

## **AQUIND INTERCONNECTOR PROJECT**

### **APPLICATION BY AQUIND LIMITED FOR AN ORDER GRANTING DEVELOPMENT CONSENT**

#### **TRANSCRIPT OF ORAL EVIDENCE TO BE PRESENTED AT COMPULSORY ACQUISITION HEARING 1 AND 2 10<sup>TH</sup> AND 11<sup>TH</sup> DECEMBER 2020**

#### **DEADLINE 5 (30<sup>TH</sup> NOVEMBER 2020) SUBMISSION ON BEHALF OF PORTSMOUTH CITY COUNCIL (PCC)**

### **1.0 Introduction**

- 1.1 Portsmouth City Council ('PCC') is an Interested Party and Affected Person pursuant to the Planning Act 2008 in relation to AQUIND Limited's ('Aquind' or 'the Applicant') application under the Planning Act 2008 (as amended) for a Development Consent Order (DCO) in respect of the AQUIND interconnector (the 'Project' or 'Proposed Development') : a 2000MW subsea and underground High Voltage Direct Current (HVDC) bi-directional electric power transmission link between Normandy in France and the South Coast of England.
- 1.2 PCC is due to attend the Compulsory Acquisition Hearings programmed for 10<sup>th</sup> and 11<sup>th</sup> December 2020 and make submissions at that hearing.
- 1.3 The following is provided in order to meet the Examining Authority's ('ExA') requirement for a full transcript of any oral submission PCC intends to make at the said hearing as clarified with the Examining Authority (ExA) in PCC's letter of 23 November 2020 to which the ExA responded on 25 November 2020 confirming the proposed approach.
- 1.4 PCC is an Affected Person and has multiple plots affected by the Proposed Development; they are detailed for information as Appendix 1 to this note. PCC is also a relevant Local Authority. The transcript below provides details of the contributions that PCC will be making to both CAHs, in our role as Local Authority and as a directly Affected Person.

### **2.0 SUMMARY OF CA ISSUES**

- 2.1 s.122 of the Planning Act 2008 is one of the most fundamental and important aspects of the DCO regime which an applicant must meet. It provides that a DCO may authorise an applicant (which of course under the 2008 Act can be a private body not a public authority with statutory enabling powers) powers to compulsorily acquire land but *only if* the applicant can satisfy the Secretary of State that:

- (i) the land identified within the Order is **required** for the development to which the consent relates, or is required to facilitate, or is incidental to, the development, or is replacement land given in exchange under section 131 or 132, and
- (ii) there is a **compelling case in the public interest** for the compulsory acquisition.

2.2 As set out in the Governments CA Guidance <sup>1</sup> applicants “*must therefore be prepared to justify their proposals for the compulsory acquisition of any land to the satisfaction of the Secretary of State*” [7] [emphasis added].

2.3 It is also correct to note that s123 of the 2008 Act must also be met in order for such powers to be granted namely that one of three conditions is met by the proposal. These are (1) the application for the order included a request for compulsory acquisition of land to be authorised - in which case the proposals will have been subject to pre-application consultation, and the other pre-application and application procedures set out in the 2008 Act have been followed; or(2) if the application did not include such a request, then the relevant procedures set out in the Infrastructure Planning (Compulsory Acquisition) Regulations 2010 have been followed; or (3) all those with an interest in the land consent to the inclusion of the provision.

2.4 A number of general considerations also have to be addressed either as a result of following applicable guidance or in accordance with legal duties on decision makers. These are that:

- I. all reasonable alternatives to CA must be explored;
- II. the applicant has shown that it has a clear idea of how it intends to use
- III. the land and to demonstrate funds are available;
- IV. there are no legal impediments to the implementation of the scheme
- V. the applicant can satisfy the decision maker must that the purposes stated for the acquisition are legitimate and sufficiently justify the inevitable interference with the human rights of those affected.

