



COMPLAINT TO THE UTILITY REGULATOR

**BY SMULGEDON WINDFARM LIMITED REGARDING A CONNECTION OFFER
MADE BY NORTHERN IRELAND ELECTRICITY LIMITED IN RELATION TO
SMULGEDON WIND FARM**

DETERMINATION

21 July 2017

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1 **Introduction**

- 1.1 The Northern Ireland Authority for Utility Regulation (referred to hereafter as the **Utility Regulator**)¹ has received, by way of a letter and enclosures dated 22 March 2017 (with an amended version following on 28 March 2017), a formal complaint from Smulgedon Windfarm Limited (**SWFL**) regarding a ‘distribution connection’ dispute between SWFL and NIE Networks Limited (**NIE**) (the **Dispute**).
- 1.2 The Dispute relates to the offer made by NIE to SWFL on 21 October 2014 (the **Cluster Offer**) to connect Smulgedon Wind Farm (the **Wind Farm**) to NIE’s electricity distribution system.
- 1.3 The Dispute between SWFL and NIE (together, the **Parties**) falls to be determined by the Utility Regulator under Article 26 of the Electricity (Northern Ireland) Order 1992 (the **Electricity Order**), and in accordance with Article 37(11) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (the **Directive**).
- 1.4 The Utility Regulator has considered the Dispute in accordance with its Policy on the Resolution of Complaints, Disputes and Appeals and Guide for Applicants dated June 2013 (the **Procedure**).
- 1.5 The Board of the Utility Regulator has appointed us – Jon Carlton, Utility Regulator Board Member, and Kevin Shiels, Director of Retail and Consumer Protection – jointly to determine the Dispute (together, the **Decision-Makers**). We do so as delegates of the Utility Regulator and on its behalf.
- 1.6 This document sets out our determination of the Dispute and includes the order we make in determining the Dispute.
- 1.7 In making and writing this determination, we have had the benefit of being able to consider the following materials relevant to the factual and legal background to the Dispute –
- (a) A document submitted by SWFL setting out the grounds of its complaint (the **Complaint**) together with six volumes of supporting documents (together, the **Bundle**).

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

- (b) A response to the Complaint by NIE, dated 28 April 2017 (the **Response**).
 - (c) NIE's response of 25 May 2017 to the Utility Regulator's information request of 17 May 2017 (the **Information Response**).
 - (d) An expert technical opinion provided by Gutteridge Haskins & Davey Limited (the **GHD Opinion**), provided as Annex 1 to this Determination.
 - (e) An expert legal opinion provided by Gowling WLG (UK) LLP, provided as Annex 2 to this Determination (the **GWLG Opinion**), provided as Annex 2 to this Determination.
 - (f) The Parties' representations on the two expert opinions.
- 1.8 Finally, we had the benefit of hearing from the representatives of both Parties at the Utility Regulator's offices at Queens House on 30 June 2017, and of being able to ask them questions as to certain aspects of their submissions.
- 1.9 This draft determination adopts the following structure –
- (a) The Parties (at [Section 2](#));
 - (b) The applicable legal framework (at [Section 3](#));
 - (c) Factual background to the clustering approach (at [Section 4](#));
 - (d) Factual background to the dispute (at [Section 5](#));
 - (e) The views of SWFL (at [Section 6](#));
 - (f) The views of NIE (at [Section 7](#));
 - (g) The issues falling to be determined (at [Section 8](#));
 - (h) Our determination in relation to those issues (at [Section 9](#)); and
 - (i) The Order (at [Section 10](#)).
- 1.10 Where we use cross-references in the form of a volume and page number (presented as

[x]/[y] these are to documents in the Bundle.

2 Section Two - The Parties

SWFL

2.1 SWFL is a 100% subsidiary of Gaelectric NIB Limited, a company incorporated in the Republic of Ireland. Its ultimate holding company is Gaelectric Holdings Public Limited Company, also a company incorporated in the Republic of Ireland.

2.2 SWFL's head office is based at –

Smulgedon Windfarm Ltd
c/o Gaelectric Developments Ltd
2nd Floor Princes Dock
14 Clarendon Road
Belfast BT1 3BG
Northern Ireland

2.3 Gaelectric Developments Ltd is also a 100% subsidiary of Gaelectric Holdings Public Limited Company.

2.4 SWFL holds a licence for the generation of electricity (4/470 – 526) and the Wind Farm is one of three Gaelectric wind energy projects in Northern Ireland.

NIE

2.5 NIE 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.

2.6 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.

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

2.8 NIE's distribution licence (2/2.1 – 2.162) (also known as the successor distribution licence) is the relevant licence for the purposes of this dispute (the **Licence**).

3 Section Three - Applicable Law

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

The Electricity Order

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

3.3 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’.

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

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

3.6 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).

- 3.7 Under Article 24 of the Order, 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.
- 3.8 Alternatively, Article 25 of the Electricity Order permits an electricity distributor and a connection applicant to enter into a connection agreement on agreed terms – which may be different to those specified in Articles 19 to 24 of the Electricity Order – and for those agreed terms to determine the respective rights and liabilities of the parties. This is referred to as a ‘special connection agreement’.
- 3.9 Under Article 26 of the Electricity Order, it is open to an electricity distributor and/or a connection applicant to refer any dispute arising under Articles 19 to 25 of the Electricity Order to the Utility Regulator for determination.
- 3.10 Specifically, Article 26 of the Electricity Order provides –
- (1) A dispute arising under Articles 19 to 25 between an electricity distributor and a person requiring a connection,
 - (a) may be referred to the Authority by either party; and such a reference shall 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.
- (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 ...'

3.11 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'.

3.12 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.'

3.13 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.'

3.14 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.'

Directive 2009/72/EC

3.15 The Authority also has the power to determine distribution connection charging (and other) complaints under the Directive.

3.16 In this regard Article 37(11) of the Directive provides –

'Any party having a complaint against a transmission or distribution system operator in relation to that operator's obligations under this Directive may refer the complaint to the regulatory authority which, acting as dispute settlement authority, shall issue a decision within two months after receipt of the complaint. This period may be extended by two months where additional information is sought by the regulatory authority. That extended period may be further extended with the agreement of the complainant. The regulatory authority's decision shall have binding effect unless and until overruled on appeal.'

3.17 Article 32 of the Directive sets out certain requirements on Member States with regard to the implementation of third-party access to electricity networks. It states –

'1. Member States shall ensure the implementation of a system of third party access to the transmission and distribution systems based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users. Member States shall ensure that those tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force in accordance with Article 37 and that those tariffs, and the methodologies — where only methodologies are approved — are published prior to their entry into force.

2. The transmission or distribution system operator may refuse access where it lacks the necessary capacity. Duly substantiated reasons must be given for such refusal, in particular having regard to Article 3, and based on objective and technically and economically justified criteria. The regulatory authorities where Member States have so provided or Member States shall ensure that those criteria are consistently applied and that the system user who has been refused access can make use of a dispute settlement procedure. The regulatory authorities shall also ensure, where appropriate and when refusal of access takes place, that the transmission or distribution system operator provides relevant information on measures that would be necessary to reinforce the network. The party requesting such information may be charged a reasonable fee reflecting the cost of providing such information.'

3.18 The application and effect of Article 32 of the Directive is an issue in dispute between the Parties.

Directive 2009/28/EC

3.19 Article 16 of Directive 2009/28/EC (the **Renewables Directive**) states as follows –

'1. Member States shall take the appropriate steps to develop transmission and distribution grid infrastructure, intelligent networks, storage facilities and the electricity system, in order to allow the secure operation of the electricity system as it accommodates the further development of electricity production from renewable energy sources, including interconnection between Member States and between Member States and third countries. Member States shall also take appropriate steps to accelerate authorisation procedures for grid infrastructure and to coordinate approval of grid infrastructure with administrative and planning procedures.

2. Subject to requirements relating to the maintenance of the reliability and safety of the grid, based on transparent and non-discriminatory criteria defined by the competent national authorities:

(a) Member States shall ensure that transmission system operators and distribution system operators in their territory guarantee the transmission and distribution of electricity produced from renewable energy sources;

(b) Member States shall also provide for either priority access or guaranteed access to the grid-system of electricity produced from renewable energy sources;

(c) Member States shall ensure that when dispatching electricity generating installations, transmission system operators shall give priority to generating installations using renewable energy sources in so far as the secure operation of the national electricity system permits and based on transparent and non-discriminatory criteria. Member States shall ensure that appropriate grid and market-related operational measures are taken in order to minimise the curtailment of electricity produced from renewable energy sources. If significant measures are taken to curtail the renewable energy sources in order to guarantee the security of the national electricity system and security of energy supply, Members States shall ensure that the responsible system operators

report to the competent regulatory authority on those measures and indicate which corrective measures they intend to take in order to prevent inappropriate curtailments.

...

5. Member States shall require transmission system operators and distribution system operators to provide any new producer of energy from renewable sources wishing to be connected to the system with the comprehensive and necessary information required, including:

(a) a comprehensive and detailed estimate of the costs associated with the connection;

(b) a reasonable and precise timetable for receiving and processing the request for grid connection;

(c) a reasonable indicative timetable for any proposed grid connection.

Member States may allow producers of electricity from renewable energy sources wishing to be connected to the grid to issue a call for tender for the connection work.'

3.20 The application of the Renewables Directive is an issue in dispute between the Parties.

The Licence

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

3.22 More specifically, Condition 30 provides –

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

(a) the carrying out of works (if any) required to connect the Distribution System to any other system for the transmission or distribution of electricity and for the obtaining of any consents necessary for such purposes;

(b) the carrying out of works (if any) in connection with the extension or reinforcement of the Distribution System rendered necessary or appropriate by reason of making the connection or modification to an existing connection and for the obtaining of any consents necessary for such purposes;

(c) the installation of appropriate meters (if any) required to enable the Licensee to measure electricity being accepted into the Distribution System at the specified entry point or points or leaving such system at the specified exit point or points;

(d) the installation of such switchgear or other apparatus (if any) as may be required for the interruption of supply;

(e) the date by which any works required so as to permit access to the Distribution System (including for this purpose any works to reinforce or extend the Distribution System) shall be completed and so that:

(i) where the application is for a Relevant Generation Connection, the date is within 24 months of the date the agreement is entered into (the 'relevant period'), unless it is not reasonably practicable for the works to be completed within the relevant period (in which case the licensee shall provide the applicant with the reasons why it is not reasonably practicable for the works to be completed within the relevant period); and

(ii) unless otherwise agreed by the person making the application, a failure to complete such works by such date shall be a material breach of the agreement entitling the person to rescind the agreement;

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

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

(ii) to be set in conformity with the requirements of paragraph 5 of Condition 32 and (where relevant) of paragraph 4;

(g) the installation of special metering, telemetry or data processing equipment (if any) for the purpose of enabling any person who is bound to comply with the Distribution Code to comply with its obligations in respect to metering thereunder or the performance by the Licensee of any service in relation to such metering thereunder; and

(h) such further matters as are or may be appropriate for the purposes of the agreement.

...

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

5. The Licensee shall not be obliged pursuant to this Condition to offer to enter or to enter into any agreement:

(a) if to do so would involve the Licensee:

(i) in breach of its duties under Article 12 of the Order; or

(ii) in breach of any regulations made under Article 32 of the Order or of any other enactment relating to safety or standards applicable in respect of the Distribution Business; or

(iii) in breach of the Distribution Code; or

(b) if the person making the application does not undertake to be bound by such parts of the Distribution Code and to such extent as the Authority shall from time to time specify in directions issued to the Licensee for the purposes of this Condition.

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

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

(a) Paragraph 1 which reads –

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

(b) Paragraph 3 which reads –

'3. The statements referred to in paragraphs 1 and 2 shall be in such form and to contain such detail as shall be necessary to enable any person to make a reasonable estimate of the charges to which it would become liable for the provision of such services, and (without prejudice to the foregoing) including such of the information set out in paragraphs 4 and 5 as is required by such paragraphs to be included in the statement.'

(c) Paragraph 6 which reads –

'6. Connection charges for those items referred to in paragraph 5 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.'

(d) Paragraph 7 which requires NIE, where directed to do so by the Utility Regulator, to prepare a statement or statements approved by the Utility Regulator providing that charges for connection to NIE's distribution system will be made on such basis as shall be specified in the direction. It also provides that each statement prepared in

accordance with the requirements of the paragraph shall, from the date it is approved by the Utility Regulator or such later date specified by the Utility Regulator, replace the previous corresponding statement prepared by NIE.

- 3.24 Condition 15 requires NIE 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 or person or persons.

Practice and procedure

- 3.25 The practice and procedure to be followed by the Decision-Makers in determining this dispute on behalf of the Utility Regulator is set out in the Policy on the Resolution of Complaints, Disputes and Appeals and Guide for Applicants.
- 3.26 Where the Utility Regulator considers it appropriate, it may adapt the process set out in that policy to fit the needs of a particular case.
- 3.27 We have followed an adapted procedure in this case which has included commissioning the GHD Opinion and the GWLG Opinion, and providing the Parties a chance to make representations on those opinions. We have also held an oral hearing at which we have had the opportunity to question the Parties on their submissions and, in particular, their representations on the GHD Opinion and the GWLG Opinion.
- 3.28 In determining disputes, the principal objective and general duties of the Utility Regulator under Article 12 of the Energy (Northern Ireland) Order 2003 (the Energy Order) do not apply (see Article 13(2) of the Energy Order for reference).

4 **Section Four - Factual Background to the Clustering Approach**

4.1 The approach for connecting groups, or 'clusters', of generation projects to NIE's distribution system is of importance to the issues for determination and so a summary of the factual background to this is set out below.

Background to Clustering Approach

4.2 On 16 March 2010 (**3/20.1 – 20.19**), NIE issued a consultation paper entitled “*Charges for Connecting Groups of Generators to the Northern Ireland Distribution System*” (the **2010 Consultation**).

4.3 The 2010 Consultation –

(a) outlined NIE's view that its distribution connection charging methodology as applicable for generation connections i.e. charges based on the Least Cost Technically Acceptable (**LCTA**) connection, was –

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

(b) set out its proposals for connecting groups, or 'clusters', of generation projects to the distribution system – hence reference to 'clustering approach'; and

(c) invited views on the proposals by 28 April 2010.

