9 Section Nine – Some conclusions of fact

9.1 The factual background as set out in Section 3 above is undisputed.

9.2 In the light of those facts we make some further findings and draw some conclusions as follows.

The status of the Quinn Group

9.3 We were informed at the hearing that the operations of the Quinn Group in Co. Fermanagh are significant, and that it is the largest employer in the county with a current workforce of over 600 people.

9.4 We note these statements and have no cause to doubt their accuracy. Moreover, we are aware of the obvious implication of them, which is that the commercial success of the Quinn Group is of considerable significance to the economy and people of Co. Fermanagh.

9.5 However, while there was certainly nothing improper in the submission being made, we have decided that the status and significance of the Quinn Group as an employer, the wider impact of its commercial success, and the benefit it brings to the community in the Fermanagh area cannot be of relevance to the determination that we have to make in relation to this dispute. We therefore propose to attach no weight to these facts in reaching our decisions.

The nature of the connection

9.6 All of the connection works were carried out such that the points of connection were at distribution voltage, notwithstanding that the construction of a 110kV line was also required. We therefore conclude that we are concerned with distribution connections, appropriately considered under Article 26 of the Electricity Order.

The conduct of the Quinn Group

9.7 It is clear to us that the Quinn Group acted in relation to the connection works as if it were a single entity. Whatever the merits of its arguments for or against the treatment of its requirement for a connection as if it were three independent applications for connection – which are considered more fully below – we can find in the documentation no evidence that Quinn Glass, Quinn Cement and Mantlin acted with any degree of independence in relation to the application. On the contrary, it is clear that, in practice, the Quinn Group acted as a whole.

9.8 The contrary point was taken by Quinn Building Products in the written note dated 20 March 2009 and prepared on its behalf by Brian Kennelly of Counsel. At paragraph 20 of that note it is said that –

> "On no view could the connection requirements of each of the companies [Quinn Glass, Quinn Cement and Mantlin] be viewed as one and the same thing, so closely linked and overlapping as to be in substance the legal requirement of one person."

9.9 We disagree, and note that this statement appears inconsistent with the general body of evidence that we have seen in the Bundle.

9.10 One document which seems to exemplify the situation is an email from the Quinn Group to NIE dated 25 June 2004 (Volume B, Tab 30) from which there is a substantial quotation at paragraph 3.8 above. That email followed a meeting between the Quinn Group and NIE, and set out the views of the Quinn Group as to various connection options which had been put forward at that meeting. Although dating from more than two years prior to the Connection Works Agreement, this was nonetheless a time at which the new windfarm was already in contemplation.

9.11 In the email, the Quinn Group speaks of its electricity requirements in aggregate. It rejects one possible option on the basis that "...this option will only satisfy the Quinn Group present requirements and will have no future spare capacity. This will ultimately curtail any Quinn Group expansion in the Derrylin area". It approves another option on the basis that it "provides the Quinn Group with a large enough supply for any possible future expansion". And it notes, when calculating the additional load caused by the re-energisation of the Quinn Cement plant, "The above exclude ongoing projects within the Quinn Group that may add 0.25 to 0.5 MVA to the above total". At this time, we also note that the Quinn Glass and Quinn Cement facilities were served via a common connection point.

9.12 Contrary to its submission on 20 March 2009, this seems to us to demonstrate that the Quinn Group was considering all of its requirements to be 'closely linked and overlapping' to such an extent that it did describe them as if they were the requirement of one person. Nor is this in any way an isolated document. We quote from it merely to give an example of what appears to us to be the situation reflected in the body of documents in front of us. As to the evidence that Quinn Glass, Quinn Cement and Mantlin acted as genuinely independent entities, we can find none.

9.13 In addition, we note that even in the context of this Complaint, Quinn Building Products has continued in its submissions to use language reflecting the same perspective of thought. For instance, in its submission of 20 February 2009 (Volume C, Tab 74), it referred to the separate entities as facilities owned by the corporate group –

> "Had Quinn Group known that it could have avoided the capital investment associated with the 110kV line upgrade, then it could and would have proceeded with separate, phased applications in respect of its Glass plant, its Cement plant and subsequently, its increased wind generation capacity."

