

ELECTRICITY ACT 1989 (SECTION 36 AND SCHEDULE 8)

TOWN AND COUNTRY PLANNING ACT 1990 (SECTION 90)

THE ELECTRICITY GENERATION STATIONS AND OVERHEAD LINES (INQUIRIES  
PROCEDURE)(ENGLAND AND WALES) RULES 2007

PUBLIC INQUIRY TO CONSIDER SECTION 36 ELECTRICITY ACT 1989 CONSENT  
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)

AND A PUBLIC INQUIRY TO CONSIDER A SECTION 78 TOWN AND COUNTRY  
PLANNING ACT 1990 APPLICATION BY:

- (3) WIND PROSPECTS DEVELOPMENT 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)

**SUBMISSION ON BEHALF OF THE  
MINISTRY OF DEFENCE  
ON COSTS APPLICATIONS AGAINST THE MINISTRY  
OF DEFENCE**

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## *Glossary*

- “**AMEC**” means AMEC Project Investments Ltd (later AMEC Wind Energy Ltd) acquired by Vattenfall Wind Power Ltd on 6 October 2008;
- “**Circ 8/93**” means Department of the Environment Circular 8/93, entitled *Award of costs incurred in planning and other (including compulsory purchase Order) Proceedings*, dated 29 March 1993;
- “**Circ 02/2006**” means DCLG Circular 02/2006, entitled *Crown Application of the Planning Acts* dated 7 June 2006;
- “**DCLG**” means the Department for Communities and Local Government;
- “**the Developers**” means AMEC, GR and WP;
- “**EGSR**” means *The Electricity Generating Stations and Overhead Lines (Inquiries Procedure) (England and Wales) Rules 2007*, SI 2007/841;
- “**Green Rigg**” means Green Rigg Fell, Birtley Parish, Northumberland;
- “**LGA**” means the *Local Government Act 1972*;
- “**MOD**” means the Ministry of Defence;
- “**PCPA**” means the *Planning and Compulsory Purchase Act 2004*;
- “**Steadings**” means Steadings Windfarm Limited;
- “**TCPA**” means the *Town and Country Planning Act 1990*;
- “**TCPI Rules**” means *The Town and Country Planning (Inquiries Procedure) (England) Rules 2000*;
- “**third party**” means third party as defined in §1 of Annex 4 to Circ 8/93; and
- “**Wind Prospect**” means Wind Prospect Development Ltd.

## ***Introduction***

1. The MoD has already made its submission in relation to the power of one Secretary of State to order another Secretary of State to pay costs (11 November 2008, MOD/0/35). Those submissions stand and are not repeated here. This document need only be considered were that submission not to be accepted.
  
2. There is one further introductory observation. All three costs applications are animated by DCLG Circular 02/06 (7 December 2006). As AMEC has acknowledged (§1.6 of AMEC's costs submission), it was not until week 16 that it became aware of DCLG Circular 02/06. Until then the stated position of AMEC had been that there was no power in the Secretary of State to order costs against the MoD. Neither Wind Prospect nor Steadings demurred from this stance. As is acknowledged at §1.5 of its costs submissions, AMEC had used that very understanding as a plank of its submission that the MoD should not be able to raise the threat radar issue. The Inquiry is not told what the catalyst was for three very experienced Planning Counsel to learn of the existence of a Planning Circular that had already been in public circulation for nearly two years. It is no part of the MoD's case to draw sinister suggestions out of simple slips. These things do happen. And it happened to each of the three Developers, to all their solicitors and all their Counsel.<sup>1</sup> The MoD takes no point on this evolution in the Developers' case on costs.

## ***Principles for an award of costs***

3. The Secretary of State's current guidance on costs awards in planning proceedings is found in Circular 8/93.<sup>2</sup>
  
4. The starting position is that costs in planning proceedings do not follow the event. Annex 1 to the Circular is of general application. It begins:
  - "1. In planning and other proceedings to which this guidance applies, the parties normally meet their own expenses. Except for compulsory purchase and analogous orders (which are dealt with in Annex 6), costs are awarded only when what is termed 'unreasonable' behaviour is held to have occurred. The word "unreasonable" is used in its ordinary meaning, as reflected in the High Court's judgment in the case of *Manchester City Council v. Secretary of State for the Environment and Mercury Communications Limited* [1988] JPL. 774.
  2. The principle that the parties normally meet their own expenses means that, in proceedings to which this guidance (except Annex 6) applies, awards of costs do not

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<sup>1</sup> At least on this (if seemingly little else), they were at one with Counsel for the MoD. The latter would like to think that Counsel for AMEC has withdrawn (albeit only implicitly) the unsubstantiated insinuation made to the Inquiry on 6 November 2008 that Counsel for the MoD had improperly sat on his hands as he listened to the Developers' Counsel erring in their understanding of the law.

<sup>2</sup> Paragraph 13 cancels Circulars 2/87 (WO 5/87) and 23/91 (WO 77/91)

necessarily 'follow the event'. A decision on a costs application, when made, does not follow directly from the result of the appeal itself. An appellant is not awarded costs simply because the appeal succeeds. Nor are the planning authority awarded their costs simply because the appeal fails. An award against a successful party may very occasionally be justified. (For example, a partial award may be made against a successful appellant for behaviour resulting in procedural delay.)"

5. Paragraph 6 of Annex 1 sets out general preconditions for a costs award:

"6. Before an award of costs is made, the following conditions will normally need to be met: -

- (1) one of the parties has sought an award at the appropriate stage of the proceedings (as explained in Annex 5);
- (2) the party against whom costs are sought has behaved unreasonably; and
- (3) this unreasonable conduct has caused the party seeking costs to incur or waste expense unnecessarily, either because it should not have been necessary for the matter to be determined by the Secretary of State, or because of the manner in which another party has behaved in the proceedings (for example, because the arranged inquiry or hearing had to be cancelled or extended, resulting in wasted preparatory work or unnecessary additional expense).

The Secretary of State and Planning Inspectors determine only the extent of any costs payable, not the actual amount (see paragraph 5 of Annex 5)."

6. Pausing here, before any costs may be made against any party (whether a main party or a third party) under Annex 1, two preconditions must be satisfied:

- (1) the party must have behaved unreasonably; and
- (2) and that unreasonable conduct must have caused the claiming party "to incur or waste expense unnecessarily".

7. It is the "unreasonableness" requirement that separates awards of costs in planning appeals from awards of costs in litigation. Implicit in the distinction is that in planning appeals a party can reasonably maintain an unsuccessful objection. Provided that a party (whether a main party or a third party) to a planning appeal has advanced some evidence (i.e. evidence that is not devoid of real substance) in support of its case, then, unless the other side then advances evidence that that party *knows* is both cogent and overwhelming, it will not have been unreasonable:

"There is thus an evidential threshold which, if reached, is unlikely [*scil.* likely] to put a planning authority beyond the risk of a finding that it has been guilty of unreasonable conduct. I propose to refer to it by use of the phrase 'sufficient evidential basis' by which I mean evidence, not lacking real substance, which is capable of belief and which, if accepted, would be capable of making good the plaintiff authority's objection. I would wish to stress, though, there may not be only one test of unreasonable conduct in relation to the raising of a planning objection and the evidential threshold. A planning authority which persists with an objection knowing the appellant is in a position to advance cogent and overwhelming evidence to refute it may, in an appropriate case and despite any evidence the planning authority may have to offer, lay itself open to a finding of unreasonable conduct despite the fact that its own evidence crosses the evidential threshold so that it may be at risk, therefore, of an order that it pay the costs of the attendance of the appellant's relevant witnesses at the inquiry": *R v SSE ex p Wakefield Metropolitan BC* at 81.