4.4 On 15 October 2010 (**3/21.1 – 21.18**), NIE issued a consultation report on “*Charges for Connecting Groups of Generators to the Northern Ireland Distribution System*” (the **2010 Report**).

4.5 The 2010 Report –

(a) discussed the views of respondents and points raised by them;

(b) set out the criteria which NIE used to assess the responses and to develop a charging methodology proposal;

(c) set out NIE's recommendations for changes required in connection charging policy; and

(d) confirmed that NIE intended to take forward the clustering approach (and more specifically the proposals for a hybrid model) in discussions with the Utility Regulator with a view to incorporating it into the next distribution connection charging statement.

- 4.6 On 15 November 2010, the Utility Regulator issued a “*Consultation on Electricity Connection Policy to the Northern Ireland Distribution System*” (the **Connection Policy Consultation - 3/22.1 – 22.30**).
- 4.7 Chapter 10 of the Connection Policy Consultation explained that NIE had previously issued the 2010 Consultation and the 2010 Report, and invited respondents to make known any further views they may have on NIE’s recommendations to the Utility Regulator.
- 4.8 The closing date for responses to the Connection Policy Consultation was 10 January 2011.
- 4.9 On 21 December 2010, the Utility Regulator had, notwithstanding the absence of an approved cluster charging methodology, given approval to NIE for expenditure on pre-construction works for four wind farm clusters at Killymallaght, Mid-Antrim, Pomeroy and Altahullion (none of which, for the avoidance of doubt, was in the vicinity of the Wind Farm). NIE did not seek approval from the Utility Regulator for pre-construction works for a cluster substation at Garvagh at that time.
- 4.10 On 25 February 2011, the Utility Regulator submitted a 'For Decision' paper to the Board of the Utility Regulator entitled “*Charges for Connecting Groups of Generators (Clustering) to the Northern Ireland Distribution System*” (the **Board Paper**).
- 4.11 More specifically the Board Paper explained –
- (a) the obligation on NIE (set out in Condition 32 of the Licence) to prepare a statement approved by the Utility Regulator setting out the basis upon which charges will be made for connection to the distribution system, and
 - (b) that the Utility Regulator had approved in principle the concept of clustering and agreed a process specifically for the Magherakeel cluster. (With regard to Magherakeel, what had been approved related to funding and cost recovery matters for two wind farms being in a cluster).
- 4.12 It also –
- (a) outlined the consultation and liaison with NIE that had taken place to date,
 - (b) identified some of the risks involved with the hybrid model based on clustering proposed by NIE,
 - (c) asked the Board to approve the development of a new connection charging methodology in line with the 'Option 3' Hybrid model (based on a clustering approach) proposed by NIE,

(d) stated that –

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

(e) included the following paragraph –

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

4.13 On 21 April 2011, the Utility Regulator issued its "*Decision Paper on the Charges for Connecting Groups of Generators (Clustering) to the Northern Ireland Distribution System*" (the **Decision Paper - 2/14.1 – 14.2**).

4.14 The Decision Paper –

(a) contained much of the information included in the Board Paper,

(b) communicated that the Utility Regulator's decision was to approve the development of a new connection charging methodology in line with the 'Option 3' Hybrid model, and

(c) explained that the Utility Regulator would instruct NIE to submit for approval its revised Statement of Charges for Connection to the Northern Ireland Distribution System (**Statement of Charges**).

Current Position on Clustering Methodology

4.15 The current Statement of Charges for Connection to the Northern Ireland Distribution System approved by the Utility Regulator and its predecessors including the dates on which they became effective are listed below.

Statement of Charges for Connection to the Northern Ireland Distribution System	March 2010
Statement of Charges for Connection to the Northern Ireland Distribution System (3/25.1 – 25.32)	1 October 2012
Statement of Charges for Connection to the Northern Ireland Electricity Distribution System	9 May 2013
Statement of Charges for Connection to the Northern Ireland	1 October 2013

Electricity Distribution System (<u>3/26.1 – 26.32</u>)	
Statement of Charges for Connection to the Northern Ireland Electricity Distribution System (<u>4/383 – 458</u>)	13 October 2014
Statement of Charges for Connection to the Northern Ireland Electricity Distribution System	1 October 2015
Statement of Charges for Connection to the Northern Ireland Electricity Distribution System (<u>4/575 – 670</u>)	1 October 2016

- 4.16 The last Statement of Charges approved by the Utility Regulator and therefore in full force and effect is the Statement of Charges dated 1 October 2016.
- 4.17 The Statement of Charges dated 1 October 2012 included a section referred to as Annex 1 – Windfarm Clusters but was listed as for future use and was intentionally left blank.
- 4.18 On 9 May 2013 the Utility Regulator approved a new Statement of Charges for Connection to the Northern Ireland Electricity Distribution System. This Statement of Charges included –
- (a) Section 7 - Charging arrangements for Authorised Generators connecting to the network as part of a Generator Cluster; and
 - (b) Appendix 2 - Methodology for Connecting Groups of Generators to the Northern Ireland Distribution System using Cluster Substations.
- 4.19 The Statement of Charges dated 1 October 2013 also contains these provisions. The cluster methodology included in the Statement of Charges is underpinned by the principles agreed between the Utility Regulator and NIE dated 13 March 2013.

The Garvagh Cluster

- 4.20 On 29 August 2014 NIE submitted a paper to the Utility Regulator seeking approval in respect of pre-construction activities associated with the establishment of a 110/33kv wind farm cluster at Garvagh.
- 4.21 The Utility Regulator approved that request on 12 September 2014. Further pre-construction approval was sought by NIE on 26 August 2016², granted in principle on 4 October 2016³ and

² The Response, Item 38.

³ Letter from the Utility Regulator to NIE, 4 October 2016 (4/671 – 674).

confirmed on 15 December 2016⁴.

4.22 The table below sets out the wind farms which have accepted offers of connection via the Garvagh cluster, and the capacity of each⁵.

Wind farm	Capacity (weighted) (MW)	Capacity (cumulative total) (MW)
Evishagarran	39.9	39.9
Craiggore	34.0	73.9
Smulgedon	16.1	90.0

4.23 Both Parties agree that the Garvagh cluster will satisfy the 56MW threshold for viability whether or not the Wind Farm connects to it⁶.

4.24 NIE states that it expects the Garvagh cluster to be completed in late 2020⁷.

⁴ Second Affidavit of Michael Atkinson (4/715 – 716).

⁵ The information in this table is taken from the First Affidavit of Michael Atkinson and is undisputed by SWFL (4/39).

⁶ The Complaint, paras 2.5.2(c), 4.5.6, 6.4.3 and 6.5.2; First Affidavit of Michael Atkinson (4/38).

⁷ Third Affidavit of Michael Atkinson (6/607).

5 Section Five - Factual Background to the Dispute

5.1 The following summary of the factual background is derived from the submissions of the Parties and focuses on matters that are not in dispute.

SWFL's Connection Application

5.2 SWFL was granted planning permission for the Wind Farm on 2 October 2012 and applied for connection to NIE's network on 28 January 2013.

5.3 On 20 November 2013, NIE indicated to SWFL that a connection would be made using the cluster methodology.

5.4 On 21 July 2014, SWFL amended its connection application such that the specified point of connection on the application form was changed from the Wind Farm to a new control house that it proposed to construct on premises closely situated to Limavady Main, and to which it proposed to self-build a 33kV connection.

The Cluster Offer

5.5 On 21 October 2014, NIE made SWFL an offer to connect the Wind Farm via the Garvagh cluster (the **Cluster Offer**).

5.6 SWFL accepted the Cluster Offer on 5 October 2015.

The first complaint and judicial review

5.7 On 12 August 2015, SWFL made a complaint to the Utility Regulator with respect to the Cluster Offer under Article 26 of the Electricity Order. The Utility Regulator determined that complaint on 20 January 2016.

5.8 On 18 April 2016, SWFL filed an application for leave for judicial review with respect to the Utility Regulator's determination. Leave was granted on 11 November 2016.

5.9 On 9 February 2017, an order was granted by consent quashing the determination of 20 January 2016.

- 5.10 Although we are aware that the Utility Regulator has made a determination in relation to a previous complaint by SWFL in relation to the Cluster Offer, we confirm that we are not aware of the nature of that complaint or the determination of it – save where these have been referred to by the Parties as part of the present Dispute. Nor are we aware of the submissions made by the Utility Regulator and the Parties in the judicial review proceedings.
- 5.11 We have considered the Dispute afresh and with open minds.

6 Section Six – Views of SWFL

6.1 Although we have had regard to all of the arguments and evidence submitted by SWFL, the summary below draws mainly from the Complaint. This is because SWFL's written and oral submissions on the preliminary versions of the GHD Opinion and the GWLG Opinion have been taken into account in finalising those opinions. We have, however, referred to those submissions where they touch upon relevant issues beyond making points in relation to the preliminary opinions.

6.2 SWFL states that –

'it now falls to the Utility Regulator to decide upon all the legal and factual issues relating to the compatibility of the [Cluster Offer] ... with the legislative regime and obligations supplied by:

2.2.1 EU law, principally by the Electricity Directive; but also by the Recyclables Directive (the "EU Obligations");

2.2.2 The material provisions of The Electricity (Northern Ireland) Order 1992 (the "Order Obligations"); and

2.2.3 Condition 30 of the distribution licence granted to NIEN, which is the monopoly supplier of electricity distribution services in the whole of Northern Ireland (the "Licence Obligations").⁸

6.3 In summary, SWFL states that the Cluster Offer –

'was so attended by accrued and future delay, contingency (particularly contingency depending upon the actions of third party developers) and uncertainty (as to project scope, delivery time, or cost) [so as to be]:

2.3.1 in substance a constructive refusal of access; alternatively

2.3.2 a disproportionate, vague, unreasonable and/or non-compliant offer,

so as to be in breach of the EU Obligations, the Order Obligations and/or the Licence Obligations.⁹

⁸ The Complaint, para 2.2.

6.4 SWFL states that NIE has justified the Cluster Offer on the basis that its terms have been dictated by the clustering policy contained in Appendix 1 to successive Statements of Charges and that any other form of offer would be impermissible discrimination¹⁰.

6.5 However, SWFL states that these points offer no justification for any breaches of obligation, not least since –

2.5.1. It is legally impermissible to use a policy of this kind to rewrite any of the Obligations (whether EU, Order or Licence Obligations);

2.5.2 NIEN has in any event consistently failed properly to construe and apply the Policy to the facts of this case. Were it to do so, it would and should appreciate that:

(a) The Policy constituted no proper basis for its failure to comply with its Obligations.

(b) The Policy on its face required NIEN to give consideration to the making of a single conventional direct connection, with associated reinforcements for that one connection, (a "direct connection"), rather than a connection based on a cluster (a "cluster connection"), where three conditions were met. And on the facts each of these conditions are met and have been so since September 2014, that is before the Cluster Offer was made.

(c) Even were such conditions not met in full, the delay and prejudice caused to SWFL by the uncertainty and delay in this case is so stark to require the separate provision of a direct connection to SWFL so as to comply with the EU, Order and Licence Obligations; not least since, as NIEN has repeatedly pointed out, the Garvagh Cluster is viable without and will proceed without SWFL.¹¹

6.6 In relation to discrimination, SWFL summarises its position as follows –

'The satisfaction of those 3 Conditions, and the particular facts of this case, serve to justify the differential treatment of SWFL (and all others who meet such conditions).

⁹ The Complaint, para 2.3.

¹⁰ The Complaint, para 2.4.

¹¹ The Complaint, para 2.5.

None of the other windfarm disputes to which NIEN has referred involved developers meeting such Conditions; or related to disputes covered by such Policy (which had not been adopted). But, in any event, the fact that NIEN may have unlawfully failed to make exception for others where warranted, given the delays and problems constituted by their offers (which it is for NIEN to prove) provides the basis to require the same (unlawful) treatment for SWFL.¹²

6.7 SWFL seeks a determination –

'... (a) that it is entitled to a direct connection, priced in accordance with the LCTA method applicable to connections other than Designated Clusters; and (b) of the precise distribution system works required to deliver such direct connection; and (c) of the time by which such direct connection must be delivered by NIEN.'¹³

Breaches of the EU Obligations

The applicable law

6.8 In relation to the EU Obligations which it identifies, SWFL provides the following excerpts from the Directive¹⁴ –

(a) Recitals 26, 27 and 31,

(b) Article 32, and

(c) Article 37.

6.9 It goes on to state –

3.1.4 It follows from such provisions that there were directly effective EU Obligations, in relation to any distribution network operator identified by national implementing legislation as being the a network operator [sic] obliged to provide a network connection:

3.1.4(a) To refuse an immediate connection (subject to the constraints of making the connection between site and the distribution network - i.e. laying the

¹² The Complaint, para 2.6.

¹³ The Complaint, para 2.7.

¹⁴ The Complaint, paras 3.1.1 – 3.1.3.

connecting cable and joining apparatus) only where there are network capacity issues.

- 3.1.4(b) To identify the reinforcement works necessary to address network capacity issues, and the time required for such reinforcement to be undertaken.
- 3.1.4(c) In fact to make an offer of connection that was a real and certain offer of connection, with clearly and finally identified costs (including the costs of network reinforcement) and charges calculated in advance.
- 3.1.4(d) To offer to provide such connection within a reasonable and/or identified time-frame.
- 3.1.4(e) To deliver such application within such a reasonable and/or identified time, once accepted.¹⁵

6.10 SWFL states that any other interpretation would 'strip Article 32 of all or substantial meaningful effect', conflict with the EU principle of effectiveness and undermine the aims of the Directive¹⁶.

6.11 It states that these conclusions are reinforced by the provisions of the Renewables Directive from which it provides Articles 16(1) – (5)¹⁷.

Alleged breaches of the EU Obligations

6.12 SWFL states that Article 32 of the Directive 'confers an immediately enforceable and directly effective right on SWFL of access to the NIE electricity system, subject only to refusal on the basis of lack of necessary capacity'¹⁸.

6.13 However, SWFL contends that NIE has constructively refused SWFL access to the network without citing lack of capacity as a reason¹⁹. In essence this is because – given the lead-time involved – a connection via the Garvagh cluster could not be made in time for SWFL to take advantage of the grace periods in relation to the Northern Ireland Renewables Obligation

¹⁵ The Complaint, para 3.1.4.

¹⁶ The Complaint, para 3.1.5.

¹⁷ The Complaint, para 3.1.6.