9.14 Quinn Building Products has encouraged us in its submissions to look at the substance rather than the form of this matter. As a general principle we agree that this is the right thing to do. In that context, it seems to us that, although Quinn Glass, Quinn Cement and Mantlin are independent companies in their legal form, they did not act in substance as if that was the case.

9.15 In the light of our conclusions in the following sections, it may be that nothing turns on these matters. But, if it were necessary to do so, we would be minded to conclude that the Quinn Group did in fact act in relation to the connections as if it were a single entity with an aggregated connection requirement.

The role of Quinn Building Products

9.16 We can find no evidence that Quinn Building Products was acting as agent for Quinn Glass, Quinn Cement or Mantlin when it applied for a connection, signed the Connection Works Agreement, paid the connection charges, or made the Complaint to the Authority.

9.17 The language of agency was used in the written note prepared on behalf of Quinn Building Products by Brian Kennelly of Counsel dated 20 March 2009, and the letter from Carson McDowell dated 3 April 2009 asserted that its client had 'been clear throughout' that it was acting as agent. However, we note that none of the previous submissions made by Quinn Building Products assert the existence of an agency relationship, and that none of the documents with which we have been provided appears to evidence, directly or indirectly, the existence of an agency relationship.

9.18 Again, in the light of our conclusions in the following sections, it may be that nothing turns on these findings. But, if it were necessary to do so, we would be minded to conclude – absent any persuasive evidence to the contrary – that Quinn Building Products did not in fact act as agent for the other companies within the Quinn Group.

10 Section Ten – Determination in relation to Issue 1

10.1 A number of questions arise under the general heading of Issue 1, and these are more fully set out at Section 8 above and need not be repeated by us here.

10.2 In summary, however, in order for Quinn Building Products to succeed in establishing its entitlement to a rebate under this heading, we would need to determine that it was correct as to each of the following –

(i) the appropriate connection charging methodology to be applied,

(ii) the appropriateness of treating the connection application as a series of applications made in a particular sequence,

(iii) the effect of that series of applications on the LCTA solution, and

(iv) in consequence, the designation of the 110kV line as a 'System Asset' rather than a 'Connection Asset'.

10.3 It seems clear to us that the question of 'treating the connection application as if it were a series of applications' is at the heart of these matters and fundamental to the submissions made by Quinn Building Products in relation to Issue 1.

10.4 Put simply, we have been asked by Quinn Building Products to determine this dispute on the basis that the Quinn Group should be put in the same financial position as if Quinn Glass, Quinn Cement and Mantlin had made independent connection applications, with the application made by Mantlin being phased so as to follow that of the other two companies.

10.5 If we do not conclude that this is an appropriate basis on which to determine the dispute, Quinn Building Products must fail in relation to Issue 1, regardless of any view that we might take as to the other questions arising under that heading. The question of whether to treat the application as a series of applications is therefore essential to its case in respect of Issue 1.

10.6 That Quinn Building Products understands this is made clear from the response of its solicitors, Carson McDowell, to one of the preliminary opinions received from our external legal advisers. The relevant opinion – provided at Appendix 3 to the Statement – said that we could not lawfully adopt the approach of 'disaggregating' a connection application. In their letter dated 18 March 2009, Carson McDowell characterised the effect of this as being that 'the Authority is bound to reject our client's complaint'. In our view, this was correct.

10.7 We now have the benefit of advice provided by our external legal advisers which is based on their preliminary opinion but also takes into account the submissions made by or on behalf of the Parties. We note that NIE agreed with the preliminary opinion of our external legal advisers, but that Quinn Building Products, in the submission of Brian Kennelly of Counsel dated 20 March 2009, expressed a number of reasons for disagreeing with it. In their formal advice to us, our legal advisers have considered and addressed these submissions (Annex 2).