8. The power to award costs against a third party is even more constrained. The MoD is a "third party" within the meaning of Circ 8/93: see §12 of Annex 1 and §1 of Annex 4.

Accordingly the power to award costs is circumscribed by the requirements of Annex 4 of Circular 8/93. Annex 4 introduces a requirement of exceptionality.

9. Paragraph 2 of Annex 4 provides:

“Awards of costs either in favour of or against third parties, including statutory consultees, will be made only in exceptional circumstances. In general, third parties will not have costs awarded to, or against, them where unreasonable behaviour by one of the principal parties relates to the substance of the case (i.e. the appeal, or the refusal or permission, is considered unreasonable). But, where unreasonable conduct relating to procedural matters at the inquiry, or hearing, causes unnecessary expense, third parties may be awarded costs, or have costs awarded against them. An example would be an unnecessary adjournment caused by unreasonable conduct, whether of a third party or of another party.”

10. Paragraph 2 of Annex 4 contradistinguishes costs against a third party<sup>3</sup> from costs against a principal party in three ways:

- (1) Under Annex 4 the power to award costs in favour of or against third parties only arises in exceptional circumstances, as opposed to unsuccessful but unexceptional circumstances;<sup>4</sup>
- (2) Under Annex 4, the power to award costs is limited to where the unreasonable conduct relates to procedural matters, as opposed to unreasonable conduct which relates to the substance of the case;<sup>5</sup> and
- (3) Under Annex 4, the power to award costs is further limited to conduct at the inquiry, as opposed to conduct before the inquiry.

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<sup>3</sup> The Circular only recognises two classes of parties: a “principal party” being the relevant planning authority and the appellant. And all others, who are defined for the purposes of Circ 8/93 as “third parties”. See Annex 1 §12. There is no basis for the contention made in §§16-17 of Wind Prospects’ Costs Submission that this categorisation is to be unpicked in the case of a government department. Still less is there any basis for the assertion in §17 that: “There is no sensible and fair reason for treating a body such as MOD any more favourably than a local authority.” This is an argument that goes to a redrafting of the terms of the Circular, rather than to the meaning of the Circular as it is currently drafted.

<sup>4</sup> Steadings states (without any explanation) in §17 of its Costs Submissions that “the better view” is that “any requirement to show exceptional circumstances does not apply in relation to procedural unreasonableness”. This assertion flies in the face of the words of §2 of Annex 4, which expressly says just the opposite, opening with the sentence: “Awards of costs either in favour of or against third parties, including statutory consultees, will only be made in exceptional circumstances”.

<sup>5</sup> The suggestion in §15(iii) of the Costs Submission of Wind Prospect that this constraint does not apply in the case of unreasonable behaviour by a third party, fails to read para 2 of Annex 4 as a whole. When so read, it is perfectly clear that that paragraph creates a dichotomy between matters of procedure and matters of substance. In relation to matters of procedure, parties will be exposed to costs orders under Annex 4. In relation to matters of substance, they will not. A similar proposition is made, as a fallback proposition (§17) in Steadings’ Costs Submission, where it is said that “any resulting test is materially less demanding than in respect of substantive unreasonableness”. No explanation is given for this proposition, support for which is nowhere to be found in Annex 4.

11. Parsing the requirements of §2 of Annex 4 to Circular 8/93, before a third party can be ordered to pay costs of an inquiry:
- (1) There must be unreasonable behaviour/conduct by the third party. As to the meaning of “unreasonable behaviour/conduct” see §7 above.
  - (2) That unreasonable behaviour/conduct must relate to procedural matters, as opposed to the substance of the case.<sup>6</sup>
  - (3) That unreasonable conduct must have taken place “at the inquiry”, as opposed to things that took place before the Inquiry opened.<sup>7</sup>
  - (4) That unreasonable conduct must have been causative of the expense that is being sought to be recovered by the claiming party. Thus, for example, to the extent that the claiming party would in any event have incurred costs to meet a legitimate point, those costs will not be recoverable: the conduct, though unreasonable, will not be causative of the expense.<sup>8</sup> Paragraph 2 of Annex 4 gives the paradigm case for an award of costs: where the unreasonable conduct of the third party has caused an unnecessary adjournment. This causation requirement will not be satisfied by mere say-so: see *R v SSE ex p Brandvik Kinton Ltd*, 17 October 2000, Gibbs J at §45(vi) - 46:

“[45](vi) Finally, I come to the matter of the inspector’s finding that the amount of any additional expense was a matter of speculation rather than calculation. It is of course right that the estimating of costs thrown away is not a precise science. It is true that if a head of wasted costs can be attributed with reasonable particularity to a defined head of misconduct, then the amount of such costs will be a matter of agreement, alternatively assessment by a costs judge. The parties do not dispute this principle. However, in my view it is clear that a certain threshold must be attained beyond mere speculation before that process can be set in motion. In paragraph 19 of the costs report, which I repeat for these purposes, the inspector said as follows:

‘Accordingly, while I believe there to be some substance in the submission that the Council acted unreasonably, I am not convinced that its actions (or the lack of them) led to the appellant incurring unnecessary expense. There is no issue that did not have to be resolved in one way or another - by negotiation or at the inquiry. I note the appellant’s submission on the amount of costs. However, even if I thought unnecessary expense had been incurred, it seems to me that there should be a basis for assessing that expense with some degree of accuracy. In my view, any additional expense that may have been incurred in this case must be a matter for speculation rather than calculation.’

46. It is clear from the inspector’s reasoning that he was unable to be persuaded that the matter had got beyond mere speculation as to whether additional costs

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<sup>6</sup> Although this is included in the quotation from the circular in AMEC’s costs submission (§3.9), AMEC’s simple summary omits any reference to it relating to “procedural matters.”

<sup>7</sup> This requirement is overlooked in the costs submission of AMEC: see §3.9.

<sup>8</sup> See *R v SSE ex p Chichester DC* [1993] 2 PLR 1 at 8 and *R v SSE ex p Wakefield Metropolitan BC* (1996) 75 P & CR 78 at 80-81.

might have been incurred as a result of any particular act or omission of the second respondent. Accordingly, it is clear that he considered that the necessary threshold had not been reached which would justify any costs order. That was in my judgment a matter for him, and his conclusions were well within the scope of a reasonable tribunal's findings. There is no reason to think that the inspector was unaware that, given the necessary findings of fact on additional costs which went beyond speculation, costs could be awarded and made the subject of agreement or assessment in the normal way. In fact he was expressly referred to Circular 8 of 93 by both parties and had their submissions upon it well in mind. This is apparent from paragraph 2 of his costs report (the applicant's submissions) and paragraphs 5 and 6 of that report (the respondents' submissions). Reminding myself of the contents of paragraphs 5 and 6 of the report, I find that he clearly accepted the respondents' submissions on that topic. Viewed as a whole, I consider his reasoning on the matter to be clear and intelligible and his conclusions within the scope of those reasonably open to him in law."

