

**COMPLAINT BY SMULGEDON WIND FARM (EAST) LIMITED IN RELATION TO A
CONNECTION TO NORTHERN IRELAND ELECTRICITY NETWORKS LIMITED'S ELECTRICITY
DISTRIBUTION SYSTEM**

FINAL DETERMINATION

22 September 2021

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1. **SECTION ONE - INTRODUCTION**

- 1.1 On 26 February 2021, the Northern Ireland Authority for Utility Regulation (the **Authority** – and hereafter referred to as the **Utility Regulator**) received an application (the **Application (B14)**) from Smulgedon Wind Farm (East) Limited (**SWFEL**), under and in accordance with Article 26 of the Electricity (Northern Ireland) Order 1992 (the **Electricity Order (A1)**), requesting the Utility Regulator to determine a dispute (the **Dispute**) between SWFEL and Northern Ireland Electricity Networks Limited (**NIE Networks**).
- 1.2 The Dispute relates to the variation on 29 October 2020 (the **October Variation (B3)**) of the terms of a connection offer made by NIE Networks to SWFEL (together, the **Parties**), dated 21 October 2014, for the connection, of what was, in 2014, proposed to be a single windfarm being developed by SWFEL, to NIE Networks' electricity distribution system at the Garvagh/Agivey Cluster (the **Connection Offer (B1)**).
- 1.3 The Dispute centres on the reasonableness of NIE Networks' requirement that SWFEL provide the security required by the October Variation (the **Security**) within 120 days of the date of the October Variation.
- 1.4 The Dispute falls to be determined by the Utility Regulator under Article 26 of the Electricity Order.
- 1.5 The Utility Regulator has progressed its determination of the Dispute in accordance with its Policy on the Resolution of Complaints, Disputes and Appeals and Guide for Applicants dated August 2018 (the **Policy (A4)**) – as adapted to reflect the circumstances of the case.
- 1.6 The Application has been acknowledged and the Parties have been informed (by letter dated 15 April 2021 (**B19**)) that the Utility Regulator has jurisdiction to consider and determine the Dispute. The Parties have also been informed and regularly updated of the timetable within which the Utility Regulator will make its determination.
- 1.7 The Utility Regulator has appointed us, Jon Carlton (Board member of the Utility Regulator) and Ciaran MacCann (Manager of the Utility Regulator), jointly to determine the Dispute (together, the **Decision-Makers**). We do so as delegates of the Utility Regulator and on its behalf.
- 1.8 The Application requested that the Utility Regulator exercise its power under Article 26 of the Electricity Order to direct NIE Networks to –
- (a) extend the date for provision of the Security until determination of the Dispute, (the **First Requested Direction**), and

- (b) cease development of the unique connection currently being developed for (or, in association with) the connection of a third party (Craigmore Wind Farm) to the Garvagh/Agivey Cluster (the **Second Requested Direction**).

1.9 In a determination dated 24 May 2021 (**B21**), we made the First Requested Direction, on behalf of the Utility Regulator, in the following terms –

- (a) *NIE Networks must maintain the Connection Offer and not revoke or withdraw it, or allow it to lapse, because of lack of provision of security by SWFEL.*
- (b) *Where SWFEL provides the required security prior to the final determination of the Dispute, NIE Networks must accept that security as properly provided under the Connection Offer, notwithstanding it has not been provided within the timeframe specified by NIE Networks which forms the subject of the Dispute.*
- (c) *This direction shall have effect from 24 May 2021 until –*
 - (i) *the date of the order of the Utility Regulator made under Article 26(1)(b) of the Electricity (Northern Ireland) Order 1992,*
 - (ii) *where the Dispute is withdrawn before its final determination, from the date of withdrawal, or*
 - (iii) *such other date as determined by the Utility Regulator.*

1.10 In the same determination, we declined to make the Second Requested Direction.

1.11 This document is our determination in respect of the Dispute and includes the order we make under Article 26 of the Electricity Order.

1.12 In reaching this determination, we have reviewed and considered the following materials and documents –

- (a) A Statement of Case (the **Statement**) prepared for us by the case management team – the Statement 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 issue to be determined.
- (b) The documents set out in Appendix 1 to the Statement, which included all of the submissions of the Parties and were copied to them.

1.13 The Parties were also afforded the opportunity to comment on –

- (a) a draft of the Statement, and
- (b) a provisional determination, dated 17 August 2021 (the **Provisional Determination**).

- 1.14 The comments received from the Parties on the draft Statement were taken into account by the case management team in preparing the final version of the Statement (and reflected within the relevant sections of this document).
- 1.15 In arriving at our final determination, we have taken into account the submissions received from the Parties on the Provisional Determination.
- 1.16 This document is structured as follows –
- (a) Parties to the Dispute (at [Section 2](#)).
 - (b) Applicable legal framework (at [Section 3](#)).
 - (c) Factual background to the Dispute (at [Section 4](#)).
 - (d) The views of SWFEL (at [Section 5](#)).
 - (e) The views of NIE Networks (at [Section 6](#)).
 - (f) The issue for determination (at [Section 7](#)).
 - (g) Our determination in relation to that issue (at [Section 8](#)).
 - (h) Our other observations (at [Section 9](#)).
 - (i) Recovery of Utility Regulator's Costs (at [Section 10](#)).
 - (j) The Order (at [Section 11](#)).
- 1.17 This determination references a number of documents (including correspondence provided by the Parties). An index to these documents is attached at [Appendix 1](#). The Parties have received copies of all of these documents.

2. **SECTION TWO - THE PARTIES TO THE DISPUTE**

SWFEL

2.1 SWFEL is a company involved in the generation of electricity and a subsidiary of RG Developments Limited. It was formerly named Smulgedon Windfarm Limited (**SWFL**) until changing its name from June 2020.

2.2 SWFEL's head office is based at –

Smulgedon Wind Farm Limited
The Business Centre
Unit C2
80-82 Rainey Street
Magherafelt BT45 5AJ

2.3 SWFEL is the owner of the Smulgedon wind farm project which, once constructed, will connect to the NIE Networks' distribution network at the Garvagh/Agivey Cluster substation.

NIE Networks

2.4 NIE Networks is a subsidiary of ESBNI Limited. It is the owner of the electricity transmission system in Northern Ireland, and the owner and operator of the electricity distribution system in Northern Ireland.

2.5 It is licensed to undertake these activities and accordingly holds an electricity transmission licence and an electricity distribution licence granted or treated as granted under Articles 10(1)(b) and 10(1)(bb) of the Electricity (Northern Ireland) Order 1992 respectively.

2.6 NIE Networks is the only party in Northern Ireland entitled to offer terms to connect, or to modify an existing connection, to the electricity distribution system.

2.7 NIE's distribution licence (also known as the successor distribution licence) is the relevant licence for the purposes of this dispute (the **Licence (A2)**).

3. **SECTION THREE – APPLICABLE LEGAL FRAMEWORK**

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

3.2 The Utility Regulator confirmed on 15 April 2021 that it has valid jurisdiction under Article 26(1A) of the Electricity Order (**A1**) to consider and to make a determination in respect of the Dispute.

The Electricity Order (A1)

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

3.4 Article 3 of the Electricity Order establishes a legal definition of distribution.

3.5 Specifically, it defines –

- (a) a distribution system as ‘*a system which consists (wholly or mainly) of low voltage lines and electrical plant and is used for conveying electricity to any premises or to any other distribution system*’, and
- (b) a high voltage line as ‘*an electric line of a nominal voltage of or exceeding 110 kilovolts*’ with a low voltage line to ‘*be construed accordingly*’.

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

3.7 Articles 19 to 24 of the Electricity Order make provision in respect of distribution connections.

3.8 In particular, they establish –

- (a) a duty to connect on request (Article 19(1)),
- (b) a procedure for applicants to require a connection (Article 20),
- (c) a number of exceptions from the duty to connect (Article 21),
- (d) a right for an electricity distributor to recover the reasonable costs of making a connection to such extent as is reasonable in all the circumstances (Article 22),
- (e) a right for an electricity distributor to require reasonable security for payment (Article 23), and

- (f) a right for an electricity distributor to impose certain additional terms of connection (Article 24).

3.9 In relation to the distributor's power to recover its reasonable costs, Article 22 states as follows –

- (1) *Where any electric line or electrical plant is provided by an electricity distributor under Article 19(1), the distributor may require any expenses reasonably incurred in providing it to be defrayed by the person requiring the connection to such extent as is reasonable in all the circumstances.*
- (2) *Regulations made, after consultation with the Authority, may make provision for entitling an electricity distributor to require a person requiring a connection in pursuance of Article 19(1) to pay to the distributor, in respect of any expenses reasonably incurred in providing any electric line or electrical plant used for the purpose of making the connection, such amount as may be reasonable in all the circumstances if—*
- (a) *the connection is required within the prescribed period after the provision of the line or plant; and*
- (b) *a person ("the initial contributor") has made a payment to the distributor in respect of those expenses, the line or plant having been provided for the purpose of making a connection to any premises or distribution system as required by that person.*
- (3) *Regulations under paragraph (2) may require an electricity distributor who, in pursuance of this Article or the regulations, has recovered any amount in respect of expenses reasonably incurred in providing any electric line or electrical plant—*
- (a) *to exercise his rights under the regulations in respect of those expenses; and*
- (b) *to apply any payments received by him in the exercise of those rights in making such payments as may be appropriate towards reimbursing the initial contributor and any persons previously required to make payments under the regulations.*
- (4) *Any reference in this Article to any expenses reasonably incurred in providing an electric line or electrical plant includes a reference to the*

capitalised value of any expenses likely to be so incurred in continuing to provide it.'

3.10 Article 23 provides as follows in regard to the distributor's power to require security for such costs –

'(1) Subject to the following provisions of this Article, an electricity distributor may require any person who requires a connection in pursuance of Article 19(1) to give him reasonable security for the payment to him of all money which may become due to him under Article 22 in respect of the provision of any electric line or electrical plant.

(2) If a person fails to give any security required under paragraph (1), or the security given has become invalid or insufficient, and he fails to provide alternative or additional security, the electricity distributor may if he thinks fit—

(a) if the connection has not been made, refuse to provide the line or plant for so long as the failure continues; or

(b) if the connection is being maintained, disconnect the premises or distribution system in question.

(3) Where any money is deposited with an electricity distributor by way of security in pursuance of this Article, the distributor shall pay interest, at such rate as may from time to time be fixed by the distributor with the approval of the Authority, on every sum of 50p so deposited for every three months during which it remains in the hands of the distributor.'

3.11 Article 24 provides that any additional terms of connection –

(a) may be imposed for the purpose of enabling the distributor to comply with regulations under Article 32 (relating to safety),

(b) must be reasonable in all the circumstances for that person to be required to accept, and

(c) where they restrict any liability of the distributor for economic loss resulting from negligence, without prejudice to the generality of sub-paragraph (b), be reasonable in all the circumstances for that person to be required to accept.

3.12 Alternatively, Article 25 of the Electricity Order permits an electricity distributor and a connection applicant to enter into a connection agreement on agreed terms – which may be different to those specified in Articles 19 to 24 of the Electricity Order – and for

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

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

3.14 Specifically, Article 26 provides as follows –

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

(a) may be referred to the Authority by either party; and such a reference shall be accompanied by such information as is necessary or expedient to allow a determination to be made in relation to the dispute; and

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

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

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

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

(a) the period of 2 months from the date when the dispute was referred to the Authority; or

(b) where the information sent to the Authority under paragraph (1)(a) was in its opinion insufficient to enable it to make a determination, the period of 4 months from when the date when the dispute was referred to the Authority.

(2) No dispute arising under Articles 19 to 25 which relates to the making of a connection between any premises and a distribution system may be

referred to the Authority after the end of the period of 12 months beginning with the time when the connection is made.

