Amendment 106

Moved by ***Lord Teverson***

106: After Clause 141, insert the following new Clause—

"Amendment of Electricity Act 1989: generating station and overhead line development by non licence-holders

In Schedule 9 to Electricity Act 1989 (preservation of amenity and fisheries), after paragraph 4 insert—

"4A (1) Sub-paragraph (2) applies where a person who is neither a licence holder nor authorised by exemption to generate, distribute, supply or participate in the transmission of electricity applies for the consent of the Secretary of State under section 36 or 37 of this Act.

(2) Paragraphs 1 and 3 above apply to the making and consideration of the application as they apply to the making and consideration of relevant proposals made by a person who is a licence holder or so authorised by exemption.""

Lord Teverson: My Lords, this amendment and the next concern the Electricity Act 1989. I have not yet read it all but I have not once come across the word "decarbonisation" in it. It shows how we have moved forwards—or backwards, depending on how one looks at it—over the years.

Amendment 106 relates to a decision made only a few weeks ago concerning Viking Energy, which was looking to obtain a consent under Section 36 of the 1989 Act for a wind farm in Shetland. There was a judicial review of that decision, which was upheld by the Outer House of the Court of Session. That has done something that this Energy Bill is trying to prevent —that is, it has increased uncertainty for investors—and changed completely the view within Scotland of what is needed to obtain a Section 36 consent for a major

power project over 50 megawatts. The judgment laid down that the people who were applying needed a generating licence before they could obtain that consent. That is not always the case and I suggest that it should not necessarily be the case.

These schemes tend to be joint ventures involving generating companies that already have licences—in this case, Scottish and Southern Energy was one of the major shareholders of Viking—which try to obtain their Section 36 permission for the generating station to go ahead; it could be wind power or any form of power. But clearly there has to be a licence to operate before the project can go ahead and generate electricity, so there is no question about the organisation that gets the consent being competent and being able to move forward. Indeed, given the amount of investment that is required for these projects over 50 megawatts—in this case, one-third of a gigawatt—clearly there would be no financial backing if the organisations were not seen as competent.

The decision north of the border has introduced a great deal of uncertainty into the system and made the progress towards investment in power generation far more difficult. It has also put into question those Section 36 consents that perhaps have already been granted at a time when the operator did not have a licence. I would be very interested to hear how my noble friend the Minister sees the status of those past consents now that this court ruling has taken place.

I understand that the Scottish Government have appealed against that decision to the Inner House of the Court of Session, and that the appeal will take place in February and March. Once again, that causes a hiatus in investment. It means that there is great uncertainty over future investment in power in what is a particularly important part of the UK for renewables. Therefore, I have tabled this amendment in order to bring clarity and ensure that the way in which this system was always thought to operate is reinstated. I should add that within England and Wales this is not an issue, as I understand it, because there has been consequent legislation, either primary or secondary since the Electricity Act 1989. South of the border, the position is quite clear. I beg to move.

9.45 pm

Lord Forsyth of Drumlean (Con): My Lords, I am very disappointed that my noble friend Lord Stephen is not here tonight. This issue first came to my attention because of some very unfortunate publicity in the *Daily Telegraph*, where he was accused of promoting his business interests through this amendment. Quite rightly, he withdrew his name and made it clear that his name had been added to the amendment in error.

Lord Teverson: My Lords, perhaps my noble friend will allow me to intervene. I absolutely endorse that and make it clear that the name of my noble friend Lord Stephen was added to this amendment completely by error and without his permission at the time.

Lord Forsyth of Drumlean: Whatever one's views on wind farms—I confess I am not an enthusiast for them—it is absolutely essential that the process by

which permissions are given and projects are undertaken are seen to be fair and take account of all objections and environmental and other interests. This example is about a particular wind farm development in some respects, but it is also about the rule of law and our attitudes to the rule of law.

The fact of the matter is that this whole saga arose because of the Viking project in Shetland, with over 100 turbines, where there was considerable local opposition. The project is being promoted by the Shetland Islands trust, which has got the oil money—and a large number of the trustees are councillors in Shetland—together with Scottish and Southern Energy. They are the people who are promoting this project. There was very considerable local opposition to this project, but the council decided that it was not conflicted, even though the

Shetland trust was a party to the development. As a result, there was no public inquiry. The Scottish Ministers in the Scottish Government gave the project the go-ahead. Some local opposition sought judicial review of that decision, which went to the Court of Session, which is the equivalent of the High Court in England.

