PLANNING ACT 2008 (AS AMENDED) – SECTION 55

APPLICATION BY ABERGELLI POWER LTD FOR AN ORDER GRANTING DEVELOPMENT CONSENT FOR THE ABERGELLI POWER PROJECT

WRITTEN REPRESENTATION OF INTERESTED PARTY – MR MICHAEL EDWARDS

1. Background

1.1 This is a Written Representation is submitted on behalf of Mr Michael Edwards as an Interested Party in relation to the application by Abergelli Power Limited for an Order granting Development Consent ("the DCO") for the Abergelli Power Project ("the Project").

1.2 A Relevant Representation was submitted on behalf of the Interested Party on 27 July 2018 and the Preliminary Meeting was held on 10th October 2018. Following this, the Examiner issued an updated timetable by way of a letter dated 17th October 2018, including a revised timetable for examination of the application. The deadline for the submission of written representations of Interested Parties is Friday 9th November 2018. Guidance issued by the Examiner in conjunction with the revised timetable confirms that written representations can cover any relevant matter and are not restricted to the matters set out in the Initial Assessment of Principal Issues discussed at the Preliminary Meeting.

2. Summary of Matters Covered by Written Representation

2.1 The matters addressed in these written representations are as follows:

(a) The validity of the Draft Development Consent Order, in particular, the consideration of the Electrical Connection and the Gas Connection;

(b) The Compulsory Acquisition – in particular the justification for the access route.

3. Development Consent Order – Summary

3.1 The Project includes a Gas Connection ("GC") which will consist of a new above ground installation (AGI) and underground gas connection (gas pipeline) as well as an Electrical Connection, ("EC") which will consist of an underground electrical cable to export power from the generating equipment to the National Electricity Transmission System (NETS). Both the GC and EC have not been included within the DCO.

3.2 It is submitted that the GC and the EC are integral to and form part of the Project for the construction of the generating station and therefore should have been included in the application for development consent. The DCO is required for any development which is, or forms part of, a nationally significant infrastructure project and it is submitted that the GC and EC should therefore have been included within the DCO. It is submitted that grant of development consent for only part of a proposed generating station would be unlawful and that the decision by Abergelli Power Limited (APL) to

exclude the EC and GC from the DCO renders the draft Order invalid. The DCO should therefore be refused on the grounds of it being invalidly submitted or else APL should be invited to withdraw the DCO and submit a new application.

4. Development Consent Order – Statutory Requirements

4.1 One of the purposes of the Planning Act 2008 was to streamline the consenting process for large scale national projects so that, where a project fell within the parameters of 'development consent', it would not be necessary to obtain any other consents, such as the grant of planning permission.

4.2 Section 14 of the Planning Act 2008 ("the 2008 Act") defines a nationally significant infrastructure project to include the construction and extension of a generating station. A project must fall entirely within the definition of an NSIP in order to be considered under Section 14 of the 2008 Act (as per *R. (on the application of Gate) v Secretary of State for Transport [2013] EWHC 2937 (Admin); [2014] J.P.L 383 (QBD) (Admin).* (**Appendix A)**

4.3 Section 31 of the 2008 Act requires that a DCO is required for development to the extent that the development is or forms part of a nationally significant infrastructure project and Section 115 provides for consent for associated development. As the DCO is situated in Wales, the types of development which can be considered associated development are limited, effectively "*the carrying out or construction of surface works, boreholes or pipes.…"*. Government Guidance ("Planning Act 2008 – Guidance on associated development applications for major infrastructure projects") recognises the limitations of Section 115 in relation to Wales (as currently in force) and, in addition, the same guidance (at para.5) confirms that it is for the Secretary of State to decide on the case-by-case basis whether or not development should be treated as associated development.

