

**Submissions Received After the Close of the Examination at 23:59
on 8 February 2020**

**EN010097
VPI Immingham OCGT Project**

Last Updated: 22 April 2020
Date of Report: 07 May 2020
Date of Decision: 07 August 2020

Submissions made before the date of the Report		
No.	Name	Date
1	Nick McDonald on behalf of the Applicant	09 March 2020
2	Burges Salmon LLP on behalf of Phillips 66 Limited	22 April 2020

From: [REDACTED]
To: [Immingham OCGT](#)
Cc: [REDACTED]
Subject: VPI OCGT - EN010097 - update from the Applicant on land agreement [PM-AC.FID3422141]
Date: 09 March 2020 16:56:51

Dear Sir/Madam

I act for the Applicant, VPI Immingham B Limited. The Applicant submitted an agreed statement with Phillips 66 Limited at Deadline 7 of the examination in which the Applicant agreed to provide an update by 9 March on obtaining lender's consent for the agreements between the parties. The update is as follows: VPIB is continuing to seek lender approval, and is confident that this will be obtained. The Applicant will provide the Secretary of State with a further update no later than the date by when the Examining Authority's report is to be issued.

This email is copied to Phillips 66's solicitor.

Yours sincerely

Nick McDonald
Legal Director
for Pinsent Masons LLP

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1 INTRODUCTION

- 1.1 This post-examination submission is a summary of the case of Phillips 66 Limited ("P66") to the Secretary of State ("SoS") in respect of VPI Immingham B's application for the VPI Immingham OCGT DCO, reference EN010097.
- 1.2 This submission is made with reference to the joint statement between the Applicant and P66 which was provided to the Examining Authority ("ExA") at Deadline 7 on 6 February 2020 [REP7-011] and previous submissions made by P66. Events expected by that joint statement have not occurred which compels P66 to update its position.
- 1.3 All terms used within this document are as defined in the Applicant's Application Documents, and P66's previous submissions, unless otherwise stated.

2 JOINT STATEMENT AND CURRENT POSITION

- 2.1 The joint statement provided to the ExA at Deadline 7 [REP7-011] explains that the parties intend to enter into agreements and have agreed the form of these contracts. These agreements comprise the documents required to enable the Applicant to acquire from P66 the interests in land it requires to construct and operate the Project, as well as a Compromise Agreement to provide for other relevant matters.
- 2.2 As these agreements will provide for variations to existing leases held by VPI Immingham LLP we have been informed that the consent of its lender is required. On the assumption this would be readily obtainable by the Applicant, P66 supported the parties' joint intention to execute and complete the agreements as soon as lender consent has been obtained by VPI Immingham LLP.
- 2.3 However, Lender consent has not yet been obtained by VPI Immingham LLP. P66 has sought updates on when that consent will be available. No firm date has emerged and the determination period has now extended well beyond the point by which P66 had assumed that consent could reasonably have been obtained, if indeed it is to be forthcoming.
- 2.4 The position is therefore that the Applicant seeks to acquire rights from P66 which P66 has agreed to grant to it voluntarily. In these circumstances it is axiomatic that that powers of compulsory acquisition cannot be granted¹. To do so would be unlawful. That is reflected in DCLG's guidance on the use of such powers²:
- "Applicants should seek to acquire land by negotiation wherever practicable. As a general rule, authority to acquire land compulsorily should only be sought as part of an order granting development consent if attempts to acquire by agreement fail..."*
- 2.5 The only obstacle to the completion of the voluntary acquisition of the rights the Applicant seeks to acquire is the Applicant's relationship with its group company's lender. That is not a matter for which P66 should be penalised. If the Applicant has failed to identify the correct subject of its application for compulsory powers, in this case its lender, it cannot fairly seek to transfer that burden onto P66.

¹ See for example the consideration of that situation arising at paragraph 11 of R. (FCC Environment) v SSECC [2015] EWCA Civ 55, Env L.R.22.

² Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land, paragraph [25]

- 2.6 The Applicant and P66 have been in regular discussions on the proposed project since March 2018 with negotiations taking place through meetings and email correspondence. The agreements to acquire the P66 land interests started to resemble their agreed form in September 2019. Despite the importance of P66 land interests to the project and these negotiations continuing for many months, it is unfortunate that the process for obtaining lender consent was only started by the Applicant in February 2020 when the joint statement was provided to the ExA at Deadline 7 [REP7-011].
- 2.7 The previous joint statement envisaged that lender consent would be forthcoming prior to any decision being taken on the Applicant's Application. It would now appear that consent may not be forthcoming, and accordingly P66 seeks to make its position clear in the absence of that consent.
- 2.8 That position is the one P66 position is set out in previous submission to the ExA. Those submissions are summarised below for ease of reference.

