The Planning Inspectorate
Yr Arolygiaeth Gynllunio

Application by Wrexham Power Ltd for the Wrexham Energy Centre (EN010055)

Examining Authority commentary on the draft DCO

The Examining Authority's (ExA's) commentary on the draft DCO (dDCO) is set out below, with issues and questions arising from it. The issues and questions are principally addressed to the Applicant, to statutory authorities with prospective obligations arising under draft provisions and to persons affected by compulsory acquisition (affected persons) and other individual interested parties identified by name in the right hand column. However, comments from other interested parties and affected persons are welcome.

Questions (where asked) are requests for further information pursuant to the Infrastructure Planning (Examination Procedure Rules) 2010 (EPR) Rule 17.

Readers are requested to refer to the Applicant's most recent submitted dDCO (Revision 5) [REP6-012] and to the comparison draft (Version 4 to Version 5) [REP6-013] in order to link the issues and questions raised to the draft provisions to which they relate.

Abbreviations used

PA2008	*The Planning Act 2008*
Art	*Article*
ALA 1981	*Acquisition of Land Act 1981*
BoR	*Book of Reference [REP4-014]*
CA	*Compulsory Acquisition*
dDCO	*Draft DCO [REP6-012](Rev 5) & [REP6-013]*
EM	*Explanatory Memorandum [APP-034](Rev 0)*
ES	*Environmental Statement*
LIR	*Local Impact Report*
LPA	*Local planning authority*
MP	*Model Provision (in the MP Order)*
MP Order	*The Infrastructure Planning (Model Provisions)(England & Wales) Order 2009*
NPS	*National Policy Statement*
NSIP	*Nationally Significant Infrastructure Project*
R	*Requirement*
SI	*Statutory Instrument*
SoS	*Secretary of State*
TP	*Temporary Possession*
7 Dec PPs	*Draft Protective Provisions annexed to a letter from the Applicant to the ExA dated 7 December 2016 [AS-006]*

Q No.	Part of DCO	Relevant extract from DCO (for ease of reference)	Commentary	Response sought from
1.	**Art 2(1)**	*"illustrative foul and surface water drainage strategy" means the draft foul and surface water drainage strategy (document reference number 6.4.9, revision 1) and submitted under regulation 5(2)(o) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009;*	**Definition of "illustrative foul and surface water drainage strategy"** Document 6.4.9 rev 1 was not submitted with the application and is just entitled 'Drainage Strategy. On that basis: • should this definition read *"…means the Drainage Strategy (document reference 6.4.9, revision 1) certified by the Secretary of State as the illustrative foul and surface water drainage strategy for the purposes of this Order;"* and • Does there need to be a corresponding addition to the list of documents for certification in A35?	Applicant
2.	**Art 2(1)**	*"Order land" means the land required for, or required to facilitate or is incidental to, or affected by, the authorised development shown on the land plans and described in the book of reference;*	**Definition of "Order land"** Should this read (so as to correct the grammar): • *"Order land" means the land which is required for, or is required to facilitate, or is incidental to, or is affected by, the authorised development shown on the land plans and described in the book of reference;* ?	Applicant

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3.	**Art 30(1)**	*30.—(1) Where <u>any apparatus of a public utility undertaker or of a public communications provider is removed under article 28</u> (statutory undertakers) any person who is the owner or occupier of premises to which a supply was given from that apparatus is to be entitled to recover from the undertaker compensation in respect of expenditure reasonably incurred by that person, in consequence of the removal, for the purpose of effecting a connection between the premises and any other apparatus from which a supply is given.*	**Statutory undertakers that are not 'public utility undertakers'** As noted in the ExA's original DCO queries, statutory undertakers such as water and electricity providers are not covered by this Article as they are not 'public utility undertakers' as defined. Should there be some equivalent provision providing compensation for loss of such supplies?	Applicant
4.	**Art 39(1) & (2)**	*39.—(1) The undertaker must not exercise the powers conferred by the provisions referred to in paragraph (2) in relation to any land unless it has first put in place either—* *(a) <u>a guarantee in respect of the liabilities of the undertaker to pay compensation</u> under this Order in respect of the exercise of the relevant power in relation to that land; or* *(b) an alternative form of security for that purpose <u>approved by the Secretary of State</u>.*	**Guarantee of compensation liabilities** Earlier questions from the ExA on this provision have been responded to in the current drafting, providing a guarantee in respect of the liabilities. • The Applicant is asked whether a figure should be included for the estimated amount of the guarantee, or alternatively whether provision should be made for the amount of the guarantee to be determined by an independent body, thus providing an assurance of its adequacy? • Art 39 (1) (b) makes clear that an 'alternative form of security is approved by the Secretary of State, but Art 39 (1) (a) is unclear about who approves the adequacy of the guarantee. Should that be expressed as the Secretary of State too, or some other body, independent of the undertaker? • With reference to Question 13 below, the	Applicant, Mr Owen Earthworm

