Triton Knoll Offshore Wind Farm Limited
Triton Knoll Electrical System

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Appendix 2: Written Summary of The Applicant's Oral Case put at Compulsory Acquisition Hearing on the afternoon Wednesday 20 January and Thursday 21 January 2016

Date: 1st February 2016

Appendix 2 of the Applicant's response to Deadline 5

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Date: 1st February 2016

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Approved By:	Kim Gauld-Clark
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1. Summary of The Applicant's Oral Case

Item 1 – Introduction

1.1 Following an introduction from the Examining Authority ("the ExA"), the Applicant, along with other parties in attendance, introduced its representatives.

Item 2 – Opening Remarks by the Examining Authority

1.2 The ExA confirmed that a number of matters which have a bearing on the Items listed in the Compulsory Acquisition Hearing Agenda [EV-035] ("the CA Agenda") were discussed during the Local Impacts Issue Specific Hearing on Tuesday 19th of February 2016. The ExA confirmed that the Items listed in the CA Agenda would only therefore be discussed to the extent that they had not already been examined.

1.3 For ease of reference, this Summary follows the order that the various CA Agenda Items were discussed.

Item 3 - Requests to question a person making oral representations directly under s.94 of the 2008 Act

1.4 No such requests were made.

Item 4 - Summary by the Applicant of changes to key documents submitted at Deadline 4

1.5 The Applicant explained that the changes made to key documents at Deadline 4 are set out in the following Appendices to the Applicant's Deadline 4 response:

- Appendix 18: Schedule of DCO Amendments [REP4-045];
- Appendix 19: Development Consent Order Schedule of Amendments Explanatory Document [REP4-046]; and
- Appendix 20: Application documents Schedule of Amendments [REP4-047].

1.6 The ExA confirmed that changes made to the draft Development Consent Order would be discussed in detail during the Issue Specific Hearing on the Development Consent Order on Friday 22 January.

1.7 The Applicant confirmed that it submitted updated versions of the following outline plans and comparison documents at Deadline 4 (as the changes to these plans are set out in detail in Appendix 20 to the Applicant's Deadline 4 response, the Applicant did not rehearse the details):

- Appendix 21: Outline Construction Method Statement (Revision C) [REP4-048];
- Appendix 22: Outline Construction Method Statement (Revision C to Revision B) Comparison [REP4-049];
- Appendix 23: Outline Noise and Vibration Management Plan (Revision B) [REP4-050];
- Appendix 24: Outline Noise and Vibration Management Plan (Revision B to Revision A) Comparison [REP4-051];
- Appendix 25: Outline Soil Management Plan (Revision B) [REP4-052];
- Appendix 26: Outline Soil Management Plan (Revision B to Revision A) Comparison [REP4-053];
- Appendix 27: Outline Landscape Strategy and Ecological Management Plan (Revision B) [REP4-054]; and
- Appendix 28: Outline Landscape Strategy and Ecological Management Plan (Revision B to Revision C) Comparison [REP4-055].

1.8 The Applicant confirmed that proposed changes to the following documents (set out in Appendix 20 to the Applicant's Deadline 4 response) would be made, and the final versions of all the outline onshore management plans would be submitted, for Deadline 7 (24 February 2016):

- Outline Code of Construction Practice [APP-198];
- Outline Construction Environmental Management Plan [APP-107];
- Outline Communications Plan [APP-108];
- Outline Traffic Management Plan [APP-110];
- Outline WSI Onshore Archaeology [APP-111];
- Outline Access Management Plan [APP-113]; and
- Outline Pollution Prevention and Emergency Incident Response Plan [REP1-060].

1.9 The Applicant explained that the only changes relating to compulsory acquisition at Deadline 4, were those made to the draft Development Consent Order, which were:

- Article 6 (Application and modification of legislative provisions)- A proposed new sub-paragraph (2)(e) was included in Article 6 of the draft Development Consent Order submitted as Appendix 15 of the Applicant's Deadline 4 response [REP4-042], to dis-apply provisions of the Lindsey County Council (Sandhills) Act 1932 ("Sandhills Act"). The Applicant noted that it considered that Article 6 required further modification to make it clear that the dis-application relates to the exercise of powers of compulsory acquisition as well as the construction of works. A new provision (Article 6(3)) has been agreed with Lincolnshire County Council and included in the draft Development Consent Order which forms Appendix 22 to the Applicant's Deadline 5 response, as follows (this replaces proposed sub-paragraph (2)(e) referred to above):

  "(3)The following provisions do not apply in relation to the exercise of any power conferred by this Order-

  the provisions of the Lindsey County Council (Sandhills) Act 1932 (d)"

  The citation (d) has also been updated to include the calendar year and chapter number- "1932 c.lxxxvi".

- Consequential amendments to Schedule 5 to reflect new definition of "Unlicensed Works"- the "package" of rights allocated to plots 48/17B and 48/19 in Schedule 5 of the draft Development Consent Order submitted as Appendix 15 of the Applicant's Deadline 4 response [REP4-042], was modified to utilise the new definition of "Unlicensed Works".

Item 5- Summary by the Applicant of the position on Statements of Common Ground

1.10 The ExA acknowledged submission of Appendix 33 of the Applicant's Deadline 4 Submission: *Statements of Common Ground Summary and Index* [REP4-063].

1.11 The ExA summarised its understanding of the status of the various Statements of Common Ground ("SoCG") as follows:

- SoCGs have been concluded with eight parties, namely: Eastern Inshore Fisheries Association; Historic England; Lincolnshire Wildlife Trust; Trinity House; the Marine and Coastguard Agency; National Trust; Westminster Gravels Limited; and National Grid Viking Link Limited.

- It has been agreed with Public Health England that a SoCG is not required.

- SoCG are being negotiated with thirteen other parties, namely: Anglian Water; the Canal and Rivers Trust; Conoco Phillips; EDF; Natural England; Boston County Council; East Lindsey District Council; the Environment Agency; Lincolnshire County Council; the Marine Management Organisation; the three Internal Drainage Boards (Witham Fourth, Black Sluice and Lindsey Marsh); National Grid; the Lincolnshire Association of Agricultural Valuers the National Farmers Union and the CLA (collectively the "Land Interest Group"/ "LIG").

1.12 The Applicant confirmed that SoCGs have been concluded with eight parties and that no SoCG is required to be entered into between the Applicant and Public Health England.

1.13 **Boston Borough Council and East Lindsey District Council** - The Applicant explained that the SoCGs with Boston Borough Council and East Lindsey District Council submitted for Deadline 2 ([REP2-035] and [REP2-036] respectively), as supplemented by subsequent Deadline submissions, are in agreed form and no further changes are required. David Loveday confirmed that this represented the position of East Lindsey District Council and asked that the ExA, in considering the SoCG, has regard to the matters stated as not being agreed.

1.14 **Canal and Rivers Trust** - With regard to the SoCG with the Canal and Rivers Trust (CRT), the Applicant confirmed that there are two outstanding matters, namely, the agreement of commercial terms and protective provisions. The Applicant advised that commercial terms were due to be finalised imminently, but despite strident attempts on the Applicant's behalf, the CRT has not yet engaged on the proposed protective provisions. The Applicant confirmed that it would continue to seek to engage but if comments are not forthcoming the proposed protective provisions would be those included in the draft Development Consent Order by the Applicant, which are based on protective provisions agreed by the CRT on other schemes. The Applicant considers it unlikely that a SoCG will be agreed with CRT.

1.15 **Conoco Phillips** - The Applicant confirmed that discussions regarding a template commercial crossing agreement are well advanced with Conoco Phillips and the Applicant anticipates that the agreement will be concluded soon. If this is done it may not be necessary to submit a SoCG.

1.16 **EDF** - The Applicant confirmed that negotiations on the final drafting of the"Good Neighbour Agreement" are well underway with EDF. The agreement seeks to address issues raised by EDF in previous Deadline responses. The Applicant advised that it expects conclusion of the agreement to 'unlock' discussions on the SoCG.

