



Commission for Energy Regulation

An Coimisiún um Rialáil Fuinnimh

Special Order Application by EirGrid Pertaining to
the East West Interconnector

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Abstract:

This decision paper details the Commission's rationale for the granting of the special orders in relation to the East West Interconnector. This application was made by EirGrid pursuant to the Electricity Supply Act, 1927 with respect to lands at Batterstown, Co. Meath and Rush, Co. Dublin.

Target Audience:

This decision document relates to the application by EirGrid to the Commission for three special orders pursuant to the Electricity (Supply) Act, 1927.

The affected parties are the landowners named in the applications.

Members of the public and those living near the proposed route of the interconnector would also be interested in this decision document.

Related Documents:

- [Special Order Application](#) (27 November 2009)
- Transcript of Public Inquiry (14 April 2010)

For further information on this decision paper, please contact **Paul Hogan (phogan@cer.ie) at the Commission.**

Executive Summary

This decision document relates to the application by EirGrid to the Commission for three special orders pursuant to the Electricity (Supply) Act, 1927 (as amended) (“**the 1927 Act**”) and the Electricity Regulation Act, 1999 (as amended) (“**the 1999 Act**”) in connection with the East West Interconnector project (“**the EWIC**”).

These special order applications relate to rights over lands owned by the following:

- Fingal Language institute Limited at White House, North Beach, Rush, Co. Dublin
- Mrs Catherine Judy Smyth and Mr Francis Smyth at Portain, Batterstown, Co. Meath
- Mr Fred Smyth at Portain, Batterstown, Co. Meath

Each special order application from EirGrid seeks to acquire or use compulsorily a right of way so that EirGrid can pass and re-pass over the roadway as indicated in the landowners’ folios. EirGrid also seeks, in relation to each application, a wayleave to construct and place an electric line (up to 400kV) as defined in the 1999 Act consisting of power cables, ducts, a fibre optic cable and access chambers with manholes (where applicable) and any other materials and plant connected therewith on or below the respective roadways.

EirGrid is not seeking to full ownership of the land per se. Rather EirGrid only requires a Right of way for access and a wayleave agreement to install and maintain the cable as already outlined in part 8 of the application.

The Commission engaged in a consultation process with the affected landowners and with the general public. Following this period the Commission moved to holding a Public Inquiry chaired by an independent Chairperson appointed by the Commission in to two of the three applications. During this inquiry two of the affected landowners were afforded the opportunity to make their case against the granting of the special orders and to directly question the applicant, EirGrid.

The Commission considered the issues raised both during the Public Inquiry and during the consultation phase and also considered whether it is proper for EirGrid to acquire the rights over the affected lands compulsorily in connection with the East West Interconnector project. Having considered the matter the Commission has decided to grant the special orders in the case of the three applications.

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1.0 Introduction

1.1 *The Commission for Energy Regulation*

The Commission for Energy Regulation ('the Commission') is the independent body responsible for overseeing the regulation of Ireland's electricity and gas sectors. The Commission was initially established and granted regulatory powers over the electricity market under the *Electricity Regulation Act, 1999*. The enactment of the *Gas (Interim) (Regulation) Act, 2002* expanded the Commission's jurisdiction to include regulation of the natural gas market, while the *Energy (Miscellaneous Provisions) Act 2006* granted the Commission powers to regulate electrical contractors with respect to safety, to regulate to natural gas undertakings involved in the transmission, distribution, storage, supply and shipping of gas and to regulate natural gas installers with respect to safety. The *Electricity Regulation Amendment (SEM) Act 2007* outlined the Commission's functions in relation to the Single Electricity Market (SEM) for the island of Ireland. This market is regulated by the Commission and the Northern Ireland Authority for Utility Regulation (NIAUR). The Commission is working to ensure that consumers benefit from regulation and the introduction of competition in the energy sector.

1.2 *Purpose of this paper*

The purpose of this paper is to outline and describe the Commission's decision with regard to the three special order applications made by EirGrid on 27 November 2009 relating to three pieces of land at Rush, County Dublin and Batterstown, County Meath. The Commission has carried out a consultation with all the affected landowners and the wider public. For reasons set out herein, a public inquiry was held into the lands at Batterstown, County Meath. This paper has considered fully all comments and submissions made to the Commission. Issues raised throughout the process will be addressed in this paper, as well as outlining the final decision on this topic pertaining to the respective lands.

1.5 Structure of this paper

- **Sections 2.0** deals with the background to the applications, the legal basis for considering them, the procedure for dealing with the applications and the consultation process;
- **Sections 3.0** deals with the public inquiry, including the submissions made by all parties and counter arguments;
- **Sections 4.0** deals with the Commission's consideration of the application and the arguments presented taking into account the Commission's statutory powers and legal position. The Commission's decision is presented, based on the rationale of the section. Finally the issue of compensation is discussed.

2.0 Background Information

2.1 Special Order Applications

On 27 November 2009 EirGrid applied in writing to the Commission seeking three special orders pursuant to the Electricity (Supply) Act, 1927 (as amended) (“**the 1927 Act**”) and the Electricity Regulation Act, 1999 (as amended) (“**the 1999 Act**”) in connection with the East West Interconnector project.

These special order applications seek rights affecting private roadways on part of the lands owned respectively by the following:

- Fingal Language Institute Limited at White House, North Beach, Rush, Co. Dublin
- Mrs Catherine Judy Smyth and Mr Francis Smyth at Portain, Batterstown, Co. Meath
- Mr Fred Smyth at Portain, Batterstown, Co. Meath

Each special order applications from EirGrid seeks to acquire or use compulsorily:

- i. a right of way so that EirGrid can pass and re-pass over the roadway as indicated in the landowners’ folios; and
- ii. a wayleave to construct and place an electric line (up to 400kV) as defined in the 1999 Act consisting of power cables, ducts, a fibre optic cable and access chambers with manholes (where applicable) and any other materials and plant connected therewith on or below the respective roadways.

The right of way and the way leave summarised above and more particularly detailed in part 6 and 8 of each application (“**the Rights**”) are required so that EirGrid can carry out work that is necessary to install the cable and to allow EirGrid to carry out any necessary maintenance work on the cable and to pass and repass over the roadways concerned. The Rights sought are detailed more fully in the applications submitted by EirGrid for a special order in relation to each of the above lands.

Schedule 1 of each application sets out on a map of the area of the landowners’ lands affected by the Rights sought. Schedule 2 of the applications set out the route of the East West Interconnector project and trench cross sections along the route. Schedule 3 of the applications sets out the proposed route and alternatives considered for the East West

Interconnector Project. Schedule 4 of each of the applications provides correspondence between EirGrid and the respective landowners demonstrating that negotiations took place and were ultimately unsuccessful with the respective landowners. The Commission considers this correspondence to be confidential. Schedule 5 of each of the applications sets out a table of Key Deliverables for the East West Interconnector Project. As set out above, schedule 6 of each of the applications details the strategic need for the East West Interconnector project.

EirGrid is not seeking to full ownership of the land *per se*. Rather EirGrid only requires a Right of way for access and a wayleave agreement to install and maintain the cable as already outlined in part 8 of the application.

2.2 Legal Basis

Section 45 of the 1927 Act sets out the legal basis for the Board to acquire compulsorily any land or to acquire or use compulsorily any right over land by special order.

