



Renewable Generation Connection Dispute

Reference DET-522

Determination

23 June 2014

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1 Section One - Introduction

- 1.1 The Northern Ireland Authority for Utility Regulation (referred to hereafter as the **Utility Regulator**¹) received on 15 August 2013, by way of a letter dated 13 August 2013, a formal complaint made by [REDACTED] (the **Complainants**).
- 1.2 The complaint referred to a connection agreement entered into by the Complainants with Northern Ireland Electricity Ltd (NIE) on 24 July 2013 (the **Connection Agreement**). The Connection Agreement relates to the making of a connection between the Complainants' [REDACTED] generating plant at [REDACTED] (the **Premises**) and NIE's electricity distribution system.
- 1.3 The letter stated that the complaint was a dispute referred to the Utility Regulator for determination under Articles 26 and 31A of the Electricity (Northern Ireland) Order 1992 (the **Order**). Paragraph 1(c) of Article 31A confirms that a dispute can only be made under that paragraph if "the subject matter of the complaint does not fall to be dealt with under Article 26..."
- 1.4 The complaint concerns the terms of the Connection Agreement which agreement governs the making of a connection between NIE's distribution system and the Premises. The complaint is therefore a dispute arising under Articles 19 to 25 of the Order which falls to be determined by the Utility Regulator under Article 26 of the Order (the **Dispute**).
- 1.5 The practice and procedure followed in considering and dealing with the Dispute is the Utility Regulator's published policy on the Resolution of Complaints, Disputes and Appeals, dated June 2013 (the **Procedure**). In accordance with this Procedure and with the delegated authority given to me under the Utility Regulator's scheme of delegation, I Tanya Hedley (holding the post of Director within the Utility Regulator) have been appointed to determine the dispute. I do so for and on behalf of the Utility Regulator.
- 1.6 In considering the matter I have received general and technical input and advice from the Utility Regulator's consultants and legal input and advice from the Utility Regulator's lawyers.
- 1.7 This document sets out my determination of the Dispute and includes the order I make in determining the Dispute.

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

1.8 In making my determination I have:

- (a) Been briefed by the investigating team (a team of Utility Regulator staff) on the background to and facts of the Dispute and the issues arising, and have received a report prepared by them.
- (b) Received copies of all the documents and correspondence relating to the Dispute.
- (c) Received and reviewed each Party's response to my draft determination as sent to both Parties on 8 May 2014 (the **Draft Determination**).

1.9 The documents and correspondence referred to in paragraph 1.8 are listed in Annex 1 and, unless confidential to either Party, are included in the bundle enclosed with this draft determination (the **Bundle**).

1.10 The document adopts the following structure:

- (a) Introduction (at Section 1),
- (b) The Parties (at Section 2),
- (c) Factual background (at Section 3),
- (d) The applicable legal framework (at Section 4),
- (e) Issue for Determination (at Sections 5),
- (f) Views of the Complainants (at Section 6),
- (g) Views of NIE (at Section 7),
- (h) The Determination (at Section 8),
- (i) Concluding Observations (at Section 9),
- (j) The Order (at Section 10).

2 Section Two - The Parties

2.1 The following summary reflects the status of the Parties.

The Complainants [REDACTED]

2.2 The Complainants are developers of renewable generation projects. They are developing a [REDACTED] generating station at [REDACTED].

NIE

2.3 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.

2.4 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 Article 10(1)(b) and 10(1)(bb) respectively.

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

3 Section Three - Factual Background

3.1 The following summary of the factual background is derived from the information provided to the Utility Regulator by the Parties.

Factual Background

3.2 On 21 January 2013, the Complainants made an application to NIE for the Premises to be connected to NIE's distribution system. NIE acknowledged the application on the same date and allocated it the Job Number [REDACTED].

3.3 Following an exchange of correspondence between the Parties, the provision of information from the Complainants to NIE, and a site visit by NIE of the Premises, by way of a letter dated 2 May 2013 NIE sent to the Complainants its connection offer as set out in a letter dated 29 April 2013 (the '**connection offer letter**').

3.4 The connection offer letter confirmed that the offer was open for acceptance in accordance with its terms for 90 days from the date of the offer i.e. until 5pm on 28 July 2013.

3.5 With regard to the particular issue which the Utility Regulator is being requested to determine (as explained further in section 5), the connection offer letter and/or the accompanying letter dated 2 May 2013 state that:

- (a) NIE has received a very high level of applications for connection of small scale generation which has resulted in network capacity limits being reached in certain geographical areas, including the location of the proposed connection point for the Premises;
- (b) To address the matter NIE has identified that significant additional reinforcement work was required on the distribution network;
- (c) The cost of the additional reinforcement work has not been included in the connection offer;
- (d) NIE is in contact with the Utility Regulator with a view to seeking the Utility Regulator's agreement to the necessary reinforcement work²; and
- (e) The offer of a connection is conditional on the Utility Regulator's agreement being provided and the necessary reinforcement works being undertaken.