2.5 As a preliminary matter the CA Guidance also states [25] that:  
*‘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.’*

2.6 It is also clearly the case that CA powers can only be granted by the SofS under the 2008 Act where s31 and s 115 apply i.e. it can be shown that the development the subject of the DCO properly requires “development consent” “*to the extent that the development is or forms part of a nationally significant infrastructure project*” and that the development is “(a) *development for which development consent is required, or (b) associated development or(c) related housing development (s115(1)).*”

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<sup>1</sup> Planning Act 2008 Guidance related to procedures for the compulsory acquisition of land Sept 2013

- 2.7 PCC's position as a relevant local planning authority and IP as well as that of an affected person is one of objection and in particular in the context of the proposed CA powers that the applicant fails to meet a number of the significant and requisite legal tests in order to justify the acquisition of the Order land which it has an interest in.
- 2.8 PCC also objects to the purported proposed powers of temporary use or temporary possession which is relevant to the ExAs considerations in the CA context because of the real nature i.e. permanent nature of some of those so called temporary powers.

#### Efforts to negotiate

- 2.9 PCC has set out its concerns about the paucity of Aquind's approach to negotiations prior to making its application from the start e.g. letter to the Inspectorate dated 28 November 2019. Its attitude is highlighted by the issues that have arisen over highway subsoil owners and the rather peculiar if not arrogant assumptions that such owners will not bother to seek compensation for the interference by Aquind of their legal rights. This is obviously not how other applicants have addressed this same issue and PCC considers at the very least the ExA and the SofS should condemn this sort of approach and attitude.
- 2.10 With regard to PCC's own interests the Applicant has stated its intention to seek to agree the land and rights sought in the draft DCO by private treaty (in the Statement of Reasons **[APP-022]**) however, Heads of Terms were not issued to PCC until after the Application was accepted for Examination.
- 2.11 This is an extraordinary approach for the applicant of a DCO to take towards a major land holder.
- 2.12 PCC has of course endeavoured to engage with Aquind and despite productive meetings held since that time between the Applicant's and PCC's respective agents, meaningful progress has not yet been made to agree even principal Heads of Terms, and a draft easement detailing the rights sought by the Applicant is yet to be issued. It is very much the experience of PCC that there has been no demonstrable efforts made by the Applicant to satisfy the requirements of the Guidance, and the use of compulsory acquisition powers can certainly not be demonstrated to be only have been sought where attempts to acquire by agreement have failed i.e. as a matter of last resort. There were no attempts made at all to acquire by agreement prior to the application.
- 2.13 A legal agreement is essential to ensure that the concerns PCC as in terms of the construction and operation of the Proposed Development are properly addressed, and PCC requests that the Applicant seeks to satisfy the

requirements of the Guidance and meaningfully engages with PCC to reach a legal agreement before the close of Examination.

Order Land is required for the development in accordance with the 2008 Act

- 2.14 PCC has set out in a number of previous representations its views as to the wide breadth of powers it is seeking in respect of the Order land and the unjustified flexibility it seeks in order later to identify important details of the cable route and what will determine that route such as whether the construction will use HDD or trenching methods. Indeed the person who is supposed to determine these fundamental details is the contractors who have not been identified or appointed and which have had no influence upon the design of the scheme at all.
- 2.15 This approach fails wholly to accord with the legal tests. There is always going to be a conflict to some degree in respect of DCO's between the use of the Rochdale Envelope; identifying justifiable limits of deviation and the need legally to show that all the land is required. The applicant has adopted the circular argument that it will only seek to exercise CA rights over the Order land when it itself decides in future what land it requires but where the arbiter of that decision is not an independent authority or third party.
- 2.16 This does not meet the requirement to show that the all the Order land is 'required' - all the above demonstrates is that the applicant would like as much leeway as possible and correlative wide ranging power to force the acquisition of land and interests when it does not know what it needs yet.
- 2.17 This approach is typified in PCC's view by the inclusion of plot 10-14 some 40,000 sq m of allotment land which the applicant seeks permanent surface rights over as a result of acquiring New Connection Works Rights Classes (a), (b),(c), (d), (e), (f), (g) and (h) as set out in the Land Plans and BoR (doc ref 4.3). Not only has the applicant confused matters from the start (i.e. pre and post application) by stating it only wants to lay the cable through HDD and that it would not interfere at all with surface rights but where that is not assured and indeed where it has chosen not to seek subsoil right alone. Thereafter the insistence on having rights of access across the whole plot is clearly inconsistent with a suggestion that it only wants limited rights. Added to this is the failure to consider whether allotment holders would be affected.
- 2.18 Setting all that aside, PCC will welcome any attempts by the applicant to correct this approach and pare the interference back to that which it can properly justify.
- 2.19 PCC notes that the ExA appears to ask its questions about the commercial FOC infrastructure cabling ('the FOC development') and whether it is associated development under the dDCO session. This issue however clearly has an impact upon CA as well.