Section 45 of the 1927 Act has been amended and any amendments are footnoted below:

45.—(1) If and whenever the Board thinks proper to acquire compulsorily any land or to acquire or use compulsorily any easement or other right over land or any right of impounding, diverting, or abstracting water for the purpose of the exercise of any of the powers or the performance of any of the duties or functions conferred or imposed on it by this Act, the Board may by special order declare its intention so to acquire such land or so to acquire or use such right, and every such special order shall operate to confer on the Board full power to acquire compulsorily the land or to acquire or use compulsorily the right mentioned therein under and in accordance with this section.

(2) The Board shall not make a special order under this section in relation to the compulsory acquisition of a right of impounding, diverting, or abstracting water without previous consultation with the Minister for Fisheries.

(3) The Board shall not make a special order under this section in relation to the compulsory acquisition of a right of impounding, diverting, or abstracting water in or from any canal without previous consultation with the Minister.

(4) Before making a special order under this section, the Board—

(a) shall deposit and keep open for inspection in its principal office or some other suitable place such plans, specifications, and other documents as will show fully and clearly the land or right intended to be acquired or used by virtue of the order, and

(b) shall give notice, in such manner as it may consider best adapted for informing persons likely to be affected by the order, of its intention to consider the making thereof and of the manner in which representations and objections in respect of the order may be made, and

(c) shall, if it considers it expedient so to do, cause a public inquiry to be held in regard to the making of the order.

(5) A special order made under this section may incorporate—

(a) the Acquisition of Land (Assessment of Compensation) Act, 1919, with the modification that the expression “public authority” shall include the Board^[1]., and

(b) the Lands Clauses Acts so far as the same are not inconsistent with the said Acquisition of Land (Assessment of Compensation) Act, 1919 ^[2]

(6) Nothing in this section shall authorise the Board to acquire use, or otherwise interfere with compulsorily under this section any land or water or any easement or other right over land which at the date of the first publication of notice of the intention of the Board to consider the making of a special order in that behalf belongs to a gas or water undertaker and is used or authorised to be used by such undertaker for the purpose of his undertaking.

Therefore, under section 45 of the 1927 Act a special order operates to confer on the Board the full power to acquire compulsorily the land or to acquire or use compulsorily a right over land.

Section 47 of the 1999 Act amended this Section 45 of the 1927 Act and the power to make a special order was transferred to the Commission.

47.—(1) *Subject to subsection (2) the power to make a special order conferred on the Board by section 45(1) of the Principal Act shall be exercisable by the Commission and not by the Board on the application of the Board or a holder of an authorisation or a person who has applied for an authorisation and any references in that Act to the making of special orders shall be construed as references to the making of such orders by the Commission.*

(2) A special order made by the Commission shall operate to confer on an applicant for an authorisation under section 16 the functions which such an order would confer on the Board.

¹ Section 45(5) (a) has been amended by section 43 of the 1999 Act.

² Section 45(5)(b) has been amended by section 17 of the Electricity (Supply) (Amendment) (No. 2) Act, 1934

(3) Where an application is made to the Commission for a special order under this section, section 45(2) to (6) of the Principal Act shall apply to the Commission as it does to the Board.

The Commission can only exercise the power to make a special order on the application of either the ESB or the holder of an authorisation granted under Section 16 of the 1999 Act.

In making the decision whether to grant or refuse to grant the special order, the Commission must follow the provisions set out in section 45(2) to (6) of the 1927 Act.

The procedure includes requirements for consultation, inspection, notice and the holding of a public inquiry (if it is considered expedient to do so). The procedural aspects required under section 45 are detailed in section 2.3 of this paper.

2.3 Procedure for Dealing with the Special Order Applications

Section 47 of the 1999 Act (referring to section 45 of the 1927 Act) sets out the procedure that must be followed by the Commission before deciding on whether to grant the special orders applied for. The key considerations can be summarised as follows:

- i. Authorisation to Construct
- ii. Impounding, Diverting or Abstracting Water
- iii. Notice of Application & Inspection of Documents
- iv. Responses Received
- v. Public Inquiry
- vi. Land Belonging to Gas or Water Undertaker

Please note that a full chronology of the process is provided in Appendix A.

2.3.1. Authorisation to Construct

On 24 October 2008 the Commission granted to EirGrid an authorisation to construct an interconnector between Ireland and Great Britain under Section 16 of the 1999 Act.

On 27 November 2009 EirGrid applied to the Commission for three special orders pursuant to the 1927 Act and the 1999 Act in connection with the East West Interconnector project.

The scope of the special order applications is summarised in section 2.1 of this Decision paper.

As EirGrid is (and was at the time of the application for the special orders) the holder of the authorisation to construct an interconnector under section 16 of the 1999 Act the Commission accepted this application for consideration as to whether to decide to grant or refuse to grant to EirGrid the special orders sought under section 47 of the 1999 Act and section 45 of the 1927 Act.

2.3.2 Impounding Diverting or Abstracting Water

Section 45(2) of the 1927 Act prohibits the making of a special order under section 45 in relation to the compulsory acquisition of a right of impounding, diverting or abstracting water without previous consultation with the Minister for Fisheries.

Section 45(3) of the 1927 Act prohibits the making of a special order under section 45 in relation to the compulsory acquisition of a right of impounding, diverting or abstracting water in or from any canal without previous consultation with the Minister for Industry & Commerce.

EirGrid confirmed in each application for the special orders sought that the special orders do not involve the right of impounding, diverting, abstracting water or the right of impounding, diverting, abstracting water from a canal.

Therefore it was not necessary to consult with either of the Ministers.

2.3.3. Notice of the Application & Inspection of Documents

Section 45(4)(a) requires that the Commission deposit and keep open for inspection in its principal office or some other suitable place such plans, specifications and other documents as will show fully and clearly the land or right intended to be acquired or used by virtue of the order.

Section 45(4)(b) requires that the Commission give notice to persons likely to be affected by the special order of its intention to consider the making of the special order and the manner in which representations and objections thereto may be made. Such notice is required to be given in the manner it considers best adapted for informing those persons likely to be affected by the special order.

In order to comply with subsection 45(4)(a) and (b), on 21 December 2009 the following actions were taken:

- i. Letters were sent to Dunslaughlin Garda Station³ and Balbriggan Garda station⁴ requesting that the application and associated maps be left on public display for the duration of the consultation period.
- ii. A notice was placed in one national newspaper (“The Irish Independent”) and two relevant local newspapers (“The Fingal Independent”)⁵ and (“The Meath Chronicle”)⁶. Each notice indicated that an application for a special order(s) was received by the Commission from EirGrid which could be viewed at the Commission’s offices, on its Website or at the above referenced Garda stations.

³ Dunslaughlin Garda station is the local Garda station to the lands respectively owned by Fred Smyth and Catherine Judy Smyth.

⁴ Balbriggan Garda station is the local Garda station to the land owned by Fingal Language Institute.

⁵ The Fingal Independent is the local newspaper to the land owned by Fingal Language Institute.

⁶ The Meath Chronicle is the local newspaper to the lands respectively owned by Fred Smyth and Catherine Judy Smyth.

- iii. The three applications were scanned and uploaded onto the Commission's Website for public viewing on 22 December 2009. These applications consisted of the relevant applications made by EirGrid for each of the three landowners and associated maps and technical drawings. The applications made available for public viewing did not include copies of the correspondence between the parties and EirGrid, on the basis that the correspondence contained therein was confidential.
- iv. The three applications were available for public inspection at the Commission's principal office at The Exchange, Belgard Square North, Tallaght, Dublin 24 from 22 December 2009 for the duration of the consultation phase. Again, the applications made available for public viewing did not include copies of the correspondence between the parties and EirGrid, on the basis that the correspondence contained therein was confidential.
- v. The Commission wrote to each of the three concerned landowners individually notifying them of the application for a special order received from EirGrid and enclosed a copy of the entirety of the relevant application pertaining to their respective lands which the Commission had received from EirGrid.
- vi. The Commission requested in this notification that any observations the landowners may have made to the Commission before 22 January 2010. The landowners were also each informed that once their responses have been received and reviewed, notice of how the matter would be progressed would be given.