3.6 Having received the connection offer, there continued to be an exchange of information and correspondence between the Parties and also with other third parties.

² NIE had indicated in a letter to the Utility Regulator (dated 29 March 2013) that additional network upgrades were required but had not at this stage requested any additional funding.

- 3.7 This correspondence included a letter from NIE to the Complainants which provides that should the connection offer be accepted by the Complainants, the resulting contract may be terminated by the Complainants on 30 days' written notice if NIE's statement of charges (as existed on that date) is amended to permit NIE to recover all or any of the costs of the "necessary 33kV reinforcement works" from the Complainants and NIE seeks to vary the connection offer to recover such costs.
- 3.8 Annex 1 provides the chronology of events and details of the correspondence exchanged between the Parties and/or other third parties in respect of the matter.
- 3.9 The connection offer was accepted by the Complainants on 24 July 2013. This acceptance resulted in the Connection Agreement which included the terms set out in the connection offer.
- 3.10 On 13 August 2013 the Complainants referred the Dispute to the Utility Regulator. As noted earlier, given that the subject matter is the terms of the Connection Agreement, the matter falls to be determined by the Utility Regulator under Article 26 of the Order.

4 Section Four – The Applicable Legal Framework

4.1 The following is a summary of the applicable law.

4.2 As part of my consideration of the Dispute I have read the appropriate parts of the relevant legislation and where appropriate taken legal advice on the application and interpretation of the relevant legislation.

The Electricity Order

4.3 NIE is, by virtue of being licensed under Article 10(1)(bb) of the Order, an electricity distributor.

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

4.5 In particular, they establish –

- (a) a duty to connect on request (Article 19(1)),
- (b) a procedure for applicants to require a connection (Article 20),
- (c) a number of exceptions from the duty to connect (Article 21),
- (d) a right for an electricity distributor to recover the reasonable costs of making a connection to such extent as is reasonable in all the circumstances (Article 22),
- (e) a right for an electricity distributor to require reasonable security for payment (Article 23), and
- (f) a right for an electricity distributor to impose certain additional terms of connection (Article 24).

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

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

4.8 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 be accompanied by such information as is necessary or expedient to allow a determination to be made in relation to the dispute; and

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

and subject to paragraph (1A) the practice and procedure to be followed in connection with any such determination shall be such as the Authority may consider appropriate.

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

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

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

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

(2) No dispute arising under Articles 19 to 25 which relates to the making of a connection between any premises and a distribution system may be referred to the Authority after the end of the period of 12 months beginning with the time when the connection is made.

.....

(7) An order under this Article –

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

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

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

The Third Internal Markets Directive

4.9 The Utility Regulator also has a duty to determine distribution connection charging (and other complaints in accordance with Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (the **Directive**).

4.10 In this regard –

(a) Article 37(11) of the Directive provides –

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

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

The Renewables Energy Directive

4.11 Also of some relevance is Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and subsequently repealing Directives 2001/77/EC and 2003/30/EC (the **Renewables Directive**).

4.12 Paragraphs 1, 2 and 5 of Article 16 of the Renewables Directive are of particular note. These read 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, Member 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.

The Licence

- 4.13 NIE's electricity distribution licence also places certain obligations on NIE with regard to the making of connections offers and sets out certain functions of the Authority with regard to distribution disputes. A copy of the current licence can be found at http://www.uregni.gov.uk/uploads/publications/NIE_Distribution_Licence_-_IME3_Modifications_-_effective_28_March_2014.pdf

4.14 In brief –

- (a) 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 of person or persons.
- (b) Among other things, Condition 30 requires NIE:
 - (i) on application made by any person to offer to enter into an agreement for connection to the distribution system;
 - (ii) to ensure that the offer makes detailed provision regarding to certain specified matters including matter specified in paragraph 2 of the condition, including for example:
 - (A) the connection charges to be paid by the applicant, which must (unless manifestly inappropriate) be presented so that they are referable to the connection charging statement prepared in accordance with Condition 32 and are set in conformity with the requirements of the specified paragraphs of that Condition 32;
 - (B) the date by which any works required so as to permit access to their distribution system shall be completed;
 - (iii) to offer terms for connection (or modification to an existing connection) as soon as practicable and, except where the Authority consents to a longer period, in any event not more than three months after receipt by NIE of a connection application containing all the information that NIE may require for the purpose of preparing the connection offer.
- (c) Condition 32 requires NIE to:
 - (i) prepare a statement approved by the Authority setting out the basis upon which charges will be made for connection to their distribution system;
 - (ii) ensure that, in setting its charges for connection, it shall not restrict, distort or prevent competition in the generation, transmission, distribution or supply of electricity; and
 - (iii) set connection charges at a level which will enable NIE to recover the appropriate proportion of the costs directly or indirectly incurred in carrying out any works, the extension or reinforcement of their 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 a reasonable rate of return on the capital represented by such costs.

