LLANDINAM WIND FARM

# APPLICANT'S OPENING SUBMISSIONS

## Introduction

*The Applications*

1. The Applicant in respect of the Llandinam re-powering scheme ("LR") - ie a scheme to repower the existing Llandinam wind farm with larger but fewer turbines - is Celtpower Limited ("CP")[1].

2. There are before these conjoined inquiries two CP applications in respect of LR, namely (1) for consent under section 36 of the Electricity Act 1989[2] ("the 1989 Act") and (2) for a direction under section 90(2) of the Town and Country Planning Act 1990 ("the 1990 Act") that planning permission be deemed granted for the development there comprised ("the planning direction"). There is also before these inquiries a parallel project – separately promoted – under section 37 of the 1989 Act for a grid connection to serve LR. LR is alone amongst the projects here in having a grid-connection proposal at application stage.

3. The proposed wind farm would comprise 34 turbines[3] each with an installed capacity of up to 3MW, giving an overall installed capacity of up to 102 MW. The turbines would comprise a tubular steel tower, a nacelle, and a three-blade rotor, having a height to blade tip of up to 122m (hub height up to 80m)[4]. The proposed development includes new access tracks and site access[5].

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[1] CP is a joint partnership between ScottishPower Renewable Energy Limited and Eurus Energy Limited

[2] CD/COM/023

[3] As against 102 existing turbines. The existing turbines have a hub-height of 31m with a rotor diameter of 28m; this gives height to blade tip of 45 m

[4] Except for T29, 30 and 42 which will be 111.2 m to blade tip – Volume 1 of 2013 SEI at 4.2.4

[5] The ES material has assumed micro-siting of up to 50 m for turbines and up to 100 m for tracks – ES Volume 1 at 4.5.1 paragraph 5

4. The LR applications were accompanied by an Environmental Statement ('ES'), in accordance with the relevant EIA Regulations; there has been subsequent provision of tranches of further information[6].

*Electricity Act 1989*

5. Under the 1989 Act any licence holder is required, in formulating any relevant proposals (including the construction of a generating station of more than 10 megawatts)[7], to:

    a. Have regard to the desirability of preserving natural beauty, of conserving flora, fauna and geological or physiographical features of special interest and of protecting buildings and other objects of architectural, historic or archaeological interest; and

    b. Do what it reasonably can to mitigate any effect which the proposals would have on the natural beauty of the countryside or on any such flora, fauna, features, sites, buildings or objects.

6. The foregoing duties are relevant because, on an application such as this, the SofS is required[8] to have regard to the desirability of the matters in sub-paragraph (a) above (and to the extent to which any licence holder has complied with its duty under sub-paragraph (b) above). It can be seen, for reasons which follow, that the SofS can here be satisfied (1) that appropriate regard has been had to all the relevant matters and (2) that reasonable mitigation is available and can, where necessary, be secured by appropriate condition(s). In respect of (2) it is important to note that the test is "mitigation" – ie not "removal" – of any adverse effects and that the test is further qualified by the word "reasonable"; in other words this is a matter of judgement and balance, having regard to the significant weight to be attached to the benefits[9] - the benefits of renewable energy, particularly for the very environmental interests identified in that Schedule to the 1989 Act, are too important and urgent to be lost.

[6] See AD/CPL/002 *et seq*; a Corrigendum is being issued in respect of the latest NTS
[7] Schedule 9 para 1(1)
[8] Schedule 9 para 1(2)
[9] PPS 22 para 1(iv)

7. As is often the way, the scheme has generated a number of representations, including letters of support. In so far as objections reflect a desire to protect private interests, *Planning Policy Wales* indicates[10]:

> *The planning system does not exist to protect the private interests of one person against the activities of another. Proposals should be considered in terms of their effect on the amenity and existing use of land and buildings in the public interest. The Courts have ruled that the individual interest is an aspect of the public interest, and it therefore valid to consider the effect of a proposal on the amenity of neighbouring properties. However, such consideration should be based on general principles, reflecting the wider public interest (for example a standard of 'good neighbourliness'), rather than the concerns of the individual.*
>
> *When determining planning applications local planning authorities must take into account any relevant view on planning matters expressed by neighbouring occupiers, local residents and third parties. Whilst the substance of local views must be considered, the duty is to decide each case on its planning merits. As a general principle, local opposition or support for a proposal is not, on its own, a reasonable ground for refusing or granting planning permission; objections, or support, must be based on valid planning considerations. There may be cases where the development proposed may give rise to public concern. The Courts have held that perceived fears are a material planning consideration that should be taken into account in determining whether a proposed development would affect the amenity of an area and could amount to a reason for refusal of planning permission. It is for the local planning authority to decide whether, upon the facts of the particular case, the perceived fears are of such limited weight that a refusal on those grounds would be unreasonable.*