1.17 **Natural England** - The Applicant advised that the final outstanding item to be agreed relates to the deemed Marine Licence and sediment transport and associated monitoring. An amendment to the deemed Marine Licence is being discussed with NE and the Marine Management Organisation in this regard.

1.18 **Westminster Gravels** - The Applicant confirmed its understanding that Westminster Gravels no longer wishes to object to the Triton Knoll Electrical System.

1.19 **National Grid** - The Applicant advised the ExA that a Joint Statement had been submitted to the Examination by National Grid on 20th January 2016 confirming the agreed position. The ExA acknowledged receipt of such a Statement from National Grid via e-mail and confirmed that it had been published on the PINS website. The Applicant confirmed that the Statement reflected the agreed position i.e. that the Applicant has, subject to the conclusion of necessary private agreements, agreed not to exercise compulsory purpose powers in respect of National Grid, but that the powers require to remain in the Development Consent Order so that they can run with and bind the land, and thus any unknown third party interests and successors in title to National Grid. (The Applicant also submitted a written Statement to that effect to the ExA, via e-mail, on 20th January 2016 .)

1.20 **Environment Agency -** The Applicant advised that it is continuing to liaise with the Environment Agency with a view to submitting an updated SoCG for Deadline 5. Carol Bolt on behalf of the Environment Agency confirmed this position.

1.21 **Marine Management Organisation -** The Applicant confirmed that a revised draft SoCG had been provided to the Marine Management Organisation and that comments were due to be received on 19th January. The Applicant advised that in lieu of receipt of written comments, the Applicant had recently had a constructive telephone conversation with the Marine Management Organisation.

1.22 **Land Interest Group (LIG) -** The Applicant confirmed that it was seeking to agree a SoCG with the LIG. The Applicant reiterated that it had undertaken at the Local Impacts Hearing on 19th January to provide the ExA with an update on progress as soon as possible after the proposed meeting with the LIG on 4th February, and that in the Applicant's opinion, that was the appropriate time to provide the next update, rather than at Deadline 5. The ExA agreed.

1.23 **Lincolnshire County Council -** The Applicant and Lincolnshire County Council agreed to work towards submitting a SoCG at Deadline 5, setting out matters agreed and any matters not agreed, as appropriate.

1.24 **Internal Drainage Boards-** Andrew Carrott of Witham Fourth Internal Drainage Board confirmed that the outstanding issues between the three Internal Drainage Boards and the Applicant were crossing depth, the imposition and form of restrictive covenant, and protective provisions. Mr Carrott advised that good progress had been made on all issues, though he did not anticipate the SoCG being in agreed form by Deadline 5. With regard to the restrictive covenant, Mr Carrott confirmed that as competent public authorities the Internal Drainage Boards do not consider that the restrictive covenant should bind them. The ExA noted the fact that the Internal Drainage Boards carry out functions on land in which they have no interest i.e. they have no legal interest to be bound by the restrictive covenant. The Applicant explained that the carrying out of the Internal Drainage Boards statutory functions had been expressly 'carved out' of paragraph (c) of the modified form of restrictive covenant included in the Note submitted as Appendix 30 of the Applicant's Deadline 4 submission [REP4-060], notwithstanding the Applicant's primary position that such a 'carve out' is not strictly necessary as restrictive covenants cannot as a matter of law restrict the exercise of any body's statutory functions.

1.25 The Applicant noted the ExA's request that where agreement is reached with any of these parties that they also notify PINS that they wish to withdraw their objection to the scheme.

Item 6 - Report from the Applicant on the position in respect of The Crown Estate Commissioners ("the Commissioners") and Highways England Historical Railways Estate ("HEHRE")

1.26 The ExA noted that the Commissioners had submitted a section 135 Planning Act 2008 consent at Deadline 1 [REP1-064], and that the HEHRE section 135 Planning Act 2008 consent formed Appendix 1 of the Joint Statement between the Applicant and the HEHRE submitted at Deadline 3 [REP3-051]. The ExA confirmed that it did not wish to discuss this Item further, subject to any comments the Applicant may wish to make.

1.27 The Applicant confirmed that the position is set out in the section 135 consents and associated Joint Statement between the Applicant and the Commissioners [REP-050] and the Applicant and the HEHRE (referred to above) at Deadline 3. In respect of progress towards concluding private treaty agreements for the land and rights required, the Applicant explained that it hopes to agree Heads of Terms with the Commissioners following a meeting to be held between the Commissioners and their land agent during the week commenting 18th January 2016. The Applicant has reached agreement over the nature of the rights sought, and discussions are progressing with regards to the consideration to be paid.

1.28 Updated Heads of Terms were send to the HEHRE on the 15th of January 2016 and the Applicant looks forward to concluding discussions on the HoTs swiftly.

1.29 The ExA noted that the Planning Act 2008 does not allow the compulsory acquisition of Crown land.

Item 7 - Report from the Applicant and Lincolnshire County Council on the position in respect of special category land under section 131 and 132 of the Planning Act 2008

1.30 Plot 01/01 comprises a section of beach at Anderby Creek which is owned by Lincolnshire County Council. The Applicant has taken a precautionary approach and treated plot 01/01 as open space for the purposes of section 132 of the Planning Act 2008 when compiling the Application.

1.31 The Applicant – whilst expressly reserving its right to argue the contrary elsewhere, should that become necessary or appropriate - accepted that it is sensible to assume, for the purposes of this examination, that Plot 01/01 forms part of the land designated as public open space pursuant to section 9 of the Sandhills Act, notwithstanding that it is difficult to reconcile the plans showing the land designated by the Sandhills Act, and the Land Plans showing the extent of plot 01/01. As noted at paragraph 6.8 of the Joint Statement ("LCC Joint Statement") which comprises Appendix 1 of the *Applicant's Response to Lincolnshire County Council response to Deadline 3* [REP4-033], the Applicant reserves the right to argue should it be necessary to do so, that either the Sandhills Act does not apply and/or there is no breach of it.

1.32 As explained at paragraph 6.7 of the LCC Joint Statement, the Applicant agreed to the insertion of a provision into Article 6 of the draft Development Consent Order (Revision E) [REP4-042] to dis-apply the Sandhills Act. Please see Item 4 above for an explanation of the further proposed modifications to Article 6.

1.33 The ExA confirmed that, in its opinion, the Applicant has followed the correct procedure in respect of section 132 of the 2008 Act, following the coming into force of the Growth and Infrastructure Act 2013, and that there is no requirement to submit an application to and/or obtain the consent of a separate Secretary of State. Simon Randle on behalf of Lincolnshire County Council confirmed that LCC stands by the position of the Council set out in the LCC Joint Statement. The Applicant confirmed that its position is as set out in the LCC Joint Statement, and that it does not accept LCC's suggestion that there is any uncertainty over the correct procedural position.

1.34 The ExA confirmed that the test to be met by the Applicant is that set out in section 132(3) of the 2008 Act. The Applicant explained that the construction impacts on the beach are for short periods and in discrete areas. Upon removal and reinstatement of the works, the restoration and bringing back into use of those parts of the beach will be aided by the natural processes of wind, wave and tide. Given that there will be no above ground infrastructure on the beach, the reinstatement will be very quick.

1.35 The ExA summarised what it understood to be the Applicant's and LCC's positions as set out in previous Deadline responses and commented that there would appear to be disagreement between the Applicant and Lincolnshire County Council on points of fact pertaining to the question of satisfaction of the section 132(3) test. The ExA noted that the Applicant contends that once the works to the beach have been completed, the public will be able to use the land as before. There will not be any remaining visual impact. The fencing off of small areas of the beach will be for discrete periods of time and during the construction phase only. There will be no above ground infrastructure on the beach for the remainder of the construction period or for the operational period. The Applicant submits that the visual effects of construction will be very short-lived. In the latter respect, the Applicant clarified that it is impossible to say that there will be no residual effect immediately following construction but that the beach will be restored very quickly, and referred to the ExA to paragraph 9 of its response to the ExA's Second Question CA 2.20 which confirmed that the visible effects of construction 'will be very short lived'.