(d) Condition 31 provides that where NIE has failed to enter into an agreement with a person entitled or claiming to be entitled pursuant to a request under Condition 30, the Authority may settle any terms of the agreement in dispute.

4.15 I note that in determining disputes, the principal objective and general duties of the Authority under Article 12 of the Energy (Northern Ireland) Order 2003 (the **Energy Order**) do not apply (see Article 13(2) of the Energy Order).

4.16 Articles 19 to 26 of the Order, Articles 12 and 13 of the Energy Order and Conditions 30-32 of the Licence are enclosed with this determination.

5 Section Five – Issue for Determination

5.1 The issue to be determined in respect of this dispute is whether the Connection Agreement can include the Conditional Terms (as set out at paragraph 6.8 of this determination).

Preparatory Work - Technical Review

5.2 In preparation for considering the case and to ensure that it was fully appraised of the technical matters raised by NIE, the Utility Regulator appointed Sinclair Knight Merz (**SKM**) to undertake a review and technical assessment of the connection.

5.3 The purpose for this technical assessment was essentially to enable the Utility Regulator to (i) consider the relevance (if any) of technical issues raised by NIE with regard to the need for additional reinforcement works, and (ii) understand further the demarcation between the charges set out in the Connection Agreement and their correlation to works to be undertaken to the distribution system for the purposes of the connection.

5.4 Accordingly SKM were asked to:

- (a) review whether the information provided by NIE supported NIE's view that it [NIE] needed to undertake the additional 'non-chargeable' reinforcement works (i.e. reinforcement works the costs of which it could not, in accordance with the applicable connection charging statement, recover direct from the applicant) in order to allow the Premises to connect to NIE's distribution system. The review was to consider how NIE applied its planning standards and the order in which it processed its connection applications;
- (b) where they determined that the information provided by NIE did not support NIE's views, either identify if any other information was likely to exist that would resolve any doubts as to the validity of NIE's views, or provide a statement detailing the errors in NIE's assumptions, calculations and application of its planning standards;
- (c) review whether the investments NIE proposed to make would allow the Complainants' generating plant to operate without restriction; and
- (d) identify any other technical issues which they would consider relevant to the subject matter of reinforcement works.

5.5 SKM's report (entitled the **Technical Note** and dated 26 September 2013) was sent to the Parties on 23 January 2014 for the purposes of enabling them to comment on its contents and findings.

5.6 The Parties' responses to the Technical Note were relayed to SKM. In considering the Parties' views, SKM sought further information from the Utility Regulator including a letter sent by NIE

to the Utility Regulator dated 29 March 2013 letter with regard to 'generation connections'. This letter had informed the Utility Regulator as follows –

"We have taken further advice and concluded that the only way forward, given that network capacity limits are being reached, is to issue conditional offers to customers wishing to connect to those parts of the distribution network where there is no further capacity available. The conditional element in the offers relates to the need for NIE to obtain regulatory agreement for the necessary investment before proceeding with any work".

- 5.7 Having received the further information from the Utility Regulator, SKM confirmed in a letter to the UR dated 7 April 2014 that the main conclusion in its Technical Note that the *"Complainants were disadvantaged by the manner in which NIE processed the Complainants connection application"* is no longer valid.
- 5.8 It therefore withdrew its Technical Note and confirmed that its review of the reverse power flow issues on the transformers at [REDACTED] confirms that the connection solution proposed by NIE is the most appropriate technical solution in this specific case.
- 5.9 A copy of SKM's report and SKM's response to the issues raised by NIE on 5 February 2014 is included as Annex A.
- 5.10 I should confirm that the above information, which sets out the background to and receipt of the findings of the technical review, is included for completeness only.
- 5.11 SKM were not asked to and did not consider any matter relating to the inclusion of the Conditional Terms which is the subject of the Dispute that I have determined.

6 Section Six – Views of the Complainants

6.1 The views of the Complainants are set out in their:

- (a) letter of 13 August 2013 (the '**complaint letter**');
- (b) letter to the Utility Regulator dated 5 September 2013;
- (c) e-mail to the Utility Regulator dated 16 September 2013;
- (d) letter to the Utility Regulator dated 28 January 2014; and
- (e) response to the Draft Determination (as sent to both parties on 8 May 2014).

6.2 I have read all of the above documents in full and have had full regard to all of these submissions. The following is a summary of the key elements of those submissions.

6.3 As noted earlier, on 24 July 2013 the Complainants accepted the connection offer made by NIE on 29 April 2013. This acceptance resulted in the Connection Agreement.

