

NON-CONFIDENTIAL VERSION

BEFORE THE COMPETITION AND MARKETS AUTHORITY

IN THE MATTER OF AN APPEAL UNDER ARTICLE 14B OF THE ELECTRICITY (NORTHERN IRELAND) ORDER 1992

B E T W E E N :

SONI LIMITED

Applicant

and

THE NORTHERN IRELAND AUTHORITY FOR UTILITY REGULATION

Respondent

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APPLICATION FOR THE SUSPENSION OF A DECISION

ENERGY LICENCE MODIFICATION

SONI TSO PRICE CONTROL 2015-2020

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## NON-CONFIDENTIAL VERSION

On 12 April 2017, SONI Limited (the **Applicant**) applied for permission to bring an appeal (the **Appeal**) under Articles 14B(1) and (3) of the Electricity (Northern Ireland) Order 1992 (the **Electricity Order**)<sup>1</sup> against the decision of the Northern Ireland Authority for Utility Regulation (the **Utility Regulator**), made under Article 14 of the Electricity Order, to make modifications to the conditions of the transmission system operator (**TSO**) licence (the **TSO Licence**) in respect of the price control for the Applicant's TSO business which was originally due to commence on 1 October 2015 (the **Price Control**), as published on 14 March 2017 (the **Decision**).<sup>2</sup>

Also on 14 March 2017, in accordance with Article 14(8) of the Electricity Order, the Utility Regulator published its notice of intention that the modifications to the conditions of the TSO Licence would take effect from 9 May 2017.<sup>3</sup>

Pursuant to Article 14C(1) and paragraph 2 of Schedule 5A of the Electricity Order, by this application the Applicant seeks the suspension of the Decision pending determination of the Appeal.

Pursuant to paragraph 2(2)(a) of the Electricity Order, this application is made at the same time as the application for permission to bring the Appeal.

### **Reasons underlying the Applicant's application for the suspension of the Decision**

1. The Applicant respectfully submits that the Decision should be suspended pending the CMA's determination of the Appeal<sup>4</sup>. This is because the Applicant clearly satisfies the criteria required for suspension as explained in this application.
2. As the Applicant's case in the Appeal is that it will be insufficiently funded in order to attract necessary finance for its activities due to the Utility Regulator's failure to secure its financeability, it is uncertain how, in the absence of suspension, it can deliver the required activities and outputs under the Decision. The Applicant is exposed to a shortfall in funding under the Decision of £14.7 million, which is significant for the Applicant given the size and scale of its business operations.<sup>5</sup>
3. The implementation of the Decision would result in lower total allowable revenues being set than under current tariffs meaning the Applicant could not finance its activities, which would be against the consumer interest. In particular, the implementation of the Decision would cause difficulty for the Applicant in continuing to pay for the costs of network planning staff who transferred to the Applicant from NIE in May 2014, the ongoing costs of employer pension contributions to its Defined Benefit Scheme and the capital costs of information systems to support delivery of the DS3 programme (a workstream which has already commenced).<sup>6</sup>

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<sup>1</sup> SI 1992/231.

<sup>2</sup> Utility Regulator "Decision on the Licence Modifications for the Price Control 2015-2020 of the Electricity System Operator for Northern Ireland (SONI)", 14 March 2017 [NOA1/18] and "Modifications to SONI Limited's Electricity Transmission Licence", 14 March 2017 [NOA1/17].

<sup>3</sup> Article 14(10) of the Electricity Order.

<sup>4</sup> In **Exhibit 1/A** the Applicant list the relevant materials to which the CMA is requested to have regard to in considering this application for suspension. This includes the Notice of Appeal which contains a Glossary at pages 6-10 that explains the terms used within this application [NOA1].

<sup>5</sup> See the Notice of Appeal and, in particular, Part I Overview and Introduction and Part IV, Grounds of Appeal [NOA1].

<sup>6</sup> See Part IV of the Notice of Appeal, errors 9, 10 and 11 [NOA1].

