Decision of the Commissioner for Environmental Information on an appeal made under article 12(5) of the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (the AIE Regulations) Case CEI/19/0012

Date of decision: 16 August 2019

Appellant: Mr. J

Public Authority: EirGrid PLC (EirGrid)

Issue: Whether EirGrid was justified in refusing to provide further information in relation to parts of a request concerning Capital Project 966 because it did not hold such information

Summary of Commissioner's Decision: The Commissioner accepted EirGrid's assurance that it did not hold certain information at the relevant time. He found that EirGrid's refusal to provide further information was justified in relation to all parts of the request except one. He found that EirGrid had not properly addressed one part because it had not properly had regard to the appellant's clarification of the scope of that part. Accordingly, he varied EirGrid's decision by annulling its decision on that part while affirming its decision on the other parts. He expressed his expectation that EirGrid will make a fresh decision on the annulled part in accordance with the AIE Regulations, if the appellant so wishes.

Right of Appeal: A party to this appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision, as set out in article 13 of the AIE Regulations. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.

Background

This case involved a project called "Capital Project 966". EirGrid explained that it "is a proposed electricity development that will help to transfer power to the east of the country and distribute it within the network in Meath, Kildare and Dublin". It said:

> "The project follows EirGrid's 'Framework for Grid Development', which is a six step approach when we develop and implement the best performing solution option to any identified transmission network problem. Further information about this process is described in the document 'Have Your Say", published on EirGrid's website. The six steps are shown on a high-level in Figure 1. Each step has a specific purpose with defined deliverables".

On 4 December 2018, the appellant submitted an AIE request to EirGrid that related to Capital Project 966. It said:

> "The conclusion of the 'Part A – Options Report' prepared by EirGrid identifies a number of possible 'solution options' under consideration. In order to understand the various aspects of the proposed project and to make properly considered submissions I request:
>
> 1. Copies of the route maps of the existing 220kV overhead lines being considered for the 'upvoltage' to 400kV solution at the best possible scale.
> 2. A detailed breakdown of the 'capital cost' figure of €68m indicated for the 'upvoltage' of the 220kV lines to 400kv option.
> 3. A detailed breakdown of the 'capital cost' figure of €38m indicated for the new Dunstown – Woodland 220kV OHL option.
> 4. A detailed breakdown of the 'capital cost' figure of €64m indicated for the new Dunstown – Woodland 400kV OHL option.
> 5. A detailed breakdown of the 'capital cost' figure of €98m indicated for the new Dunstown – Woodland 220kV UGC option.
> 6. A detailed breakdown of the 'capital cost' figure of €130m indicated for the new Dunstown – Woodland 400 UGC option.
> 7. Information on the 900MW of data centres which is given by EirGrid [as] one of the 'drivers' of Capital Project 966.

8. Information on the criteria currently used by EirGrid to assess the routing of 220kV and 400kV overhead lines."

EirGrid gave notice of its decision to grant the request on 20 December 2018 and it released certain information to the appellant.

On 18 January 2019, the appellant asked EirGrid to review the decision. He said that he wanted more detailed information, as follows:

1. He complained that the maps provided to meet part 1 of the request were not to the best possible scale.
2. He said the breakdown of costs provided to meet parts 2 - 6 of the request was "not detailed at all" and he explained why this was his view.
3. He said the information provided to meet part 7 "is not of any use" and he said: "Please provide information on:
    a. How many Data Centres are counted by EirGrid as 'drivers' of this project?
    b. What are the approximate locations of these data centres?
    c. Where are the various sub-stations listed in the decision located – a map would be useful?
    d. How many of the data centres which are the 'drivers' of this project have planning permission?
    e. How many of the data centres which are the 'drivers' of this project have been offered connection agreements?
    f. How many of the data centres which are 'drivers' of this project have executed connection agreements?
    g. What are the estimated dates by which supply is required for each of the data centres involved as 'drivers' of this project?
    h. If the analysis undertaken by EirGrid to get to the figure of 900MW was carried out in 2016, what is the current analysis as we head into 2019?"
4. In relation to part 8 of the request, he asked two questions about consultations with landowners.

On 30 January 2019, EirGrid issued a review decision which affirmed the original decision. It referred to the parts of the AIE request as "questions". In relation to part 1, which sought maps, it said:

> "Given the stage of the project and the purpose of step 2, the information provided satisfies the request as it was given. The level of detail of the maps that were expected was not indicated in the original request. Given that the information provided was consistent with that used during step 2 of the development process, it was not reasonable to expect that you be asked to clarify your request, or to be in a position to provide more detailed information at this time".

The appellant complained that despite reading that paragraph a number of times, he remained unsure as to what it was suggesting. My investigator asked EirGrid to explain the second sentence in that paragraph and EirGrid provided a response which explained that it did not hold better maps at that stage in the project. It would have been preferable if EirGrid had said the same thing to the appellant, in clear language, in its decision.

In relation to parts 2 – 6, it said that "no more detailed information" was "available" at that stage in the project.