4.4 Annexes A and B of the Guidance provides guidance on the types of development that may qualify as associated development, however the list is non-exhaustive and paragraph 12 clearly states that "*these annexes should not be treated as an indication that the development listed in them cannot in its own right constitute a project, or integral part of a project, for which obtaining development consent is mandatory under the Planning Act*". Development which constitutes an integral part of an NSIP cannot, by implication, also be treated as associated development under Section 115 – such development must be the subject of an application for development consent.

5. Development Consent Order – APL's Approach

5.1 APL has submitted a Statement of Reasons in support of the DCO (Document Reference 4.1) and, under paragraph 1.7, APL confirms that both the GC and EC are considered to be associated development and not part of the DCO. APL confirms, in the same paragraph, that "*this approach is consistent with paragraph 3.23 of the decision letter for the Hirwaun Generating Station Order 2015 ("the Hirwaun Order") where the Secretary of State determined that the gas connection and the electrical connection were not part of the generating station and it was not therefore appropriate to include the gas connection and electrical connection in the DCO*". APL have submitted separate planning applications in relation to both the EC and the GC. It is clear that APL have placed reliance on the Secretary of State's decision in

the Hirwaun Order in determining whether or not to include the GC and the EC within the DCO.

6. Development Consent Order – The Hirwaun Order

6.1 The decision letter of the Secretary of State, at paras. 3.18-3.23 (**Appendix B**) contains the reasons for excluding the EC and GC. This was contrary to the conclusions reached by the Examiner and also by the local planning authority, Rhondda Cynon Taff County Borough Council. However, the Secretary of State did not provide any detailed reasons as to why the EC and GC should be excluded but appears to place reliance on the decision in *R (on the application of Redcar and Cleveland Borough Council) v Secretary of State for Business, Enterprise and Regulatory Reform [2008] EWHC 1847 (Admin)* as well as other case law not referred to in the decision letter.

6.2 The decision in *Redcar* concerned electric cables connecting an offshore windfarm to the shore as well as an onshore substation. Sullivan J (as he then was) held that the extent of a development consent (granted in that case under section 36 of the Electricity Act) should be determined by reference to the place where the electricity is generated – in that case it was held that the electricity was generated offshore and the cabling and substation were ancillary facilities.

6.3 However, Sullivan J. commented "*Whether or not such ancillary facilities are included in any section 36 application will depend upon the facts of the individual case, including, in particular, the physical proximity of the ancillary facilities to the turbines themselves. In the case of an oil or coal-powered generating station the turbines and some or all of the ancillary facilities may well be housed in one building or structure or complex of buildings or structures"* and, when considering the example of a wind farm separated by kilometres of water from the onshore facilities, it is clear that the various elements should be treated separately "*not least since the environmental implications of the offshore turbines may well be entirely divorced from the environmental impact of the onshore facilities many kilometres away"*.

6.4 It was clear that in *Redcar*, the challenge failed on the facts since the onshore elements could not properly be considered to be part of the offshore generating station as defined. It is clear from *Redcar* however, that the Secretary of State does not have power to grant development consent for the construction of only part of a generating station. To the extent that the GC and EN are integral to the current Project, they must be included in the DCO.

6.5 It is clear from the decision in *Redcar*, that geographical considerations are critical to determining whether the EC and GC are integral elements of the Project, such that they should have been included in the DCO. In total contrast to the wind farm in *Redcar*, the Project has the following qualities:

(a) Both the EC and the GC are situated within the parameters of the Order Land but the EC and GC are excluded from the DCO itself. Inclusion within the Order Land indicates that both elements are integral to the Project;

(b) Both the EC and GC will give rise to the same environmental impacts as the Project as they are located in such close proximity. This is clearly distinguishable

from *Redcar* as observed by Sullivan J, where different components were many kilometres apart;

(c) The access road is contiguous with the EC (although the EC is significantly shorter in length than the access road);

(d) The access road is included within the DCO but, despite running along the same route, the EC has been excluded;