10.8 That advice draws attention to the fact that our legal advisers in their preliminary opinion had not considered the case on the same basis as the submissions made on behalf of Quinn Building Products on 20 March 2009.

10.9 This is consistent with what we understood to be the case from the submissions made at the hearing on 20 March 2009.

10.10 At that hearing it was said on behalf of Quinn Building Products that we were not being requested to determine the case on a speculative basis – i.e. that we were not being asked, in spite of the connection application being made by Quinn Building Products, to determine the case as if three separate applications were made by Quinn Glass, Quinn Cement and Mantlin. Instead it was submitted that, in substance, three separate applications had in fact been made by the companies in question, and that we were merely asked to determine the case in the light of this situation.

10.11 We propose to consider the case on the basis of the submissions made, both in writing and orally, on 20 March 2009.

10.12 The effect of those submissions is that we are not being requested to determine the case on the basis of a hypothetical scenario as to a series of applications which might have been, but were not in fact, made.

10.13 Had that been the basis on which we were invited to make our determination, we would have considered that it was bound to fail for the reasons more fully set out in the legal advice at Annex 2. We would have noted that NIE had expressed its broad agreement with that position, and also that Quinn Building Products, in its submissions in writing and at the hearing, did not challenge the statement that a hypothetical scenario was not a rational basis for our determination.

10.14 We would therefore have concluded that we should not determine the dispute on the basis that a single connection application should be treated as a series of applications.

10.15 However, we now consider our determination as to Issue 1 on the basis of Quinn Building Products' submission that when it applied for a connection it did so as the representative of Quinn Glass, Quinn Cement and Mantlin, and therefore that in substance (if not in form) those three companies were the persons requiring to be connected.

10.16 We do not consider the evidence before us sufficient to suggest that this was in fact the case. For reasons which we have outlined in Section 9 above, all of the evidence we have seen in this case strongly suggests that the Quinn Group acted in relation to the connection application as if it were a single entity. We have not accepted the submission made by Quinn Building Products that the connection requirements of the companies cannot be viewed as 'linked and overlapping'. We have noted that the evidence suggests that they were treated within the Quinn Group as if that is precisely what they were.

10.17 We are therefore some way from being persuaded that the persons who required connection for the purposes of Article 19 of the Electricity Order were Quinn Glass, Quinn Cement and Mantlin. However, we do not propose to make a conclusive finding on this point.

10.18 Even if we assumed for present purposes that the recent submissions made by Quinn Building Products were correct – and that Quinn Glass, Quinn Cement and Mantlin were in substance the separate persons requiring a connection – we would not conclude that Quinn Building Products should succeed in its case in relation to Issue 1.

10.19 That case requires, as it is summarised in Section 6 above, that Quinn Glass and Quinn Cement made applications for connection which resulted in the construction (at no cost to them) of a 110kV line, and that Mantlin subsequently applied for connection and (at no cost to it) took the benefit of the existence of that line.

10.20 In other words, what is essential to the argument that has been put forward by Quinn Building Products is that not only did Quinn Glass, Quinn Cement and Mantlin each apply for a connection, but that they did so separately and in a particular sequence.

10.21 If the submission made by Quinn Building Products is correct, these three companies did each apply for a connection. But it appears to us that they did so in common (via Quinn Building Products), at the same time, and not in the necessary sequence.

10.22 In respect of the submission made by Mr Kennelly of Counsel on behalf of Quinn Building Products that the companies 'required connection on a phased basis', it seems clear from the evidence that they did not do so. The evidence is that –

(i) Quinn Building Products negotiated connections with NIE in relation to the glass plant, cement plant and windfarm at the same time, and

(ii) Quinn Building Products agreed them at the same time and under cover of the same document.

10.23 Moreover, we are unable to find in the Connection Works Agreement – which makes provision for works to be carried out in respect of the glass plant, cement plant and windfarm (including the 110kV line) – any evidence of a requirement for or agreement to phasing of the type to which Quinn Building Products refers, and none has been drawn to our attention.