Thus, as a general proposition, each land owner is to be able to develop his land as he sees fit; it is inevitable that any such development may have an impact on neighbouring land – but that, of itself, is not sufficient to refuse consent and the planning system recognizes the need for an element of 'give-and-take'. The prevailing guidance recognizes the freedom to develop and the stress is on those matters which warrant protection in the public interest as opposed to individual interests *simpliciter*. Additionally, here the development is (1) of a type – renewable energy schemes – which itself falls to be brought forward in the public interest and (2) is wholly reversible in so far as there are live issues before this inquiry. In the result, for any planning objection to succeed it must sound materially in the public interest and, additionally, be sufficiently substantial – and the more so since any adverse effect will be temporally limited - wholly to outweigh the other undoubted public benefits of the scheme.

[10] At paragraph 3.1.7-8 – CD/COM/008

*Alternative sites and solutions*

8. So far as concerns LR:

   a. The environmental material contains clear evidence of the site selection process, and alternative design and layout and there is no outstanding Request for Further Information issued by the SofS.

   b. I adopt as a correct statement of the law - on the need to consider the availability of alternatives – the text in Volume 2 of the Planning Encyclopedia[11]. In particular, even were the second test in **Edwards v SoSE** met, the third and fourth are not; where need is, as here unconstrained, logically no one site can be an alternative to another - and this is not a case where, as with for example a MSA, only one (or a very limited number of) permission(s) is to be granted. The question in the context of on-shore wind farms was expressly considered in **Derbyshire Dales DC v SofS for CLG** ("the Carsington case") and the local authority's argument rejected by Carnwath LJ as he then was[12].

9. Whilst decided in the English jurisdiction and under the former PPS 22, the Swinford decision continues to reflect a helpful and correct application of the law in this respect, the more so since it was a recovered decision. The Inspector concluded, and the SofS expressly agreed[13]:

> [Having considered PPS 22 (see now *inter* alia Reg 3 – at least 15%) I *concur with Nuon that the need is unconstrained and RE generation needs to be brought forward wherever it can be, subject to its being acceptable when the overall balance is properly drawn.*
>
> [The Council] *considers that the proposed scale, arrangement and siting of the development have not been demonstrated to be avoidable with reference to alternatives, and submits that smaller or fewer turbines would have less impact on cultural heritage assets. Given the unconstrained nature of the need, Nuon believes that no one RE scheme can be regarded as an alternative to another, and that there is no requirement to provide a menu of different layouts, designs, size or*

[11] At **P70.32-35**, photocopy appended
[12] [2009] EWHC 1729 (Admin)
[13] At IR para 228-230 and DL para 21 – CD – CPL – INS 002 and 003

*number of turbines. Lord Justice Carnwath in the Carsington judgement refers to PPS 22 principle 1(viii), which provides that development proposals should demonstrate any environmental, economic and social benefits as well as how any environmental and social impacts have been minimised through careful consideration of location, scale, design and other measures. He accepted that "careful consideration of location" may be said to imply a need for the developer to demonstrate the particular merits of the selected site, but considered that it was far from requiring the decision-maker in every case to review potential alternatives as a matter of obligation.*

*This is not a proposal for which only one or at least a limited number of permissions could be granted. If an environmentally preferable alternative site were to be available, it seems to me that an argument might be advanced for the development of both sites, if this was necessary to achieve policy objectives and impacts could be satisfactorily in both cases. I consider that Nuon is correct that even were it the case that smaller or fewer or differently laid-out turbines might have a lesser impact, that is not a reason for refusal. What is relevant is not whether, following the various design iterations, the appeal scheme has adverse effects, but whether any such remaining adverse effects would be outweighed by the benefits. Paragraph 1(viii) of PPS 22 refers to a balance between benefits and impacts, and requires the latter to be minimised. In my view, this means firstly that harm would need to be minimised to the extent that it was outweighed by the benefits; and secondly, that any measures to minimise harm, which could reasonably be achieved without diminishing the benefits of the proposal, should be adopted. The objections to the proposal in this case do not raise any specific issues relevant to the second point. In my view, compliance with PPS 22 is therefore a matter of balance, which I deal with below, but, in the circumstances which apply here, I do not consider that there is any requirement to assess alternative sites or configurations for the proposed wind farm.*

10. So far as concerns the separately promoted grid connection for LR, that is primarily a matter for those promoting that element. For present purposes CP merely notes that the original ES for that scheme already includes consideration of, *inter alia*, alternatives and route selection[14].