Former law officer, Lynda Clark, after three months of deliberation and a well argued and clearly very considered opinion, which I have read and is freely available, concluded that this proposal was unlawful because it did not meet, as my noble friend has said, the requirements of Schedule 9 of the Electricity Act 1989, which makes it clear that anyone who is planning on producing a power plant which includes a wind farm should have a licence from Ofgem before planning approval can be granted. When the judge asked the parties to the development who had the necessary consent, none of them had, and the project had to go back to square one.

When I was a Secretary of State—and for as long as I have known—the principle has been that when a judge reaches a conclusion as to the state of the law, that is the law until such time as it is subject to an appeal. What happened next is an absolute scandal. The Scottish Government then decided that they disagreed with the judge in her opinion and that they would go ahead anyway. In a letter signed by Catherine Cacace to John Campbell QC, the Energy Consents and Deployment Unit said:

"Scottish Ministers note that the Court has found that an application for consent under section 36 of the Electricity Act 1989 can only be made (and so granted) where the applicant at the time of making the application either holds a licence to generate electricity or is exempt from that requirement".

It goes on—wait for it:

"Scottish Ministers' position is that they disagree with, and have appealed, the decision … The decision on the legislative interpretation runs contrary to the established practice relating to the handling of applications for consent which has been in place both north and south of the border for many years … Our intention is therefore to continue to operate in accordance with the practice … and to deal with current applications on that basis".

In other words, "We will ignore the law". It goes on to say:

"Scottish Ministers consider that the balance of public and national interest is in favour of continuing with the current approach until the appeal has been determined, in particular because of the need to continue to support the economy and our renewable energy ambitions".

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So their renewable energy ambitions trounce the law of the land. That is very undesirable and unprecedented —as far as I know; I see a noble Lord sitting on the Front Bench who is familiar with both the law and Shetland. I can think of no other case. The normal practice would be to stay any development until such

time as an appeal had been considered. What I very strongly object to about the amendment is that it would take away the legal position that has been established for many years, and which has been confirmed by the court, in a retrospective manner. It would create a situation in which any Tom, Dick or Harry could apply for permission to establish a wind farm—or, I guess, any other form of generation. Those tests about their ability to meet environmental and other requirements under the legislation would then be applied to them.

This is an undesirable development, by both the Scottish Government and my noble friends. The proper procedure here would be to at least wait for the appeal. It is certainly quite wrong for the Scottish Government to continue in this way. If you look at it from the point of view of the objectors, they have gone to a judicial review, won their case—and everyone knows how difficult it is to win a case on judicial review—and the Scottish Government are just saying that they are going to ignore that. Should this House to seek to overturn the effect of that judgment, when people are talking in terms of the need to support "our renewable energy ambitions"? Our renewable energy ambitions must carry public consent. This is no way in which to proceed. I have strong objections to the amendment, and I hope that my noble friend will reject it.

Lord Berkeley of Knighton (CB): My Lords, earlier this evening, I found myself in agreement with the noble Lord, Lord Forsyth, about transparency. I feel even more strongly about this issue. It seems that we are challenging the rule of law. I know that a lot of people in this country feel that their ability to object to something is often overruled by big business and large amounts of money, and that they do not really have a voice. The Government promoted a Localism Act which is often in conflict with what they wish to see for energy generation.

The noble Lord, Lord Teverson, mentioned an argument which planners are always throwing back at objectors: "Well, they wouldn't do it if it didn't make sense and they didn't know what they were doing". I repeat: Mammon has a role to play here. The objectors must be allowed to put their point of view. If you are now going to insult them by saying, "We are even going to take judicial review and the law away from you", where does that leave them?

Lord Mackay of Clashfern (Con): My Lords, it is some little time since I did applications for power stations in Scotland; the last one was about 35 years ago. However, I have some understanding of the way in which these matters were approached.

As your Lordships know, in order to generate, transmit or supply electricity you must have a licence and there is a pretty good reason for that. Section 36, which my noble friend mentioned, provides for an application for consent to construct or operate a power

station. Of course, a wind farm is a generation system which amounts to a power station. In order to operate that you must have a licence, or have an exemption from a licence, usually because the power station you want to

operate is very small. It does not seem very strange to require that as a condition for applying for a station. It would seem a little odd that the relevant authorities could grant consent for a station if you were not authorised to operate it. It could happen, I suppose, but it seems a little unlikely. Therefore it is not at all surprising that it is assumed in the definition of the conditions for consent that that would be so.