1.36 The ExA noted that LCC contends that construction of the works will require the closure of the beach and the alteration of it for the creation of vehicular access. LCC further asserts that once works are completed there will be a continued visual presence. The land was unspoiled and devoid of modern influences but will now be subject to construction which will of itself have effects, and afterwards the remnants of construction will still be visible. This will intrude into the area and will have changed the pristine and unspoiled nature of the park. LCC also referred to the Lincolnshire Coastal Country Park.

1.37 The Applicant confirmed that its position has not changed since it responded fully to LCC's submissions at Deadline 3 and Deadline 4. The Applicant also submitted that the reference to the footpath closure is not relevant and reiterated to the ExA that the issue of the footpath and access to the beach was addressed by LCC's PROW officer at the Local Impacts Hearing on 19th January, who confirmed that he was happy with those matters. LCC reserved its position to make additional submissions in writing, and the Applicant made clear its concerns that it be notified as soon as possible of any additional points so that it has the opportunity to respond.

1.38 The ExA asked that the parties seek to agree the factual position in a joint statement/SoCG to be submitted for Deadline 5 (1st February 2016). As at Deadline 5, the Applicant and LCC are still in discussions on the draft SoCG and the Applicant reserves its position in this respect.

1.39 The ExA commented that it may wish to issue further written questions to inform its consideration of the satisfaction of the section 132 test.

Item 8 - Report from the Applicant on the position in respect of statutory undertakers affected by a request for compulsory acquisition and the provisions of section 127 and/or section 138 of the Planning Act 2008.

1.40 The ExA queried the number of private treaty agreements which had been concluded. The Applicant advised that since Deadline 2, a total of 3 interests had agreed terms with the Applicant. The ExA commented that the Applicant's response to ExA Second Written Question CA 2.21 included in document [REP2-027], provided a useful update on the status of negotiation of protective provisions. The ExA also acknowledged the position set out in the Joint Statement submitted by National Grid (please see paragraph 1.19 above in this regard.) As regards other statutory undertakers the Applicant confirmed as follows:

1.41 **Network Rail** - The Applicant confirmed that Heads of Terms had been agreed with Network Rail and that the Applicant would continue to engage with Network Rail with a view to concluding a Deed of Undertaking and submitting agreed protective provisions to the ExA at Deadline 5 (1st February 2016).

1.42 **Environment Agency and Internal Drainage Boards** - The Applicant confirmed that protective provisions are in substantially agreed form with the Environment Agency and Internal Drainage Boards (please see comments at Item 12 below in this regard.) The proposed restrictive covenant has been approved by the EA and the IDBs, subject to gaining formal IDB Board approval.

1.43 **Western Power Distribution** - The Applicant advised that a few minor points required to be resolved with Western Power Distribution and that the Applicant would endeavour to resolve these for Deadline 5 or provide an update on progress at that point.

1.44 **Anglian Water** - The Applicant advised that it anticipated protective provisions being agreed with Anglian Water imminently.

1.45 **Canal and Rivers Trust** - As explained at paragraph 1.14 above, despite strident attempts on the Applicant's behalf, the CRT has not yet engaged on the proposed protective provisions. The Applicant confirmed that it would continue to seek to engage but if comments are not forthcoming the proposed protective provisions would be those included in the draft Development Consent Order by the Applicant, which are based on protective provisions agreed by the CRT on other schemes.

1.46 The ExA entreated statutory undertakers to confirm withdrawal of their objections in writing as soon as possible.

1.47 The Applicant has provided an update on the progress in agreeing protective provisions at Appendix 21 to its Response to Deadline 5.

Item 9 – Compelling case in the public interest for the land to be acquired compulsorily, including (a) whether the public benefits that would be derived from the compulsory acquisition will outweigh the private loss that would be suffered by those whose land is to be acquired

1.48 The ExA recited the test set out in section 122 of the Planning Act 2008 and explained that the ExA had sufficient information on the overall need for the proposed development. The ExA asked if the Applicant had sought to quantify what private loss might be suffered.

1.49 The Applicant confirmed that it has considered two aspects. First, loss had been considered in the economic sense; this includes that which will be calculated in accordance with the Compensation Code - a tried-and-tested, fair system and not one needing to be assessed by the ExA. Second, less tangible 'losses' had been considered; this included having regard to the nature of the proposed development, noting for example, that there is mitigation inherent in that the proposed development comprises underground cables, as opposed to more visually intrusive overhead lines. The Applicant acknowledged that on the one hand the undergrounding of cables reduces landscape and visual effects, but on the other hand can exacerbate other effects, such as possible effects on archaeology. The Applicant explained that that the Environmental Statement [APP018-091] is fit for purpose and will, in conjunction with the other supporting documentation, enable an accurate quantification of need versus any private (and other) impact.

1.50 The Applicant noted that the proposed development is reconcilable with existing land uses and highlighted the additional mitigations included in the numerous outline plans submitted as part of the Application (as subsequently amended), which will for example provide for the restoration of and the continued use of the land.

1.51 While expressing a desire to avoid discussing commercial issues, the ExA noted that in its response to ExA Second Written Question CA 2.18 [REP2-027], the Applicant stated that compensation for crop loss would be approximately £4 million. The ExA asked the Applicant to confirm if a global figure of £4 million for private loss would be correct.

1.52 The Applicant confirmed that it would be; this response was based on the assumptions set out in the response to CA 2.18. The Applicant noted however, that there is a need to be cautious when referring to 'global' or 'total' loss as freehold owners and tenants will have separate heads of claim. The ExA acknowledged the point and proceeded to ask the Land Interest Group to comment.

1.53 Louise Staples on behalf of the LIG commented that crop loss will need to be calculated for the five year construction period and possibly a further period thereafter, depending on how long it takes to reinstate the soil to its original condition.

1.54 The ExA asked the LIG to confirm if a £4 million estimate is in the 'right area'. Robert Hurst on behalf of the LIG confirmed that £4 million is in 'the right ball park'.

1.55 The Applicant pointed out that, in examining the issue of whether there was a the compelling case in the public interest, it was not for the Examination process to anticipate the precise quantification, in due course, of the total compensation that may be payable along the route. The ExA confirmed that its question was asked because the LIG put forward an estimate of crop loss at the previous CA hearing on 13th November 2015.

Item 10 - To establish that the land is required for the development to which the development consent relates or is required to facilitate, or is incidental to, that development and is for a legitimate purpose, including the process for securing an approach whereby the undertaker would only seek to compulsorily acquire land and/or permanent – rather than temporary – rights over land that is required to facilitate, or is incidental to, that development and is for a legitimate purpose:

1.56 The ExA explained that it wished to consider two issues. First, whether the Applicant requires the whole of the 60 m corridor and all of the land within the Order limits. Second, whether there would be a procedure for identifying the land that would be needed permanently and whether/how that would be secured in the draft Development Consent Order.

Requirement for the 60 m corridor

1.57 On the first issue, the Applicant confirmed that it necessarily requires powers of compulsory acquisition over all of the land within the 60 m wide corridor. The Applicant has provided further detail regarding the TKES cable corridor in the paper at Appendix 29 to the Applicant's Deadline 4 response [REP4-057] This demonstrates how the development for which development consent is sought may be delivered within the cable corridor and the corresponding scope of the new rights that are required. As it stands, all of that land is presently to be regarded as required for the development to which the development consent relates, or as required to facilitate that development or as incidental to it (in the following paragraphs, to save repetition and where the context requires, the words "require" or "need" etc are used the cover all three permutations i.e. as directly required and as facilitating and as incidental).

