

**ELECTRICITY ACT 1989 (SECTION 36 AND SCHEDULE 8)
TOWN AND COUNTRY PLANNING ACT 1990 (SECTION 90)
THE ELECTRICITY GENERATING STATIONS AND OVERHEAD LINES
(INQUIRIES PROCEDURE) (ENGLAND AND WALES) RULES 2007**

**PUBLIC INQUIRY TO CONSIDER SECTION 36 ELECTRICITY ACT 1989
APPLICATIONS BY:**

- (1) STEADINGS WIND FARM LIMITED FOR CONSENT AND DEEMED PLANNING PERMISSION TO CONSTRUCT AND OPERATE A WIND FARM AT KIRKWHELPINGTON, NORTHUMBERLAND (KNOWN AS STEADINGS)**
- (2) AMEC PROJECT INVESTMENTS LIMITED FOR CONSENT AND DEEMED PLANNING PERMISSION TO CONSTRUCT AND OPERATE A WIND FARM AT RAY ESTATE, NORTHUMBERLAND (KNOWN AS RAY WIND FARM)**
- (3) WIND PROSPECT DEVELOPMENTS LIMITED FOR CONSENT AND DEEMED PLANNING PERMISSION TO CONSTRUCT AND OPERATE A WIND FARM AT GREEN RIGG FELL, BIRTLEY, NORTHUMBERLAND (KNOWN AS GREEN RIGG WIND FARM)**

REPLY TO AMEC/0/50

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Introduction

1. At the opening of this Inquiry (15 January 2008) I stated as follows:

“33. There is nothing unavoidably unfair to AMEC, or to the other developers, in this Inquiry. If AMEC thinks that there is, it could and it should have made an application to the High Court, at the very latest immediately after 21 December last year. The High Court is the proper forum for Mr Norris’s unfairness complaint. Mr Norris knows that. And yet, AMEC has not made any such application to the High Court. Instead, they continue to complain to you how unfair it all is. They complain that the MoD’s objections are just theoretical. Then they tell us that they are not going to put any of this to any of the MoD’s witnesses. Can I just underline that. Mr Norris describes (*Opening* §14) the MoD’s objection as a “very important, arguably decisive, consideration.” But he is not going to put a single question on this “very important, arguably decisive” consideration to any of the MoD’s witnesses. These are the very people who speak to it. That is fine if that is what AMEC want to do. However, as a matter of law, if a party does not put to a witness of another party the points of dispute with that witness’ evidence or attack the witness’ credit, it is not open to the first party to submit that that witness’ evidence should be rejected. You cannot adopt a cross-examination that has not yet been heard or delivered. So I put a marker down. Either AMEC puts it case to the MoD witnesses or, as a matter of law, it will have forfeited its ability to submit that the MoD’s evidence should be rejected.”
2. By a *Note on Procedure* dated 21 January 2008 (Inquiry Document “AMEC/0/50”), William Norris QC, Counsel for AMEC, asked the MoD to “confirm” that Mr Coppel’s submission was withdrawn.
3. I do not withdraw the submission. I reiterate it.
4. AMEC has elected to take what it acknowledges is a highly unusual course of action. The reason it is highly unusual is because it rejects all the basic means by which any party in any proceedings presents its case to a tribunal of any sort. Namely,
 - by attending the hearing, at least for those times when it is dealing with issues with which that party is concerned;
 - by presenting all the evidence that it has that supports its case;
 - by challenging the evidence of others with which it does not agree;
 - and
 - by making submissions founded upon the evidence before the tribunal.

In so rejecting the above, AMEC has voluntarily assumed the risk of the consequences of doing so. That is its choice. There have been no circumstances that compel it to make this choice. It is fixed with the consequences.