- (5) The expense for which a costs order is sought must have been an "unnecessary" one: in other words, an expense that would not have had to be incurred for the due determination of the issues before the inquiry.
12. Only to the extent that all five requirements are met does the Inquiry have *power* to award costs against a third party. Even where all five requirements are satisfied, the award of costs is discretionary.<sup>9</sup> This Inquiry must consider whether that discretion should be exercised: satisfaction of all 5 requirements does not automatically yield an award for the resultant costs.
13. There is scant authority on the exercise of the costs power against a third party. The closest example that Counsel's researches could find was the *Kyle* decision (CD130(vv)). There a costs application was made against Glasgow Prestwick Airport (a third party) by AMEC. The Reporter refused the application. However, the Reporter allowed the Airport's application for a partial award of costs against AMEC, largely on the basis that AMEC's multiple adjournment requests and changes of position during the adjournments had caused Glasgow Prestwick Airport unnecessary expense. The Reporter made clear that:
- "During the numerous requests by the applicant [AMEC] for adjournments, I made clear my dissatisfaction that matters had not been resolved earlier, and that inquiry time was being lost, to the inconvenience of parties. Whilst the applicant may have seen this as a way of presenting a case that would ultimately be acceptable to Ministers, it was not a satisfactory way of presenting a major case at inquiry, and I find that this behaviour was unacceptable".
14. Even if a costs award were to be made, it will then be necessary to consider whether it should be full or partial. Paragraph 7 of Annex 5 to the Circular states:

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<sup>9</sup> Para 12 of Steadings' Costs Submission fails to recognise that satisfaction of the preconditions to an award of costs gives rise to a discretion rather than an automatic requirement that an award of costs follows. There is no basis for the suggestion in that paragraph that the requirements of Circ 8/93 shift according to the identity of the parties. This suggestion is simply incorrect.

"7. Some cases do not justify a full award of costs. In these circumstances, a partial award may be made. An example is where a planning authority have failed to provide evidence to substantiate only one of several reasons for refusing a planning application; in this case an award would be limited to the costs of appealing against that reason. Similarly, where an unnecessary adjournment is caused by the unreasonable conduct of one of the parties, the award of costs would be limited to the extra expense caused by the adjournment - that is, over a limited period."

15. The MoD now turns to consider the three applications<sup>10</sup>.

#### *AMEC's Costs Application*

16. AMEC identifies (§3.19) six instances of "unreasonable behaviour" on the part of the MoD, each of which it says merits the awarding of costs under Annex 4 of Circ 8/93. These will be considered in turn.

#### *Late objection in relation to the ATC operations at Spadeadam*

17. The first instance of "unreasonable behaviour" is said to be "the lateness of [the MoD's] objection in relation to ATC operations at Spadeadam" (§3.19.1). It is said that this change of position was "announced with an entirely unsatisfactory explanation...".
18. This instance fails to meet the requirements of Annex 4 of Circ 8/93 because:
- (1) The "unreasonableness" requirement (see §7 above) is unmet. But for its timing, AMEC has more-or-less conceded that the MoD's objection on ATC grounds would have stopped AMEC's application in its tracks: see §3.10-3.11. The question thus becomes: the MoD having become alive to a "show-stopping" point, was it unreasonable for it to make that point? The answer is "no". The stance of AMEC is unattractive. There is nothing "unreasonable" in a party to proceedings rectifying an earlier oversight.
  - (2) The matter complained of (i.e. the failure to take the ATC point earlier and then the taking of the point shortly before the PIM) was not conduct *at* the Inquiry. By the time that the Inquiry opened, the MoD case on the ATC radars had crystallised.
  - (3) The matter complained of has not been causative of loss. Had the point been raised earlier, AMEC would still have had the cost of meeting the point. The timing of the ATC issue had not caused AMEC to incur costs that it would not otherwise have incurred.

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<sup>10</sup> In doing so, the MoD notes by way of explanation rather than complaint, that it has received a total of 575 pages of submissions since the resumption of the Inquiry on Tuesday 16 December 2008. Counsel have tried to be as complete as possible and would like to think that all the principal points have been covered. But if there are one or two oversights these should not be taken as acquiescence to the point made.

- (4) In any event, the cost was necessary. Once the MoD raised the show-stopping issue and AMEC decided to persist in it, the issue had to be explored. The costs were “necessary”.

*Failure to explain “the real reason” for the MoD’s objection*

19. Embodied in the second instance of “unreasonable behaviour” (§3.19.2 also §3.16) is the accusation that there is some reason for the MoD’s objection to AMEC’s development other than that set out in the MoD’s documents. Quite what this is or might be AMEC leaves unstated. AMEC has not stated any reason at the Inquiry. It has not been suggested that there is an animus between the MoD and AMEC. On the part of the MoD, there is none. Nor has it been suggested that the MoD stands to gain by making an unwarranted objection. Absent some such alternative reason from that provided by the MoD’s Julian Chafer’s Proof of Evidence (MOD/1/1), this instance does not get off the ground.
20. In any event “the failure to explain” is not causative of loss. It is not suggested by AMEC that, had such an alternative explanation been put forward, it would have abandoned its appeal.

*Failure to co-operate with the Developers between September 2007 and the start of the Inquiry*

21. The third instance of “unreasonable behaviour” is said to be the failure of the MoD to co-operate with the Developers between September 2007 and the start of the Inquiry (15 January 2008) and to answer their legitimate and reasonable requests for information (§3.19.3 see also §3.6). This instance does not get airborne for Annex 4 purposes:
  - (1) The conduct complained of is not conduct that took place at the Inquiry. In terms, it is conduct that took place before the Inquiry started.
  - (2) It is, in any event, factually incorrect. Tellingly, AMEC does not identify any specific instance (or even its best instance) in which this is said to have taken place. Requests for information have been made. At all times the MoD has done its best to answer them as promptly as it can. Those requests have been extensive. They have come from three separate Developers. Answering them has often involved research and analysis. There never has been deliberate obstructiveness. It is quite wrong for AMEC to suggest that there has, and then fail ever to attempt to make good the accusation.

*Late introduction of the threat radar objection*

22. The fourth instance is said to be the late introduction of the threat radar objection (§3.19.4). Complaint is made that this came three months after the MoD had expressly said (in December 2007) that it could accommodate any impact on the threat radar systems at Spadeadam (§3.4).

23. The MoD has never shirked the fact that it would have preferred that it had included threat radars in its Statement of Case. But it did not do so: see the account given in Julian Chafer's Proof of Evidence (MOD/1/1). Threat radars were a serious issue that had to be given serious consideration. AMEC does not suggest otherwise. Indeed, the seriousness of the issue was borne out by its own evidence: see AMEC/10/5. No costs point could have been raised had the issue been raised in the MoD's statement of case. The threat radar issue, and all the evidence relating to it, was necessary. AMEC is unable to demonstrate that the timing of the introduction of the threat radar issue occasioned expenditure that would not have been incurred had the issue been raised at the outset. The conduct complained of was thus neither causative of expense nor is the expense an "unnecessary" one.

*The surreptitious introduction of the threat radar issue*

24. The fifth instance is said to be "the circumstances in which [the threat radar] objection was introduced, surreptitiously and without notice" (§3.19.5).
25. This criticism is a misconceived attempt to re-agitate AMEC's original objection to the introduction of the threat radar issue. That objection was rejected in March 2008 and it is not open now to revisit the arguments that were then addressed and decided upon.
26. In any event, MOD/0/10 does not warrant the epithet "surreptitious". That document, which remained for over 9 months the mainstay of the MoD's case on threat radars, was produced, lodged and served within two hearing days of the first reference to threat radars.
27. There was nothing causative in the MoD's conduct. There was nothing unnecessary about considering the threat radar issue.

