GREEN RIGG WIND FARM

GREEN RIGG FELL, BIRTLEY PARISH, NORTHUMBERLAND

APPLICATION FOR COSTS

ON BEHALF OF WIND PROSPECT DEVELOPMENTS LIMITED

The application

1. WPD apply against the MOD for all of their costs involved in addressing the MOD case. In addition WPD apply against the MOD for all of their costs involved in addressing the NATS case. In the event that it is concluded for any reason that WPD are not entitled to a full award of their costs in relation to either or both of those cases WPD apply for such partial award as is considered appropriate.

Power to award costs

2. The MOD's position with respect to the Secretary of State's power to award costs against the MOD in favour of WPD is not entirely clear but it appears to be (i) that it accepts that the Secretary of State has power under the provisions of the Town and Country Planning Act 1990 to award costs to WPD against the MOD, but (ii) this power has been inadvertently removed by the Inspector choosing to run the inquiry in accordance with the Electricity Inquiries Rules[1]. No explanation is given as to how this acts to remove the Secretary of State's powers although it is stated this position is taken on instructions. Unfortunately the MOD's approach makes it necessary to rehearse the legal position.

3. The Secretary of State's power to award costs arising out of public inquiries derives from section 250(5) Local Government Act 1972 which provides that *"The Minister causing an inquiry to be held under this section may make orders as to the costs of the parties at the inquiry and as to the parties by*

[1] MOD/0/35 para 9

whom such costs are to be paid, and every such order may be made a rule of the High Court on the application of any party named in the order".

4. Section 320(2) Town and Country Planning Act 1990 applies 250(5) LGA 1972 to inquiries held under the TCPA 1990.
5. This is clearly explained in paragraph 6 of circular 8/93.
6. The power to award costs is not derived from or dependent upon any subordinate legislation (such as inquiry procedure rules). It can be noted in particular that the Town and Country Planning (Inquiries Procedure) (England) Rules 2000 to which the Green Rigg application is subject[2] is silent as to the question of costs.
7. Section 292A(1) TCPA 1990 provides that the Act is to bind the Crown and therefore the power to award costs under section 320(2) applies against the Crown (in this case the MOD).
8. This is clearly explained in paragraph 5 of circular 2/06 which warns all Crown bodies that the statutory provisions to award costs apply to them.
9. It is important to note that the power to award costs against the MOD is derived from section 320(2) TCPA 1990 and section 250(5) LGA 1972 in exactly the same way as in the case of all other parties. There is no need to rely upon other legislation. Furthermore circulars 8/93 and 02/06 provide guidance they do not alter the power which is derived from Act of Parliament.
10. The Electricity Inquiries Procedure Rules[3] are silent as to costs in exactly the same way as the TCPA Inquiry Rules. They have no effect upon the Secretary of State's powers to award costs with respect to WPD which are as already stated derived from section 250 LGA 1972.
11. Furthermore even if the Electricity Inquiries Procedure Rules were considered to be relevant the decision of the Inspector to operate the inquiry in accordance with the procedure set out in those rules does not and cannot operate so as to deprive the Secretary of State of her statutory power to award costs or deprive WPD of its statutory right to apply for costs.

[2] X3para 10
[3] Electricity Generating Stations and Overhead Lines (Inquiry Procedure) (England and Wales) Rules 2007

Principles for award of costs

12. Circular 8/93 provides guidance on the award of costs. The following guidance in Annex 1 is relevant –

    i) The purpose of the availability of costs awards is intended to bring a greater sense of discipline to ***all*** parties involved in planning proceedings (para 4).

    ii) The conditions for an award of costs are (a) that an application is made at the appropriate stage of the proceedings, (b) the party against whom costs are sought has behaved unreasonably, and (c) that unreasonable conduct has caused the party seeking costs to incur or waste expense unnecessarily (para 6).

    iii) Costs awards for or against third parties will be made only in exceptional circumstances as explained in Annex 4.

13. An application for costs is being made at the appropriate stage and the conduct of the MOD about which complaint is made has caused WPD very considerable unnecessary expenditure. The first and third conditions for an award of costs clearly apply. The only issue which requires determination is whether the MOD's behaviour has been unreasonable.

14. Annex 4 sets out the *"General policy on awards of costs to, or against, third parties"*. It must be remembered that paragraph 3 of the Annex has been cancelled by paragraph 6 of circular 2/06. The most important paragraph for present purposes is paragraph 2 which 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 refusal of 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."

