4 Section Four – Applicable Law

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

4.2 As part of our consideration of the Complaint we have read the appropriate parts of the relevant legislation included in the Bundle (Volume A, Tabs 1-3).

Transmission and distribution

4.3 Article 3 of the Electricity Order establishes a legal definition of transmission and distribution (Volume A, Tab 2).

4.4 Specifically, it defines –

(i) 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*',

(ii) a transmission system as '*a system which…consists (wholly or mainly) of high voltage lines and electrical plant…*', and

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

4.5 The Quinn Group connections are low voltage (i.e. connected at the 33kV side of the 110/33kV transformer) and supply is metered at 33kV. They are therefore distribution connections.

Distribution connections and 'special connection agreements'

4.6 Articles 19 to 24 of the Electricity Order make provision in respect of distribution connections (Volume A, Tab 2).

4.7 In particular, they establish –

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

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

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

(iv) 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),

(v) a right for an electricity distributor to require reasonable security for payment (Article 23), and

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

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

4.9 Specifically, Article 25 of the Electricity Order provides –

"(1) Notwithstanding anything in Articles 19 to 24, a person who requires a connection in pursuance of Article 19(1) may enter into an agreement with the electricity distributor (referred to in this Part as a 'special connection agreement') for the making of the connection on such terms as may be agreed by the parties.

(2) So long as a special connection agreement is effective, the rights and liabilities of the parties shall be those arising under the agreement and not those provided for by Articles 19 to 24.

(3) Nothing in paragraph (2) prevents the giving of a notice under Article 20(1) requiring a connection to be made as from the time when a special connection agreement ceases to be effective."

Determining distribution connection charging disputes

4.10 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 Authority for determination.

4.11 Specifically, Article 26 of the Electricity Order provides –

> "(1) A dispute arising under Articles 19 to 25 between an electricity distributor and a person requiring a connection,
>
> (a) may be referred to the Authority by either party; and
>
> (b) on such a reference, shall be determined by order made either by the Authority or, if the Authority thinks fit, by an arbitrator appointed by the Authority,
>
> and the practice and procedure to be followed in connection with any such determination shall be such as the Authority may consider appropriate.
>
> (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. ..."

4.12 The Authority also has the power to determine distribution connection charging (and other) complaints under the Directive (Volume A, Tab 1).

4.13 In this regard –

(i) Article 23(5) of the Directive provides –

> "Any party having a complaint against a transmission or distribution system operator with respect to the issues mentioned in paragraph 1, 2 and 4 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. This period may be further extended with the agreement of the complainant. Such a decision shall have binding effect unless and until overruled on appeal. ...", and

(ii) Article 23(2)(a) of the Directive refers to the methodologies used to calculate or establish the terms and conditions for '*connection and access to national networks, including transmission and distribution tariffs*'.

4.14 Where it applies, the main effect of the Directive is to impose a maximum four month timetable within which a complaint must be determined (subject to agreeing an extension of time with the complainant). There is no equivalent time limit under Article 26 of the Electricity Order.

4.15 We note for completeness 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 (Article 13(2) of the Energy Order at Volume A, Tab 3).

Application to the Complaint

4.16 The Parties agreed terms for the disputed connections in the form of the Agreement. The Agreement is a 'special connection agreement'.

4.17 Consequently, we find that the Complaint is a distribution connection charging dispute falling to be determined under Article 26 of the Electricity Order, and in accordance with Article 23(5) of the Directive.

4.18 We also note that the Parties were informed of the intention to treat it as such, and neither Quinn Building Products nor NIE have objected or suggested an alternative legislative basis (Volume C, Tabs 56, 62, 70 and 74).

4.19 We have received legal advice from our external lawyers, Wragge & Co LLP, on the scope of our power to determine disputes under Article 26 of the Electricity Order. This states that the Authority has the power to determine disputes in relation to terms that have already been accepted (in a 'special connection agreement' or otherwise) or money that has already been paid.