*Failure to co-operate with Developers with the provision of information*

28. Finally it is said that the MoD failed to co-operate with the Developers by providing them with the information sought in a competent and accurate manner. Again, the instance is devoid of detail. The same points as were made in relation to the third instance are made here.
29. In short, none of the instances satisfies all the requirements for a costs order as set out in Circular 8/93, Annex 4, §2.

*Steadings' Costs Application*

30. At the outset, it is noted that as at the preparation of these submissions, the MoD had

only received from Steadings a document entitled "Draft/Outline Submissions in Support of a Costs Application Against the MOD" (received 16 December at 11h20) ("*Draft CS*"). In larger part, this document is devoted to a consideration of the underlying principles relating to costs in planning proceedings. To the extent that the document deals with the ability of one Secretary of State to order another Secretary of State to pay costs, the MoD has already set out its position in MOD/0/35. In the same way that Steadings assumed of the MoD (§2), "in the interests of fairness and efficient use of inquiry time" the MoD assumes that this document "fully summarises the basis upon which [Steadings claims] the power to award costs [in favour of] it." It is noted that Steadings does not explain to the Inquiry at what point it became aware of DCLG Circular 02/06 or what was the catalyst for it becoming aware of that document.

31. It is said (*Draft CS* §15) that the MoD has "here behaved manifestly unreasonably, in terms both of procedure and the substance of its case" and that "that unreasonableness has cause Steadings to incur or waste expense unnecessarily." Reference is then made to the "relevant and extensive examples of the various manifestations of unreasonableness ... identified in Steadings' closing submissions." The Draft Costs Submission goes on to assert that "there is neither time nor need to repeat those matters afresh in these Submissions. They go to the reasonableness of both the objection and to the procedure is the way in which the MOD has approach this inquiry and dealt with the objectors [sic]. On any analysis, the MOD's unreasonableness has here been egregious and been manifested to an exceptional extent." (§16). The document to which §16 refers – some 251 pages long – was not received until later that day.
32. At *Draft CS* §17, Steadings refers to Annex 4 of the Costs Circular, recognising its imposition of a requirement to show exceptional circumstances.<sup>11</sup> It is said that "by whatever test, the MOD's conduct here qualifies in terms of procedural unreasonableness." The document does not identify the "conduct here".
33. In *Draft CS* §17, it is asserted that "notwithstanding the distinction in paragraph 1 [of Annex 4] between principal parties and third parties, the MOD's role here has been, on its own approach, as a principal party *de facto*, irrespective of any debate *de jure*; this of itself is a sufficient exceptional circumstance to found a full award of costs." There is utterly no support for this submission. It flies in the case of §12 of Annex 1 to the Costs Circular, which states in terms: "in this guidance, the term 'principal party' refers to the relevant planning authorities and the appellant. All other interested parties are defined for the purposes of this guidance as third parties." The MOD is not "the relevant planning authority". The MOD is not "the appellant". It is not either of these parties "*de*

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<sup>11</sup> As already noted above, Steadings' reading of §2 of Annex 4 is unsustainable on a complete reading of that paragraph.

*facto*". It is not either of these parties "*de jure*".

34. Paragraph 17 of the *Draft CS* then goes on to say "the present circumstances, taken as a whole, are sufficient in any event to satisfy any test of exceptional circumstances, however formulated and applied." There is then no identification of what is meant by "the present circumstances". The MOD is left in the dark, apart from trying to guess from the 251 page Closing Submission, which matters it is that are said to constitute a "present circumstance" for the purpose of this application for costs.
35. Finally, by way of introduction, in *Draft CS* §20, it is said that there is a "further avenue to the costs application, wholly independent of any considerations of Crown immunity." The submission concludes with the statement that in these circumstances "there is no need to rely upon section 250 of the Local Government Act 1972 (as incorporated with the 1989 and 1990 Acts) nor on any other statutory power". This would appear to be an invitation to make an ultra vires payment. The Inspector should resist the temptation.
36. Returning to Circ 8/93 itself, and the requirements imposed by para 2 of Annex 4 (see §11 above), the only unreasonable conduct that can be relied upon for the purposes of making a third party costs order is conduct that has taken place "at the Inquiry". Accordingly, to the extent that the Closing Submissions of Steadings refer to conduct that took place before the Inquiry opened, they cannot be taken into account for the purposes of a third party costs award.
37. Secondly, contrary to the submission in *Draft CS* §17, the unreasonable behaviour/conduct must relate to procedural matters as opposed to the substance of the case. Accordingly, the bulk of the references in Steadings Closing which (not surprisingly) relate to the substance of the case, are irrelevant to a consideration of third party costs. Any issue that involves an evaluation of competing evidence is a substantive issue. It does not become a procedural issue by one party asserting that the outcome of that evaluation must be in its favour. Accordingly, the extensive references in the Closing Submissions inviting this Inquiry to prefer the evidence of Steadings to that of the MoD on various issues are matters of substance. They are not matters of procedure. They are not relevant to a third party costs application.
38. It is for a party to decide the sort of evidence that it will call in support of a particular proposition. Extensive criticism is made of the co-called failure by the MoD either to put in certain technical evidence or to have not carried out certain technical analyses prior to the submission of the statement of case. So far as the latter is concerned, it is irrelevant because it is not conduct at the Inquiry. So far as the former is concerned, in each case the point made by the MoD has been vouched by evidence from those with practical experience of the particular facility in question. This, for example, it is notable that Sqn

Ldr Coleman in looking at the proposed location of the turbines, knowing their dimensions, knowing the locations at which threat systems would be placed, was able to predict that they would be within LOS of the radars of those threat systems. His expertise was vindicated when LOS analyses were carried out. His expert assessment constitutes "evidence". Whilst it is, of course, open to the parties to make submissions as to the relative weight of that evidence, that is a matter going to the substance of the case: it is not a procedural matter.

39. Moreover, the "unreasonableness" requirement only requires that the evidence put forward by the objector "if accepted, ... be capable of making good ... the objection" (see §7 above). It is indisputably the case that, were this Inquiry to accept the evidence that has been put forward by the MoD, that evidence would be capable of making good the MoD's objection. It follows that, to the extent that Steadings' Closings are directed to the quality of the MoD's evidence, they are not capable of meeting the "unreasonableness" requirement. They are not capable, therefore, of sustaining or supporting Steadings' application for costs against the MoD.
40. Steadings has not begun to show how it is that the various matters referred to in its Closing Submissions have been causative of the expense that is being sought to be recovered by Steadings. Steadings states in terms (§173 pg 152) that "there is the stringest presumption in favour of taking any expression of concern by the MoD very seriously". It is then said (§174) " had the MoD come forward at the inquiry and, acknowledging the shortcomings of its approach to date, provided cogent evidence from well-qualified experts, then its case might warrant serious consideration." This statement recognises that an aviation objection by the MoD was an objection that Steadings had to meet and, indeed, had to take "very seriously". Insofar as Steadings has devoted time and energy to meeting the MoD's aviation objections, those objections have not been causative of an expense that ought not to have been incurred. Accordingly, for this reason too the Closing Submissions of Steadings do not satisfy one of the essential requirements for a costs order against a third party.
41. Moreover, the issues which have been raised and debated in dealing with the MoD's aviation objections cannot properly be said to have been "unnecessary". The detail to which the Developers have descended, the various acknowledgments of adverse radar effects, both for the purposes of air traffic control and threat systems, and the multitude of suggested operational and technical mitigations, bespeak an important issue that must be resolved if consent is properly to be given. For this reason, too, an essential requirement for the making of a third party costs order is absent.
42. Finally, Steadings does not identify in its *Draft CS* what heads of cost are being sought against the MoD.