The landowners concerned and the general public were given until 22 January 2010 to submit responses to the Commission in relation to the Commission's intention to consider making the special order.

Two landowners made contact with the Commission and requested an extension of the deadline. The Commission granted an extension of one week to 29 January 2010.

The third landowner was contacted following the lapsing of the closing date of 22 January 2010 to verify whether or not this landowner had sent any response to the Commission in case their response had been delayed or lost in transit. The Commission notified this landowner that that the other landowners who were the subject of the other special order applications had made a request for an extension to the consultation period offered and these requests had been granted by the Commission.

The Commission offered the same extension of the consultation period to this third landowner and the request was accepted by the landowner.

2.3.4 Land Belonging To Gas or Water Undertaker

Section 45(6) prohibits the Board from acquiring use, or otherwise interfering with compulsorily any land or water or easement or other right over land which at the date of the notification of the intention to consider making the special order belongs to a gas or water undertaker and is used or authorised to be used by such undertaker for the purpose of the undertaking.

EirGrid have confirmed that the land which is the subject of the special order applications does not belong to a gas or water undertaker. Therefore section 45(6) is not applicable to the Commission's decision whether to grant or refuse to grant the three special orders applied for.

2.4. Responses Received to Consultation Process

All three landowners were offered the opportunity of a bilateral meeting the Commission before the end of the consultation period. One landowner accepted this invitation and met with the Commission on 18 January 2010 to discuss their response to the letter of notification and application for a special order pertaining to their respective lands.

The Commission received written responses from two of the three landowners. The responses received were from Mr Fred Smyth and from Mrs Catherine Judy Smyth and Mr Francis Smyth.

During the consultation phase Mrs Catherine Judy Smyth suggested that the east west interconnector cables be laid with or adjoining cables which are due to be laid by EirGrid in its proposals for the Meath/Cavan and Cavan/Tyrone power projects as this would cause the least amount of inconvenience to property owners in the relevant areas.

During the consultation phase Mr Fred Smyth made several written submissions to the Commission. His submissions included conveying his concerns as to the status of the roadway on his land as to whether it was 'in the charge' of Meath County Council, the conduct of EirGrid on his land, a matter of a boundary issue with Meath County Council, the availability of maps at Balbriggan Garda Station, conduct of ESB Telecoms and the affect of the cable route traversing the Portain Bridge in relation to flooding on his land. Much of Mr Fred Smyth's submissions were subsequently raised by him at the Public Inquiry held by the Commission in relation to the special order application pertaining to his land.

During the consultation period no responses from members of the public were received.

Fingal Language Institute was contacted following the lapsing of the initial closing date for the consultation of 22 January 2010 to verify whether or not any response to the letter of notification and application for a special order pertaining to their land had been sent to the Commission, suspecting that perhaps it was delayed or lost in transit. The Commission indicated that the two other landowners whose lands were the subject of the other special order applications received had been given an extension following their respective requests. Therefore the Commission offered the same extension to the deadline to this landowner. This offer was accepted, however, no response was ever received by the Commission from this landowner during the consultation period.

On 23 June the Commission received correspondence from Fingal Language Institute querying the grounds on which the Commission must take into consideration in deciding to grant or not to grant a special order and highlighting that an alternative route be selected on health and safety grounds.

2.5 Public Inquiry

The Commission has the discretion under section 45(4) (c) to hold a public inquiry in regard to the making of a special order if it considers it expedient to do so.

Mr Fred Smyth and Mrs Catherine Judy Smyth and Mr Francis Smyth requested that a public hearing be held so that their views and comments can be presented to the Commission. In the opinion of Mr Fred Smyth and Mrs Catherine Judy Smyth and Mr Francis Smyth a Public Inquiry would enable the Commission to arrive at “*a more reasoned decision.*”

The Commission considered this request and determined that a public inquiry would be conducive to further exploring the submissions made by Mr Fred Smyth and Mrs Catherine Judy Smyth and Mr Francis Smyth and would facilitate the drawing out arguments for and against the granting or refusing to grant the special orders pertaining to their land in a public forum.

For these reasons the Commission decided to hold a public inquiry relating to the applications by EirGrid for a Special Order concerning the lands owned by Mr Fred Smyth on the one hand and Mrs Catherine Judy Smyth and Mr Francis Smyth on the other hand.

3.0 Public Inquiry into Special Order Applications

3.1. Introduction

A Public Inquiry into two of the Special Order Applications was held on 14 April 2010 at the Trim Castle Hotel, Trim, Co. Meath. The Public Inquiry was chaired by an independent Chairman, Mr Michael Ward, who was appointed by the Commission.

The scope of the Public Inquiry was limited to the appropriateness of the making or refusing to make the special orders in relation to the lands of Fred Smyth on the one hand, and Francis and Catherine Judy Smyth on the other hand.

Notice of the Public Inquiry was given on the Commission's Website and the event was open to anyone who wished to attend. Three parties spoke at the Public Inquiry – EirGrid, Mr Fred Smyth and a representative for Mrs Catherine Judy Smyth. It was noted at the outset of the hearing by Mr Fred Smyth that Mr Francis Smyth was now deceased.

The Chairman provided for the Commission a summary report of the proceedings following the Public Inquiry. A full transcript of the proceedings was also produced. This transcript was sent to all parties concerned and is also being made available for download from the Commission's Website along with this Decision document.

3.2 Summary of Submissions and Issues Raised

3.2.1 EirGrid Submissions

- EirGrid detailed the strategic need for the East West Interconnector project and provided the policy background and summarised the benefits to the project.
- EirGrid is making an application to the Commission for Energy Regulation for a special order as provided for in Section 47(1) of the Electricity Regulation Act, 1999 pertaining to lands belonging to Mr Fred Smyth at Portain, Batterstown, Co. Meath and Mrs Catherine Judy Smyth and Mr Francis Smyth at Portain, Batterstown, Co. Meath.
- EirGrid's preference in relation to wayleaves is to come to an agreement with landowners rather than pursuing a special order. Other wayleaves were secured along the route on a mostly voluntary basis with landowners.
- Planning permission was granted in September 2009 by An Bord Pleanála for the development on the east west interconnector project. As part of the planning application EirGrid submitted a report dealing with route selection. It is EirGrid's view that the route via the road in question is the only suitable route; it lies within a planning corridor which was granted as

part of the An Bord Pleanála decision. The cable is to be kept within this corridor which is 30 metres in width.