...

(6) *A person making an order under this Article shall include in the Order his reasons for reaching his decision with respect to the dispute.*

(7) *An order under this Article –*

(a) *may include such incidental, supplemental and consequential provision (including provision requiring either party to pay a sum in respect of the costs or expenses incurred by the person making the order) as that person considers appropriate; and*

(b) *shall be final and shall be enforceable, in so far as it includes such provision as to costs or expenses, as if it were a judgment of the county court.*

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

3.15 Article 19(1)(a)(i) places a duty on an electricity distributor to make a connection between a distribution system of his and any premises, when required to do so by '*the owner or occupier of the premises*'.

3.16 Article 19(3) also provides that –

'The duties under this Article shall be performed subject to such terms as may be agreed under Article 20 for so long as the connection is required.'

3.17 Article 20 states –

(1) *Where a person requires a connection to be made by an electricity distributor in pursuance of Article 19(1), he shall give the distributor a notice requiring him to offer terms for making the connection.*

(2) *That notice must specify—*

(a) *the premises or distribution system to which a connection to the distributor's system is required;*

(b) *the date on or by which the connection is to be made; and*

- (c) *the maximum power at which electricity may be required to be conveyed through the connection.*
- (3) *The person requiring a connection shall also give the distributor such other information in relation to the required connection as the distributor may reasonably request.*
- (4) *A request under paragraph (3) shall be made as soon as practicable after the notice under paragraph (1) is given (if not made before that time).*
- (5) *As soon as practicable after receiving the notice under paragraph (1) and any information requested under paragraph (3) the distributor shall give to the person requiring the connection a notice—*
 - (a) *stating the extent to which the proposals specified in the other person's notice under paragraph (1) are acceptable to the distributor and specifying any counter proposals made by the distributor;*
 - (b) *specifying any payment which that person will be required to make under Article 22(1), or under regulations made under Article 22(2);*
 - (c) *specifying any security which that person will be required to give under Article 23;*
 - (d) *specifying any other terms which that person will be required to accept under Article 24; and*
 - (e) *stating the effect of Article 26.'*

3.18 Article 21 states –

- '(1) *Nothing in Article 19(1) requires an electricity distributor to make a connection if and to the extent that—*
 - (a) *he is prevented from doing so by circumstances beyond his control;*
 - (b) *circumstances exist by reason of which his doing so would or might involve his being in breach of regulations under Article 32, and he has taken all such steps as it was reasonable to take both to prevent the circumstances from occurring and to prevent them from having that effect; or*

- (c) *there is a lack of capacity or there are exceptional circumstances which render it impracticable for him to do so.*
- (2) *Without prejudice to the generality of paragraph (1) an electricity distributor is not required to make a connection if—*
 - (a) *making the connection involves the distributor doing something which, without the consent of another person, would require the exercise of a power conferred on him by any provision of Schedule 3 or 4;*
 - (b) *those provisions do not have effect in relation to him; and*
 - (c) *any necessary consent has not, at the time the request is made, been given.'*

The Licence (A2)

3.19 Condition 15 of the Licence requires NIE Networks to ensure that in providing offers of connection to its distribution system it does not unduly discriminate between any persons, or any class or classes of person or persons.

3.20 Condition 27 of the Licence requires NIE Networks to put in place a Distribution Code covering *'all the material technical aspects relating to connections to and use of the Distribution System'*. The Distribution Code must be designed to –

'neither prevent nor restrict competition in the generation and supply of electricity in Northern Ireland, or, to the extent that the Distribution Code may have such effect, on the Island of Ireland.'

3.21 Condition 30 of the Licence requires NIE Networks to offer terms for connection to and use of the distribution system.

3.22 More specifically, with regard to connection charges, paragraph 9(a) of Condition 30 (as presently in force) provides that any connection offer made by NIE Networks shall set out –

'the connection charges to be paid to the Licensee, such charges (unless manifestly inappropriate):

- (i) *to be presented in such a way as to be consistent with and referable to the statements prepared in accordance with paragraph 1(b) (or, as the case may be, paragraph 8) of Condition 32, or any revision thereof; and*

(ii) *to be set in conformity with the requirements of paragraphs 6 and 7 of Condition 32.'*

3.23 Paragraph 6 of Condition 32 of the Licence sets out the matters that the 'connection charging statement' (the **Connection Charging Statement (A3)**) prepared by NIE Networks pursuant to the obligation in paragraph 1(b) of Condition 32 must include.

3.24 Paragraph 7 of Condition 32 of the Licence states –

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

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

(b) a reasonable rate of return on the capital represented by such costs.'

Connection Charging Statement (A3)

3.25 The currently applicable Connection Charging Statement approved by the Utility Regulator is the 'Statement of Charges for Connection to the Northern Ireland Electricity Networks' Distribution System' effective from 15 July 2020 (**A5**).

3.26 Accordingly, this is the relevant Connection Charging Statement for the purposes of the Utility Regulator's determination of the Dispute.¹

3.27 In relation to the payment of security, section 7.6.1 of the Connection Charging Statement provides as follows –

*'Where a connection offer is made for connection to either a **Designated Generation Cluster Infrastructure** or an **Approved Generation Cluster Infrastructure** or a **Constructed Generation Cluster Infrastructure** the **Authorised Generator** shall, in addition to the stage payments, provide payment security to the satisfaction of NIE Networks and which provides for recovery of the **Authorised Generator's** total contribution to the cluster infrastructure less any contribution made at the time of agreement for connection to the **Designated Generation Cluster Infrastructure** or **Approved Generation Cluster***

¹In line with the Utility Regulator's determination in *DET-523 - Determination of Pigeon Top Wind Farm connection dispute with NIE*, available at https://www.uregni.gov.uk/files/uregni/media-files/2014_08_26_Pigeon_Top_Dispute_-_Final_Determination_redacted.pdf.

*Infrastructure or a **Constructed Generation Cluster Infrastructure**. Such security will not be required to be put in place until the generation cluster infrastructure has been approved by the **Authority**. The security shall be free of lien or condition save that the **Authorised Generator** has failed to make a payment or payments. In the event that payment is made for an **Authorised Generator** by calling payment security, the network capacity will no longer be reserved for that **Authorised Generator**, its estate or its successors nor will the **Authorised Generator**, its estate or successors be entitled to a refund of connection charges already paid.'*

(Emphasis in original)

- 3.28 The drafting of section 7.6.1 of the Connection Charging Statement is the same in both the current statement and the 2014 version which was in place at the time of the Connection Offer.

Practice and procedure

- 3.29 The practice and procedure being followed by the Utility Regulator for the purposes of the determination of the Dispute is that set out in the Policy **(A4)** – supplemented as required in order to ensure good governance and best practice.
- 3.30 For completeness, we note that, in determining disputes, the principal objective and general duties of the Utility Regulator under Article 12 of the Energy (Northern Ireland) Order 2003² (“the **Energy Order**”) do not apply (see Article 13(2) of the Energy Order).

² The Energy Order, available at <https://www.legislation.gov.uk/nisi/2003/419/contents>.

4. **SECTION FOUR – BACKGROUND TO THE DISPUTE**

4.1 The following summary of the factual background is derived mainly from the relevant section of the Statement. Neither Party made any comment on this summary in submissions on the Provisional Determination. We take the following summary to be accurate and adopt it for the purposes of this determination.

The Connection Offer

4.2 On 21 October 2014, NIE (as it then was) made SWFL (as it then was) an offer to connect the wind farm via the Garvagh/Agivey Cluster (the **Connection Offer**) (**B1**). The Connection Offer related to the connection of seven wind turbines with a Maximum Export Capacity (**MEC**) of 2.3MW each.

4.3 SWFL accepted the Connection Offer on 30 September 2015 and paid a deposit of ██████████, plus VAT.

4.4 As its project developed, SWFL decided that rather than construct a single wind farm, it would instead divide the project into two separate wind farms as this was considered more financially viable.

4.5 Following engagement between the two parties, SWFEL made an application to NIE Networks requesting an amendment to the Connection Offer in order to facilitate the splitting of the site into two wind farms operated by two separate companies (**B2**). It requested that the substation location be moved to suit the eastern portion of the original site (which was to be operated by SWFEL) and a three panel switchboard.

The October Variation

4.6 In response, NIE Networks made the October Variation dated 29 October 2020 (**B3**). The October Variation states that it purports to vary the Connection Offer³ –

'...to reflect:

(i) The Utility Regulator (UR) approval for construction of Garvagh cluster to which the Installation is to be connected, and requirement for You to provide security for the Cluster Charge,

(ii) Your request to change the proposed electricity substation for the Installation from its existing position to a new location on the wind farm site,

(iii) Your request to install a three panel switchboard at the Installation,

³ October Variation, para 1.1 (**B3**).

*(iv) Current NIE Networks policy with respect to the achievement of certain milestones (**Network Planning Milestones**) by the Installation.'*

(Emphasis in original)

4.7 The October Variation states that, save as varied by it, the terms of the Connection Offer remain in full force and effect.⁴ It also states that it was '*subject to and must be read in conjunction with*' NIE Networks Statement of Charges for Connection, dated 15 July 2020 (the Connection Charging Statement described in section 3 above).⁵

4.8 With respect to the Security, the October Variation provides that⁶ –

'In accordance with section 7.6.1 of the [Connection Charging Statement]..., You are required to provide security for the balance of the Cluster Charge, as shown in the table above, in the form of an unconditional, irrevocable Letter of Credit from an approved Bank, using the template found in Appendix 2. Any Letter of Credit which is not in accordance with the attached template may be refused by Us.

As an alternative to providing a Letter of Credit as payment security for the balance of the Cluster Charge, You may pay the balance of the Cluster Charge as a single lump sum payment.

The Letter of Credit / payment must be provided when returning the Acknowledgement Form (Appendix 1), or not later than 10 December 2020, in order to maintain the current cluster construction programme, which requires invoicing and receipt of the next stage payment prior to 10 December 2020.'

4.9 The balance of the Cluster Charge with respect to which the Security was sought is [REDACTED], plus VAT.

4.10 SWFEL wrote to NIE Networks on 4 December 2020 (**B4**) making the following four points –

- (a) SWFEL asked whether the 10 December 2020 deadline in the October Variation related to enabling the cluster works to proceed to their current schedule or whether it was a deadline for acceptance of the October Variation.
- (b) SWFEL stated that it accepted its responsibility to pay the Cluster Charge but was in the process of arranging finance. It pointed out that the 2014 Connection Charging Statement referenced within the Original Offer

⁴ October Variation, para 1.3 (**B3**).

⁵ October Variation, para 1.5 (**B3**).

⁶ October Variation, para 3.1.1 (**B3**).

confirmed that once the deposit had been paid, further payments were only required once various stages have been reached.

- (c) SWFEL noted that the Connection Offer did not have an expiry date and requested assurance from NIE Networks that the latter would not consider that failure to accept the October Variation meant that the Connection Offer had lapsed.
- (d) SWFEL noted that the Connection Offer had incorporated the 2014 Connection Charging Statement and that the suggestion in the October Variation that the latter should be read in conjunction with the 2020 Connection Charging Statement represented a fundamental change to the contract agreed between NIE Networks and SWFL.

4.11 By letter dated 8 December 2020 (**B5**), NIE Networks provided the following responses to the points made by SWFEL –

- (a) If SWFEL was unable to provide the Security by 10 December 2020 then, as per the Distribution Generation Application and Offer Process Statement (**DGAOP**) (**A5**), it could be provided within 120 days of the date of the October Variation (so by 26 February 2021).
- (b) Provision of security for the Cluster Charge was required following receipt of construction approval by the Utility Regulator for the cluster substation and the final date for that security to be received was 10 December 2020.
- (c) The Connection Offer constituted terms offered under Article 20 of the Electricity Order. It was not a contract and could be unilaterally varied by NIE Networks to incorporate any new connection policies or terms such as the DGAOP.
- (d) SWFEL had the right to raise a dispute with the Utility Regulator in relation to the terms of the October Variation. Based on determinations of previous disputes, NIE Networks expect the Utility Regulator to decide any such dispute with reference to the Connection Charging Statement in force at the time of determination. It was therefore confident that the reference to the 2020 Connection Charging Statement was correct.