43. There are one or two criticisms made in Steadings' Closings which, although directed to the substance of its case against the MoD, might, on one view, be said also to relate to its costs contention. For example, at §233, in introducing Steadings' submissions on the threat radar issue, it is said that "the manner in which this objection arose is surprising and unacceptable - as is the MoD's approach to the provision and giving of its evidence. Additionally, there would appear to have been a complete abdication of any proper decision-making process. Such decision as there was - to raise the objection - appears to have been taken without the benefit of any relevant technical appraisal and by those without any relevant knowledge of Spadeadam or of the threat-radar training there provided."
44. This is an accusation that has been repeatedly made since the first raising of the threat radar issue. It is an accusation that has been made and that has been continued to be made without any basis being put forward for its making. That alone is improper conduct on that part of those making it. Its repetition was no doubt intended to make it a reality. In order to dispel this unfounded accusation, the MoD produced to the Inquiry MOD/0/30. This showed beyond any doubt that the Range Controller had been supplied with the key data relating to the three proposals and had expressly supported the making of the objection embodied in the Statement of Case Addendum (MOD/0/10, 14 March 2008). That alone should have brought to an end these accusations. That they have continued in the face of MOD/0/30 is indicative of the preparedness to make these accusations regardless of the evidence.
45. In fact, this very point had been addressed and dispelled by a letter from Julian Chafer to David Goodman of Hammonds Solicitors (dated 3 May 2008) (WPD/0/18), a copy of which was sent to both Steadings and AMEC. Despite the clear terms of that letter, this accusations persisted throughout the Inquiry and, most recently, in the closings. The preparedness of Steadings to continue with the point, ignoring all of the material that has been produced demonstrating its incorrectness, illustrates a willingness to make accusations of this sort not just with no evidential basis for saying so (which is itself improper), but regardless of the evidence.

#### ***Wind Prospect's Costs Application***

46. In the early afternoon of 17 December 2008, the MoD was provided with a copy of Wind Prospect's application for costs. Many of the points made in Wind Prospect's costs submission mimic those made in Steadings' costs submission. These have already been dealt with above and are repeated as against Wind Prospect.
47. It is said at §176 of Wind Prospect's Closing Submission ("*Closing*") that the MoD's

conduct since April 2007 has “clearly been unreasonable and in the case of any other party to the inquiry would be expected to result in an award of costs against them. There is no reason why MOD should be treated any differently.” There is a reason. That reason is that the MoD is treated for the purposes of Circ 8/93 as a third party: see §12 of Annex 1. The guidance in relation to costs against third parties is very different from that relating to main parties.

48. This point cannot be side-stepped by the assertion that the “MOD has taken the role of a principal party” (*Costs* §18(1)). Such a proposition is irreconcilable with §12 of Annex 1 of Circ 8/93.

49. The *Costs* submission also fails to appreciate that Annex 3, dealing with unreasonable behaviour relating to the substance of the case including action prior to submission of the appeal, does not apply to third parties. The costs provision in relation to third parties are exhaustively dealt with in Annex 4. As set out in §§10 and 11 above, in order to recover costs against a third party there must be the usual elements:

- unreasonable conduct; and
- that unreasonable conduct must *cause unnecessary expense*;

Over and above these elements, Circular 8/93 imposes the following requirements for costs to be recovered against third parties:

- the unreasonable conduct must relate to procedural matters;
- those procedural matters must be *at the Inquiry or hearing*; and
- the circumstances must be exceptional.

Accordingly, the observation made in *Closing* §176 is misplaced.

50. The almost the entirety of the costs submissions relating to the ATC case, and much of the submission relating to threat radar, is irrelevant as it goes either to the substance of the case or to matters which did not occur at the Inquiry.

#### *Air Traffic Control*

51. The main thrust of Wind Prospect’s case on costs in relation to air traffic control is stated in *Costs* §23:

“Plainly this was an objection that was at all times without foundation or any proper evidential base. MOD behaved unreasonably in raising, progressing and maintaining this objection.”

It is to be noted that this extreme position is not shared by the other two developers.

52. The contention is that the MOD’s conduct has been unreasonable because its objection has always lacked sufficient evidential basis. As is set out at §7 above, *R v SSE ex p Wakefield MBC* makes it clear that evidence is sufficient if it is “capable of belief” and “if accepted, would be capable of making good the ... objection.”

53. The evidence submitted to this Inquiry by the MoD meets this threshold by a healthy margin. Indeed, the proffering of mitigation suggestions itself gives the lie to Wind Prospect's assertion in *Costs* §23. The unsubstantiated accusations that documents such as the Outline Statement and Statement of Case were prepared without undertaking proper assessments are irrelevant (*Costs* §26).
54. It is said that the MoD should immediately after some answers by Sqn Ldr Deane have withdrawn its objection to these proposals: *Closing* §156 (cf §§189, 192). This is described as "the MoD's failure to act appropriately on their own evidence". This is something that goes to the substance of the MoD's case. It involves an evaluation of the MoD's evidence. This is not a procedural issue. One of the essential requirements of a third party costs order is thus absent
55. That this is an evaluative matter is borne out by the preponderance of material before the Inquiry, which demonstrates that the misgivings that had been articulated by Sqn Ldr Deane were borne out by scientific assessment. Much of it was eventually admitted by the Developers' witnesses. This is itself borne out by *Closing* §164 of the closing statement where it is said that "all of the proposed turbines were found to be in LOS of the RAF Spadeadam's radars at Deadwater Fell and Berry Hill". Wind Prospect also recognises that "there are various impacts which wind turbines can potentially have upon primary surveillance radar" (§179). And a little later it is stated "it is therefore accepted that the radars will detect the wind turbines, and that therefore the issues of potential obscuration and clutter arise": *Closing* §181.
56. Complaint is made in *Costs* §§24 and 25 relating to the MoD's change of position concerning Green Rigg.<sup>12</sup> The Inquiry will remember that in Mr Chafer's proof of evidence (MOD/1/1) the MoD recognised and acknowledged that mistakes had been made and states in terms that those mistakes were regretted. However, what took place thereafter is not to be tarred by earlier shortcomings of the MoD. This is the very situation in relation to third parties which is contemplated in Annex 4 to the Circular, and in which third parties are contradistinguished from the principal parties. The events spoken to by Wind Prospect in *Costs* §24-25 cannot found an award of costs, nor can they be taken into account in determining whether the MoD's conduct *at the Inquiry* was unreasonable. Attempting to bring such considerations in through the back door as "context" is also impermissible.

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<sup>12</sup> It is stated that the MoD has failed to address in its Closing the history of its change of position or explain why its long held position on Green Rigg was wrong: §§161 and 224. The MoD has explained its position in §§43-4 and §55 of MOD/1/2 (Rebuttal Proof of Julian Chafer MOD/1/2).