(e) The Government guidance on associated development includes access arrangements as examples of the types of development which would qualify as associated development, therefore APL appear to have adopted an inconsistent approach and there is no logical reason why the access road has been included within the DCO whilst excluding both the GC and EC. It is clear that APL have simply adopted the approach taken by the Secretary of State in the Hirwaun Order without proper consideration of the facts (in particular, the geographical situation) in relation to the Project;

(f) It is clear that the other decisions referred to by the Secretary of State in relation to the Hirwaun Order (and which are considered in Counsel's Opinion obtained by the applicant in the Hirwaun Order) are also distinguishable from the facts of the Project – as the former concerned electrical connections covering substantial distances (for example, the Swansea Tidal Lagoon and South Hook decisions);

7. Development Consent Order – Conclusions

7.1 It is submitted that APL have incorrectly applied the Secretary of State's decision in the Hirwaun Order to the circumstances of the Project. Even if the Secretary of State was correct in the determination of the Hirwaun Order, this does not justify APL's decision to exclude the GC and EC from the DCO when all the evidence supports the view that both are integral to the Project and should have been included within the DCO.

7.2 The Secretary of State's decision in the Hirwaun Order is not binding on a subsequent decision maker in a subsequent case. It is submitted that the decision is of limited assistance to the current Project as the Secretary of State failed to give any detailed reasons for excluding the GC and EC in that project. Simple reliance on that decision in the current Project is not justification for excluding the GC and EC.

7.3 As the GC and EC are integral to the Project, their omission leads to the draft DCO being invalid and the grant of development consent, as currently construed, would be unlawful;

7.4 The CPO seeks to acquire land in relation to the construction of both the access road and the EC and this serves to reinforce the integral nature of the EC to the Project.

8. Compulsory Acquisition – Summary

8.1 It is submitted that APL have not satisfied the relevant tests set out in Section 122 of the 2008 Act in relation to the compulsory acquisition of land.

9. Compulsory Acquisition – Statutory Requirements

9.1 The compulsory acquisition of land within a development consent order can only be granted where the decision-maker is satisfied that two conditions are met in accordance with Section 122 of the 2008 Act, namely:

(a) 1 -

(i) the land is required for the development to which the development consent relates; or

(ii) It is required to facilitate or is incidental to that development; or

(iii)It is replacement land which is to be given in exchange for the order land;

(b) 2 - there is a compelling case in the public interest for the land to be acquired compulsorily.

10. Compulsory Acquisition – Land and Rights Required

10.1 APL seeks compulsory acquisition powers to permanently acquire plots 13, 14, 15 and 17 for the purposes of access to the power generation plant and for services. Plots 13A, 13B, 17A and 17B are temporarily required to construct the access road to the power generation plant. APL contends that they are justified in seeking compulsory acquisition powers to secure land, the temporary use of land and new rights in land in order to construct, operate and maintain the Project. Further, APL suggests that the land and rights to be acquired are no more than is required in order to facilitate the construction and operation of the Project.

10.2 The Statement of Reasons submitted in support of the draft DCO, at Paragraph 6.6.8 considered the alternative layouts and route options. The Statement of Reasons suggests that two Access Route Options were considered as part of the Project in order to access the generating equipment site. The preferred option which was chosen is Access Option 2 which will result in the compulsory acquisition of land and rights in land of the parcels set out above. At paragraph 6.6.12, APL sets out its justification for the choice of Access Option 2 as follows: *"The main reasons for this choice were that the majority of the public consulted during 2014 supported this option in preference to 'Access Option 1', as it would result in a lower adverse impact on traffic by using a shorter route and would avoid roads leading to Morriston Hospital"*. No other justification for the choice of Route Option 2 is given.