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			Applicant is requested to clarify whether its calculation of the sum required to give effect to this guarantee has taken effect of the passage of the gas connection alignment through a commenced / operational solar farm and the necessary costs associated with this? If so, does this make any difference to the Applicant's readiness and capacity to honour the guarantee? • With reference also to Question 13 below, Art 39(2) lists the provisions in respect of which the proposed guarantee or alternative security in Art 39(1) applies. Given that in its letter of 7 December 2016 [AS-006], the Applicant has annexed draft protective provisions that include proposals to repay expenses and costs to a solar farm operator (paragraph 5), should that provision be included in the list in Art 39(2)?	
5.	**Various Articles relating to compensation under Part 1 of the Land Compensation Act 1961**		**Tribunal jurisdiction and application of the 1961 Act** A number of Articles make provision for *"compensation to be determined, in case of dispute, under Part 1 of the 1961 Act"*. It is acknowledged that a provision in this form is in various MPs and is commonplace in DCOs and other similar Orders. However, the only situation in which Part 1 of the 1961 Act only refers questions of disputed compensation to the Tribunal, is where a statute authorises the compulsory acquisition of land. It does not appear to provide for reference to the Tribunal	Applicant

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			in any other case not involving compulsory acquisition (e.g. in relation to the felling of trees under A31), or to be a general procedure for disputes resolution. • Could the Applicant explain clearly by whom and under what process compensation would be assessed in the event that it became due under the Articles containing such provision for compensation, and propose any such amendments to provisions as appear necessary to address this point?	
6.	**Schedule 1**	*and <u>such other buildings, structures, works or operations as may be integral to and part</u> of the construction, operation and maintenance of the works in this Schedule 1 but only within the Order limits and insofar as they are unlikely to give rise to any materially new or materially different environmental effects from those assessed in the environmental statement.*	**Integral and associated development** The ExA notes the Applicant's view (paragraph 3.21 of its oral summary at the last DCO ISH – REP6-011)) that it is not necessary to exclude 'associated development' from A3, in part because of the inclusion of the wording 'integral and part of'. The ExA remains concerned about the potential ambit of this part of Schedule 1. • Should this read e.g. "such other ancillary buildings, structures, works or operations as are integral to and part of ….the Works in this Schedule…."?	Applicant
7.	**R2(4)**	*(4) Numbered work 1 may not commence until written details of the following have been submitted to and approved by the relevant planning authority—*	**Pre-commencement submission of details of works** At present there are no other requirements requiring pre-commencement submission of details of numbered works 2-5. Should there be?	Applicant, WCBC

