodology Statement') was *"issued to SONI for review on 14 April 2016"*, *"discussed at a meeting with SONI on 15 April 2016"*, and *"was eventually submitted"* by SONI to the Utility Regulator on 14 June 2016 with an accompanying letter confirming that the revised draft had been *"jointly developed between SONI and NIEN"*,⁹⁶ and
 - (iii) *"the opportunity was taken in June 2016 to delete"* the references to the 'Connection Charging Methodology Statement' in paragraphs 2.2 and 2.3 of Section S to *"facilitate further discussion regarding alternative wording"*.⁹⁷

8.9 The evidence before us establishes that on 14 April 2016 NIEN issued a draft version of Section S to SONI to *review* which had empty square brackets in place of the words 'Connection Charging Methodology Statement' and that version was *discussed* at a meeting on 15 April

⁹³ Paragraph 4 of the SONI Reply.

⁹⁴ Paragraph 3 of the SONI Reply.

⁹⁵ Page 2 of the NIEN Response (in the second paragraph under the heading Paragraph 3).

⁹⁶ Page 2 of the NIEN Response (in paragraph under the heading Paragraph 4).

⁹⁷ Page 2 of the NIEN Response (in the second paragraph under the heading Paragraph 3).

2016. But there is no evidence which establishes that SONI agreed to these changes as proposed by NIEN.
- 8.10 NIEN does not submit that SONI agreed to the changes at the meeting on 15 April 2016 – only that they were *discussed* at that meeting. In any event, the version sent to the Utility Regulator on 18 May 2016 – and therefore after the meeting at which NIEN's proposed changes were *discussed* – does not include the said changes.
- 8.11 There is no evidence before us which confirms that the changes proposed by NIEN in April 2016 were either further discussed with, and/or agreed upon by, SONI at any time after 18 May 2016.
- 8.12 NIEN does not disagree with SONI's submission that NIEN was responsible for collating the June 2016 versions of the proposed TIA Document modifications. In this context, NIEN does not confirm either that it drew SONI's attention to the fact that there was a change to paragraphs 2.2 and 2.3 between the 18 May 2016 version and the 14 June 2016 version or that it did not need to draw SONI's attention to that change because SONI was already apprised of it.
- 8.13 We note that NIEN states that the *opportunity* was taken in June 2016 to delete the references to 'Connection Charging Methodology Statement'. However, it does not assert that the opportunity was taken by both NIEN and SONI in agreement. The clear inference here is that NIEN took the opportunity to delete them when collating the June 2016 versions.
- 8.14 In its response to the Supplementary Provisional Determination, NIEN submitted that SONI failed to raise any disagreement with the changes NIEN had made to these paragraphs after they were submitted to SONI for review and that it has responsibility for demonstrating that the changes were not agreed.
- 8.15 We do not accept this as a proposition. The responsibility is on the party contending that the changes are agreed to demonstrate that this is the case.
- 8.16 In support of its position NIEN also highlights that SONI's letter of 14 June 2016 to the Utility Regulator states that the revised draft had been '*jointly developed*'. It is the case, however, that the letter goes on to say that all changes are with respect to the "*introduction of contestability, with the exception of some other minor updates and/or clarifications*".
- 8.17 However, the changes which NIEN contends are agreed by SONI to paragraphs 2.2 and 2.3 of Section S of the TIA Document are not changes which fall within the scope of changes for the 'introduction of contestability'.
- 8.18 Also in its response to the Supplementary Provisional Determination, NIEN submitted that Section S was reviewed by both Parties in order to update it to deal with transmission works

relating to clusters that may be carried out contestably and that updating Section S was necessary for contestability.

- 8.19 We do not accept this line of argument given the nature of the changes that NIEN contends to be made to paragraphs 2.2 and 2.3. It cannot be the case that replacing existing words with empty square brackets is a change that is *'necessary for contestability'*. Neither can they be said to be 'minor updates' or 'clarifications'. Changing existing references of 'Connection Charging Methodology Statement' and replacing them with empty square brackets is neither an update nor a clarification.
- 8.20 SONI asserts that it has not agreed to the changes and there is nothing in the submissions made by NIEN which establishes that SONI did agree to the changes. In circumstances where Section S of the June 2016 drafts were collated by NIEN were different to the previously agreed May 2016 version and sent to SONI (and indeed the UR) without the purported changes being drawn to its attention, that SONI did not raise any disagreement to the proposed changes does not mean or equate to SONI having agreed them.
- 8.21 Given that the changes proposed by NIEN in June 2016 to paragraphs 2.2 and 2.3 were not –
- (a) present in the May 2016 version;
 - (b) drawn to the attention of SONI;
 - (c) (and have never been) agreed to by SONI;
 - (d) concerned with, or necessary for, the introduction of contestability;
 - (e) minor updates or clarifications; and
 - (f) approved by the Utility Regulator as the approval given by the Utility Regulator in June 2016 was to changes required for the introduction of contestability and changes which were minor updates and clarifications,

it is the case that the text of paragraphs 2.2 and 2.3 (as currently in effect) includes the words 'Connection Charging Methodology Statement' and does not include empty square brackets.