5. AMEC's stated approach to this Inquiry is, in summary, as follows:
- AMEC will not be represented nor will it represent itself at the Inquiry (§3 Norris note).
 - Despite not being represented nor representing itself, it will somehow call witnesses (§3 Norris note). The MoD understands that this will simply be to enable the introduction of its witnesses' proofs of evidence and to tender those witnesses for cross-examination: there will be no examination-in-chief and no re-examination of AMEC's witnesses.
 - Despite the stated non-representation, AMEC has through Leading Counsel already made an opening submission and it similarly intends to make a closing submission (§3 Norris note).
 - Without having heard the evidence and without being represented at the hearing or representing itself, it nevertheless "has formally challenged evidence which contradicts that which [AMEC] has served" (§3 Norris note).
 - Before any cross-examination has been carried out and having said that it will not be there when it is carried out, AMEC nevertheless says that it "adopt[s] the cross-examination of others which furthers AMEC's cause" (Norris §3). The manner by which such cross-examination will be identified and the ascertainment of the manner and extent to which others' cross-examination furthers AMEC's cause are not stated.¹
6. Against this, AMEC now repeats the propositions that it made during its opening as to the consequences of its unusual course. Namely, that the absence of active² cross-examination, particularly in an inquisitorial (as opposed to an adversarial)³ process:

¹ The explanation proffered by AMEC that since "all the relevant evidence on both sides will have been exchanged so what is in issue and would ordinarily need to be challenged in cross-examination is entirely clear" (§6 Norris note) does not begin to bear analysis, particularly where that evidence relates to complex, technical issues such as the aviation issues in this Inquiry.

² It is not known what other sort of cross-examination there is.

³ The supposed dichotomy between inquisitorial proceedings and adversarial proceedings is neither real nor helpful. Proceedings in which the tribunal has an inquisitorial role (*i.e.* proceedings in which the tribunal can indicate to the parties that it wants to hear them on matters that are not in issue between or have not been raised by them) will often also be adversarial in nature. The present inquiry is a paradigm.

- (1) goes only to weight;
 - (2) does not have the effect that AMEC is bound by contrary evidence, and AMEC can submit “if it wishes” that the unchallenged opposing evidence should not be accepted; and
 - (3) does not preclude AMEC from submitting (for example) its aviation evidence should prevail over that called for the MoD.
7. The propositions show little understanding of a central object and function of cross-examination. It is essential to the fair conduct of any proceedings with opposing parties that one party (“party A”) should put to each of his opponents’ witnesses in turn so much of his own case as concerns that particular witness. That does not require line-by-line questioning of the evidence of an opponents’ witnesses. It only requires that party A provide each such witness with a sufficient opportunity of providing an explanation upon any particular matter that is in contention by party A. In particular, if the credit or professionalism of an opponent’s witness is to be called in question, party A must put that squarely to that witness, identifying the grounds for that challenge, in order that that witness has the opportunity to explain himself. Where party A’s points of challenge to an opposing witness’ evidence are already perfectly clear from proofs or other documents, then that will suffice to meet the fairness requirement.⁴ However, the fairness requirement is not met by leaving the points of contention to be deduced from the totality of the material adduced by party A. If the required challenge is not made to a witness’ evidence, party A will not be allowed to attack that witness’ evidence on that point in his final address. This is all elementary stuff.⁵
8. With this introduction, the MoD makes three specific observations.
9. First, AMEC’s peculiar decision will inevitably deprive the Inspector and all those appearing before him of the benefit of knowing the precise scope of the challenge to the aviation evidence presented by the objectors. Parts of that evidence are site-

⁴ It is also not necessary to challenge expressly evidence of a witness that is inherently “incredible or romancing.” That has little potential application to the evidence which this Inquiry has received as to the impact of wind-turbines upon the efficacy of air traffic control radars.

⁵ Starting with *Browne v. Dunn* (1894) 6 R 67 and most recently *Markem Corporation & Anor v. Zipher Ltd* [2005] RPC 31 at [50]-[61]. It “remains a valid rule of good practice and fairness”: *Deepak Fertilisers v. Davy McKee UK (London) Ltd*[2002] EWCA Civ 1396 per Latham L.J. at [50].

specific. One consequence of AMEC's "limited role" is that those parts of the evidence relating specifically to the Ray windfarm will be wholly unchallenged.