57. In *Closing* §206 it is said that the MoD “essentially adopts” the approach of Sqn Ldr Jones, said to be that a wind farm in LOS of Spadeadam must be objected to. This in fact is not the MoD’s case at this Inquiry is set out in its Closing Submission (§§120-121). It is perfectly clear that Mr Spencer’s first step was to establish LOS (and this is the accepted methodology), and his second involved using a separate software package to calculate the extent to which (if any) each of the turbines of each Proposal would produce a radar return sufficiently strong to be detected by the radars and to be displayed on the PPI. The conduct of the MoD *at the Inquiry* was not unreasonable and the complaints made by Wind Prospect in *Costs* §25 are ill-founded.
58. At §174 it is said that it was only late in the day that the MoD commissioned any technical radar analysis. Quite apart from anything else, this is factually incorrect. That technical analysis was carried out in July 2003 (MOD/1/3 Document 8), and this is referred to by Counsel for Wind Prospect later in his *Closing*, and in *Costs* §27. When further analysis was carried out by Mr Spencer, it confirmed the misgivings of Sqn Ldr Deane.
59. It is stated in §158 that the MoD’s closing “introduces arguments or evidence not advanced or relied upon by its witnesses and which were not put to WPD’s witnesses”. Having made this statement, the Closing fails to identify what they are, excusing itself with the remark “this additional material is not addressed in this closing”.
60. It is stated that another example of the MoD’s uncooperative approach was their approach to the offer made by Wind Prospect to turn off the wind turbines if necessary to accommodate the use of Spadeadam: *Closing* §173. In fact, as is set out in §199-202 of the MoD’s closings, there was no such “stopping” offer. There was a “slowing down” offer, and the MoD’s stance towards that offer was perfectly reasonable. The suggestion in *Costs* §35 that the MoD’s lack of response *before the Inquiry* to what is there characterised as a “switching off” offer is irrelevant to the assessment of whether the MoD has acted unreasonably at the Inquiry.
61. At §185 it is said that the MoD in its closing ignores “all of this evidence relating to obscuration including Mr Spencer’s acceptance of the science and seeks to reinstate a case on obscuration”. The criticism is misplaced. Mr Spencer did not abandon the issue of obscuration. Obscuration is cylindrical in effect and occurs at all altitudes of the area in which it applies: cf§184 of Green Rigg’s submission. If this is a reference to the antenna gain theory that was shown XXM by Mr Short of Mr Collinson to be severely flawed.
62. Criticism is made at §186-7 that the MoD having accepted (it is said) the Collinson Conjecture (as described at §134-136 of the MoD’s closing) the MoD has not

subsequently sought to come back to the Inquiry with further information. In fact there was no reason for the MoD to do so. Mr Collinson's conjecture was not borne out by the documents on which he relied: see §§137-38 of the MoD's closing. Moreover, Mr Spencer never accepted the conjecture during XXM. The MoD is not required to come back to the Inquiry with further information on a still-born conjecture.

63. Wind Prospect fails to demonstrate that, but for the MoD's evidence, it could simply have not troubled the Inquiry with evidence in relation to ATC radars. That is demonstrably not the case. One of the requirements of a costs order against a third party is missing.

#### *Threat Radars*

64. This complaint is made in the *Closing* at §§302-304 about the way in which the threat radar issue emerged. This was in fact addressed by Mr Chafer in his second supplementary proof of evidence (MOD/1/5). It is said by Green Rigg that the MoD's earlier stance in relation to threat systems cannot have been through shortcomings in its understanding of the effect of the turbines upon those threat systems: §304. The implication here is one of deliberateness on the part of the MoD. That is exactly the opposite of the charge made against the MoD by AMEC.
65. Complaint is made in the *Closing* at §306 of what is described as "a remarkable and wholly inappropriate manner [in which the threat issue was raised] without any prior notice in the XXM of the Steadings air control witness" (the epithets are repeated in *Costs* §51). This is a reference to the XXM of Mr Trott on Tuesday 11 March (Day 23). Given that Mr Trott was a joint author of the Spaven/James/Trott report, and that he was the last witness for Steadings, upon the MoD becoming alive to the issue of threat radars it was right for it to raise it at the first possible opportunity. The first possible opportunity was XXM with Mr Trott, where the issue was raised in a non-confrontational and informative way.
66. There is no obligation to forewarn witnesses of the questions that will be asked in XXM. The line of questioning was the catalyst for the identification of the threat radar issue. Having done so, the MoD promptly agreed to set out its parameters, which it did a few days later, on Friday 14 March, in the Statement of Case Addendum (MOD/0/10) (over the adjournment of the Inquiry).
67. The MoD then set out its evidence in support of the threat case by two statements, provided on the following Monday, 17 March 2008: MOD/4/1 and MOD/5/1. The threat radar issue being raised, and allowed according to the timetable set by the Inquiry, it is not open to suggest that the whole process was procedurally unreasonable.

68. At §307-311 it is repeatedly stated that the manner in which the MoD has presented the threat radar case has been unreasonable. It is asserted that there has been resultant waste to the developers. The allegation of waste is repeated in *Costs* at §53ff.
69. It is enough to examine just a number of these assertions for it to be revealed that they are unfounded exaggerations.
70. For example, it is said in *Closing* §307 that the MoD “behaved unreasonably in its progression of this objection” and that “a considerable amount of Inquiry time had to be wasted to get the MoD to provide any detail as to what its case was on threat emitters” (see also *Costs* §53). This criticism is developed, with Wind Prospect describing itself as having been “initially fobbed off with the absurd suggestion that, for security reasons, the MOD could not even reveal what threat emitters were located on Spadeadam.”
- This misrepresents the chain of events and what the MoD said. The MoD said that it could not reveal *all* the threat emitters that were located at Spadeadam. And that remains the case: see MOD/5/1 §11 first sentence.
  - It has already been noted that the MoD raised the threat issue on Tuesday 11 March and that the Addendum was filed before noon on Friday 14 March, there having been two non-sitting days. That document provided detail as to the MoD’s case on threat emitters. The MoD has adhered to that case. Further, on the following Monday (17 March 2008) and Tuesday (18 March 2008), the two proofs of evidence from Sqn Ldr Coleman and Sgt Edmond were filed and served. All of these documents set out precisely what the threat systems were and their essential radar parameters. It is quite wrong to speak of an “obstructive contention” having been “abandoned”. There has been no obstructiveness by the MoD and this is apparent when the chronology of events is borne in mind.
  - In *Closing* §308 this accusation is repeated with the statement: “the MOD finally set out its objection in writing on 14 March after a considerable amount of Inquiry time was wasted trying to obtain a clear expression of its position and a direction on 12 March that it do so”. As has already been noted, the issue was first raised in XXM on Tuesday 11 March. On the following day the MoD volunteered to provide an addendum to its case by Friday 14 March. The MoD kept its promise. Inquiry time was not “wasted”.
  - Counsel for Wind Prospect carries on by adding: “late in the Inquiry it became clear that this Addendum Statement of Case (MOD/0/10) was produced before Sgt Edmond had considered the issue. Counsel for Wind Prospect then goes on to say (quite improperly) that Sqn Ldr Coleman confirmed that he had not seen MOD/0/10 nor been consulted upon it before it was produced, and that he was not involved in the decision to object on the basis of the impact on threat radar.”

See also *Closing* §317(ix). In XXM, Sqn Ldr Coleman stated that he “recognised details” that he “supplied” in MOD/0/10. This was vouched by MOD/0/30, which reveals that on Wednesday 12 March Mr Chafer e-mailed Sqn Ldr Coleman with a plan showing the positions of the turbines. Further, that e-mail in terms refers to earlier “telephone conversations” between Mr Chafer in Sqn Ldr Coleman. Further, MOD/0/30 reveals that on 13 March, Sqn Ldr Coleman e-mailed Mr Chafer stating, inter alia, “the location represents an area down which aircraft coming off tankers from the east use with some regularity. They are smack bang in the way of radars positioned to the east N of the Range and in my opinion they represent a significant change to an already well-populated ‘clutter map’.”