15. The following should be noted about this paragraph –

    i) This is a *general* policy i.e. it clearly admits of and anticipates exceptions.

    ii) The policy is that costs will only be awarded against third parties in *exceptional* circumstances. This again provides that costs will be awarded against third parties.

    iii) The paragraph limits the occasions when costs may be awarded to or against third parties where there is unreasonable behaviour with respect to the substance of the case on the part of one of the principal parties. It is important to note that there is no such limitation where the unreasonable behaviour relates to the substance of the third party's case.

    iv) There is no limitation on the award of costs against third parties for procedural reasons.

16. In considering the position of third parties and the application of the policy it is important to keep the circumstances in mind. There is clearly a distinction to be drawn between members of the public who wish to appear at inquiries and bodies such as the MOD. The Secretary of State clearly does not wish members of the public to feel constrained about appearing at inquiries out of fear that they may have costs awarded against them bearing in mind in particular the likely disparity of resources (both financial and evidential) which may normally apply where members of the public are involved. That is a very different position from a government body which has all of the resources of the State and attends at the inquiry claiming to have particular and unique expertise and qualifications for dealing with the matter in hand.

17. There is no sensible or fair reason for treating a body such as MOD any more favourably than a local authority. It would be a deeply unattractive argument to suggest that the MOD can attend at an inquiry and take up weeks of

inquiry time forcing parties to expend considerable sums of money with a wholly unreasonable case without being at risk as to costs. Clearly that is not the Secretary of State's policy, although she could be forgiven for never having contemplated that a government body would behave in the manner that the MOD has chosen to do at this inquiry.

18. If it is argued that costs can only be awarded against MOD in exceptional circumstances there are a number of factors present which must make this an exceptional case –

    i) The MOD has taken the role of a principal party (indeed it has behaved as though it were *the* principal party).

    ii) The MOD's case has required the calling of very substantial amounts of technical evidence.

    iii) The MOD's case has required very considerable periods of inquiry time (MOD specific issues occupied 17th June – 20th June, 15th July – 18th July, 22nd & 23rd July 28th & 29th October and 6th November – in addition their cross-examination of the various witnesses took up a considerable further amount of inquiry time).

    iv) It is particularly important to take into account the scope and extent of the MOD's unreasonable behaviour both procedurally and with respect to the substance of its case. Their unreasonable conduct has been so gross that it must qualify as exceptional.

19. The wording of the Circular cannot be interpreted as excusing a government body, professionally represented and calling substantive evidence, from an award of costs where its behaviour is demonstrably unreasonable. The Secretary of State's policy cannot sensibly be interpreted as absolving a government body from any responsibility for conduct as unreasonable as that exhibited by the MOD in this case.

20. In addition it is clear from the MOD's approach even in closing that it still fails to acknowledge the many failings in its conduct and offers no words of apology. A clearer need for the exercise of the costs discipline explained in paragraph 4 of 8/93 cannot be imagined.

21. In short it is difficult to conceive of a more exceptional case.

Unreasonable behaviour on the part of MOD with respect to MOD case

22. MOD has behaved unreasonably both procedurally and with respect to the substance of their case in a considerable number of respects which are summarised below. The summary merely identifies the topics. The Inspector is invited to refer to his notes, the closing submissions on behalf of WPD, and the evidence, for the details of the various identified matters.

23. Before considering the catalogue of unreasonable conduct on the part of MOD the simple overarching position which should be kept in mind when reviewing the various elements of unreasonable behaviour identified is –

    i) MOD were consulted at all stages over very many years about the Green Rigg proposal and confirmed on a number of occasions that they had no objection to the proposal.

    ii) Very late in the day MOD concluded that they had an objection (air traffic control) and even later in the day (immediately before the PIM) they communicated that objection to the relevant parties.

    iii) Thereafter MOD were continually unhelpful and at times obstructive in providing necessary information and clarifying their position.

    iv) At an even later stage (day 24 of the Inquiry) MOD introduced a new objection (threat radar) and continued their uncooperative and obstructive behaviour.

    v) During cross-examination MOD's witnesses categorically confirmed that there was no basis for objecting to Green Rigg on any of the grounds raised.

vi) By the end of the evidence MOD's witnesses had clearly confirmed that MOD's longstanding and considered position that there was no objection to Green Rigg had been correct all along.

vii) Despite this, MOD has maintained its objection and sought to make submissions in closing that do not reflect the evidence of its witnesses.