3 P66'S OBJECTION TO COMPULSORY ACQUISITION

- 3.1 P66's case is that the Applicant has failed to demonstrate that there is a compelling case in the public interest for the compulsory acquisition of P66's land. Accordingly any provisions of the dDCO which would authorise compulsory acquisition ought to be modified to prevent such acquisition.
- 3.2 The reasons why the statutory tests are not met are set out in detail within P66's submission at Deadline 2 on 11 September 2019 [REP2-024]. In brief however, the proposed DCO would result in a series of adverse impacts on P66's business at the Humber Oil Refinery. When weighed against the public benefits of the Applicant's proposals, there is not a compelling case in the public interest.
- 3.3 P66 does not object to the grant of DCO per se. However, if the ExA removes the powers of compulsory acquisition over P66's land, it will need to consider whether the Applicant is able to demonstrate a reasonable prospect of its scheme being delivered.
- 3.4 Suggested amendments to the dDCO which the SoS ought to consider in the event he or she is minded to grant the dDCO, but remove powers of compulsory acquisition of P66's land are included in Appendix One to P66's submission at Deadline 6a on 23 January 2020 [REP6a-007].

4 PROTECTIVE PROVISIONS – EXISTING PIPELINE SITE AND EXISTING VPI CHP SITE

- 4.1 P66's case is that the rights sought by the Applicant over:
- (a) the Existing Pipeline Site (Plots 33, 39 to 40 and 42 to 58); and
 - (b) the Existing VPI CHP Site (Plots 7 to 16, 18 to 32 and 34 to 38),
- are not justified, and do not meet the test of a compelling case in the public interest under s.122 of the Act.
- 4.2 However, in the event the SoS is minded to grant those rights to the Applicant, he or she must consider when doing so what form appropriate protective provisions ought to be in to regulate those rights.
- 4.3 P66 have proposed amendments to the drafting of these protective provisions in Appendix Two and Three of P66's submission at Deadline 6a on 23 January 2020 [REP6a-007].
- 4.4 This drafting offered by P66 should not be construed as agreement to these protective provisions. P66 submits even this drafting is not adequate to allow the rights of compulsory sought by the Applicant to be confirmed.

- 4.5 Further detail and the rationale for these drafting amendments are included in paragraphs 3 and 4 of P66's Deadline 6a submission [REP6a-007] and in paragraph 3 of P66's Deadline 6 submission on 2 January 2020 [REP6-009].

5 PROTECTIVE PROVISIONS – HYDROCARBON PIPELINES CROSSING

- 5.1 P66 and the Applicant have agreed the terms of the protective provisions which ought to be included in the dDCO for the protection of 3 hydrocarbon pipelines operated by P66 within the Order Limits and over which the Applicant proposes crossing works for the service connections (gas, electricity, and other utilities) of its proposed OCGT plant. Those pipelines are situated within plot 17 of the Land Plans.
- 5.2 These protective provisions are contained at paragraphs 36 to 50 of Part 4 of Schedule 9 to the dDCO [REP5-003]. Some minor drafting amendments are suggested by P66 to refine the operation of these provisions. The amendments and the rationale for the changes can be found in paragraph 5.3 of P66's Deadline 6a submission [REP6a-007].
- 5.3 Further detail of P66's position on these protective provisions is contained in paragraph 2 of P66's Deadline 6 submission [REP6-009].
- 5.4 Notwithstanding these amended provisions, P66 continues to object to the principle of compulsory acquisition of the rights necessary for these works to be carried out.

6 CONCLUSION

- 6.1 P66 objects to the exercise of compulsory acquisition powers against its land. Even with the proposed amendments, the protective provisions do not comprise appropriate safeguards.
- 6.2 Powers of compulsory acquisition under a DCO should only be sought where attempts to acquire by agreement fail. Given that negotiations were successful and agreements were reached subject to lender consent, compulsory acquisition powers cannot lawfully be included within the DCO.
- 6.3 Should there be any residual doubt, for the reasons advanced by P66 during the examination of the dDCO, there is no compelling case in the public interest for the acquisition of its rights. The Applicant's proposal fails to meet the test in s.122 of the Act.

Burges Salmon LLP on behalf of Phillips 66 Limited

22 April 2020