



EIRGRID

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16th November 2010

Karen Egan,
Department Communications
Energy and Natural Resources,
29-31 Adelaide Road,
Dublin 2.

Re: Recent Court Proceedings where defendants alleged EirGrid does not have statutory rights pursuant to S.53 Electricity (Supply) Act 1927

Dear Karen,

Many thanks for arranging a meeting with yourself, David, Aoife, and Aine on 19th October 2010. As requested I attach herewith Opinion of Michael Conlon BL on the issue of whether the powers conferred on the Electricity Supply Board ('ESB') pursuant to section 53 of Electricity (Supply) Act, 1927 (the '1927 Act') were transferred to EirGrid by Regulation 29 of S.I. 445/2000. You will note from the attached Opinion that Michael Conlon BL is of the view that these powers were **not** extended to EirGrid by Regulation 29 of S.I. 445/2000.

As discussed at our meeting, in recent High Court proceedings which involved ESB and EirGrid as joint Plaintiffs seeking an Interlocutory Injunction in order to construct a line over the Defendant's property pursuant to Section 53 of the 1927 Act, the Defendants contended that the Infrastructure Agreement of 16th March 2006 which was entered into between ESB and EirGrid does not give to EirGrid the right to affect entry onto their lands.

In accordance with Regulation 18 of S.I. 445/2000 the relationship between ESB and EirGrid is regulated by the Infrastructure Agreement. The purpose of this agreement is to enable EirGrid as the Transmission System Operator (TSO) to discharge its functions under S.I. 445/2000.

The Defendants in particular referred to the statutory apportionment of the functions and responsibilities between the Transmission Asset Owner (TAO) and the Transmission System Operator. The Defendants contended that **both** ESB and EirGrid needed a statutory basis to enter upon their lands in order to exercise their respective functions.

The Defendants stated that the Infrastructure Agreement could not be relied on as the source of EirGrid's right to affect entry onto their lands as such an agreement cannot and does not delegate the statutory powers of ESB to EirGrid in circumstances where the legislature has expressly delegated certain of ESB's statutory powers to EirGrid but declined to delegate any statutory power pursuant to Section 53 of the 1927 Act.

As discussed at our meeting it is imperative that the powers conferred on ESB pursuant to section 53 of the 1927 Act be extended to EirGrid as a matter of urgency to ensure that EirGrid has the necessary statutory powers to carry out its statutory and licence functions. In view of Grid25 and the enormous infrastructure build and the fact that all the objectors to electricity infrastructure share their views and approaches this matter needs to be dealt with urgently.

Your colleagues indicated that you would give consideration to proposing an amendment to S.I. 445/2000 expressly transferring S.53 of the 1927 Electricity Act to EirGrid.

I look forward to hearing from you on this matter.

Yours sincerely



Niamh Cahill
Niamh Cahill
Company Lawyer / Company Secretary
EirGrid plc

cc: Deirdre Nagle.

Encl.

**Opinion in relation to Regulation 29 of S.I. 445/2000 and whether powers under
Section 53 of the 1927 Act have been transferred**

Querist: EirGrid

Agent: EirGrid Legal Division (Deirdre Nagle)

Background

By email of 20th October, 2010, Deirdre Nagle of EirGrid asked me to provide an opinion on "*Whether the powers conferred on the ESB pursuant to section 53 of Electricity (Supply) Act, 1927 were transferred to EirGrid by Regulation 29 of S.I. 445/2000*". ESB is called "the Board" for the purpose of this opinion. The Electricity (Supply) Act, 1927 (as amended) is sometimes called "the 1927 Act". The Electricity Regulation Act, 1999 (as amended) is called "the 1999 Act" and the European Communities (Internal Market in Electricity) Regulations, 2000 (S.I. 445 of 2000) are sometimes called "the 2000 Regulations".

The Law

Regulation 29

Regulation 29 of the 2000 Regulations provides as follows.

"(1) Any duty, obligation, or requirement on the Board under Part VII and Part VIII of the Act of 1999 necessary for the discharge of the transmission system operator's functions under these Regulations, shall also be regarded as a duty, obligation or requirement on the transmission system operator.