- 8.22 Accordingly, paragraphs 2.2 and 2.3 of Section S of the TIA Document therefore currently reads as follows –

"2.2 *Should SONI receive such an application from NIE Networks then SONI shall submit an offer to NIE Networks to provide such works as may be chargeable to a connectee under SONI's Connection Charging Methodology Statement.*

- 2.3 *Should NIE Networks accept SONI's offer then NIE Networks shall pay the charges as set out in SONI's offer and recorded in a statement of account drawn up for that purpose. The offer provided by SONI shall be in accordance with the terms and methods of calculation set out in SONI's Connection Charging Methodology Statement."*

Application for a Connection/Connection Offer

- 8.23 As confirmed above, paragraph 2.2 of Section S of the TIA Document provides that where SONI receives an application, under paragraph 2.1 of Section S of the TIA Document, from NIEN Distribution it shall submit an offer to NIEN Distribution to provide such works as may be chargeable to a connectee under the TCCMS. Paragraph 2.3 of Section S provides that any such offer made by SONI shall be in accordance with the terms and methods of calculation set out in the TCCMS.
- 8.24 An application is made by NIEN Distribution under paragraph 2.1 of Section S of the TIA Document where it is of the view that a Construction Project is required in order for a connection to its distribution system to proceed. The application is for SONI to provide any necessary transmission works.
- 8.25 NIEN Distribution made an application to SONI on 17 October 2014. The application did not specifically state that it was being made under paragraph 2.1 of Section S of the TIA Document.
- 8.26 It is clear, however, that both Parties have (for almost four years now) proceeded on the basis that the application made by NIEN Distribution's letter of 17 October 2014 is one made pursuant to paragraph 2.1 of Section S. Furthermore, neither Party has submitted that the application is not one made pursuant to that paragraph 2.1.
- 8.27 In its Reply, NIEN submits that it has not applied to SONI for a connection but has applied to SONI for it to provide any necessary transmission works.⁹⁸ It does not make any submissions as what is the difference between applying for a connection and applying for necessary transmission works.
- 8.28 In responding to the Provisional Determination, NIEN stated that it had previously made submissions on the difference between the two types of application (but did not provide any specific references for these previous submissions) and that the difference is that Section S of the TIA Document deliberately avoids referring to an application for a connection because NIEN is not a User of the transmission network.
- 8.29 We note that NIEN Distribution's application letter of 17 October 2014⁹⁹ includes the following

⁹⁸ Tab 11, paragraph 7 – page 2.

⁹⁹ Tab 9, Exhibit 3.

statements -

"NIE hereby apply for a connection to the transmission system of a cluster substation..."

"It was felt that...would expedite the connection process once NIE formally applied to SONI"

"In line with SONI's charging statement, £60,500 has been transferred to the SONI bank account..."

- 8.30 It is clear from this letter that NIEN has made an application for the Agivey Substation to be connected to the Transmission System.
- 8.31 In any event, even if the letter had not explicitly referred to it being an application for a connection, it is right to say that the application made by NIEN under paragraph 2.1 of Section S of the TIA Document is an application for SONI to provide the necessary transmission works for the Agivey Cluster to be connected to the transmission system.
- 8.32 In the context of this Dispute there is no distinction to be made between an application for a connection and an application for necessary transmission works. NIEN has made an application requesting SONI to provide the works necessary to make the Cluster Connection.

Treating NIE Distribution as a connectee

- 8.33 Where SONI receives an application from NIEN Distribution requesting it to provide works necessary to make the Cluster Connection, it is required to submit an offer to provide such works as *"may be chargeable to a connectee under the TCCMS"*.
- 8.34 The term 'connectee' is not defined in either the TIA or the TCCMS.
- 8.35 SONI submits that it broadly equivalent to the term 'User' as defined in the TCCMS.¹⁰⁰
- 8.36 It also submits that it does not matter whether NIEN Distribution would or would not constitute a User for the purposes of the TCCMS because the requirement on it is to treat NIEN Distribution as if it were a connectee and thus a User.¹⁰¹
- 8.37 NIEN submits that –
- (a) it is not a User as it does not fall within the definition of User in the TCCMS;¹⁰²
 - (b) SONI's position that paragraph 2 of Section S of the TIA Document requires it to treat NIEN Distribution is untenable because the TCCMS applies either to a 'User' or an

¹⁰⁰ Tab 10, paragraph 1.1.1(c).

¹⁰¹ Tab 10, paragraph 3.8.1(k).

¹⁰² Tab 9, page 8 and Tab 11, paragraph 9.

'Applicant' (both terms being defined in the TCCMS) and does not place any significance on the word a connectee;¹⁰³ and

- (c) use of the word connectee does not by itself permit SONI to charge it in accordance with the TCCMS.¹⁰⁴