- The road in question as part of the Public Inquiry is a public road but is not in the charge of Meath County Council but the council has maintained it in the past. Meath County Council indicated this towards the end of 2008 and has not been maintained since. It is of good construction and has provided the only access to the ESB station at Woodlands for a period of 30 years for trucks and other equipment. Construction equipment will be smaller than the equipment which has accessed the site in the past.
- EirGrid would prefer to place the cables in the roadway as due to the weight of the large cable drums laying cables in agricultural land would result in a much higher environmental and agricultural impact. Also, laying the cables in the road would provide for easier installation and maintenance or repair in the event of a fault.
- The Environmental Report prepared for the project indicated a preference to lay the cable in the road. The corridor is wider than the road permitting routing around any unforeseen obstacles. It was noted that 97% of the route will be on public roads.
- The area adjacent to the road has been surveyed ecologically and archaeologically with a hydrology report prepared. The documentation was not submitted at the Public Inquiry.
- Operational details include 4 days for installation of the ducting, 2 days for pulling the cable through the ducts and 1 day for ground filling.
- There will be 100 operators on site at the Woodland station during the construction phase with associated construction traffic. Duct installation for the entire route is expected to commence in June 2010 and finish at the end of 2011. Subject to the special order request, the road under consideration is scheduled to be opened in the first quarter of 2011. Access to farms, the Woodland station, etc will be maintained during this period with access maintained for all users along the entire route.
- A survey of the road was not undertaken.
- The folio maps showing the combined sections of the road owned by Mr Fred Smyth was measured along the longest possible section of the road in order to avoid any “short-changing” of the landowner’s interest. This length is 173 metres.
- It is possible that there are developments associated with the Woodland station and if ESB Telecoms are going in and out of the site EirGrid do not have any knowledge of such movements.
- If the special order is not granted access to the Woodland station would not be possible via the road in question. EirGrid would then need to seek a material change in relation to the planning already granted by An Bord Pleanála.

- Responding to the claim raised by an objector that EirGrid has no rights to pass over the portion of the route in question for which planning permission was sought, arguing that the planning permission is null and void, EirGrid does not accept that the appropriate leave should have been secured in advance of the planning application. At the oral hearing in March 2009 into the granting of planning permission for the interconnector project the issue was dealt with on the basis that a special order application would be made if agreement could not be reached with the landowner. Planning permission to build the interconnector has been secured and is not an issue under consideration by the Commission for Energy Regulation in the special order application.
- EirGrid does not have a prescriptive right to use the road and that the situation with the ESB appears to be different.
- The planning permission issued by An Bord Pleanála is outside the scope of the Public Inquiry.

3.2.2 Mr Fred Smyth Submissions

- The maps in Balbriggan Garda station were not present for viewing when Mr Fred Smyth went to the station at Balbriggan to view the maps.
- The maps that were displayed in relation to Mr Fred Smyth's land were not accurate regarding the situation "on the ground".
- A report was received from Meath County Council stating that the situation on the ground is as shown on the maps and that there has been an encroachment on the property at the cottage.
- A survey should be undertaken of the road in question.
- It would appear from the map that the area within the red lines does not apply to the strip in question specifically in terms of the wayleave sought.
- There is significant concern regarding ESB Telecom as it does not have a right of way on the road. It is contended that if the special order is granted then ESB Telecom will have secured a right of way.
- There is no indication of moving into agricultural land within the red lines which EirGrid is empowered to do under the Section 53 wayleave powers.
- It would seem that Portain Bridge cannot be dismantled, the cable laid through it and the bridge reinstated without causing flooding. Despite meeting EirGrid drainage specialists Mr Fred Smyth is concerned that there could be flooding.
- In February 2006 Meath County Council was contacted and informed Mr. Fred Smyth that the lane was not in charge, that it is a private lane.
- However in October 2009, a legal opinion made reference to the road which stated that Meath County Council adopted the road and a letter was issued to that effect. Mr Fred Smyth believes that the letter was not issued in error but was issued deliberately.

- A Section 53 wayleave confers extensive and effective powers and is more than is actually needed at the Woodland station; the problem is not with the wayleave but with the route.
- EirGrid should select a route that suits the wayleave and also create a new entrance to the Woodland station on the Trim road. Mr Fred Smyth contended that if the route is changed then there would be no need for a public inquiry and adds that the route has already been changed with respect to the Balleally landfill site.

3.2.3 Mr Steen Submissions (on behalf of Mrs Catherine Judy Smyth)

- The Commission is not in a position to make an informed decision on the application because all of the documentation in support of EirGrid's application has not been presented.
- EirGrid was aware of the status of the roadway from 2008 and it chose to make an application to An Bord Pleanála for planning permission in the knowledge that it had no legal entitlement to access the buildings to be constructed even if planning permission was granted. It is contended that the planning application is therefore defective.
- Whilst the time for judicial review may have passed it is intended that it would make matters worse and invite a further judicial review process if the Commission makes a bad decision on foot of an improper decision.

3.2.4 EirGrid Response to Objectors' Submissions

- The reference to Portain Bridge is not understood as it is well away from the relevant location in the maps.
- EirGrid do not have a wayleave for the road. The ESB have a prescriptive right in which access has been gained by way of use over the years.
- The issue relating to the Balleally landfill site was changed during the planning process.
- EirGrid is not being selective in relation to documents being relied upon; it is relying on matters that are the subject of the special order application. It was on this basis that the documentation was presented to the An Bord Pleanála oral hearing and was not considered relevant in the context of the special order public inquiry.
- There are no grounds for a judicial review of the planning permission. The fact that such a review could have been sought does not mean that EirGrid considers that there is any difficulty with the planning permission as granted.
- EirGrid cannot go outside the planning corridor without seeking a variation from An Bord Pleanála. Laying the cable in a field in some places would not get over the need for a right of access over the road. It would also not

deal with the substantial part of the application which is to provide access to the Woodland converter station to build, maintain and operate it in the future. Hence the laying of the cable and the right of access cannot be separated.

4.0 Commission's Consideration

4.1 Legal Position

Section 47 of the 1999 Act confers on the Commission the ability to exercise the power to make a special order conferred on the Board by section 45(1) of the 1927 Act.

Section 45(1) of the 1927 Act states that:

*“If and whenever the Board thinks **proper** to acquire compulsorily any land or to acquire or use compulsorily any easement or other right over land [...] the Board may by special order declare its intention so to acquire such land or so to acquire or use such right, and every such order shall operate to confer on the Board full power to acquire compulsorily the land or to acquire or use compulsorily the right mentioned therein under and in accordance with this section.”*
(Emphasis Added).

Therefore, the Commission, in exercising the power to make a special order, must consider whether it thinks it ‘proper’ for EirGrid to acquire compulsorily the Rights sought in each of the three special order applications.

Furthermore, section 47 of the 1999 Act requires that section 45(2)-(6) of the 1927 Act applies to the Commission as it does to the Board. Section 45(2)-(6) sets out several prerequisites to be met before making a special order. Details of the procedure followed have been set out in section 2.3 of this paper.

There is no legislative definition of the word ‘proper’ in the 1927 Act. Therefore the Commission has taken into account the literal meaning of the word ‘proper’ which is ordinarily understood to mean ‘appropriate’. In making the decision whether to make the special order or not, the Commission must then consider whether it is appropriate to grant the special orders applied for in light of the applications made by EirGrid for each of the special orders and the submissions received during the consultation process required by section 45 of the 1927 Act.

4.2 Commission's Analysis

The Commission considers that EirGrid is a proper applicant for purposes of deciding to grant or not to grant a special order because EirGrid is the holder of an authorisation to construct an interconnector under section 16 of the 1999 Act.

Each special order application from EirGrid seeks to acquire or use compulsorily a right of way so that EirGrid can pass and re-pass over the roadways as indicated in each the landowners' respective land folios. EirGrid also seeks, in relation to each application, a wayleave to construct and place

an electric line (up to 400kV) as defined in the 1999 Act consisting of power cables, ducts, a fibre optic cable and access chambers with manholes (where applicable) and any other materials and plant connected with the interconnector cable on or below the respective roadways.