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.

24. The evidence established that MOD's position with respect to Green Rigg changed in April 2007 although it was not communicated to anybody until shortly before the PIM in September 2007 – this delay (which was never explained and ran counter to MOD's claims to have alerted people as quickly as possible) was in itself unreasonable behaviour.

25. The evidence established that the change in position occurred because a decision was taken to object automatically to any proposal which was in line of sight of the relevant radar. This decision was taken without any technical or operational input to justify the approach and importantly this approach ran completely contrary to what the MOD stated their approach to be, which they say is the correct approach (i.e. once it is established that there is line of sight undertake technical and operational assessments to determine if there is any problem created). Objecting on the basis of this approach and without any input to justify the approach is unreasonable behaviour.

26. The MOD objection, Outline Statement and Statement of Case were all prepared without undertaking any radar assessment. In any circumstances it would be unreasonable to make and progress an objection without having undertaken this first and fundamental assessment.

27. The conduct was all the more unreasonable because the MOD had undertaken an assessment in 2003. MOD's evidence confirmed that this assessment had identified all of the relevant radar effects and set out them out fully and correctly. After considering this assessment properly the MOD had concluded

that there was no ground for objection. It was clearly unreasonable to object and pursue an objection without undertaking a further assessment.

28. The MOD's radar assessment was eventually undertaken shortly before the evidence was provided. That assessment was incorrect; WPD were put to unnecessary expense in dealing with this inaccurate assessment and bringing necessary corrections to the attention of the MOD.

29. The MOD objection, Outline Statement and Statement of Case were all prepared without undertaking any operational assessment. MOD's position was that having established a radar impact it was then necessary to undertake an operational assessment to determine whether this would create any problems; it was only if an operational assessment revealed a problem that there would be any ground for an objection. To make and progress an objection without such an assessment was unreasonable.

30. The MOD's conduct was all the more unreasonable because in 2003 such an operational assessment had been undertaken and it had been concluded that there would be no problem.

31. The MOD's Outline Statement and subsequent Statement of Case were drafted without any proper assessment by the relevantly qualified people as to what if any issue there might be. As a consequence the Statement of Case raised a number of issues (such as low flying) which were subsequently abandoned and it was littered with assertions and technical errors. This is unreasonable behaviour.

32. The evidence established that the Statement of Case had been deliberately drafted in a wide manner to keep the MOD's options open because it was not known what the MOD's case would ultimately be. Objecting and producing a Statement of Case on such a basis is unreasonable behaviour.

33. WPD's advisers wrote to MOD to seek clarification of the issues and information required to enable them to assess the MOD's case and prepare any necessary evidence or response. These requests started as early as 28th September 2007. Despite a number of reminders MOD provided no answers until 11th December 2007. This belated response appears to have been prompted by the fact that MOD were going to have to explain themselves to

the Inspector at the additional PIM which only needed to be called as a result of their conduct. A substantial amount of the response failed to provide answers to the questions asked, contesting the relevance of matters, answering different questions or providing at best partial and unhelpful answers. This uncooperative behaviour would be unreasonable in any circumstances, but it was all the more so given the history of the matter, the late introduction of an objection shortly before the inquiry, and the fact that the information sought was either known only to MOD or could only be used with their permission.

34. The MOD's obstructive and unhelpful behaviour made it necessary for the Inspector to call a second PIM to address the problems arising from the MOD's unreasonable conduct which included failing to respond to the Inspector's e-mails[4]. This second meeting was required because of the MOD's unreasonable behaviour.

35. In an attempt to avoid the expense of addressing MOD's objection during this period WPD made an offer to MOD to provide for "switching off" of the turbines at any time when they might be considered to be raising an issue for RAF Spadeadam. If there had been any substance in the MOD's case this would have dealt with it. MOD failed to respond to this offer a further example of their unreasonable behaviour.

36. MOD did not carry out or obtain any assessment to consider the impact of Green Rigg until shortly before the start of the inquiry. Progressing this matter without any assessment was a further example of their unreasonable conduct.

37. The MOD's relevant witness Sqn Ldr Deane produced/endorsed the Statement of Case and prepared his proof without any radar input – any proper operational assessment must proceed from an understanding of the radar impact – there was none. This was further unreasonable behaviour.

38. MOD raised shadowing as a technical radar issue only to abandon it later acknowledging that in practice it would have no impact as it could only occur

[4] X/5 para 2

within 100-200m of a wind turbine. As this was always known, it was unreasonable to raise and progress it as an objection.