Schedule 9 of the Electricity Act 1989 is a set of requirements for the protection of the environment, basically, which a person—it is described in the amendment of the noble Lord, Lord Teverson—who is either a licence holder or exempt for a licence must take account of in his proposals. It is pretty obvious that the proposals are for the construction of a generating station and that you would therefore be a person who would have a licence to operate the generating station if, in fact, it is agreed and consented to by the relevant authority.

The judgment of the noble and learned Baroness, Lady Clark, which is well reasoned and a little longer than my speech so far, is just to that effect. Schedule 9 starts with the condition that you are either a licence holder or exempt and then you have to ensure that your proposals, in effect, do not damage the amenity, or the environment. That is the crux of this and I find her reasoning rather convincing. In fact, it is what I always understood. As I say, it is a long time since I understood it, but it was my understanding at the time. The last application I made, as it happens, was for Torness power station, which was the last nuclear power station to be built in Scotland and is now coming near its decommissioning. I was under the instruction of the noble Lord, Lord Tombs, who was at that time the chairman of the South of Scotland Electricity Board whose station it was. Anyway, so far as I have an interest in this matter it is a very aged interest and it has nothing to do with finance or anything of that sort.

In my submission, it seems that what the noble and learned Baroness, Lady Clark, who was a law officer in the previous Government, has decided is right. However, it is, of course, subject to appeal and as the noble Lord, Lord Teverson, said, the appeal is to be a reclaiming motion, strictly speaking, in the Scottish terminology, and to be heard by the Inner House of the Court of Session in February. The rule in relation to sub judice does not apply when we are discussing legislation, so we are free to discuss this matter, but I think that the judgment of the noble and learned Baroness, Lady Clark, is extremely cogent and I will look forward to hearing what happens on appeal. In the mean time, that is the highest assertion of what the law of Scotland is, and, indeed, for that matter, anywhere else where the same rules apply. In the law of Scotland the Supreme Court of Scotland, the Court of Session, has decided that to be the fact. Therefore it is highly undesirable for this House to alter that position at this moment. It seems pretty sensible that before you get consent to erect a power station you should be qualified to operate it. As I said, that is the crux of the decision.

I therefore hope that the Government will not accept this amendment, which is not very well placed from the point of view of logicality.

10 pm

Lord Forsyth of Drumlean: Before my noble and learned friend sits down, will he comment on the conduct of the Scottish Government, who say that they will continue as if this judgment had not been made because they do not agree with it?

Lord Mackay of Clashfern: I have made known my view about what the judgment says and my noble friend Lord Forsyth has made his view known about how the Scottish Government approach these matters. I do not particularly wish to comment on what they have done so far as I do not know fully enough the facts about these other applications. However, certainly in so far as the application from Shetland is concerned, there is no doubt that the decision of the Court of Session until reversed will set that consent aside. There is no question at all of going ahead to erect the station in Shetland at present. That would be completely without sanction, because the judge has set aside the consent as being unlawful. The rule of law will certainly be applied in Shetland, so far as that is concerned; the noble Lord has said whether the Shetland law applies more generally, and I will leave it with what he said.

Lord Lang of Monkton (Con): My Lords, I had not intended to speak in this debate; I know that the hour is late, so I will be brief. However, when I saw that my noble friend Lord Forsyth had tabled an amendment that seemed to be almost in diametric opposition to the preceding amendment—we have not yet reached my noble friend's amendment—it seemed that there was probably something of interest to be debated. Having heard what has been said, I am glad that I was here to hear it, and I am appalled at what I have heard. However, I am greatly reassured by the views of my noble and learned friend Lord Mackay.

My own views on windmills, which I first made clear in this House some 12 years ago, is of strong opposition to them. They are an appalling waste of time and money; they ruin the environment and damage wildlife; they do not deliver power when the wind is too strong or when there is no wind at all; and when they do deliver power, there is so little of it that it is completely worthless and has to be backed up by other forms of energy. I will not repeat all those views again to the House tonight.

What is at issue is not a matter of energy generation but of the rule of law. I am aghast to hear that the Scottish Government are now cheerfully setting aside a judgment in the High Court in anticipation of an appeal, which may or may not go in their favour. My noble friend referred to his time in the Scottish Office, and my noble and learned friend Lord Mackay referred to his experience many years back. I was present at the opening of the Torness power station, although I had no hand in its design or in the legalities behind it. However, I

served in the Scottish Office for nine years, ahead of my noble friend, so between us we did about 12 years.