[14] Section 37 ES at Section 3 – AD/SPM/019

*Environmental information*

11. Regulation 13 of the Electricity Works (Environmental Impact Assessment) Regulations 2000 ("the 2000 Regs") provides that *The Secretary of State, when dealing with a section 36 consent ... in relation to which an environmental statement has been provided, may in writing require the applicant to provide such further information as may be specified concerning any matter which is required to be, or may be, dealt with in the environmental statement.* Regulation 3(1) precludes grant of consent unless the requirements of Regulation 4 have been satisfied. The combined effect of Regulations 3 and 4, read with Regulation 13, is that, where the SofS concludes that the environmental material is not fit for purpose such that further information is required, he may not determine the application(s) unless and until he has so notified the applicant in writing and the applicant has had a fair opportunity to provide such information.

*Appropriate assessment*

12. NRW asserts a need for appropriate assessment of LR in so far as concerns the River Wye SAC. CP does not accept this but has – nonetheless and for the avoidance of doubt – carried out what is effectively a 'shadow' appropriate assessment[15]. This concludes that, in any event, LR will not have an adverse impact on the integrity of the European site.

[15] SE! 2013 Volume 2 at Appendix 8-6

**Matters (1)-(3): The extent to which the proposed developments are consistent with:**

**- the objectives of the Government Policy on the energy mix and maintaining a secure and reliable supply of electricity as the UK makes the transition to a low carbon economy and achieving climate change goals.**

**- the policies relating to generation of renewable energy contained within the relevant National Policy Statements for Energy Infrastructure: Overarching National Policy Statement for Energy (EN-1) of July 2011 and National Policy Statement for Renewable Energy Infrastructure (EN-3) July 2011.**

**- Welsh Government and local policies: including Planning Policy Wales, Edition 4 (2011)[16]; Technical Advice Note 8, Planning for Renewable Energy (2005); and Energy Wales: A Low Carbon Transition (2012); and Powys Unitary Development Plan (adopted March 2010).**

*International and UK policy and legal obligations*

13. In the case of renewable energy the relevant policies inter-relate with various domestic and international legal obligations and cascade down from international through European, national and regional to the local level. There is seemingly substantial (emerging) agreement on the relevance of various elements at the (inter)national level[17]. Peter Frampton summarises this higher tier material succinctly in his evidence, as does the draft Statement of Common Ground[18]; that evidence is here adopted, without being repeated, for the purposes of these submissions. I simply stress two points: first, the duty on the SofS under Regulation 3 of the Promotion of the Use of Renewable Sources Regulations 2011 ("Reg 3")[19] *to ensure that the renewable share in 2020 is at least 15%*; second, the Government's White Paper policy imperative[20] *to produce around 30% of our electricity from renewables by 2020*.

14. In such circumstances the development plan, though still potentially important (subject to its being up-to-date, compliant and comprehensive), takes effect as a product of that overall chain. Even were section 38(6) of the 2004 Act to apply here – and there is agreement it does not - any development plan falls to be considered in the context of the higher legal and policy tiers. At best, the development plan can only hope to be up-to-date with and to reflect accurately

[16] PPW Edition 4 was replaced by Edition 5 in November 2012; it is to that later policy which the Applicant's evidence relates
[17] Draft SoCG – though see stance of NRW
[18] Frampton proof Section 2; draft SoCG Sections 3 to 5
[19] SI 243/2011 *Renewable share* is defined as *the share of energy from renewable sources in the United Kingdom as calculated in accordance with Article 5 of the Directive* – CD/COM/037
[20] The UK Low Carbon Transition Plan (CD/COM/027) – Draft SoCG at paragraph 5.20

those higher tiers. In so far as it fails to accord with those higher tiers, the latter are most material considerations indicating otherwise.

15. The fact that the need for renewable energy sounds, as has been recognized by Government, at the supranational level is crucial. It means that, in drawing any planning balance, considerable weight is to be attached to bringing forward any relevant renewable energy project. Thus there must be an imperative and overriding reason for refusing a project. The mere fact there may be impacts – even at the national level - which some argue to be adverse is not, of itself, sufficient to weigh the balance negatively.

16. The content of Government policy is not an appropriate subject for discussion and review at a pubic inquiry; the inquiries' role is, rather, to apply such policy[21]. Self-evidently, no policy can transmute an immaterial consideration into a material one, or vice versa. The policy-maker is not bound slavishly to follow his/her/its own policy – but any departure from such policy must be justified by clear and cogent reasons[22]. And there must be a consistent approach to the construction of policy; such construction may ultimately be a matter for the courts[23].