¹⁸ The Complaint, para 5.1.1.

¹⁹ The Complaint, para 5.1.4.

Scheme (the **NIRO Scheme**) set out in the Renewables Obligation Closure Order (Northern Ireland) 2016.

6.14 SWFL states that the ROCs available under the NIRO Scheme 'are and always have been central to the financial viability and levels profitability' of the Wind Farm²⁰. It states that in order to benefit from the NIRO Scheme SWFL will require a connection by no later than 31 March 2018²¹.

6.15 In the alternative, SWFL states that –

'NIE provided access on unfair and/or unreasonable terms, given:

- (a) the delayed, costly and contingent/uncertain nature of the access supposedly on offer;
- (b) the absence of any contractual commitment and/or any enforceable timeline to provide the connection, which is, for the reasons set out above, of no practical utility to SWFL.²²

6.16 With respect to that contingency, SWFL states –

'4.4.3. As a matter of contractual interpretation:

- (a) It is questionable whether the "offer" even if accepted would give rise to any binding obligation as its content is so uncertain as to call into question whether any clear consideration is provided by NIEN: it amounts to little more than a promise to consider doing something in a time-frame and of a nature entirely of NIEN's unilateral determination.
- (b) If the offer does give rise to any enforceable contractual obligations, such obligations are contingent upon:
 - (i) The actions and decisions of NIEN;
 - (ii) The actions and decisions of third-parties affected by the proposed Cluster, including: (a) the landowner of any proposed site for the new

²⁰ The Complaint, para 4.6.2.

²¹ The Complaint, para 4.6.6.

²² The Complaint, para 5.1.8.

substation (which land may have to be acquired by compulsory purchase); (b) the landowner of land over which cables must be run;

(iii) The actions of third party windfarm developers, most particularly the developers of Evishagaran and Craiggore, whose developments provide the wind[f]arm capacity that allow the Threshold Condition to be met. Should either such developer withdraw, the Threshold Condition will no longer be met;

(iv) The continued approval (at various stages) of the Utility Regulator for construction of the Cluster. Should, say, the Threshold Condition cease to be met, the Utility Regulator will (or is very likely to) withdraw permission to construct the Cluster.

(c) The offer contains no promise of any form of timescale for the commencement or completion of the works required for a Cluster Connection, still less a timescale, deadline or longstop date for the provision of a working cluster-based connection for SWFL.²³

6.17 SWFL makes the following points in relation to the terms of the Cluster Offer which it states contain an impermissible degree of contingency –

(a) Clause 1.2 indicates that the Cluster Offer remains at all times dependent upon third party consents or approvals (necessarily including from the Utility Regulator). Moreover "The Connection Charge may be revised at any time in accordance with the terms of this Offer".

(b) Clause 1.4 indicates that the Cluster Offer was made subject to the NIEN's 18 October 2014 Statement of Charges (which replaced the May 2013 Statement of Charges in like terms) and "is subject to and must be read in conjunction with the said Statement of Charges". Such clause meant that if the MEC to be connected to Garvagh fell at any time below the Threshold (for instance because of the failure of Evishagarran to succeed on its planning appeal), the pre-approval for the Garvagh Cluster was liable to lapse, along with the status of Garvagh as a Designated Cluster.

²³ The Complaint, para 4.4.3. SWFL suggested in the Complaint that the terms of the Cluster Offer also breached the Unfair Contract Terms Act 1977 (para 4.4.3(d)), however this point was withdrawn in its representations on the GWLG Opinion (para 4.5).

- (c) Clause 2.1 identified the works required for the construction of the Garvagh Cluster, including the construction of a new substation at an unspecified location.
- (d) Clause 2.2 identified that "The development of the Garvagh Cluster Works shall be in accordance with Section 7 of the Statement of Charges. Your attention is drawn to the requirement for the Utility Regulator to approve such development. We confirm that the Utility Regulator has approved in principle the Garvagh Cluster preconstruction works."
- (e) Clause 2.3 identified that the Garvagh Cluster works required planning permission which had not yet been applied for. In fact planning permission would be separately required for the substation and the 110kV cables running from it to the transmission main.
- (f) Clause 3.1 to 3.3 identified that the amount of the Connection Charge (composed of a Cluster Charge and Unique Charge) was liable to change if locations for the connection circuit and/or defined locations for the auxiliary transformer and proposed switch room (which had only been provisionally identified) were changed; and that difficulties with wayleaves/statutory consents or changes in the route for cable installation may also prompt changes in the charges. This reflected the fact that the site for the proposed substation was merely notional/hypothetical and had not been acquired or optioned.
- (g) Clause 3.5 identified the Cluster charge as £3,264,722 based on a MW pro rata division of the 90 MW capacity of the Garvagh Cluster; and the Unique Charge as £1,392,421.
- (h) Clause 4.1 stated "It is not possible to commit that the work associated with connection will be commenced on a particular date, carried out within a specific period of time or that the connection will be available on or before a specified date. However, NIE will reasonably endeavour to complete the work as expeditiously as possible in accordance with our statutory duties pursuant to the [Electricity Order]." In fact, as explained below, such contractual stipulation is a clear breach of Order and Licence Obligations to provide a certain completion date, breach of which would entitle SWFL to rescind the contract.

- (i) Clause 4.3 stated that the works required the procurement (under EU inspired procurement rules which bind NIEN) of major items of plant and cable which can have a lead time of more than 6 months, such that such process could not start until payment of a deposit. However, notwithstanding SWFL's payment of a deposit on 30 September 2015, NIEN has taken no steps whatever toward procuring such items.
- (j) Clause 7 governed acceptance and the payment of a 10% deposit. Clause 7.9 stipulated that "If, for any reason, You do not wish to proceed with the connection after Your acceptance of this Offer, NIE at its discretion may agree to the agreement for connection being terminated, and refund any payments surplus to NIE costs incurred. A further application would then be required to connect the Wind Farm to the Distribution System"²⁴

Capacity at Limavady Main

6.18 SWFL acknowledges that, although NIE did not refer to a lack of capacity at the time that the Cluster Offer was made, it has now stated that there is no capacity to allow a direct connection between the Wind Farm and Limavady Main.

6.19 However, SWFL states that –

'the burden of proof in showing that this lack of capacity (beyond typical reinforcement work) was in fact the reason, and a good reason for refusing access to SWFUL [sic] is upon NIE. NIE's evidence, even ignoring its 'after the event' nature, comes nowhere near meeting this standard. Its inadequacy is only heightened by the fact this new justification has been offered well after the commencement of the proceedings; it is inconsistent with the case on justification that it previously offered; and it seems to be preferred only to explain NIEN's views as to the likely timeline and cost now of a direct connection.'²⁵

6.20 SWFL states that, 'reinforcement works aside, there is capacity to accommodate SWFL at Limavady substation'²⁶. It states that in October 2013 it was informed that reinforcement

²⁴ The Complaint, para 4.4.2(a) – (j).

²⁵ The Complaint, para 5.1.7.

²⁶ The Complaint, para 4.5.1.

works would require additional switchgear and – apart from cabling from the Wind Farm to the substation – would cost between £700,000 and £800,000²⁷.

6.21 SWFL states that NIE belatedly claimed a lack of capacity in a letter dated 23 January 2017 stating that the scope of works required would trigger significant reinforcement works both at distribution and transmission level²⁸. That letter referred to the 'uprating' of the 33kV mesh, the 110kV I 33kV transformers and the 100kV mesh.

6.22 This was then supplemented in the third affidavit of Michael Atkinson which suggested that an entirely new backup 45MW transformer would be required, as well as replacement – as opposed to uprating – of the 33kV mesh²⁹. Mr Atkinson stated that such reinforcement works would cost £2.75 million and take between 15 to 18 months to complete.

6.23 As part of its complaint, SWFL submitted a technical report by DNV-GL³⁰ which states that reinforcement works required on the distribution system consist of the use of a generation export or load management scheme to combat the alleged transformer capacity issue –

'Additionally, Mr Morris notes that it may be possible to mitigate the mesh capacity issue with a "hard-wired system such as a generator intertrip scheme – which would disconnect the wind farm in the event of an overload condition being detected upon the mesh." In respect of the alleged earthing issue, noted in NIEN's letter to SWFL of 23 January 2017, Mr Morris indicates it "...would be possible to expand the substation earth electrode by installing a bare copper cable in the same trench as the new 33kV cable."³¹

6.24 SWFL states that –

'Should such reinforcement/upgrade work be completed, there is no dispute that there is capacity on the transmission system out of the Limavady [sic] to take the additional power generated by SWFL. So much is established by SWFL's necessarily aborted investigation of a transmission connection from SONI detailed in the next section. As no stage [sic] in development of that potential offer with SONI, which was predicated on a 110kV cable being run to the Limavady Main was it suggested that such

²⁷ The Complaint, para 4.5.2.

²⁸ The Complaint, para 4.5.4. The letter referred to is at (6/634 – 639).

²⁹ The Complaint, para 4.5.4 referring to paras 11 – 12 of the Third Affidavit of Michael Atkinson (6/601 – 602).

³⁰ (6/582 – 594).

³¹ The Complaint, para 4.5.7.

generation capacity could not be absorbed into the transmission system at Limavady without major works.³²

- 6.25 SWFL's position is therefore that there is no issue of lack of capacity to facilitate a direct connection. Whilst reinforcement works are required – and will be 'at the upper end of the standard range' – these are entirely characteristic of direct connections of this kind³³.
- 6.26 During the oral hearing, SWFL clarified that it would be prepared to accept an interruptible direct connection on the basis outlined in the third affidavit of Michael Atkinson which referred to reinforcement works costing £2.75 million and taking 15 to 18 months to complete.
- 6.27 SWFL confirmed that it would be willing to pay for the reinforcement work required for it to be connected to the network where required to overcome any capacity issues³⁴.

Breaches of the Order Obligations

- 6.28 In relation to the Order Obligations, SWFL provides the following provisions from the Electricity Order³⁵ –
- (a) Article 12,
 - (b) Article 13,
 - (c) Article 19,
 - (d) Article 20,
 - (e) Article 24(b), and
 - (f) Article 26(1) – (8).
- 6.29 SWFL goes on to state –

'3.2.7 It follows from the above that the Electricity Order, expressly requires any offer/counter-offer by NIEN:

³² The Complaint, para 4.5.8.

³³ The Complaint, para 4.5.9(a).

³⁴ Oral hearing transcript, p. 27, lines 9 to 14.

³⁵ The Complaint, paras 3.2.1 – 3.2.6.

- (a) to stipulate the date by which a connection will be delivered;
- (b) to detail and price any and all reinforcement works required to provide such connection;
- (c) to be reasonable in all the circumstances.

3.2.8 It also follows, as an necessary/implied obligation from the scheme of the Electricity Order, read in the light of the EU obligations, that any offer of connection must not include an impermissible degree of contingency, either as to the scope and cost of the works to be undertaken; or, a fortiori, as to whether the connection of the form promised will ever be delivered at all. Such prohibition upon contingency has been correctly identified and applied by the Utility Regulator in §§8.16 - 8.17 of its Determination in Dunmore DET 522.³⁶

6.30 SWFL states that none of the exceptions to the duty to connect contained in Article 21 of the Electricity Order exist in the present case³⁷ and that NIE has – in constructively refusing access – failed to act in accordance with the Order Obligations, properly construed to give effect to Article 32 of the Directive.

6.31 Further, SWFL states –

'the terms of "offer" purportedly made by NIEN do not accord with its statutory duties under the Electricity Order as:

- (a) Article 20.5(a) requires NIEN, should it wish to make a counteroffer to the time line proposed by SWFL (which for both the First and Second Connection Application envisaged a connection in 9 months), to specify a precise time by which the connection it offered would be operational as the "date on or by which the connection is to be made". The Cluster Offer contained no such date.
- (b) Articles 19 and 20 required an actual and unconditional offer of access to be made; in fact the Cluster Offer was so conditional in nature as to breach Articles 19 and 20;

³⁶ The Complaint, paras 3.2.7 – 3.2.8.

³⁷ The Complaint, para 5.2.4. SWFL notes that the provision for a refusal of access in 'exceptional circumstances' is not contained in Article 32 of the Directive.

- (c) Article 24(b) required NIEN to specify only additional terms which were "reasonable in all the circumstances for [SWFL] to be required to accept". In fact the totality of terms, and in particular the limitation of liability, offered by NIEN were so one-sided (in particular by transferring all risk to SWFL, notwithstanding the taking from it of a substantial and largely non-refundable deposit and by limiting liability for nonperformance) as to be unreasonable.³⁸

Breaches of the Licence Obligations

- 6.32 In relation to the Licence Obligations, SWFL provides Condition 30(2)(a), (b), (d) – (f) and (h) which it states further reinforces the EU Obligations and Order Obligations identified above³⁹.
- 6.33 SWFL argues that the Cluster Offer breached Condition 30 in the following respects –
- (a) Contrary to Condition 30(2)(a) and (b), it did not make detailed provision regarding either the works or the extension/reinforcement works required for a connection; 'instead the offer contained a projection of the potential configuration of a cluster, which configuration/design was yet to be confirmed'⁴⁰.
- (b) Contrary to Condition 30(2)(e), 'it failed to specify a "time of the essence" date which the connection would be provided, breach of which would entitle SWFL to rescind the agreement (and of necessity, to sue for damages)⁴¹.
- (c) Contrary to Condition 30(4), the Cluster Offer was not made within three months of SWFL's initial application for connection⁴².

The Statement of Charges and the 'Identified Exception'

- 6.34 SWFL states that it is no answer to the breaches it identifies for NIE to seek to rely on the clustering methodology set out in Appendix 2 to each Statement of Charges since May 2013.
- 6.35 SWFL states that the clustering methodology recognises that (as a matter of law) the considerations which serve to justify its application to all generators within a given area cannot justify 'unlimited delay'. As such, SWFL states that the clustering policy provides –

³⁸ The Complaint, para 5.2.6.

³⁹ The Complaint, para 3.3.1.

⁴⁰ The Complaint, para 5.3.1.

⁴¹ The Complaint, para 5.3.2.

⁴² The Complaint, para 5.3.3.