The purpose of the Rights sought by EirGrid in all three special order applications is then to install the cable and to allow EirGrid to carry out any necessary maintenance work on the cable and to pass and repass over the roadways concerned.

Each application made by EirGrid will be considered in turn along with the submissions made by the respective landowners to the Commission.

The Commission's consideration of these issues will be given in the context of the legal position outlined section 4.1 of this decision.

4.2.1. Application pertaining to the land of Fingal Language Institute

As the applicant is a holder of an authorisation to construct an interconnector issued by the Commission, the Commission accepted this application for consideration as to whether to decide to grant or refuse to grant to EirGrid a special order in relation to the land owned by Fingal Language Institute.

In making the application the Commission understands that EirGrid considered alternative routes by which the interconnector project could be located and realised, but is confined to the planning corridor as laid out in the planning permission received from An Bord Pleanála. The Commission is satisfied that the route indicated is within the planning corridor as determined by An Bord Pleanála. Therefore, it was only open to EirGrid to locate the interconnector along this planning corridor. The land of Fingal Language Institute, on which the roadway in question is located, is within this planning corridor.

On reviewing the application and paying particular attention to the confidential correspondence between Fingal Language Institute and EirGrid (which was provided in the application) the Commission is satisfied that reasonable endeavours have been taken by EirGrid to negotiate and reach agreement as to the acquisition of the Rights sought in relation to the roadway on the land owned by Fingal Language Institute. As evidenced by the correspondence provided by EirGrid in its application it appears that despite reasonable efforts being made, negotiations were unsuccessful and no agreement was reached as to the acquisition of the Rights applied for. Having exhausted attempts to reach agreement, the Commission accepts it was necessary for EirGrid to apply to the Commission under section 47 of the 1999 Act for a special order

to acquire compulsorily the Rights sought over the roadway on the land of Fingal Language Institute because it was within the planning corridor.

The Commission considers that EirGrid has the necessary statutory powers to undertake and construct the East West Interconnector project.

It is noted that EirGrid does not seek to acquire compulsorily full ownership of the roadway in question. Rather EirGrid has applied for a special order to acquire the Rights detailed at section 2.1 on the roadway of the land owned by Fingal Language Institute. The Commission is satisfied that the Rights sought to be acquired compulsorily by EirGrid are less extensive than that of full ownership of the roadway in question or indeed the entire piece of land owned by Fingal Language Institute.

In order to properly reach its decision as to whether it is proper to grant, or refuse to grant, the special order applied for in relation to the land of Fingal Language Institute, the Commission underwent a consultation process as detailed in section 2.3. This included writing to Fingal Language Institute soliciting comments on the application. To bring the application to the attention of the wider community, and to others potentially affected by the special order, the Commission placed notices in the local Garda station and in local and national newspapers. No response to the application pertaining to Fingal Language Institute was received. Similarly, no response was received by the Commission from the general public as to the application pertaining to Fingal Language Institute within the consultation period. The Commission is satisfied though that every opportunity has been afforded to Fingal Language Institute and to other parties that may be affected to make a submission on the application.

However Fingal Language Institute did write to the Commission on 23 June querying the grounds on which the Commission must take into consideration in deciding to grant or not to grant a special order and highlighting that an alternative route be selected on health and safety grounds.

The Commission's consideration of the application for the special order in relation to the land owned by Fingal Language Institute is based on the application received from EirGrid and the Commission's own analysis of the pertinent information relating to the interconnector. The Commission has been mindful of the rights of a landowner who may be affected by the grant of a special order in arriving at its decision.

Likewise the Commission considers that it has fairly considered the application made by EirGrid.

In arriving at its decision the Commission takes into account its overarching duties and responsibilities. This are, among others, protecting the interests of

final customers and promoting the continuity, security and quality of supplies⁷. These duties and functions also relate to the public interest and it is in this regard the Commission is mindful to balance the information at hand, the competing rights and interests of EirGrid's interest to obtain the special order for the purpose of the East West Interconnector project against the landowner's rights over his/her land.

The Commission is further satisfied that issuing the special order request for the Rights over the roadway owned by Fingal Language Institute, though permanent Rights, would not unduly burden, diminish or disproportionately adversely affect its property rights to or enjoyment of the land. Furthermore the Commission is satisfied that any disruption or interference to Fingal Language Institute's enjoyment of the road would be minimal, temporary and would largely only occur during the construction phase of the project (with any subsequent interference possibly occurring during temporary maintenance of the electric line under the road).

Furthermore, the Commission has considered that any interference to Fingal Language Institute's rights over the roadway in question would, on balance, be offset by the provision for compensation incorporated into the special order under section 45(5) of the 1927 Act. The matter of compensation is a material consideration when deciding whether interference with property rights is appropriate and is dealt with further at section 4.4 of this decision paper.

Notwithstanding the letter received on 23 June there are no specific health and safety grounds specified under the legislation detailed in section 2.2 under which the Commission can make its decision. Also the Commission does not have a statutory remit to reconsider matters relating to planning or to the route of the cable. These matters have been dealt with as part of the original planning application and subsequent An Bord Pleanála hearing. The grounds the Commission must take into consideration in deciding to grant or not to grant a special order are set out in section 45 of the 1927 Act.

It is for these reasons that, on balance, the Commission has decided to grant the special order request made by EirGrid with respect to the land owned by Fingal Language Institute.

4.2.2 Application pertaining to the land of Mr. Fred Smyth

As the applicant is a holder of an authorisation to construct an interconnector issued by the Commission, the Commission accepted this application for consideration as to whether to decide to grant or refuse to grant to EirGrid a special order in relation to the land owned by Mr Fred Smyth.

⁷ Electricity Regulation Act, 1999 (as amended)

In making the application the Commission understands that EirGrid considered alternative routes by which the interconnector project could be located and realised, but is confined to the planning corridor as laid out in the planning permission received from An Bord Pleanála. The Commission is satisfied that the route indicated is within the planning corridor as determined by An Bord Pleanála. Therefore, it was only open to EirGrid to locate the interconnector along this planning corridor. The land of Mr. Fred Smyth, on which the roadway in question is located, is within this planning corridor.

On reviewing the application and paying particular attention to the correspondence between Mr Fred Smyth and EirGrid (which was provided in the application) the Commission is satisfied that reasonable endeavours have been taken by EirGrid to negotiate and reach agreement as to the acquisition of the Rights sought in relation to the roadway on the land owned by Mr Fred Smyth. As evidenced by the correspondence provided by EirGrid in its application it appears that despite reasonable efforts being made, negotiations were unsuccessful and no agreement was reached as to the acquisition of the Rights applied for. Having exhausted attempts to reach agreement, the Commission accepts it was necessary for EirGrid to apply to the Commission under section 47 of the 1999 Act for a special order to acquire compulsorily the Rights sought over the roadway on the land of Mr. Fred Smyth because it was within the planning corridor.

The Commission considers that EirGrid has the necessary statutory powers and consents to undertake and construct the East West Interconnector project.

It is noted that EirGrid does not seek to acquire compulsorily full ownership of the roadway in question. Rather EirGrid has applied for a special order to acquire the Rights detailed at section 2.1 on the roadway of the land owned by Mr. Fred Smyth. The Commission is satisfied that the Rights sought to be acquired compulsorily by EirGrid are less extensive than that of full ownership of the roadway in question or indeed the entire piece land owned by Mr. Fred Smyth.