4.12 The DGAOP was published by NIE Networks, with effect from 18 May 2018 and updated on 26 April 2019, to provide detail on the submission process and requirements for applicants applying to connect a generating unit (other than microgeneration) to NIE

Networks' distribution system.⁷ It states that a connection agreement will be completed and signed off at the final stages of the construction phase.⁸

4.13 With respect to security the DGAOP states⁹ –

'In the circumstance where a Generating Unit applicant receives an offer of terms for connection to a Cluster Substation which has UR construction approval, the applicant must provide a security bond/payment by no later than 120 days from the date of the Terms Letter. Failure to provide the security bond/payment by this date will be deemed a breach of the terms for connection and therefore the applicant's offer of terms for connection will be terminated and capacity retracted.'

4.14 SWFEL wrote again to NIE Networks on 16 December 2020 **(B6)**. It stated that –

- (a) The Connection Offer had all the characteristics of a contract and, although the Connection Offer incorporated the 2014 Connection Charging Statement, the incorporation of the DGAOP would require SWFEL's consent.
- (b) The October Variation was not a 'Terms Letter' within the meaning of the DGAOP and, even it was, if the Security was not provided within 120 days the effect would be that the October Variation was withdrawn, not the Connection Offer.
- (c) SWFEL understood that, in accordance with both the 2014 and 2020 Statements of Charges, the requirement to provide the Security was triggered by the construction approval by the Utility Regulator for the substation. SWFEL did not dispute the requirement to provide the Security, it simply wanted a discussion with NIE Networks on what would be a reasonable timeframe to provide it.

4.15 NIE Networks responded in a letter dated 8 January 2021 **(B8)** reiterating its view that the Connection Offer was not a contract. It also stated that it considered the 120-day timeframe to provide the Security was reasonable as it was consistent with NIE Networks' general policy as set out in the DGAOP.

4.16 Following some further correspondence and a meeting between the Parties **(B11)**, SWFEL wrote to NIE Networks on 22 February 2021 **(B12)** advising of its decision to refer a dispute to the Utility Regulator. In that letter, SWFEL asked NIE Networks to confirm that it would not revoke the Connection Offer until the determination of the dispute.

⁷ DGAOP **(A5)**, p. 1.

⁸ DGAOP **(A5)**, p. 2.

⁹ DGAOP **(A5)**, p. 14.

- 4.17 NIE Networks replied by letter dated 24 February 2021 **(B13)** suggesting that when raising its dispute, SWFEL should request a direction from the Utility Regulator requiring NIE Networks to extend the date for provision of the Security until such time as the complaint was determined.

The January 2021 connection offers

- 4.18 Following the October Variation, SWFEL asked for the original wind farm site to be split into two and to reduce the MEC from 16.1MW to 9.4MW using the four easterly turbines of the original seven.
- 4.19 A separate company, Smulgedon Wind Farm (West) Limited (**SWFWL**), then applied for a new connection offer to a separate substation for the three westerly turbines with a MEC of 7.05MW.
- 4.20 On 11 January 2021, NIE Networks issued another variation to the Connection Offer to SWFEL to accommodate the reduction in capacity **(B9)**. It required security in respect of that connection by 26 February 2021 in line with the October Variation, albeit for a lesser sum of [REDACTED] plus VAT.
- 4.21 NIE Networks also issued a new connection offer to SWFWL on 11 January 2021 **(B10)**. Security in respect of the new connection offer was required by 11 May 2021. We understand that this new connection offer has not been accepted.

5. **SECTION FIVE – VIEWS OF SWFEL**

5.1 SWFEL's views are set out in –

- (a) the Application **(B14)**,
- (b) its reply, dated 16 June 2021, (the **Reply to the Response (B27)**) to NIE Networks' submissions, dated 9 June 2021, in respect of the Application (the **Response (B25)**), and
- (c) its response, dated 23 July 2021, **(B32)** to an initial draft of the Statement **(B30)**.

5.2 In a letter dated 31 March 2021 **(B17)**, SWFEL provided answers to questions asked by the Utility Regulator in its letter dated 24 March 2021 in relation to the application for directions **(B16)**. In a letter dated 1 July 2021 **(B29)**, it also provided answers to further questions asked by the Utility Regulator on 21 June 2021 **(B28)**.

5.3 In an email to the Utility Regulator dated 2 September 2021, SWFEL stated that it had no response to make to the Provisional Determination '*at this time*' **(B35)**. As such it made no submissions on the Provisional Determination in advance of the deadline set by the Utility Regulator.

5.4 We have read the above documents in full and have had full regard to all of these submissions. In doing so, we have borne in mind that our role is to determine the issue set out in Section Seven of this document.

5.5 The summary below, of the views which have been expressed by SWFEL as relevant to the issue for determination, is derived mainly from the relevant section of the Statement. We adopt it as accurate for the purposes of this determination.

Summary

5.6 SWFEL objects to the requirement by NIE Networks that SWFEL provide the Security within 120 days of the date of the October Variation.

5.7 SWFEL objects to the timeframe imposed for two reasons –

- (a) the Connection Offer is a contract and its terms cannot be varied without SWFEL's consent, and
- (b) if NIE Networks can vary the terms of the Connection Offer to impose the 120-day timeframe, then it should not be allowed to do so.

5.8 SWFEL states that it accepts its obligation to pay the Cluster Charge, and has every intention of doing so, but objects to the manner in which NIE Networks has imposed the payment terms and the short duration of the timeframe for payment.¹⁰ It asks the Utility Regulator to consider what would be a reasonable timeframe and suggests that, at very least, NIE Networks should be required to reissue the October Variation to include the 120-day timeframe, which should then run from the date of reissue.

The nature of the Connection Offer

5.9 SWFEL states that the Connection Offer has all of the legal characteristics of a contract, including: (i) offer, (ii) acceptance, (iii) consideration, and (iv) mutuality of understanding and intention to enter into legal relations.¹¹

5.10 Although accepting that it relates to the transmission system in a different jurisdiction, SWFEL also draws attention to the fact that when describing its connection process National Grid refers to reviewing the '*contract offer*' and countersigning and executing '*the contract*'.¹²

5.11 SWFEL notes that in correspondence prior to the dispute, NIE Networks pointed to the case of *Norweb plc v Dixon*¹³ (**Norweb**) as authority for the proposition that the Connection Offer is not a contract. In response to this, SWFEL states that *Norweb* relates to an agreement between a utility provider and a domestic customer for the supply of electricity on a tariff basis and asserts that because the terms of supply were fixed by law, rather than as a result of negotiation between the parties, the agreement could not be a contract.¹⁴ SWFEL contends that the present case may be distinguished as it relates to a business-to-business agreement in respect of *connection* rather than supply.¹⁵

5.12 SWFEL asks why, if there is no 'enforceable contract', the Connection Offer contains pages of legal terms and conditions.¹⁶

5.13 SWFEL states that contracts (whether entered into through negotiation or a legal obligation) represent a meeting of minds where parties agree the terms by which they are bound to each other. Those terms, and in particular, terms as to payment cannot be changed unless the terms specifically contain a right to do so.

¹⁰ Application (B14), para 3.34.

¹¹ Application (B14), paras 1.10.1 and 3.2.

¹² Application (B14), para 3.2.

¹³ [1995] 3 All ER 952 (A6).

¹⁴ Application (B14), para 3.3.

¹⁵ Application (B14), para 3.4.

¹⁶ Application (B14), para 3.4.

- 5.14 In response to NIE Networks' statement that its ability to change connection terms is required to allow it to give effect to later policies, SWFEL states¹⁷ –
- (a) if SWFEL had not requested the variation then the new payment terms would not have been introduced and, if NIE Networks' point was correct, it would write to all existing recipients of a connection to outline any new policy but it does not do so, and
 - (b) such policies must be introduced in NIE Networks' role as the distribution network operator and to effectively manage the network, and the new payment terms do not achieve that because the burden placed on small developers would mean they drop out of the process.
- 5.15 SWFEL points to the fact that it took NIE Networks until 8 December 2020 to confirm the 120-day timeframe, by which time a month of that specified period had elapsed. It states that most developers will provide security from a financial institution, rather than cash, and that to expect any company (regardless of size) to do so from a standing start in two months over Christmas is not reasonable. As such, SWFEL stated that the '*retrospective*' imposition of the 120-day timeframe as a condition of acceptance of the October Variation was legally questionable.¹⁸
- 5.16 SWFEL states that NIE Networks has derived the 120-day timeframe from the DGAOP. However, the DGAOP is forward-looking in nature and the section containing the 120-day timeframe relates to a new connection offer, not a variation of an existing one. As such, the DGAOP '*does not provide the authority for the basis for payment terms [that]... NIEN thinks it does*'.¹⁹
- 5.17 Finally, SWFEL points to the Utility Regulator's determination in the Transmission Interface Arrangements Dispute,²⁰ and states that it would seem odd that the obligations of the distribution network operator and transmission system operator should be determined with reference to the policy that was in force between them at the time, but that obligations are imposed on a connectee on a rolling basis with rights lost or withdrawn over time as and when policies change. SWFEL states that this is unfair and undermines the faith that developers and funders can place on connection offers when deciding on whether to commit funds to projects.²¹

¹⁷ Application (B14), paras 3.6 – 3.10.

¹⁸ Application (B14), paras 3.11 – 3.12.

¹⁹ Application (B14), para 3.13.

²⁰ Available at <https://www.uregni.gov.uk/files/uregni/media-files/TIA%20Final%20Determination%2028%20March%202019.pdf>

²¹ Application (B14), paras 3.15 – 3.16.

SHOULD NIE NETWORKS BE ALLOWED TO CHANGE PAYMENT TERMS?

- 5.18 SWFEL submits that, even if NIE Networks does have the power to alter payment terms, it is potentially in breach of its licence conditions.
- 5.19 SWFEL states that it is a matter of public record that borrowing from banks is at a 13-year high due to the Covid-19 pandemic. It states that it is not eligible for loans directly related to the pandemic and is therefore '*at the back of the queue*' when attempting to secure credit from a financial institution.²²
- 5.20 It states that, even absent the current economic conditions, the two months and 18 days over Christmas provided by NIE Networks (following its clarification of the deadline) would prove difficult for a small company or independent developer, as many will not have sufficient cash reserves and many financial institutions would not process an application within that timeframe.²³
- 5.21 SWFEL states that the purpose of the DGAOP was to prevent capacity hoarding. It questions why NIE Networks waited two years after the introduction of the DGAOP before deciding that SWFEL needed to provide security under it. SWFEL suggests that this was because NIE Networks does not believe that it is entitled to apply the DGAOP retrospectively and has used SWFEL's variation request as an excuse to apply it.²⁴
- 5.22 SWFEL states that it had not anticipated from any of NIE Networks' published documents that its payment terms would be changed or that such a short timeframe would be imposed '*on the basis of seeking to alter its connection*'.²⁵
- 5.23 SWFEL states that NIE Networks is using a '*one size fits all*' approach to payment terms to persons of different classes which risks breaching its obligations under Condition 15 of the Licence. It also states that, as it is not apparent that NIE Networks would have changed the payment terms without the application for variation, it is drawing a distinction between those who seek to vary their connection and those who do not, which SWFEL suggests is discrimination.²⁶
- 5.24 SWFEL also points to the obligation in condition 27 of the Licence which requires NIE Networks to comply with a Distribution Code designed to neither prevent nor restrict competition in the generation or supply of electricity in Northern Ireland. SWFEL states

²² Application (B14), para 3.18.