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4. Absent suspension, there is a risk of what the Utility Regulator itself describes as “*key outputs*”<sup>7</sup> (namely I-SEM, DS3 System Services and Network Planning) being delayed (or the quality of these outputs being compromised). This is because, as explained in the Notice of Appeal and by Aidan Skelly, EirGrid’s Director of Finance and Legal,<sup>8</sup> when the Applicant approached banks to seek funding in 2016, the banks were not prepared to lend to the Applicant based on their reading of the Final Determination.
5. As a result, the Applicant currently is not able to access debt markets whilst at the same time is in the process of delivering significant investments in fulfilment of regulatory and public policy objectives. These are investments the Applicant cannot defer, or where deferral would have negative consequences for electricity market participants and consumers in Northern Ireland. The scale and scope of these investments continues to increase as a result of the Utility Regulator’s decisions or those of its SEM Committee.<sup>9</sup>
6. In addition the Applicant’s only current debt facility, a Revolving Credit Facility to support unanticipated differences in Dispatch Balancing Costs and provide stability to market participants in the wholesale electricity market, was due to expire and, again for the reasons as set out in AS1, the Applicant is not in a position to replace it at this time. The current lenders have agreed as an interim measure to continue to provide this facility to the Applicant while the Price Control process is ongoing. However these arrangements have not yet been finalised. Were the Decision now to be implemented prior to the full determination of this Appeal, even recognising the Appeal would be ongoing and that the Decision could later be reversed, it is not clear to the Applicant that the lenders would still be willing to proceed. As outlined by Aidan Skelly and Robin McCormick, General Manager of SONI,<sup>10</sup> the scale and volatility of potential mismatches in Dispatch Balancing Costs can be very significant and are by their nature uncertain and difficult to forecast. They must be settled to very precise wholesale market timelines.
7. It is clear that, absent suspension of the Decision, the revenues available to the Applicant would be reduced, with consequential impacts on cash flow to support continued operation and investments. Moreover, the scale of tariff resetting and therefore how significant the shortfall will be, and notwithstanding that in any event the Applicant believes it will be significant, is further beset by the uncertainty created through the Utility Regulator’s introduction by the Decision of the Qt term in the price control formula. This Qt term was not consulted upon in accordance with the requirements as set out in the Electricity Order and no guidance as to its application has been provided<sup>11</sup>.
8. In addition, the Utility Regulator has introduced a new Demonstrably Inefficient and Wasteful Expenditure (**DIWE**) term which it proposes to apply without having provided the Applicant with any guidance on its intended application. No provider of capital is likely to finance a business such as the Applicant’s whilst such an unspecified “sword of Damocles” hangs over its head<sup>12</sup>.

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<sup>7</sup> Final Determination, Executive Summary [NOA1/12/3].  
<sup>8</sup> Section 15 of NOA1 and paragraphs 30-35 of AS1. EirGrid is the Applicant’s parent company.  
<sup>9</sup> SEM-16-078b, I-SEM Draft revised Level 1 milestones, November 2016 – (available at <https://www.semcommittee.com/sites/semcommittee.com/files/media-files/SEM-16-078b%20I-SEM%20Draft%20revised%20Level%201%20milestones.pdf>).  
<sup>10</sup> Paragraphs 69-71 of AS1 and paragraph 23(a) of RJM1.  
<sup>11</sup> See Part IV of the Notice of Appeal, error 8 [NOA1].  
<sup>12</sup> Part IV of the Notice of Appeal, error 7 [NOA1].

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9. Hence if the suspension is not granted, significant cash flow problems will result and it is wholly unclear whether and, if so, from whom, the Applicant will acquire the necessary temporary funds pending the resolution of the Appeal, and at what cost. This not only has impacts for the Applicant and consumers but also the wider electricity industry given the significant custodian role it operates in managing various industry revenues and payments, ensuring any shortfall in revenues does not result in any payment shortfalls. These involve costs which the Applicant manages but which are largely uncontrollable, the volatility of which is expected to increase post I-SEM implementation in May 2018, i.e. during the 2017/18 tariff year<sup>13</sup>, which would therefore be affected were the decision not to be suspended at this time. The period in which the CMA will consider the Appeal is therefore a critical timeframe for implementing stability into the financial arrangements.

### Significant Costs

10. The test for suspension is one as to whether in the absence of suspension the Applicant might be expected to face or incur significant costs. Although the term “*significant costs*” is not defined in the Electricity Order or in any related guidelines, and the interpretation of that term has not previously been considered by the CMA or the English courts, it can be inferred to mean “*costs which are higher than average*” rather than “*exceptional*”, pursuant to the interpretation of the term “*significant*” under the existing case law: see *HMRC v Isle of Wight Council*,<sup>14</sup> *Tunbridge Wells BC v Quietlynn*,<sup>15</sup> *L (A Child) (Care: Threshold Criteria), Re*<sup>16</sup> and *JT v Stirling Council*.<sup>17</sup> The Applicant has supplied evidence in support of the Appeal that it would not attract any funding from external sources. Therefore, whilst it may be difficult to assess what extra costs it would have to bear if it was obliged to give effect to the Decision during the conduct of the Appeal, it is clear that there will be significant costs in the form of lower revenues.
11. This is, however, an unusual situation as, whilst in the absence of suspension the Applicant would, as described above, clearly incur significant costs, it will be Northern Ireland consumers – the very consumers whom the Utility Regulator has a principal duty to protect – who will be most significantly affected. This is because on the Utility Regulator’s own calculation the benefits falling to consumers brought about by implementing the Price Control amounts to 70 pence per annum. However, this must be seen in the light of the material adverse consequences for consumers of implementing a Decision which fails to secure the Applicant’s financeability and impairs the Applicant’s ability to deliver the investments that the Utility Regulator itself states that consumers require, such as I-SEM, DS3 and Network Planning projects.<sup>18</sup> The marginal gain to consumers in the short term through temporarily lower tariffs is clearly outweighed by the significant costs to consumers in the longer term through risks to delivery of critical investments.
12. As such, in addition to the financeability impacts referred above, the balance of convenience has to be struck between the damage to the public interest which might result from somewhat higher

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<sup>13</sup> Tariffs are usually set in August each year.