4.20 A copy of this advice is found at Annex 1. We note that Quinn Building Products has made no submission in relation to it, and that NIE (in its letter from [REDACTED] dated 19 March 2009) reserved its position but otherwise made no submission. We therefore propose to accept the advice in the terms in which it is given.

4.21 Article 25(2) of the Electricity Order provides that, so long as a 'special connection agreement' is effective, the rights and liabilities of the Parties shall be those arising under that agreement and not those provided for by Articles 19 to 24 of the Electricity Order.

4.22 This is therefore the starting position in relation to the Complaint, and is consistent with an assumption that the Agreement reflects the Parties' desired position(s), taking into account the fact that both Quinn Building Products and NIE are substantial commercial entities capable of negotiating and entering into an agreement on arm's length terms.

4.23 We are, however, being asked to revisit the Agreement concluded between the Parties and to consider the availability of a rebate to Quinn Building Products of monies paid thereunder.

4.24 Quinn Building Products asserts that such rebate is payable on the two grounds summarised in Section 6 below. NIE rejects this assertion for the reasons summarised in Section 7 below.

4.25 The question for us is whether it is appropriate in all the circumstances to determine that a rebate is payable to Quinn Building Products on either or both of the grounds it advances.

4.26 If Quinn Building Products succeeds on either ground, it will be entitled to a rebate. However, if Quinn Building Products fails on both grounds, the rights and liabilities of the Parties will remain those set out in the Agreement.

Practice and procedure

4.27 In order to ensure consistency with the Directive, we must determine this dispute by not later than 17 April 2009 (Section 8 of the Statement).

4.28 The practice and procedure to be followed by us in determining this dispute on behalf of the Authority – as it was followed by the staff of the Authority in the procedure prior to the papers in the dispute being submitted to us – is as set out in the Dispute Resolution Procedure dated April 2007 (Volume C, Tab 52).

4.29 We take it that this procedure may be supplemented as required in order to ensure good governance and fair process.

5 Section Five – Complaints Procedure

5.1 The principal elements of the procedure followed in relation to the Complaint have been as set out in the following table –

Stage 1	The Authority – • Set out the basis on which it proposed to determine the Complaint (Volume C, Tab 55) • Provided an outline of its proposed procedure and requested information from the Parties (Volume C, Tab 56) • Invited NIE to submit its representations on the Complaint (Volume C, Tab 66) • Requested further information from the Parties (Volume C, Tabs 66 and 67) • Invited Quinn Building Products to reply to the representations of NIE (Volume C, Tab 71) • Provided a preliminary view of the issues to be determined and invited comments on it from the Parties (Volume C, Tabs 72 and 73)	15 January to 20 February
Stage 2	The Authority – • Invited the Parties to attend an oral hearing in front of us (Volume C, Tab 81) • Provided us with – - the Statement which set out in detail the background to the Complaint and the issues arising in it, - the Bundle comprising all of the relevant	3 March to 20 March

	information obtained in relation to the Complaint - copies of preliminary legal opinions from the Authority's external legal advisers • Made copies of the Statement, the Bundle and the legal advice available to the Parties and invited their written representations on any aspect of it • Arranged an oral hearing in front of us which was attended by the Parties and their legal representatives	
Stage 3	Following consideration of all of the documents, written representations, and submissions at the oral hearing, we – • Set out our initial views in the form of a draft determination which was sent to the Parties with an invitation for them to comment (Volume D, Tabs 95 and 96) • Obtained legal advice on the issues which had been the subject of the preliminary opinions and disclosed it to the Parties with an invitation for them to comment (Volume D, Tabs 95 and 96)	20 March to 27 March
Stage 4	We considered all of the information and further representations received in the light of the draft determination, and issue this determination	3 April to 10 April

5.2 At each stage of this procedure, the information and submissions of each Party has been copied to the other, and the information and advice considered by us was copied to the Parties.