- 2.20 PCC has explained how it is clear that the FOC development is not associated development within the meaning of the 2008 Act (under s115) or indeed any development to which the 2008 Act can apply and in light of the AD Guidance<sup>2</sup>. To that end the SofS has no power under the 2008 Act to grant CA powers in respect of the Order land required for this development.
- 2.21 PCC submits that all such Order land should be removed from the DCO.

Funding (see issue 5 of the ExA's Agenda)

- 2.22 As set out in [17 and 18 ] of the CA Guidance the applicant must provide a statement with “ *as much information as possible about the resource implications of both acquiring the land and implementing the project for which the land is required*” and in the event that “*the project is not intended to be independently financially viable, or that the details cannot be finalised until there is certainty about the assembly of the necessary land.... the applicant should provide an indication of how any potential shortfalls are intended to be met.*”.
- 2.23 In addition, the CA Guidance discourages the reliance of applicants upon difficulties with funding which mean that the 5 year period required under Regulation 3(2) of the Infrastructure Planning (Miscellaneous Prescribed Provisions) Regulations 2010 for the service of any notice to treat might not be met. Fundamentally applicants “*should be able to demonstrate that adequate funding is likely to be available to enable the compulsory acquisition within the statutory period following the order being made, and that the resource implications of a possible acquisition resulting from a blight notice have been taken account*”.
- 2.24 PCC has raised this issue before and considers that the Applicant has failed to meet the above and provide sufficient evidence of the availability of funds required for the compulsory acquisition powers being sought, powers which are blighting large areas of land within the Order limits.
- 2.25 Further, once the DCO has been made claimants can make a request for an advance for 90 percent of the compensation owed; the Applicant has not provided evidence that those funds will be available in the event the DCO is made.
- 2.26 PCC considers that in light of the doubts about requisite funding that as a minimum a bond needs to be put in place to ensure that the Applicant can demonstrate it has the resources to fund the proposed acquisition of rights and land which are having a blighting effect on the Order land now.

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<sup>2</sup> Guidance on associated development applications for major infrastructure projects – April 2013

## Impediments

- 2.27 PCC has raised in its earlier submissions (see deadline 4 response REP4-036) concerns about the status of the Aquind project in light of its no longer being listed as a Project of Common Interest and how that impacts upon the application of the TEN-E Regulations. In addition, Aquind made it clear in its appeal against the refusal by Acer to grant exemptions under the TEN E Regulations (which it has recently been successful before the CJEU in overturning it in *Aquind v Acer* T-735/18 2019/C 103/60) albeit without reflecting its non PCI status) that there is a “*legal impossibility for the applicant to operate the proposed interconnector in France without an exemption;*”.
- 2.28 Further the ExA clearly needs to understand what the impact is of this loss of status on the Aquind project upon the need for consents from the French authorities.
- 2.29 Clearly if the prospect of the French side of the project is now under threat that would be a fundamental impediment to the progress of this scheme overall.

## Alternatives

- 2.30 As noted above the applicant must satisfy the SofS that all reasonable alternatives to CA have been explored.
- 2.31 It is still not clear why Portsmouth, the most densely populated city outside London and the UK's only island city, has been chosen as the landfall point for the on-shore cable. Whilst the Applicant suggests the cable route encroaches into the highway as little as is practicable in certain locations this is unavoidable. Implications of cabling through the highway would in fact have far greater an impact than off-road routing and result in severe impacts upon traffic movement with significant disruption and inconvenience to city residents, businesses and visitors. Queueing, diverted or rat-running traffic will significantly impact air quality, detrimentally impairing the ability of PCC to achieve its statutory obligations.
- 2.32 It should also be noted that the approach the Applicant has taken is contrary to the approach by Esso on the recently made Southampton to London Pipeline DCO, where Esso sought to avoid highway land due to the increased likelihood of ‘strike’ from other utilities accommodated in the highway, and the preference to use private agreements with landowners of private land to manage the construction and operational requirements of the project. If the rationale applied by Esso was considered to be sound, resulting in the DCO being made by the Secretary of State, the contradictory position adopted by the Applicant cannot be maintained.