39. Despite the evidence the MOD attempted to resurrect shadowing as an in issue in closing. The attempt to reinstate this issue is a further example of MOD's unreasonable behaviour.

40. MOD raised obscuration as a radar issue. Their witness had to accept that radar services could not be provided to aircraft in the vicinity of Green Rigg at altitudes at which obscuration could be an issue. This information was always known to MOD and it was unreasonable to raise and progress obscuration as an objection.

41. The MOD's evidence on obscuration is not acknowledged in its closing. The attempt to rely upon obscuration is further unreasonable behaviour.

42. Spadeadam has two operational radar. The evidence suggested that both radars could not be affected by Green Rigg at the same time. MOD failed ever to consider this issue and consequently failed to establish that Green Rigg would have any impact upon the provision of radar services at Spadeadam. This was an essential prerequisite to raising any objection and it was unreasonable to pursue an objection without addressing this point.

43. The significance of Spadeadam's radar was raised by WPD and MOD's witness accepted that the analysis was correct in theory but wanted to consider practical examples before agreeing that this resolved all radar issues (and hence any potential ATC issue). It was unreasonable to maintain this objection once the issue had been raised without addressing this point. The MOD has failed to address this point.

44. Any operational impact is dependent in the first place upon there being a radar impact. MOD failed to establish that there would be any radar impact capable of giving rise to an operational impact. It was unreasonable to make and maintain an objection in such circumstances.

45. The objection to Green Rigg was raised and pursued without any thought being given to the number of flights which might be affected (assuming that there was ground to conclude that any would be affected). MOD failed to provide any information on this until well into the inquiry and then provided

new contradictory figures immediately prior to giving evidence even though they had held those figures for some 3 months. It was unreasonable to pursue an objection without this information and to be obstructive in providing the information.

46. When the information on flights was finally considered by MOD during the evidence at the inquiry the relevant witness accepted that the figures were so low that any impact upon operations could not be material or give rise to an objection. It was unreasonable to make, progress and maintain an objection on impact on ATC in these circumstances.

47. The MOD advanced its case on the basis that aircraft would be undertaking high energy manoeuvres at low level and be being engaged by threat radar in the vicinity of Green Rigg. This was contrary to the position previously set out by MOD at the Blinkbonny Heights Inquiry and Sqn Ldr Deane ultimately conceded that this was not correct and that the position was as originally stated by MOD at the previous inquiry. It was unreasonable to have advanced a case on this basis and to attempt to maintain a case on this basis despite the evidence.

48. MOD's original concerns identified in April 2007 were (i) low level obstructions and (ii) flights in receipt of a radar service accessing the range having to reroute. The first issue had been abandoned prior to the inquiry. The evidence established that the second concern related to such a small number of flights that it could not be a material impact. In the circumstances there was no reasonable basis upon which to raise and progress a case.

49. In order to bolster their case MOD introduced new issues in the form of Flt Lt Willingham's letter of 9th January 2008. The MOD witness had to concede that there was no substance in any of the issues raised in this letter for reasons which were obvious and would have been obvious to the MOD if it had ever reflected upon the issues raised. It was unreasonable to have raised or relied upon these issues.

50. The MOD had conducted a proper operational assessment in 2003 which had concluded that there would be no unacceptable operational impact upon RAF Spadeadam. The evidence established that there had been no material change

in circumstances since that date and that the assessment that there would be no unacceptable impact remained correct. It was unreasonable to make, progress and maintain an objection in those circumstances.

51. Impact on threat radar was raised in a remarkable and wholly unconventional fashion over two months after the start of the inquiry. It was raised even though it had previously been considered and MOD had concluded that any impact would be acceptable and there had been no further assessment to warrant any change of position. It was unreasonable to raise the issue in such circumstances and no adequate explanation has been forthcoming as to how or why it came to be raised.

52. It was clearly unreasonable to raise impact upon threat radar so late in the inquiry process.

53. The manner in which the threat radar issue was raised and the lack of information provided resulted in a considerable amount of time both during and outside of the inquiry being expended simply trying to establish what the MOD's case was and trying to obtain information to allow WPD to assess it. This was unreasonable behaviour.

54. The MOD belatedly produced an amended Statement of Case but this was done without any technical input from anybody with any knowledge of the matter. This was further unreasonable behaviour.