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8.	**R4(1)**	*4.—(1) No authorised development may commence until a construction and environment management plan has been submitted to and approved by the relevant planning authority. The construction and environment management plan must be substantially in accordance with the draft construction environment management plan in so far as it relates to the relevant numbered work set out in the document with reference appendix 19.1 revision 2 of the environmental statement and must include the following—*	**Construction and Environment Management Plan** R4(1) requires the submission of a Construction and Environment Management Plan before commencement. • Should this read: *"…substantially in accordance with the draft construction and environment management plan (document reference 6.4.11, revision 2) forming part of the environmental statement insofar as it relates to the relevant numbered work and must…")*? • Would it be preferable for the draft CEMP to be a separate certified document listed in A35 in view of its importance?	Applicant
9.	**R12(1)**	*12.—(1) Numbered works 1 and 2 must not commence until written details of the surface and foul water drainage system for the operation of the authorised development has been submitted to and approved by the relevant planning authority. The surface and foul water drainage system must be substantially in accordance with the illustrative foul and surface water drainage strategy.*	**Surface and foul water drainage system and Work No. 3** R12(1) requires the submission of written details of the surface and foul water drainage system before the commencement of Works Nos. 1 and 2. • In relation to drafting, the Applicant is asked to consider whether the underlined text in column 3 should be redrafted as follows? - "…*The submitted details of the surface and foul water drainage system must be substantially in accordance with*…."? • The ExA notes the Applicant's view (paragraph 3.29 of its oral summary at the last DCO ISH [REP6-011]) that Work No. 3 need not be referred to in this requirement. Having considered this further the ExA	Applicant, NRW, Welsh Water

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			agrees that as Work No. 3 relates to surface water drainage and related landscaping and ecological mitigation and is largely self-contained, there is no apparent scope for interface with the foul drainage system. However, the potential for cross-over between the landscape and ecological performance of the surface water drainage system provided in Work No. 3 and the discharge of R12(1) remains a possible source of confusion whilst the requirement refers jointly to a "…surface and foul water drainage system…". Should R12(1) (or another provision such as a definition) be amended to make express that the details sought do not relate at all to Work No. 3, or to clarify that surface water discharged from a system serving Works Nos. 1 and 2 is discharged into Work No. 3. Views are sought from the Applicant, NRW and (in relation to foul drainage) Welsh Water about how best to provide drafting clarity on this point.	

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10.	**R13(3)**	*(3) The artificial lighting for the authorised development must be implemented in accordance with the approved details.*	**Artificial lighting** R13(3) relates to artificial lighting. • Is it necessary for a timescale for implementation of the approved lighting to be provided? • If so, should that be done on the face of the Order or could a timescale form part of the 'approved details' by adding the words "… *and the timescale for its implementation*…" after 'development' and before 'must'?	Applicant, WCBC
11.	**Protective provisions** **Sch 9 Part 1**		**Protective Provisions: National Grid** Have the changes to Part 1 of Schedule 9 been considered and agreed by National Grid? Is there any outstanding disagreement? Please provide evidence.	Applicant, National Grid
12.	**Protective provisions** **Sch 9 Part 6**		**Protective Provisions: Wales and West Utilities** Have the changes to insert Part 6 of Schedule 9 been considered and agreed by Wales and West Utilities? Is there any outstanding disagreement? Please provide evidence.	Applicant, Wales and West Utilities
13.	**Protective Provisions not yet incorporated into the dDCO, annexed to the Applicant's letter to the ExA of 7 December**		**Protective Provisions (and their relationship with Compulsory Acquisition): Solar Farm Undertaker** At the Compulsory Acquisition Hearing and the Issue Specific Hearing on the draft Development Consent Order held on 24 November 2016, The ExA raised questions with the Applicant relating to the ongoing need for the exercise of compulsory acquisition powers over land owned	Applicant, Mr Owen, Earthworm.

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	2016 (7 Dec PPs): all provisions		by Mr Gerard Michael Ormrod Owen of Pickhill Bridge Farm, Cross Lanes, Marchwiel, Wrexham LL13 0UH (Mr Owen) and subject to an unspecified option agreement (the solar farm option) in favour of Earthworm Energy Limited, Browns Road, Daventry, Northamptonshire, NN11 4NS (Earthworm) providing for the construction of a solar farm, for which planning permission has been granted. The land in question is traversed by the Applicant's proposed gas connection alignment and remains the most direct and preferred route for the construction of this alignment by the Applicant. The preferred route benefits from an extant planning permission. It having become clear than an effect of the proposed compulsory acquisition in this location would be to bisect the consented solar farm with consequential effects on its deliverability or operation, the Applicant has engaged with Mr Owen to negotiate a private agreement for a diversionary route by which the proposed gas connection alignment would pass around the proposed solar farm. This diversionary route would remain within land owned by Mr Owen. In the Applicant's submission, the diversionary route is not the preferred route and its delivery would have to be conditional (in summary terms) upon: • proof of need for the diversion, in terms of the proposed solar farm undertaker demonstrating an obligation on their part to construct and operate the solar farm; and	