### Highway Land Acquisition (Agenda issue 3)

- 2.33 PCC welcomes the changes made at Deadline 4 by the Applicant, whereby the application for the acquisition of rights over PCC (and other highway authority) owned land was excluded from the Book of Reference, to confirm previous statements made by the Applicant that it was not the intention to acquire rights in highway land owned by highway authorities.
- 2.34 However, the Applicant has not changed its position in respect of providing compensation to owners of subsoil. Despite making references to other infrastructure schemes (HS2, Channel Tunnel Rail Link, Crossrail 1) where compensation and a notional contribution to professional fees was made, the Applicant is irrationally not providing equivalent compensation as the schemes it has identified as providing precedent to the Applicant's approach.
- 2.35 As a commercial promoter, not funded by the taxpayer, the Applicant should be taking a proactive approach in ensuring that the future neighbours of the scheme are provided with an appropriate level of compensation that they could reasonably be expected to receive in accordance with the other infrastructure schemes the Applicant has cited.

### Open Space and Special Category Land (Agenda issue6)

- 2.36 PCC has set out in submissions to date the impact on up to 17 playing fields due to the Applicant's proposals, and these are impacts the Applicant has failed to address or mitigate appropriately in accordance with the harm that would be caused.
- 2.37 The Applicant has stated that whilst it is continuing to seek compulsory acquisition powers for a term of 7 years *'it is not the case that the works will be ongoing...for 7 years'* (*Applicant's Responses to Deadline 2 Submissions'* **[REP3-014]**).
- 2.38 The Applicant stated its position in respect of the impact on Special Category Land in the Statement of Reasons [REP1-025], paragraph 1.5.5:  
*The Applicant therefore considers that the special category land when burdened with the rights sought in the Order will be no less advantageous to any person or the public than it was before, and therefore the test provided for at section 132(3) of the Act is satisfied.'*
- 2.39 PCC considers that the Applicant has failed to identify the long term impacts of the rights sought in the Order due to the potential 7 year displacement of users from Special Category Land. One heavily impacted section of the route is the very heavily utilised Farlington Playing Fields, which accommodates cricket in the summer and football in the winter, along with providing the Victorious Festival with an essential campsite facility.

- 2.40 The impacts at Farlington Playing Fields were recognised by the Applicant in the 'Applicant's Responses to Deadline 2 Submissions' [REP-014], where it confirmed (in paragraph 69 of table 2.12) that '*Despite mitigation measures, Chapter 25 (Socioeconomics) of the ES (APP-140) concludes that there are significant residual effects at Farlington Fields, due to the extent and duration of the project.*'
- 2.41 This acknowledgement by the Applicant is in stark contradiction to the opinion in the Statement of Reasons that section 132(3) of the Act had been satisfied, and the Special Category Land would be no less advantageous. No adequate mitigation to alleviate the impacts of the construction of the Proposed Development have been identified, no replacement land has been provided to accommodate displaced users of Special Category Land, and the Applicant has not sought to limit (in either time or physical area) the extent of the temporary occupation of land, despite stating the works would not be continuing over the 7 year period for which they are applying for powers. It is PCC's view that the Applicant has failed to satisfy the requirements of S.132 and S.133 of the Act, and that powers should not be granted over this land. Further, the Applicant has not sought to consider alternatives (including modifications to the scheme) as is required in accordance with the Guidance, including using HDD beneath Farlington Playing Fields, to minimise the disruption to the Special Category Land and the consequential displacement

#### Milton Piece Allotments (Agenda issue 9)

- 2.42 The ExA within their agenda at 9.6 has asked "The Applicant and PCC to explain their current positions on the Milton Common options [REP1-091] (CA1.3.106)."
- 2.43 PCC's current position is unaltered to that provided in response to CA1.3.106, in that PCC's view is to prefer the route that avoids areas of land that the council has remediated. However PCC remains of the view that the applicant has failed to provide appropriate and necessary information through proper assessment of the route options to demonstrate which route is the safest route for the Examination. This matter is one that PCC continues to discuss with the applicant as we progress associated matters of common ground and disagreement."