10. Secondly, it is questionable whether a party can "adopt" a cross-examination yet to be undertaken, still less one that is not going to be heard by the party purporting to adopt it. It will not always be clear whether a particular answer given or proposition put in cross-examination "furthers AMEC's cause."
11. Thirdly, the stance adopted by those acting on behalf of AMEC places the Inspector in an invidious position. Not only will he have to grapple with the complex issues raised by the Ray windfarm application, he will have to do so without the benefit of seeing those issues developed through cross-examination of the objectors' witnesses and through AMEC asking its own witnesses questions that speak to the points of dispute as they have emerged from the proofs. It is the points of dispute, rather than the points upon which there is no dispute, that generally present the greatest challenge to any inquiry of this sort. And it is those points upon which an inspector's reliance upon the parties is at its greatest.
12. It is correct that the Inspector in this Inquiry has an inquisitorial function. But it is important to identify the scope of that function. Unlike some other tribunals with an inquisitorial function, it is not open (for example) to the Inspector to call witnesses.⁶ Put broadly, the inquisitorial function of the Inspector is principally directed to inquiring of the parties (if necessary, through the witnesses that those parties have called) about matters that they themselves consider to be either not in issue or of lesser importance. Whichever way, the Inspector must make the matters with which he is concerning himself tolerably clear to the parties, he must give those parties an opportunity to deal with those matters, and he must not pursue those matters for partisan reasons or in a way that might fairly be perceived to be partisan.⁷
13. The assertion made in AMEC/0/50 (§6) that:

⁶ There is "no duty at all on the inspector to put himself in the position of an advocate for one of the parties": *Snow v. SSE* (1976) 33 P&CR 81 (where the court rejected the suggestion that an inspector was under a duty to formulate questions on behalf of an unrepresented party).

⁷ *Dyason v. SSE* (1998) 75 P&CR 506; *Jory v. SSTLGR* [2003] 1 PLR 54; *Halifax BS v. SSE* [1983] JPL 816.

“...this is an inquisitorial process in which the Inspector can and would intervene where there is a conflict of evidence which necessitated examination by question and answer”

is both far-reaching and fraught with difficulty. The stated “necessity” for examination where there is a conflict of evidence asserts a duty on the Inspector to identify any such conflict and a further duty on the Inspector to carry out an examination of the witnesses sufficient to resolve that conflict.

14. Mr Norris QC is simply wrong in this assertion. It is not the function, still less the duty, of an Inspector in an Inquiry such as this to identify any conflicts of evidence and then to carry out an examination of the witnesses so as to resolve that conflict. An Inspector who embarked on such a process would very easily over-step the mark, almost certainly resulting in a challenge by way of appeal. Furthermore, if an Inspector were to embark on such a course, even-handedness would compel him to carry it out for all parties and all evidence: one party cannot secure for itself favoured treatment by simply not bothering to turn up as and when it chooses.
15. In short, AMEC’s position is no different from any other party to proceedings in which there are opposing sides: it must act in a manner that is fair to witnesses, to other parties and to the Inspector. If AMEC chooses not to put questions to the MoD’s witnesses upon the points of those witnesses’ evidence that are disputed by AMEC, it is not open to AMEC in its closing submissions to invite this Inquiry to reject that evidence of those witnesses, whether expressly or implicitly.⁸
16. There is no “obvious injustice” to AMEC from this (cf. §7 Norris note). It is one of the consequences of refusing to play an effective role in the Inquiry.

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⁸ For example, by identifying in closing submissions a conflict of evidence upon a particular point and inviting this Inquiry to prefer the evidence of AMEC’s witness to that of the MoD’s witness on that point.