- 8.38 NIEN states that it is not a User because it does not enter into connection agreements with SONI as this is rendered unnecessary by clause 1 of Section S of the TIA Document.¹⁰⁵ This provides at paragraph 1.1 that NIEN "*shall (subject to the provisions of the Relevant Documents) have the right for the Distribution Connection Equipment to be and remain connected to the Transmission System at the Connection Point and to be and remain Energised for the remainder of the Term*".
- 8.39 The right that NIEN has under paragraph 1.1 of Section S of the TIA Document applies in respect of '*Distribution Connection Equipment*'.
- 8.40 Distribution Connection Equipment is defined as being '*Plant and Apparatus agreed as such between the Parties*'¹⁰⁶ (i.e. between NIEN and SONI). This indicates that the Parties have an agreed list of 'Plant' and 'Apparatus' for this purpose. NIEN has not in support of its contention submitted evidence that the agreed list includes the Agivey Substation. We therefore proceed on the basis that any such agreed list does not include the Agivey Substation.
- 8.41 In responding to the Provisional Determination, NIEN submitted that its right under paragraph 1.1 is not limited to a specific list or frozen at a point in time and that SONI has not presented any evidence to confirm that the right was intended to be an enduring right applicable to future distribution connection equipment.
- 8.42 We do not disagree with NIEN's submission that what constitutes Distribution Connection Equipment is not frozen at a point in time or that paragraph 1.1. of Section S cannot apply to new (future) distribution equipment. However, it is the case that it applies only to that equipment which is agreed between the Parties as being Distribution Connection Equipment and neither Party has made any submission to the effect that they have agreed this to be the case for the Agivey Substation.
- 8.43 In any event paragraph 1.1 confirms that the right to be (and remain) connected is subject to the provisions of the Relevant Documents – the TIA Document is one such Relevant Document. NIEN's right for any new equipment to be connected is therefore subject to the other provisions (including provisions in paragraph 2 of Section S) of the TIA Document.

¹⁰³ Tab 11, paragraph 8.

¹⁰⁴ Tab 11, paragraph 8

¹⁰⁵ Tab 10, page 8.

¹⁰⁶ Paragraph 8.1 of Section S of the TIA Document.

- 8.44 The requirement on SONI under paragraph 2.2 of Section S of the TIA Document is to submit an offer to provide such works as may be chargeable to a connectee. This means that SONI is required to treat NIEN Distribution as if it were a connectee – irrespective of whether or not it is actually a connectee.
- 8.45 The word connectee is not defined – but it does not need to be. It is clear that in the context in which it is used it means any person that is or will be connecting to the Transmission System. That is a person that is an Applicant or a User as defined in the TCCMS.
- 8.46 Accordingly, SONI is required to make an offer as if NIEN Distribution were either an Applicant or a User (as each term is defined in the TCCMS), i.e. to treat NIEN Distribution as an Applicant or a User.
- 8.47 For these purposes, it matters not whether NIEN Distribution would or would not fall within the definition of Applicant or User (although it is to be noted that it does actually fall within the definition of Applicant, i.e. within limb (a) of the definition).

Works chargeable to a connectee under the TCCMS

- 8.48 Section 4 of the TCCMS set out, at paragraph 4.3, the type of costs that any person wishing to enter into a connection agreement for a connection to the Transmission System. It therefore sets out the works that may be chargeable to a connectee.
- 8.49 Among other things, paragraph 4.3 provides that the connectee can be required to pay (i.e. SONI can charge) "a proportion of the costs of any existing Connection Assets to be shared with other Users who are already connected, if any, with this cost being estimated based on the assumption that the value of all connection works to deliver the Connection Assets were subject to a Non-Contestable Offer irrespective of whether or not this was the case".¹⁰⁷
- 8.50 Section 7 of the TCCMS sets out the cost allocation rules for shared assets. More particularly paragraph 7.1 states that "Where a new User connects to the All-Island Transmission Networks by making use of existing Connection Assets which have been funded by existing User(s) who connected within the preceding ten years the new User will be charged a proportion of the value of the shared Connection Assets calculated in accordance with sub-paragraph 7.3".
- 8.51 NIEN submits that even if the provisions of paragraph 7.1 of the TCCMS did apply to NIEN Distribution there is no legal basis to support the imposition of the Use of Shared Assets Charge.¹⁰⁸

¹⁰⁷ Paragraph 4.3.3 of the TCCMS refers.

¹⁰⁸ Tab 10, page 8.

- 8.52 The two parts of this submission appear to be inconsistent with each other. If paragraph 7.1 of the TCCMS applies to NIEN Distribution then the legal basis supporting the imposition of the Use of Shared Assets Charge is through the combination of paragraphs 2.2 and 2.3 of Section S of the TIA Document and of paragraph 7.1 of the TCCMS.
- 8.53 Notwithstanding this we have considered NIEN's contentions that there is no legal basis because –
- (a) SONI has not consulted on the application of a Use of Shared Assets Charge for cluster infrastructure as required by Article 32 of Directive 2009/72/EC; and
 - (b) the methodology for calculation of a Use of Shared Assets Charge has not been approved by the Utility Regulator as required by Article 37 of Directive 2009/72/EC.
- 8.54 With regard to NIEN's first point, Article 32 of Directive 2009/72/EC does not impose a requirement on SONI to consult on its charging methodology. The requirement is for there to be a system of third party access to the Transmission System based on published tariffs and for the tariffs, or the methodologies underlying their calculation, to be approved by the Utility Regulator and to be published before they take effect.
- 8.55 With regard to NIEN's second point, the TCCMS – being the methodology underlying the calculation of tariffs (charges), for third party access to the Transmission System – has been approved by the Utility Regulator. Accordingly, the requirements of Article 37 of Directive 2009/72/EC are met.
- 8.56 In its response to the Provisional Determination, NIEN disputed that the methodology for the calculation of the Shared Asset Charge has been previously approved by the Utility Regulator. Its basis for doing so appears to be because the Provisional Determination proposed a different method of calculation to the two potential methods of calculation identified by NIEN in its submission.
- 8.57 NIEN is mistaken in this respect. It was our provisional conclusion that the method of calculation for the Use of Shared Asset Charge is that which is set out in the TCCMS. The TCCMS has been approved by the Utility Regulator and therefore the method of calculation for the Use of Shared Asset Charge has also been approved by the Utility Regulator.
- 8.58 NIEN also submitted that the effect of our provisional conclusions was that we had provisionally concluded that SONI had applied the TCCMS incorrectly. That too is incorrect – we did not provisionally conclude that to be the case or make any observations as to whether or not SONI had applied the method of calculation set out in the TCCMS. In its response to the Provisional Determination, SONI confirmed that the Use of Shared Asset Charge specified in the