²³ Application (B14), para 3.19.

²⁴ Application (B14), paras 3.20 – 21.

²⁵ Application (B14), para 3.22.

²⁶ Application (B14), paras 3.23 – 24.

the imposition of '*excessively short durations*' on payment terms will restrict the number of companies able to compete in the market.²⁷

- 5.25 Finally, SWFEL invites the Utility Regulator to consider why NIE Networks is putting in place the relevant terms and suggests that this is because NIE Networks is being put pressured to advance the project by a large developer wishing to connect in proximity to SWFEL. It states that, if such pressure is at play, NIE Networks must be at risk of discriminating between persons, limiting competition and undermining the purpose of its cluster connection policy which was intended to drive benefits in efficiency and reduce impacts on local landowners and the environment.²⁸

The Reply to the Response

- 5.26 In the Reply to the Response, SWFEL states that its correspondence with NIE Networks following the issue of the October Variation sought to clarify its confusion caused by elements of the latter. It stated that it was difficult to arrange finance when it was not clear on what basis payment was being requested, or when it was required.²⁹
- 5.27 SWFEL states that the explanation given in the Response for the relevance of the DGAOP demonstrates that there is no real basis for reliance on the DGAOP.³⁰
- 5.28 SWFEL states that it is incorrect that it has argued that it should be afforded more than 120 days to make payment. Rather, it claims that it did not find out what the relevant deadline was until NIE Networks' letter of 8 December 2020, some two months after the October Variation, which then left SWFEL two months (due to the Christmas holidays) to finalise payment.³¹
- 5.29 It reiterates that such a short timeframe may amount to a breach of Condition 15 of the Licence. SWFEL adds that discussions with potential investors to obtain finance will not conclude within two months and that when an investor asks what the deadline for payment is, it cannot be found in NIE Network's publicly available information or in correspondence. Against this background, SWFEL states that it and other small developers struggle compared to larger developers with cash reserves or access to funding on shorter notice.³²
- 5.30 In relation to the suggestion in the Response that SWFEL should put forward what it considers to be a reasonable period for payment of security, SWFEL disagrees stating that this is a matter for the Utility Regulator, but that any period should be clearly

²⁷ Application **(B14)**, paras 3.25 – 3.26.

²⁸ Application **(B14)**, paras 3.29 – 3.33.

²⁹ Reply to the Response **(B27)**, p. 1.

³⁰ Reply to the Response **(B27)**, p. 2.

³¹ Reply to the Response **(B27)**, p. 2.

³² Reply to the Response **(B27)**, p. 2.

articulated to connectees. It states that the minutes of the meeting provided by NIE Networks with its response falls short of a publicly available statement detailing payment requirements in the event of a variation.³³

Information on obtaining security

- 5.31 Following submission of the Reply, the Utility Regulator asked SWFEL (**B29**) to –
- 'explain (providing evidence where available): (i) all steps that SWFEL has taken to try to organise the security required by the October variation by 26 February 2021 and, (ii) the difficulties that SWFEL has encountered in providing that security within that particular timeframe.'*
- 5.32 In its response (**B28**), SWFEL states that the details of the negotiation process for funding are highly commercially sensitive and that, although it had requested consent from its funding providers to disclose its correspondence with them, that consent had not been provided.
- 5.33 As such, SWFEL sets out a high level description of the standard steps it takes when engaging with investors to provide security which includes –
- (a) an initial approach to investors once there is a full understanding of the payment required, the payment terms and capacity secured for the project,
 - (b) due diligence checks by the investor on the viability of the project,
 - (c) legal formalisation of any agreement reached, and
 - (d) provision of the security to the relevant distribution network operator.
- 5.34 SWFEL states that when it acquired the wind farm in 2018 it held discussions with investors regarding subsequent payments, but that investors do not commence funding procedures until all required documentation is available for due diligence.
- 5.35 It states that, as the October Variation did not contain a final date for payment and caused confusion around the provisions relied on by NIE Networks, meaningful funding negotiations could not begin at that point.
- 5.36 SWFEL confirms that since the commencement of the Dispute and the making of the First Requested Direction confirming the available capacity, SWFEL has been able to enter negotiations and hopes to have the Security in place in the *'forthcoming weeks'*.

³³ Reply to the Response (**B27**), p. 2.

5.37 Following this, in an email to the Utility Regulator, dated 13 August 2021, SWFEL provided an update to say that it will '*shortly be in a position to*' put in place the Security **(B33)**.

6. SECTION SIX – VIEWS OF NIE NETWORKS

6.1 The views of NIE Networks are set out in its –

- (a) response to the complaint, dated 9 June 2021 (the **Response (B25)**),
- (b) response, dated 23 July 2021, (**B31**) to an initial draft of the Statement (**B30**),
and
- (c) response, dated 2 September 2021, to the Provisional Determination (**B36**).

6.2 In a letter dated 31 March 2021 (**B18**), NIE Networks also provided answers to questions asked by the Utility Regulator in its letter dated 24 March 2021 in relation to the application for directions.

6.3 We have read the above documents in full and have had full regard to all of these submissions. In doing so we have borne in mind that our role is to determine the issue set out in Section Seven of this document.

6.4 The summary below, of the views which have been expressed by NIE Networks as relevant to the issue for determination, is derived from the relevant section of the Statement. We adopt it as accurate for the purposes of this determination.

Summary

6.5 As a preliminary point, NIE Networks states that the October Variation was not an 'offer' that required 'acceptance' by SWFEL. It was a variation of the Connection Offer that took effect without any such acceptance.³⁴

6.6 NIE Networks states that the one key issue for determination is what represents a reasonable period for the provision of security for the Cluster Charge.³⁵

6.7 It states that –

- (a) in circumstances where Article 23 of the Electricity Order (**A1**) allows NIE Networks to require security, the timeline in the DGAOP provides a sound and reasonable basis for fixing the timeline under the October Variation,
- (b) *Norweb* is authority for the proposition that a connection offer under Article 19 of the Electricity Order is not a contract,
- (c) it does not discriminate between different classes of developer,

³⁴ Response by NIE Networks to information request (**B18**), p. 1.

³⁵ Response (**B25**), p. 1.

- (d) the obligation to provide the Security was contained in the Connection Offer and, in May 2020, SWFL was informed that NIE Networks would be seeking construction approval and, once this was received, security would need to be provided, and
- (e) the 120-day timeframe for provision of security achieves a reasonable balance between the interests of consumers and the interests of developers, and is a reasonable approach to dealing with the connection queue at the cluster substation.

The Electricity Order and the Connection Charging Statement

- 6.8 NIE Networks points out that it has the power to require *'reasonable security'* under Article 23 of the Electricity Order in relation to offers made under Article 19 of the Electricity Order. The Connection Offer stated that it was made under Article 19 and SWFEL has neither sought to suggest (i) that it was not, nor (ii) that it was a special agreement made under Article 25.³⁶
- 6.9 It submits that, without the ability to impose a timeframe, the right to require security would be meaningless. In the absence of a timeframe for provision of security on the face of the Electricity Order, NIE Networks' states that the timeframe must be *'reasonable in all the circumstances for that person to be required to accept'* in line with Article 24(b).³⁷
- 6.10 NIE Networks states that, since the period for acceptance of a connection offer is 90 days, a 90-day timeframe for provision of security would have been permissible.³⁸
- 6.11 It states that the development of the new cluster substation is being undertaken in accordance with Appendix 2 of the Connection Charging Statement and connection to it being charged under section 7 of that statement. Section 7.6.1 of the Connection Charging Statement provides that security for the Cluster Charge is not required to be put in place until the cluster infrastructure has been approved by the Utility Regulator. As such, security was not required on acceptance of the Connection Offer, but SWFEL was put on notice that security would be required in the future.³⁹
- 6.12 NIE Networks points out that paragraph 3.5 of the Connection Offer stated that a Cluster Charge would apply and provided an estimate of the charge. The Connection Offer stated that the estimated Cluster Charge would be updated once construction approval was received from the Utility Regulator, and paragraph 7.4 stated that SWFEL would

³⁶ Response (B25), p. 2.

³⁷ Response (B25), p. 2.

³⁸ Response (B25), p. 2.

³⁹ Response (B25), p. 2.

be required to provide security for any residual amount of the Cluster Charge not paid on acceptance of the offer.⁴⁰

- 6.13 NIE Networks states that the provision of construction approval on 26 October 2020 triggered the need to request security under section 7.6.1 of the Connection Charging Statement. It states that section 7.6.1 is identical in both the 2014 and 2020 statements.⁴¹
- 6.14 It points out that the Connection Charging Statement does not specify a timeframe for provision of security and that it is not relying on that statement in relation to the imposition of the 120-day timeframe.⁴²

The DGAOP

- 6.15 NIE Networks states that the October Variation was based on the need to obtain the Security and to respond to the application for variation to allow SWFEL to split the site. It denies that the request for the Security is linked in any way to the application for variation and suggests that a single letter was simply the optimum way to deal with the two separate issues. It states that the Security would have been required even without the variation request.⁴³
- 6.16 NIE Networks states that the initial request for the Security to be provided by 10 December 2020 was to align the development of the connection for SWFEL with that of another developer connecting to the same cluster. However, following submissions from SWFEL, the timeline for provision of the Security was changed to 120 days in line with the DGAOP.⁴⁴
- 6.17 NIE Networks explains that the DGAOP was put in place, following consultation, in order to establish milestones to apply to new connections so as to ensure that scarce capacity was not hoarded by applicants unable to proceed with their connections. It agrees that the October Variation is not a 'Terms Letter' within the meaning of section 8 of the DGAOP. However, it states that the relevance of that section is in the principle that security should be provided within 120 days of being requested. As such, provision of security is treated in the same way as the need to secure planning permission.⁴⁵

⁴⁰ Response (B25), p. 1.

⁴¹ Response (B25), p. 2.

⁴² Response (B25), p. 2.

⁴³ Response (B25), p. 3.

⁴⁴ Response (B25), p. 3.

⁴⁵ Response (B25), p. 3.

- 6.18 NIE Networks states that this principle should also apply in cases such as SWFEL's where the connection offer has been made before construction approval has been provided.⁴⁶
- 6.19 In response to SWFEL's points regarding *Norweb*, NIE Networks states that the case is still applicable law in regard to Article 19 connection offers and must be applied by the Utility Regulator. It states that the points made by SWFEL in relation to the arrangements put in place by National Grid are irrelevant to NIE's connection process.⁴⁷
- 6.20 NIE Networks also submits that section 7 of the DGAOP states that it sets out milestones for an applicant 'wanting to connect' a generating unit and, as SWFEL wanted to connect in October 2020, it was encompassed by this wording.⁴⁸

Treatment of SWFEL by NIE Networks

- 6.21 NIE Networks states that, in compliance with Condition 15 of the Licence, it treats all applicants for connection equally, whether they are a large or small developer and regardless of their access to borrowing. It recognises that some developers may find its requirements more difficult to comply with than others, but that this is for the developer to manage.⁴⁹
- 6.22 It points out that the requirement for security was signalled in the Connection Offer and that developers connecting to the Garvagh/Agivey Cluster were kept regularly updated as to progress. As part of the Response, NIE Networks provided minutes of a meeting held with developers on 6 May 2020 (**B26**) at which it informed those developers that it intended to submit an application for construction approval, that updated offer letters would then be sent out once that approval was received and that a letter of credit would be required for outstanding Cluster Charges.
- 6.23 On this basis, NIE Networks states that SWFEL had between May and October to put security in place, in addition to the 120-day period which NIE Networks later provided. It suggests that the allegation that NIE Networks has been unreasonable in setting the deadline for provision of the Security is '*wholly unfounded and without merit*'.⁵⁰
- 6.24 NIE Networks states that any difficulty experienced by a small developer in securing funding must be balanced against the credit risk to consumers due to the funding arrangements for the development of cluster substations agreed between NIE Networks

⁴⁶ Response (**B25**), p. 3.