In order to properly reach its decision as to whether it is proper to grant, or refuse to grant, the special order applied for in relation to the land of Mr Fred Smyth, the Commission underwent a consultation process as detailed in section 2.3. This included writing to Mr Fred Smyth soliciting comments on the application. To bring the application to the attention of the wider community, and to others potentially affected by the special order, the Commission placed notices in the local Garda station and in local and national newspapers. No response was received by the Commission from the general public as to the application pertaining to Mr Fred Smyth within the consultation period.

The Commission is satisfied every opportunity has been afforded to Mr Fred Smyth to make his submission on the application. Mr Smyth wrote to the

Commission on several occasions to make submissions and met with staff of the Commission during the consultation period. His request that a Public Inquiry be held into his application was accepted by the Commission for the reasons set out in section 2.5 of this decision paper. At the inquiry Mr Fred Smyth was given the opportunity to make his case against the granting of the special orders and to question EirGrid directly on its application concerning his land.

The Commission believes that it has fairly considered the issues raised by Mr Fred Smyth and that he has been afforded all reasonable opportunity during the consultation period and at the Public Inquiry to make his submissions heard.

Likewise the Commission considers that it has fairly considered the application made by EirGrid.

Mr Smyth raised the issue that the accuracy and availability of the maps pertaining to the application for the special order relating to his land was questionable. He opined that the maps were not available at Dunsloughlin Garda station and that the maps he received from the Commission were inaccurate. He wished to compare the maps he received with said maps in the Garda station.

The Commission sent the full application made by EirGrid to Mr Smyth for his consideration. The map pertaining to Mr. Fred Smyth's land was also sent for display at his local Garda station.

The Commission published maps relating to the all of the special order applications made by EirGrid (including the special order application pertaining to Mr Fred Smyth) on its Website. Therefore Mr. Fred Smyth could have viewed the map relating to the lands which were the subject of the special order application on the Website or at the Commission's offices. All maps were a copy of the maps received in the application from EirGrid.

Mr Fred Smyth is of the opinion that there has been an encroachment on his land and that the maps provided by EirGrid from the Property Registration Authority "do not reflect the situation on the ground." The Commission understands based on Mr Fred Smyth's submissions that he intends to address this matter with Meath County Council.

The maps provided by EirGrid are maps made available by the Property Registration Authority. The accuracy of any or all of the maps as compared with the 'situation on the ground' cannot be verified by the Commission as the Commission has no statutory remit to determine or settle boundary line disputes or claims of trespass. The Commission considers any allegations of encroachment or trespass on private property to be a private matter between the persons concerned which is outside the scope of the Commission's remit. As such, the Commission does not consider this claim to be a relevant

consideration for the purpose of determining whether it is proper to grant or refuse to grant the special order in relation to Mr Smyth's land and cannot address this issue further. In any event, matters of encroachment, as far as the Commission is concerned, does not directly relate to or affect the laying of electric lines under the land in question, nor would it likely affect the applicant's ability to pass and repass over the land in question. In short, for the purpose of making a decision on the special order application then, the issue of encroachment is not relevant. The salient point for the purposes of the special order is that Mr Smyth is the registered legal owner of the land in question.

In conjunction with this issue Mr Smyth raised the point that he has a legal opinion that made reference to the road which stated that Meath County Council took the road in charge and a letter was issued to that effect from Meath County Council. Mr Smyth believes that the letter was not issued in error but was issued deliberately. Again, the Commission is not in a position to determine whether or not a road is 'in the charge' of a particular body. The Commission cannot comment on the actions or motivations of Meath County Council. For the purposes of evaluating the special order application made to the Commission according to the records of the Property Registration Authority, Mr Smyth is the owner of the road in question. The issue of the road being in charge by Meath County Council, or any maintenance of the road which may or may not have been carried out by Meath County Council in the past, is not a relevant consideration as far as the Commission is concerned for the purpose of determining whether or not it is proper to grant the special order applied for pertaining to Mr Smyth's land.

Mr Smyth raised an issue in relation to potential flooding that could arise if Portain Bridge is dismantled and reassembled in order to facilitate the laying of the cables through it. Notwithstanding any assurances given by EirGrid's drainage specialists as to the matter of flooding as a result of the construction at the Portain Bridge, this Bridge is not located on Mr. Fred Smyth's land. Therefore this is not a relevant consideration for the purposes of determining whether it is or is not proper to grant the special order applied for pertaining to Mr. Smyth's land. The Commission has been mindful of the broader planning process in which issues such as flooding over the route along the planning corridor could have been raised and dealt with by An Bord Pleanála.

Mr Fred Smyth communicated his significant concern that ESB Telecom would, if EirGrid were to be granted the special order, receive a "de facto" right of way on Mr Smyth's roadway. The Commission would like to clarify that it has no statutory basis for issuing a special order to any party other than the holder of the authorisation to construct the interconnector, as discussed in Section 2.2. The Commission has no regulatory remit over the actions of ESB Telecom because the Commission does not regulate the telecommunications

sector, which ESB Telecoms, though a subsidiary company of ESB, would be part of. This function is regulated by the telecommunications regulator, ComReg⁸. Mr Fred Smyth also raised an issue as to EirGrid's conduct and use of his roadway. The Commission understands that this matter has been dealt with privately between EirGrid and Mr. Fred Smyth.

Mr Smyth cited 'Section 53'⁹ as conveying extensive and effective powers and is more than is actually needed at the Woodland station. The Commission would like to clarify that it has issued its consent under section 53 of the 1927 Act (as amended by the 1999 Act) to EirGrid on 17 November 2008. However, under Section 53 of the 1927 Act an electric line may not be placed above or below a street, road, railway, or tramway. Therefore, it is not open to EirGrid to utilize its consent under section 53 of the 1927 Act to lay the cable under Mr Smyth's road. Therefore, EirGrid chose to apply to the Commission for a special order to compulsorily acquire the Rights sought under section 47 of the 1999 Act and section 45 of the 1927 Act.

Mr Smyth has indicated that EirGrid should select an alternative route for the interconnector so that the electric lines would not have to be placed on his road and suggested that a new entrance is built to the Woodland substation. EirGrid on the other hand has submitted in its application that while other alternative routes were considered, it must adhere to building the interconnector within the planning corridor approved by An Bord Pleanála. The Commission considers that selection of an alternative route for the interconnector would necessarily involve an interference with the property rights of other landowners. Therefore the Commission does not accept that shifting the burden from Mr Smyth to other landowners should reasonably be taken into account by the Commission unless there were material reasons demonstrated as to why this would be more appropriate. No such reasons were demonstrated by Mr. Smyth during the consultation period or at the Public Inquiry. The question for the Commission to determine is whether it is proper to grant or refuse to grant to EirGrid the special order in relation to the Rights sought over the roadway in question on Mr. Smyth's land. The fact that Mr Smyth would prefer the electric line to be laid over another piece of land such as at a new second entrance to the Woodland station is not then, in the Commission's opinion, a proper reason to refuse the special order sought.

In arriving at its decision the Commission takes into account its statutory duties and responsibilities. This are, among others, protecting the interests of final customers and promoting the continuity, security and quality of supplies¹⁰. These duties and functions also relate to the public interest and it is in this regard the Commission is mindful to balance the information at hand,

⁸ www.comreg.ie

⁹ The Commission understands that Mr Smyth is referring to Section 53 of Electricity (Supply) Act, 1927, as amended by Section 49 of the Electricity Regulation Act, 1999.