5.3 We are satisfied that the procedure has been transparent and that each Party has had a full opportunity to set out its case, to make representations as to the case of the other Party, to see and consider the information that was before us, and to respond to our initial views on the Complaint before we reached any final conclusions.

6 Section Six – Views of Quinn Building Products

6.1 The views of Quinn Building Products are set out in –

(i) the Complaint (Volume C, Tab 53),

(ii) its letter to NIE dated 4 September 2008 (Volume B, Tab 49 (and Appendix C to the Complaint)),

(iii) its letters to the Authority dated 20 February 2009 (Volume C, Tab 74) and 25 February 2009 (Volume C, Tab 78),

(iv) the submission made on its behalf by Brian Kennelly of Counsel dated 20 March 2009 (Volume D, Tab 92), and

(v) the submission made on its behalf by Carson McDowell dated 3 April 2009 (Volume D, Tab 97).

6.2 The views of Quinn Building Products were also expressed to us in the hearing on 20 March 2009, both by way of oral submissions and answers to questions asked by us.

6.3 We have had full regard to all of these submissions, both written and oral. The following summary of the key elements of those submissions is largely derived from the Statement, and in that context no objection was taken to it by either Party. However, in the light of things subsequently said at the hearing and in writing we have made small amendments to it to ensure that it is accurate. We adopt it for the purposes of this determination.

6.4 In essence, Quinn Building Products makes two key arguments in favour of a rebate.

6.5 First, Quinn Building Products asserts that, in accordance with NIE's current (i.e. post-SEM) connection charging methodology, it is entitled to a low cost connection. We will refer to this as 'Issue 1'.

6.6 Second, and in the alternative, Quinn Building Products asserts that, if it is not so entitled, it has a legitimate expectation of a low cost connection on which it is entitled to rely. We will refer to this as 'Issue 2'.

6.7 This formulation of the two key arguments was accepted by the Parties prior to the Statement (Volume C, Tabs 78 and 79).

6.8 Quinn Building Products' more detailed arguments under each of these headings can be summarised as follows -

The Quinn Group is entitled to a low cost connection under NIE's current (i.e. post-SEM) connection charging methodology.

(i) Quinn Building Products' entitlement to a rebate can be established using the connection charging principles applicable to either the transmission or the distribution system, whichever results in the least cost to it.

(ii) The connected parties – namely Quinn Glass, Quinn Cement and Mantlin – could obtain the same improvements in connection capacity and quality under NIE's current (i.e. post-SEM) connection charging methodology at no capital cost.

Specifically –

(a) 110kV reinforcement was required to meet Quinn Glass and Quinn Cement's power quality and demand requirements. The need for 110kV reinforcement was therefore established irrespective of the plan to increase wind generation, which was a later and secondary consideration.

(b) The individual demand requirements for Quinn Glass and Quinn Cement – 12MVA and 13MVA respectively – were within the capacity of the existing distribution system. Consequently, the new 110kV line would be a 'System Asset' and no capital cost would be incurred by the Quinn Group for this element of the works.

(c) The requirement to 'disregard electricity flows caused by any other customer' means that, once Quinn Glass and Quinn Cement's power quality and demand requirements had resulted in the construction of the new 110kV line, a subsequent generator connection application by Mantlin would incur only shallow connection costs.

(d) The Quinn Group made separate, phased applications in respect of the two demand connections, followed by the generator connection – or in any event should be treated as having done so – and should therefore obtain the reinforcement works at no capital cost.

(iii) The 110kV reinforcement project was defined by a single Connection Works Agreement solely for reasons of convenience and expediency. The Quinn Group was not party to discussions regarding the post-SEM connection charging arrangements and could not have known at the relevant time that this contractual arrangement – which was recommended to it by NIE – would or might affect its ability to obtain a rebate. It is inequitable for a rebate to be refused on this basis.