⁴⁷ Response (**B25**), p. 4.

⁴⁸ Response (**B25**), p. 3.

⁴⁹ Response (**B25**), p. 4.

⁵⁰ Response (**B25**), p. 4.

and the Utility Regulator. Obtaining security protects consumers from bad debts if a connectee were to default.⁵¹

6.25 It also allows NIE Networks to take into account the interests of developers who may be in a position to proceed with their connection, but have not received an offer.⁵²

6.26 As such, NIE Networks believes that the 120-day timeframe achieves a reasonable balance between the interests of consumers and developers, and is a reasonable approach to dealing with the connection queue at a cluster substation.⁵³

6.27 Finally, NIE Networks notes that SWFEL has not indicated what, from an objective perspective, a reasonable timeframe for the provision of security might be.⁵⁴

Response to the Provisional Determination

6.28 NIE Networks states that the approach that we took in arriving at the Provisional Determination was flawed on a number of grounds.

6.29 It draws attention to the issue for determination as set out in the Statement and in Section Seven of the Provisional Determination. It states that the issue as framed in the Statement *'must be definitive'* and that the Decision-Makers have no discretion to determine an issue that has not been identified in the Statement as for determination. This is because whereas the Parties had an opportunity to comment on the issues for determination as set out in the Statement, they may be deprived of an opportunity to provide representations on any additional issue determined by the Decision-Makers which was not set out in the Statement.⁵⁵

6.30 NIE Networks states that the single issue for determination in the Dispute, as set out in the Statement and Provisional Determination (and which is the same as that in paragraph 8.1 of this document), was wholly determined by the Decision-Makers in our finding that *'the imposition of a 120-day timeframe was reasonable'* or alternatively *'that it was reasonable for NIE Networks to request security within 120 days of 29 October 2020'*.⁵⁶

6.31 However, NIE Networks suggests that we considered two further issues in the Provisional Determination *'that were not set out in the Statement of Case or set out in the PD section 7'*. These issues were (i) whether SWFEL was afforded the benefit of the 120-day period in this particular case, and, if not, (ii) whether the period allowed by

⁵¹ Response (B25), p. 4.

⁵² Response (B25), p. 5.

⁵³ Response (B25), p. 5.

⁵⁴ Response (B25), p. 5.

⁵⁵ Response to the Provisional Determination (B36), p. 1.

⁵⁶ Response to the Provisional Determination (B36), p. 1.

NIE Networks for the provision of the Security was nonetheless reasonable in all the circumstances. NIE Networks states that these two issues '*were not within the gift of the Decision Makers to determine*'.⁵⁷

- 6.32 Had those issues been capable of determination, NIE Networks considers that the approach taken by us to addressing them was flawed.
- 6.33 It states that '*Having confirmed that it was reasonable for NIE Networks to request security within 120 days of 29 October 2020*', it was not necessary for us to consider whether or not SWFEL had been afforded the benefit of that 120-day period as, given the date of the October Variation as 120 days before the deadline of 26 February, SWFEL had been provided with 120 days to provide the Security as a matter of fact.⁵⁸
- 6.34 NIE Networks states that for us to determine that it had not requested the Security within 120 days of the October Variation, it would have been necessary for us to consider (i) whether or not the October Variation was a reasonable request for security as it requested provision within 42 rather than 120 days, and (ii) if the request in the October Variation was not reasonable, whether the period of 42 days it afforded counted towards the required 120 days.
- 6.35 Neither of these issues was set out in the Statement and, even if they had been, our approach to determining them was, in NIE Networks' view, '*neither reasonable nor rational*'.⁵⁹
- 6.36 NIE Networks states that we have wrongly focused on the communication of the 120-day timeframe, and the knowledge held by SWFEL with regard to it, rather than the period of time actually given.
- 6.37 It continues that in the Provisional Determination we appear to have ignored or discounted the 42 days given for provision of the Security in the October Variation, without providing any reasoning or legal authority to support that view. NIE Networks also states that had the validity of the 42-day period been raised in the Statement it would have had the opportunity to give a view on that issue.⁶⁰
- 6.38 NIE Networks refers to the statement in the Provisional Determination that it had made no submissions as to the reasonableness of the 80-day timeframe provided by its letter of 8 December 2020 and explains that this was because it was not raised as an issue in the Statement. It also states that just because a 120-day period is reasonable, does not, of itself, mean that an 80-day period is unreasonable and that any assessment of

⁵⁷ Response to the Provisional Determination (B36), p. 1.

⁵⁸ Response to the Provisional Determination (B36), p. 2.

⁵⁹ Response to the Provisional Determination (B36), p. 2.

⁶⁰ Response to the Provisional Determination (B36), p. 3.

its reasonableness would need to take into account the 42-day period that preceded it.⁶¹

- 6.39 It states that the 42-day period was set to accommodate the construction programme, and to try to ensure that trenching could be used and paid for by all developers. As such, the 80-day and 42-day time periods require a much broader analysis than was afforded in the Provisional Determination, which seemed to focus on the need to specify 120 days in each of the October Variation and the letter of 8 December 2021.⁶²
- 6.40 NIE Networks states that if the Statement had identified the content of either letter as an issue for determination, the correct approach would have been for us to determine the aggregate period of time within which the Security was to be provided, having regard to the content of both letters.⁶³
- 6.41 NIE Networks states that doubt is cast on the fairness of the process adopted by the Utility Regulator since the issue for determination identified 29 October 2020 as the date from which time for the provision of the security started to run, but the Decision-Makers have determined that time did not start to run from that date.⁶⁴

⁶¹ Response to the Provisional Determination (B36), p. 3.

⁶² Response to the Provisional Determination (B36), p. 3.

⁶³ Response to the Provisional Determination (B36), p. 3.

⁶⁴ Response to the Provisional Determination (B36), p. 4.

7. SECTION SEVEN – ISSUE TO BE DETERMINED

7.1 As set out in the Provisional Determination, the single issue to be determined in the Dispute is whether it was reasonable in all the circumstances for NIE Networks to require provision of the Security within 120 days of the date of the October Variation.

7.2 SWFEL made no comment on the issue for determination.

7.3 NIE Networks agreed with the issue, but as set out in Section Six, considered that we departed from that issue in the approach taken in the Provisional Determination. We address the issues raised by NIE Networks in Section Eight.

8. **SECTION EIGHT – DETERMINATION OF THE ISSUE**

Our approach to determination of the issue

- 8.1 The issue that we must determine is set out in Section Seven and has remained unchanged through the draft Statement, the Statement and the Provisional Determination. This explicitly requires us to consider whether the imposition of the 120-day timeframe from the date of the October Variation was reasonable in all the circumstances of the case.
- 8.2 In our Provisional Determination, we set out our consideration in three stages. We first addressed SWFEL's submission that the Connection Offer could not be varied without its agreement. We then went on to consider whether a 120-day timeframe was reasonable in the abstract – in other words, whether a 120-day timeframe could be reasonable in any case. Finally, we considered whether the terms actually imposed on SWFEL, with respect to the timeframe for payment of the Security, were reasonable in this case – in other words, whether the imposition of a 120-day timeframe, running from the date of the October Variation, was reasonable in all the circumstances of this case.
- 8.3 The wording of the issue for determination explicitly requires us to consider the reasonableness of imposing a 120-day timeframe, running from the date of the October Variation, in all the circumstances of the case. That is a broader question than those which NIE Networks seems to suggest, which are whether a 120-day timeframe is reasonable in the abstract and, if so, whether the period running from the date of the October Variation to the deadline of 26 February 2021 totals 120 days. Those alternative questions ignore the requirement for us to consider all the circumstances of the case – which must include the manner in which the 120-day timeframe was imposed and the effect this had on SWFEL. NIE Networks therefore seeks to construe the issue for determination more narrowly than its clear wording will bear.
- 8.4 As such, NIE Networks' submissions on the Provisional Determination begin from a mistaken interpretation of the issue for determination.
- 8.5 NIE Networks asserts that it has not had an opportunity to make submissions on the issues that we have determined. This is incorrect. NIE Networks was provided an opportunity – which it took – to make comments on the Provisional Determination, in relation to both its factual accuracy and the provisional conclusions it outlines, with the one limitation being that no new evidence would be accepted at that point. It follows that NIE Networks was in fact afforded an opportunity to make submissions on all aspects of the Provisional Determination, including in relation to the reasonableness of the 42-day period and the 80-day period.

- 8.6 Prior to the Provisional Determination, we note further that Section 5 of the Statement set out the views of SWFEL 'as relevant to the issues for determination'.⁶⁵ As such, it was explicitly signalled that the content of that section of the Statement was considered relevant to the issue for determination set out in Section 7 of the Statement, which is the same issue as that set out in this final determination. NIE Networks had an opportunity to comment on the draft Statement. It did not make any submission that the summary of the views of SWFEL (or any part of it) was irrelevant to the issue for determination.
- 8.7 On the basis of the above, we are not persuaded that our approach to considering the issue for determination in the Provisional Determination was flawed – either in relation to the matters that we should consider, or the opportunities afforded to the Parties to put their case – and we adopt the same approach in this document.
- 8.8 In the remainder of this section, we consider the following points in turn –
- (a) SWFEL's contention that the Connection Offer cannot be changed except with its agreement.
 - (b) If the Connection Offer can be changed without agreement, whether a 120-day timeframe for security is reasonable in the abstract.
 - (c) If a 120-day period is reasonable in the abstract, whether, in the specific circumstances of this case, it was reasonable for NIE Networks to impose a 120-day timeframe running from the date of the October Variation.

The nature of the Connection Offer and the October Variation

- 8.9 SWFEL contends that the Connection Offer is a contract and that NIE Networks did not have the power to impose the requirements in relation to Security as the Connection Offer did not contain terms permitting such changes. By contrast, NIE Networks asserts that, following *Norweb*, the Connection Offer is not a contract and that it was entitled to impose the requirements in relation to Security.
- 8.10 We agree with NIE Networks that *Norweb* applies and that the Connection Offer is not a contract, notwithstanding SWFEL's arguments to the contrary.
- 8.11 *Norweb* concerned section 16 of the Electricity Act 1989 (the **1989 Act**), the parallel provision in Great Britain to Article 19 of the Electricity Order. As part of its determination, the Court in *Norweb* was required to consider whether a request for

⁶⁵ Statement, para 5.4. This mirrors the same paragraph in the draft Statement (**B30**).

supply under section 16 (as it was then) gave rise to a contract between the customer and the supplier. It held that it did not –

'In my judgment, the legal compulsion both as to the creation of the relationship and the fixing of its terms is inconsistent with the existence of a contract. As regards the creation of the relationship, the supplier is obliged by s 16(1) of the 1989 Act to supply if requested to do so. The exceptions from the duty to supply provided in s 17 are very limited in scope. [Counsel for the respondent] submits that s 17(2)(c) gives the supplier what she calls a 'discretion' not to supply. That is not so. A supplier is excused from supplying if (the burden being on him) it is not reasonable in all the circumstances for him to be required to do so. What is reasonable is a question of fact to be established objectively. Discretion does not come into play. Thus, save in certain narrowly defined circumstances, if a consumer requests the supply of electricity, the supplier is obliged to supply.