6.4 The Complainants' principal argument (and the only matter which is effectively in dispute between the Parties and therefore on which I can make a determination under Article 26 of the Order) is that the terms of the Connection Agreement provide that the making of the connection is (and consequently the connection charges are) conditional upon NIE getting agreement from the Utility Regulator in respect of the costs of the reinforcement works.

6.5 This is clear from the complaint letter which among other things states –

"The complaint refers to a conditional offer received by us for connection..."

"NIE are acting contrary to the current regulatory rules by attempting to amend terms and include the cost of additional network upgrade work in our offer of connection."

"We strongly believe that the licence terms applicable at the date of our application should apply to our quotation and should not be amended."

6.6 The Complainants consider that these terms of the Connection Agreement should be removed (see final paragraph of the complaint letter).

6.7 This is the dispute between them and NIE which has been referred to the Utility Regulator for determination. The decision for the Utility Regulator is therefore whether the Connection Agreement can include such terms or whether they should be removed.

6.8 The precise terms in question are those which are under the heading Conditional Offer and Further Important Conditions in the connection offer dated 29 April 2013 (the **Conditional Terms**). The Conditional Terms are as follows:

Conditional Offer

"This connection offer reflects the work required to provide for the export of your proposed generation onto the NIE 11kV distribution network. However due to the high level of small scale generation in this geographical area, the capacity of the associated NIE 33kV distribution network cannot currently safely accommodate your proposed level of generation export.

As a result, significant reinforcement works, in addition to the works detailed in this offer, are required in order to enable your proposed generator to export power onto the distribution system. We are in contact with the Utility Regulator with a view to seeking its agreement to the necessary reinforcement works and therefore your offer of connection is conditional on that agreement being provided and the necessary reinforcement works being undertaken.

At this point we are not certain as to whether these reinforcement works will be agreed to by the Utility Regulator but it would only be once such works had been agreed that NIE could provide a defined timeline for the works. We will therefore need to reconsider these terms, whether then accepted by you or not, once the position of the Utility Regulator becomes known, and then the terms may be subject to amendment or withdrawal.

This offer is open for acceptance in accordance with its terms until 90 days have expired from the date of this offer. Having regard to the conditionality of this offer, we are willing to waive the usual requirement that you pay 20% of the Connection Charge (as detailed below) upon your acceptance of this offer, and instead the payment of 20% of the Connection Charge is only payable by you upon us notifying you that the Utility Regulator has confirmed its agreement to the necessary reinforcement works.

If you do decide to accept this offer, then if we do not confirm to you the position of the Utility Regulator in relation to the agreement of the reinforcement works within 12 months from the date of this offer, you shall after that period be entitled to withdraw your acceptance of this offer, and the agreement between us shall be terminated.

Further Important Conditions

If the offer is accepted within the period stated above it is then subject to the generator installation being connected and the Schedule 1A protection tests and certification being completed within twelve months of NIE notifying you that the Utility Regulator has confirmed its agreement of the necessary reinforcement works (or such later date which we notify you that the reinforcement works are completed).

6.9 The Complainants' views in this respect can be summarised as follows -

- (a) NIE is acting contrary to the current regulatory rules by attempting to amend terms of the Connection Agreement and include the cost of any 33kV reinforcement works (see paragraph number 3 of the complaint letter).
- (b) The connection charges to which the Complainants should be liable should be based

on the connection charging statement applicable at the time of its connection application and they should not therefore be charged for any 33kV reinforcement works (see the second and third paragraphs under paragraph number 3 and the first paragraph under the heading conclusion, of the complaint letter).

- (c) The connection charging statement that applies to the Connection Agreement is the charging statement dated 1 October 2012 (the **Charging Statement**). The Charging Statement does not permit NIE to recover charges for 33kV reinforcement works from the Complainants. With regard to reinforcement works the costs that NIE can recover from the Complainants are those costs relating to reinforcement of the distribution system at the connection voltage level and/or one voltage level above the connection voltage level (see the second and third paragraphs under paragraph number 3).
- (d) NIE has failed to demonstrate any technical need for the Connection Agreement to include the Conditional Terms (see paragraph number 5 of the complaint letter).
- (e) NIE has stalled the project since the end of April 2013 (see paragraph number 6 of the complaint letter).

6.10 The Complainants also provide letters of support in respect of the Dispute from the following third parties (i) [REDACTED], (ii) [REDACTED], and (iii) the [REDACTED].

6.11 In responding to the Draft Determination, the Complainants essentially:

- (a) Confirmed that they welcomed the Draft Determination;
- (b) Provided an update with regard to timings for the connection; and
- (c) Opined that the costs of the Utility Regulator should be attributed to NIE as the submission of the complaint was the only way they could be certain of obtaining a grid connection which was compliant with the October 2012 Charging Statement.

6.12 I note that the Complainants also raise a number of other issues in the form of complaints that they have against NIE, particularly with regard to the processes and procedures followed by NIE in respect of the Complainants' application for a connection.