- '(a) At Section 5 for a process by which direct connections would be considered in the alternative to cluster offers (the "Identified Exception"); and
- (b) For expedition of the approval design and build of the designated cluster once the Threshold [of 56MW] was passed: see Section 6. Such aspect of the policy require proactive work [sic] on the Cluster even if substantial/critical parts of the MAV leading to the satisfaction of the Threshold remained in planning, with all the attendant planning risk.⁴³

6.36 SWFL locates the Identified Exception in the section of Appendix 2 to the Statement of Charges on 'Timing'⁴⁴ and states that it requires three conditions to be met –

'namely that: (a) the party seeking the direct connection was the first in the queue (measured by time of application for a connection) of parties whose capacities were used to calculate whether or not the 56MW Threshold would be met (the "Head of the Queue Condition"); (b) the Clustering Policy and the delivery of a cluster connection would lead to a delay of 18 months or more compared to a direct connection (the "Delay Condition"); and (c) removal of the party seeking the direct connection would not lead to the Threshold no longer being met (the "Threshold Condition").⁴⁵

6.37 However, SWFL argues that the First in the Queue Condition is not an absolute requirement, but a 'rule of thumb', and the wording of the Threshold Condition implies that the Identified Exception may in some cases be applied even where it is not met⁴⁶.

6.38 Where the three conditions are met, SWFL states that NIE is 'obliged ... to offer a direct connection to the first generator affected by such severe delay'⁴⁷.

6.39 SWFL contends that it met the three conditions at the time when the Cluster Offer was made as –

'6.4.1 By the time of the Cluster Offer, if not earlier (as SWFL contends, as and when it became clear no later than in May 2014 that SWFL [read Brockaghboy] would not accept a Cluster Offer), it met the First in the Queue Condition.

⁴³ The Complaint, para 4.2.4.

⁴⁴ The Complaint, para 4.2.7. The relevant section as it appears in the October 2016 Statement of Charges can be found at **(4/665 – 666)** and is unchanged from the May 2013 version.

⁴⁵ The Complaint, para 4.2.8.

⁴⁶ The Complaint, para 4.2.9.

⁴⁷ The Complaint, para 4.2.10.

6.4.2 The Delay Condition was satisfied at the date of the Cluster Offer, when it was apparent that clustering had already caused 18 months delay in making the offer; and a Cluster would take 4 to 4.5 years at least to deliver, compared to the worst case of 15 months NIEN now projects for the extended reinforcement works (and when the £800,000 odd of more modest reinforcement works under discussion in 2013 would be more speedily deliverable).

6.4.3 The Threshold Condition is met, as the Garvagh Cluster is and always has been viable without SWFL ever since the Cluster Offer was made (and before then upon receipt of a planning application from the other windfarms to be clustered), as set out above.⁴⁸

Discrimination

6.40 SWFL argues that its situation is different from other generators to whom NIE has refused a direct connection as it falls within the Identified Exception and the delay that it will experience in obtaining a connection is exceptional, with the result that it will not be able to avail of the NIRO Scheme⁴⁹.

6.41 SWFL also states that whether or not other generators have been the victims of an unlawful denial of access is irrelevant to the determination of its case⁵⁰ and, to the extent that those other generators may have complained to the Utility Regulator, they are now barred from challenging the determination of any such complaint by way of judicial review⁵¹.

⁴⁸ The Complaint, paras 6.4.1 – 6.4.3.

⁴⁹ The Complaint, para 7.1.1.

⁵⁰ The Complaint, para 7.1.2.

⁵¹ The Complaint, para 7.1.3.

7 Section Seven – Views of NIE

7.1 Although we have had regard to all of the arguments and evidence submitted by NIE, the summary below draws mainly from the Response. This is because NIE's written and oral submissions on the preliminary versions of the GHD Opinion and the GWLG Opinion have been taken into account in finalising those opinions. We have, however, referred to those submissions where they touch upon relevant issues beyond making points in relation to the preliminary opinions.

7.2 NIE does not agree with the case put forward by SWFL. NIE states that SWFL's complaint should fail for the following key reasons –

2.8.1 it contains significant errors of law, including a fundamental misunderstanding of the application of relevant EU law principles and a resultant misinterpretation of the provisions of the Electricity Order; and

2.8.2 its central contentions are based on a number of crucial factual errors:

(A) no provision of the Clustering Methodology leads to a conclusion that a direct connection is required for SWFL. SWFL attempts to rely on provisions which allow NIEN, in certain identified circumstances, to consider whether it may be preferable to offer a generator a direct connection. However, those provisions do not operate as an automatically applicable exception; they instead set out various factors to which NIEN may have regard in the specified circumstances. In any event, the relevant provisions are not engaged on the facts of this case;

(B) to the extent that the Connection Offer contains conditionality and/or contingency, it does not go beyond the degree necessary and inherent in making distribution connections – in particular in circumstances where the Distribution System is heavily congested. Such conditionality and/or contingency is for example inherent in the Clustering Methodology, which has been repeatedly endorsed by the UR as well as the practice throughout the rest of the UK; and

- (C) the closure of the NIRO scheme is irrelevant. It is not a factor to which NIEN was required to have regard in determining the best way to connect Smulgedon Wind Farm in accordance with its statutory duties. The closure of NIRO was a policy decision of the Northern Ireland Executive for which NIEN cannot be held accountable. Instead the onus is on SWFL to react to the changing legal environment in which it must do business.'

Breaches of the EU Obligations

The applicable law

- 7.3 NIE states that it is not necessary for the Utility Regulator to determine whether or not Article 32 of the Directive has direct effect as it does not apply to the facts of this case. This is because it has been held in a line of cases from the European courts that Article 32 applies to 'access' to the network rather than 'connection' and, even if it does apply, other provisions of European law make it clear that NIE is not restricted to refusing to make an offer of connection only where the network lacks capacity⁵².
- 7.4 NIE states that notwithstanding the clear legal position that Article 32 does not apply to connection, the primary obligation it imposes – for member states to ensure the implementation of a valid system of third party access – is implemented through the Statement of Charges⁵³.
- 7.5 NIE further states that the Renewables Directive does not apply to this case as it too relates to access rather than connection, imposes obligations on member states rather than individual operators, and, in its requirement to provide guaranteed access for renewable generation, does not add to the obligations found in domestic law⁵⁴.
- 7.6 In any event, NIE states that –
- (a) there is no requirement for an 'immediate' connection in EU law, nor are there any provisions as to the timeliness of any connection⁵⁵, and

⁵² The Response, Annex 1, Items 10 – 11.

⁵³ The Response, Annex 1, Item 10.

⁵⁴ The Response, Annex 1, Item 17.

⁵⁵ The Response, Annex 1, Items 11, 12, 14 and 15.

- (b) although it accepts that it is required to identify the works needed to provide access to the network and the costs of a connection, both have been provided in the Cluster Offer⁵⁶.

Alleged breaches of the EU Obligations

- 7.7 NIE denies that the Cluster Offer is a constructive refusal of access to the network⁵⁷.
- 7.8 In response to SWFL's points regarding the NIRO Scheme, NIE states that this was not a consideration that it was required to factor into its decision-making. It also points out that it has continued to receive 'a large number of connection applications' from wind farm developers 'clearly demonstrating' that such projects remain commercially viable despite the closure of the NIRO Scheme⁵⁸.
- 7.9 In relation to the points made by SWFL regarding the interpretation of the Cluster Offer, NIE submits that it is not appropriate to construe the terms of the offer as though it were a contract. This is because Article 26 of the Electricity Order does not permit such an analysis and the courts have stated that a connection offer does not create a contractual relationship⁵⁹.
- 7.10 NIE further states that all offers, even those for direct connections, will contain some degree of contingency and conditionality. It accepts that the Cluster Offer is contingent on the actions of third party wind farm developers but states that the drawbacks from this 'must be balanced against the clear and measurable benefits of adopting clustering'⁶⁰. Likewise, approval from the Utility Regulator is also an aspect of many connection offers, and can arise where, for example, associated reinforcement works are required at transmission level.
- 7.11 In relation to the terms of the Cluster Offer that SWFL argues contain an impermissible degree of contingency, NIE makes the following points –
- Clause 1.2 - 'Conditions 30.2(a) and (b) of the Licence require NIEN to make "detailed provision" regarding the consents necessary for any works. The reference to consents and approvals in clause 1.2 is therefore unobjectionable. Further, the reference to the Connection Offer being revised in accordance with its terms reflects Article 24(b) of the Electricity Order which permits NIEN to include in connection offers terms for connection that are reasonable in all the

⁵⁶ The Response, Annex 1, Items 12 and 13.

⁵⁷ The Response, Annex 1, Item 75.

⁵⁸ The Response, Annex 1, Item 68.

⁵⁹ The Response, Annex 1, Item 51.

⁶⁰ The Response, Annex 1, Item 53.

circumstances. Where the connection offer refers to situations in which the cost of connection may be affected by matters outside the reasonable control of NIEN (such as a particular connection scheme requiring planning permission) then it is a reasonable term of connection that the costs of connection may be varied in such situations.⁶¹

Clause 1.4 - 'NIEN is required by Condition 32 of the Licence to implement a Statement of Charges which must be approved by the UR. Condition 30.2(f)(i) requires the charges set out in connection offers to be calculable by reference to the applicable Statement of Charges. There is therefore nothing untoward in the Connection Offer making reference the applicable Statement of Charges.

SWFL is correct that circumstances may arise during the development of a cluster outside of NIEN's control which may cause NIEN to reassess the case for the cluster in order to determine whether or not the case for it is still met. NIEN will not proceed with a cluster where the case is clearly not met, as doing so would not be consistent with its duties. To the extent this introduces a degree of conditionality or contingency into connection offers, it is inherent in clustering and, for the reasons set out at item 40 above, cannot be considered objectionable.⁶²

Clause 2.1 - 'This clause is required by Conditions 30.2(a) and (b) of the Licence, which require connection offers to include "detailed provision" relating to the works required.'⁶³

Clause 2.2 - 'For the reasons stated ... [in relation to clauses 1.2 and 1.4] above, it is entirely proper for NIEN to make reference in connection offers to the applicable Statement of Charges and to the consents required for the works necessary to implement the connection.'⁶⁴

Clause 2.3 - 'For the reasons stated ... [in relation to clause 1.2] above, it is correct and proper for NIEN to make reference in connection offers to the consents required for works necessary to implement the connection. Moreover, planning permission for the conductors that will connect generating assets to

⁶¹ The Response, Annex 1, Item 41.

⁶² The Response, Annex 1, Item 42.

⁶³ The Response, Annex 1, Item 43.

⁶⁴ The Response, Annex 1, Item 44.

substations are also required for direct connections where overhead lines are used.⁶⁵

Clauses 3.1 to 3.3 - 'It is not NIEN's case that a site for the Garvagh Cluster had been acquired or optioned at the time of the Connection Offer.

NIEN is required by Condition 30.2(f) of the Licence to specify in connection offers the applicable charges, by reference to the Statement of Charges used to calculate those charges. Accordingly, where the approved and published methodology set out in the Statement of Charges dictates that the charges may change, then NIEN is required to make this clear in the Connection Offer.

Further, the references to the need for landowner consents or wayleaves are standard terms in connection offers, even direct connection offers. They reflect the degree of contingency that is inherent in the making of distribution connections (even direct connections).⁶⁶

Clause 3.5 - 'This clause is required in accordance with Condition 30.2(f) of the Licence.'⁶⁷

Clause 4.1 - '...the Electricity Order does not require a certain completion date for works, nor does it require the inclusion of an indicative date of connection in connection offers.

Whilst Condition 30.2(e) does state that connection offers must state the date by which any works required to permit access to the distribution system will be completed, and provide that if NIEN fails to complete the works by that date the applicant (unless it otherwise agrees to an extended date) will have the ability to rescind the connection agreement, this does not support SWFL's arguments in this case. Even though this condition makes clear that timing is important, it does expressly acknowledge that it cannot always be achieved in practice and that measures need to be in place to deal with this contingency. This implies that a connection offer may be conditional on the necessary works being completed, albeit that the applicant has the right to terminate

⁶⁵ The Response, Annex 1, Item 45.

⁶⁶ The Response, Annex 1, Item 46.

⁶⁷ The Response, Annex 1, Item 47.

should that completion not be timely. Accordingly, this does not advance SWFL's case further.

Notwithstanding the above, SWFL is wrong as a matter of law to refer to phrases such as “contractual stipulation” and “contract” in relation to the Connection Offer... The Connection Offer is an offer of terms for connection pursuant to the statutory scheme provided for in Articles 19-25 of the Electricity Order and does not create a contract recognised in law. If a contract had been required by SWFL it was at liberty to request a special agreement under Article 25 but it did not do so.

For completeness, the right for SWFL to withdraw its application for connection is provided for in paragraph 7.9 of the Connection Offer.⁶⁸

Clause 4.3 - '... this clause cannot in and of itself reveal a degree of unlawful conditionality or contingency. Detailing the procurement that must be carried out before NIEN can complete the necessary works falls within the "detailed provision" that NIEN is required by Conditions 30.2(a)-(b) of the Licence to include in connection offers.⁶⁹

Clause 7 - 'It is perfectly standard in any form of offer or agreement that requires he payment of a deposit for that deposit to be forfeited if the payor should seek to withdraw from the arrangement after the payee has incurred costs intended to be covered by the deposit. This clause is entirely unobjectionable. In any event, Condition 30.2(f)(i) requires NIEN to set out charges in connection offers calculated in accordance with the applicable Statement of Charges, which provides for the payment of a deposit.⁷⁰

Capacity at Limavady Main

7.12 NIE states that –

'there was not sufficient capacity on the Distribution System to grant [SWFL] the connection it sought, in the form sought, without considerable upgrade works being carried out, going beyond those works that are typical for direct distribution

⁶⁸ The Response, Annex 1, Item 48.

⁶⁹ The Response, Annex 1, Item 49.

⁷⁰ The Response, Annex 1, Item 50.

connections and notwithstanding the deeper capacity constraints on the Transmission System at Limavady Main.⁷¹

- 7.13 In relation to the reinforcement works that would be necessary to facilitate a direct connection, NIE states –

'The reinforcement works that would have been required to accommodate a direct connection for Smulgedon Wind Farm at Limavady Main would indeed have gone far beyond what is "entirely characteristic" for direct connections (i.e. it is unusual for direct connections to mains substations to require transformer management schemes, new switchboards or resolution of earthing hot zones) and the requirements of Article 20 and Condition 30.2 do not suggest otherwise.'⁷²

- 7.14 In its submissions in response to the preliminary GHD Opinion, NIE stated that reinforcement of the transmission system will be required regardless of whether a direct connection is made on an interruptible or non-interruptible basis⁷³. NIE contended that 'there is no further transmission capacity at Limavady Main'⁷⁴.