1.58 The paper at Appendix 29 to Deadline 4 demonstrates how the 60 m wide cable corridor has been arrived at, why in all the material circumstances of the case, it is necessary to seek powers of compulsory acquisition over that land, and why it is not possible to reduce the scope of the land over which compulsory purchase powers are sought without putting at risk the deliverability of the authorised project. The conditions in sections 122(1) and (2) of the Planning Act 2008 are therefore satisfied.

1.59 The ExA questioned whether all of the land that may be subject to trenched construction techniques was required. The Applicant confirmed that it was and that it would be premature to determine otherwise.

1.60 The Applicant explained that the width ultimately required (i.e. required permanently) is referable to, and a function of, the construction method, including depth of cable burial and the existence of presently undiscoverable obstructions.

1.61 The Applicant has presented clear evidence that so far as the trenchless construction is concerned that the full width of the 60 m will need to be acquired. Wherever the trenchless technique is employed, the infrastructure required for six circuits will occupy up to the full 60 m so there is a need to be able to acquire permanent rights over the full 60 m. The Applicant referred to the Figures 8, 10 and 12 in the Appendix 29 Addendum paper which illustrate the use of trenchless techniques to cross a variety of features. Where trenchless techniques are required to be used to drill underneath constraints, it is necessary to have regard to certain considerations such as ground stability and thermal separation (i.e. the deeper the cables are buried the wider apart they need to be). The closer together the drilling rigs (and therefore the closer the cables) the more difficult stability becomes.

1.62 It should also be borne in mind that that there are stand-off distances for the directional drilling, to allow a gradual gradient of the drill for cable installation. The stand-off distance will vary depending on the ground conditions that are encountered and the size and nature of the obstacle to be crossed. This could be a 20 m to 40 m distance but in some cases it could be much larger. Figures 8, 10 and 12 at Appendix 29, submitted at Deadline 4 provide layouts of the cables where they are crossing an obstacle for which it is necessary to use a trenchless crossing technique such as a horizontal directional drill (HDD). These provide three indicative scenarios demonstrating the different cable layouts for three different sizes of feature to be crossed. They demonstrate that while the distance away from a feature that an HDD will need to start and end will vary, the separation between the drilling activities is generally likely to be the same, which therefore results in the same separation between the buried cables, regardless as to whether a small drain or road is being crossed, or a large railway and river.

1.63 Where it is possible for trenched techniques to be used, cables are laid at a shallower depth, with a narrower separation distance in between, which may result in a reduced area over which rights need to be acquired. However, it is not possible for the Applicant to argue at this stage that anything other than the full 60 m will be required, even where it may currently be proposed to undertake trenched construction techniques. The indicative layout shown in Figure 6 of the TKES cable corridor in the paper at Appendix 29 to the Applicant's Deadline 4 response [REP4-057] demonstrates that it may be possible for the permanent width of the cable corridor to be limited to around 40 m in some stretches of the cable corridor where the cables are buried in trenches. However, where obstacles are encountered, the cable circuits may need to be micro-sited around an obstruction resulting in an increased width of the permanent corridor. Further explanation is provided in 4.26 and 4.27 of Appendix 29, submitted at Deadline 4.

1.64 The Appendix 29 Addendum Paper explains that there may be a need to deviate laterally to avoid hitherto undiscovered constraints, such as archaeological finds. Similarly it may be necessary, including in the interests of the delivery of appropriate mitigation, to deviate vertically, i.e. go deeper. The nature of the obstruction and the required deviation may also mean that trenchless construction techniques have to be used. The Applicant therefore reiterated that whilst the Crossing Schedule submitted at Appendix 45 to the Applicant's Response to Deadline 4 [REPG-078] sets out which features (roads, drains, rovers, railway) it has committed to cross using trenchless crossing techniques, it is very likely to be the case that very many more features will be crossed using this technique. However, it is not possible to determine which specific features those will be until after the pre-construction surveys have been undertaken to further determine the ground conditions and any ecological or archaeological constraints which inform the detailed design for each stage of the onshore works. As such, it is necessary to have the flexibility to be able to employ the trenchless technique at any point along the 60 km onshore cable route, and to be able to acquire rights over the full 60 m width at any such point.

1.65 It is simply not possible or practicable to have carried out all the investigations required to identify all the possible constraints at this stage and there is a continuing duty on all promoters to mitigate environmental effects. Any reduction in the width of the cable corridor would reduce the ability to mitigate via the use of trenchless techniques. The Applicant confirmed that in accordance with the basic propositions of environmental mitigation, it is essential to preserve the right and ability to navigate around and/or under constraints. It is imperative that, in order to deliver and operate this nationally significant infrastructure project, the Applicant has the flexibility to deviate the installation of the underground infrastructure both laterally and vertically; this in turn has effects on the scope of the land over which rights need to be acquired. It should also be borne in mind the fact that – even ignoring legal constraints (as to which see below) - it is not in the Applicant's interest to use (or the public interest, having regard to the desirability of delivering generation as cost-effectively as can be appropriately achieved), and pay for, any more land than is absolutely necessary.

1.66 The ExA asked the Applicant if it could envisage a need for 60 m permanently. On the ExA's calculation the Applicant would require a 26.8m width which would move within the 60m corridor. The ExA considered that the Applicant would deviate and leave a space where it had not deviated which would not then be subject to compulsory acquisition. The ExA also surmised that the Applicant would not need permanent powers over the haul road or soil storage areas which will have been occupied temporarily during construction.

1.67 The Applicant explained that as far as soil storage areas are concerned, even in the most straightforward construction, at least a part of the soil storage area would, post-construction, be required for the outer cable safety protection zone. With respect to the temporary haul road, paragraph 4.23 of the Appendix 29 Addendum explains that the temporary haul road will be positioned in the middle of the cable circuits, rather than at the outer edge. This ensures that the construction activities are optimised through allowing access to two work-faces either side of the haul road simultaneously. The land formerly occupied by the temporary haul road is also required to be maintained between cables during the operational phase of the authorised project to ensure that it is possible to access all cable circuits in the event of needing to remedy cable faults during the operational phase. Repair of cable faults will require similar plant and equipment to that needed for the initial construction phase, therefore access and laydown requirements for remedial works during the operational phase will be equivalent to those during construction. The land comprising the former temporary haul road will therefore be encompassed within the land over which the rights and the restrictive covenant are to be applied, and it is incorrect to assume that one can deduct this space, and that of the soil storage areas, to arrive an at arbitrary permanent width.

1.68 For the avoidance of doubt, for the purposes of the construction, installation, operation, maintenance and decommissioning of the authorised project, the final width of the land over which the new rights and restrictive covenant will be acquired within the 60 m cable corridor will be determined by the:

- land in which the cable infrastructure is installed (including the cable ducts, joint bays, links boxes);
- the land comprising the spacing in between the cable circuits (which may include thermal separation, micro-siting around obstructions, and land formerly occupied by the temporary haul road and topsoil storage areas); and
- the land comprising the cable safety zones from the outer edges of the cable circuits.

1.69 For reasons already set out, the evidence presently available permits of no conclusion other than that the powers of permanent compulsory acquisition sought are here required; it cannot be said that any of the land so referenced is not required. Nor is there any argument (i) that the environmental statement is not fit for purpose or (ii) that further environmental information is required.

The need for a procedure to identify the land to be acquired?

1.70 On the second issue raised by the ExA, the ExA asked whether there would be a procedure for identifying the land to be acquired pursuant to Article 14 of the draft Development Consent Order (Revision E) [REP4-042]. The Applicant drew a distinction between the purpose for which compulsory acquisition powers may be authorised pursuant to section 122 of the 2008 Act, and the exercise of those powers, once authorised. The wording of Article 14 of the draft Order is such that the Applicant may acquire so much of the Order land as is required for the authorised project or to facilitate it, or is incidental to it. Quite clearly, it is envisaged on the face of the draft Order, in common with orders for other nationally significant infrastructure projects - whether, for example, development consent orders, Transport and Works Act orders or powers promoted by hybrid bill - that, once compulsory acquisition powers are authorised, not all of the Order land may need to be actually acquired compulsorily; though, at present, no conclusion can be reached that any of the referenced land is not required.

