**Memorandum in respect of Observation made on June 24th re ACCC/C/2014/112**

*( Note:The following text is as read out as an introduction and general observation on the communication & hearing – except for the additional footnotes provided. )*

We would first like to thank both the communicants and the Party Concerned for their participation in this matter, and in particular we would like to acknowledge our appreciation of the Committee's and Secretariat's commitment and diligence.

The Environmental Pillar as an advocacy voice of 28 Irish eNGO's recognises the imperatives of responding to climate change and in general supports a move to renewable energy. However we share certain concerns with the communicant in respect of non-compliance. Our objective in making this observation is to support the implementation of the Convention in Ireland and assist the committee in its deliberations on compliance.

There are statements from both sides with which we disagree as a matter of both fact and law.

However more importantly, we feel that aspects of this broad communication have been rendered even more complex by virtue of the timing of the underlying decisions at issue, and what obligations under the convention arose for Ireland in 2005 consequent on the EU's ratification of the Convention, and following Ireland's own ratification of the convention in 2012. Without prejudice to what obligations arose for Ireland consequent on the EU's ratification, we believe there are other examples post 2012 Irish ratification which may be more clear cut and of interest to the committee in its deliberations on Ireland's compliance with a range of articles raised by the communicant.

We would be happy to supply examples in written observations[3] for the committee to consider as appropriate.

However now we would like to make some brief specific comments in relation to Access to Environmental Information following on the earlier hearing.

**Access to Environmental Information**

*( Note : This pertains to the oral ex tempore observation on the communication and hearing with some additional clearly highlighted notes and footnotes for clarity and/or substantiation.)*

Fees

It was observed that there is a €50 fee[4] to file an appeal with the Commissioner for Environmental Information (the **Commissioner**) against a decision of a public authority to refuse access to environmental information. This fee was reduced from €150 in 2014.

While the fee may seem small, it is nonetheless anomalous since in the overall hierarchy of decision making and appeals in respect of access to environmental information this is the only step at which a fee is payable. There are no upfront fees to make an initial request or internal review request to a

[3] For clarity: Any further observation we submit will be to provide further examples relating to allegations already made in the communication. Where appropriate we may also address a new communication for the consideration of the committee as appropriate.

[4] http://www.ocei.gov.ie/en/Make-an-Appeal/How-to-make-an-Appeal/Fees-Payable/

public authority and there are no court fees payable in respect of court appeals against decisions of the Commissioner.

Therefore, it is more expensive to make an appeal to the Commissioner than to initiate proceedings in the High Court.

It should also be noted that in the past the Commissioner has used the possibility of a refund of the appeal fee to persuade applicants to withdraw appeals when they have been informed that the appeal is unlikely to be successful. Often after waiting more than a year and in some cases several years for the appeal to progress applicants are happy to end up getting their money back. Crucially when an appeal is withdrawn there is no published decision or precedent.

Time

While it is acknowledged that dedicated resources have now been provided to the Office of the Commissioner delays in decision making are still significant. Despite receiving dedicated resources, the Commissioner has not published any information indicating what service levels an appellant can expect.

The Irish Freedom of Information provisions[5], being the general law concerning access to documents of public bodies specifies a decision should be made within four months[6] by the Information Commissioner where possible. However, for appeals relating to Access to Environmental Information there is no specific obligation on the Commissioner for Environmental Information to make a timely decision. [7]

It is important to emphasise that appeals under both access regimes are handled in the same office and the Information Commissioner and the Commissioner for Environmental Information are the same person.

For decisions made by the Commissioner in 2015 the median time to make a decision was almost two years and for those made in 2016 it is currently almost one and half years. [ Note: As an addendum to this observation we set out below tabulated details of the decisions and timeframes, together with the update in the footnote indicated [8].]

It is currently taking between two and three months for appeals to be checked for formalities and to be assigned to an investigator in the Commissioner's office and although decisions appear to be made

[5] Freedom of Information Act 2014
[6] Section 22(3)
[7] For clarity : Unlike under the Freedom of Information provisions - for appeals relating to Access to Environmental Information there is **no** specific obligation on the Commissioner for Environmental Information to make a decision within any specified time, and the Irish provisions do not even require that the decision in respect of an appeal on a request for environment information be "timely". We note the requirements of the convention Article 9(4) in that regard.
[8] Please note by way of update that since the date of the hearing at the 53rd meeting of the ACCC a further 4 decisions of the Commissioner for Environmental Information have been published. Information concerning these decisions has been included in the table but the median time to make a decision remains the same as that noted in the oral observations.

faster the number of appeals lodged increased by 80% in 2015 compared with the average number received over the preceding five years. The Commissioner attributes this increase to the decrease in the application fee from €150 to €50[9].