¹⁰ Electricity Regulation Act, 1999 (as amended)

the competing rights and interests of EirGrid's interest to obtain the special order for the purpose of the East West Interconnector project against the landowner's rights over his/her land. The Commission has also been mindful of the rights of a landowner who may be affected by the grant of a special order in arriving at its decision.

The Commission is further satisfied that issuing the special order request for the Rights over the roadway owned by Mr Fred Smyth, though permanent Rights, would not unduly burden, diminish or disproportionately adversely affect its property rights to or enjoyment of the land. Furthermore the Commission is satisfied that any disruption or interference to Mr Fred Smyth's enjoyment of the road would be minimal, temporary and would largely only occur during the construction phase of the project (with any subsequent interference possibly occurring during temporary maintenance of the electric line under the road).

Furthermore, the Commission has considered that any interference to Mr Fred Smyth's rights over the roadway in question would, on balance, be offset by the provision for compensation incorporated into the special order under section 45(5) of the 1927 Act. The matter of compensation is a material consideration when deciding whether interference with property rights is appropriate and is dealt with further at section 4.4 of this decision paper.

It is for these reasons that, on balance, the Commission has decided to grant the special order request made by EirGrid with respect to the land owned by Mr Fred Smyth.

4.2.3. Application pertaining to the land of Mrs Catherine Judy Smyth

As the applicant is a holder of an authorisation to construct an interconnector issued by the Commission, the Commission accepted this application for consideration as to whether to decide to grant or refuse to grant to EirGrid a special order in relation to the land owned by Mrs Catherine Judy Smyth.

In making the application the Commission understands that EirGrid considered alternative routes by which the interconnector project could be located and realised, but is confined to the planning corridor as laid out in the planning permission received from An Bord Pleanála. The Commission is satisfied that the route indicated is within the planning corridor as determined by An Bord Pleanála. Therefore, it was only open to EirGrid to locate the interconnector along this planning corridor. The land of Mrs Catherine Judy Smyth, on which the roadway in question is located, is within this planning corridor.

On reviewing the application and paying particular attention to the confidential correspondence between Mrs Catherine Judy Smyth and Mr Francis Smyth

(now deceased) and EirGrid (which was provided in the application) the Commission is satisfied that reasonable endeavours have been taken by EirGrid to negotiate and reach agreement as to the acquisition of the Rights sought in relation to the roadway on the land owned by Mrs Catherine Judy Smyth. As evidenced by the correspondence provided by EirGrid in its application it appears that despite reasonable efforts being made, negotiations were unsuccessful and no agreement was reached as to the acquisition of the Rights applied for. Having exhausted attempts to reach agreement, the Commission accepts it was necessary for EirGrid to apply to the Commission under section 47 of the 1999 Act for a special order to acquire compulsorily the Rights sought over the roadway on the land of Mrs Catherine Judy Smyth because it was within the planning corridor.

The Commission considers that EirGrid has the necessary statutory powers to undertake and construct the East West Interconnector project.

It is noted that EirGrid does not seek to acquire compulsorily full ownership of the roadway in question. Rather EirGrid has applied for a special order to acquire the Rights detailed at section 2.1 on the roadway of the land owned by Mrs Catherine Judy Smyth. The Commission is satisfied that the Rights sought to be acquired compulsorily by EirGrid are less extensive than that of full ownership of the roadway in question or indeed the entire piece land owned by Mrs Catherine Judy Smyth.

In order to properly reach its decision as to whether it is proper to grant, or refuse to grant, the special order applied for in relation to the land of Mrs Catherine Judy Smyth, the Commission underwent a consultation process as detailed in section 2.3. This included writing to Mrs Catherine Judy Smyth and Mr Francis Smyth soliciting comments on the application. To bring the application to the attention of the wider community, and to others potentially affected by the special order, the Commission placed notices in the local Garda station and in local and national newspapers. No response was received by the Commission from the general public as to the application pertaining to Mrs Catherine Judy Smyth within the consultation period.

The Commission is satisfied though that every opportunity has been afforded to Mrs Catherine Judy Smyth to make a submission on the application. In reaching its decision the Commission underwent a consultation process as detailed in section 2.3. This included writing to Mrs Catherine Judy Smyth and Mr Francis Smyth soliciting their comments on the application. To bring the application to the attention of the wider community, and to others potentially affected by the special order, the Commission placed notices in a relevant Garda station and in local and national press. Again this is detailed in section 2.3.

Mrs Catherine Judy Smyth's request that a public inquiry be held into her application was met by the Commission. At the inquiry Mrs Catherine Judy

Smyth was given the opportunity to make her case against the granting of the special orders and to question EirGrid directly on its application.

Therefore, the Commission believes that it has fairly considered the issues raised by Mrs Smyth and that she has been afforded opportunities to do so. Likewise the Commission considers that it has fairly considered the application made by EirGrid. Notwithstanding the process the Commission has given careful consideration to the issues raised and considered each in turn. The Commission has been mindful of the rights of a landowner who may be affected by the grant of a special order in arriving at its decision.

Mrs Catherine Judy Smyth believes that the Commission is not in a position to make an informed decision on the application because not all of the documentation in support of EirGrid's application has been presented. The Commission's statutory function under section 45 of the 1927 Act (read in conjunction with section 47 of the 1999 Act) is to examine and determine the appropriateness of issuing the special order in accordance with the procedure set out in section 45. This remit does not extend to reopening those issues already dealt with as part of the hearing into issuing the original planning permission.

The Commission satisfied that, having conducted the consultation process set out in section 45 and held a Public Inquiry in relation to the special order application pertaining to Mrs Catherine Judy Smyth, it is in receipt of relevant information relating to this application to allow it arrive at its decision. The relevant information to the application affecting Mrs Catherine Judy Smyth includes the application by EirGrid, applicable maps and folios of the lands which are the subject of the special order applications, maps showing cable routes and Mrs Smyth's submissions.

Mrs Smyth argued that EirGrid was aware of the status of the roadway on her land from 2008 and it chose to make an application to An Bord Pleanála for planning permission in the knowledge that it had no legal entitlement to access the buildings to be constructed even if planning permission was granted. The Commission understands from this submission that Mrs. Catherine Judy Smyth's argument is that the planning permission granted by An Bord Pleanála to EirGrid is defective in that EirGrid should not have been able to seek planning permission for lands to which it did not have rights.

The Commission is of the view that as An Bord Pleanála is the competent authority in granting planning permission it is not the place of the Commission to reopen the original planning application or the decision of An Bord Pleanála. The Commission has no appellate function in relation to planning authority decisions. The project, including the route corridor encompassing the lands belonging to Mrs Catherine Judy Smyth, has been deemed by An Bord Pleanála to satisfy the planning criteria. Therefore the Commission considers that it cannot take the validity of the decision to grant the planning permission

to EirGrid into account as part of its determination as to whether it is proper to grant the special order requested pertaining to Mrs Catherine Judy Smyth.

Mrs Catherine Judy Smyth suggested during the consultation phase that the East West interconnector cable be laid with or adjoining cables which are due to be laid by EirGrid in its proposals for the Meath/Cavan and Cavan/Tyrone power projects as this would cause the least amount of inconvenience to property owners in the relevant areas.

The Commission respects this view and would be supportive of opportunities that allow infrastructure projects to be delivered with minimal disturbance but delivering maximum benefit. Notwithstanding that in the case of the projects cited by Mrs Catherine Judy Smyth, their inherent design, route layout and being at differing stages of development may not lend themselves to such a synergy, this submission cannot be accepted by the Commission as a reason that it is inappropriate to grant the special order applied for pertaining to her land.