6.13 These areas of complaint can be summarised as –

- (a) The process adopted and followed by NIE in respect of the making of a connection offer not being sufficiently transparent as NIE had not given any prior indication to the Complainants that the making of the connection may be subject to certain conditions.
- (b) NIE failing to comply with its licence obligation to provide a connection offer within three months.

- (c) A lack of clarity and transparency on the part of NIE in relation to (i) possible costs which may be applied for reinforcement works, and (ii) information provided by NIE with regard to grid capacity in the [REDACTED] geographical area.
- (d) NIE not acting in a reasonable or acceptable manner by stalling the connection process.

6.14 These are matters which fall outside of the scope of Article 26 of the Order. This is because they are not matters which are in dispute between NIE and the Complainants but essentially complaints in respect of whether or not NIE is or has been in breach of any of its statutory or licence obligations.

6.15 They are not therefore matters for my formal determination under Article 26. To assist, however, I provide some initial views on these matters in Section Nine – Concluding Observations.

7 Section Seven – Views of NIE

7.1 The views of NIE are set out in its:

- (a) response to the Complainants' letter of 13 August 2013, as set out in a letter to the Utility Regulator dated 4 September 2013 and the supporting documents enclosed with that letter;
- (b) letters to the Utility Regulator dated 11 September 2013, 13 September 2013, 23 September 2013, 24 September 2013, and 5 February 2014; and
- (c) response to the Draft Determination (as sent to both parties on 8 May 2014).

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

7.3 The following is a summary of the key elements in NIE's submissions -

- (a) 33kV reinforcement works are required at or in respect of the [REDACTED] primary substation as a direct result of the increase in connected and committed small scale generation within the area served by that primary substation.
- (b) The 33kV reinforcement works required at or in respect of the [REDACTED] primary substation are –
 - (i) at the lower end of the cost scale and are associated with enabling reverse power flow at the substation (and the Complainants were informed that this was the case);
 - (ii) necessary in order for NIE to meet its statutory duty under Article 12 of the Order (i.e. to develop and maintain an efficient, coordinated and economical system of electricity distribution). This is because were NIE to (i) make a connection offer to, and/or enter into a connection agreement, with the Complainants which was not conditional upon the reinforcement works being undertaken (and thereby NIE being certain of being able to recover the costs of such reinforcement works), the making of the connection requested by the Complainants would result in a thermal overload of system (i.e. as a consequence of the connection required by the Complainants and by other applicants). In doing so NIE would be in breach of its Article 12 duty.
- (c) NIE addressed the Complainants' concerns in respect of their potential liability (in terms of increased costs) as the Connection Agreement provides for the Complainants to terminate the contract should NIE propose a variation in respect of increased costs resulting from reinforcement works.

7.4 In responding to SKM's Technical Note, NIE set out a number of concerns about the Technical Note and the manner in which it was prepared. In particular it responded to say that in its view the Technical Note contained:

- (a) Fundamental inaccuracies and should not be relied on by the Utility Regulator's decision makers in determining the dispute.
- (b) An incomplete analysis regarding the delay in issuing the connection offer.
- (c) Irrelevant speculation by SKM on alternative capacity allocation methodologies and possible alternative outcomes.
- (d) Incorrect conclusions in relation to the imposition of conditionality capacity allocation.
- (e) Recommendations that were not based on the facts present when the connection offer was issued.

7.5 NIE's submissions on the Draft Determination can be summarised as follows -

- (a) The Conditional Terms were removed from the Connection Agreement following funding approval from the Utility Regulator in October 2013 and the connection has been energised.³
- (b) The need for an Order, as per the Draft Order, has therefore been overtaken by events since the complaint was raised in August 2013.
- (c) Notwithstanding the above updated position, NIE comments on the Draft Determination since connection offers to other small scale generators contain 'conditional terms'⁴ which may become the subject of future determinations.
- (d) The Utility Regulator gives insufficient weight to SKM's technical assessment that 33kV reinforcement is required and that NIE's solution is the most appropriate one.
- (e) The UR states that NIE's duty to develop and maintain an efficient, co-ordinated and economical system of electricity distribution is not subject to regulatory approval of the recovery of costs. However, the UR does have a duty to ensure that NIE can finance its activities.
- (f) The Connection Agreement [as originally entered into] complied with the Charging

³ This is in contrast to the Complainants' response to the Draft Determination which said that as of the date of their response (21 May 2014) the generator had not been connected although a transformer was installed on 20 May 2014. However, the question of whether or not a connection has been made is not relevant to the Dispute and therefore not a matter on which I comment further.

⁴ NIE's response uses the term as it is used in the Draft Determination but that term refers specifically to the 'conditional terms' included (at least initially) in the connection agreement entered into with NIE by the Complainants. For present purposes it is assumed that the offers to which NIE refers contain similar condition terms.