17. The prevailing policy matrix fully reflects the general acceptance of the urgency and importance of responding to climate change by, *inter alia*, the bringing forward of renewable energy projects. The question is not of maintaining the *status quo* and comparing the existing situations with and without the wind farm. The question is rather whether this proposal should come forward to assist in achieving the sort of objectives agreed to be necessary in responding to climate change. The present site and its surroundings are – and will remain - as much subject to the adverse effects of climate change as are other places.

18. The Energy White Paper 2007[24] stated, amongst other things:

> *New renewable projects may not always appear to convey any particular local benefit, but they provide crucial national benefits. Individual renewable projects are part of a growing proportion of low-carbon generation that provides benefits shared by all communities both through reduced emissions and more diverse supplies of energy, which helps the reliability of our supplies. This factor is a material*

[21] **Bushell v SoSE** [1980] 2 All ER 608 HL
[22] **Gransden v SoSE** [1986] JPL 519, at 521; upheld at [1997] JPL 365
[23] **Tesco Stores v Dundee City Council** [2012] SC 13
[24] May 2007 (CD/FWLC/PLA/002– Box 5.3.3; Frampton proof paragraphs 2.4 and 2.9

*consideration to which all participants in the planning system should give significant weight when considering renewable proposals. These wider benefits are not always immediately visible to the specific locality in which the project is sited. However, the benefits to society and the wider economy as a whole are significant and this must be reflected in the weight given to these considerations by decision makers in reaching their decisions.*

This cited extract refers not only to the climate change benefits of renewable energy but also to the security-of-supply advantages; the strategic importance of this latter element – namely access to energy supplies which avoid the state and its citizens being held to ransom – is self-evident but, surprisingly, often ignored. CP's case is that any impacts of LR will not be unacceptable. But, even were CP wrong in that, any adverse impact must still be weighed against the wider national and global imperative. The White Paper also, and unusually, specifies the weight to be attached to renewable energy; the fact that this is not simply left to the decision-maker's discretion presumably reflects the overriding importance of bringing forward such projects.

19. Renewable generation needs to be brought forward wherever it can be, subject to its being acceptable when the overall balance is properly drawn. For example, the 2007 White Paper put the question of 'need' beyond doubt when it confirmed that[25]:

*Recognising the particular difficulties faced by renewables in securing planning consent, the Government is also underlining that applicants will no longer have to demonstrate .. the need for their particular proposal to be sited in a particular location*

This also re-confirmed that there is no need to deal with alternative sites.

20. The UK has not performed well in terms of meeting the relevant targets for the provision of energy from renewable sources[26]. It should also be noted that the Welsh Government does not have devolved powers in respect of energy policy; thus, whilst Welsh policy must be taken into account, the policy context is provided by UK and national energy policy[27].

[25] Frampton proof paragraph 2.9
[26] Frampton proof, eg paragraph 2.20
[27] TAN 8 paragraph 1.3 – CD/COM/016

21. Sof M 2 expressly refers to NPS EN 1 and 3. These are dealt with both in the evidence of Mr Frampton and the draft SoCG. For present purposes it may be sufficient merely to stress one point, namely that:

> *Modern onshore wind turbines that are used in commercial wind farms are large structures and there will always be significant landscape and visual effects from their construction and operation for a number of kilometres around a site* (emphasis added)

Thus Government recognizes that some adverse impacts 'go with the territory'.

*Welsh policy and advice*

22. Welsh policy and guidance is already rehearsed in Mr Frampton's proof[28] and the draft SoCG[29]; I do not need to repeat that at this stage. For present purposes I stress the various points. First:

    a. As the Welsh Government accepts[30], LR - as a repowering scheme - falls into a different category from the other proposals here; *..Llandinam falls just outside SSA C. The Llandinam application is a re-powering of an existing development. The Welsh Government's policy in relation to the re-powering of existing developments which fall outside SSAs is that they should be encouraged* ***provided*** *that the environmental and landscape impacts are acceptable (Section 2.14, Technical Advice Note 8, Welsh Government, 2005).*

    b. Paragraph 2.14 of TAN 8 provides that *There will also be opportunities to re-power and/or extend existing wind farms which may be located outside SSAs and these should be encouraged provided that the environmental and landscape effects are acceptable.*

    c. The Welsh Government assumes, against LR, that the proposal falls outwith the relevant SSA boundary. This is correct in so far as regards the original TAN 8 boundary for SSA C[31]. Here, of course, PCC has

[28] Paragraphs 3.9 to 3.46 and 4.2 to 4.28
[29] Sections 6 and 7
[30] Welsh Government letter of 21st January 2013 – CON-001-002
[31] TAN 8 paragraph 2.4 expressly envisages TAN 8 boundaries being open to refinement by local planning authorities

carried out a refinement exercise and LR lies wholly within the boundary as so refined. This reinforces the policy support which LR attracts[32].

d. LR falls to be considered against the baseline not of an undeveloped site but of a site (i) which includes an existing wind farm with a materially greater number of (smaller) turbines (and with materially less installed capacity – 31MW) and (ii) where no condition determines the life of the existing permission or requires decommissioning.

e. LR is additionally marked out by the fact of there already being a pending grid-connection application.