10.24 On any view, applications that were made jointly in the course of negotiations with NIE by Quinn Building Products, resulting in a single Connection Works Agreement under which works were to be (and were) carried out at the same time, cannot have been a series of separate requirements for connecting different persons 'on a phased basis'. There was therefore no sequencing of applications of the type essential for the purposes of Quinn Building Products' arguments in relation to Issue 1.

10.25 In these circumstances, Quinn Building Products cannot succeed in its arguments in relation to Issue 1.

10.26 It is therefore unnecessary for us to determine the other questions arising under the heading of Issue 1. Our answers to those questions could have no bearing on our overall conclusion in relation to that issue. We therefore make no finding in relation to them.

11 Section Eleven – Determination in relation to Issue 2

11.1 The questions arising in relation to Issue 2 are those more fully set out at Section 8 above.

11.2 We consider that our determination in relation to this issue turns on the legal position. The submissions of Quinn Building Products in relation to this issue were from the outset of the case based on the concept of 'legitimate expectation' and the issue has been framed entirely in terms of that concept.

11.3 We understand that legitimate expectation is a concept which forms a part of public law, and which in certain circumstances requires public authorities, as a matter of legal duty, to fulfil expectations – whether arising from their representations or conduct – to which they have given rise.

11.4 In deciding whether a legitimate expectation exists in favour of Quinn Building Products, we were invited to consider certain statements made in correspondence by the Authority and NIE in the period prior to the Connection Works Agreement being entered into (Volume C, Tab 78). Quinn Building Products submitted that it was by virtue of those statements that a legitimate expectation was created both by NIE and the Authority.

11.5 The preliminary opinion of our external legal advisers – provided at Appendix 4 to the Statement – said that, notwithstanding the submissions of Quinn Building Products, the basic elements required for a legitimate expectation did not exist in the facts relevant to this dispute.

11.6 Carson McDowell on behalf of Quinn Building Products (in their letter dated 18 March 2009) characterised the effect of this as being that 'the Authority is bound to reject our client's complaint'. This was correct in that, if that preliminary legal opinion was right, the argument of Quinn Building Products in relation to Issue 2 would be bound to fail.

11.7 We now have the benefit of advice provided by our external legal advisers which is based on their preliminary opinion but also takes into account the submissions made by or on behalf of the Parties. We note that NIE agreed with the preliminary opinion of our external legal advisers, but that Quinn Building Products, in the submission of Brian Kennelly of Counsel, expressed a number of reasons for disagreeing with it. In their formal advice to us, our legal advisers have considered and addressed these submissions (Annex 3).

11.8 The advice remains that no legitimate expectation has arisen in this case, in relation to either NIE or the Authority, that would entitle Quinn Building Products to a rebate of monies paid. We have considered and had full regard to that legal advice, and we accept it. For the reasons which it more fully sets out, and with which we agree, we consider that Quinn Building Products does not succeed in its case in relation to Issue 2. We therefore so determine.

11.9 We were invited by Quinn Building Products, in the most recent submission made on its behalf by Carson McDowell (Volume D, Tab 97), to consider not only the legal aspects of the legitimate expectation argument but to 'reflect on what is fair and just for the participants in the electricity sector in Northern Ireland'. Having regard to this submission and the other representations of the Parties we have addressed ourselves to this point.

11.10 It seems to us that the Connection Works Agreement was entered into between two significant companies, and that the charge for the connection works was agreed between them on the basis of the prevailing charging methodology. We have seen no evidence leading us to believe that this process or the substantive agreement that was reached was either unfair or unjust.

11.11 We also note that the connection assets have the potential to deliver a general benefit to those in the area which they serve. But it is not unusual for new assets of this nature to have some level of generalised benefit, and it does not follow that the person for whose principal benefit and at whose request they were constructed should not be required to meet their reasonable cost.