- 7.15 In support of this submission, NIE provided to the Utility Regulator a report by SONI, the transmission system operator, dated August 2016, assessing the possibility of providing direct connections for all of the generators then proposed to be connected via the Garvagh cluster. NIE also provided a letter from SONI, dated 28 June 2017, which stated that –

'as part of the analysis in support of the pre-construction approval process for Garvagh Cluster, SONI concluded that any further generation in the vicinity of Limavady would trigger the need for 110kV reinforcement of both the Coleraine Main to Rasharkin main and also the Kells Main to Rasharkin Main 110kV transmission corridors... The costs involved in such works would run to tens of millions of pounds and take a number of years to implement.'

Breaches of the Order Obligations

- 7.16 In response to SWFL's submissions with respect to the Order Obligations, NIE states –

⁷¹ The Response, para 64. See also, the Response, Annex 1, Item 56.

⁷² The Response, Annex 1, Item 65.

⁷³ NIE submission on preliminary GHD Opinion, para 2.2.

⁷⁴ NIE submission on preliminary GHD Opinion, para 2.3.

- '(a) The Electricity Order does not require NIEN to stipulate the date by which a connection will be delivered. SWFL's assertion here appears to arise from a misunderstanding of the requirements of Article 20. Article 20(2)(b) requires the applicant seeking a connection to specify the date by which it wishes the connection to be made. Article 20(5)(a) requires NIEN to communicate to the applicant the extent to which its proposals (including as to timing) "are acceptable to the distributor" and to specify "any counter proposals made" by NIEN. It is clear from the wording of Article 20(5)(a) that these are two distinct concepts, and that just because NIEN may be required to inform an applicant that its proposed timeframe is not possible, it does not require NIEN to stipulate an alternative timeframe, let alone a specific date;
- (b) It is not disputed that NIEN is required to specify the works that will be required in order to deliver a connection and the costs of such works. Indeed, the Connection Offer does so; and
- (c) Although [SWFL's reference to a requirement that an offer be 'reasonable in all the circumstances'] is not explained, NIEN understands that SWFL is referring to Article 24(b) which requires the terms of the Connection Offer to be "reasonable in all the circumstances for that person to be required to accept". It is important to keep in mind that this provision relates only to the specific terms of the Connection Offer, and the Electricity Order does not refer to a more holistic consideration of whether an offer was reasonable in all the circumstances as SWFL appears to suggest.⁷⁵

7.17 NIE also states that Articles 19 and 20 do not require any counter-offer to be wholly unconditional and that SWFL has failed to show that any of the terms it complains of are not reasonable in all of the circumstances⁷⁶.

Breaches of the Licence Obligations

7.18 In relation to the breaches of the Licence Obligations that SWFL outlines, NIE states the following –

- (a) In compliance with Conditions 30(2)(a) and (b), the Cluster Offer did make detailed provision regarding the necessary reinforcement works at sections 4 and 5⁷⁷.

⁷⁵ The Response, Annex 1, Item 18.

⁷⁶ The Response, Annex 1, Item 85.

- (b) the failure to specify a 'time is of the essence' date in compliance with Condition 30(2)(e) does not advance SWFL's case any further –

'Whilst Condition 30.2(e) does state that connection offers must state the date by which any works required to permit access to the distribution system will be completed, and provide that if NIEN fails to complete the works by that date the applicant (unless it otherwise agrees to an extended date) will have the ability to rescind the connection agreement, this does not support SWFL's arguments in this case. Even though this condition makes clear that timing is important, it does expressly acknowledge that it cannot always be achieved in practice and that measures need to be in place to deal with this contingency. This implies that a connection offer may be conditional on the necessary works being completed, albeit that the applicant has the right to terminate should that completion not be timely.'⁷⁸

- (c) NIE has made a valid connection offer and it is no answer to this to state that it did not do so within the three months stipulated by Conditions 30(4) and 30(6)⁷⁹.

The Statement of Charges and the 'Identified Exception'

- 7.19 NIE states that SWFL has misconstrued the nature of what it characterises as the Identified Exception –

'It is correct that stage 2 of the assessment process recognises the importance of timing as part of the Further Assessment, which includes the following factors:

- the capacity on the Transmission System at the local substation and the most efficient location for the generation in question to enter the Transmission System;
- the potential 'routes' for connecting the generators in question to the Distribution System including identifying and assessing the potential alternatives (including the use of multiple overhead lines or underground cables);
- carrying out an environmental analysis against a range of criteria, and assessing whether a cluster based offer or a series of direct connections is preferable from an environmental perspective;
- calculating and comparing the construction and all-of-life costs for the two alternatives; and

⁷⁷ The Response, Annex 1, Item 86.

⁷⁸ The Response, Annex 1, Item 48.

⁷⁹ The Response, Annex 1, Item 88.

- an assessment of timing, as NIEN acknowledges that individual connections may involve a shorter lead time than the development of cluster substations (the "Timing Provisions").

However, SWFL is not correct to categorise the Timing Provisions, forming part of the stage 2 Further Assessment, as an "Identified Exception". As is clear from the above, timing is one of a number of factors that inform NIEN's assessment of whether direct connections would be a preferable alternative to a cluster based solution.⁸⁰

7.20 In terms of the interpretation of the Timing Provisions, NIE states –

'The key elements of this provision are as follows:

- The implementation of a cluster based approach ideally should not severely delay "an individual generator's connection" – i.e. in order for NIEN even to turn its mind to the question of one specific generator being given a direct connection (alongside a cluster for the other generators in the same relevant geographic area), that individual generator must be severely delayed as compared with all other generators that have been considered for connection via the relevant cluster. It is unlikely that a generator will be sufficiently disadvantaged compared with all other generators if it is not 'first in the queue' at a particular cluster, but this does not mean that being (first in the queue) at a particular cluster is enough to satisfy this requirement.
- Such a severe delay will not arise if that individual generator is not delayed by more than 18 months as compared with the likely timeframe for a direct connection. Even where a delay exceeds 18 months, it needs to be balanced against the impact on all other generators that it is proposed will connect via the cluster in question.
- Where the removal of a particular generator will result in the 56MW threshold no longer being satisfied, that generator will not generally be offered an individual connection.

Where the three factors identified above suggest that it may be appropriate to offer the generator in question a direct connection, the provision provides that "*consideration may need to be given to providing the generator with an individual connection*" (emphasis added). This clearly shows that the Clustering Methodology nonetheless grants NIEN a margin of discretion. This is important as there are a large

⁸⁰ The Response, Annex 1, Item 24.

number of other factors in play, including: (i) the different stages of project development that each generator may be at; (ii) the potential requirement for new infrastructure; (iii) the costs of new infrastructure that may require to be funded by the general customer base; and (iv) the uncertainty regarding generator use of new infrastructure.

It is also clear that, in all cases, an assessment of which approach satisfies NIEN's general duties, including its duty to maintain an efficient, coordinated and economical system of electricity distribution, would be necessary. This includes taking account of the optimum way to introduce new generation onto the Transmission System.⁸¹

7.21 In the Information Response, NIE stated that the Timing Provisions provided a process allowing a 'detailed individual assessment of one direct connection for a particular generator whilst the remaining generators connect via the cluster'⁸² (emphasis in original). NIE stated application of this exception would be envisaged only in very limited circumstances.

7.22 In relation to whether SWFL meets the requirements of the Timing Provisions, NIE states –

'The key points are:

- As explained above, the Timing Provisions of the Clustering Methodology give NIEN a broad discretion (as part of the stage 2 Further Assessment which forms part of the assessment process that NIEN is required to complete prior to designating a cluster) to consider alternative means of connecting a particular generator where that generator suffers an undue delay as compared with all other generators that it is proposed would connect to a particular cluster. This discretion involves not only an assessment of the specific factors identified in the Clustering Methodology, but also a more holistic analysis including an assessment of which options best ensure compliance with NIEN's duties.
- In December 2013 (and indeed at the time of making the Connection Offer in October 2014, which is the relevant date for the purposes of the UR's assessment), NIEN's assessment was that the approach that best served its general duties was to designate the Garvagh Cluster.
- As at October 2014 there was no one generator that was unduly delayed as compared with all other generators. In particular, it cannot be said that SWFL was unduly delayed as: (1) it was clearly second in the queue behind

⁸¹ The Response, Annex 1, Item 26.

⁸² The Information Response, para 10.

Brockaghboy wind farm; and (2) TCI applied for a connection for Upper Ballyrogan wind farm shortly after SWFL applied, and received a connection offer on the same date.

It is therefore clear that, in accordance with the Timing Provisions of the Clustering Methodology, NIEN was not required to turn its mind to the question of direct connections for Brockaghboy or Smulgedon Wind Farm in October 2014.⁸³

- 7.23 In its written response to the preliminary GWLG opinion, NIE stated that SWFL may not meet the relevant criteria as the reinforcement works required to provide it with a non-interruptible direct connection may take the same amount of time to complete as construction of the Garvagh cluster given the work required to both the distribution and transmission systems⁸⁴.

Discrimination

- 7.24 NIE states that –

'As a starting point, it must be borne in mind that (as set out at item 3 above) NIEN is legally required by Condition 15 of the Licence not to unduly discriminate between persons seeking connection to the Distribution System. This means that, where NIEN has a published policy (such as the Clustering Methodology) explaining how it will connect certain types of generator, it must apply that policy consistently. As explained throughout this submission, SWFL has failed to demonstrate that its position is sufficiently different from that of any other generator that it is proposed will connect via a cluster so as to justify preferential treatment. Accordingly, for NIEN to grant it such differential treatment (in the form of a direct connection) would be a breach of its Licence.⁸⁵

- 7.25 In its submissions at the oral hearing, NIE accepted that if the Identified Exception was met then there would be no issue of undue discrimination in granting SWFL a direction connection⁸⁶.

Detrimental impact on clustering and network efficiency

- 7.26 NIE states that concluding that SWFL is 'entitled to a direct connection would have a significant detrimental impact for clustering as a whole⁸⁷. It further states –

⁸³ The Response, Annex 1, Item 33.

⁸⁴ NIE written submission on preliminary legal opinion, para 6.11.

⁸⁵ The Response, Annex 1, Item 95.

⁸⁶ Oral hearing transcript, p. 67, line 13 to p. 68, line 4.

'Clustering can only work if applicants are required to connect to clusters where the application of the Clustering Methodology determines that clustering is the appropriate approach to take. This is the case even if the result is, in some cases, that a cluster-based connection would take longer than a direct connection. Indeed without this requirement, it may not be possible to progress the cluster at all. In addition, allowing direct connections for early applicants where a cluster is justified (other than in the limited circumstances set out in the relevant provisions of the Clustering Methodology) would result in an inefficient allocation of the limited remaining capacity on the Distribution System, which would not be consistent with NIEN's duties.'⁸⁸

- 7.27 NIE also stated that granting a direct connection would be less efficient given where the connection would be made to the network and that consumers would potentially be exposed to some financial risk⁸⁹.

⁸⁷ The Response, Annex 1, Item 92.

⁸⁸ The Response, para 4.4.

⁸⁹ NIEN oral submissions, transcript, p. 59, lines 23 to p. 61, line 10.

8 Section Eight - Issues to be Determined

8.1 The following are the issues to be determined by the Utility Regulator.

Issues for Determination

8.2 The issues for determination by the Decision-Makers, in respect of the terms of the Cluster Offer are –

- (a) On the basis of the evidence that can properly be considered by the Utility Regulator at this time, was NIE legally entitled under the applicable legislation to refuse to offer SWFL a direct connection to Limavady Main?
- (b) What is the legislation applicable to the Cluster Offer and does the Cluster Offer fail to meet the requirements set out in that legislation?
- (c) In particular, are the terms of the Cluster Offer reasonable, taking into account –
 - (i) any uncertainty or contingency that they contain, and
 - (ii) the likely delay in providing a connection under those terms.

9 Section Nine – Determination

Capacity at Limavady Main and the preliminary GHD opinion

9.1 One of the central issues in dispute between the Parties is whether or not there is capacity on Limavady Main to facilitate an interruptible direct connection to the Wind Farm. This question arises in relation to capacity on both the distribution and transmission systems.

9.2 We commissioned the GHD Opinion to provide technical input into our determination on this issue.

The Procedural Issue

9.3 A preliminary opinion from GHD was shared with the Parties on 14 June 2017 and representations were invited in relation to it. On 23 June 2017, SWFL wrote to the Utility Regulator expressing disappointment that GHD had sought input from NIE but not from SWFL in the preparation of the preliminary report, notwithstanding the fact that SWFL had been asked for, and provided, contact details for someone who would be able to respond to technical queries from GHD.

9.4 SWFL stated that it considered the approach adopted by GHD –

'to give rise to a breach of legitimate expectation, a breach of natural and constitutional justice, an abuse of process and to be indicative of bias on the part of the Utility Regulator.'⁹⁰

9.5 The Utility Regulator responded in a letter dated 26 June 2017, noting the points raised by SWFL and stating that the Utility Regulator looked forward to receiving any further particularisation of its legal submissions in relation to them, which would be considered – together with any points made at the oral hearing – prior to the finalisation of the GHD Opinion and our determination⁹¹.

9.6 In its representations on the preliminary GHD opinion SWFL stated –

'This expert evidence has been produced in a one-sided process in which: one party to the complaint, NIEN, has been fully consulted by and engaged with by the expert;

⁹⁰ Letter from Pinsent Masons to the Utility Regulator, dated 23 June 2017.