Connection Offer had been calculated in accordance with the method of calculation set out in the TCCMS.

8.59 Paragraph 2.3 of Section S of the TIA Document requires that the offer made by SONI under paragraph 2.2 of Section shall be in accordance with the terms and methods of calculation set out in the TCCMS.

8.60 It is not in dispute between the Parties that –

- (a) the Agivey Substation will, once it is connected to the Transmission System, be sharing an asset (an overhead line) with at least one other User, namely BWFL (the **Overhead Line**);
- (b) BWFL has funded (in part) the Overhead Line; and
- (c) the Cluster Connection is, on present timings, to be made within 10 years of the connection of the Brockaghboy Wind Farm.

8.61 Accordingly, in order for SONI to be compliant with paragraph 2.3 of Section S of the TIA, the Offer made by SONI under paragraph 2.2 of Section S must include provisions relating to charges for use of the shared assets in accordance with paragraphs 4.3 and 7.1 of the TCCMS.

Determination on Issue One

8.62 We have duly and fully considered all of the submissions of the Parties relating to Issue One.

8.63 Having done so, for all the reasons given above, our determination on the first issue is that the Offer, made by SONI pursuant to paragraph 2.2 of Section S of the TIA Document to NIEN Distribution for the connection of the Agivey Substation to the Transmission System, can (indeed it must) include a Use of Shared Assets Charge.

9 SECTION NINE – DETERMINATION ON ISSUE TWO

9.1 As our determination on Issue One is that the Offer can (indeed must) include a Use of Shared Assets Charge we are also required to determine the second issue. This is the basis on which the Use of Shared Assets Charge is to be calculated.

Parties Submissions on the basis of the calculation of the Use of Shared Assets Charge

9.2 NIEN submits that although the Overhead Line is a single asset, from a charging perspective it comprises two distinct categories of asset which it then refers to as (a) connection assets capacity and (b) system asset capacity.¹⁰⁹

9.3 Its position is that, should we determine that the Offer can include a Use of Shared Assets Charge, the amount of the Use of Shared Assets Charge should be calculated on the premise that NIEN Distribution is first using the capacity in that part of the Overhead Line that is a System Asset (i.e. on its argument that part of the Overhead Line which has not been paid for by BWFL) and only when that capacity is fully used by it does it use any capacity in the part of the Overhead Line that is a Connection Asset (i.e. on its argument that part of the Overhead Line that has been paid for by BWFL).

9.4 This is the basis of its Approach X.

9.5 NIEN's reasons for submitting that any Use of Shared Assets Charge should be calculated on the basis of Approach X are that it –

- (a) is consistent with fair allocation of capacity on a 'first come first served basis' – which it states is the cornerstone of capacity allocation;
- (b) is more likely to result in a project proceeding; and
- (c) will encourage the take up of cheaper system capacity and the defraying of costs to the NI customer through the use of system charges.

9.6 SONI's position is that –

- (a) calculating a Use of Shared Assets Charge on the basis of Approach X is unfair, discriminatory, inconsistent with the TCCMS, and inconsistent with the SEM Committee's decision on connection harmonisation;¹¹⁰ and
- (b) the application of the 'first come first served' principle referred to by NIEN Distribution would mean that where SONI has designed, developed and constructed an asset with

¹⁰⁹ Tab 12, paragraph 17.

¹¹⁰ Tab 11, paragraphs 3.13(a), (b) and (d).

a specification (available capacity) that is over and above that required by the first person connecting to the asset, that person is first availing itself of the additional capacity available within the asset and therefore should be permitted to connect for free.¹¹¹

- 9.7 SONI submits that a Use of Shared Assets Charge is to be calculated on the basis of Approach Y as this is the only equitable solution. This is that NIEN Distribution first uses the capacity remaining in that part of the Overhead Line that has been paid for by BWFL.
- 9.8 Both Approach X and Approach Y proceed on the premise that a Use of Shared Assets Charge is calculated on the basis of capacity allocation.