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			• obtaining planning permission for the diversion. The Applicant has made clear its view that, even if the necessary conditions were to be met indicating that the solar farm would become operational, the plots subject to the solar farm option would remain subject to CA provisions in the dDCO. Its reasoning is set out in full in its letter to the ExA of 7 December 2016 [AS-006][1]. Recognising the remaining potential for the CA provisions to impact adversely on the solar farm undertaking, the Applicant has proposed draft protective provisions in favour of the solar farm operator. Whilst these are not incorporated into the Version 5 dDCO, a draft is annexed to the Applicant's letter of 7 December 2016 [AS-006][2]. The purpose of the protective provisions is to provide assurances to a solar farm operator about the process for the removal and reinstatement of solar farm equipment and the payment of associated expenses and costs, cooperation and the availability of arbitration. They address a range of foreseeable adverse operational effects. Having taken account of the Applicant's reasoning in its letter of 7 December 2016 [AS-	

[1] Letter to the ExA from Pinsent Masons, Solicitors for the Applicant of 7 December 2016 [AS-006] https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010055/EN010055-001504-Letter%20to%20PINS%207th%20December%202016.pdf

[2] In [AS-006] from pg 6

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			006] and of the annexed draft protective provisions, the ExA retains a concern that, should the necessary conditions for the pursuit of the diversionary route be met, the retention of CA provisions over the solar farm option land could have additional adverse effects over and above those addressed in the draft protective provision annexed to the Applicant's letter of 7 December 2016 [AS-006]. It appears possible that the ongoing presence of CA provisions in such circumstances could: • harm the prospects for a solar farm operator obtaining construction finance and/or a contract to sell power (adverse commercial effects); • be contrary to the provisions of the PA2008 s 122, as it would not be clear that the land is required for the development to which the consent relates (as an implementable diversion would be available) and there would no longer be a compelling case in the public interest for the compulsory acquisition; and • be contrary more broadly to DCLG guidance on compulsory acquisition[3]. Turning to the detail of the DCLG guidance: • An ongoing interference in the rights of those interested in the land burdened by the original gas connection alignment may no	

[3] 'Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land', DCLG 2013 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236454/Planning_Act_2008_-_Guidance_related_to_procedures_for_the_compulsory_acquisition_of_land.pdf

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			longer be necessary and proportionate in circumstances where a deliverable alternative exists (paragraph 8). • The solar farm option land would arguably no longer be required for the development to which the development consent relates (paragraph 11(i)) and nor would it serve any of the remaining purposed in paragraph 11 of the DCLG guidance. • In terms of the balance of the public interest against private loss, the adverse commercial effects on a solar farm operation and the potential for the loss of renewable energy generation capacity from a solar farm broadly supported by NPS EN-1 might weigh against the imposition of CA in circumstances where it is not clear that the CA of the solar farm option land is necessary (paragraphs 14 – 16). In reaching this position, the ExA has noted the Applicant's submission set out in its letter of 7 December 2016 [AS-006] that there ought be no need to place any provision on the face of the dDCO to remove the compulsory acquisition provisions on the original gas connection alignment in circumstances where the conditions enabling the construction of the diversionary alignment are met. Whilst such submissions have held good in many circumstances where an applicant and a person with an interest in land reach a voluntary private agreement to facilitate the objective for which compulsory acquisition was sought and	