#### Fort Cumberland Optical Regeneration Station (Agenda issue 6)

- 2.44 PCC maintains The Applicant has failed to recognise the impact of the temporary and permanent land take at the Fort Cumberland car park. The car park at Fort Cumberland is contiguous to and serves Special Category Land and PCC has argued forms part of the Special Category Land. Regardless of whether the car park itself satisfies the definition of Special Category Land, the users of the car park will be displaced (due to the ORS building, screening and works) and thus the users of the Open Space that the car park serves will



be permanently displaced. It cannot therefore be maintained, as set out by the Applicant in paragraph 1.5.5 of the Statement of Reasons [APP-022] that: *'The Applicant therefore considers that the special category land when burdened with the rights sought in the Order will be no less advantageous to any person or the public than it was before, and therefore the test provided for at section 132(3) of the Act is satisfied.'*

- 2.45 It should also be noted that some of the displacement is unnecessary altogether, as the ORS building exceeds the requirements of the Proposed Development, as confirmed in the Applicant's 'Statement in Relation to FOC (Doc Ref 7.7.1) submitted at Deadline 1): "*Whilst it is not possible to state with absolute certainty the extent to which the size of the ORS is dictated by the proposed commercial use, it is anticipated that approximately two thirds of the cabinets within the ORS will be available for commercial use*".
- 2.46 The Applicant therefore needs to recognise the displacement of users from Special Category Land in consequence of the ORS building, reduce the size of the ORS building (by approximately two thirds), to ensure the land acquisition is proportional to the needs of the Proposed Development. Finally, PCC has raised with the Applicant that they have identified permanent screening/landscaping around the ORS building for which the Applicant is relying on New Connection Rights. The rights sought are inconsistent with above ground and permanent works and the land should be identified as being permanently acquired in the Land Plans. The Applicant's agent issued correspondence on 26<sup>th</sup> November 2020 confirming that it deemed the rights sought in the dDCO to be proportional. It seems completely inconsistent to seek to secure land permanently for the ORS building yet the land required to accommodate screening to the building only requires the acquisition of rights. The Applicant is seeking to artificially reduce the footprint of its permanent acquisition (and consequential compensation liability).

### **Benefits of the Scheme – Need to show Compelling Case**

- 2.47 As set out above the applicant must show and the SofS must be satisfied that there is a compelling case in the public interest to justify the compulsory acquisition proposed by the DCO and which is also relevant to the justifying the interference with human rights.
- 2.48 PCC asks the ExA to note a number of fundamental issues that raise serious questions about the needs and benefits of this scheme. The first is of course that whilst the SofS made the s35 direction in respect of the interconnector scheme in 2018 many things have changed since then including in particular the (non) progress of Brexit with a deal and Aquind's loss of PCI status.
- 2.49 PCC notes that the only NPS to which this project can seek support is EN-1 which the Government has acknowledged as a consequence of recent challenge by Dale, Monbiot and GLP -v- SST [2020] should be reviewed under the 2008 Act given its age. Section 3 of EN-1 [3.1] states on the one hand that "*all applications for development consent for the types of infrastructure covered by the energy NPSs*" should be assessed "*on the basis*

*that the Government has demonstrated that there is a need for those types of infrastructure and that the scale and urgency of that need is as described for each of them in this Part*". In addition, section 3.1 states that "substantial weight" should be given "to the contribution which projects would make towards satisfying this need when considering applications for development consent under the Planning Act 2008". It is clear however that this is a reference only to the projects specifically addressed within EN-1 and the other energy NPS i.e. not interconnectors. In addition, EN-1 specifically refers to interconnector projects at [3.3.33] and confirms that "Increased investment in interconnection is... unlikely to reduce the need for new infrastructure in the UK to a great extent."

