

ISH – 1 Oral record and Supplementary Commentary

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22.7.2021

Draft DCO, Deeds of Obligation and Certified Documents: Security and Securitisation issues

We wish to supplement some concerns expressed at ISH 1, recognising that there are many aspects to energy security and equally a variety of interests which do not necessarily coalesce.

1 Public and community security interests

Our interest, for the moment, concerns the national public interest and community interest. These community interests have been recognised as separable from local authority interests by the developer's issue of a document of Community Pledges. These are not necessarily securable met by local authorities and their S106s and CILs but have a status through interested party consultation rights underpinned by the Aarhus Convention. While some securities for impacted communities and private interests can be delivered by local authorities, we take the declaration "Our Pledges to the Local Community" as an important and wide-ranging and potentially valuable recognition of these interests. The Pledges were issued with the DCO, but not, as we understand it, as part of the DCO and its associated processes.

Our national and local community concerns have been strengthened after studying the Draft Deed of Obligation Explanatory Memorandum (8.20) by the developer's legal advisers Herbert Smith Freehills. We see their recital of the Newbury Criteria and the Wednesbury standard as connected to the DCO's enforceable provision on planning parameters and also the broader facility provided by the Rochdale standard.

2 Controlling Interest and Transfer of Benefit

The issue which brings national and community concerns together is future controlling ownership passing from the well-known hands of EDF to a likely mixed ownership regime with maybe another minority stake in development and operation by Government but, essentially, a different controlling structure

and commercial culture. Such a shift in ownership and control is possible from the point of FID, rather than the assumed point of successful construction and the commencement of operations. We cite below the carefully crafted formulation of EDF UK's chief executive to Parliament, and note that the Regulated Asset Base financing model being explored by Government and EDF for Sizewell may well present ownership and control issues in its own right if it takes the form of an imposed (sic) levy on consumers.

We therefore suggest that a fully precautionary approach needs to be taken to some community security issues, and equally national security matters. We understand that the national security issue will be being explored by other IPs and ask the ExA to note our previous submissions detailing some activities we have pursued about the implications of an ownership stake for China's CGN corporation. EDF is the major wholesale electricity supplier to UK national and local government, and, we understand, more recently, also to the universities and higher education sector. It's consumer interests are also substantial.

Further we note that ownership changes in the commercial market place are not always smooth and stable affairs. EDF's acquisition of British Energy plc came about because of a failed privatisation and can be seen as a rescue rather than a public policy-led affair.

3 ONR Capability Requirement

These concerns may also be matters for the ONR which has a duty to secure operator capability in its own licensing, although at this stage we are not clear about whether there is a substantial and relevant overlap of responsibilities between the DCO making process and ONR's responsibilities during the long project construction period. And, of course, the ONR has no substantive community obligation or consultative duty in this regard.

4 Planning doctrines and Statutory Duties

We are also aware of the sustainable development and good design imperatives of the primary enabling statute, the 2008 Act. These can be seen as potentially countervailing to commercial freedoms which might be further pursued through DCO redetermination – a growing activity according to recent report and reliance during construction and operation on Newbury, Wednesbury, Rochdale and planning parameters.

We have been studying the DCO for Hinkley Point C and Wylfa as exemplars, aware that local and national circumstances have changed in key respects. One of these is that while HPC's public subsidy and other supports and conditions are direct responsibilities of government, the (failed) Wylfa Horizon project and SZC are, at present, simply freestanding developer projects seeking license to operate in energy markets. Their accountability to communities and government will be defined strictly by their final DCO provisions, as concisely set out by the HSF Explanatory Memorandum.

5 Further ISH request

We ask that there is further ISH examination on DCO and related matters, after full and final relevant documentation has been made available to IPs. This clearly involves issues raised and being pursued in correspondence, any new DCO draftings and the draft agreements resulting from SoCGs and maybe other mechanisms. IPs have a need and, in many cases, a public duty of due diligence to fully scrutinise them, and, we suggest, even more reason given the likelihood of a different ownership and control structure to the one promoted by the developer and, we believe, assumed by many IPs and statutory consultees.

6 Benefit of ownership – EDF as a minority stakeholder

Further to our previous submission about the DCO involving a right to transfer benefit of ownership simply by informing the SoS, and evidence from EDF UK holding company annual accounts, we can now draw attention to confirmations from the chief executive of EDF UK Simone Rossi who told Le Figaro on 24th June this year that it was essential for the British Parliament to legislate for support for the Sizewell project. He reminded French newspaper Le Figaro that he had previously told a UK Parliamentary hearing in September "EDF ne veut conserver qu'une partie minoritaire au capital de la future centrale de Sizewell" (trs: " EDF does not wish to keep any more than a minority share of capital in Sizewell").

We have also found that the benefit of ownership clause in Hinkley Point C's approved DCO does straightforwardly require SoS approval. The SZC variant is not therefore a special condition. It is a clear signal.

We remain of the view that the SZC Draft DCO Benefit of Ownership clauses - the two need to be read to the end – invite reconsideration.

7 Securing the Community Pledges from EDF

The eleven community pledges widely distributed – to all Suffolk households, we think - in the EDF Community Newsletter of June 2021 need to be secured. This need not be problematic because they refer (sic) to undertaking expressed in DCO documentation but not as requirements or obligations. The Schedule 22 listing of Certified Documents would be a convenient location as a preliminary to securing them in line with the associated Deed of Obligations. The statement supporting the Pledges reports that to “honour these pledges” some items will be incorporated in “discussions with the local authorities”. That is not yet a security, and of course would not in any case bring the full scope of the pledges directly to community level.

8 Securitisation of SoGC generated funds and Pledges

The Eleven Pledges and SoGC derived agreements need some security as well as fair governance, a matter which has been raised and to which we note the ExA has repeatedly drawn attention. They might fit appropriately in the Deed of Obligation.

9 Certified Documents

It follows from 3 above that the Schedule 22 Certified Documents list may need supplementing in respects of civil agreements and pledges. We further suggest that the Workforce Code of Conduct be certified if it is not already incorporated in the CCP.

10 Post construction extension of S106 Agreement and Compensation Funds

Further to examination of the proposed 3 year extension of some deeds of obligation and review clauses in agreements, we suggest that an appropriate form is found to cover the monitoring, assessment and management undertakings for the protection, conservation and enhancement of the condition of natural habitats and species. A 3 year extension might not be sufficient to achieve these targets for species suffering a decline and a slow recovery of population. The drafting of Environment Statement mitigations may also need revisiting to establish an extension to construction impact times.

The principle of using time requirements to secure obligations and requirements has already been adopted between HPC and Government with the introduction of construction delay penalties in the form, we believe, of

reductions in the period of Contract for Difference price support. Its 35 year cover will be reduced by an amount for each period of delay.

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