(iv) The 110kV reinforcement will, as has been acknowledged by NIE in the Environmental Statement, provide a reliable and secure supply which fulfils NIE's statutory responsibilities and caters for industrial, commercial and residential development for the next ten to fifteen years in the entire local area. The development will also relieve stress on the existing area network in Enniskillen.

The Quinn Group has a legitimate expectation of a low cost connection on which it is entitled to rely.

(v) Quinn Building Products has a legitimate expectation of a full rebate arising from the High Level Design Paper and the High Level Design Decision Paper, in conjunction with assurances provided by the Authority and NIE.

(vi) The Quinn Group made the decision to proceed with the reinforcement project in anticipation of such rebate.

6.9 Based on the above, Quinn Building Products asserts that it is entitled to a full rebate of connection charges paid. It is also claiming interest on such charges (Volume B, Tab 50).

7 Section Seven – Views of NIE

7.1 The views of NIE are set out in –

(i) its letters to the Quinn Group dated 28 August 2008 (Volume B, Tab 48) and 23 October 2008 (Volume B, Tab 51),

(ii) its letters to the Authority dated 16 February 2009 (Volume C, Tab 70) and 27 February 2009 (Volume C, Tab 79),

(iii) its letter to the Authority dated 19 March 2009 (Volume D, Tab 91), and

(iv) its letter to the Authority dated 3 April 2009 (Volume D, Tab 99).

7.2 The views of NIE were also expressed to us in the hearing on 20 March 2009, both by way of oral submissions and answers to questions asked by us.

7.3 We have had full regard to all of these submissions, both written and oral. The following summary of the key elements of those submissions is derived from the Statement. Since no objection was taken to it by either Party, and since we do not consider that anything said at the hearing requires it to be amended, we take it to be accurate and adopt it for the purposes of this determination.

7.4 In essence, NIE does not consider that either of the two key arguments put forward by Quinn Building Products are sustainable.

7.5 More particularly, NIE's views can be summarised as follows –

The Quinn Group is not entitled to a low cost connection under NIE's current (i.e. post-SEM) connection charging methodology.

(i) If the Agreement were to be entered into today, the correct rules to apply would be those contained in the Distribution Connection Charging Statement. The Transmission Connection Charging Statement would not apply (except as a means of cost comparison for the purposes of determining the LCTA solution). However, regardless of whether the connection is considered under the transmission connection rules or distribution connection rules, and irrespective of

whether one applies the current charging rules or those in force at the time of the Agreement, the result is the same. The Quinn Group is required to pay the full cost of the connection.

(ii) There were practical and technical reasons why the Parties agreed that the reinforcement project would be treated as a single job and the Quinn Group has benefited from this approach (including being able to choose how to allocate payments between its businesses). However, even applying the artificial construct of retrospectively addressing the combined connection as a series of separate connections (which is not what NIE was asked to do by the Quinn Group and was, at the time, not a practical proposition given the combined Quinn Glass/Quinn Cement supply point), there is either no difference in overall cost or a potential increase in cost for the Quinn Group.

Specifically –

(a) The Quinn Group and NIE have cooperated throughout the process to arrive at a single combined scheme. Ultimately, the Quinn Group and NIE consciously agreed on a combined scheme because it resulted in the optimal solution for the Quinn Group for both generation and demand.

(b) When only an increase in demand at the combined Quinn Glass/Quinn Cement supply point was under consideration, a 33kV reinforcement scheme was the LCTA solution.

(c) In terms of power quality, the 33kV network supplied from Enniskillen Main is typical, in terms of equipment, configuration, operation and protection arrangements of much of NIE's rural 33kV network. The network was designed and maintained to be fit for purpose, and performance was within an acceptable standard.

(d) On this basis, the case for building a 110kV line only became the most appropriate – and LCTA – solution when the wind farms were taken into account.

(e) However, it is in any case academic whether the 110/33kV solution was the LCTA solution because, on a proper construction of the relevant charging rules, it would still have been fully chargeable to the Quinn Group.