12 Section Twelve – Concluding Observations

12.1 We wish to make some further observations which, though not part of the reasoning for our determination or of our formal conclusions – and therefore strictly outside the scope of the determination proper – we hope will be of assistance to the Parties in the future and will also provide some useful guidance to others who may have similar disputes.

12.2 First, the parties have been constructive overall in their dealings with the Authority and have approached this Complaint with unquestionable good faith. We do not draw any adverse inferences from any statements or evidence in front of us that anything other than good faith has been demonstrated by either Party.

12.3 We have had regard to the submissions that were made by Quinn Building Products on these matters, and we take account of the fact that this was the first complaint of its kind to be made to the Authority, and therefore that there were no precedents on which the Parties could draw. We are also conscious of, and grateful for, the constructive engagement by both Parties with our process for considering the Complaint, and for the large quantities of information with which we have been provided within a timescale that was necessarily tight.

12.4 In that context, we wish merely to draw attention to the following. Where a party refers to the Authority a dispute by making a complaint under Article 23(5) of the Directive, the effect of its doing so is to place the Authority under a strict timetable for the resolution of that dispute. This is perfectly right and proper. But we do think that there must then be a corresponding duty on the party in question – at least as a matter of due process – to state its case as fully and clearly as possible at the outset. To do so would be fair to the other party to the dispute, which is entitled to know what case it has to answer, and would facilitate the Authority making its determination within the required timetable.

12.5 We would therefore encourage all parties in future to state their cases as fully and clearly as possible at the outset of the complaint, and to provide with their complaint as much supporting information as they can. This might normally include –

(i) legal documents such as contracts, applications and formal documents created in other proceedings,

(ii) all correspondence relevant to the complaint,

(iii) a statement setting out any relevant law on which the complainant wishes to rely and explaining its relevance to the case, and

(iv) a chronology of key events.

12.6 Second, an important part of the case advanced by Quinn Building Products was that it believed in 2006 that it would have the right to a rebate of its costs of connection. This is the point that was relied on under the heading of the legal doctrine of legitimate expectation, and in the event we have been unable to accept that part of its case.

12.7 However, we note that the statements which Quinn Building Products said were sufficient to constitute a legitimate expectation were statements that had been made before it entered into the Connection Works Agreement on 19 July 2006. This begs a question which we asked at the hearing – if Quinn Building Products considered that NIE had agreed to a rebate, why did it not ensure that this agreement was reflected in its contract with NIE?

12.8 In our determination we have drawn no adverse inference from the fact that there was no such agreement reflected in the contract. However, where an agreement is between two very substantial commercial entities, and especially where it is a high value agreement, we would encourage them to take proper advice and ensure that the contract between them accurately reflects what they have agreed.

12.9 Third, we note that, prior to the connection works which are the subject of this dispute, the electricity supply to the Quinn Group manufacturing facilities at Gortmullan was the subject of some disruption.

12.10 In the event, it has not been necessary for the purposes of our determination for us to consider whether the level of this disruption was within appropriate tolerances, since the relevant argument made by Quinn Building Products failed on other grounds, as set out more fully in Section 10 above. It would only have been necessary to consider the disruption to the supply as part of an assessment of what was the LCTA solution, had we accepted the argument that the connection application should be treated as a series of applications made in a particular sequence.

12.11 We note that NIE maintains that the quality of supply received by the Quinn Group was consistent with the applicable standards. Since it was not necessary for us to consider the issue, we do not at this time express a view as to whether the quality of supply to the Quinn Group was appropriate given the characteristics of the load in a rural location such as Derrylin.

12.12 We do, however, think that this question gives rise to potentially important issues of wider relevance about the quality of supply in rural locations in Northern Ireland, and propose to recommend to the Authority that it should carry out a policy review, pursuant to a future forward work programme, of whether the existing statutory and regulatory standards in relation to quality of supply are reasonable or might in any respect benefit from strengthening.

12.13 Fourth, and finally, we note that there was in this case no formal written application for a connection. We understand the circumstances in which this occurred, and in particular that the Parties had been in discussions for some time before the Connection Works Agreement was entered into, and no doubt regarded the fact of the requirement for a connection to be too obvious to need stating in any formal way.