⁹¹ Letter from the Utility Regulator to Pinsent Masons, dated 26 June 2017.

whilst the complainant, SWFL has not. Such a process adopted by a supposedly neutral expert is patently unfair. SWFL seeks immediate disclosure of the notes and details of any meetings between the expert and NIE; and disclosure of the instructions given to the expert. But as it stands such basic procedural flaw [sic] taints this process and amounts to: breach of natural and constitutional justice or fairness; a breach of legitimate expectation of equal treatment, notably by the failure to offer SWFL an equal opportunity to comment prior to the completion of the report; as well as actual bias, or the an [sic] appearance of bias on the part of the Authority's expert.⁹²

- 9.7 On 29 June 2017, SWFL wrote to the Utility Regulator drawing attention to references in NIE's submissions on the preliminary GHD opinion to a meeting with GHD on 12 June (which was not referenced by GHD), as well as to a letter to the Utility Regulator from SONI dated 28 June 2017 (which had not been copied to SWFL).
- 9.8 SWFL requested a copy of the SONI letter, as well as confirmation that NIE had not been shown a draft of the preliminary GHD opinion before it had been shared with SWFL.
- 9.9 In its letter, SWFL again repeated its submissions regarding the flaws in the process by which the preliminary GHD opinion had been prepared.
- 9.10 The letter from SONI was provided to SWFL by NIE on 29 June 2017.
- 9.11 At the oral hearing on 30 June 2017, the Utility Regulator made clear that, although the SONI letter stated that it had been requested by the Utility Regulator, this was not in fact the case. It also confirmed that the Decision-Makers would be placing no weight on the letter and that it would not be shown to GHD. SWFL was asked, if we accepted its submissions that there was a procedural issue that needed to be addressed, what remedial action SWFL considered would be necessary in respect of that issue.
- 9.12 SWFL stated that it was unable to commit to what was required to cure any defect in process until it had received full disclosure of the documents and information that it had requested. It went on to state –

'The potential cure lies in being given a fair opportunity to engage with and respond to... [the correspondence between NIE and GHD] and, if necessary, and this is always critical when courts use independent experts, to have input into the questions

⁹² SWFL submissions on preliminary opinions, 28 June 2017, para 7.2.

that the experts should be asking of NIEN so as to structure or assist him in any information he seeks. One very obvious thing that one would seek to do, particularly if some of these capacity constraint arguments are pursued, is to get access to the SCADA database and to understand what the actual loads are, what the actual amounts being generated at Limavady over the four years of data, that they no doubt have, and compare it to the projected actual loads of Smulgedon wind farm, that is likely to be highly informative in relation to the questions of capacity constraint and whether or not they are technically acceptable, as we imagine they are or must be otherwise SONI wouldn't have made the offer it did.⁹³

- 9.13 In its oral submissions SWFL also drew attention to the centrality of whether or not there was capacity on the transmission network to allow for a direct connection.
- 9.14 SWFL made clear that it intended no criticism of any individual at GHD with respect to the process adopted in preparing the preliminary GHD opinion⁹⁴.
- 9.15 On 4 July 2017, the Utility Regulator disclosed to SWFL the documents requested in its letter of 29 June. On the same date, SWFL sent a letter requesting further documents.
- 9.16 Also on 4 July 2017, the Utility Regulator sent a letter to the Parties noting SWFL's submissions on the need for transparency and even-handedness in the process by which the GHD Opinion was drafted, as well as the central role that the question of capacity on the transmission system had come to play in the dispute between the Parties.
- 9.17 The letter stated that we, the Decision-Makers, agreed with both of those points and set out the steps that we considered needed to be taken to ensure that the GHD Opinion provided a robust foundation for our determination. These were as follows –
- (a) The Utility Regulator would provide SWFL with the documents requested in its letter of 29 June 2017 and SWFL would be given an opportunity to make representations to GHD on those documents.
 - (b) GHD would prepare a preliminary set of questions to be asked of SONI. These would be shared with both Parties, and each party would be provided with an opportunity to make representations on those questions. Upon considering those representations, GHD would finalise the questions, which would be shared with both Parties.

⁹³ Oral hearing transcript, p. 17, line 25 to p. 18, line 13.

⁹⁴ Oral hearing transcript, p. 15, lines 27 – 28.

- (c) SONI's responses to the questions would be shared with both Parties, and each party would be provided with an opportunity to make representations on those responses.
 - (d) A further preliminary technical opinion would be drafted and both Parties would be given an opportunity to make representations on it.
- 9.18 The letter also confirmed that, going forward, all correspondence between each party and GHD would be copied to the other party and any meetings between GHD and a party – both in person or otherwise – would be attended by the other party in an observer capacity. Each party would also be provided with copies of any correspondence, and the minutes of any meetings, between GHD and SONI.
- 9.19 The letter highlighted that the nature of the steps it set out were such that there was no prospect that they could be completed, and a determination drafted, by the statutory deadline of 21 July 2017. In light of the holiday period, the letter stated that we considered that an additional two months would realistically be necessary in order to complete those steps and determine the Dispute.
- 9.20 SWFL was asked for confirmation – under Article 26(1A) of the Electricity Order – that it agreed to an extension of the statutory timetable until 22 September 2017 to allow for the accommodation of the points it had raised.
- 9.21 On 5 July 2017, NIE provided confirmation that it had not had sight of any advance draft of the preliminary GHD opinion⁹⁵.
- 9.22 SWFL responded to the Utility Regulator in a letter dated 7 July 2017. That letter reiterated SWFL's objections to the process that had been undertaken in the preparation of the preliminary GHD opinion and made additional points in light of the documents that had been disclosed on 4 July 2017.
- 9.23 The letter stated that the only real answer that NIE had to SWFL's case now seemed to be an absence of capacity on the transmission network and noted that 'fair and transparent ventilation of this issue does indeed present a logistical difficulty for the Utility Regulator to resolve the dispute within the statutory timeframe'.

⁹⁵ Email from Herbert Smith Freehills to the Utility Regulator, copying in Pinsent Masons, dated 5 July 2017.

9.24 SWFL went on to outline a list of technical issues which it stated were required to be 'established as a matter of fact' in the GHD Opinion, 'with full participation by SWFL'. However, SWFL stated that it –

'...does not and cannot (for fear of waiver of its rights) consent to the extension of the statutory timetable until 22 September 2017 (or for the avoidance of doubt, at all past the statutory deadline of 22 July 2017)...

We cannot at present consent to the extension of time request (and certainly not without sight of the documentation requested, which should be provided as a matter of urgency), but instead leave it to the Decision-Makers alone to decide how far to go beyond the statutory time periods in order to resolve this complaint fully and fairly. Whatever approach is taken we respectfully ask that the Decision-Makers expedite the process in whatever manner is required (including working over the holiday period if necessary) to ensure that the relevant statutory timeframe is met.'

9.25 The documents requested by SWFL in its letters of 4 July and 7 July were provided on 11 July 2017.

9.26 In summary, the position arising as a result of the correspondence set out above is that SWFL has raised a number of procedural issues in relation to the preparation of the preliminary GHD opinion which it states must be addressed to ensure that the final opinion reflects a fair and balanced process.

9.27 We agreed with this submission and suggested a process which would ensure transparency and even-handedness in the finalisation of the GHD Opinion. However, SWFL has refused to agree to any extension of the statutory deadline to allow for the correction of the issues that it has identified. With respect to the final two sentences in the quotation above, it is left unclear how exactly SWFL considers that the Decision-Makers could both go beyond the statutory timeframe to ensure that the dispute is resolved fully and fairly and expedite the process to ensure that the statutory timeframe is met.

9.28 We note that, under the statutory scheme, the Utility Regulator does not have the ability to extend the deadline by which a determination must be made unilaterally. Nor can it agree such an extension with NIE.

9.29 We also note that the deadline in the Electricity Order transposes into domestic law the deadline for determination of disputes found in Article 37(11) of the Directive.

- 9.30 In stating that it leaves it to the Decision-Makers to 'decide how far to go beyond the statutory time periods in order to resolve this complaint fully and fairly', SWFL has effectively invited the Utility Regulator to decide to breach an obligation arising under EU law.
- 9.31 We do not find that an attractive submission. In the course of this Dispute, SWFL has made a number of representations about the importance of compliance with EU law. Moreover, it was within the discretion of SWFL to allow for an extension of time in order to allow for the points that it has raised about the GHD Opinion to be addressed while avoiding any breach by the Utility Regulator of EU law requirements. It has declined to do so, and that was a choice open to it. But the consequence of this choice is that the legal obligation to determine this Dispute by 22 July 2017 still stands.
- 9.32 We are not persuaded, in all of these circumstances, by the suggestion that we should of our own motion disregard our obligation to determine the Dispute by the statutory deadline. Nor do we consider that it is necessary to do so for the fair and appropriate determination of this case.

The Utility Regulator's Approach to the Issue

- 9.33 The position that has become clear during the course of this Dispute is that the existence or otherwise of capacity on the transmission network is a central issue of contention between the Parties. However, the evidence submitted by the Parties has not been sufficient to allow GHD to provide definitive advice to us on that matter, or for us to reach a determination of it, within the statutory timescale.
- 9.34 However, whether or not such capacity exists is a question of fact to which an answer exists and can be identified outside the Dispute. That answer is one that can be provided by SONI, the operator of the transmission system which is responsible for its management in line with all relevant legal requirements. It is therefore capable of being resolved without the need for the exercise of any judgement on the part of the Utility Regulator.
- 9.35 Moreover, it is not the usual practice of the Utility Regulator to perform an investigative role in the determination of complaints by obtaining or generating new evidence that has not been submitted by either party. This is for the simple reason that the tight statutory timetable does not facilitate a process of this nature. It is a form of process that could otherwise be adopted, but not one that the Utility Regulator is typically in a position to adopt while complying with its obligations under EU law.

- 9.36 Instead, the Utility Regulator proceeds by relying on the evidence that has been submitted to it by the parties to the dispute, and determining the case in the light of that evidence and the submissions made in relation to it. It is satisfied that this procedure, which is typical of the manner in which courts of law in the UK determine disputes brought before them, is both fair and appropriate.
- 9.37 We, the Decision-Makers, had decided that in the unusual circumstances of this dispute we were willing to make an exception to the usual procedure by asking GHD to obtain evidence by directly liaising with SONI on the issue of capacity on the transmission network. However, this could only be possible in circumstances where an extension of the statutory timetable was granted by SWFL in order to facilitate it.
- 9.38 However, we are clear that what we are required to determine in this case is the terms of the connection agreement between NIE and SWFL. That determination might be based in part on the resolution of disputed issues of fact where the evidence is available to us to reach such a resolution. However, it is not necessary for us to resolve every question of fact in order to conclude on the reasonable terms of the connection agreement. In particular, where there are outstanding questions of fact that are capable of being answered outside the dispute process, and not capable of being answered by us within that process, it is open to us to determine the Dispute by providing that the agreement should contain an appropriate condition precedent that may be triggered once the facts are established.
- 9.39 In this case: (i) the Parties have not placed before us evidence sufficient for us to conclude whether or not there is capacity on the transmission system to facilitate a direct connection at Limavady Main; (ii) the information to answer that question is in the possession of a third party (SONI) and has not yet been obtained; (iii) SWFL have not allowed an extension of time that would permit us in a fair and transparent manner, through the investigation of our expert GHD, to obtain that information so that we can determine as a matter of fact whether the capacity exists.
- 9.40 In all of these circumstances, on the basis of the matters further determined by us below, we have formulated our order so that the connection agreement must be amended to include a condition precedent, the subject of which is whether or not SONI provides written confirmation of the existence of transmission capacity which facilitates an interruptible direct connection at Limavady Main.

- 9.41 Without prejudice to the fact that we may have been able to resolve this question with more evidence and/or adequate time to obtain evidence (thereby rendering it unnecessary to set a condition precedent) we consider this to be the fairest way in the circumstances of the case to determine the Dispute whilst still adhering to the statutory deadline.
- 9.42 As identified below, the GHD Opinion advises that sufficient capacity exists on the distribution network to facilitate a direct connection following the works that SWFL has indicated that it accepts as necessary and will pay for. However, GHD reaches no conclusions in relation to the question of transmission capacity, and we therefore make no finding in relation to it. Consequently, no detriment can be suffered by SWFL by virtue of any unfairness in relation to that question.
- 9.43 We therefore proceed to determine the Dispute on the basis of the evidence and information available to us, and do so within the deadline set by Article 26(1B) of the Electricity Order and Article 37(11) of the Directive.
- 9.44 We set out in the following subsections our determination on each of the issues that we are required to address.

- (a) **On the basis of the evidence that can properly be considered by the Utility Regulator at this time, was NIE legally entitled under the applicable legislation to refuse to offer SWFL a direct connection to Limavady Main?**

The point in time for our consideration

- 9.45 We have sought advice on whether, in determining the Dispute, we are required to consider the position as it stood at the time that the Cluster Offer was made, at the time of our determination, or at some other time.
- 9.46 The GWLG Opinion states that, on a proper interpretation of the statutory framework set out in Articles 19 to 26 of the Electricity Order, we are required to consider the terms that have been offered by NIE in light of the circumstances at the point that we make our determination.
- 9.47 GWLG noted that its interpretation accorded with the position taken by the Utility Regulator in a previous determination in which it held that the charging statement against which it should assess terms offered by NIE is that in force at the time of the determination, not at the time that the application or offer was made⁹⁶.
- 9.48 We note that in their submissions on the preliminary GWLG opinion, SWFL agreed with this interpretation and NIE reserved its position.
- 9.49 We accept GWLG's advice in this respect and in determining the Dispute have considered the Cluster Offer in light of circumstances as they currently stand⁹⁷.

NIE's ability to refuse to make an offer of connection

- 9.50 The grounds upon which NIE can refuse to make an offer of connection are set out in Article 21 of the Electricity Order, with certain additional grounds provided under Condition 30(5) of the Licence. These are set out above in paragraphs 3.14 and 3.22 respectively.
- 9.51 We note that NIE has made it clear that it has never sought to rely on any exception from the duty to connect⁹⁸.

⁹⁶ *Pigeon Top Dispute – Final Determination DET-523*, para 9.3.

⁹⁷ However, we have also considered past circumstances where relevant as set out in our determination on issues (b) and (c).

⁹⁸ NIE submissions on preliminary GWLG opinion, para 4.3.

9.52 On the evidence before us, the only potentially relevant ground on which NIE could have refused to offer SWFL a direct connection to Limavady Main – had it wished to do so – was on the basis of a lack of capacity under Article 21(1)(c) of the Electricity Order.

9.53 The GHD Opinion concludes that, with some reinforcement work, sufficient capacity exists on the distribution network to facilitate an interruptible connection to Limavady Main –

'3. To facilitate an interruptible connection of the Smulgedon 16.1MW wind farm directly to Limavady Main 33kV NIE has indicated that a transformer management scheme could be implemented to automatically disconnect the Smulgedon wind farm in the event of 45MVA transformer outage. NIE propose what they consider to be the Least Cost Technically Acceptable (LCTA) option which is to retain the existing 45MVA transformers and replace the existing 33kV mesh switchgear with a compact 33kV GIS switchboard which will cost £2.75 million with an 18 month implementation programme.