Connecting to transmission system assets

- 9.9 Paragraph 4.2 of the TCCMS provides that in connecting to the Transmission System a new User may connect to either Connection Assets or to System Assets and the connection charge payable will vary in each circumstance.
- 9.10 As to which type of assets constitute Connection Assets and which type constitute System Assets this is set out in Section 5 of the TCCMS.
- 9.11 Paragraph 5.1 provides that Connection Assets are essentially –
- (a) those assets which are installed to enable the transfer of the maximum export/import capacity (as the case may be) of the User to/from (as the case may be) the Transmission System (and for this purpose in deciding which assets are required to enable these transfers, power flows other than those to and from the User are disregarded); and
 - (b) those assets which are installed as a result of the User's effect on fault current levels on the Transmission System (but excluding any installed at any location other than the transmission node to which the User connects).
- 9.12 Paragraph 5.2 confirms that assets which are not Connection Assets are System Assets. It also confirms that costs of System Assets are recovered through use of system charges (and therefore not through connection charges).

¹¹¹ Tab 11, paragraph 3.13(i).

The Overhead Line

- 9.13 It is not in dispute between the Parties that the Agivey Substation will connect to the Overhead Line and that the Overhead Line is a composite asset in that it is both a Connection Asset and a System Asset.
- 9.14 Paragraph 4.2 of the TCCMS states that a new User may connect to either Connection Assets or to System Assets. This envisages that all transmission system assets fall neatly and clearly into these two categories. However, the Overhead Line is a composite asset in that it is both Connection Asset and a System Asset.
- 9.15 Notwithstanding that there is no dispute between the Parties that the Overhead Line is a composite asset, in its response to the Provisional Determination NIEN submitted that an asset cannot fall into both categories and that the TCCMS does not permit composite assets.
- 9.16 While it may be that this is an unusual case and therefore not a circumstance that was envisaged or anticipated to be possible, it is not the case that an asset cannot fall into both categories or that the TCCMS does not permit composite assets. Paragraph 4.2 refers to connecting to either a Connection Asset or a System Asset but does not preclude the possibility of connecting to an asset that is both a Connection Asset and a System Asset. Indeed in this respect it is right to say that the part of the single asset that constitutes a System Asset would not exist but for the existence of the part that constitutes the Connection Asset.
- 9.17 The facts of the case before us are that the Agivey Substation will connect to a composite asset which is both a Connection Asset and a System Asset.
- 9.18 The Overhead Line to which the Agivey Substation is connecting is therefore, as provided for in paragraph 4.3.3 of the TCCMS, an existing Connection Asset which is to be shared with BWFL (as its wind farm is already connected to it).

Method for calculating the Use of Shared Assets Charge

- 9.19 Section 7 of the TCCMS sets out how a Use of Shared Assets Charge is to be calculated.
- 9.20 There is nothing within this Section 7 or indeed any other section of the TCCMS which provides that a Use of Shared Assets Charge is or can be calculated by reference to capacity allocation. Accordingly, neither of the generic approaches formulated and submitted by NIEN are applicable.
- 9.21 It is appropriate for these purposes to highlight that a Use of Shared Assets Charge is not concerned with or calculated by reference to the ongoing use the User makes of the Connection

Asset (the ongoing use that a User makes of the Connection Asset is only relevant for calculation of "Use of System" charges).

- 9.22 That this is the case is evident from paragraph 7.1 of the TCCMS. This provides that a Use of Shared Assets Charge is applicable where a new User "connects to the Transmission System by making use of existing Connection Assets" (emphasis added).
- 9.23 Accordingly, neither Approach X nor Approach Y apply or indeed can apply for the purposes of calculating the Use of Shared Assets Charge – as both of these approaches are erroneously premised on the charge being calculated by reference to capacity allocation.
- 9.24 How the charge is to be calculated is set out in paragraphs 7.1 and paragraph 7.3 of the TCCMS. It is therefore the approach, and only the approach, that is set out in these paragraphs which applies for this purpose.
- 9.25 In its response to the Provisional Determination, NIEN submitted that the 'value' of the shared Connection Asset is and can only be the value of the capacity used by the person connecting to the shared asset.
- 9.26 NIEN is mistaken in making this submission. The value of the Connection Asset is determined in accordance with paragraphs 7.3.1 and 7.3.2 of the TCCMS and it is clear from these paragraphs that the value is determined by reference to costs and is therefore a financial value.

Determination on Issue Two

- 9.27 We have duly and fully considered all of the submissions of the Parties relating to Issue Two.
- 9.28 Having done so, for all the reasons given above, our determination on the second issue is that the Use of Shared Assets Charge is to be calculated using the approach set out in paragraphs 7.1 and 7.3 of the TCCMS.
- 9.29 This approach is to –
- (a) first determine the value of that part of the existing Connection Asset which is to be shared and which has been funded by BWFL (see paragraphs 7.1 and 7.3.1 to 7.3.2 of the TCCMS); and
 - (b) then determine the proportion of that amount that can be charged to NIEN Distribution (the new User) (see paragraphs 7.1, 7.3.3 and 7.3.4 of the TCCMS).
- 9.30 The Use of Shared Assets Charge is not calculated by reference to capacity allocation matters and accordingly neither Approach X nor Approach Y is the right approach.

