

CLOSING SUBMISSIONS ON BEHALF OF THE MoD

(This reduces to writing the submissions made orally by Counsel for the MoD)

Basic stance of the MoD

1. The MoD expresses its strongest possible opposition to this proposal.
2. The one and only basis of the MoD's opposition is that this proposal will have a serious adverse effect on the operation and effectiveness of the Air Defence radar system of the United Kingdom.
3. On the current state of technology and given the laws of physics, it is not possible to modify or condition (call it what you will) the proposal such as to lessen the adverse effect on the operation and effectiveness of the Air Defence radar system of the United Kingdom.
4. I will make submissions separately on your ability to impose a condition of the kind suggested by Mr Trinnick and by the MoD. The difficulty with these is the same. It is no greater or lesser because the developer vests the power to confirm in the Secretary of State and the other vests the power to confirm in the Chief Officer for the Deployable Air Command and Control Systems and Sensors.
5. This inquiry has read and heard the evidence of Sqd Ldr Breedon. He is uniquely well qualified to assess the impact of this development on the operation and efficacy of the Air Defence radar system of the United Kingdom. It is notable that there was no challenge to his expertise; and there was no suggestion that his assessments of these matters could be gainsaid. Mr Ainslie conceded this very point in his cross-examination.
6. What this inquiry is thus left with is uncontroverted evidence from Sqd Ldr Breedon as to the likely impact of this development on the operation and effectiveness of the Air Defence radar system of the United Kingdom.
7. What does Sqd Ldr Breedon tell us? In his first proof of evidence he sets out the three classes of adverse effect on Air Defence radar caused by wind turbines:
 - (1) Obscuration (§§28-31). Obscuration is a "hole" in radar coverage as an aircraft flies over the turbine. Obscuration results from the large radar reflection caused by wind turbines.

- (2) Shadow region (§32). Shadow is an area of diminished return signal amplitude in an area behind the turbines. The lower the amplitude of a return signal, the more likely it is to fall below the signal threshold for recognition. This is of great importance when seeking to detect objects that do not want to be seen.
- (3) Clutter (§§33-36). This is spurious signal returns from the turbines themselves. These confuse the radar system because they cannot always be distinguished from the radar return signals with which the Air Defence radar system is interested.

These three factors led Sq Ldr Breedon to conclude (§63) that he believed that the windfarm would “have a significant adverse impact on the efficacy of the radar at Brizlee Wood.”

8. The Inquiry will remember that the radar at Brizlee Wood is one of strategic importance. Sq Ldr Breedon sets that out at §§9-15 of his first proof. In order to see how that fits into the whole picture, I would invite the Inquiry to re-read §§16-25 of Sq Ldr Breedon’s first proof.
9. In the above respects, the windfarm at Middlemoor presents the same problems for air defence radar systems as other windfarm developments.
10. But so far as adverse effect on the air defence radar system is concerned, this windfarm development is in a different league. Middlemoor is situated in line of sight of the air defence radar at Brizlee Wood and within such close proximity to it that it breaks the beam formation from that radar. In this way, the adverse effects upon the operation and efficacy of that facility and the air defence radar system is altogether greater than in ordinary cases.
11. The adverse effects upon the air defence radar system are so great that they completely overshadow the usual problems that a windfarm development presents for the air defence radar system. Sq Ldr Breedon speaks to this in his second proof. The Inquiry will recall his oral evidence on this point. There was no qualification to his assessment of the adverse effects: see §§8, 8 and 10 of his second proof.
12. The MoD does not understand Npower to say that this Inquiry can properly subordinate national security implications of this order to their interest in seeing

this development go forward. As indicated earlier, Npower has not sought to question Sq Ldr Breedon's assessment of the effect of this windfarm upon the operation and effectiveness of the Brizlee Wood radar facility.

13. Ineluctably, this compels only one conclusion. This application cannot be permitted. There is no answer to the MoD's objection. To use Sq Ldr Breedon's words: "it is the laws of physics."
14. It gives the MoD no pleasure to take this line. The MoD will continue to work with windfarm developers to try to minimise the adverse impact of any windfarm development upon the air defence radar system of this country. As Mr Ainslie noted, this is a developing area. His evidence was that *some* things which had been thought insuperable 5 years ago have since been resolved.