12.14 Nonetheless, it would have been helpful if the requirement for a connection had been formally documented from the outset. As we understand it, to do so would be consistent with Article 20 of the Electricity Order, which envisages a written connection application being made, and makes NIE's statutory duty to connect conditional upon the receipt of that written application.

12.15 We do not want to discourage NIE from taking a sensible and proportionate view of the circumstances of each case. We understand that there may be some cases in which it is unhelpful to, for instance, a domestic customer to insist on a written application where the nature of the requirement is already perfectly clear. But in relation to a connection of this size, being requested by a major commercial entity, we would expect matters to be fully and formally documented.

12.16 We would therefore encourage NIE in future cases of large commercial connections to ensure that it obtains a written connection application as envisaged by Article 20 of the Electricity Order. We would also encourage it to consider producing a formal application document that could be provided to an applicant for it to complete, so as to facilitate this process. We note and welcome its representations that it has already moved some way towards doing so.

13 Section Thirteen – Order

13.1 Quinn Building Products has asked us to make an order under Article 26(1) of the Electricity Order, with the effect that it should receive a rebate of monies paid to NIE in respect of the connection.

13.2 For the reasons given above, and having full regard to our legal duties under public and Community law, we determine against it on both Issues 1 and Issue 2, and therefore decline to make that order.

13.3 We instead order that the Connection Works Agreement between Quinn Building Products and NIE dated 19 July 2006 should stand on its current terms, and that the respective obligations of the Parties should be those set out in it.

13.4 We invited submissions from the Parties as to whether we should make any incidental, supplemental or consequential provision – in particular any order as to our costs – in accordance with Article 26(7)(a) of the Electricity Order. However, in the light of the representations made, we do not consider that we should do so.

13.5 As to the issue of costs, we have had regard to the matters referred to at Article 26(8) of the Electricity Order. We have noted that the Dispute Resolution Procedure dated April 2007 (Volume C, Tab 52) expressly refers to the fact that a costs order may be made, and therefore that the Parties were on notice to this effect. And we believe it unlikely that either of the Parties would be precluded by limited means from meeting any costs order that may be made.

13.6 However, we also take into account the fact that the Complaint is the first of its kind to be determined by the Authority, and therefore that the process was new to the Parties who had no obvious precedents on which to draw. For that reason, in this particular case, we believe that it is appropriate in this case to exercise our discretion not to make a costs order. We do not consider that there are any aspects of the conduct of the Parties which require us to do so.

13.7 However, since our decision not to make an order for costs in this case is largely based on its nature as the first complaint of its kind, it should not be regarded as setting any precedent as to the future. We expressly reserve the right to order the payment of costs in the context of subsequent complaints. In doing so, we will consider each case on its own merits and circumstances.

13.8 In addition to the factors set out in the Electricity Order, we recommend (but without any intention of being either prescriptive or exhaustive) that the Authority, in considering any order as to costs, take into account additional matters such as –

(i) the extent to which a party could have resolved the issues in dispute at an earlier stage or via alternative means,

(ii) the manner of conduct and clarity of the communications between the parties when dealing both with each other prior to a complaint arising, and also with the Authority and each other after a complaint has been made,

(iii) any value/benefit of the complaint to the wider utility industry to which it relates, and

(iv) the merits of the arguments raised by the parties.

Christopher Le Fevre
Donald Henry

Authorised on behalf of the Authority

10 April 2009

Utility Regulator
ELECTRICITY GAS WATER

Annex 1

External Legal Advice on Article 26 of the Electricity (Northern Ireland) Order 1992

[REDACTED]

Annex 2

External Legal Advice on Treatment of Connection Application as if it were a Series of Applications

[REDACTED]

Annex 3

External Legal Advice on Legitimate Expectation

[REDACTED]

Annex 4

Index of Further Documentation

[REDACTED]