1.71 Article 14 expressly links the exercise of the power to compulsorily acquire to what is required at the time that such power is exercised. The legislative and judicial framework ensures that it is inherent in the nature of compulsory acquisition that, when exercising the powers under any DCO which has been made, one can only lawfully acquire such land as is actually needed for the development. This is a matter of judgment and discretion for the body to whom compulsory acquisition powers are granted, subject ultimately to the supervisory jurisdiction of the Courts, whether through direct or collateral challenge.

1.72 The grant of the compulsory acquisition power, and every other power, in the draft Order is subject to challenge, as is any subsequent exercise of the power. Indeed, it is settled law that it would be unlawful for the Applicant to seek – post any assumed making of the DCO - to exercise any power of compulsory acquisition under the DCO to acquire land which it did not then require; this is because, if and to the extent that the full 60 metres was no longer required, (i) the substance of the scheme would – in respect of the surplus land no longer required – have changed and (ii) the power of compulsory acquisition would enure only in respect of such land as was still required – i.e. to the extent any compulsory acquisition power covered surplus land no longer required, it would – to that extent – have been effectively abandoned (see for example and generally, Grice v Dudley Corpn [1958] 1 Ch 329 – attached as Annex 1 to this hearing summary). The ability to challenge the exercise of compulsory acquisition powers provides the necessary check and balance.

1.73 The Land Interest Group raised concerns as to how the landowners would know where the infrastructure had been installed and requested that some form of mechanism/process be provided for and secured in the draft Development Consent Order via one of the management plans.

1.74 The Applicant explained that the process of finalising the detailed design will be completed following extensive discussion with the landowners and their agents, the Agricultural Liaison Officer being an important point of contact. The measures in the outline management plans ensure that the final design of the cable infrastructure and the final extent of the rights and restrictive covenant sought will have been arrived at via an iterative and constructive process in which landowners will have been involved. The Applicant also explained that it is in its commercial interest – and, having regard to delivering an economic generating station, in the public interest - to acquire rights over the minimum amount of land possible. The Applicant has to develop an economic and efficient scheme, and if it was to spend money on acquiring land that is not required for the authorised project, the Applicant will not meet the economic and efficiency tests prescribed by OfGem.

1.75 Notwithstanding the Applicant's position that there is already a check and balance inherent in the process of exercise of compulsory acquisition powers, in acknowledgement of the practical concerns raised by the Land Interest Group, the Applicant has updated the Outline Soil Management Plan (paragraphs 2.9 and 3.18) which comprises Appendix 14 to this Deadline 5 response to provide for a process by which the Applicant would, via the ALO, provide the landowners and tenants with copy plans relating to their landholdings as follows:

- Prior to the start of the construction works on their landholding, cable installation plans showing the proposed locations of the cable trenches, soil storage areas, temporary haul road, joint bays and link boxes within the Order Limits: and

- Following the installation of the cable circuits on their landholding, "as built" plans showing the location of cable ducts, joint bays, link boxes and cable safety zones and within the Order land the extent of the easement and restrictive covenant over their land.

1.76 The Applicant would point out that the as-built plans will not necessarily reflect the previous cable installation plans as it may be necessary for changes to be made to the cable installation plans to accommodate unforeseen site or engineering constraints. In the event that changes are needed to the cable installation plans the ALO will provide revised plans to the landowners and tenants.

1.77 A point arose regarding whether Lincolnshire Country Council were alleging that the Environmental Statement was not fit for purpose and whether there was a need for further environmental information. The ExA pointed out that if it was determined that further environmental information was required, the ExA would be required to suspend the examination. LCC confirmed that it was not taking such a point.

Land requirement at the substation

1.78 The ExA requested clarification whether the amount of land required for the substation, (to be acquired freehold) will vary depending on the choice of AIS/GIS technology, given that the footprint of the buildings will be different. The Applicant confirmed that whilst the two technologies may result in different configurations in terms of the footprint of the buildings which will house the substation, the area of proposed freehold acquisition of land goes beyond that which is required for the physical building comprising the substation. This is a result of the need to install drainage systems for the substation; the need to allow access for maintenance purposes; and the requirement for appropriate landscaping and fencing of the entire substation area. As a result, the overall footprint of the substation is not determined solely by the choice of switchgear, and it will be the same overall footprint whether AIS or GIS is used.

1.79 Further, the Applicant referred to Figure 7.1 of the Outline Landscape Strategy and Ecological Management Plan (document reference 8.1) [REP4-054], which shows the indicative landscape scheme at the substation. The Applicant explained that it is not permitted to plant full sized trees within the land shown coloured pale green because of the presence/proximity of existing onshore turbines operated by EDF. In a "Good Neighbour Agreement" that is currently in negotiation with EDF, the Applicant is undertaking not to plant large trees within a buffer of the turbines (the area shown coloured pale green). That reduced the amount of planting possible. If GIS technology were to be utilised (which has a smaller building footprint) a greater amount of planting could be carried out which would help to mitigate the visual impacts on the settlement of Bicker, which is the most sensitive receptor to the south-east of the substation site.

1.80 The Applicant noted that the final design of the landscaping has not been fixed, and will be agreed with Boston Borough Council in accordance with Requirement 6 of the Draft DCO. The Applicant confirmed that if a design were agreed with Boston Borough Council which, for whatever reason, did not require the full possible extent of the landscaping, the Applicant would not exercise powers of compulsory acquisition to acquire the full extent of the land.

Item 11- To seek to establish that all reasonable alternatives to compulsory acquisition have been explored, including:

a) progress in acquiring land by negotiation wherever practicable

1.81 The ExA commented that the schedule of negotiation with landowners that the Applicant submitted at Appendix 43 Deadline 4 [REP4-073] shows the amount of activity with landowners, only one agreement has been reached. Martin Wheeler of Ardent, who are the agents for the Applicant, reported the Applicant has signed heads of terms with 3 further parties, and has agreed terms (albeit not yet signed) with two statutory undertakers, bringing the number of agreements to 8, one of those being for the acquisition land at the main substation.

1.82 The Applicant confirmed that negotiations with the Land Interest Group are progressing well. In response to submissions towards the end of 2015 that the landowners would not accept a permanent easement, the Applicant proposed a private treaty alternative of a time limited easement to all landowners in December 2015. The Applicant met with the Land Interest Group on 3 and 22 December 2015 to discuss technical matters, and a further meeting was held between the parties on 14 January 2016 regarding the commercial terms. Momentum has been building with further meetings during the week of the hearings, 19 – 22 January, with the lead members of the Land Interest Group (Robert Hurst, Giles Johnston and Louise Staples from the National Farmer's Union) who are representing landowners and occupiers along the route as the Lincolnshire Association of Agricultural Valuers member component of the Land Interest Group represent the majority of the landowners and occupiers.

1.83 The Applicant thanked the lead members of the Land Interest Group (Robert Hurst, Giles Johnston as well as Louise Staples of the NFU) for their efforts in the ongoing discussions to reach agreement.

b) The Applicant's commitment to securing necessary land by agreement including the potential use of alternative dispute resolution techniques

1.84 The Applicant explained that it continues to seek to reach agreement with all affected parties and an enhanced, time limited, financial incentive offer has been made. The principle commercial terms of the incentive offer have now been agreed with the LIG and the Applicant is confident that an increased number of signed heads of terms with landowners will be achieved before the end of the examination.