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			where the agreement and the compulsory acquisition proposal relate to the same land, the ExA remains concerned that the distinguishing fact in this case is that the voluntary agreement provides for the use of a diversionary route which is different land. In such circumstances, should the necessary conditions providing for the delivery of the diversionary route be met, different land can be used to achieve the original objectives of the compulsory acquisition. Whilst this point is arguable and the ExA has no concluded position, to proceed with a tandem compulsory acquisition of the original route in such circumstances does not appear to meet the elements of the DCLG guidance highlighted above. In such circumstances, and without prejudice to the position set out in its letter of 7 December 2016 [AS-006], the Applicant is requested to take one of the following courses of action: • **provide a Statement of Common Ground** with Mr Owen and Earthworm, clarifying that the protective provisions as annexed to the letter of 7 December 2016 [AS-006] are (subject to any necessary minor drafting revisions to be provided) agreed between these parties and that, for stated reasons, there is no breach of PA2008 or the DCLG guidance and no further changes are sought; or • **prepare an amendment to the annexed protective provisions**, addressing the adverse commercial effects and prospective	

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			breaches of PA2008 or the DCLG guidance identified above by ensuring that in circumstances where the necessary conditions for the implementation of the diversionary alignment are met, provisions in the dDCO that would otherwise bring about the compulsory acquisition of the solar farm option land would cease to have effect. • If it is the view of one or more of the Applicant, Mr Owen and or Earthworm that amendments to the dDCO are required to address any element of the adverse commercial effects and prospective breaches of PA 2008 or the DCLG guidance identified above, but that these should not be placed into a Protective Provision benefitting the solar farm operator, responses to this question should identify where in the dDCO the appropriate drafting should be placed and should provide a fully drafted set of amendments. If the second or third of these options is pursued by the Applicant, Mr Owen and Earthworm are invited to respond to it at Deadline 8. It should be noted that the following questions 14 – 22 address the content of the proposed Protective Provision [AS-006] as currently drafted. Responses to this Question (13) and ongoing negotiations between the Applicant and Mr Owen and / or Earthworm may lead to the	

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			need for structural and textual changes to the proposed Protective Provision which replace aspects of drafting addressed in the following questions. If that becomes the case, the Applicant is asked to make that clear in its response to this question and to respond to further questions below as appropriate, making clear that the relevant drafting has been replaced.	
14.	**7 Dec PPs: Paragraph 2**	*"apparatus" means any solar photovoltaic panels, cables or other apparatus belonging to or maintained by the Solar Operator <u>for the purposes of electricity generation</u> pursuant to the planning permission*	**Protective Provision for the Solar Operator: Interpretation: "apparatus"** Should a reference to '… and for the export of electricity …' be added after the underlined text to protect grid or distribution network connection assets associated with the solar farm? Alternatively could the underlined text be deleted for the same effect?	Applicant, Earthworm
15.	**7 Dec PPs: Paragraph 2**	*"specified work" means so much of any of the works comprised in the authorised development or works required to facilitate <u>or are incidental</u> to the authorised development (including, but without limitation, the gas pipeline) whlch are in, on or under any land purchased, leased, held, appropriated or used under this Order that are near to, or will or may affect, any apparatus*	**Protective Provision for the Solar Operator: Interpretation: "specified work"** Should the underlined text be amended to read 'or which are incidental to'?	Applicant

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16.	**7 Dec PPs: Paragraphs 2 and 3(3)**	*(3) Regardless of anything in sub-paragraph (2), the undertaker may, in the notice issued under sub-paragraph (1), give notice to the Solar Operator that it desires itself to execute any work, or part of any work, in connection with the removal of apparatus in any of plots GC12, GC12A and GC12B as identified on the land plans, and where such notice is given that work, instead of being executed by the Solar Operator, must be executed by the undertaker within 28 days of the Solar Operator receiving such notice.*	**Protective Provision for the Solar Operator: Interpretation: "work"** Does the term 'work' (in the first underlining) here take the same meaning as in the body of the dDCO / as defined in Art 2(1)? If not, the Applicant is requested to define 'work' for the purposes of these protective provisions in Paragraph 2.	Applicant
17.	**7 Dec PPs: Paragraph 3(3)**	*As Q16 above*	**Protective Provision for the Solar Operator: Removal of apparatus** The provision seeks the removal of certain solar farm assets where notice is served by the undertaker on the solar farm operator. • Is 28 days' notice reasonable and sufficient for a solar farm operator to decommission and remove assets? (For example: the ExA has not reviewed the extant planning permission for the solar farm. However, it is possible that the number and siting of certain assets may be conditioned and hence removal may require an application to vary a condition. It may take longer than 28 days to contract for the removal of assets at a reasonable price, using an appropriately qualified contractor.) • Is it reasonable for the undertaker to take a power to execute removal itself? • Is the wording 'within 28 days of the Solar	Applicant, Earthworm

