

INQUIRY INTO AN APPLICATION UNDER SECTION 36 OF THE 1989 ELECTRICITY ACT TO CONSTRUCT AND OPERATE A WIND FARM, NEAR DUFFTOWN, MORAY

NOTE OF MATTERS AGREED AT OR ARISING FROM THE PROCEDURAL MEETING ON 24 JUNE 2010

Introduction

1. The inquiry is being held in connection with the application lodged under section 36 of the 1989 Electricity Act, by Dorenell Limited (UK), to construct and operate a wind farm, near Dufftown, Moray.

2. The Scottish Ministers have appointed Dilwyn Thomas BSc(Hons), MBA, MRTPI, a Reporter in the Directorate for Planning and Environmental Appeals (DPEA), to conduct the inquiry and report to them.

The issues to be addressed

3. Parties agreed that the main issues that the Reporter will need to consider in preparing his report are:

- Landscape and visual impact (including cumulative impact and impact on the Cairngorms National Park)
- Tourism and recreation (including public access)
- Economic impacts and benefits
- Design
- Wildlife and habitats, and ornithology
- Peat related matters
- Aviation safety
- Hydrology, private water supplies, and salmon fisheries
- Drainage arrangements
- Cultural heritage
- Road and traffic matters
- Noise
- Telecommunications
- Consistency with national planning, development planning and national energy policies, and the council's strategy for wind farm location, and
- Possible conditions and any legal agreements if consent is granted.

The approach to the inquiry

4. There are no statutory rules relating to Electricity Act cases. Up until now, the 1997 Town and Country Planning (Inquiries Procedures) (Scotland) Rules have been applied, by analogy, with all the evidence presented at an inquiry being subject to formal cross examination. However, last year the provisions of the 2006 Planning etc (Scotland) Act came into effect which changed and modernised the way in which the DPEA deal with planning appeal cases and planning applications called in by the Scottish Ministers for their own determination. Amongst other things, these changes

are intended to ensure that the procedures adopted in appeal and called in cases are proportionate and efficient, and that the process is transparent and fair. The new procedures are set out in the 2008 Town and Country Planning (Appeals)(Scotland) Regulations and in Circular 9/2009 on Planning Appeals.

5. The DPEA is now seeking to apply the spirit of this new approach to a wider range of casework, including section 36 cases such as this. In essence, this approach allows more flexible procedures to be adopted at such an inquiry. In particular, it means that each issue identified for consideration can be dealt with by the most appropriate mode of inquiry, such as an inquiry session, a hearing session, or further written submissions. Such further procedures are desirable where it is necessary to gather further information on an issue, or to have the evidence of parties explored and tested. On some issues, sufficient information will already have been lodged, and no further procedures will be required. This approach applies the 2008 Regulations (and the linked circular), with adjustments, and by analogy, to this inquiry. It does not apply or reflect the 1997 Rules.

Issues requiring further procedure

6. Parties agreed the following further procedures in this case:

Further written procedures on peat related matters, wildlife and habitats issues (but not ornithology), and aviation safety issues. This is because the Reporter requires further information and representations on these issues to prepare his report.

Hearing sessions on design issues, ornithology issues, and possible conditions/legal agreements if consent is granted. This will allow the differences between parties on each of these important issues to be explored.

It is standard procedure to consider possible conditions and legal agreements at an inquiry and a discussion on them does not weaken the overall position of participants.

Inquiry sessions on landscape and visual issues (including cumulative impact and impact on the Cairngorms National Park), tourism and recreation issues, economic impact and benefit issues, and policy issues (but only insofar as they relate to the development plan and the council's strategy for wind farm location [see paragraph 31]). This will allow the different position of parties to be explored and tested on issues which are very significant in this case.

7. The formal procedures notices, which will be issued in due course, will confirm the further procedures being used in this case.

8. On the remaining issues (hydrology, private water supplies and salmon fisheries, drainage arrangements, cultural heritage, road and traffic matters, noise, and telecommunications), parties agreed that the Reporter has sufficient information to prepare his report, and that no further procedures are required.

9. All of the consultation responses and letters of representation already lodged will be taken into account by the Reporter in preparing his report on the application.

Participation in further procedures

10. For the further written submission procedures, the participants are likely to be:

Peat related matters, and wildlife and habitats issues (excluding ornithology): the applicants (Dorenell Limited [UK]), the council, Scottish Natural Heritage, and other consultees and third parties who have lodged significant representations on these issues (potentially including the Speyside Business Alliance [who are also representing Save our Scenic {SOS} Moray/STOP Dorenell, it's a dram disgrace]).

Aviation safety issues: the applicants, the council, and National Air Traffic Systems.

11. For the hearing sessions, the participants are likely to be:

Design issues: the applicants, the Cairngorms National Park Authority, the Speyside Business Alliance, and the Mountaineering Council of Scotland.

Ornithology issues: the applicants, the Speyside Business Alliance, the Mountaineering Council of Scotland, and RSPB Scotland.

Conditions/legal agreements: the applicants, the council, and the Speyside Business Alliance. The written views of Scottish Natural Heritage and SEPA on the proposed conditions and agreements will also be required.