In relation to parts 7, it said:

> "The table [provided] contains the best information available at the time about data centres with connection agreement, data centres working towards getting a connection agreement, data centres that have indicated that they were about to enter the process to get a connection agreement and the aggregated size of their planned demands at the transmission stations they requested to connect to".

It is notable that while the decision did not say that other information captured by this part of the request had been withheld, the reference to the "best" information gave the impression that it might have been. The decision made no reference to the clarification of this part given by the appellant in his request for an internal review and it concluded that "the information provided satisfies the query as it was given and it also represents the information in the form that it is available and relevant for the assessment of transmission network reinforcement".

In relation to part 8, the decision said:

> "Given the stage of the project and the purpose of step 2, the information provided satisfies the request as it was given. The follow up questions (i.e. when are landowners consulted) are also addressed by the original response".

The appellant appealed to my Office on 28 February 2019 against EirGrid's decision on parts 1 to 7 of his request.

Scope of Review

It is clear that the parties differ in what they believe the AIE request was seeking. EirGrid believes that its decisions "satisfied" the request and that no requested information had been withheld, while the appellant believes otherwise.

EirGrid informed my Office that "the request was deemed to be clear with no clarifications required". I disagree with that assessment. There was significant ambiguity in the request and EirGrid's failure to recognise and address that ambiguity led to unnecessary complications in this case.

In carrying out my review I had regard to the submissions made by the appellant and EirGrid. I also had regard to: the Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations (the Minister's Guidance); Directive 2003/4/EC (the AIE Directive), upon which the AIE Regulations are based; the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention); and the Aarhus Convention—An Implementation Guide (Second edition, June 2014) ('the Aarhus Guide').

Assessment

I considered EirGrid's decisions on each part of the request.

Part 1: Maps

There was a lack of clarity as to what the appellant meant by "maps at the best possible scale". Different scales best suit different purposes. Ideally, EirGrid would have asked the appellant what he meant by "best possible scale", but EirGrid did not ask this question. In his request for an internal review, the appellant said: "the public consultation process for the possible upvoltage of the existing 220kV [lines] should involve all property and landowners close to the existing lines". That suggests that he wanted maps at a scale at which landowners or occupiers could most readily see if the lines being considered crossed their

lands. He submitted to my Office that the lines already exist and therefore maps showing the lands they cross must exist. He complained that the absence of 'legible' maps showing the exact routes of the lines has left the public, including numerous landowners, in the dark as to whether a particular line was being considered for upgrade.

However, while EirGrid did not inform the appellant in its review decision that it did not hold maps that showed more clearly the lands crossed by the lines under consideration and that it had released the only maps that it held at the time, that is what it has since told my Office. EirGrid explained that ESB Networks, as the "asset owner", would have maps which showed the lands crossed but it assured me that EirGrid did not itself, at the relevant time, hold such maps. I accept that assertion and explanation, while once again noting that it is regrettable that EirGrid did not explain this to the appellant in clear language.

I conclude that EirGrid's implied refusal to provide other maps was justified on the ground that such maps were not held.

Parts 2 – 6: Detailed costs breakdown

These parts of the request sought "a detailed breakdown of the capital cost" figures for five specific options. The appellant complained that the breakdowns released to him were "not detailed at all". I disagree. The released breakdowns were detailed, notwithstanding that the appellant made it clear in his internal review request that he wanted more detail.

In his request for internal review, the appellant said he wanted a "fully detailed breakdown of the costs of each option under consideration". I interpret that as clarification that, in parts 2 – 6 of the request, the appellant sought the *most detailed* breakdown of such costs available.

In its internal review decision, EirGrid informed the appellant that "no more detailed information [was] available" at that stage of the project.

EirGrid has since assured my Office that it did not hold more detailed information and it explained that it would not hold such information at that stage in the life of the project. I accept that assurance and I therefore conclude that EirGrid's effective refusal to provide further details in response to parts 2 – 6 of the request was justified on the ground that such information was not held.

Part 7: Information on data centres

This part asked for "information on the 900MW of data centres given by EirGrid [as] one of the drivers of Capital Project 966". Given the ambiguity as to what *specific* information on data centres was sought, it would have been appropriate for EirGrid's original decision maker to have told the appellant that this part was too general and invited him to specify the information sought.

Even the most minimalist interpretation of a request for information on data centres would recognise that addressing the request required consideration of whether information on the locations (or approximate locations) of such centres was held. Yet EirGrid did not release such information while all the while maintaining that "no information was withheld". It is difficult to believe that EirGrid did not hold information on the numbers and locations of the data centres which it had identified as drivers of a major project.

In his request for internal review, the appellant complained that the information released was "not of any use" and he set out a list of what he wanted in relation this part of the request. The list (3(a-h) is set out earlier in my decision.