Conditions - principle

15. Section 36 of the *Electricity Act 1989* provides (so far as relevant):

“(1) Subject to subsections (2) and (4) below, a generating station shall not be constructed at a relevant place (within the meaning of section 4), and a generating station at such a place shall not be extended or operated except in accordance with a consent granted by the Secretary of State.

(2)-(4)

(5) Subject to subsections (5A) and (5B), a consent under this section—

(a) may include such conditions (including conditions as to the ownership or operation of the station) as appear to the Secretary of State to be appropriate; and

(b) shall continue in force for such period as may be specified in or determined by or under the consent.

.....”

16. The Act itself contains no further indication as to the identification of what is appropriate. Nor do the *Electricity (Application for Consent) Regs 1990* give any such clue.
17. A little guidance can be found in the Department for Business Enterprise and Regulatory Reform document entitled *A guidance note on Section 36 of the Electricity Act 1989*: see §§3.6, 3.49-3.51. The document does not have any special statutory status. Beyond telling us that any conditions under a s.36 consent should comply with the 6 requirements set out in Circular 11/95 under the *Town and Country Planning Act 1990* (which relates to planning conditions), the

document does not shed much light.

18. Essentially, subject to these 6 requirements, conditions under s.36 are at large, with the lodestar being appropriateness.
19. The MoD's objection to the imposition of a condition along the lines suggested by NPower (and indeed by the MoD) is a fundamental one. It goes to the very nature of a consent. The objection is one that can equally be made of any permission, notice, licence, consent, call it what you will. It is that the condition essentially negates the consent. It is a contradiction in terms to grant a consent to construct a particular generating station but condition that consent such that that generating station may not be constructed without the approval of the very person who purports to grant consent (or someone else), providing no defined and objectively referable means of determining whether that approval must be given. That is no consent at all. It is a deferral of consent to another person and/or another time, with the initial decision-maker (this Inquiry) doing no more than carrying out a preliminary sift. This is not the task that has been conferred upon the Secretary of State, and through him this Inquiry, by s.36.
20. Section 36 confers upon the Secretary of State power to grant a consent to construct, extend and/or operate a generating station. That power is not conferred on anyone else. That power is not subject to any sort of veto that can thereafter be exercised.
21. Section 36 does enable a consent to include such conditions as appear to the Secretary of State to be appropriate. But the Secretary of State cannot under the guise of a condition remove or fundamentally alter the very consent that has been granted. Conditions shape the consent that has been granted. The consent here will be to construct a particular electricity generating station. The proposed condition moves the control of whether this particular generating station will be constructed to the Secretary of State *in the exercise of the condition*. This is an impermissible condition. No amount of playing around with language will get around this fundamental difficulty.
22. Another way of putting the point is to say that satisfaction of the condition is not within the control of the person who has been granted the consent. We know from the evidence, not disputed on this point, that it is quite possible (the MoD

would say very likely if not inevitable) that erection and operation of the windturbines cannot be done without adversely affecting the air defence radar system. The developer can make modifications of one sort and another to the turbines, but it is acknowledged by him that it is quite possible (the MoD would say very likely if not inevitable) that no matter what modifications are made, there is no way of overcoming the adverse effects upon the air defence radar system. A condition that will likely prove impossible to achieve is bad in law: *British Airports Authority v. Secretary of State for Scotland* [1979] JPL 260.

Suggested conditions

23. On the assumption that the submissions about the permissibility of the proposed conditions are not accepted (*i.e.* that this Inquiry concludes that either or both the conditions is permissible), the MoD makes the following submissions in relation to the two suggested conditions.

24. So far as the condition suggested by Npower is concerned, based on the evidence of Sq Ldr Breedon, this condition would fail to address the adverse effects of the development on air defence radars. The suggested condition is inadequate on three bases, each sufficient in itself:
 - (1) It vests in a person with no air defence radar qualifications or expertise the task of determining the impact of the development upon the air defence radar capability of this country. The unchallenged evidence of Sq Ldr Breedon is that this is a highly technical and skilled area, and that it is easy for the untrained to think they know when they simply do not sufficiently know. This inadequacy cannot be answered by the assertion that the Secretary of State for Business, Enterprise and Regulatory Reform can inform himself from recommendations received by him from relevant positions within Sq Ldr Breedon's unit. First, the condition as drafted provides no mechanism to ensure that that happens. If it did not, and approval were given, there is nothing that could be done about it. Secondly, it would not be open to the Secretary of State for Business, Enterprise and Regulatory Reform to follow whatever was put in front of him by Sq Ldr Breedon (or his equivalent). The lawful exercise of the power of approval presupposes that the Secretary of State for Business, Enterprise and Regulatory Reform may differ in his views from those expressed by