- 2.50 The benefits therefore of this proposed interconnector are clearly not recognised as a matter of national policy nor indeed under European policy any more.
- 2.51 In addition, in light of the fundamental questions arising as to the lawfulness of the inclusion of the FOC development as part of this DCO which clearly provides a commercial support for the interconnector then even further issues arise as to the claimed benefits of the scheme.

### **3.0 Closing Remarks**

- 3.1 In summary, the Applicant has not made any meaningful efforts to negotiate with PCC to address the severe and long-lasting impacts of the Proposed Scheme. These impacts will result in the long-term displacement of users of Special Category and Open Space land and there has been no recognition of the consequences of the Proposed Scheme proposals on the users of the Order land. The users of Open Space land and Special Category Land, and the users of the local highway network, have been poorly treated by the Applicant – users of playing fields will be displaced with no replacement land provided, road users will face severe disruption and delays due to the poor routing solution adopted by the Applicant, where modifications and alternatives to the Proposed Development have failed to be considered. Further, owners of subsoil are not being provided with compensation they are rightfully owed, demonstrating the alarming disdain for the key stakeholders to this scheme.
- 3.2 The Applicant has also failed to confirm it will have the funds that it will need to secure the land included in the DCO. The DCO seeks rights for apparatus (the FOCs that will provide excess capacity) that does not form part of the Proposed Development, nor should be considered as Associated Development, and therefore should not be subject to compulsory acquisition powers.
- 3.3 The Applicant has failed to demonstrate that it has satisfied the compulsory acquisition tests, failed to mitigate the impacts of the Proposed Development, failed to demonstrate it has the funds for the powers it seeks, and has attempted to include apparatus that should not be consented under the

Planning Act 2008. It has also failed to show it has explored all reasonable alternatives to CA.

- 3.4 Lastly the applicant cannot in PCC's submission show that it requires all the Order land and that there is a compelling case in the public interest to justify the inevitable interference with the human rights of those affected and to grant this private company CA rights.
- 3.5 It is PCC's position that the SofS must refuse to authorise this applicant the CA powers sought by this DCO and asks the ExA to make that recommendation accordingly.

## APPENDIX 1

The PCC plots affected by the scheme and included in the Book of Reference are:

<b>Plot</b>	<b>Rights</b>	<b>Plot Area m<sup>2</sup></b>
6-10	New Connection Works Rights	3663
7-04	New Connection Works Rights	10814
7-07	New Connection Works Rights	46
7-12	New Connection Works Rights	93174
7-13	New Access Rights	6207
7-14	New Connection Works Rights	3309
7-15	Temporary Use of land	5326
7-16	New Access Rights	188
7-17	New Access Rights	10
7-18	New Access Rights	3
7-19	New Access Rights	651
7-20	New Access Rights	12
7-21	New Access Rights	68
7-23	New Connection Works Rights	93516
7-25	New Connection Works Rights	47892
8-02	New Connection Works Rights	8477
8-03	New Connection Works Rights	33386
8-05	New Connection Works Rights	1402

8-09	Temporary Use of land	2302
8-10	New Connection Works Rights	24684
9-01	New Connection Works Rights	109
9-04	New Connection Works Rights	261
9-06	New Connection Works Rights	69373
9-12	New Connection Works Rights	83
9-13	New Connection Works Rights	1121
9-15	New Connection Works Rights	12
9-16	New Connection Works Rights	8
9-17	New Connection Works Rights	10
9-18	New Connection Works Rights	1214
9-20	New Connection Works Rights	13254
9-29	New Connection Works Rights	4354
10-02	Temporary Use of land	83
10-03	Temporary Use of land	1252
10-12	New Access Rights	212
10-13	New Access Rights	8609
10-14	New Connection Works Rights	45830
10-21	New Connection Works Rights	10152
10-22	New Connection Works Rights	1291
10-30	Permanent acquisition of land	559
10-32	New Connection Works Rights	3990
10-33	New Connection Works Rights	7254
10-34	New Connection Works Rights	3991
10-36	New Connection Works Rights	3689
10-37	New Connection Works Rights	1404

The PCC owned highway land has not been included since the removal of powers over that land was applied at Deadline 4 by the Applicant.