EirGrid's review decision acknowledged only that the appellant wanted "more information on data centres" but did not respond to the specific points he had raised. EirGrid later submitted to my Office that "the request for internal review outlined additional questions and queries to the ones submitted in the original request". It seems that EirGrid simply regarded those 'questions and queries' as outside of the scope of the request. I do not agree with that approach. While there is no obligation on public authorities to answer questions in response to AIE requests, EirGrid's review decision maker ought to have recognised that these "further questions" identified for the first time the information that the requester sought in this part of the request. In effect, they did no more than answer the question that EirGrid's original decision-maker might reasonably have put to the requester in the first place, which was "what exact information about those data centres do you seek?" If the original decision-maker had sought and obtained clarity on that matter from the outset and the appellant later introduced "further questions" in his review request, questions which *expanded* rather than merely *clarified* the request, I would support EirGrid's position. However, I do not consider it appropriate for a public authority to ignore obvious ambiguity in an AIE request and later dismiss bone fide clarification of the request on the ground that it goes beyond the scope of the request as first stated. The AIE Regulations require public authorities to assist requesters. Public authorities should be well able to recognise clear instances of ambiguous requests and

take the initiative by engaging with requesters with a view to obtaining clear statements of what is sought in an AIE request.

EirGrid later told my investigator that it had in fact released information on the number and approximate locations of data centres. It said that a table which it had released to the appellant identified the sub-stations to which such centres are connected and suggested that this constituted information on the number and approximate locations of data centres. The table listed 13 "assumed stations" by place name and voltage. To explore this claim, my investigator asked EirGrid whether he could take it that the fact that there are 13 stations listed in the decision in relation to part 7 of the request means that EirGrid had identified 13 data centres, located somewhat proximately to those stations, as drivers of the project. EirGrid said yes.

It is not obvious to me (or, I suspect, to the appellant) that there could only be *one* data centre associated with any one sub-station. Therefore, I do not see how revealing a list of sub-stations "satisfies" a request for information on the number of data centres that were considered to be drivers of the project. Second, while EirGrid told my investigator that the data centres concerned "should all be expected to be within approximately 10 km of the substation", EirGrid did not inform the appellant of this in its decisions. I conclude that EirGrid did not release information which showed the number or approximate locations of the data centres at issue. EirGrid released information *related* to data centres, but without explaining *how* it related to the number or locations of such centres.

I conclude from the above that EirGrid did not properly process part 7 of the request. That part should be understood as having asked for the specific information at 3 (a-h) above (if held by or for EirGrid on 4 December 2018, i.e. the date on which when EirGrid received the AIE request) on "the 900MW of data centres" which EirGrid regarded as amongst the drivers of Capital Project 966.

Summary of conclusions

I concluded that EirGrid did not hold better maps or more detailed breakdowns of the capital costs of the options specified in the AIE request.

I concluded that EirGrid did not properly address part 7 of the request, in that it did not have proper regard for the clarification of that part of the request that was given by the appellant in his request for an internal review.

Decision

Having carried out a review under article 12(5) of the AIE Regulations, I hereby affirm EirGrid's decision to refuse to provide further information in relation to parts 1 – 6, on the ground that such information was not held at the relevant time. I annul its decision on part 7 of the request because I found that EirGrid did not properly consider the scope of this part, in light of the clarification given by the appellant.

I expect EirGrid to make a fresh decision on part 7 of the request, if the appellant so wishes, in accordance with the AIE Regulations. It would, of course, be open to the appellant to make a fresh request for access to information which would capture any more current information held.

Appeal to the High Court

A party to the appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.

A point about language

EirGrid's original decision maker referred to the parts of the AIE request as "queries" and went on to provide a "response" to each "query". Its internal review decision maker referred to the parts of the request as "questions" and found that the information released to the appellant "satisfied" each request or query, as it was made. In later correspondence with my Office, EirGrid explained that the information it had provided to the appellant was "the best information available at the time".

I am concerned that the characterisation of AIE requests as "questions" to be "satisfied" by providing selected information, even when that information is regarded as being "the best information", could present a distorted view of the AIE regime. That regime is fundamentally not designed to facilitate the asking and answering of questions, although of course the answers to questions might well lie in information held in records. AIE requests are not 'questions' or 'queries' and any response which *selects* particular information from all of the information held, even if it is the "best" information, in an attempt to "satisfy" the request, would be inappropriate. AIE *requests* should be followed by *decisions* which clearly *identify* the environmental information captured by the request that is held by or for the public authority concerned and state whether access to such information is *granted* or *not*,

and if not, why not, with reference to specific provisions from the AIE Regulations permitting refusal.

What I expect EirGrid to do on foot of this decision

In the interests of clarity for both parties, the following is how I expect EirGrid to respond to this decision.

If EirGrid decides not to appeal this decision to the High Court, it should:

1. Inform the appellant of that decision as soon as it is taken and ask if he wishes EirGrid to process part 7 of the request.
2. If the appellant expresses a wish for EirGrid to process part 7, regard that part as an AIE request asking for the information specified at 3 (a-h) above (unless the appellant indicates that he no longer wishes to have access to any of those items of information) that was held when the appellant made his request.
3. Process the request in accordance with the AIE Regulations, giving notice of a decision within the statutory timeframe and informing the appellant of his right to request a review of that decision. Any decision should address all of the information captured by the request and not merely information that EirGrid might regard as "the best information".

Peter Tyndall
Commissioner for Environmental Information
16 August 2019