- (2) *Any power conferred on the Board under Part VII and Part VIII of the Act of 1999 necessary for the discharge of the transmission system operator's functions under these Regulations shall, to that extent, be regarded as a power conferred on the transmission system operator and not on the Board, other than where it is also necessary for the Board to discharge its functions as transmission system owner in which case that power shall be a power conferred on both the Board and the transmission system operator.*
- (3) *Any work commenced or being carried out by the Board for the purposes of any duty, obligation or requirement on the Board or in exercise of any power conferred on the Board under Part VII and Part VIII of the Act of 1999 necessary for the discharge of the transmission system operator's functions under these Regulations, shall be continued and carried out by the transmission system operator.*
- (4) *In the event of a dispute between the transmission system owner and the transmission system operator over any matter in paragraph (1), (2) or (3), the matter in dispute shall be submitted to the Commission for decision. The Commission shall issue directions regarding its decision, as it sees fit, regarding the matter in dispute, and the transmission system owner and the transmission system operator shall comply with such directions.”*

[Emphasis added]

On my reading of regulation 29, regulation 29(1) transfers 'duties' rather than 'powers'. As far as I am aware, the only part of regulation 29 which transfers powers to EirGrid is regulation 29(2) which provides:-

”Any power conferred on the Board under Part VII and Part VIII of the Act of 1999 necessary for the discharge of the transmission system operator's functions under these Regulations shall, to that extent, be regarded as a power conferred on the transmission system operator ...”.

What powers does regulation 29(2) transfer? It transfers powers "*conferred on the Board*" under Parts VII and VIII of the 1999 Act. Neither Part VII nor Part VIII confers on the Board powers pursuant to section 53. Those powers were already conferred on the Board by the 1927 Act (which, of course, was amended over the years).

Section 49 of the 1999 Act

As far as I am aware, the only reference to section 53 of the 1927 Act in Part VII and Part VIII of the 1999 Act is section 49 of that Act (the 1999 Act), which provides as follows:-

"A holder of an authorisation or the holder of a direct line permission may, with the consent of the Commission, for the purposes of such authorisation, exercise the powers conferred on the Board by subsections (1) to (5) and (9) of section 53 of the Principal Act and references to the Board in those subsections shall be construed as including references to a holder of an authorisation."

As appears therefrom, that section itself refers to powers which were "... *conferred on the Board by subsections (1) to (5) and (9) of section 53 of the Principal Act ...*". Having regard to the language of regulation 29(2) of the 2000 Regulations and of section 49 of the 1999 Act, I think it would be a challenging argument to make to a court to suggest that powers pursuant to section 53 of the 1927 Act (which, almost by definition, were conferred by the 1927 Act) were, in fact, "*conferred*" on the Board by the 1999 Act, section 49 of which does not purport to confer any section 53 powers on the Board and, in fact, refers to those powers as having been conferred by the 1927 Act.

In considering section 49 of the 1999 Act, I should say, for completeness, that the persons to whom section 53 powers are transferred pursuant to the terms of section 49 of the 1999 Act are, firstly, holders of an "*authorisation*" and, secondly, the holders of a "*direct line permission*".

In the Interpretation section (section 2) of the 1999 Act it is stated that “*‘authorisation’ means an authorisation granted under section 16*”. Section 16 (as amended by the Energy (Miscellaneous Provisions) Act, 2006) provides that an ‘*authorisation*’ may be granted “*to construct or reconstruct a generating station*” or “*to construct an interconnector*”.

The question of direct line permissions is dealt with in section 37(1) of the 1999 Act, which provides that:-

“The Commission may grant or refuse to grant a permission to a person to whom this section applies to construct a direct line not connected to the transmission system or distribution system when initially constructed for the purpose of facilitating the supply of electricity.”

If and insofar as EirGrid has been granted or may be granted an authorisation to construct an interconnector, it would appear to me that it may, with the consent of the Commission, for the purpose of such authorisation, exercise the powers conferred on the Board by sections 1 to 5 and 9 of section 53.

Conclusion

I was asked “*whether the powers conferred on the ESB pursuant to section 53 of Electricity (Supply) Act, 1927 were transferred to EirGrid by Regulation 29 of S.I. 445/2000*”. In my opinion, the answer to that question is “no”.

As appears from what I have discussed above, in my view, if and insofar as EirGrid has been granted or may be granted an authorisation to construct an interconnector, it may, with the consent of the Commission, for the purpose of such authorisation, exercise the powers conferred on the Board by sections 1 to 5 and 9 of section 53.

Michael Conlon, B.L.

Law Library,
Four Courts,
Dublin 7.

11th November, 2010