

**Commission References: 2011/C001 & 2014/C004**

**THE PLANNING ACT (NORTHERN IRELAND) 2011**

**SECTION 26**

**Regionally significant planning applications by SONI Limited – proposed electricity substation on land to the rear of 152 Trewmount Road, Turleenan, Moy, County Tyrone, and erection of 400-kilovolt overhead electrical transmission line from there to the townlands of Crossreagh and Crossbane, County Armagh with amendments to existing 275-kilovolt line (O/2009/0792/F); and associated works including site levelling and preparation, new access points and access lanes, working and stringing areas, guarding, fencing and related mitigation works (O/2013/0215/F)**

**Report on the First Stage of the Public Local Inquiry**

**by Commissioners T A Rue and J de-Courcey**

**Inquiry Date: 21<sup>st</sup> June 2016**

**Date of Report: 19<sup>th</sup> July 2016**



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## Background

1. The proposed developments are part of a cross-border project known as the North/South or Tyrone/Cavan Interconnector. That part of the project which entails development in the Republic of Ireland is being pursued separately through planning procedures that operate in that jurisdiction.
2. In May 2011, the former Department of the Environment (DoE) asked the Commission to conduct a public local inquiry for the purpose of considering representations made in respect of the 2009 planning application for the substation and overhead line. The inquiry opened on 6<sup>th</sup> March 2012 but was adjourned two weeks later when it became apparent that the application and the environmental statement (ES) and its addenda had not been properly advertised in the press. The Commission recommended that before it was re-advertised, the ES should be consolidated and updated to take account of changes put forward by the applicants in their evidence to the inquiry.
3. On 9<sup>th</sup> October 2014, DoE renewed its request for a public inquiry into the 2009 application and asked that it be conjoined with an inquiry into the 2013 application for associated works. In view of the length of time which has passed since then and the changes to the proposals, the Commission has found it necessary to start the inquiry process all over again with fresh evidence.
4. The Commission decided to hold the new inquiry in two stages. The first stage is for consideration of legal and procedural issues. The Commission invited submissions on such matters from all interested parties. Two broad topics were identified for consideration, namely the enlargement of the site covered by the substation and overhead line application and strategic environmental assessment (SEA). We assume that these are the only issues of a legal and procedural nature that objectors will be raising in the course of the inquiry process and that they have presented all the evidence they wish to put forward in regard to these issues. This report considers the identified legal and procedural issues only.

## Statutory Framework

5. The Planning Act (Northern Ireland) 2011 defines the respective roles of the Department for Infrastructure (the statutory successor to DoE) and the Commission in relation to developments of regional significance. Planning applications for such developments are made to the Department (see Section 26(5)). The Department makes the final decision on such applications (Section 26(13)). From start to finish, jurisdiction over regionally significant planning applications remains with the Department.
6. For the purpose of considering representations made in respect of a regionally significant planning application, the Commission may cause a public inquiry to be held by the Commission under Section 26(10). The Department decides to have an inquiry and the Commission makes the arrangements. In determining the application, the Department must consider (Section 204(9)) and take into account (Section 26(12)) the Commission's report but is not obliged to accept all or any of the Commission's recommendations. The Commission's role is advisory only.