55. The MOD was then particularly obstructive in providing information, which behaviour was unreasonable.

56. The MOD's Statement of Case and evidence failed to narrow down the issues and the MOD refused to answer questions (or provided "answers" which did not answer questions) which would have narrowed down the areas of dispute. For example MOD raised a considerable number of weapons systems for consideration about which ultimately there was no concern and which its witnesses accepted they had realised from the outset there was no basis for concern and it refused to provide information which would narrow down the locations which required consideration. Despite prompting from the Inspector MOD prevaricated in providing information as to the frequency with which particular sites and systems might be affected. This was all unreasonable.

57. The MOD's evidence continued to raise a concern about the Skyguard system even though its witness agreed that it was always obvious to the MOD that Skyguard could not be affected by any of the proposals. Despite the clear answers from the witness which clearly applied to all proposals, the MOD continues to raise an issue with respect to Skyguard in its closing. This is unreasonable.

58. At the outset WPD sought information as to which systems would be affected, how many sites upon which they would be affected and how often this would occur. MOD refused to provide this information. When MOD's witness was questioned he had to accept that had MOD answered the question posed by WPD the answer would have been two weapons systems, one site and never. Not surprisingly the witness confirmed that there was no sustainable objection. One is left with one of two alternatives: either MOD had never considered the point and therefore had not appreciated that there was no case, or they were fully aware of the point and had declined to answer the question for that reason. Either way it was unreasonable in raising progressing and maintaining the objection.

59. The MOD's witness conceded that he had erred on the side of not disclosing information without seeking any guidance as to the information which could be disclosed. There was no proper basis for the refusal to disclose this information. This was unreasonable.

60. By the end of cross-examination MOD's witness had withdrawn each of the issues raised by the MOD in their amended Statement of Case and the relevant paragraph in his proof. Despite a wholly inappropriate re-examination the MOD were unable to re-establish any of these propositions. MOD completely failed to adduce any evidence to establish its case. This was unreasonable.

61. Fundamentally the MOD case was that Spadeadam's value for training would be diminished. It is important to recall that the relevant issue was aircrew training, not training of groundcrew at Spadeadam. MOD failed to call any evidence as to the impact of the proposal upon the training of aircrew and it was apparent that they had failed to consider this fundamental issue. It was

unreasonable to raise the objection and then to pursue it without considering this issue and without calling evidence on the point. MOD persisted in this failure even though the omission was pointed out in WPD's evidence. This was unreasonable.

62. MOD's objection was dependent upon there being some form of impact upon the radar of the relevant threat systems. MOD failed to produce any technical evidence to demonstrate this impact or to carry out any assessment of the likely impact. It is an established principle that those objecting to development must produce evidence to support their objection, as the Inspector made clear when declining to direct MOD to produce further evidence or clarification of its case. Instead their witness relied upon a "gut" feeling. This was despite the fact that MOD had experience of wind turbines in the vicinity of Spadeadam which disclosed no impact. Furthermore its witness had not considered the trials undertaken by MOD to address this issue that had been undertaken because of concerns that they had previously argued an impact at inquiry without adequate evidence.

63. MOD failed to consider the significance of Danger Area 508. The need to avoid this area meant that any aircraft flying in the vicinity of Green Rigg would have to fly at an altitude above which all the evidence demonstrated there could be no impact.

64. MOD failed to consider the impact of Green Rigg alone. The MOD only considered what it claimed was the cumulative impact of all three proposals. It was unreasonable to progress a case against Green Rigg on its own when this issue had never been considered.

Unreasonable behaviour on the part of MOD with respect to NATS case

65. Late in the day NATS raised an objection to Green Rigg but it concluded that it could address this objection by blanking out Green Rigg, a solution that it seeks in its closing submissions. Whilst it is not accepted that there is any substance in this objection or any need to take any measures to address the objection, as a pragmatic step and to avoid the expense of addressing this at the inquiry WPD were prepared to agree this approach. This would have

avoided WPD needing to call evidence to rebut the NATS objection at the public inquiry.

66. This approach was prevented by MOD's objection. Despite this no evidence was adduced in any proof to substantiate any objection on the part of MOD to this solution.

67. During the course of giving evidence a reason was advanced by Sqn Ldr Deane, but he abandoned this reason which was demonstrated to be without foundation and it is now accepted that if necessary the issue can be addressed by blanking as proposed by NATS.

68. If MOD had not raised this objection there would have been no need for WPD to address NATS objection. It was unreasonable to raise this issue and fail to substantiate it.

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