23. Second, PPW provides[33]:

> *The potential for renewable and low carbon energy in Wales as established in the Energy Policy Statement 2010 demonstrates that strategic scale wind energy continues to offer the greatest potential (for activities within the control of the planning system in Wales). Wales has an abundant wind resource and power generation using this resource remains the most commercially viable form of renewable energy. The Welsh Government accepts that the introduction of new, often very large structures for onshore wind needs careful consideration to avoid and where possible minimise their impact. However, the need for wind energy is a key part of meeting the Welsh Government's vision for future renewable electricity production as set out in the Energy Policy Statement (2010) and should be taken into account by decision makers when determining such applications.*

Notwithstanding the words in parenthesis, the cited extract has resonance for present purposes. Irrespective of the weight – or lack of it, *per* the Alliance – to be attached to TAN 8, the position remains the same. There is acceptance of the substantial role for onshore wind energy in Wales; and, whilst Welsh policy is to be taken into account (see above), the context is provided by UK and national policy – this matrix provides the clearest imperative for bringing forward renewable energy, of whatever type, wherever it achieves a positive overall balnce.

[32] As noted in PCC's Interim Development Control Guidance Onshore Wind Farm Developments ("IDCG") – at paragraph 2.2 – *The second draft of the IDCG was formally authorised by Powys County Council's Board on 22nd April 2008 for use in development control with immediate effect*
[33] PPW paragraph 12.8.12

*Development plan*

*24.* It is agreed that section 38(6) is not here engaged. But, even were the case otherwise – or the development plan to be regarded as a material consideration of such importance that the approach was the same as would be the case under section 38(6) – the development plan would still here need to be construed and applied in the context of the other policy and legal requirements[34].

25. The concept of accord with the development plan – whether required by statute or merely arising as a material consideration - does not require compliance with each and every policy thereof. The courts have confirmed that, in the context of the old section 54A of the Town and Country Planning Act 1990 (and, by parity of logic, one presumes, section 38(6) of the 2004 Act), it is necessary to read the development plan as a whole. It must also be read in the context of subsequent policy and legislative intervention. On any reasonable analysis, the overall dominant theme or policy matrix is that relating to bringing forward renewable energy to meet targets. LR accords with that theme; in any event, the other material considerations militate decisively in favour of consent issuing, even were there some material failure to accord with the development plan.

[34] Section 38(6) of the 2004 Act provides: *If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise.*

**Other Statement of Matters points**

26. These Opening Submissions do not seek to anticipate evidence to be called in respect of SofM 4 to 15 at future sessions. For the present it suffices for CP to note that:

    a. No aviation issue here arises and thus SofM 11 is not engaged.

    b. PCC has concluded[35] that LR *can now be considered acceptable in landscape and visual terms* (SofM 4); it is understood this relates both to LR in isolation and cumulatively. At the time of writing, NRW still, apparently, maintains a cumulative landscape and visual impact objection[36].

    c. NRW has withdrawn its objection in respect of the Caersws Basin Landscape of Special Historic Importance[37] (SofM 10). PCC is, apparently, currently reviewing its position on this[38].

    d. PCC is now satisfied in terms of noise impacts, subject to the agreement and imposition of suitable conditions (SofM 6).

    e. CP remains prejudiced by PCC's continuing failure to identify whether it will advance a socio-economic case and, if so, to specify what that case will allege (SofM 8).

    f. Discussions continue with NRW and PCC with a view to achieving further agreement or to refining the precise nature of any residual disagreement.

    In the result, CP is reviewing its intentions in terms of which witnesses it will call at future sessions and the extent to which such witnesses are either no longer necessary or can simply provide written statements.

[35] PCC SofC at paragraph 6.3.2
[36] NRW letter of 24th May 2013
[37] NRW letter dated 24th May 2013
[38] PCC SofC paragraph 6.7.2

**Conclusion**

27. CP commends this scheme to the inquiry as one which, for reasons revealed by evidence to be called and/or already available, achieves a positive overall planning balance such that consents should issue.

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4th June 2013