As for the terms of the supply, [counsel for the respondent] submits that there is scope for what she calls 'bargaining'. I cannot agree. The tariff is fixed by the supplier (s 18). The supplier can require the consumer to defray any expenses reasonably incurred in supplying any electric line or plant (s 19) and to give reasonable security (s 20(1)). The supplier can also impose additional terms of supply (s 21). The consumer has no bargaining power in relation to these matters. It seems to me that the principal terms are imposed on the consumer by the supplier not as a result of any bargaining, but by the supplier exercising the power conferred on it by the Act.⁶⁶

8.12 By way of contrast, the Court drew attention to the provisions of section 22 of the 1989 Act which referred to special agreements in substantially similar language to the current version of Article 25 of the Electricity Order.

8.13 Under section 22 a customer and a supply company could enter into a negotiated agreement for supply 'on such terms as may be specified in the agreement' –

'Section 22(3) states that the rights and liabilities of the parties to the special agreement shall be those arising under the agreement, and not those provided for by ss 16 to 21 of the Act. Thus a clear distinction is drawn as to the source of the rights and liabilities between (i) supplies under special agreements, which are governed by the terms of those agreements, and (ii) supplies to tariff customers, which are governed by the Act. This provides clear confirmation

⁶⁶ *Norweb plc v Dixon*, at 959.

*that the rights and liabilities as between tariff customers and their public electricity suppliers are governed by statute and not by contract.*⁶⁷

- 8.14 The relevant sections of the 1989 Act were amended by the Utilities Act 2000. Those amendments included the replacement of references to supply with references to connection, limiting the scope of the provisions to electricity distribution. Equivalent amendments were later made to Articles 19 to 25 of the Electricity Order.⁶⁸
- 8.15 However, nothing in those amendments changed the fundamental nature of the relevant provisions, and the material elements of the statutory scheme to which the Court in *Norweb* drew attention are still current. We have taken into account the decision in *Norweb* and agree with NIE Networks that connection agreements (other than any that might be entered into under Article 25) are not contracts, and that it would be inappropriate to seek to construe them as such.
- 8.16 The points made by SWFEL in relation to the terminology and process used by National Grid in Great Britain does not alter that position. Likewise, the decision of the Utility Regulator in the Transmission Interface Arrangements Dispute is not relevant in this case. That dispute related to a contractual agreement entered into by SONI and NIE Networks rather than the terms of a connection offer made under statute.⁶⁹
- 8.17 In addition, we note that the Connection Offer does, in fact, make clear that it is subject to, and must be read in conjunction with, the Connection Charging Statement.⁷⁰ It also states that the cluster works are being undertaken under section 7 of the Connection Charging Statement,⁷¹ which in turn states that security will be required upon construction approval for the works by the Utility Regulator. Taking these two documents together, it is clear that the Connection Offer anticipated its variation in relation to the provision of security following construction approval for the relevant cluster works.
- 8.18 We find, therefore, that NIE Networks was not precluded from making variations in relation to the Security in the October Variation as, contrary to SWFEL's arguments: (i) the Connection Offer was not a contract, and (ii) the Connection Offer anticipated that security would be required following construction approval. It follows that the requirements as to the Security were not unreasonable *on this basis*. We note that

⁶⁷ *Norweb plc v Dixon*, at 960.

⁶⁸ Arts. 19-26 of the Electricity Order were substituted (from 1 November 2007) by [Electricity Regulations \(Northern Ireland\) 2007 \(S.R. 2007/321\), regs. 1\(2\)](#), (with transitional provisions in Pt. IV)

⁶⁹ Transmission Interface Arrangements Dispute, available at <https://www.uregni.gov.uk/files/uregni/media-files/TIA%20Final%20Determination%2028%20March%202019.pdf>, para 7.3.

⁷⁰ Connection Offer (B1), para 1.4.

⁷¹ Connection Offer (B1), para 2.2.

neither Party made any comment on our finding in this respect in response to the Provisional Determination.

8.19 We next consider whether the terms imposed by NIE Networks in this case – in relation to the Security - were *otherwise* reasonable in all the circumstances.

8.20 Having regard to the circumstances of the Dispute, we consider that question to be composed of the following two elements –

(a) whether a 120-day timeframe for provision of the Security by SWFEL is reasonable on its face, and

(b) if so, whether the imposition of the 120-day timeframe from the date of the October Variation for provision of the Security by SWFEL was reasonable in this case.

The 120-day timeframe

8.21 It is NIE Networks' case that a requirement for SWFEL to provide security within 120 days is reasonable. We agree that this is a reasonable timeframe on its face, and we note that SWFEL did not make any comment on that finding in response to the Provisional Determination.

8.22 We note that NIE Networks has the power to require security under Article 23 of the Electricity Order. We also note that it is made clear in both the Connection Offer and the Connection Charging Statement that security will be required upon construction approval of the cluster by the Utility Regulator. That security would be required was therefore signalled from 2014.

8.23 We accept that NIE Networks advised SWFEL on 6 May 2020 (**B26**) that: (i) it intended to submit an application for construction approval, (ii) updated offer letters would then be sent out once that approval was received, and (iii) a letter of credit would be required for outstanding Cluster Charges.

8.24 We acknowledge that, at that point, it would not have been clear to SWFEL what the actual timetable for provision of security would be once updated offer letters were provided. However, we consider that SWFEL was put on notice that security would be required in the coming months and that it should have known, in broad terms, what the relevant amount for security might be. We consider that, on this basis, SWFEL could have commenced discussions, at least in principle, with its funders from May 2020, although it may not have been able to finalise arrangements.

8.25 We note that the provisions in the DGAOP in relation to security do not encompass SWFEL as NIE Networks accepts the October Variation is not a Terms Letter, as defined

in the DGAOP. However, we agree with NIE Networks that the timeframe for provision of security set out in the DGAOP which has applied to new applicants from 2018 provides a reasonable basis on which to fix the timeframe for the provision of the Security by SWFEL.

- 8.26 Firstly, the DGAOP was the subject of consultation with industry before it came into effect. At that point, smaller independent developers will have been able to make comments on whether a 120-day timeline was too short for them to comply with, or that it unduly advantaged larger developers.
- 8.27 Secondly, that timeline has been in place for new applicants for the last three years, during which time a number of smaller developers have applied for connection, seemingly without issue.
- 8.28 Although it would have been preferable for SWFEL to know in advance that a 120-day timeframe would apply – in the same way that new applicants have since 2018 – it did have the opportunity between May and October 2020 to begin taking initial steps to talk to its funders. Although this meant that SWFEL was in a different position to new applicants since 2018, we do not consider that this difference required NIE Networks to provide SWFEL with a longer timeframe than 120 days.
- 8.29 Thirdly, we acknowledge that any timeframe will need to balance the interests of: (i) consumers that may be ultimately called upon to fund bad debts, (ii) the developer applying for connection, (iii) other developers whose connection may depend on work at the same cluster proceeding, and (iv) other applicants in the queue for connection. We consider the 120-day timeframe to strike a reasonable balance between these various interests.
- 8.30 We consider that each of these reasons individually is sufficient for us to find that the imposition of a 120-day timeframe is reasonable on its face, and we so find. We have seen no evidence to convince us that a 120-day timeframe unduly discriminates against smaller developers and we find no reason that SWFEL should be afforded a longer timeframe than smaller developers that have applied for connection in the last three years.
- 8.31 We accept NIE Networks' submission that the requirement for the Security in the October Variation was an outworking of the Connection Charging Statement and was not imposed simply because SWFEL had requested a separate variation to the Connection Offer to facilitate the splitting of the original site into two. We find that there is, therefore, no issue in relation to discrimination between those developers that apply for a variation and those that do not. We accept that, even if SWFEL had not applied for

a variation, a requirement for provision of the Security would have been imposed following construction approval for the cluster.

- 8.32 We note that, in the Reply to the Response, SWFEL explicitly states that it does not suggest that it should be afforded more than 120 days to provide the Security. The implication is that SWFEL considers 120 days to be a reasonable period to provide security. By contrast, SWFEL makes the case that it did not find out what the relevant deadline was until NIE Networks' letter of 8 December 2020, many weeks after the October Variation. SWFEL asserts that this left it with insufficient time to provide the Security.⁷²
- 8.33 We acknowledge that there will be a range within which NIE Networks can fix a reasonable timeframe for provision of security. However, bearing in mind the issue for determination in this dispute, we make no finding on NIE Networks' suggestion that a 90-day timeframe would have been reasonable. In circumstances where NIE Networks has decided, following consultation, that 120 days is a reasonable timeframe for new applicants and that system has been operating for four years with no discernible issues, we find that the imposition of the same timeframe for SWFEL would be reasonable in the abstract for the reasons given above.

The application of the 120-day timeframe in this case

- 8.34 In its response to the Provisional Determination, NIE Networks states that in the Provisional Determination we determined that *'it was reasonable for NIE Networks to request security within 120 days of 29 October 2020'*.⁷³
- 8.35 That is not the case. As set out in the preceding section we have determined that the provision of a 120-day timeframe for SWFEL would be reasonable on its face. However, in line with the issue for determination, we must now consider whether the 120-day timeframe imposed on SWFEL from the date of the October Variation was reasonable, not in the abstract, but in all the circumstances of this case.
- 8.36 In deciding that issue we address two questions: (i) whether the way in which that timeframe was imposed meant that SWFEL was afforded the benefit of the 120-day period in this particular case, and, if not, (ii) whether the actual period which SWFEL did have the benefit of for the provision of the Security was nonetheless reasonable in all the circumstances.

Did SWFEL have the benefit of the 120-day period?

⁷² Reply to the Response (B27), p. 2.

⁷³ Response to the Provisional Determination (B36), p. 1, repeated on p. 2.

- 8.37 As to the first issue, SWFEL states that it was not previously aware that the timeframe for provision of the Security would be 120 days as that timeframe is nowhere published by NIE Networks.
- 8.38 We agree. Although the DGAOP is published and does contain the 120-day timeframe, the references to that timeframe do not apply to developers, such as SWFEL, who made applications for connection before it came into force. Neither was the 120-day timeframe contained in the Connection Charging Statement. Nor was it recorded on the face of the October Variation.
- 8.39 Indeed, in the October Variation, NIE Networks sought to impose a much shorter timeframe of 42 days for the provision of relevant security (around a third of what NIE Networks considered reasonable in the DGAOP).
- 8.40 Furthermore, we agree with SWFEL that the wording in the October Variation around the deadline of 10 December 2020 was not clear. This is because the October Variation stated that provision of the Security by 10 December 2020 was *'in order to maintain the current cluster connection programme'*.⁷⁴ It was not stated that this was an absolute deadline for provision of the Security and what, if any, alternative deadline applied.
- 8.41 It was only when SWFEL sought clarity in this regard that, on 8 December 2020, NIE Networks did provide a clear deadline of 26 February 2021 – being 120 days after the date of the October Variation.
- 8.42 The October Variation did not provide a clear 42-day timeframe which was then extended by the letter of 8 December 2020 to comprise a clear and complete 120-day period. The lack of clarity in the October Variation meant that SWFEL was only provided with a clear timeframe for the provision of the Security by the letter of 8 December 2020 – 80 days out from the deadline of 26 February 2021. As such, we do not consider that SWFEL was afforded the benefit of the 120-day period to provide the Security. Rather, the effect of the letter of 8 December 2020 was to provide SWFEL with a clear timeframe of only 80 days until the deadline for provision of the Security.
- 8.43 In circumstances where NIE Networks has, since 2018, considered it appropriate to clearly indicate in advance to applicants that security will be required within 120 days of a Terms Letter, we do not find it reasonable for NIE Networks to inform SWFEL that a 120-day timeframe applied several weeks through the relevant period – and only then at SWFEL's prompting.

⁷⁴ October Variation (B3), p. 3.