- It was quite wrong of Counsel for Wind Prospect to make this accusation without any factual basis to support it. And it is even more wrong for Wind Prospect to continue to make the accusations of professional impropriety in the face of evidence that demonstrates its falsity. In §28 of Sqn Ldr Coleman’s proof of evidence (MOD/4/1, Monday 17 March) he specifically stated that he had been provided with basic statistics for each of the three proposed wind farms including numbers, sizes and locations.
  - So too the statement by Counsel for Wind Prospect to this Inquiry: “There is no evidence before the Inquiry that there was any assessment by any suitably qualified person prior to the objection being raised or even the production of MOD/0/10, still less an explanation as to how the MOD came to the conclusions set out in MOD/0/10. What is clear is that the document was produced without consultation with the Range Controller and the technical witness the MOD claimed to be the persons best placed to judge this matter” (*Closing* §309).
71. The emergence of the threat radar issue and the chronology of key events should not be still occupying the time of this Inquiry. On 3 May 2008, Mr Chafer of Defence Estates wrote to the solicitor for Wind Prospect reminding them of the principle dates involved. That document is before the Inquiry as WPD/0/18. The table in that document sets out on a day-by-day basis how the threat issue emerged and makes untenable the propositions of unreasonable conduct still being made by Wind Prospect.
72. Next, in *Closing* §310 it is said that “MOD/0/10 did not clearly set out [the MoD’s] case”. It is said that that document “named seven different weapons systems which the MOD claimed it anticipated the wind farm proposals would have a material adverse impact upon.” (See also *Closing* §317(x)) Then it is said, that the “MOD’s proofs of evidence did not take the matter materially forward and, in particular, did not clarify matters.” This is wrong. It is quite clear from MOD/4/1, served on Monday 17 March, the working day following MOD/0/10, that the principal threat systems anticipated to be affected by the turbines were the SA-8, the SA-8 and, to a lesser extent, the Skyguard: see, for instance, §§13 and 24.

73. In *Closing* §311, it is said that the developers sought clarification and that the MoD was obstructive. It is said that the “MOD persistently stonewalled on the information” and that it “refused to reveal the locations which required consideration”. (See also §317(xii)) Not so. On 24 April 2008, the Developers visited Spadeadam. They were invited to raise such questions as they wished in relation to Spadeadam. In order that all the Developers were treated equally, these questions and the answers to them were reduced to writing so that they could be shared be all concerned alike. Those questions and the responses are set out in SWFL/0/33. In particular, those answers set out 14 threat radar remote sites, giving their latitude, longitude, elevation and grid references. It is quite wrong for this to be characterised as “persistent stonewalling”. This cannot be characterised as “refusal to reveal locations that required consideration”.
74. Then it is said in *Closing* §313 that the MoD “frequently sought refuge behind the excuse that information was sensitive”. The MoD did not “seek refuge” behind the “excuse” that “information was sensitive”. Sqn Ldr Coleman said properly that exact details of the range of threat systems in operation at Spadeadam could not be disclosed. Wind Prospect’s own witness, Mr Lennox, expressly acknowledged in XXM that the reticence of the MoD was the proper approach to be taken and that he did not criticise the MoD for taking that approach. He specifically articulated that he was *not* saying that the MoD was trying to be obstructive. Indeed, he elaborated that he had worked for the MoD for 32 years and that he was well aware of the difficulties. He said he did not want to see any foreign country getting any information from the evidence from this inquiry. I am conscious of the difficulties that this creates. The kernel of this was set out in Mr Lennox’s proof of evidence WPD/8/2 §10.
75. As another instance of the supposed unreasonableness of the MoD, it is said in *Closing* §§318-320 that the MoD was wrong to carry on in the face of a supposed clear “withdrawal” of §5 of MOD/0/10. It is, of course, not for a witness to withdraw a case. Still less is that to be done on the basis of XXM where there has been no opportunity for RXM on the supposed “withdrawal”. In *Closing* §321 it is said that “the MOD was exceptionally permitted to re-open the re-examination of Sqn Ldr Coleman some 3 months after his evidence had been completed.” There was nothing exceptional in that. What was exceptional was the misguided attempt by Counsel for the developers, including Counsel for Wind Prospect, to block off a legitimate line of re-examination. That illegitimate line was corrected. Wind Prospect did not appeal that ruling. Upon RXM of Sqn Ldr Coleman, it became apparent that he did not “withdraw” §5 of MOD/0/10 but added nuances to it (contrary to the assertion in *Costs* §60).
76. In *Closing* §328 it is said that the MOD has been unreasonable in that there was “never any evidence to support the MOD’s central allegation on the impact on realism and

efficacy on training". This is expanded upon in *Costs* §61, which claims that the "MOD failed to call any evidence as to the impact of the proposal upon training of aircrew and it was apparent that they had failed to consider this fundamental aspect". This is built on the premise that only those with aircrew experience (such as the witnesses at the Blinkbonny inquiry) are capable of speaking to the impact on training (*Closing* §326). The suggestion that those currently charged with providing the training at Spadeadam are incapable of assessing the extent to which they will be impaired in the provision of that training is illogical.

77. It is said at *Closing* §334, after a consideration (not entirely accurate) of the answers given by Sqn Ldr Coleman to questions from the inspector, that "the answers recognised that any concern arose not on the basis of any of the evidence or figures before the Inquiry but rather on the basis of this 'knowledge' even though he had not witnesses any effect of wind turbines on threat radars." It is then said that "the MOD cannot substantiate a case on that basis nor could the SoS lawfully refuse planning permission on that basis ... that is the end of the matter and is a further example of the MOD's unreasonable conduct." Again, not so.
78. In the RXM on Day 54, Sqn Ldr Coleman was specifically taken to the figures before the Inquiry (ie AMEC/10/5 pg20 and SWFL/12 pg 27) before answering questions in relation to those sites. Further, in answering a question from the Inspector, Sqn Ldr Coleman himself referred to his concerns having been "demonstrated by the table in AMEC". There is nothing unreasonable in the MoD's conduct. What the evidence demonstrates is that the judgment of Sqn Ldr Coleman was vindicated by the scientific analysis. Far from discrediting Sqn Ldr Coleman, the analysis carried out in AMEC/10/5 and SWFL/12 demonstrates that Sqn Ldr Coleman's experience-based predictions were borne out by scientific analysis. It serves to demonstrate the very reasonableness of the MoD's case.
79. In *Closing* §336 this unreasonableness theme is developed by stating that even if the Inquiry were to accept Sqn Ldr Coleman's answers to the Inspector, the impact would "at worst" be limited to the effect on an SA-6 on "about three days a year at each of the two sites" [ie Albemarle Barracks and Otterburn]. In fact, Sqn Ldr Coleman's answers to the Inspector included evidence that the SA-6 was to be placed on Blackshaws Hill "for an exercise in the next couple of weeks" and that there was no reason why the SA-6 should not go to Blackshaws Hill. Further, Sqn Ldr Coleman in answer to questions from the Inspector said that there would also be an effect on the TAR when the SA-6 was located at Prior Lancy and that it was routinely placed there: the reason that Prior Lancy did not feature more highly was that normally, when positioned there, the SA-6 was concerned with aircraft entering from a direction other than the Otterburn-Newcastle corridor.