<sup>14</sup> Case C-288/07 *The Commissioners of Her Majesty’s Revenue & Customs v Isle of Wight Council* [2008] OJ C 301/9, paragraphs 68 and 71-79.

<sup>15</sup> *Tunbridge Wells Borough Council v Quietlynn Ltd and others; The Council of the Borough of South Tyneside v Private Alternative Birth Control Information and Education Centres Ltd; Watford Borough Council v Private Alternative Birth Control Information and Education Centres Ltd and another* ([1985] Crim LR 594 at 594-595.

<sup>16</sup> *L (A Child) (Care: Threshold Criteria), Re* [2007] 1 FLR 2050 at 2064.

<sup>17</sup> *JT v Stirling Council* 2007 S.C. 783 at paragraph 23.

<sup>18</sup> See paragraphs 46-71 of AS1 for a description of these projects.

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tariffs being implemented on a temporary basis and damage to the Applicant, which in itself would harm the public interest.

13. If the Applicant's appeal is upheld and more finance is forthcoming, the suspension will have been properly granted. If, on the contrary, the Price Control is upheld, the Applicant will be subject to the normal "true-up" from the date on which the Decision would have been implemented absent suspension. Consumers will be no worse off.
14. To the Applicant, it seems self-evident that the case for a suspension is a strong one, in particular because the Utility Regulator has shown no urgency at all in adopting the Price Control as explained by Bill Thompson, Group Regulation Manager at EirGrid.<sup>19</sup> The Decision was published more than eighteen months later than originally planned.

### **Balance of convenience**

15. The balance of convenience test is a key part of the House of Lords' well-established judgment in *American Cyanamid*,<sup>20</sup> which sets out the criteria for determining whether an interim injunction should be granted. In cases involving two private entities, the court would ordinarily be required to weigh whether the parties could be compensated by an undertaking in damages if an injunction were granted or, conversely, whether damages would be an adequate remedy if an injunction were not granted.
16. However, such considerations are not typically appropriate in public law cases, where the balance of convenience test must instead weigh the consequences suffered by the individual against the "*wider public interest*",<sup>21</sup> taking account of the particular factual circumstances in which the injunction is sought (often referred to as the "*special factors*").
17. The financial harm to the Applicant were the Price Control to come into effect would be far more significant than that for consumers; moreover, for the reasons set out above, the resulting impact on outputs would be harmful to consumers. The Applicant's case is that there is a real risk of no further funds being forthcoming and that in the event the Decision were not to be suspended the Revolving Credit Facility, the extension of which it is currently in the process of finalising, could, in fact, collapse. Were this to be the case, it is not clear how the Applicant would be in a position to deliver on the objectives set out for it by the Utility Regulator. The consumers of Northern Ireland would be the ultimate losers.

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<sup>19</sup> See PART C OF BT1.

<sup>20</sup> *American Cyanamid Co v Ethicon Ltd (No. 1)* [1975] A.C. 396.

<sup>21</sup> See e.g. *R. v Secretary of State for Transport, Ex parte Factortame Ltd. and Others (No. 2)* [1991] 1 A.C. 603, page 673.

**STATEMENT OF TRUTH**

I believe that the facts stated in this application are true.

Signed .....

Name .....

Dated .....

**BEFORE THE COMPETITION AND MARKETS AUTHORITY**

**IN THE MATTER OF AN APPEAL UNDER ARTICLE 14B OF THE ELECTRICITY (NORTHERN IRELAND) ORDER 1992**

**B E T W E E N :**

**SONI LIMITED**

**Applicant**

**and**

**THE NORTHERN IRELAND AUTHORITY FOR UTILITY REGULATION**

**Respondent**

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**[DRAFT] ORDER FOR SUSPENSION OF PRICE CONTROL  
DECISION**

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**Upon** the appeal by the Applicant relating to the decision by the Respondent for the 2015-2010 Price Control (the **Decision**) by the Notice of Appeal dated 12 April 2017 (the **Appeal**)

**And upon** the application by the Applicant for the suspension of the Decision dated 12 April 2017

**And having regard** to the Competition and Markets Authority's powers under The Energy (Northern Ireland) Order 1992

**IT IS ORDERED** that:

The Utility Regulator suspend the Decision and maintain the operation of the existing price control arrangements pending the final determination of the Appeal or further order.

Liberty to apply.