4. NIE consider that retrofitting a transformer management scheme to the existing mesh with the addition of a local 33kV switch is not technically acceptable. NIE indicate that it is not implemented elsewhere on the network and that retrofitting interface equipment and secondary wiring to the existing 55 year old mesh would have questionable reliability. Of particular concern is the fact that no automatic back up protection is available for a failure of the transformer management system which could result in two 45MVA transformers being forced out of service creating major supply problems for the Limavady Main 33kV

5. The NIE Policy for transformer management schemes is to implement the scheme as part of a 33kV switchboard which would be more reliable than a retrofitting to existing mesh switchgear as all the secondary wiring would be enclosed within the switchboard panels and that the wiring would be rated to deal with overload conditions. GHD agrees that this is a lower risk option to the retrofit transformer management scheme.⁹⁹

9.54 GHD advises that 18 months is a realistic estimate to carry out the necessary reinforcement work¹⁰⁰.

⁹⁹ GHD Opinion, section 5, paras 3 – 5.

¹⁰⁰ GHD Opinion, section 2.8.3.

- 9.55 NIE has raised the issue of a lack of capacity on the transmission system. We note that SONI made an offer to SWFL of a direct connection to the transmission system on 2 October 2015 – after the Cluster Offer was made on 21 October 2014¹⁰¹. In its submissions at the oral hearing, NIE stated that capacity on the transmission system ran out in the middle of 2016¹⁰². While we do not question that the statement reflects NIE's belief, we have been provided with no documentary evidence which supports it and therefore do not feel able to place any weight on it. However, we are also satisfied that we cannot place any reliance on the existence of the offer of a connection made on 2 October 2015. That offer, now almost two years old, does not provide evidence of the capacity currently available on the transmission system at the time of our determination.
- 9.56 The GHD Opinion makes reference to a report from SONI dated 23 August 2016 which NIE suggests is supportive of its view that there is insufficient capacity at transmission level to facilitate a direct connection. GHD places no weight on that report as, without an extension of time to the statutory deadline for determination, GHD was unable to engage in any direct discussions with SONI. However, the GHD Opinion does highlight certain respects in which the report cannot be said to close off the possibility that the transmission network can indeed facilitate an interruptible connection between the Wind Farm and Limavady Main¹⁰³.
- 9.57 We have had sight of the SONI report and SONI's letter to the Utility Regulator of 28 June 2017. We have not placed weight on either of these documents. Quite apart from any issue of fairness in the manner of their production or their submission to the Utility Regulator – which would have led us discount them in any event – neither document presents compelling evidence on the relevant issue. The report considers the impact on the transmission system should all generation capacity currently scheduled to be connected to the Garvagh cluster be connected directly to Limavady Main. Apart from GHD's view of the report, which we note, we consider that it does not provide evidence of the impact on the transmission network should SWFL alone receive an interruptible direct connection.
- 9.58 Likewise, it is not clear whether SONI's letter of 28 June 2017 has addressed the issue of a direct connection by SWFL alone, as we have not had sight of the question that NIE asked of SONI to generate the letter.
- 9.59 In short, without further evidence we are unable to make a conclusive finding on whether or not capacity exists on the transmission system to facilitate an interruptible or non-interruptible direct connection for SWFL.

¹⁰¹ SONI's offer letter was enclosed with Pinsent Masons' letter to the Utility Regulator on 7 July 2017.

¹⁰² Oral hearing transcript, p. 68, lines 24 – 25 and p. 69, lines 7 – 11.

¹⁰³ GHD Opinion, section 3 and section 5, paras 6 – 8.

9.60 As stated in the previous subsection, we were prepared to ask GHD to conduct investigations so as to come to a conclusion on the issue of transmission capacity, but have been unable to ask it to do so in light of SWFL's refusal to extend the statutory deadline for our determination.

9.61 Our findings on this issue are therefore confined to the following –

- (a) Sufficient capacity exists on the distribution network to facilitate a direct connection between the Wind Farm and Limavady Main on the basis of the implementation of a transformer management scheme (a new 33kV switchboard) costing £2.75m and taking 18 months to complete. We note that SWFL has stated that it is willing to pay for such reinforcement works¹⁰⁴.
- (b) NIE would have been entitled to refuse to offer SWFL a direct connection – or indeed any connection at all – if there was insufficient capacity on the transmission network to facilitate this. Likewise, a direct connection could be refused at the present time if no such capacity in fact exists.

¹⁰⁴ ¹⁰⁴ Oral hearing transcript, p. 27, lines 9 to 14.

- (b) What is the legislation applicable to the Cluster Offer and does the Cluster Offer fail to meet the requirements set out in that legislation?**

The Applicable Legislation

- 9.62 The Parties disagree as to the applicability to the Dispute of Article 32 of the Directive.
- 9.63 In the face of this disagreement we asked GWLG to advise us on the legislation applicable to the Cluster Offer. The GWLG Opinion states that it is not necessary for us to make a finding on whether Article 32 imposes the directly effective obligation for which SWFL contends, or on whether Article 32 applies to connection as well as access.
- 9.64 We accept that the provisions of the Electricity Order must be interpreted in light of the Directive. We also accept that, as the relevant provisions of the Electricity Order are intended to implement EU law obligations, proportionality is relevant to our consideration of whether the terms of the Cluster Offer are reasonable.
- 9.65 Beyond these two points, Article 32 has potential relevance only in circumstances where there has been a refusal of connection (to the extent that Article 32 relates to connection). However, as discussed below, we have not found that NIE has refused to make an offer of connection.
- 9.66 On this basis we accept the advice provided in the GWLG Opinion that it is not necessary for us to make a finding on whether Article 32 is directly effective, or on whether it applies to connection.
- 9.67 We have considered, and accept, the advice provided in GWLG Opinion about the need to apply a proportionality standard, and have taken this into account in our consideration of reasonableness in the following section. In the light of our conclusions in that section, which we reached applying the standard of reasonableness in its normal sense, we have not found it necessary in addition to set down an analysis in the more structured form provided by the proportionality test. However, we have considered that test in the terms set out in the GWLG Opinion, and are satisfied that by applying it we would arrive at exactly the same conclusions.
- 9.68 We also accept the advice provided in the GWLG Opinion that for the purposes of determining the Dispute –
- (a) we are not required to make a finding as to whether Article 16(2)(b) of the Renewables Directive is directly applicable as the system of access to which it refers

has been implemented in domestic law through Articles 19 to 25 of the Electricity Order, and

(b) in determining the Dispute, we are not considering whether NIE has breached the terms of the Licence, although we do consider the obligations set out in the Licence in our assessment of reasonableness in the next subsection.

9.69 In relation to the latter, the GWLG Opinion draws our attention to previous determinations of the Utility Regulator in which it has noted that breaches by NIE of its Licence are not for formal determination as part of a dispute between parties under Article 26 of the Electricity Order¹⁰⁵.

9.70 As such, the applicable legislative requirements against which we must consider the Cluster Offer are those set out in Article 20(5) of the Electricity Order in relation to what an offer must contain, and Article 24(b), which requires that the terms offered by NIE must be reasonable.

9.71 The GWLG Opinion notes that the Order contains other tests with respect to particular types of term – such as the 'double reasonableness' requirement in relation to costs of connection that a person pay 'any expenses reasonably incurred ... to such extent as may be reasonable in the circumstances'¹⁰⁶. However, SWFL has not argued that NIE has breached any term which falls outside the default test of reasonableness in Article 24(b), and we apply that test in our determination on issue (c).

Does the Cluster Offer contain the information required in Article 20(5)?

9.72 SWFL argues that the Cluster Offer breaches Article 20(5) of the Electricity Order by failing to make a counter-offer which specified a timeframe within which a connection would be made.

9.73 We accept the advice provided in the GWLG Opinion that Article 20(5) does not require NIE to provide a timeframe within which a connection will be provided.

9.74 However, that obligation is contained in Condition 30(2)(e) which gives effect to Article 16(5)(c) of the Renewables Directive. We consider that obligation below in our assessment of whether the terms of the Cluster Offer are reasonable.

¹⁰⁵ For example, *DET-524 - Determination of Brockaghboy Wind Farm connection dispute with NIE*, para 11.19, *Renewable Generation Connection Dispute – Reference DET-522*, File 3, Tab 17, para 6.14, and *DET-523 – Determination of Pigeon Top Wind Farm connection dispute with NIE*, para 9.22.

¹⁰⁶ Article 22(1) of the Electricity Order.

- (c) **In particular, are the terms of the Cluster Offer reasonable, taking into account –**
- (i) **any uncertainty or contingency that they contain, and**
 - (ii) **the likely delay in providing a connection under those terms.**

- 9.75 Whether or not the terms of the Cluster Offer are reasonable must be assessed in the context of whether or not the Wind Farm can be connected to the distribution network otherwise than via the Garvagh cluster.
- 9.76 As discussed above, as the Dispute has progressed, the question of capacity to facilitate an interruptible direct connection of the Wind Farm to Limavady Main has become a fundamental issue between the Parties.
- 9.77 The GHD Opinion has confirmed that there is capacity on the distribution network to facilitate a direct connection on an interruptible basis with some reinforcement work that SWFL has confirmed it is willing to pay for. However, GHD has been unable, within the statutory timeframe for determination of the Dispute, to provide a definitive answer on whether or not the necessary capacity exists on the transmission network.
- 9.78 We have therefore considered the reasonableness of the Cluster Offer in the context of (i) capacity existing to facilitate a direct connection, and (ii) no capacity existing to facilitate a direct connection.

Where the necessary capacity exists on the transmission network

- 9.79 NIE has been clear throughout its submissions in the Dispute that it must apply the clustering methodology set out in its Statement of Charges. This is correct. Condition 30(2)(f) of the Licence requires that the charges set out in an offer of connection must reflect the relevant Statement of Charges.
- 9.80 We accept the legal advice that we have received in the GWLG Opinion that the Licence – and the applicable Statement of Charges made under it – reflect the policy of the Utility Regulator, and that we are under a public law duty to follow that policy unless there is a good reason to depart from it.
- 9.81 NIE stated several times in its submissions at the oral hearing that the clustering methodology in the Statement of Charges has been approved by the Utility Regulator. It has also stated in its written submissions that the clustering methodology is the means by which it discharges a range of legal duties, including –

- (a) the duty not to unduly discriminate between connection applicants which exists in EU law and is given effect at domestic level by Condition 15 of the Licence, and
- (b) the duty to develop and maintain an efficient, coordinated and economic system of electricity distribution which is capable of meeting reasonable demand for electricity distribution in the long term¹⁰⁷.

9.82 We agree. The Utility Regulator is fully supportive of clustering and we the Decision-Makers can see no good reason in this case to depart from that policy as set out in the current Statement of Charges.

The Timing Provisions

9.83 The primary issue for us to determine in the application of the Statement of Charges is whether or not SWFL meets the three conditions set out in the Timing Provisions in Appendix 2 to that statement – what SWFL refers to as the 'Identified Exception'.

9.84 We accept the legal advice in the GWLG Opinion that the correct interpretation of the Timing Provisions is that they contain a two stage process. The first stage is to ascertain whether the conditions set out in the Timing Provisions are met in relation to a particular applicant. If so, the second stage is then to consider whether it is unreasonable for that applicant not to be provided with a direct connection in all the circumstances of the case.

9.85 As to the first stage, the GWLG Opinion states, and we accept, that the Timing Provisions contain three conditions, each of which must be met before an applicant who would otherwise be offered a connection via a cluster is considered for a direct connection. Those conditions are that –

- (a) the applicant is 'first in the queue' for connection to that particular cluster, measured by the date of application of those parties whose capabilities are used to determine whether the cluster meets the 56MW threshold for viability,
- (b) a connection via a cluster would result in severe delay – defined as 18 months or more – in comparison with a direct connection, and
- (c) providing a direct connection to that applicant would not result in the cluster falling below the 56MW threshold for viability.

¹⁰⁷ The Response, para 2.4, referring to Article 12(1)(a) of the Electricity Order.

(together the **Conditions**)

9.86 It is our view that SWFL meets the Conditions for the following reasons –

- (a) Following the acceptance by Brockaghboy Wind Farm of an offer of connection to the transmission network, SWFL's is the earliest application for connection of those generators to be connected to the Garvagh cluster.
- (b) The effect of the Timing Provisions is that any period of delay in excess of 18 months may be viewed as severe. NIE has stated that a cluster connection will be available in late 2020. This is over three years from the date of our determination and some six years from the date on which the Cluster Offer was made. By contrast, NIE has stated that an interruptible direct connection to Limavady Main can be made from between 15 – 18 months.

We note that in its submission on the preliminary GWLG opinion, NIE stated that the length of time for a direct connection may in fact be the same as that for a connection via Garvagh cluster. However, we note that this statement referred to a non-interruptible connection and assumed a lack of capacity on the transmission system which would require extensive reinforcement works. In view of the fact that SWFL is seeking an interruptible connection and the issue of capacity at transmission level remains to be resolved, we place no weight on NIE's submission.

It is our finding that the delay that will be suffered by SWFL in waiting for a connection via Garvagh Cluster is 'severe' within the meaning of the Timing Provisions when compared to the length of time within which an interruptible direct connection can be provided.

- (c) Both parties are in agreement that the Garvagh Cluster will proceed even if SWFL is granted a direct connection.

9.87 Even where the Conditions are met, an applicant is not automatically entitled to a direct connection and the second stage is to consider whether it is unreasonable for such a connection to be denied. We consider that, taking all the circumstances of this case into account, SWFL should be granted a direct connection where the capacity exists to facilitate this.

- 9.88 Our finding in this regard is based on the length of the delay that SWFL will suffer waiting for a connection via Garvagh cluster. The Timing Provisions are intended to mitigate the adverse effects of severe delay in the application of the clustering methodology. Those provisions set 18 months as the minimum delay that will be considered severe. It must be the case that as the period which an applicant must wait beyond 18 months increases, the stronger will be the case that an applicant will be granted a direct connection.
- 9.89 We have also considered whether there are any reasons why SWFL should not be granted a direct connection in this case. In this regard we have considered (i) the points made by the Parties as to how we should treat previous determinations of the Utility Regulator, (ii) NIE's points in regard to the impact of granting a direct connection on clustering and the network, and (iii) undue discrimination.
- 9.90 We discuss each of these factors in turn below before turning to the NIRO Scheme and the points made by SWFL in relation to contingency.