Statement given that (i) it did not include charges for the 33kV reinforcement, and (ii) it could be terminated by the Complainants in the event that the Charging Statement was subsequently amended to permit NIE to recover from new connectees the costs of 33kV reinforcement.

- (g) The Conditional Terms do not have the effect of permitting, or providing for, NIE to charge for 33kV reinforcement as any proposed changes to the charging statement to recover such charges would certainly require the UR's approval.
- (h) The UR gives insufficient weight to SKM's technical assessment that 33kV reinforcement is required and that NIE's solution is the most appropriate one.
- (i) The Draft Determination would result in unworkable arrangements for the connection of small scale generators if it has wider application.

8 Section Eight – The Determination

- 8.1 As noted in Section Five, the issue to be determined is whether the terms of the Connection Agreement can include the Conditional Terms.
- 8.2 Under Article 19 of the Order, NIE has a duty to make a connection when required to do so by the owner or occupier of premises. This duty is subject to certain exceptions but is otherwise to be performed subject to such terms as are agreed under Article 20 of the Order.
- 8.3 Article 20 provides, among other things, that NIE may specify any other terms which the person requiring the connection will be required to accept under Article 24. For the purposes of this dispute I do not need to consider the provisions of Articles 24(a) or (c). Article 24(b) provides that NIE may require the person requiring a connection to accept “any terms which it is reasonable in all the circumstances for that person to be required to accept”.
- 8.4 The issue for determination therefore is whether the Conditional Terms are reasonable in all the circumstances for the Complainants to be required to accept.
- 8.5 In response to NIE's submissions on the Draft Determination, I should clarify that the Complainants did not request that I determine whether or not there was or is a technical need for 33kV reinforcement arising as a result of the Complainants' application for a connection or whether NIE's technical solution was the most appropriate solution.
- 8.6 It is correct, as noted in Section Five, that the Utility Regulator appointed SKM to undertake a review and technical assessment of the connection and that SKM reported that the technical solution proposed by NIE is the most appropriate technical solution in this specific case. SKM were appointed prior to my appointment as the decision maker and were appointed just in case the issues in the case (and accordingly any determination) were to be informed by whether or not there was a technical need for 33kV reinforcement works. The technical review was therefore essentially preparatory work in case it was required.
- 8.7 The question for me to determine is not whether 33kV reinforcement works were or are required, it is whether the Conditional Terms are reasonable in all the circumstances for the Complainants to be required to accept. This is clear from the concluding paragraphs in the complaint letter which state that the Complainants do not consider that the Conditional Terms should form part of the Connection Agreement and ask that such Conditional Terms are removed.
- 8.8 NIE's statutory duties with regard to the making of connections are confirmed and expanded upon by Condition 30 of the Licence. Condition 30 requires NIE to make a connection offer which makes detailed provision regarding the works required in order for the connection to be made and the connection charges to be paid by the applicant.

- 8.9 The charges are, unless manifestly inappropriate, to be presented in such a way so that they are referable to the charging statement prepared in accordance with paragraph 1 of Condition 32 of the Licence, and to be set in conformity with certain specified provisions of Condition 32 that are to be included in the charging statement.
- 8.10 The charging statement referred to in Condition 30 must be a charging statement approved by the Utility Regulator. The approved charging statement applicable at all material times in respect of the Dispute is the Charging Statement (i.e. the statement dated October 2012).
- 8.11 Given the inclusion of the Conditional Terms, the Connection Agreement does not:
- (a) make detailed provision in respect of charges to be paid by the Complainants; and
 - (b) set charges which are in conformity with the Charging Statement.
- 8.12 The Charging Statement did not permit, or provide for, NIE to charge for reinforcement works that may be required at the 33kV voltage level. However, the effect of the Conditional Terms is that the charges set out in the Connection Agreement could be amended by NIE such that the Complainants could be required to pay for some or all of the reinforcement works. These terms, which relate to charges, are not referable to the Charging Statement.
- 8.13 Having taken into account NIE's submissions on the Draft Determination (as summarised in paragraph 7.5 above) it is relevant for me to explain that although the Connection Agreement does not specifically require the Complainants to pay for the reinforcement works it does, by virtue of the Conditional Terms, have the effect of permitting or providing for NIE to charge for any such reinforcement works.
- 8.14 That this is the case is evident from the provision which states that "the terms may be subject to amendment or withdrawal". There is nothing within this statement, or indeed any other part of the Conditional Terms, which exclude charges from within its scope. Furthermore NIE's letter to the Complainants of 23 July 2013, which updated the connection offer, confirmed that the Complainant could terminate the resulting Connection Agreement in the event that NIE seeks to vary the agreement to recover all or any of the costs of the necessary 33kV reinforcement works from the Complainants.
- 8.15 It is not reasonable in all the circumstances for the Complainants to be required to accept terms which do not reflect the Charging Statement.
- 8.16 Furthermore, any person who is offered terms for and then enters into a legally-binding connection agreement is likely to consider that it is accordingly entitled to a connection, with such entitlement subject only to the fulfilment of reasonably achievable conditions precedent. That person may well take steps in reliance on its presumed entitlement.