Sq Ldr Breedon (or his equivalent). The Secretary of State for Business, Enterprise and Regulatory Reform cannot, under a condition such as this, fetter his discretion. The Secretary of State for Business, Enterprise and Regulatory Reform cannot under a condition such as this abdicate his decision-making role. The decision to approve or not to approve is his and his alone.

Therein lies the first inadequacy: the decision-making power is placed in hands of the wrong person.

- (2) The second inadequacy is tied up with and compounds the first inadequacy. Under this proposed condition, the decision maker need only “take into account considerations relation to air defence radar.” The touchstone for approval is not directly linked to the effect upon air defence radar. All that is required is that they have been “taken into account.”

That is simply not sufficient.

Any condition that permits an approval where the turbines will have a materially adverse effect upon air defence radar is an inadequate condition. It may be said that this gives paramountcy to the efficacy of air defence radar. So it does. The MoD does not shrink from this proposition. That is the very case of the MoD. It is unacceptable to have a condition that permits approval where approval of the development will result in a materially adverse effect upon air defence radar.

- (3) The third inadequacy of the condition is that it confines its consideration to the pre-construction stage. It provides no mechanism to control the adverse effects of the operation of the turbines or, indeed, of the effects of the turbines once erected. The condition presupposes that the precise effects of turbines upon air defence radar can be fully anticipated by looking at the specification. The condition presupposes that those precise effects are a constant. It presupposes that their effects upon air defence radar are the same, regardless of the weather, regardless of whether they are in operation, regardless of how many are in operation, and regardless of the state of alert of the air defence radar system.

None of the presuppositions is borne out.

All radar is affected by prevailing weather conditions. Those that

would breach the air defence of this country know that. Radar is greatly affected by the operation, as opposed to the mere presence, of wind turbines. And it is similarly affected by the number of turbines in operation. The efficacy of air defence radar is measured against the task that it is to perform. That task is directly related to the state of alert at any given time.

The proposed condition ignores all of this. Once approval is given, that is that. If it be found that the turbines when operating have a completely ruinous effect upon air defence radar, there is nothing that can be done. If it is found that in certain weather conditions they render ineffective air defence radar, then nothing can be done. And if this country were at any stage to be on a higher state of alert, again with this proposed condition there is nothing that could be done to lessen the interference to the air defence radar system caused by operating the turbines. The proposed condition is incapable of dealing with any of this. It is inadequate.

25. If there is to be a condition, it should be as follows:

“No wind turbine approved by this Consent shall be erected without the prior written certification by the Chief Officer for the Deployable Air Command and Control Systems and Sensors that the erection of the wind turbines approved by this consent (or any part of them) will not adversely affect the operation or effectiveness of the air defence radar system of the United Kingdom or any part of that system.

No wind turbine approved by this Consent shall be operated without the prior and current written certification by the Chief Officer for the Deployable Air Command and Control Systems and Sensors that the operation of the wind turbines approved by this consent (or any part of them) will not adversely affect the operation or effectiveness of the air defence radar system of the United Kingdom or any part of that system. This certification may:

- (1) be revoked, modified or replaced from time to time by the Chief Officer for the Deployable Air Command and Control Systems and Sensors;
- (2) include conditions of operation for the wind turbines, including (without limitation) hours of operation,

days of operation, numbers of turbines that may be operated, manner of operation, or any combination of the preceding; and

- (3) provide for an immediate stop operation command to be issued by the Chief Officer for the Deployable Air Command and Control Systems and Sensors in respect of the wind turbines or any number of them.”

26. This condition addresses each of the three inadequacies in the condition that has been suggested by Npower. Nothing less will do. The condition suggested by the MoD is a burden on Npower. The MoD appreciates that. But there is no other way of accommodating the demands of an effective air defence radar system.

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