Consideration of previous determinations

- 9.91 We note that in previous determinations the Utility Regulator has found a connection via a cluster to be reasonable even where this would lead to delay in comparison with a direct connection. The GWLG Opinion has drawn our attention to the previous determinations in the Brockaghboy and Pigeon Top disputes, together with the arguments of both parties as to why those determinations should or should not be followed in this case.
- 9.92 We accept the advice in the GWLG Opinion that we are subject to an obligation in public law to follow previous determinations of the Utility Regulator to the extent that they are correct and that the facts which gave rise to those determinations mean that a relevant principle can be extrapolated from them.
- 9.93 We have carefully considered whether or not the Utility Regulator's previous determinations in the Brockaghboy and Pigeon Top disputes disclose any principle in relation to delay that we should follow in this case. We have decided that they do not.
- 9.94 Most importantly, we note that the Utility Regulator was not asked to consider the application of the Timing Provisions in either the Brockaghboy dispute or the Pigeon Top dispute. In those disputes the Utility Regulator was asked to find that delay provided a reason to grant a direct connection outside the Statement of Charges – not, as in this case, in the context of applying the Statement of Charges. This meant that delay was being considered against a

different test – whether, on the basis of the delay in those cases, it was manifestly inappropriate to apply the Statement of Charges. That test has a higher threshold than the test of reasonableness that we are required to apply¹⁰⁸.

9.95 The Utility Regulator found that the delay in the Brockaghboy and Pigeon Top disputes did not meet the threshold which would result in the application of the Statement of Charges being manifestly inappropriate. We are not applying the 'manifestly inappropriate' test in this case. Rather we are considering whether it is unreasonable to deny SWFL a direct connection in circumstances in which we have found that it has met the Conditions to be considered for such a connection contained in the Statement of Charges.

9.96 We also note that Brockaghboy would not have met the relevant criteria to be considered for a direct connection as the cluster to which it was to be connected would not have remained viable without it.

9.97 On this basis we view the circumstances in the Dispute to be sufficiently different to those in the Brockaghboy and Pigeon Top disputes such that no relevant principle relating to delay can be drawn from those previous determinations which should be applied in this case.

Impact on clustering and the network

9.98 We also note NIE's submission that granting a direct connection to SWFL will have a detrimental impact on clustering. We do not agree. The clustering methodology contains an exception to the general position that, where the methodology applies, an applicant will be offered a connection by a cluster. The intention of that exception is to recognise that the application of the methodology may lead to delay in individual cases, and to provide a means by which an applicant can be protected from severe delay where it is appropriate to do so.

9.99 The Conditions that must be met for the exception to be considered are such that an applicant will not be considered for a direct connection if granting such a connection would render a cluster unviable. The correct application of the clustering methodology cannot be seen to endanger clustering, particularly where that methodology contains internal mechanisms to ensure that no individual cluster's viability is threatened by its application.

9.100 We do agree with NIE that the conditions in the Timing Provisions will not be met in many cases, and we note that even where they are met there may be circumstances in which it is still inappropriate to grant a direct connection. However, this means that we cannot agree with

¹⁰⁸ DET-524 - Determination of Brockaghboy Wind Farm connection dispute with NIE, para 11.13.

NIE that the granting of a direct connection for SWFL would lead to a 'flood of complaints' that would result in the 'implosion of the clustering policy'¹⁰⁹. The proper application of the Timing Provisions will only lead to a direct connection in a minority of cases.

- 9.101 We are concerned that when asked at the oral hearing to identify circumstances in which such cases might arise, NIE was unable to do so. We note that the GWLG Opinion states that this is problematic in legal terms. This is because where a policy contains an exception, those applying the policy must be able to envisage when that exception might apply, otherwise the policy risks being irrational¹¹⁰.
- 9.102 We also note that this failure to be able to envisage when the Timing Provisions might be applied is unacceptable from a policy perspective. The Utility Regulator approved – and continues to approve – the clustering methodology in successive Statements of Charges on the basis that it contained measures to mitigate the severe delay that might result from its blanket application. We find it concerning that NIE has not applied the Timing Provisions to the specific circumstances of SWFL's case.
- 9.103 We note NIE's submission at the oral hearing that granting a direct connection to SWFL would not be an efficient use of the network. However, the fact that NIE accepts that an interruptible connection can be provided through a transformer management scheme implies that it accepts that there are ways in which additional use can be made of interruptible capacity.
- 9.104 NIE also stated that granting a direct connection to SWFL had the potential to increase costs for consumers. However we have not been provided with sufficient information as to when and how that risk might crystallise to place substantial weight on this submission.

Undue discrimination

- 9.105 Finally, we note NIE's acceptance that the application of the exception in the Timing Provisions will not give rise to any issue of undue discrimination.

The NIRO Scheme

- 9.106 For the reasons above, we find that, having met the Conditions, SWFL should be provided with an interruptible direct connection to Limavady Main.

¹⁰⁹ Oral hearing transcript, p. 57, lines 24 – 27.

¹¹⁰ *R (on the application of Rogers) v Swindon NHS Primary Care Trust and another* [2006] EWCA Civ 392.

9.107 In coming to that conclusion we have not found it necessary to place any weight on SWFL's assertion that it will not be able to avail of the NIRO Scheme. In addition, SWFL states that to avail of the scheme it would require a connection by March 2018. We note that the provision of a direct interruptible connection on an 18 month timescale would not allow SWFL to meet that deadline. Indeed, the connection for which SWFL now contends would not have allowed it to meet that deadline even on the date on which the Complaint was filed.

Contingency

9.108 We note that the majority of the terms to which SWFL objects on the basis of contingency relate to clustering and will therefore be amended where a direct connection is provided¹¹¹. We not therefore need to make any finding as to whether or not these terms are impermissibly contingent in circumstances where capacity exists to facilitate a direct connection.

9.109 We have considered the remaining terms to which SWFL has drawn our attention. In doing so, we have considered the terms which have previously been found by the Utility Regulator to contain an impermissible degree of contingency¹¹².

9.110 Clause 1.2 gives NIE the right to vary or withdraw the offer where, under Article 21 of the Electricity Order, it is exempt from the duty to connect. We do not consider this term to create an impermissible degree of contingency as it simply makes provision for where circumstances change such that NIE is no longer subject to a duty to connect. By definition, such a clause cannot be contrary to that duty.

9.111 In relation to clause 7 we agree with NIE that it is not unreasonable for an agreement to contain provision for forfeiture of a deposit in circumstances where an applicant withdraws from the agreement after NIE has incurred costs under that agreement.

9.112 On this basis, we do not find that those terms that will remain in the Cluster Offer once it is amended to facilitate a direct connection are unreasonable on the basis that they contain an impermissible degree of contingency.

Determination where there is capacity for an interruptible direct connection

9.113 For the above reasons, we determine that where capacity exists to do so on the transmission system –

¹¹¹ Clauses 1.4, 2.1 – 2.3, 3.1 – 3.3, 3.5, 4.1 and 4.3.

¹¹² *Renewable Generation Connection Dispute – Reference DET-522, DET-524 - Determination of Brockaghboy Wind Farm connection dispute with NIE.*

- (a) the terms of the Cluster Offer must be amended to facilitate an interruptible direct connection between the Wind Farm and Limavady Main,
- (b) SWFL should be liable to pay the reasonable costs of any reinforcement work necessary to facilitate that connection, and
- (c) in compliance with Condition 30(2)(e), those terms must specify a date by which the necessary works will be completed.

9.114 SWFL has invited us to specify the reinforcement works necessary to facilitate a direct connection. In our view it would not be appropriate for us to do so. It is for NIE to decide what works will be necessary to facilitate a particular connection.

9.115 However, we do note that NIE has stated that in this case a transformer management scheme would be an appropriate means of providing an interruptible direct connection for SWFL. The GHD Opinion does not demur from that analysis. On the basis that NIE has therefore specified some of the work that it considers necessary to provide an interruptible direct connection, we consider that this should be reflected in the offer – as required by Condition 30(2)(b) and (d) – together with any other work necessary.

Where the necessary capacity does not exist on the transmission network

9.116 Where no capacity exists on the transmission network to facilitate an interruptible direct connection between the Wind Farm and Limavady Main, the reasonableness of the terms of the Cluster Offer must be considered on the basis that a connection via Garvagh cluster is the only means available of connecting the Wind Farm to the distribution network.

9.117 In these circumstances, the second criterion in the Timing Provisions will not be met as there will be no direct connection available against which the delay in a connection via Garvagh cluster can be assessed.

9.118 More broadly, we find that where a direct connection is not possible, the delay in receiving a connection via Garvagh cluster is not unreasonable. Whereas the timeframe for a connection via the cluster is unreasonable when compared against the time within which a direct connection could be made, it is not unreasonable where no alternative means of connection exists. In addition, SWFL has presented no evidence to suggest that the Garvagh cluster can be constructed before late 2020.

- 9.119 Nor do we find that the terms of the Cluster Offer are unreasonable on the basis that they contain an impermissible degree of contingency.
- 9.120 We have set out our views on clauses 2.1 and 7 above.
- 9.121 In relation to the remaining clauses, we note that, by its nature, clustering involves a high degree of contingency. However, this must be set against the benefits that clustering brings in terms of ensuring the efficiency of the distribution network and providing connections for applicants who would not be able to secure a connection without the cluster. Considered in this context, the clauses to which SWFL draws our attention do not contain an impermissible degree of contingency. Indeed, we note that the points made by SWFL in relation to clauses 2.1, 2.2, 3.5 and 4.3 cannot be said to relate to contingency or conditionality at all.
- 9.122 We note that the Utility Regulator has previously found certain terms to be unreasonable by virtue of contingency and we have considered whether there is any principle to be drawn from previous determinations that should be applied in this case.
- 9.123 In the DET-522 dispute, the contingent terms were impermissible primarily because they had the potential to allow NIE to charge the complainant for certain reinforcement works where such charges were not permitted by the Statement of Charges.
- 9.124 In the Brockaghboy dispute, the Utility Regulator refused to include a term which would have made the offer in that case conditional upon a grant of approval for the cluster substation.
- 9.125 We do not consider that the terms found to be impermissible by the Utility Regulator in the DET-522 and Brockaghboy disputes are sufficiently similar to those that SWFL complains about. On this basis we do not find that those determinations disclose any principles that should be applied by us in this case.
- 9.126 For completeness, in circumstances where no capacity exists on the transmission network to facilitate a direct connection, we do not find that the Cluster Offer represents a constructive refusal of access by NIE. NIE would have been entitled to refuse access under Article 21(c) of the Electricity Order. Instead it made an offer that would provide a connection in circumstances where no connection would otherwise be possible.
- 9.127 However, we do find that the Cluster Offer is unreasonable in one respect. We accept the advice provided in the GWLG Opinion that an offer which does not address the matters set out in Condition 30(2) is unlikely to be reasonable. Under Condition 30(2)(e) an offer of

connection must specify the date by which any works shall be completed. The Cluster Offer does not contain such a date.

- 9.128 We find that the specification of a date outside the Cluster Offer is insufficient as the intention of Condition 30(2)(e) is that an applicant will have a right, written onto the face of the offer, to rescind the agreement if the date is not met. Therefore, we do not consider it reasonable that the terms of the Cluster Offer fail to meet the requirements of Condition 30(2)(e).
- 9.129 On the basis that NIE now has some degree of certainty as to when it expects the Garvagh cluster to be completed – we find that it is reasonable for the terms of the Cluster Offer to specify a date for the completion of the works necessary to make the connection.
- 9.130 We do not find that the terms of the Cluster Offer fail to provide the information required by Condition 30(2)(a) or (b) as sections 4 and 5 contain the required detail of the necessary works.
- 9.131 On this basis, we find that the terms of the Cluster Offer are unreasonable in failing to specify a date by which the works necessary to provide a connection shall be completed, but are reasonable in all other respects. We note that NIE has stated that it should be able to provide a connection via the Garvagh cluster by late 2020. We therefore consider it reasonable that the date provided by the amended Cluster Offer should not be later than 31 December 2020.

10 Section Ten – The Order

10.1 SWFL has effectively requested us to make an order under Article 26(1) of the Electricity Order requiring NIE to amend the terms of the Cluster Offer so as to –

- (a) provide SWFL with an interruptible direct connection from Smulgedon Wind Farm to Limavady Main, priced in accordance with the LCTA method in the Statement of Charges,
- (b) specify the works to the distribution system that we determine are required to facilitate that connection, and
- (c) specify the time by which that connection must be delivered by NIE.

10.2 For all of the reasons given above, we order that NIE amends the terms of the connection agreement so that they provide that –

- (a) if SONI confirms in writing to either Party at a date which falls after 21 July 2017 that sufficient capacity exists on the electricity transmission network to facilitate an interruptible direct connection from Smulgedon Wind Farm (16.1 MW) to Limavady Main (33kV), then –
 - (i) NIE shall provide that connection, priced in accordance with the LCTA method in the Statement of Charges,
 - (ii) NIE will undertake the necessary reinforcement works – the reasonable costs of which will be payable by SWFL – including the provision of a transformer management scheme to automatically disconnect the Smulgedon wind farm in the event of 45MVA transformer outage,
 - (iii) those works shall be completed by a date specified in the agreement, such date to not be more than 18 months following the date on which the condition precedent in paragraph (a) is fulfilled, and
 - (iv) a failure to complete those works by that date shall, unless SWFL otherwise agrees, be a material breach of the agreement entitling SWFL to rescind the agreement,

- (b) if SONI confirms in writing to either Party at a date which falls after 21 July 2017 that there is insufficient capacity on the electricity transmission network to facilitate an interruptible direct connection from Smulgedon Wind Farm (16.1 MW) to Limavady Main (33kV), then –
- (i) the works required to facilitate the connection shall be will be completed by a date specified in the agreement, such date to be no later than 31 December 2020, and
 - (ii) a failure to complete the works by that date shall, unless SWFL otherwise agrees, be a material breach of the agreement entitling SWFL to rescind the agreement.

Jon Carlton
Kevin Shiels

Authorised on behalf of the Utility Regulator

Annex 1 – GHD Opinion

Redacted for publication

Annex 2 – GWLG Opinion

Redacted for publication