8.17 However, where a connection agreement has conditionality provisions in the nature of the Conditional Terms, there is not in practice any such entitlement. The nature and degree of the conditionality to which the Connection Agreement was subject as a result of the Condition Terms means that the Complainants were not in fact, by virtue of being a counterparty to that Agreement, entitled to a connection in the manner that they may reasonably have expected.

8.18 It is therefore potentially misleading, and in my view unreasonable, for NIE to be entering into connection agreements which do not in fact give rise to the entitlement to a connection which they appear on their face to create, as a result of containing such conditionality provisions.

Determination

8.19 My determination is that in the circumstances of the case it is not reasonable for NIE to require the Complainants to accept the Conditional Terms. Accordingly the Connection Agreement cannot include the Conditional Terms.

9 Section Nine – Concluding Observations

- 9.1 As noted earlier, in addition to disputing the terms of the Connection Agreement, the Complainants also raised a number of matters which are not the subject of a dispute between the Parties and therefore are outside the scope of the Authority's functions under Article 26 of the Order.
- 9.2 These matters are not matters for my formal determination but having had the opportunity to consider them alongside the Dispute I consider it helpful to make some observations on these matters which I hope will be of assistance to the Parties and the Utility Regulator.
- 9.3 This Section Nine is not therefore part of the formal determination.
- 9.4 Many of the other issues raised by the Complainants refer to potential breaches by NIE of its statutory and/or licence obligations. The investigation team has not investigated and I have not considered the question of whether or not NIE was or is in breach of any statutory or licence obligation. These are matters relating to the Utility Regulator's enforcement functions and the Utility Regulator will consider separately whether it is necessary or appropriate for it to investigate the complaints made and/or consider exercising its enforcement functions.
- 9.5 However, the evidence submitted by the Parties indicates that NIE's processes and procedures for handling and managing connection applications and making connection offers could be improved.
- 9.6 Having considered the evidence presented, I would strongly encourage NIE to -
- (a) Provide clear and sufficient information to connection applicants and consider how best to make connection applicants aware at the earliest opportunity of any relevant matters that may affect the timing for NIE to make a connection offer and the applicant's consideration of the connection offer.
 - (b) Conduct a detailed review of its processes with regards to the time within which it makes connections offer and on queue timeframe allocation.
 - (c) Review its process in the issuing of connection offers and provide a preliminary screening process. This would ensure that such other information in relation to the required connection as NIE may reasonably request is notified to the applicant at the earliest opportunity and assist NIE to identify any connection it does not consider it has a duty to make in order to reduce the risk for applicants incurring significant costs.
- 9.7 I also note that similar observations have been made in respect of previous determinations and would therefore encourage NIE to undertake the suggested reviews at the earliest opportunity.

10 Section Ten - The Order

10.1 The Complainants effectively asked me to make an order under Article 26(1) of the Order to the effect that the Connection Agreement should not contain the Conditional Terms.

10.2 My Draft Determination included a Draft Order for NIE to:

- (a) amend the Connection Agreement such that it does not include the Conditional Terms;
- (b) prepare an amended connection agreement which complies with paragraph (a) and send it to the Complainants within 14 days of the date of the final determination; and
- (c) enter into the amended connection agreement, which shall substitute the Connection Agreement, within 21 days of the date of the final determination.

10.3 However, in submitting its representations to the Draft Determination, NIE has confirmed that the Connection Agreement has already been amended such that it no longer includes the Conditional Terms.

10.4 Accordingly although my determination of the Dispute is in accordance with my Draft Determination, it is not now necessary or appropriate for me to make an Order along the lines of the Draft Order included in the Draft Determination.

10.5 Nonetheless the Complainants have not withdrawn their referral to the Utility Regulator for a determination. I am therefore required to determine the Dispute and to do so by way of making an order.

10.6 Accordingly in light of the above and for the reasons given in Section Eight, I order that unless the Connection Agreement entered into between NIE and the Complainants is already amended to the effect that it no longer includes the Conditional Terms, NIE shall amend the Connection Agreement to that effect (i.e. it does not include the Conditional Terms) and ensure that any such amendment required is effective from no later than 7 days of this determination.

Costs

10.7 The Procedures refers to the possibility of a costs order and therefore the Parties have been on notice to this effect. In addition I invited submissions from the Parties as to whether I should make any incidental, supplemental or consequential provision, including provision requiring either party to pay the costs or expenses incurred by the Utility Regulator in making the order.