1.85 The offer of site meetings has been reiterated and these have been taken up by a number of landowners and are to be scheduled as a matter of urgency. Where parties are not represented by agents, the Applicant continues to make contact by e-mail and telephone and is hopeful that agreement can be reached. The Applicant reiterated that it is keeping tenants informed of progress and explained that its strategy has first been to engage with the landowners as they have the capacity to grant the necessary rights, then to ask the landowners to bring the tenants into the commercial discussions when those discussions are advanced. The LIG has now asked that the Applicant leads discussions with the tenants, and the Applicant will seek to do so where appropriate.

1.86 The Applicant commented that alternative dispute resolution is a 'fall back' procedure to be utilised when face-to-face negotiations are unsuccessful. The Applicant explained that negations with the Land Interest Group and other land owners and interested parties were progressing well therefore alternative dispute resolution is not required at this stage.

1.87 Robert Hurst on behalf of the Land Interest Group confirmed that negotiations were progressing well and that there was no need for alternative dispute resolution at that point. Robert Hurst continued to explain that as part of the negotiations the Applicant and Land Interest Group had been considering how disputes would be dealt with, and discussing a form of wording to be included in relevant private treaty documentation.

1.88 The ExA acknowledged that alternatives to the acquisition of permanent rights had been considered so there was no need to discuss that element of Item 11 further than it had been in the Issue Specific Hearing on Local Impacts held on 19 January.

Item 12- To seek to establish that any potential risks or impediments to implementation of the scheme have been properly managed, including (a) any perceived impediments to obtaining any operational and other consents and to achieving the required connection to the National Grid

1.89 The ExA noted that this CA Agenda Item should have stated that the discussion will draw on responses to the ExA's Second Written questions CA 2.11 and CA 2.12, in addition to CA 2.13.

1.90 The ExA noted that the dis-application of the Sandhills Act had been considered at agenda items 4 and 8 above. Lincolnshire County Council, confirmed that it is content for the Sandhills Act to be dis-applied by Article 6 of the draft Development Consent Order (please see comments at paragraph 1.9 above in this regard).

1.91 As explained as paragraph 1.19 above, National Grid submitted a Joint Statement to the ExA on the 20th of January which sets out the agreed position regarding the connection/land at Bicker Fen.

1.92 As noted at paragraph 1.27 above, consent under section 135 of the Planning Act 2008 has been given by the Commissioners and the HEHRE.

1.93 The ExA noted the current status of SoCGs between the Applicant and the Environment Agency and Internal Drainage Boards as set out as paragraphs 1.20 and 1.24 above respectively. The ExA asked the Environment Agency's representative, Carol Bolt, to confirm that as a matter of procedure consent cannot be given to the dis-application of legislation for the purpose of section 150 of the Planning Act 2008 until protective provisions have been agreed. Carol Bolt confirmed that is the case and that the Environment Agency has a standard form of consent letter for the purposes of section 150. Carol Bolt also advised that the protective provisions were close to being agreed and that following agreement the Environment Agency would be in a position to issue a consent letter.

1.94 The ExA noted that the Internal Drainage Boards representative, Andrew Carrott, expressed an equivalent opinion during the Issue Specific Hearing on Local Impacts held on 19 January 2016.

1.95 The Applicant confirmed that it is of the same view as the Environment Agency and Internal Drainage Boards as regards procedure and progress and that the Applicant would continue to progress negotiation of the protective provisions to agreement as soon as possible.

Item 13 – To establish that the proposed interference with rights is necessary and proportionate, including with reference to Protocol 1 Article 1 of the European Convention on Human Rights, including:

a) The Applicant's proposed amendments to the restrictive covenant

Restrictive Covenant

1.96 The Applicant explained that, in the event compulsory acquisition powers were granted for the cable easement, it would be unwise not to have a means of protecting the public – including through a well-established mechanism (restrictive covenants) for putting people (including prospective purchasers and any future tenants of the land) on notice - from possible harm/injury which may result from interference with the cables. The restrictive covenant needs to be imposed on the land in which the cables are installed irrespective of who presently owns it; for example, the Environment Agency and other statutory bodies have powers of alienation, and successors in title and any other occupiers of the land will need to be made aware of the presence of the infrastructure.

1.97 Carol Bolt on behalf of the Environment Agency, commented that in her opinion the 'carve out' for bodies exercising statutory functions should be applied to the restrictive covenant in its entirety; not just paragraph (c).

1.98 The Applicant acknowledged that a number of landowners and statutory and non-statutory undertakers (including the Environment Agency, Internal Drainage Boards and Lincolnshire County Council in its capacity as local highway authority) have raised concerns regarding the imposition of a restrictive covenant and that the Applicant undertook to review the form of restrictive covenant included in the Application draft Development Consent Order [APP-010] to take account of the concerns raised. This resulted in the *Note on proposed modifications to form of Restrictive Covenant* which formed Appendix 30 to the Applicant's Deadline 4 response [REP4-060] ("the RC Note"). The RC Note included a proposed amended form of restrictive covenant and an explanation of the reasons for the changes.

1.99 Before proceeding to explain the changes, the Applicant noted that since submission of the RC note, discussions had taken place with the Land Interest Group, Environment Agency and Internal Drainage Boards and that further amendments had been proposed by the Applicant. The Applicant explained that these would be flagged, where appropriate, during the explanation of changes made to the five paragraphs comprising the form of covenant.

1.100 The Applicant explained that paragraph (a) of the restrictive covenant seeks to prevent anything being done on the relevant land parcels for the purpose of the erection of any buildings or construction etc. which may damage the integrity of the cables or prevent them from being easily accessed for the purpose of maintenance and, if necessary, repair.

1.101 The Applicant explained that concerns had been raised that paragraph (a) would appear to prohibit works of any kind upon land. To address this concern, the Applicant proposed to re-word the covenant to prohibit specified activities *unless* the Applicant's consent is obtained and to limit the prohibition on "works of any kind" to intrusive works, such as the construction of foundations and footings. The Applicant noted that, subject to any comments other parties may wish to make, the amendment had been well received.

1.102 Paragraph (b) of the restrictive covenant seeks to prevent the construction of hard surfaces on the relevant land parcels without the consent of the Applicant. Again, this restriction is imposed to protect the integrity of the cables and to ensure that they can be easily accessed for the purpose of maintenance. The Applicant's consent can however be sought for such activities and, where the Applicant is satisfied that the proposed works do not pose a risk, such consent will be readily given.

1.103 The Applicant explained that concerns had been raised by the Land Interest Group that paragraph (b) would prevent the repair of existing farm access tracks, and the laying or re-laying of hard core surfaces, without the Applicant's consent. To address this concern the Applicant proposed to amend the covenant to make it clear that it does not relate to existing hard surfacing or works consisting of the laying or re-laying of hard core surfaces/tracks that do not involve manholes, access chambers or other access points on the surface of the land.

1.104 Parties also questioned the appropriateness of the reference to increased expense in paragraphs (a), (b), and (d). In acknowledgement of this, reference to expense was removed from paragraphs (a), (b) and (d), so that "materially more difficult or expensive to maintain the authorised project" reads "materially more difficult to access or maintain the authorised project". The Applicant noted that, subject to any comments other parties may wish to make, the amendments to paragraph (b) had been well received.

1.105 Paragraph (c) of the restrictive covenant seeks to prevent excavations or other agricultural practices from being undertaken on/in the relevant land parcels below a depth of 0.6 m from the surface of the land, without the consent of the Applicant. The purpose of this restriction is to protect the apparatus from interference and/or damage and to protect members of the public/landowners from associated injury.

1.106 The Applicant acknowledged that the Environment Agency, Internal Drainage Boards and Lincolnshire County Council in its capacity as local highway authority, had raised concerns that paragraph (c) would prevent them from carrying out their statutory functions. While the exercise of statutory functions cannot be restricted by covenant, to alleviate the concerns expressed by these bodies, the Applicant amended paragraph (c) to explicitly exclude works reasonably required to be carried out by a body exercising its statutory functions or statutory rights.