Q No.	Part of DCO	Relevant extract from DCO (for ease of reference)	Commentary	Response sought from
			Operator receiving such notice' (in the second underlining) appropriate, or does it empower the undertaker to execute the removal of assets in 28 days or less and so effectively negate the purpose of a notice period.	
18.	**7 Dec PPs: Paragraph 3(4)**	*(4) Where notice is given in sub-paragraph (3), the undertaker must provide the Solar Operator with the opportunity to supervise any work, or part of any work, in connection with the removal of apparatus but if the Solar Operator does not provide any superintendence within the required 28 days, then the undertaker must proceed to execute the works.*	**Protective Provision for the Solar Operator: Removal of apparatus** Is the intention of this paragraph that the solar farm operator must nominate a supervisor within 28 days, after which the undertaker can proceed to carry out the work with or without supervision provided by the solar farm operator? If so, the drafting does not appear to achieve that intention, the adequacy and reasonableness of which is also questioned. The Applicant is also requested to review the drafting of this paragraph to address matters also raised in respect of Paragraph 3(3) in questions 16 and 17 above, namely: • the need for definition of 'work' (second underlining); and • the adequacy and reasonableness of the 28 day provision (third underlining), including the means by which the undertaker would notify the solar farm operator that it would execute the works itself. • The drafting of the first underlining should be amended to read "in the circumstances described in sub-paragraph (3)"	Applicant, Earthworm

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19.	**7 Dec PPs: Paragraph 3(7)**	*(7) Where the undertaker has served written notice in accordance with sub-paragraph (1), the Solar Operator must, within 28 days of receipt of such notice, give written notice to the undertaker <u>whether it requires the undertaker to reinstate the removed apparatus</u> in accordance with such reasonable requirements as the Solar Operator may specify and if no notice is received by the undertaker, the undertaker is under no obligation to reinstate the removed apparatus.*	**Protective Provision for the Solar Operator: Removal of apparatus** Further to issues raised in question 17 above; does this provide a reasonable and sufficient process for a solar farm operator to agree the reinstatement or non-reinstatement of removed assets? It should be noted again (e.g.) that the number and siting of removed assets and the question or whether or not they may be permanently removed may be controlled by agreements or provisions outwith the scope of these provisions, such as conditions to the extant planning permission.	Applicant, Earthworm
20.	**7 Dec PPs: Paragraph 4**	*Generally and* *(4) and its relationship with* *(5) If the Solar Operator in accordance with sub-paragraph (4) and in consequence of the works proposed by the undertaker, reasonably requires the removal of any apparatus and gives <u>written notice</u> to the undertaker*	**Protective Provision for the Solar Operator: Retained apparatus** Does this provision provide a reasonable and sufficient process for a solar farm operator to agree works where the undertaker does not propose to invoke Paragraph 3 and remove assets? More particularly, as sub paragraph (4) does not provide for written notice, how does the underlined text in sub paragraph 5 operate?	Applicant Earthworm

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21.	**7 Dec PPs: Paragraph 5 & 6**	*Generally*	**Protective Provision for the Solar Operator: Expenses and costs** Do these provisions provide a reasonable and sufficient extent for the repayment of expenses and costs occasioned by a solar farm operator as a consequence of the exercise by the undertaker of its proposed rights? See also Question 4 (Art 39) above.	Applicant Earthworm
22.	**7 Dec PPs: Paragraph 6(1)**	*(1) … if by reason or in consequence of…*	**Protective Provision for the Solar Operator: Expenses and costs** Should the underlined text read 'by reason of or'?	Applicant