10.8 The Complainants submitted that any expenses incurred by the Utility Regulation should be

attributed to NIE. NIE made no submissions in response to the invitation.

- 10.9 I have considered the Complainants' submissions and have had regard to the matters referred to in Article 26(8) of the Electricity Order. In this particular case I exercise my discretion not to make a costs order. However, this should not be regarded as setting any precedent as to the future.
- 10.10 The Utility Regulator expressly reserves the right to order the payment of costs in any other dispute and will consider each case on its own merits and circumstances.

Tanya Hedley

Authorised on behalf of the Utility Regulator

Annex 1

Date	From	To	Document
May 2011	NIE		NIE Grid connection information pack May 2011
01/10/2012	NIE		Statement of charges for Connection to the NIE Distribution System effective 1/10/12
21/01/2013	NIE	██████████	Connection application acknowledgement
29/03/2013	NIE	Utility Regulator	Generation connections
15/04/2013	Utility Regulator	NIE	Response to NIE's generation connection letter dated 29/03/2013
23/04/2013	NIE	Utility Regulator	Generation Connections – 33kV matters and Industry Workshop
10/04/2013	██████████	NIE	Correspondence re proposed connection
10/04/2013	██████████	██████████	Confirmation of correspondence with NIE
17/04/2013	NIE	██████████	Queries regarding proposed scheme
17/04/2013	NIE	██████████	Correspondence re proposed connection
25/04/2013			Site visit carried out by NIE planner
25/04/2013	██████████	██████████	Copy of email from NIE to ██████████
29/04/2013	NIE	██████████	Connection offer
29/04/2013	NIE	██████████	Confirmation on completion of connection offer

02/05/2013	NIE	██████████	Covering letter for connection offer
02/05/2013	NIE	██████████	Confirmation of covering letter and connection offer
14/06/2013	██████████ ██████	NIE	Correspondence re proposed connection
28/06/2013	██████████	NIE	Request for information regarding conditional offers
01/07/2013	NIE	██████████ ██████	Correspondence re proposed connection
02/07/2013	██████████	NIE	Query regarding reinforcement
03/07/2013	NIE	██████████	Confirmation of LV and 11kV responsibilities
10/07/2013	NIE	██████████	Queries on conditional offers and costs
11/07/2013	██████████	██████████	Queries on conditional offers and costs
23/07/2013	NIE	██████████	Letter regarding right to terminate
23/07/2013	NIE	██████████	Confirmation of letter regarding right to terminate
24/07/2013	██████████	NIE	Submission of signed documents
13/08/2013	██████████	Utility Regulator	Formal complaint to the Utility Regulator
19/08/2013	Utility Regulator	██████████	Formal acknowledgement of complaint
19/08/2013	Utility Regulator	NIE	Formal acknowledgement of complaint

19/08/2013	Utility Regulator	NIE	Information request
02/09/2013	NIE	Utility Regulator	NIE legal opinion on connection offer from CMS Cameron McKenna (confidential)*
04/09/2013	██████████ ██████████	Utility Regulator	Letter in support of claim
04/09/2013	NIE	Utility Regulator	Information request response
04/09/2013	NIE	Utility Regulator	Additional information in relation to the complaint (confidential)
04/09/2013	NIE	Utility Regulator	Applications and Connection Offers since 1st January 2013 at ██████████ substation (confidential)
05/09/2013	██████████	Utility Regulator	Additional information in relation to the complaint
11/09/2013	Utility Regulator	██████████	Confirmation regarding Point 1 of complaint
11/09/2013	Utility Regulator	NIE	Further information request
13/09/2013	Utility Regulator	NIE	Email information request
16/09/13	██████████	Utility Regulator	Confirmation email in response to letter dated 11/09/2013
23/09/2013	NIE	Utility Regulator	Information request response to letter dated 11/09/2013
23/09/2013	NIE	Utility Regulator	Information request response to email dated 13/09/2013
23/09/2013	Utility Regulator	NIE	Email information request

24/09/2013	NIE	Utility Regulator	Information request response to email dated 13/09/2013 (confidential)
09/10/2013	Utility Regulator	██████████	Notification of revised timetable
09/10/2013	Utility Regulator	NIE	Notification of revised timetable
20/12/2013	Utility Regulator	██████████	Letter seeking agreement to extend timetable
23/01/2014	Utility Regulator	██████████	Email requesting comments on technical assessment
23/01/2014	Utility Regulator	NIE	Email requesting comments on technical assessment
28/01/2014	██████████	Utility Regulator	Response on technical assessment
05/02/2014	NIE	Utility Regulator	Response on technical assessment
08/05/2014	Utility Regulator	NIE/██████████	Draft Determination
30/05/2014	NIE	Utility Regulator	Response on Draft Determination
21/05/2014	██████████	Utility Regulator	Response on Draft Determination