- 8.44 In its response to the Provisional Determination, NIE Networks states that the question of how and when that timeframe was communicated, and hence SWFEL's knowledge in relation to it, is not relevant to the issue for determination as set out in Section Seven.
- 8.45 We disagree. The issue for determination requires us to consider the reasonableness of the 120-day timeframe running from the date of the October Variation in the context of all the circumstances of the case. Those circumstances clearly encompass SWFEL's knowledge as to the timeframe it was being afforded, and when that knowledge crystallised. That knowledge can only be founded on the relevant communications.
- 8.46 The issue of SWFEL's knowledge as to the timeframe is a key part of its case, as referenced in the Application and the Reply to the Response. It was clearly recorded in Section 5 of the Statement as being relevant to the issue for determination.
- 8.47 In our view, having the benefit of a particular timeframe involves a person being clear (i.e. being put in a position where the person should know, as a result of relevant communications, for example) when the timeframe begins and ends so that they can plan their activities across the full span of that timeframe in order to meet the deadline imposed upon them. It is not sufficient for a timeframe to be applied to a person in circumstances where that person is not properly made aware of it until a proportion of that period has already passed.

Was the period from which SWFEL did benefit reasonable in all the circumstances?

- 8.48 As to the second issue, we do not consider that the deadline of 26 February 2021, 120 days out from the October Variation, but only 80 days after the provision of that deadline in the letter of 8 December 2020, was reasonable in all the circumstances.
- 8.49 In its response to the Provision Determination, NIE Networks states that our assessment in this regard must include the 42-day timeframe given in the October Variation. As set out above, we have found that the wording in the October Variation around the (initial) deadline of 10 December 2020 was not clear and it was not stated that this was an absolute deadline for provision of the Security. As such, the October Variation did not provide a clear 42-day timeframe, 40 days of which⁷⁵ can simply be added to the 80 days provided in the letter of 8 December 2020, so as to arrive at a clear 120 days.
- 8.50 We acknowledge that NIE Networks may have set the 42-day timeframe with a view to facilitating the efficient construction of connections by all developers to the cluster, but that timeframe was not clearly communicated to SWFEL in the October Variation.

⁷⁵ I.e. the period up to NIE Networks' letter of 8 December 2020.

- 8.51 Rather, between 29 October 2020 and 8 December 2020, SWFEL was left unclear by NIE Networks' communications as to what the applicable deadline for provision of the Security actually was. We do not consider that this was reasonable, as an applicant should have clarity as to when security must be provided and payments made in order to make its arrangements accordingly.
- 8.52 As outlined above, we do not consider that SWFEL had the benefit of a full 120 days given the lack of clarity relating to the first 42 days of that period. On this basis, we have effectively discounted the period before the letter of 8 December 2020 and determined that SWFEL had the benefit of a clear timeframe of 80 days.
- 8.53 We accept that just because we have found 120 days to be a reasonable period, in the abstract, within which to require security, this does not mean that a shorter period is automatically unreasonable. As we acknowledge above, there will be a range of reasonable periods that NIE Networks could apply.
- 8.54 Having thus discounted the 42-day period up to 8 December 2020 (for the reasons described), we next consider whether it was reasonable to commence the 120-day timeframe given to SWFEL from the date of the October Variation in circumstances where, in effect, that only provided a clear 80-day period for provision of the Security.
- 8.55 Under the DGAOP applicants since 2018 are provided with a 120-day timeframe to provide security. That timeframe is clearly set out in a published document. In considering all the circumstances of the case, we must consider equal treatment as between applicants. As such, there would need to be a good justification for treating applicants prior to 2018 who have not yet been asked to provide security differently. NIE Networks has provided no reason for doing so and for applying a different policy as between the two groups. It could have used the opportunity in its response to the Provisional Determination to outline why an 80-day timeframe for SWFEL was reasonable, but has not done so, save to suggest that it must be considered in light of the preceding 42 days. On the basis of our analysis of the 42-day period set out above, we do not consider that it can be used to support the reasonableness of the 80 day timeframe that followed it.
- 8.56 NIE Networks states that the principle of the 120-day timeframe, as found in the DGAOP, should also apply in cases such as SWFEL's where the connection offer has been made before construction approval has been provided.⁷⁶ As such, this was the period that it purported to provide for SWFEL. Elsewhere, NIE Networks has suggested

⁷⁶ Response (B25), p. 3.

that a 90-day timeframe would have been reasonable⁷⁷ but it has said nothing in support of the reasonableness of a clear period of 80 days.

- 8.57 An 80-day timeframe is considerably shorter than the 120 days provided under the DGAOP and the evidence and submissions before us do not provide a justification for that difference in treatment between those within the scope of the DGAOP and those (like SWFEL) who are not. Indeed, NIE Networks suggests that they should be treated the same. We agree. The problem is that the effect of NIE Networks' communications in this case means that its policy in that regard has not been applied to SWFEL, such that it has not had the benefit of the 120-day timeframe which NIE Networks intended to provide.
- 8.58 We do not consider it reasonable for NIE Networks to provide an 80-day timeframe as a result of the (above mentioned) timing and nature of its communications in circumstances where it purported to provide a 120-day timeframe.
- 8.59 We note SWFEL's suggestion that the timeframe imposed by NIE Networks was the result of pressure brought to bear by another developer connecting to the Garvagh/Agivey Cluster. We have been provided with no evidence that pressure from another developer had any material effect on NIE Networks' actions in relation to the provision of the Security and, accordingly, make no such finding.
- 8.60 As such, for the reasons set out above, we find that the period from which SWFEL did benefit was not reasonable in all the circumstances.

Conclusion

- 8.61 It follows that, in relation to the issue set out in Section Seven, we find that it was not reasonable for NIE Networks to require provision of the Security within 120 days of the date of the October Variation, in circumstances where it only made that timeframe clear in the letter of 8 December 2020. This is because, although a 120-day timeframe is reasonable in the abstract, we have found that the circumstances of this case mean that SWFEL did not have the benefit of that timeframe in practice. Instead, following 42 days where it was not clear what the timeframe (if any) was, it had the benefit of a clear timeframe of only 80 days – a period that (for the reasons described) we do not consider reasonable.
- 8.62 By contrast, we would have considered it reasonable, in this case, for NIE Networks to either –
- (a) clearly articulate the 120-day timeframe in the October Variation itself, or

⁷⁷ Response (B25), p. 2.

(b) commence the 120-day timeframe from the date of its letter of 8 December 2020.

8.63 Either course would have afforded SWFEL the benefit of the 120-day period for the provision of Security – a period that we have found would have been reasonable in this case where provided in its entirety.

9. SECTION NINE – OTHER OBSERVATIONS

9.1 The observations set out below do not form part of our reasons for the order contained in Section Ten. Neither Party made any submissions on these observations in response to the Provisional Determination.

Potential breaches of licence obligations

9.2 We note that as part of the Application, SWFEL asserts that NIE Networks may be in breach of its licence obligations. Whether or not any potential non-compliance with the Licence obligations should lead to enforcement action is a matter to be considered under the Utility Regulator's Enforcement Procedure.⁷⁸

9.3 The case management team has not investigated any issues regarding non-compliance with licence obligations and we have not considered the question of whether or not NIE Networks was or is in breach of any licence obligations. These are matters relating to the Utility Regulator's enforcement functions and the Utility Regulator will consider separately whether or not it is necessary or appropriate for it to investigate any such complaints and/or consider exercising its enforcement functions.

9.4 We have considered the points made by SWFEL in relation to NIE Networks' licence obligations only as part of our consideration of the issue for determination set out in Section Seven of this document.

The transparency of NIE Networks' security policy

9.5 We have noted in Section Eight that the 120-day timeframe for provision of security set out in the DGAOP does not cover applicants for connection prior to 2018, and that the applicable timeframe for such applicants is not set out by NIE Networks in any published document.

9.6 As this dispute has arisen in part through a lack of transparency on the part of NIE Networks, we consider that it would be in the interests of those applicants prior to 2018 who have not yet been asked to provide security to have clarity, ahead of time, that the 120-day timeframe will apply to them also.

9.7 As such, we expect NIE Networks to consider how such clarity can best be provided, and, within a reasonable period, to advise the Utility Regulator of the steps it proposes to take in this regard.

The connection offer of 11 January 2021

⁷⁸ Available at <https://www.uregni.gov.uk/publications/enforcement-policy-approach-and-procedure>

- 9.8 We note that NIE Networks states that the offer dated 11 January 2021 made to SWFWL was not accepted within the 90-day deadline and that if SWFWL is required to reapply for connection in order to secure the additional 0.35MW capacity that it requires, there is no guarantee that this will be available as there are two other applicants for connection to the substation.⁷⁹
- 9.9 In the Response, NIE Networks requests that any direction or determination in the Dispute confirm whether the offer dated 11 January 2021 made to SWFWL must be kept open for acceptance and, if so, the relevant period during which it must be kept open.
- 9.10 In response to requests for clarification (**B22** and **B23**) regarding the effect of the First Requested Direction on the connection offer to SWFWL of 11 January 2021, the Utility Regulator wrote to the Parties on 28 May 2021 (**B24**). In that letter, the Utility Regulator stated that it is the October Variation that is the subject of the Dispute and that the First Requested Direction applied only to the Connection Offer as varied by the October Variation.
- 9.11 Likewise, our determination of the Dispute and the resulting order relate only to the Connection Offer as varied by the October Variation. It is not for us to opine on, or make an order in relation to, any other connection offer made to a person other than the complainant.

⁷⁹ Response (**B25**), pp. 5 – 6.

10. SECTION TEN – RECOVERY OF THE UTILITY REGULATOR'S COSTS

10.1 Paragraph 7 of Article 26 of the Electricity Order provides that an order made under that Article may include such incidental, supplemental and consequential provision (including provision requiring either party to pay a sum in respect of the costs or expenses incurred by the Utility Regulator in making the order) as the Utility Regulator considers appropriate.

10.2 In its letter of 24 March 2021 (**B16**), the Utility Regulator –

- (a) in accordance with the Policy,⁸⁰ drew the Parties' attention to Article 26(7) of the Electricity Order,
- (b) informed the Parties that it was likely that external costs would be incurred by it in determining the Dispute,
- (c) informed the Parties that it was likely that a costs order would be made, and
- (d) referred the Parties to its published Information Note⁸¹ setting out and confirming its policy on cost recovery in respect of its dispute settlement role.

10.3 Paragraph 8 of Article 26 of the Electricity Order provides that in including in an order such provision as to costs and expenses as mentioned in paragraph 7 of Article 26, the Utility Regulator shall have regard to the conduct and means of the parties and other relevant circumstances.

10.4 The Policy⁸² states that where the Utility Regulator is considering whether to make 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.

10.5 Among other things, the Information Note confirms that –

⁸⁰ Paragraph 9 of Section D of the Policy.

⁸¹ Available at <https://www.uregni.gov.uk/publications/information-note-cost-recovery-dispute-settlement-role>.

⁸² Paragraph 24 of Section D of the Policy.

- (a) 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
- (b) 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 Conclusions on Costs

- 10.6 In the Provisional Determination, we provisionally concluded that it would be appropriate for us to make a costs order for the reasons given below.
- 10.7 We considered whether this is an exceptional case such that no costs order should be made, and have provisionally concluded that it is not. We identified no exceptional features in the Dispute (having had full regard to its nature and complexity).
- 10.8 Having decided that a costs order should be made, we next considered its terms taking into account all the relevant circumstances.
- 10.9 As part of this, we considered the outcome of the Dispute in the context of each Party's position or argument. Our provisional determination was that NIE Networks is entitled to impose a 120-day timeframe for the provision of the Security but that, in this case, SWFEL did not receive the full benefit of that period and the period which it did receive for payment was not reasonable. It followed from this that we did not find fully in favour of either Party's position with regard to the dispute between them.
- 10.10 Our starting point was, therefore, that a costs order should make provision for both Parties to make a payment in respect of the costs incurred by the Utility Regulator in determining the Dispute.
- 10.11 We considered whether there were any reasons, in the circumstances of the case, to move away from the starting point and have provisionally concluded that there are no reasons for doing so.
- 10.12 In terms of which costs of the Utility Regulator should be the subject of the costs order and the amount of such costs, we provisionally concluded (again, having regard to all the relevant circumstances) that the costs order should make a provision for the Parties to make a payment in respect of 100% of the expenses of the Utility Regulator, being the external costs incurred by the Utility Regulator in determining the Dispute (excluding VAT) (the **Specified Costs**).⁸³

⁸³ In this case, the costs to be recovered by the Utility Regulator do not include any amount in relation to the making of the decision in relation to the directions requested by SWFEL.