1.107 The Applicant explained that the Land Interest Group had also raised concerns that paragraph (c) would prevent farmers from draining their land and carrying out day-to-day agricultural activities without obtaining the Applicant's prior consent. To address this concern activities were specified which would not jeopardise the physical integrity of the proposed development, which may be undertaken without the need to obtain the Applicant's consent. The Applicant explained that since submission of the RC Note, further discussions had taken place with the Land Interest Group with a view to further amending the covenant.

1.108 Paragraph (d) of the restrictive covenant seeks to prevent the risk of damage associated with the planting of deep rooted plants and shrubs above the installed infrastructure. The Applicant's view is that the protection of the cables, both for system integrity and for the safety of the public, is paramount in determining what restrictions are required in proximity to the cables. Deep rooted species have the potential to affect the integrity of the cable ducts and ultimately the cables themselves, should roots grow between or under ducts.

1.109 Concerns were raised by the Internal Drainage Boards that paragraph (d) would appear to prohibit cutting vegetation within watercourses and along bank tops. To address this concern, the covenant was amended to make it clear that it does not relate to existing planting or growing without consent (including permitting such growth.) The Applicant acknowledged that a further concern had been raised by both the Internal Drainage Boards and Land Interest Group following review of the RC Note, that landowners should not be responsible for natural regeneration. To address this concern the Applicant has subsequently removed the words '(including permitting growth)' from paragraph (d).

1.110 Paragraph (e) of the restrictive covenant seeks to prevent any works which may render the authorised project or any part of it in breach of any statute or regulation for the time being in force and applicable. No concerns were raised nor amendments proposed to this paragraph prior to, or during, the CA Hearings. However, following discussions with the Land Interest Group, the Applicant has agreed to amend paragraph (e) so that it only relates to activities *which the landowner can reasonably* foresee may interfere with the exercise of the rights set out in this Schedule 5 or the use of the authorised project or in any way render the authorised project or any part thereof in breach of any statute or regulation for the time being in force and applicable thereto.

1.111 Following explanation of the amendments set out in the RC Note, the Applicant addressed the point raised by Carol Bolt on behalf of the Environment Agency, i.e. that the 'carve out' for bodies exercising statutory functions had only been applied to paragraph (c) of the covenant. The Applicant explained that statutory functions cannot be restricted by covenant in any event, but that an express carve-out had been added to paragraph (c) because that was the paragraph the Environment Agency and Internal Drainage Boards had expressed concerns about in their representations.

1.112 The Applicant welcomed the feedback that had been received from the parties on the form of the restrictive covenant and continues to liaise with the parties following the Hearings. A further revised form of covenant which has been agreed with the Land Interest Group, Environment Agency, Internal Drainage Boards and Lincolnshire County Council in its capacity as local highway authority, is included at Schedule 5 of the revised draft Development Consent Order (Revision F) which forms Appendix 22 to the Applicant's Deadline 5 response.

1.113 Carol Bolt on behalf of the Environment Agency confirmed that following consideration of the Applicant's *Response to Environment Agency representations on form of Restrictive Covenant* [REP4-062], and subsequent written clarifications provided by the Applicant, the Environment Agency is satisfied that the Applicant requires powers to impose the restrictive covenant on Environment Agency land, and that the Environment Agency will not be prevented from exercising its statutory functions on its or other Order land.

1.114 Simon Randle on behalf of Lincolnshire County Council commented that the Council 'wears various hats'. He acknowledged that concerns of the Council in its capacity as local highway authority had been addressed in part by the 'carve out' at paragraph (c), but explained that the Council also had concerns that paragraph (a)(ii) may prevent the carrying out of works in its capacity as local highway authority. Simon Randle acknowledged that it had been made clear that the Applicant did not intend to restrict the exercise of the Council's statutory functions so the Council should be satisfied, but that he would require that to be express.

1.115 The ExA asked the Applicant to consider whether the definition of "building" included in draft Development Consent Order (Revision E) [REP4-042] is sufficient for the purposes of the restrictive covenant. The Applicant is satisfied that the definition is consistent with those included in other Development Consent and Transport and Works Act Orders and, read in conjunction with sub-paragraph (ii) of paragraph (a), is sufficient and appropriate the purposes of the restrictive covenant.

b) The effect of compulsory acquisition on the operation of agricultural and other businesses and activities

1.116 No comments were made above and beyond those detailed in (a) above and set out in the Written Summary of the Applicant's Oral Case put at Issue Specific Hearing on Local Impacts on 19 February 2016.

Item 14 – Authority to survey and investigate the land under Article 13

1.117 The ExA acknowledged the Applicant's response to ExA Second Written Question CA 2.3 included in document [REP2-027], in which the Applicant proposed to amend the descriptions of land comprising plots 03/07, 05/34, 07/07, 11/14, 12/19, 12/23, 15/14, 33/08, 33/09 in the Book of Reference [APP-130] so that they read as follows (proposed text in red): "New rights of access for the purpose of carrying out surveys over…".

1.118 The ExA invited the Applicant to reconsider this proposed form of words, as in the ExA's opinion, it could be construed as limiting the right to a right of access only i.e. not a right to carry out surveys etc.

1.119 The Applicant confirmed that Article 13 of the draft Development Consent Order (Revision E) [REP4-042] authorises entry on to land to inter alia survey or investigate the land, and that the descriptions of the above mentioned plots specifically reference Article 13; not the Articles that authorise compulsory acquisition or others.

1.120 The Applicant also noted that these plots are clearly shown coloured green on the Land Plans ([APP-124] and [REP2-020]) which indicates "Environmental Survey Access", and are not listed in Schedule 5 (Land in which only new rights etc. may be acquired) or Schedule 7 (Land of which temporary possession may be taken) of the draft Development Consent Order (Revision E) [REP4-042]. There is therefore no suggestion that the Order would authorise the use of the land for any purpose other than the carrying out of surveys pursuant to Article 13. However, to put the matter absolutely beyond doubt, the Applicant proposes to amend the descriptions of land comprising plots 03/07, 05/34, 07/07, 11/14, 12/19, 12/23, 15/14, 33/08, 33/09 in the Book of Reference [APP-130] so that they read as follows (new text in red): "New rights (pursuant to Article 13) to survey and investigate, and to take access for that purpose, over…".

1.121 The Applicant proposes to include these amendments in the final draft Book of Reference to be submitted for Deadline 7 (24 February 2016).

Simon Randle on behalf of LCC also confirmed that LCC had no further comments on Article 13 and that the representations from Councillor Davie were made in a personal capacity.

Item 15- To seek to establish that there is a reasonable prospect of the requisite funding for the proposed project and for compulsory acquisition becoming available; including:

a) Aspects of the estimated cost of compulsory acquisition, including estimates of potential costs of claims under section 10 of the Compulsory Purchase Act 1965

1.122 With reference to the Applicant's response to ExA First Written Question CA 1.18 included in document [REP1-044], the ExA asked the Applicant to explain whether sums for claims made under section 10 of the Compulsory Purchase Act 1965 were limited to residential property.

1.123 The Applicant explained that in so far as there is injurious affection i.e. what would be a right of action in nuisance, it is limited in its effect to the McCarthy Rules and to interferences arising as a result of the construction of the authorised project with the rights of those whose land is not compulsorily acquired. Compensation may be payable where the interference gives rise to a diminution in value of the person's land.

1.124 The Applicant explained that it had understood that the ExA's First question CA 1.18 related to residential property and so it had not provided detail in that response regarding the likelihood of section 10 claims from non-residential land. The Applicant confirmed that in respect of rural access rights that it is seeking, the likelihood of a section 10 claim by a landowner would be minimal because the Applicant is providing alternative accesses. The Applicant confirmed that, nonetheless, the possibility of a section 10 claim from non-residential landowner has been accounted for in the cost estimates referred to in CA 1.18. The Applicant confirmed that the cost estimate assumes a 'worst case' agricultural land value from the Applicant's perspective i.e. a high value.