The Commission considers that selection of an alternative route for the interconnector would necessarily involve an interference with the property rights of other landowners. Therefore the Commission does not accept that shifting the burden from Mrs Catherine Judy Smyth to other landowners should reasonably be taken into account by the Commission unless there were material reasons demonstrated as to why this would be more appropriate. The question for the Commission to determine is whether it is proper to grant or refuse to grant to EirGrid the special order in relation to the Rights sought over the roadway in question on Mrs Catherine Judy Smyth's land. The Commission does not consider that, given the planning corridor identified by An Bord Pleanála and the potential interference with the rights of other landowners, that this argument constitutes material reasons as to why another route such as laying the cables with another energy infrastructure project would be more appropriate. The fact that Mrs Smyth would prefer the electric line to be laid with another proposed energy infrastructure project is not then, in the Commission's opinion, a proper reason to refuse the special order sought.

In arriving at its decision the Commission takes into account its statutory duties and responsibilities. These are, among others, protecting the interests of final customers and promoting the continuity, security and quality of supplies¹¹. These duties and functions also relate to the public interest and it is in this regard the Commission is mindful to balance the information at hand, the competing rights and interests of EirGrid's interest to obtain the special order for the purpose of the East West Interconnector project against the landowner's rights over her land.

¹¹ Electricity Regulation Act, 1999 (as amended)

The Commission is further satisfied that issuing the special order request for the Rights over the roadway owned by Mrs Catherine Judy Smyth, though permanent Rights, would not unduly burden, diminish or disproportionately adversely affect its property rights to or enjoyment of the land. Furthermore the Commission is satisfied that any disruption or interference to Mrs Catherine Judy Smyth's enjoyment of the road would be minimal, temporary and would largely only occur during the construction phase of the project (with any subsequent interference possibly occurring during temporary maintenance of the electric line under the road).

Furthermore, the Commission has considered that any interference to Mrs Catherine Judy Smyth's rights over the roadway in question would, on balance, be offset by the provision for compensate incorporated into the special order under section 45(5) of the 1927 Act. The matter of compensation is a material consideration when deciding whether interference with property rights is appropriate and is dealt with further at section 4.4 of this decision paper.

It is for these reasons that, on balance, the Commission has decided to grant the special order request made by EirGrid with respect to the land owned by Mrs Catherine Judy Smyth.

4.3 Commission's Decision

Having weighed up the information submitted in the three special order applications, the comments received during the consultation phase and, in the case of Mr Fred Smyth and Mrs Judy Catherine Smyth, the arguments presented in the public inquiry the Commission is deciding to grant the all three of the special order applications made by EirGrid.

The Commission has decided that it is proper to grant the special orders sought by EirGrid for the reasons detailed in the analysis above.

4.4 Compensation

Section 45(5) of the 1927 Act applies to the Commission per section 47(3) of the 1999 Act. Section 45(5)(a) of the 1927 Act has been amended by section 43 of the 1999 Act and section 45(5)(b) has been amended by section 17 of the Electricity (Supply)(Amendment) (No.2) Act, 1943 to now state that:

- 5) *A special order made under this section may incorporate—*
- (a) the Acquisition of Land (Assessment of Compensation) Act, 1919, with the modification that the expression “public authority” shall include the Board or a holder of an authorisation under section 16 of the Electricity Regulation Act, 1999, as the case may be [¹²], and*
 - (b) the Lands Clauses Acts so far as the same are not inconsistent with the said Acquisition of Land (Assessment of Compensation) Act, 1919 or with this section [¹³].*

When the decision is made to grant a special order, section 45(5) provides the Commission with the discretion to incorporate the Acquisition of Land (Assessment of Compensation) Act 1919 and the Land Clauses Acts so far as the same are not inconsistent with the said Acquisition of Land (Assessment of Compensation) Act, 1919.

The 1927 and 1999 Acts are silent as to whether compensation must be provided to the landowners who are the subject of compulsory acquisition of Rights over their land. However, the Commission is satisfied that compensation is both warranted and necessary to be paid to each of the landowners whose land is the subject of the special orders granted.

The Commission considers that the availability of compensation is a material constitutional consideration when deciding whether interference with property

¹² The words 'or a holder of an authorisation under section 16 of the Electricity Regulation Act, 1999, as the case may be' were added by section 43 of the 1999 Act.

¹³ The words 'or with this section' were added by section 17 of the of the Electricity (Supply)(Amendment) (No.2) Act, 1943

rights is appropriate. EirGrid has sought to acquire compulsorily, by way of special order from the Commission, Rights over the land of three landowners. No arguments have been made to the Commission by EirGrid or the three landowners that compensation should not be paid. Similarly, no arguments have been made to the Commission as to the amount of compensation which may be sought, offered or given, save for some documentation in the confidential correspondence provided EirGrid in each of the special order applications evidencing prior negotiation efforts with each landowners to agree to the acquisition of the Rights sought by EirGrid. These negotiation efforts involved the offering of payment from EirGrid in return for the voluntary agreement to give EirGrid the Rights sought over their respective pieces land. Ultimately these negotiations were unsuccessful.

The 1927 and 1999 Acts are also silent how compensation is to be assessed. As such, the Commission has no statutory function to determine the appropriate amount of such compensation to be paid to the respective landowners. However, the Land Clauses Acts and the Acquisition of Land (Assessment of Compensation) Act 1919 provide a statutory mechanism whereby compensation is assessed and in the event that EirGrid and the respective landowners fail to mutually agree the amount of compensation to be paid for the compulsory acquisition of the Rights sought over their respective lands, the aforementioned Acts provide for what is to occur. If these two pieces of legislation are not incorporated into the special orders then the matters covered by them, i.e. a procedure for determining what compensation is to be paid in the absence of an agreement between EirGrid and the landowner, would remain at large. Therefore the Commission has decided to incorporate both pieces of legislation in accordance with section 45(5).

It is clear that section 45(5) (b) anticipates a conflict between the provisions of the Lands Clauses Acts with the Acquisition of Land (Assessment of Compensation) Act, 1919 or with section 45. Therefore, as section 45(5)(b) expressly states, the Lands Clauses Acts are incorporated into the special order in so far as it is not inconsistent with the said Acquisition of Land (Assessment of Compensation) Act, 1919 or with section 45.

Therefore, in order provide each of the landowners with a right to compensation and to provide a mechanism for the determination of the amount of compensation, the Commission has decided to incorporate the Acquisition of Land (Assessment of Compensation) Act 1919 and the Land Clauses Acts, but only in so far as the same are not inconsistent with the said Acquisition of Land (Assessment of Compensation) Act, 1919 or with section 45, as amended.

Appendix A – Chronology of Events

The following table provides a chronology of key milestone for EirGrid special order application:

Action / Document	Date
Consent application submitted by EirGrid to Commission for Energy Regulation	27 November 2009
Commission consultation process with affected landowners and general public - documents published on Commission's Website, available for inspection at Balbriggan and Dunsloughlin Garda stations and Commission office	21 December 2009
Time period allowed for responses from affected landowners and general public	22 January 2010 (extended to 29 January on request by two landowners)
Decision by Commission following responses received to consultation to hold public inquiry and notification to affected landowners <u>Note:</u> Only two responses were received. These were from two of the three affected landowners	23 February 2010
Notification of date of public inquiry	19 March 2010
Date of public inquiry	14 April 2010
Date of Commission Decision whether to grant or not to grant the special orders <u>for all three applications</u>	30 June 2010