Finally, the Commissioner often issues interim decisions where there is a dispute over the status of an entity as a public body or the definition of environmental information. In that case the matter is usually remitted to the public authority for further consideration thereby ensuring further lengthy delays in processing requests for access to environmental information.[10]

Definition of environmental information

We would take issue with the statement made by the Party Concerned that the Commissioner adopts a broad definition of environmental information. It is submitted that the sentence identified by the Curator in decision reference CEI/13/0005 is typical of how the Commissioner has narrowly defined environmental information to date. [For further clarity on this matter now we would by way of postscript also refer the Committee to pages 89 and 90 of the Commissioner's 2015 annual report which sets out some recent decision on this matter (attached as Annex 2).]

The issue of whether or not information is environmental information is important from a costs perspective. This is because the Commissioner takes the view that if he decides a request is not for environmental information then any subsequent appeal against his decision does not benefit from costs protection under Part 2 of the Environment (Miscellaneous Provisions) Act 2011[11]. Therefore, appeals against such decisions are inherently riskier and less likely than appeals against refusals made on other bases. While we cannot say that this is intended but a narrow definition of environmental information has a chilling effect on proceedings in relation to access to environmental information.

It is noteworthy that in the recent decision of the Irish High Court in *Stephen Minch -v- Commissioner for Environmental Information and another* [2016] IEHC 91[12] the Commissioner's narrow approach was found to be incorrect since it did not take account of the objectives of the Convention and the Directive which implements the access to environmental information regime in the European Union.

Judge Baker held as follows[13]:

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[9] Commissioner for Environmental Information Annual Report 2015 at page 87 (see Annex 2)

[10] For clarity: The determination on the preliminary matter is not accompanied by a decision on the request – so access to the requested information has to await a further decision following any remitted decision. The example of the request for environmental information to the National Asset Management Agency was referenced. The original request was made on 3rd February 2010. Following judgements by the HighCourt, a further Supreme Court ruling in June 2015 confirmed the agency was a Public Authority. At time of writing in July 2016, a year later from that Judgement and over 6 years since the request, the information requested still has not been provided following the Supreme Courts ruling on the jurisdictional or preliminary matter as to whether the agency was a public authority and subject to the request for access made to the agency.

[11] http://www.irishstatutebook.ie/eli/2011/act/20/enacted/en/print.html This act gives effect to the provisions of the Convention relating to the costs of certain court proceedings.

[12] Judgment available at http://www.bailii.org/ie/cases/IEHC/2016/H91.html (and attached as Annex 3)

[13] At paragraph 63

*"I consider in the circumstances that the Commissioner's approach was too narrow, he failed to adopt the teleological approach that is required to the interpretation and implementation of the Regulations, and imposed an overly narrow test of remoteness in seeking to characterise both the N.B.P. and any report or information within the framework that might inform the Government on the implementation of that plan."*

On 25 May 2016 the Commissioner lodged an appeal with the Court of Appeal against this decision.

**Conclusion**

To conclude it must be observed that no account is taken of the interaction between access to environmental information and the other pillars of the Convention, particularly in terms of the timeliness of decision making. It is fair to say that decision making is so slow that the current access regime does not function as an enabler of public participation and access to justice in environmental matters.

**Post Script in response to certain comments on the 24th made by Counsel for the Party Concerned immediately following our observations**

In responding to our observation on how the protective cost rules are compromised when the Commissioner holds that the information requested is not environmental information – Counsel for the Party Concerned indicated no court had found in that regard.

However, in response, we wish to highlight that notwithstanding Counsels assertion – that the risk of exposure to the prohibitive costs of an Irish court context in the absence of certainty on costs protection and the risk of challenge to that protection - that there is for many an undeniable "chilling effect" . So for any prospective litigant considering challenging a decision of the Commissioner on a finding that the information they'd requested wasn't "environmental information" there is an arguable deterring effect contrary to the intent of the convention. This is given the implication that if the request is not covered by the regulations therefore it also falls outside the protective costs rules applying to those regulations.

To be clear the Environment and Miscellaneous Provisions Act 2011, "EMPA 2011" provides in certain cases for a level of cost protection against an award of costs being made against you if you are unsuccessful in your case. That is so long as you or your case do not trespass into certain areas which allow the judge decide that you forfeit that protection. These cost protection rules are generally referred to or characterised as an "own costs rule" as opposed to "costs follow the event". The cases covered by these provisions are limited but include proceedings in respect of the information regulations. However in determining a request is not for environmental information – the Commissioner is effectively setting the case outside the costs protection afforded to proceedings around such requests. In the context of Irish court costs – the exposure is prohibitively expensive for an ordinary individual or eNGO. It has been said of Irish court costs that they make certain litigation available only to the very rich, or the very poor who have no assets to loose.

While the EMPA 2011 also provides in Part 2 Section 7 a mechanism to seek clarity from the court on whether the rules apply, there is a lack of clarity on how these can be engaged at early stages in proceedings and what costs apply to any proceedings in respect of same. We can expand on this if the Committee so wishes.