10 SECTION TEN - OTHER MATTERS

The Supplementary Provisional Determination

- 10.1 In its submissions on the Supplementary Provisional Determination, NIEN raises concerns with regard to the issue of the Supplementary Provisional Determination.
- 10.2 More particularly, it –
- (a) states that as there is no reference in the Complaints Policy to the possibility of issuing a supplementary provisional determination it "*questions the correctness of the approach adopted by the Utility Regulator in issuing a supplementary provisional determination and questions the validity of taking a central issue to the Provisional Determination into a separate determination process*"; and
 - (b) contends that "*the premise of requiring a supplementary provisional determination and the supplementary provisional determination are fundamentally flawed*".
- 10.3 We do not accept NIEN's contentions.
- 10.4 That there is no specific reference in the Complaints Policy to the issue of a supplementary provisional determination does not mean that the approach adopted by us, the Decision Makers, in our determination of the Dispute is incorrect.
- 10.5 In this respect it is appropriate for us to draw attention to the fact that –
- (a) the Complaints Policy itself confirms that it does not provide a comprehensive description of the procedure to be followed in every case;
 - (b) the Parties were made aware from an early stage (draft statement of case stage) and throughout the process (issue of the Statement of Case and the Provisional Determination) that the Complaints Policy will be supplemented or adapted as required in order to ensure good governance and best practice; and
 - (c) the UR's letter of 14 December 2018¹¹², requesting NIEN's agreement to an extension of the timetable, confirmed that the Decision Makers would review the practice and procedure to be followed before proceeding to make the final determination.
- 10.6 A supplementary provisional determination was issued because in responding to the Provisional Determination NIEN submitted that the text of paragraphs 2.2 and 2.3 of the Section S of the TIA Document was not as stated in the Provisional Determination.

¹¹² Tab 18.

- 10.7 These were new submissions from NIEN. The text of paragraphs 2.2 and 2.3 stated in the Provisional Determination was the same as that stated for these paragraphs in the Statement of Case and other documents to which NIEN had previously responded and not made the submissions it subsequently made in response to the Provisional Determination, despite having ample opportunity to do so.
- 10.8 Given the nature and subject matter of the new submissions from NIEN, the Utility Regulator considered it right and appropriate to –
- (a) provide SONI with an opportunity respond to NIEN's new submissions with regard to the text of paragraphs 2.2 and 2.3 of Section S of the TIA Document;
 - (b) provide NIEN with an opportunity to reply to SONI's response; and
 - (c) determine the issues raised by NIEN's new submission and issue a further provisional determination (the **Supplementary Provisional Determination**) in respect of these issues; and
 - (d) provide an opportunity for the Parties to make any representations to the Supplementary Provisional Determination.
- 10.9 Accordingly, and particularly given, as NIEN acknowledges in describing it as a '*central issue*', the relevance and application of paragraphs 2.2 and 2.3 to the subject matter of the Dispute and the issues for determination, the approach adopted by the Utility Regulator was entirely right and correct. The Utility Regulator has followed proper and due process in accepting and taking into consideration the new submissions from NIEN, notwithstanding the late stage at which such submissions were made and ensuring both that the Parties had the opportunity to consider the issues arising in respect of NIEN's late new submissions.
- 10.10 Furthermore, it is not the case that the Utility Regulator has taken a central issue to the Provisional Determination into a separate determination process. There is no separate determination process. It would not have been right or appropriate, in the particular circumstances of this case, for the Utility Regulator to have proceeded, having received new submissions on a '*central issue*', to make a final determination on the Dispute without providing the opportunity for the Parties to respond to, and making a provisional determination on, the '*central issue*' in question.

Decision Makers' Role

- 10.11 As noted earlier (see paragraph 5.4), the Utility Regulator confirmed (on a number of occasions, including in its initial acceptance of the referral, the Statement of Case and the Provisional

- Determination) to the Parties that it will determine only those aspects of the Dispute which arise out of, or in connection with, the TIA Document.¹¹³
- 10.12 Notwithstanding this, in responding to the Provisional Determination and the Supplementary Provisional Determination, NIEN has continued to make submissions which relate to matters which are not within the scope of the determination of the Dispute.
- 10.13 These submissions concern, for example, matters relating to the scope and effect of NIEN Distribution's 'Statement of Charges for Connection to the NIEN Distribution System', how NIEN funds the Use of Shared Assets Charge, how the Parties might implement the final determination of the Dispute, the precise costs of the Connection Asset, and the MW capacity share of each of NIEN and BWFL, which should form the basis of the assessment undertaken in accordance with paragraphs 7.1 and 7.3 of the TCCMS.
- 10.14 These are matters which either do not fall within the scope of the Dispute (as referred to the Utility Regulator for determination) or do not arise out or in connection with the TIA Document. We therefore cannot, and do not, opine on them or take them into consideration for the purposes of determining the matters in Dispute between the Parties.

¹¹³ Tab 12.