### Enlargement of the Application Site

7. There are no statutory provisions governing the amendment of a planning application. Is it a matter for the discretion of the planning authority. It is unlikely that a court would set aside a judgment to admit an amendment unless it were perverse or irrational. The parties made reference in their written evidence to leading court judgments pertaining to the amendment of a planning application, including *Bernard Wheatcroft Limited v Secretary of State for the Environment and another* (1982) 43 P & CR 233 and *British Telecommunications plc v Gloucester City Council* [2001] EWHC Admin 1001.
8. From this case law, the following factors emerge for consideration:-
  - (i) whether the amendment would alter the substance of the development for which planning permission was applied for; and
  - (ii) whether those who should have been consulted on the changed development would be deprived of the opportunity of such consultation.
9. The enlargement of the substation and electricity line application site does not alter the substance of the proposal in terms of land use and number of structures. The amended proposal still comprises a large substation at Turleenan, near Moy, with a 34-kilometer overhead transmission line from there to the border, supported by 102 towers. A single red line previously showed the proposed route of the overhead line with crossbars denoting the towers. This did not take into account the areal extent of the tower bases, the distance between individual wires or the width of the oversail. The corridor area shown on the amended plan is more cartographically correct. While the objectors calculated that the land take has increased by 206%, the enlargement of the site is more apparent than real.
10. The amended plans show a number of deviations from the route originally proposed. The proposed positions of 74 towers have moved. The average change is 8.8 metres, the maximum is 33 metres. It is proposed to increase the height of 16 towers by between 1 metre and 6 metres. However, the applicants confirmed that no micro-siting is now proposed. In the context of the nature and scale of the development originally proposed, the amendments do not involve a substantially different layout. We are satisfied that the substance of the proposal remains the same.
11. Even though hazardous substance consent has been granted for the storage of liquefied petroleum gas nearby, there is no proposal to change the position of Tower 66. The suitability of placing a tower in the proposed position can be discussed if the inquiry proceeds to a second stage.
12. The Department was required to publish notice of the application in at least one newspaper circulating in the locality of the site. The judgment of the High Court in *Morelli v Department of the Environment for Northern Ireland* [1976] NI 159 establishes that the press advertisement must ensure that people are informed of the substance of what is proposed and must bring home to an intelligent and careful reader the nature of the works for which permission is sought.

13. In *Newry Chamber of Trade and Commerce* [2015] NIQB 65, Treacy J held that the advertisement need not specify every individual element of the proposed development; in the case of large-scale proposals, it would be unworkable for every sub-component to be listed. The judge held that it was consistent with its statutory purpose for the advertisement to set out the primary elements of the proposed development, since the reader would be able to obtain full details by checking the Department's website or viewing the planning file.
14. The Department advertised the amended application for the proposed overhead line and substation in the local press in September 2013. The notice referred to the amended description of development and consolidated ES. The Department also re-notified those neighbours who were notified when the application was originally submitted. The Department's planning witness told us that although the proposed increase in the site area did not result in any new people being notified about the amendments, he was content that the extent of the notification exercise was so wide-ranging that no one who ought to have been notified was excluded from the second round of notification.
15. Neighbour notification was carried out on a non-statutory basis until the 2011 Planning Act came into operation in April 2015. The Department's planning witness testified that everyone who would have been required to be notified had the new statutory scheme been in force was notified. This was not disputed at the inquiry and we have no reason to disbelieve the Department's evidence.
16. The applicants submitted what they referred to as further environmental information in June 2015. It entailed an amendment to one tower and an access track. On receipt of this information the Department placed another advertisement in the local press. It referred to amended application forms and amended drawings. We were told that over 100 households were re-notified. A further advertisement placed in December 2015 made specific reference to the amended site location plan for the overhead line application. All the press notices advised the public as to where the amended information could be accessed.
17. In each instance the press notice identified the primary elements of the development which planning permission was being sought. The towers are individual elements, or sub-components, of the development. It would have been unworkable for proposed changes to the precise positions of every tower to have been listed in the press notices. We are satisfied that the Department's press notices met the legal requirements in accordance with the *Morelli* and *Newry Chamber of Trade and Commerce* judgments. We are not persuaded that the Department was under any obligation to give individual property owners any more information via neighbour notification than that which was included in its statutory press notices.
18. The statutory scheme, as interpreted by the High Court, presupposes that local people, once alerted to the substance of what is proposed, will follow the matter up if they so wish. The successive press notices required interested citizens to take steps to apprise themselves more fully of the changes to the scheme. The Department received 2,990 additional representations in relation to the proposed development since it received the consolidated ES. That is an indication of the

public's ongoing interest in the development and engagement with the press notices and neighbour notifications. It does not support the objectors' contention that third parties may have experienced consultation fatigue. We find it significant that the objectors were unable to identify any particular person or class of persons who might have been prejudiced by the enlargement of the site.