- 10.13 In terms of the proportion of the Specified Costs to be paid by each Party, we considered that, although neither Party was wholly successful in its arguments, on balance, SWFEL has been more successful than NIE Networks. SWFEL's overarching argument was that the period granted to it for payment of the Security was not reasonable and we have agreed for the reasons set out in Section Eight. We did find that the 120-day period advocated by NIE Networks was reasonable on its face, but that SWFEL had not been afforded that full timescale given the lack of clarity on the part of NIE Networks. As such, our finding was that, in relation to the issue for determination, it was not reasonable in all the circumstances for NIE Networks to require provision of the Security within 120 days of the date of the October Variation
- 10.14 Based on the relative success of each Party in the Dispute, our provisional conclusion was that NIE Networks should pay 60% of the Specified Costs (as finalised) and SWFEL should pay the remaining 40%.
- 10.15 We did not identify any particular conduct (by NIE Networks or by SWFEL) – either in the period giving rise to the Dispute or during the dispute process – which leads us to consider that adjustments should be made to that provisional view.
- 10.16 In terms of the time within which each Party is to be required to make the payment, we provisionally concluded that a reasonable period is 28 days from the making of any final costs order that may ultimately be made.
- 10.17 We were not aware of any reasons why either SWFEL or NIE Networks, as commercial entities, would be unable to meet the requirements of any costs order made in line with our provisional conclusions.

Parties' submissions on the provisional conclusions on costs

- 10.18 SWFEL did not make any submissions in relation to our provisional conclusions on costs, or the provisional costs order.
- 10.19 In its response to the Provisional Determination, NIE Networks stated that the provisional costs award made against it was '*unfair and unjust*' on the basis that we had adopted the wrong approach to determining the Dispute. NIE Networks further submitted that –

'the justification for the award of costs against NIE Networks is that SWFEL was not given 120 days in which to provide security (see PD section 11.14). That justification relies on the effectiveness [of] the 29 October [Variation Offer] and 8 December letters being affected by the absence of a reference to 120 days. NIE

*Networks does not consider this to be the correct approach for determining the dispute.*⁸⁴

Conclusions on Costs

- 10.20 For the reasons given in Section Eight, we are not persuaded by NIE Networks' submission that our approach to the determination of the Dispute is flawed. As such we do not agree that our provisional conclusions on costs are either unfair or unjust on the basis that they flow from that determination.
- 10.21 We note that neither Party made any comment on our provisional conclusion as to the proportion of costs to be borne by each. As such, we have determined to include a provision in the Order (at Section Eleven) for NIE Networks to pay 60% of the Utility Regulator's external costs incurred in making the determination, and for SWFEL to pay the remaining 40%.
- 10.22 We are satisfied that this costs order is proportionate and fair having regard to all the relevant circumstances.
- 10.23 The Utility Regulator's total external costs on this matter are [REDACTED] (excluding VAT). Accordingly, the effect of the Order is that, within 28 days of the date of this final determination, NIE Networks shall pay a sum of [REDACTED] and SWFEL shall pay a sum of [REDACTED].
- 10.24 The Utility Regulator will inform the Parties by way of separate correspondence on the method for making the payment.

⁸⁴ Response to the Provisional Determination (B36), p. 4.

11. SECTION ELEVEN – THE ORDER

- 11.1 For the reasons given in Section Eight, we have found that it was not reasonable for NIE Networks to require provision of the Security within 120 days of the date of the October Variation, in circumstances where it only made that timeframe clear in the letter of 8 December 2020 and it was unclear before that date what, if any, period applied. This meant that SWFEL was, in practice, afforded a much shorter period than the 120-day period that we have found would have been reasonable in this case.
- 11.2 SWFEL has suggested that '*as an absolute minimum*' we should make an order requiring NIE Networks to reissue the October Variation with the inclusion of the relevant timeframe, which would then commence from the date of that reissued variation.⁸⁵
- 11.3 We do not agree with SWFEL's suggestion. At SWFEL's request, the Utility Regulator made the First Requested Direction on 24 May 2021, precluding NIE Networks from withdrawing the Connection Offer, as varied by the October Variation, on the basis of non-provision of the Security until (i) our final order in the Dispute, or (ii) the withdrawal of the Dispute, or (iii) such other date as the Utility Regulator determines.
- 11.4 In its response of 1 July 2021 (**B29**) to the Utility Regulator's information request of 21 June 2021 (**B28**), SWFEL stated that since the making of the First Requested Direction it had been able to enter negotiations with funders and hoped to have the Security in place '*in the forthcoming weeks*'.
- 11.5 We note that, in line with the timetable for determination of the Dispute, our final determination has been made on 22 September 2021. This date is more than 120 days from the making of the First Requested Direction on 24 May 2021, which SWFEL states allowed it to commence the process of putting in place the Security. It is also considerably longer than 120 days since the letter of 8 December 2020 in which the 120-day timeframe was imposed. In view of this – together with SWFEL's own assessment on 13 August 2021 that it would require only a short additional period to put the Security in place – we consider it inappropriate to grant SWFEL an additional 120 days following the making of our Final Determination for the provision of the Security.
- 11.6 Taking everything into account, we consider that a period of two weeks for provision of the Security from the date of our final determination would be reasonable and appropriate in the circumstances.
- 11.7 We do not consider it necessary to order NIE Networks to reissue the October Variation.

⁸⁵ Application (**B14**), para 3.35.

11.8 We note that neither Party made any comment on the above approach in response to the Provisional Determination. As such the Order we make is set out below.

The Order

11.9 We order that –

- (a) NIE Networks must –
 - (a) maintain the Connection Offer, as varied by the October Variation, and must not before 8 October 2021 revoke or withdraw it, or allow it to lapse, because of lack of provision of the Security by SWFEL, and
 - (b) where SWFEL provides the Security on or before 7 October 2021, accept the Security as properly provided under the Connection Offer, as varied by the October Variation, and
- (b) by no later than 21 October 2021 –
 - (a) NIE Networks must make a payment to the Utility Regulator of ██████████ which amount is 60% of the Utility Regulator's external costs incurred in determining the Dispute, and
 - (b) SWFEL must make a payment to the Utility Regulator of ██████████ which amount is 40% of the Utility Regulator's external costs incurred in determining the Dispute.

The First Requested Direction

11.10 In accordance with its terms, the First Requested Direction shall cease to have effect from the date of the Final Determination.

APPENDIX 1 – INDEX OF DOCUMENTS

Doc ref	From	To	Date	Document title
A1			11/02/1992	Electricity (Northern Ireland) Order 1992 – http://www.legislation.gov.uk/nisi/1992/231/contents
A2	Utility Regulator		18/01/2020	NIE Networks distribution licence – https://www.uregni.gov.uk/files/uregni/media-files/NIE%20Distribution%20Licence%20-%20effective%2018%2001%202020.pdf
A3	NIE Networks		July 2020	NIE Networks Connection Charging Statement – https://www.nienetworks.co.uk/documents/connections/socc-july-2020-update-submitted-to-ur-changes-acce.aspx
A4	Utility Regulator		20/08/2018	Policy on the Resolution of Complaints, Disputes and Appeals and Guide for Applicants – https://www.uregni.gov.uk/files/uregni/media-files/Complaints%20Disputes%20and%20Appeals%20-%20August%202018.pdf
A5	NIE Networks		26/04/19	NIE Networks Distribution Generation Application and Offer Process Statement – https://www.nienetworks.co.uk/documents/connections/distribution-generation-application-and-offer-proc.aspx
A6				<i>Norweb plc v Dixon</i> [1995] 3 All ER 952
B1	NIE Networks	SWFEL	21/10/2014	Connection Offer
B2	SWFEL	NIE Networks	12/06/2020	SWFEL application for variation (comprising nine documents)
B3	NIE Networks	SWFEL	29/10/2020	October Variation
B4	SWFEL	NIE Networks	04/12/2020	Letter in relation to October Variation
B5	NIE Networks	SWFEL	08/12/2020	Letter responding to correspondence of 4 December 2020
B6	SWFEL	NIE Networks	16/12/2020	Letter responding to correspondence of 8 December 2020
B7	NIE Networks	SWFEL	23/12/2020	Letter acknowledging correspondence of 16 December 2020
B8	NIE Networks	SWFEL	08/01/2021	Letter responding to correspondence of 16 December 2020
B9	NIE Networks	SWFEL	11/01/2021	Variation to Connection Offer to reduce capacity
B10	NIE Networks	SWFWL	11/01/2021	Connection offer to SWFWL (email with 12 attachments)
B11	NIE Networks	SWFEL	12/01/2021	Email chain regarding meeting between NIE Networks and SWFEL

B12	SWFEL	NIE Networks	22/02/2021	Letter asking for confirmation NIE Networks would not revoke Connection Offer before determination of the Dispute
B13	NIE Networks	SWFEL	24/02/2021	Letter responding to correspondence of 22 February 2021.
B14	SWFEL	Utility Regulator	26/02/2021	The Application
B15	SWFEL	NIE Networks	26/02/2021	Letter enclosing the Application
B16	Utility Regulator	The Parties	24/03/2021	Letter requesting information
B17	SWFEL	Utility Regulator	31/03/2021	Response to information request
B18	NIE Networks	Utility Regulator	31/03/2021	Response to information request, including Powerpoint slides
B19	Utility Regulator	The Parties	15/04/2021	Decision on jurisdiction and confirmation of Decision-Makers
B20	Utility Regulator	The Parties	24/05/2021	Letter confirming timetable for determination of the Dispute
B21	Utility Regulator	The Parties	24/05/2021	Determination on application for directions
B22	SWFEL	Utility Regulator	25/05/2021	Letter asking for clarification of First Requested Direction
B23	NIE Networks	Utility Regulator	26/05/2021	Email asking for clarification of First Requested Direction
B24	Utility Regulator	The Parties	28/05/2021	Letter responding to letter of 25 May 2021 and email of 26 May 2021
B25	NIE Networks	Utility Regulator	09/06/2021	The Response
B26	NIE Networks	Utility Regulator	09/06/2021	Minutes of Agivey Cluster meeting, provided with the Response
B27	SWFEL	Utility Regulator	16/06/2021	The Reply to the Response
B28	Utility Regulator	The Parties	21/06/2021	Letter requesting information from SWFEL
B29	SWFEL	Utility Regulator	01/07/2021	Response to information request
B30	UR	The Parties	07/07/2021	An initial draft of a draft Statement of Case (and the covering email)
B31	NIE Networks	Utility Regulator	23/07/2021	Representations on the draft Statement of Case
B32	SWFEL	Utility Regulator	23/07/2021	Representations on the draft Statement of Case
B33	SWFEL	Utility Regulator	13/08/2021	Email regarding potential withdrawal of dispute.
B34	Utility Regulator	The Parties	17/08/2021	Email enclosing the Provisional Determination and providing an opportunity to comment by 2 September 2021
B35	SWFEL	Utility Regulator	02/09/2021	Email stating no comment to make on Provisional Determination
B36	NIE Networks	Utility Regulator	02/09/2021	Email with submissions on Provisional Determination