1.125 As requested by the ExA, the Applicant submits an extract of *"The Law of Compulsory Purchase"* Second Edition, by Guy Roots QC, Michael Humphries QC, Robert Fookes and James Pereira, as Annex 2 to this Hearing Summary. The extract sets out the rules derived from *inter alia,* the case *Metropolitan Board of Works v McCarthy* (1847) LR 7 HL 243, HL (referred to as the 'McCarty Rules'). It is now established that a claim may only be made under section 10 of the Compulsory Purchase Act 1965 if it meets the requirements set out in the McCarthy Rules.

b) The possible use of debt funding & c) The Joint Venture shareholder's agreement

1.126 The ExA asked what effect the Statkraft announcement would have on the funding of the TKES project. Alex Meredith, the Applicant's commercial contracts manager, who was appearing as a representative of TKOWFL's finance committee, explained that on a project of this scale it is usual for shareholders to change through the duration of this type of project. This has happened before, and in fact Statkraft themselves only joined the project in 2015.

1.127 As a project financing strategy develops, there may also be changes to the sponsors/shareholders of the project. The announcement by Statkraft in December 2015 that it will no longer invest in new offshore wind projects indicates that Statkraft will be seeking a buyer for its shares in the project in the future. Such a sale is entirely in accordance with the market practice that shareholders will change during the development, construction and operation of an offshore wind farm in the UK. This expectation is driven by the scale of the investment, nature and complexity of the asset and risk profile of the sector and for those reasons, changes in shareholders have been a feature of the majority of offshore wind farms developed in the UK.

1.128 The Applicant explained that Statkraft is not pulling out of the project immediately. The existing commitments are still in place. When Statkraft joined in 2015, it was always intended that there would be a review of their involvement at periodic intervals, including award of the Contract for Difference (CfD). The Applicant confirmed that Statkraft have expressed an intention to sell off the totality of their share in TKOWFL but that no date has been formally set for this.

1.129 The Applicant clarified for the ExA that there is no certain date for the next round of CfD auctions but it is expected that it will be at the end of 2016 and that a decision will be released in early 2017.

1.130 The ExA asked the Applicant to explain the apparent approach regarding third party funding and the level of risk to the funding of the project and to the funding of land assembly.

1.131 The Applicant confirmed that the existing Funding Statement still stands, and the two shareholders are able to finance the project, but the Applicant has, through its experience on other projects, seen very good success in financing projects through project finance. The Applicant wishes to keep its financing options open. It may be that, as a result of the eventual approved funding structure for the construction and initial operation of TKOWFL, a project financing solution is the preferred strategy and as a result, some of the land assembly costs will be paid through project financing. This is not a “necessity”, because TKOWFL and its shareholders already hold sufficient resources to fund such costs, and therefore paragraph 3.3 of the funding statement is still correct; but it remains possible that TKOWFL may, in the ordinary course of managing its financing, draw on funds that have been borrowed from banks through a project finance structure.

1.132 Project finance is a process by which the investment required to build and operate an asset is borrowed principally from commercial banks. These banks secure their debt by taking charges over the relevant asset (and its income streams) and the debt is repaid gradually through the cash-flows of the project. An important aspect of project finance structure is that, in the event of a default, there is usually no (or limited) ability for the lending banks to seek recourse against the owners (or sponsors) of the project – their rights are against the project to which they have lent the money.

1.133 Due to the relatively new arrival of large scale offshore wind farms (and consequent paucity of - fully - 'worked' examples), the early sites were seen as too risky to allow for project finance and were therefore financed purely from utilities' reserves. However as offshore wind technology has developed, and the risks dramatically reduced, there has been increasing demand in the financial sector to finance offshore wind farms through project finance structures. This process started in the early 2010s with the re-financing of assets that had already been constructed, but the market has now grown and developed to offer financing to projects in the development phase.

1.134 The first successful project financings of pre-construction offshore wind assets were completed in Europe. However we have now seen a number of successful project financings of offshore wind assets in the UK. Once such example is the Galloper Offshore Wind Farm. That project was to be financed by the two utilities, but towards the end of the project it was seen as advantageous to adopt project financing. RWE, one of the two owners of Triton Knoll Offshore Wind Farm Limited, was one of the sponsors of the Galloper project that successfully raised £1.1bn of project finance in October 2015. It is expected that other transactions will follow the Galloper model, including in Scotland, and the Applicant sees this as a possibility as it moves forward with the TKES.

1.135 In terms of risk, it improves the position, meaning that more financing is available, it goes through greater scrutiny and due diligence by third parties, and the risks are reduced as a result. Both RWE and Statkraft are very creditworthy but if you put the backing of large banks behind them, it improves the project's overall creditworthiness. For everyone concerned it is de-risking the project.

1.136 The Applicant explained that one important matter which has changed since the original Funding Statement was submitted is the success of the Galloper financing. That was the first time that RWE Innogy UK went through the project financing process for an offshore wind farm in development. Indeed RWE on the Galloper project was in a similar situation whereby its partner on Galloper (SSE) announced its intention to sell its 50% share of Galloper in late 2014, and such sale and transfer to new investors was completed in an orderly fashion without impacting the project development. RWE learned a lot from that process, and found that he market is there for project financing these types of projects, and considers it to be a good option.

1.137 As requested by the ExA, the Applicant submits the public statement made by Statkraft to the Examination as Appendix 1 to the updated Funding Statement which it has submitted at Deadline 5.

d) The specification of a time limit in Article 37(3)[1]

1.138 The ExA asked why a time period is proposed at all, and why it is a period of 15 years. The Applicant confirmed that corporate guarantees issued by RWE and Statkraft require the company to hold capital against a potential draw on the guarantee. Therefore, to allow the treasury team to manage the company's capital efficiently it is an essential requirement of all guarantees issued by RWE that it has a time limit and a limit in the quantum that can be claimed.

1.139 The time limit of 15 years is a proposed time limitation set by reference to the limitation period in which either party may make a reference to the Upper Tribunal in the absence of reaching agreement on the quantum of compensation. The Applicant has considered how compulsory acquisition powers are likely to be exercised, and assuming that powers would be exercised along the entire route at the same time, triggering the start of the 15 year period, there would then be a 6 year limitation period in which to refer a claim to the Tribunal, and a further 9 years to determine the claim and pay the monies. Even if the compulsory acquisition powers are exercised on a staggered basis, there is still sufficient time. For these reasons, the Applicant considers 15 years to be more than adequate time for the security to be in place in all circumstances.

e) The nature of the guarantee or alternative form of security

1.140 The ExA asked, given the Statkraft intention to sell off its 50% stake in the project, how the Secretary of State can be certain that a parent company guarantee will be in place.

1.141 The Applicant explained that RWE would ensure that the creditworthiness of the company stepping in to any parent company guarantee will need to meet the creditworthiness of the company stepping out.

Item 15* - Oral representations from affected persons

1.142 No further submissions were made.

*The ExA acknowledged an error in the numbering of the Items in the CA Hearing Agenda [EV-035].

[1] Article 37(3) is numbered Article 38(3) in the revised draft Development Consent Order (Revision F) submitted for Deadline 5.

Item 16 – Objections to compulsory acquisition

1.143 No further comments were made by attendees at the Hearing when the ExA asked if anyone wished to make additional comments. The ExA confirmed that matters relating to compulsory acquisition had been examined to their satisfaction during the Compulsory Acquisition Hearing and the Issue Specific Hearing on Local Impacts and that the ExA had no further comments to make.

2. Annexes

Annex 1 – Grice and Another v Dudley Corporation [1958]

Annex 2 – Extract from The Law on Compulsory Purchase