19. In our opinion, the Department has wider scope to admit amendments to regionally significant planning applications than the Commission has when dealing with planning appeals. In re-advertising applications, the Department can indicate the general nature of the amendments. The Commission would be stepping outside its statutory remit as an appeals body if it were to re-advertise proposals with a changed description in order to facilitate significant amendments at appeal stage, thereby bypassing the democratically elected planning authority.
20. It seems to us that if, instead of amending the 2009 application, the applicants had chosen to withdraw it and submit a fresh application, the public consultation process have not have materially differed from what actually took place. In practical terms, the only difference is that the original Departmental reference number has continued to be used. The evidence does not point to any consultation deficit as a result of the amendments. We have not been persuaded that anyone who should have been consulted on the changed development has been deprived of the opportunity of such consultation.
21. All things considered, we have come to the view that the enlargement of the substation and overhead line application site was an admissible amendment. We do not believe that it sets an unwelcome precedent and in any case, the admissibility of each proposed amendment calls for a fact-and-degree judgment informed by relevant case law. We are not persuaded that this legal and procedural issue represents an obstacle to continuing with the inquiry.

### **Strategic Environmental Assessment**

22. European Union Directive 2001/42/EC requires strategic environmental assessment (SEA) of all plans and programmes which, among other things, set the framework for future development consent of projects which under Directive 2011/92/EU require environmental impact assessment (EIA). Where an SEA is required, it must be carried out during the preparation of the plan or programme and prior to its adoption.
23. It was established in *R (Buckinghamshire County Council & others) v Secretary of State for Transport* [2014] UKSC 3 that the purpose of SEA is to ensure that the decision on development consent is not constrained by earlier plans which have not themselves been assessed for likely significant environmental effects.
24. We are not aware of any provision in European Union law that prohibits the grant of development consent for a project before a plan or programme setting the framework for future development consent of that project has been adopted. As the objectors accepted, not every EIA project necessarily has a related plan or programme that requires SEA.

25. The objectors did not seek to argue that the planning applications under consideration in this inquiry are plans or programmes that require SEA. Their argument related to a document to be called Network 25 which was under development by Northern Ireland Electricity (NIE) in 2013. The document was to set out the scale and range of development needed to facilitate achievement of the Department of Enterprise Trade and Investment's Strategic Energy Framework target of 40% of electrical consumption from renewable energy by 2020. Required transmission reinforcements and connections from the source of energy into the existing grid were individual measures to be assessed.
26. A draft SEA scoping report was produced to accompany the Network 25 document. The proposed 400-kilovolt North/South Interconnector running southwards from Turleenan was listed as one of a number of strategy options but it was stated that it would not be assessed in the SEA. Its status was described as "*At Planning Appeals Commission. EIA completed*". The text of the report explained that projects which were sufficiently progressed that the Strategy and SEA would have no influence on them had been excluded. The objectors argued nonetheless that the SEA should have covered the interconnector option and that in the absence of the final SEA, the planning application was premature.
27. Both planning applications were originally made by NIE, the owners of the transmission and distribution infrastructure in Northern Ireland. Management of the project later passed to SONI Limited, the operators of the high-voltage electricity system, and the applications were transferred into their name in November 2014. Work on the Network 25 document has not progressed and there is no timescale for its publication, even in draft form.
28. Network 25 does not purport to be a plan or programme covering the Tyrone/Cavan Interconnector project. As the objectors accepted, there is nothing even approaching a plan or programme in preparation. We have no evidence that there are any plans or programmes which would constrain proper consideration of the SONI applications and to which the requirements of the SEA Directive apply. We are not persuaded that this legal and procedural issue represents an impediment to the continuation of the inquiry.

### **Advice**

29. Taking the two legal and procedural issues together, we see no good reason why the inquiry should not proceed to the second stage. However, we emphasise that that is a matter for the Department.
30. The Commission will await a written indication from the Department as to whether it is satisfied that the applications are ready to proceed to a substantive inquiry. If and when such confirmation is received, the Commission will make the necessary arrangements.

## **APPEARANCES**

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## **DOCUMENTS**

### **From the Department for Infrastructure**

Submission with six appendices

### **From the Applicants, SONI Limited**

Submission with 17 annexes

### **For Safe Energy Armagh and Tyrone**

Submission with six appendices