12. For the inquiry sessions, the participants are likely to be:

Landscape and visual issues(including cumulative impact and impact on the Cairngorms National Park): the applicants, the Cairngorms National Park Authority, the Speyside Business Alliance, the Mountaineering Council of Scotland, and Mr R Graham. The council should lodge a written submission (see paragraphs 26 and 28).

Tourism and recreation issues: the applicants, the Speyside Business Alliance, and Scotways.

Economic benefits and impacts: the applicants, the Speyside Business Alliance, and Mr R Graham.

Policy issues (insofar as they relate to the development plan and the council's strategy for wind farm location): the applicants, the council, and the Speyside Business Alliance. The Cairngorms National Park Authority should lodge a written submission (see paragraphs 26 and 28).

13. The Reporter considers that the council should attend and give evidence at the policy issues inquiry session so that their position on the development plan and the strategy for wind farm location, both of which they prepared, can be properly tested by those of an opposing view. He is not persuaded that the council's attendance is essential at the landscape and visual issues inquiry session as he is satisfied that their views on those issues can be reasonably covered in a written submission, which would be made available to other parties before the start of the

inquiry session (see paragraphs 26 and 28). The council agreed to attend the hearing on conditions/legal agreements.

14. Other parties who wish to take part in a hearing or inquiry session may do so provided they have already submitted relevant representations. They should inform the DPEA in writing that they wish to take part, within 14 days of the date on this note, indicating the relevant session(s). Such parties will be required to follow the procedures set out below, including the submission of hearing and inquiry statements.

The hearing of evidence at hearing and inquiry sessions

15. The hearing sessions will take the form of a structured discussion between the parties involved, which the Reporter will lead, and at which no formal examination or cross examination will be permitted. An agenda for each hearing session, prepared by the Reporter, will be circulated in advance, and each item on the agenda will be gone through at the hearing. Parties will be given the opportunity to explain their position, elaborate on areas of concern, put their point of view, and ask relevant questions informally through the Reporter, subject only to the discussion being conducted in an orderly manner. The Reporter will seek contributions from parties at the relevant time.

16. At the inquiry sessions, the order for hearing evidence at each session will be the applicants, the council, consultees to the application (such as the Cairngorms National Park Authority, the Mountaineering Council of Scotland, and Scotways), and then the objectors (such as the Speyside Business Alliance and third party individual objectors). Where the order for presenting evidence at the allotted time causes a problem for third party individual objectors, the Reporter will seek to accommodate them at a more appropriate time, which will be agreed at the start of the inquiry sessions.

17. Each party appearing will be invited to present evidence in chief, which can be subject to cross examination by those of an opposing view, following which there will be an opportunity for re-examination. The Reporter may also ask questions of witnesses. "Friendly" cross examination between parties on the same side will not be permitted, but questions of clarification are acceptable. Irrelevant or repetitious evidence or cross examination will also not be permitted.

18. Parties will be invited to provide, and exchange, written closing statements after the inquiry sessions have finished. The statements for the objectors, the consultees, and the council will be lodged first, followed by those for the applicants. The deadlines for lodging the statements will be discussed at the inquiry. It is very important that parties lodge their statements by the given date. The council will place all closing statements on their web site. They will also make copies available for public inspection.

19. If a party wishes to make legal submissions that may have an impact on the programming of the hearing and inquiry sessions, they should put them in writing and forward them to the Reporter as early as possible. Such submissions should not be left until the start of the proceedings.

Dates, location and duration of the hearing and inquiry sessions

20. The hearing sessions will start at 10.00am on Tuesday, 19 October 2010, and are expected to last in the region of 2 to 3 days. The inquiry sessions will start at 9.30am on Tuesday, 16 November 2010, and are expected to last in the region of 6 to 7 days. After the opening day of the hearing sessions, proceedings will start each day at 9:30am. They will normally continue until a suitable time between 4.30pm and 5.00pm, with a break for lunch of about an hour. Mortlach Memorial Hall, Albert Place, Dufftown, AB55 4AL is a suitable venue for the hearing and inquiry sessions, and its availability is to be established by the DPEA. A public address system will be made available at this venue. Possible issues concerning overnight storage and the use of display boards can be dealt with once the accommodation is confirmed.

Procedures for the inquiry (including the arrangements for the distribution of paperwork)

21. The procedure notices that will be sent out for the issues proceeding by way of further written submissions will set out the further information and representations required, the date by which they are to be supplied (6 weeks), and those parties who should supply them. Responses to the procedure notices should be sent to all the parties that the notice specifies. A period of 14 days is allowed for parties to comment on the further information and representations, with copies again being sent to those the notice specifies.

22. The procedure notices issued for the hearing and inquiry sessions will set out what is required of those participating in these sessions. A key principle which will apply is that all participating parties must disclose their case in a structured and consistent manner prior to the hearing and inquiry sessions commencing.

23. A hearing statement must be lodged by each party participating in the hearing sessions. It should provide an outline of the case a party intends to put forward, set out a list of the documents which are to be referred to, and state the names of those who are to speak. Participating parties may also be required to provide further information in the form of an additional statement, which sets out in more detail the case that that party intends to present at the hearing sessions. For the conditions and agreements hearing session, the statements should include a list of potential conditions and the details of any proposed agreements, along with the reasons for them (all to be provided by the applicants).