(iii) The Environmental Statement and letter to the Divisional Planning Officer dated 4 November 2005 were prepared and designed with a specific purpose in mind, and relevance should not be afforded to them in the context of the Complaint. It is also commonplace in planning applications to refer generally to the wider benefits of the scheme.

(iv) NIE's decision not to rebate the connection charges to Quinn Building Products reflects a proper application of the relevant charging rules. No rebate is payable unless and until a further network user applies for use of any unused capacity on the 110kV circuit.

<u>The Quinn Group does not have a legitimate expectation of a low cost connection on which it is entitled to rely.</u>

(v) No legitimate expectation could or should reasonably have been derived by the Quinn Group that a rebate would be forthcoming, and NIE did not ever give any assurance or guarantee to the Quinn Group that its connection costs would be refunded. NIE has never done more than provide the Quinn Group with confirmation that it would apply the connection charging rules that were finally agreed as part of the new SEM arrangements and that it would review the Quinn Group's payments in light of these.

(vi) In fact, the changes brought about by the introduction of the SEM did not result in entitlement to any rebate of these connection charges, and all the assets installed are 'Connection Assets'. There are no 'System Assets' to refund and no 'deep reinforcement' costs were ever charged to the Quinn Group.

7.6 Based on the above, NIE does not consider that Quinn Building Products has provided any grounds that require it to change its original decision not to grant a rebate of the relevant connection charges.

7.7 We note that NIE has offered to provide the Authority with further information showing why it is correct that a 33kV solution was the LCTA solution for the Quinn Group's demand requirements, and the outcome if Mantlin had been the first applicant, with Quinn Glass and Quinn Cement following (Volume C, Tab 79). However, we have not thought it necessary to request the provision of this further information for the purposes of determining the Complaint.

8 Section Eight – Issues to be Determined

8.1 The issues falling to be determined by us were set out in the Statement. In that context no objection was taken to it by either Party. However, in the light of things subsequently said at the hearing and in writing we have made small amendments to it to ensure that it is accurate.

8.2 Having considered the documentation and listened to the submissions of the Parties at the hearing, we agree that the questions below are the correct questions for us to determine, and we adopt them as such for the purposes of this determination.

8.3 The issues to be determined are therefore as follows.

Issue 1

8.4 In relation to the argument that the Quinn Group is entitled to a low cost connection in accordance with NIE's current (i.e. post-SEM) connection charging methodology, we must determine –

(i) whether NIE's transmission connection charging methodology or distribution connection charging methodology should apply;

(ii) whether NIE's pre-SEM connection charging methodology or post-SEM connection charging methodology should apply;

(iii) whether it is appropriate to treat the connection application made by the Quinn Group as a series of separate applications (in a sequence to be ascertained or determined) and to consider the outcome under the appropriate connection charging methodology for each of Quinn Glass, Quinn Cement and Mantlin;

(iv) whether, if we think it is appropriate to treat the connection application as a series of separate applications, to do so would make any difference in relation to the LCTA solution and the overall charging outcome for the Quinn Group;

(v) whether, if it is relevant, the assets installed are 'Connection Assets' or 'System Assets' for the purposes of the appropriate connection charging methodology; and

(vi) whether, based on our determination of issues (i) to (v) above, Quinn Building Products is entitled to a rebate of any or all of the connection charges paid.

Issue 2

8.5 In relation to the argument that, if the Quinn Group is not entitled to a low cost connection in accordance with NIE's current (i.e. post-SEM) connection charging methodology, it nonetheless has a legitimate expectation of a low cost connection on which it is entitled to rely, we must determine –

(i) whether the Quinn Group had a legitimate expectation of receiving a rebate of connection charges paid; and

(ii) whether, if we decide that the Quinn Group had such a legitimate expectation, Quinn Building Products is entitled to a rebate in reliance on that expectation.