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At no time, then or before, when I was the Scottish Whip for five years, do I ever recall any contemplation of defying the will of the courts. That is the fundamental issue that we are addressing underneath these two amendments. The issue of the licence is fundamental, and this amendment seems to set aside one of the few controls that are in place to try to impose some kind of discipline and proper judgment on the relevant importance of windmills in Scotland. We read every day of how the country is being covered with them like a rash, ruining the environment and all attraction to tourism, with no regard to the future or to the value of these excrescences. Therefore, setting aside my strong views on windmills, this rule of law issue has to be addressed very seriously indeed.

Lord Whitty: My Lords, I think I will leave this one to the Government.

Baroness Verma: My Lords, I thank my noble friends Lord Teverson and Lord Roper for tabling this amendment and my other noble friends for their contributions, especially my noble and learned friend Lord Mackay of Clashfern, as he laid out very clearly the position of the law without referring to windmills or any other type of energy source. The judgment referring to planning consent under Section 36 of the Electricity Act 1989 can be made only when the applicant, at the time of making the application, holds a licence to generate electricity under the Act or holds an exemption from this requirement, as my noble friend Lord Teverson pointed out. This judgment is being appealed and we are monitoring the position carefully. Given that the appeal is under way it would be premature, and indeed inappropriate, at this stage to adopt a legislative amendment without knowing what the outcomes were. Any legislative change would need to be considered in the full light of the outcomes of this case and it would be a mistake to assume that the judgment of the Outer House, if upheld, would be decided upon in exactly the same terms in the Inner House.

If we legislate now, we may find that the amendment does not deal with the final interpretation of the legislation, taking into account the arguments that are being developed as part of the judicial review hearings. In the event that this decision is upheld in terms equivalent to the original opinion of the noble and learned Baroness, Lady Clark of Calton, we will of course work with the Scottish Government to review the situation. For those reasons, I ask my noble friend Lord Teverson to withdraw his amendment.

Lord Forsyth of Drumlean: Does my noble friend agree with the position of Scottish Ministers that they should continue with their current approach until the appeal has been determined, or does she take the view that there should be a stay on these matters until the law is clarified?

Baroness Verma: My Lords, I will repeat what I have said, which is: let us wait to see what the outcome of the appeal is.

Lord Teverson: My Lords, this was tabled as rather a probing amendment, given the situation that has arisen, and I am grateful to noble Lords for their

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contributions. I do not wish to detain the House on this for too long but I will say that this has nothing to do with retrospection; I absolutely disagree that someone who develops a wind farm or any other energy-generating station over 50 megawatts is necessarily going to be the operator. It is a fact in industry in Britain and worldwide that the developer is often not the operator, in whatever industry we may talk about—they are two entirely separate processes. If you took the view that they had to be the same legal person then you would probably have to go back to 17th-century economics, let alone 21st-century ones. It does not work that way any more. It would also bring the practicalities back into line with the English and Welsh situation. In no way does this amendment make any judgment about whether people should be able to judicially review such decisions; clearly they should be able to do so. I would hope that such actions would not be vexatious, and I am sure that this one was not. Indeed, there was a judgment parallel to the licensing one concerning the wildlife directives, on which I make no judgment at all. It might have been completely valid in terms of their application.

With this amendment I was simply trying to bring the situation back to some certainty and to the situation that was understood prior to this judgment. That is not in itself retrospective. However, I am persuaded by the Minister that perhaps the right course is for this to go through the appeal process—I certainly do not think that it is a good idea for Parliament to interfere with that—and then the situation should be looked at. I am highly persuaded by the argument put forward by my noble friend Lord Forsyth about the reaction of the Scottish Government, in that clearly the rule of law is the rule of law wherever we are within the United Kingdom, and I would never wish

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to pull the carpet from under that important principle in how we live our public life. I beg leave to withdraw the amendment.

Amendment 106 withdrawn.

Amendment 106A not moved.

Clause 145: Extent

Amendments 107 and 108

Moved by ***Baroness Verma***

107: Clause 145, page 113, line 1, leave out sub-paragraph (iv) and insert—

"( ) section 49 (transition to certificate purchase scheme);"

108: Clause 145, page 113, line 6, at end insert—

"( ) Section (Closure of support under the renewables obligation)(4) extends to Northern Ireland only."

Amendments 107 and 108 agreed.

Clause 146: Commencement

Amendments 109 and 110

Moved by ***Baroness Verma***

109: Clause 146, page 113, line 32, leave out paragraph (c) and insert—

"( ) section 49 (transition to certificate purchase scheme);"

110: Clause 146, page 114, line 7, at end insert—

"( ) section (Closure of support under the renewables obligation) (closure of support under the renewables obligation);"

Amendments 109 and 110 agreed.

House adjourned at 10.10 pm.