80. In relation to *Closing* §337, it is suggested that the MoD is being unreasonable in pursuing its case on threat radars when Sqn Ldr Coleman had, it is said, in answer to questions from the Inspector, said that he was not qualified to make the contentions in §5 of MOD/0/10. In fact, in answer to questions from the Inspector as to §5 of MOD/0/10, Sqn Ldr Coleman told the Inquiry that he considered “unusable” to be too strong and that he would replace it with “significantly affected”. It is perfectly reasonable for the MoD to pursue its objection on the basis that training within the Otterburn-Newcastle corridor would be “significantly affected” by the erection of the turbines. Contrary to the assertion in *Closing* §338, the evidence does substantiate the MoD’s objection.
81. At *Closing* §§340-342, it is said that the MoD has also been “unreasonable” by having “attempted to expand their objection on the basis that there might be an impact upon sites which had not historically been used”. It was said that this “did not accord with the case set out in MOD/0/10, which was concerned with sites where systems ‘are currently located’.” In fact, this did not represent an “expansion” of the MoD’s objection. In §9 of Sqn Ldr Coleman’s proof of evidence (MOD/4/1; 17 March 2008) he refers to the dispersed sites without qualification, including by name sites at which the Real Threat Systems had not been placed in the previous 2 years. Further, the usage statistics that are before the Inquiry are only concerned with 2006-07, and as the evidence before the Blinkbonny Inquiry (MOD/3/11 document 16) demonstrates, usage changes so that, for example, Larriston Fell (which is shown in MOD/0/28 as having never been used in - 6/07) is shown as having been used for 25 days in the period 1994-96.
82. Moreover, it is clear from Sqn Ldr Coleman’s rebuttal proof (MOD/4/2 §§63-5) that he looked to an enhancement of the potential of the Range, expressly citing frequency clearances, hand standings and data connections as recent developments that enlarged the potential of the threat sites. Furthermore, MOD/0/14 §8 (7 May 08) specifically states that the MoD’s assessment had been on the basis of the Real Threat Systems being located at any one of the dispersed sites listed in answer to questions from the developers and, secondarily, being potentially located on any part of MoD land at or adjacent to any RAF site”. Finally, it is clear from SWFL/0/33 answer 20 on pg 3 that it was the MoD’s case that “threat radar systems can be deployed anywhere within Spadeadam Range, on the fixed sites mentioned in the table below, on any government land (with permission) and on private land (with permission).” The attached threat radar remote sites included sites on which the SA-6 and SA-8 had not been used in 2006-07. Accordingly, the criticism of unreasonableness by the MoD is misplaced.
83. It is said in *Closing* §351 that another instance of unreasonable behaviour by the MoD is its failure to consider Green Rigg alone and that this is “a further reason why the MoD are unable to present any case objecting to Green Rigg itself”. That is not so. In §§22-27 of Sqn Ldr Coleman’s proof of evidence (MOD/4/1, 17 March 08) he speaks to the

“introduction of an additional source of clutter” and of the effect of obscuration. Reading those paragraphs in conjunction with §29, where Sqn Ldr Coleman opens his consideration with “should any of the proposed developments proceed”, it is apparent that he was having in mind not just the collective effect of the turbines but also their individual effect.

84. At *Closing* §354 it is said that “a further addition to the catalogue of MOD’s unreasonable conduct” is evidenced by it having “only provided part of the necessary information on the weapons systems”. A similar accusation is made in *Costs* §59. Bearing in mind that the issue is the effect if the turbines on the threat systems radars, the “necessary information on the weapons systems” comprises first and foremost the range of those radars and where they might be located. Those ranges were given in MOD/0/10 §2 (14 March 2008) and again in MOD/4/1 §7 (17 March 2008). The locations of the sites were given in SWFL/0/33 shortly after the site view on 24 April 2008. It is to be noted that it was these that AMEC/10/5 and SWFL/12 relied upon for the purposes of preparing their LOS assessments. The “attack upon Mr Spaven’s credentials” was not concerned with his LOS analysis, which was at no time brought into question by the MoD, whether in its *Closing* or elsewhere, but was concerned with his expressions of views: see MOD *Closing* §594-6.
85. In *Closing* §360, it is said that the MoD, having been asked to identify the locations which would be affected by the wind farms and the frequency of such effects, “in characteristically unreasonable fashion refused to answer”. In fact, in SWFL/0/33, a document which was given to all the developers, the latitudes, longitudes and elevation of the threat radar remote sites were given, the developers had been told at the outset (MOD/0/10 §2, 11 March 2008; and MOD/4/1 §7, 17 March 2008) what the radar ranges were. The developers were not deprived of any information they required in order to meet the case of the MoD.
86. In *Closing* §372, under the rubric “Conduct of the aviation bodies” it is said that a “further very troubling aspect of this case has been the last changes of the position of the aviation bodies and their willingness to object to all proposals rather than adopt a more focussed approach”. Specific instances of “unreasonable conduct” of the MoD have already been dealt with above, There is, however a further reference in §372 which is said to evidence unreasonable conduct on the part of the MoD and it being systemic. Reference is made in this regard to the Wandylaw development and the co-called unreasonable conduct of the MoD there. In fact, in Wandylaw, the MoD was, after fruitful negotiation, able to agree a condition with the developer that accommodated its aviation concern. Far from evidencing systemic unreasonableness on the part of the MoD, Wandylaw demonstrates the openness of the MoD to discussion and its preparedness to enter into conditions where they meet its aviation concerns.

*NATS and Blanking*

87. Wind Prospect attempts to hold the MoD liable for the costs incurred in addressing the NATS case (*Costs* §§1 and 65-68). The kernel of this is set out at *Closing* §216, which states that the MOD adopted an “unacceptable and unfair approach” in its treatment of the blanking of GDF. The complaint is not borne out by the facts. The matter *was* raised in §24 of Sqn Ldr Deane’s first proof (MOD/2/1). As he was entitled to do he responded to further points made by the developers on this in his XIC. There was no earlier opportunity to do so. If XIC is not to be repetitive, that is its very objective. This was one of several issues before the Inquiry on which there were ongoing discussions, as Sqn Ldr Deane made clear in his answers to Counsel for Wind Prospect in XXM.
88. It is said in §219 that the MoD introduced a completely new basis for resisting blanking GDF in the area of Green Rigg. However, it has always been the case of the MoD that in the area of Green Rigg it wants low level coverage. There was nothing new here.

*Conclusion*

89. Time is not permitted a consideration of every single reference to unreasonableness and like epithets in the 193 page *Closing* of Wind Prospect. The above, however, serve to illustrate that upon analysis, the extravagant claims made by Wind Prospect of the supposed misconduct by the MoD of its case are not borne out. Moreover, detailed analysis of every single on the these risks sliding away from the requirements for the making of a costs order against a third party in Circ 8/93. Thus, the touchstone of “unreasonable conduct” is that set out in §7 above. It is not that, upon an evaluation of the competing evidence, a particular conclusion is to be reached. The continued repetition of the word “unreasonable” does not alter this basic fact.
90. Secondly, the unreasonable behaviour/conduct must, for the purposes of Annex 4, relate to procedural matters. The vast bulk of the complaints made against the MoD are not matters of procedure: they are matters that go to the substance of the case.
91. Thirdly, to the extent that the complaints relate to or are founded upon conduct that predated the commencement of the Inquiry, these are not legitimate matters in a consideration of an application for costs under Annex 4.
92. Fourthly, so far as such remaining complaints as there are, Wind Prospect has not begun to show that these residual matters were causative of expense incurred by it.
93. And finally, as the Inquiry will be able to assess for itself, all of the issues which have been raised by the MoD were necessary for the proper determination of Green Rigg’s proposal.

94. Like the two others, this claim for costs should be rejected.

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