10.3 It is submitted that the decision-making process to select the preferred Option 2 is flawed as it failed to have proper regard to the use of the alternative Access Option 1 which had previously been utilised by National in connection with the construction of the NG 1220mm gas pipeline from 2006. Consideration of the use of Access Option 1 within both the Environmental Statement and the Statement of Reasons is minimal and it is submitted that a much more detailed consideration of both access options should have been carried out as per *Tesco Stores Ltd v Secretary of State for the Environment Transport and the Regions (2000) 80 P&CR 427* (**Appendix C)**. In particular, the Statement of Reasons does not give consideration to the previous widening works to the B4889 road to accommodate abnormally wide vehicles to access the adjacent National Grid Site. It is submitted that, in assessing the access route options, the Statement of Reasons does not sufficient regard to the feasibility of

using Access Option 1 as an adequate access route for construction and maintenance vehicles. Option 1 also includes an existing private track extending from the Rhyd-y-pandy Road which would limit the requirements for construction of a new access. It is therefore submitted that the land required for Access Option 2 is not justified and the lack of any meaningful consideration, other than a consultation exercise carried out in 2014, does not meet the tests set out in Section 122. It is submitted that there is no compelling case in the public interest for the compulsory acquisition of the Owner's land where alternative route options are open to APL which would cause less disturbance and not require as much land to be compulsorily acquired. It is submitted that Access Option 1 is a viable alternative and that APL have sought to justify Access Option 2 on the basis of very little evidence.

10.4 In selecting Access Option 2, APL considered a number of options for the route of the purpose-built section of the access road from the substation to the generating equipment site. The two main options are set out in the ES at paragraphs 5.3.16 to 5.3.21. At para. 5.3.19, APL provides justification for the selection of Option A over Option B on the basis that "*the key advantage to Option A was its complete avoidance of the Ancient Woodland area adjacent to the Substation and Felindre Gas Compressor Station"*. Despite this, APL states that Option B performed better as it would have less impact on current and future planned operations of National Grid as well as sustainability in relation to materials and project cost. However, APL also highlight the consultation feedback and the "*importance of avoiding the Ancient Woodland"*. Indeed, following that consultation process, APL realigned Option B (now referred to as Revised Option B) to *"curve further south and avoid the area of Ancient Woodland"* and this is now the preferred route option. No other justification for the alignment of Revised Option B has been made by APL. As a result of this process, the preferred route option (Revised Option B) will result in significantly more land being acquired with resultant loss to the Interested Parties.

10.5 A report prepared by Alison J. Wheeler MSc, MICF in May 2018 (**Appendix D)**, on behalf of the agent instructed by Mr Wynne Watkins, confirms that the woodland block referred to by APL in the ES at para. 5.3.19, is **not** recorded on the Ancient Woodland Register. It is therefore submitted that the basis on which APL chose Revised Option B is unsubstantiated as it based on a factual error. It is submitted that, given that the route access option and the consequent application for compulsory acquisition powers is based on a fundamental error, there can be no justification for the DCO to be made in its current form.

10.6 A meeting between the agent representing the Interested Part and representatives of the Applicant was held at the offices of Herbert R. Thomas on Monday 24th September during which the route options to access the Project were discussed. It is submitted that the Applicant's only justification during that meeting for the choice of Revised Option B over Option A was that route A was technically difficult. No further evidence has been advanced by the Applicant, including any topographical or other considerations, and it is submitted that APL have not had sufficient regard to an alternative route option which result in significantly less land or rights in land being required and that the alternative route could be achieved by agreement with National Grid. In the circumstances, it is submitted that APL have not met the tests set out in Section 122 of the 2008 Act in that, in relation to the land required for Revised Option B, they have failed to demonstrate that the land is required for the development to

which the development consent order relates and that there is no compelling case in the public interest for the land within the ownership of the Owner to be acquired compulsorily.

11. Compulsory Acquisition – Conclusions

11.1 It is submitted that the compulsory acquisition of the Owner's Land does not meet the tests set out in Section 122 of the 2008 Act, in particular, that APL have not adequately investigated the alternative options to the compulsory acquisition of the Owner's Land or rights in land and that there is no compelling case in the public interest for the land to be acquired. It is further submitted that the DCO is therefore invalid and should not be confirmed.

Loxley

9 November 2018

Appendix A

Appendix B

Appendix C

Appendix D