24. An inquiry statement must be lodged by each party participating in the inquiry sessions. It should provide the particulars of the case a party intends to put forward, set out a list of the documents which are to be referred to, and specify the witnesses who will give evidence. Each person giving evidence at the inquiry sessions will also need to lodge a precognition (a written statement of evidence), which should be no more than 2000 words. It has not been demonstrated that an increase in the length of precognitions to 3000 words is required in this instance.

25. The dates for lodging hearing and inquiry statements will be set once the Reporter has confirmed who is participating in these sessions.

26. All documents for the hearing and inquiry sessions should be lodged at least 28 days before the start of the hearing sessions (ie by Tuesday, 21 September 2010). The applicants, the council, the Cairngorms National Park Authority, and the Speyside Business Alliance should liaise in producing a list of core documents for the hearing and inquiry sessions. They should agree who will lodge what. All documents should be submitted in a tidy and accessible manner, with the relevant parts highlighted. They must also be clearly numbered. Liaison between parties should ensure that they receive what they require. Documents include not just written material but such things as maps and photographs as well. Where parties giving evidence want to refer to a document in the course of their evidence, they must lodge it in advance. Documents which other parties have not seen should not be attached as appendices to precognitions or additional statements. These documents should be lodged as such in the normal manner, ie 28 days before the start of the hearing sessions. Electronic documents may be lodged in pdf format.

27. Any additional statements required for the hearing sessions should be submitted at least 21 days before the start of the hearing sessions (ie by 28 September 2010). All precognitions for the inquiry sessions should be submitted at least 14 days before the start of the hearing sessions (ie by 5 October 2010).

28. The written submissions to be prepared by the council and the Cairngorms National Park Authority for the inquiry sessions on landscape and visual issues (the council) and policy issues (the Cairngorms National Park Authority) should be lodged as documents (see paragraph 26).

29. All relevant papers associated with the case (including the Environmental Statement) will be placed on public deposit so that they can be referred to by members of the public. The applicants and the council should co-operate in supplying this information. When circulating papers for the inquiry, each party will have to ensure that they place a copy on deposit by sending an extra copy to the council. The council should bring the deposit set of documents to the hearing and inquiry sessions before they begin. The papers will be held at Dufftown Library, Balvenie Street, Dufftown.

30. Each party taking part in an inquiry or hearing session should send the papers they are lodging to other parties taking part in the same session when required by the Reporter. They should also send a copy to the DPEA at the same time, and confirm in writing that the exchanges have taken place. The Reporter requests that, in addition to hard (paper) copies of all material, that he be sent electronic versions of inquiry and hearing statements, any additional statements, precognitions, and closing statements. They should be in word format and preferably sent in an e-mail attachment to the DPEA.

31. Those at the procedural meeting expressed a willingness, in principle, to work together to produce agreed statements, so that the evidence presented at the hearing and inquiry sessions is more focussed. Such statements could cover basic facts, data, or assumptions relating to the proposals, eg the various methodologies used. Matters covered by agreed statements would not require to be examined any further at the relevant hearing or inquiry session. Parties at the meeting indicated

that they would produce a joint statement setting out the areas of agreement and disagreement on national planning and energy policy. Agreed statements should be lodged as documents (see paragraph 26).

Other matters

32. The applicants are publishing an update of their Environmental Statement. They indicated that it would be advertised for the first time on 9 July 2010, and that the consultation period would end on 13 August 2010. The update covers landscape and visual issues, particularly cumulative impacts, and ornithological issues.

33. The Reporter will be making a site inspection of the site and surrounding area before the start of the hearing and inquiry sessions. He is considering making this an accompanied site inspection at a date which would be arranged with those involved. The Reporter requests that the applicants, the council, the Cairngorms National Park Authority, the Speyside Business Alliance and the Mountaineering Council of Scotland liaise and provide him with a list of viewpoints from which they wish him to see the site. These are likely to be the viewpoints which are explored in greater detail at the inquiry session on landscape and visual impacts. The Reporter may add to this list. Where the viewpoint chosen for a site visit is not on or close to a road, parties should provide him with details of where it is possible to park and a map of the most appropriate route from there to the viewpoint. This information should be lodged by Friday, 30 July, 2010. If the early site inspection is accompanied, the need for a further accompanied one will be considered at the hearing and inquiry sessions. If it is unaccompanied, parties will be given the opportunity to have an accompanied site inspection either during, or at the end of, proceedings.

34. Questions to the DPEA should be directed in the first instance to the case officer – Jayne Hollas (telephone no: 01324-696454; fax no: 01324-696444; e-mail address: Jayne.Hollas@scotland.gsi.gov.uk). The office address is 4 The Courtyard, Callendar Business Park, Callendar Road, Falkirk, FK1 1XR

35. A copy of this note has been circulated to all those who have expressed an interest in the case. An additional copy will be sent to the council to make available for public inspection at Dufftown Library.

EDKT
15 July 2010