11 SECTION ELEVEN – RECOVERY OF UTILITY REGULATOR'S COSTS

Making a Costs Order

- 11.1 Paragraph 5A of Article 31A of the Electricity Order provides that the Utility Regulator may include in the determination an order requiring any person to the dispute to pay such sum in respect of the costs or expenses of the Utility Regulator in making the determination as the Utility Regulator considers appropriate.
- 11.2 In its letters of 7 August and 24 August 2018, the Utility Regulator confirmed to the Parties that it was treating the Dispute as a complaint for the purposes of Article 31A of the Electricity Order and in accordance with the Complaints Policy¹¹⁴, drew the Parties' attention to Article 31A(5A) of the Electricity Order.
- 11.3 Paragraph 5B of Article 31A of the Electricity Order provides that in making an order under paragraph 5A the Utility Regulator shall have regard to the conduct and means of the parties and other relevant circumstances.
- 11.4 The Policy¹¹⁵ states that where the Utility Regulator is considering whether to make a provision for payment of the Utility Regulator's costs, it will have regard to –
- (a) the nature and complexity of the complaint or dispute;
 - (b) the resources of the parties;
 - (c) the conduct of the parties in relation to the complaint or dispute (whether before or after the date of the application);
 - (d) the outcome of the complaint or dispute; and
 - (e) what is fair and proportionate in all the circumstances of the case.
- 11.5 In addition, on 10 November 2017 the Utility Regulator published an Information Note setting out and confirming its policy on cost recovery in respect of its dispute settlement role.
- 11.6 Among other things, the Information Note confirms –
- (a) that, other than in exceptional cases, whenever the Utility Regulator determines a dispute in respect of which it has the power to recover its costs, it will make a costs order; and

¹¹⁴ Paragraph 9 of Section D of the Policy.

¹¹⁵ At paragraph 24 of Section D of the Policy.

- (b) that the Utility Regulator will take into account all the circumstances of the case in determining which party (or parties) is required to pay its costs.

Provisional Costs Order

- 11.7 The Utility Regulator's provisional conclusions, including its reasons, on the recovery of its costs, as set out in the Provisional Determination, were that it would be appropriate to make a costs order and seek to recover its external costs incurred in determining the Dispute from NIEN.

Parties' Submissions on the provisional conclusions

- 11.8 SONI did not make any submissions on the provisional costs order.
- 11.9 NIEN submitted that the Utility Regulator is not entitled to rely on its letter of 7 August to support an award of costs because -
- (a) the UR's letter of 6 July 2018 - which was responding to a previous application that had not been properly made by NIEN - stated that Article 31A of the Order would only apply to the timescales for the UR's determination of the Dispute;
 - (b) it was reasonable for it to assume that the reference in the UR's letter of 7 August 2018 that Article 31A of the Order applies with regard to the UR's conduct of the dispute was a reference to the timescales in which the Utility Regulator would determine the Dispute; and
 - (c) reference was not made in the UR's letters of 7 August and 24 August 2018 that the Utility Regulator may invoke its statutory powers to award costs nor to the fact that the conduct of the Parties would be considered in the context of Article 31A.
- 11.10 NIEN also submitted that even if it should be liable for costs (which it does not accept), the provisional conclusions failed to give proper regard to –
- (a) the complexity of the Dispute (on the basis that Overhead Line is a composite asset which the Utility Regulator has acknowledged may be an unusual case);
 - (b) the fact that the Dispute was referred to the Utility Regulator with SONI's agreement;
 - (c) the fact this is the first dispute submitted to the Utility Regulator under the TIA Document and compliance with the TIA Document is a licence obligation for each Party.

- 11.11 It also contends that costs relating to external legal costs should not be charged where the legal advice procured by the Utility Regulator has not been provided to the Parties.
- 11.12 We have given careful consideration to NIEN's submissions and make the following points, comments and observations –
- (a) The UR's letter of 6 July 2018 was in response to a previous application by NIEN that was not properly made. It has no bearing or application in respect of the application that is now being determined by us.
 - (b) There is nothing in the Utility Regulator's letter of 7 August 2018 which either expressly or implicitly indicates that Article 31A of the Order was applicable only in respect of the timescales for the determination.
 - (c) The Utility Regulator's letter of 7 August 2018 specifically provided an opportunity for the Parties to make any submissions or representations on the application of Article 31A of the Order and neither Party made any such submissions or representations, indeed NIEN specifically confirmed that it did not have any comments in respect of the application of Article 31A of the Order.
 - (d) The Utility Regulator regularly and consistently drew the attention of the Parties to the Complaints Policy, which specifically refers (in Annex A) to the possibility of a costs order being made where Article 31A of the Order applies to the dispute.
 - (e) NIEN is mistaken in contending that the Utility Regulator has failed to give regard to the nature or complexity of the Dispute.
 - (f) The Provisional Determination confirmed that in reaching its provisional conclusions the Utility Regulator did take into consideration whether there was anything in the nature or complexity of the complaint which effected or had any bearing on which Party should be liable for the Utility Regulator's costs.
 - (g) In circumstances where there is nothing in the resources of the Parties, the fact that a dispute is (or may have been) referred to the Utility Regulator by one Party with the agreement of the other Party, that both Parties to the dispute have a licence obligation to comply with the regulatory and contractual document under which the dispute is referred or that it is the first dispute referred to the Utility Regulator under the provisions of that regulatory and contractual document, are not factors which effect or have any bearing on which Party should be liable for the Utility Regulator's costs.
 - (h) This determination takes account of the legal advice we received, in respect of both procedural and substantive matters, in our determination of the Dispute. That the legal

advice is not separately provided to the Parties does not mean that external legal costs incurred by the Utility Regulator cannot or should not be recoverable.

Determination on Costs Order

- 11.13 Taking all of the above into consideration we have determined to make the costs order set out at section 12 of this determination (the **Costs Order**).
- 11.14 Our determination is for NIEN to pay a sum of £[REDACTED] in respect of the external legal costs the Utility Regulator has incurred in making this determination.
- 11.15 The Utility Regulator will inform NIEN by way of separate correspondence on the method for making the payment.

12 **SECTION TWELVE - COSTS ORDER**

- 12.1 We order that by no later than 28 days from the date of this determination, NIEN makes a payment to the Utility Regulator of £[REDACTED].

Barbara Cantley
Tony Doherty

Authorised on behalf of the Northern Ireland Authority for Utility Regulation

Appendix 1 - Index to Bundle of Documents

Tab No	Document description	Date
	Relevant Legislation and background documents	
1	The Electricity (Northern Ireland) Order 1992	11 February 1992
2	Directive 2009/72/EC of the European Parliament concerning common rules for the internal market in electricity	13 July 2009
3	SONI Transmission System Operator Licence	1 August 2018 (granted 3 July 2007)
4	SONI Transmission Connection Charging Methodology Statement	1 September 2016
5	The Transmission Interface Arrangements Document	1 September 2016
6	UR Policy on the Resolution of Complaints, Disputes and Appeals and Guide for Applicants	June 2013
7	UR Policy on the Resolution of Complaints, Disputes and Appeals and Guide for Applicants	August 2018
8	NIEN Distribution Licence (Condition 17 only)	

Tab No	Document description	Date
	Documents submitted with the application to determine a dispute	
9	Application to determine a dispute from NIE Networks to the Utility Regulator	31 July 2018
Appendix 1	Diagram – Generation in the vicinity of South East Limavady	
Appendix 2	Diagram – Composite 110kV 400mm ² line – including original LCTA and the UR ‘enhanced specification’ (i.e. the SONI SOP)	
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Exhibit 1	SONI TIA Section D construction application to NIE Networks	4 March 2014
Exhibit 2	NIE Networks Section D construction offer to SONI	14 May 2014
Exhibit 3	NIE Networks – TIA application to SONI in line with Section S	17 October 2014
Exhibit 4	SONI – construction application to NIE Networks pursuant with TIA Section D	3 April 2015
Exhibit 5	NIE Networks – construction offer to SONI – pursuant with TIA Section D	29 January 2016
Exhibit 6	NIE Networks/SONI submission to the Utility Regulator for incremental funding for SONI SOP (NIE Networks cover letter)	4 November 2016

Tab No	Document description	Date
	Documents submitted with the application to determine a dispute	
Exhibit 7	SONI Paper accompanying NIE Networks/SONI submission to the Utility Regulator for incremental funding for SONI SOP	3 November 2016
Exhibit 8	The Utility Regulator's approval of incremental funding for SONI SOP	18 November 2016
Exhibit 9	SONI Section S offer	14 February 2018
Exhibit 10	NIE Networks letter to SONI	9 March 2018
Exhibit 11	NIE Networks letter to SINI	29 March 2018
Exhibit 12	SONI letter to NIE Networks	4 May 2018
Exhibit 13	Minutes of meeting between NIE Networks and SONI	23 May 2018

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	Documents submitted with the NIEN Reply	
11	Reply	10 September 2018
Appendix 1	Diagram of Approach X and Approach Y	

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12	Letter from the Utility Regulator to the Parties	7 August 2018
13	Letter from the Utility Regulator to the Parties	24 August 2018
14	Letter from the Utility Regulator to the Parties	18 October 2018

Tab No	Document description	Date
	Further Documents	
15	Provisional Determination	21 November 2018

Tab No	Document description	Date
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16	NIE Networks' submissions on the Provisional Determination	5 December 2018
Appendix 1	TIA Section S approved by the Utility Regulator on 14 June 2016	
17	SONI's submissions on the Provisional Determination	5 December 2018
18	Letter from the Utility Regulator to NIE Networks requesting extension of process as a result of NIE Networks' new submissions	14 December 2018
19	E-mail from NIE Networks to the Utility Regulator agreeing to the extension	18 December 2018
20	Letter from SONI to the Utility Regulator regarding the extension	19 December 2018
21	Letter from the Utility Regulator to SONI inviting representations on NIE Networks' new submissions	20 December 2018
22	SONI's representations on NIE Networks' new submissions	7 January 2019
23	Letter from the Utility Regulator to NIE Networks inviting a response to SONI's representations	8 January 2019
24	Letter from NIE Networks to the Utility Regulator providing a response to SONI's submissions	15 January 2019
25	Letter from NIE Networks to the Utility Regulator requesting a 'stay' in the process	1 February 2019

Tab No	Document description	Date
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26	Letter from the Utility Regulator to NIE Networks agreeing to a stay in the process	5 February 2019
26	Supplementary Provision Determination	5 March 2019
27	Letter from SONI to the UR stating they had no submissions to make on the Supplementary Provision Determination	12 March 2019
28	NIE Networks' submissions on the Supplementary Provision Determination	12 March 2019
29	Letter from NIE Networks to the Utility Regulator requesting a further 'stay'	20 March 2019
30	Letter from the Utility Regulator to NIE Networks rejecting the request for a further 'stay'	26 March 2019