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Aquind Interconnector application for a Development Consent Order for the 'Aquind Interconnector' between Great Britain and France (PINS reference: EN020022)

Mr. Geoffrey Carpenter & Mr. Peter Carpenter (ID: 20025030)

**POST HEARING NOTE IN RELATION TO ORAL REPRESENTATIONS RELATING TO
SCOPE OF AUTHORISED DEVELOPMENT DELIVERED DURING COMPULSORY
ACQUISITION HEARING 2 AND REDUCTION OF LAND TAKE**

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**FOLLOW UP INFORMATION IN RESPONSE TO: (i) REQUESTS BY THE ExA MADE
DURING CAH2; (ii) COMMENTS BY THE APPLICANT MADE DURING COMPULSORY
ACQUISITION HEARING 2**

Submitted in relation to Deadline 6 of the Examination Timetable

**POST HEARING NOTE IN RELATION TO ORAL REPRESENTATIONS RELATING TO
SCOPE OF AUTHORISED DEVELOPMENT**

SECTION A INTRODUCTION

1. For the purposes of seeking powers of compulsory acquisition of land of the Affected Party against its will, the Applicant Limited Company has based its acquisition case on sections 122(2)(a) and (b) of the Planning Act 2008 (“PA 2008”), in particular, exclusively on the basis that: “is required for the authorised development and/or to facilitate the authorised development”. See e.g. paragraphs 4.2, 4.2.1 and 4.2.2, 4.4, 4.9, 4.13, 4.22, 4.23, 4.24, 4.30, 4.31, of **[REP5-034]** Deadline 5 Submission - Late Submission - 7.9.18 Applicant's Transcript of Oral Submissions for Compulsory Acquisition Hearing 1.
2. The dDCO seeks a high degree of ‘Rochdale’ envelope flexibility for a comparatively simple proposal envisaging linking two convertor stations, on opposite sides of the English Channel, to which would be connected two pairs of electrical cables. The scope or extent of the Applicant’s envisaged authorised development directly affects the actual extent of the land envisaged by it to be taken from the Affected Party against its will and this presents hurdles to lawful justification for acquisition.
3. The degree of flexibility sought in relation to the authorised development *here* is in countervailing tension with the degree of “conclusivity” required to be demonstrated to justify the compulsory acquisition of that land. However, that tension is resolved by the express terms of the statutory scheme and the related national guidance terms. Whereas the discretion under section 120(3)-(4) of the PA 2008 to include provisions in the dDCO **[REP5-009]** (as at the date of Deadline 6 submission) is wide: “An order granting development consent may make provision relating to, or to matters ancillary to, the development for which consent is granted”, may provide for frameworks and flexibility of provisions, and may include the provisions in Part 1 of Schedule 5 that include compulsory acquisition of land, the tension is resolved by section 120(7) makes subsections (3)-(6) “subject to the ... the following provisions of [Chapter 1 of Part 7]”. Within Chapter 1, the following section 122 provides for the compulsory acquisition of land only where two preconditions are satisfied: see sections 122(1), and (2)-(3). Thereby, whereas the degree of acceptable flexibility that may be acceptable in isolation under 120(3), it may be unable in law to justify acquisition requirements of section 122 that: the land “*is required* for the development to which the development consent *relates*”; or the land “is required to facilitate” *that* development; and result in an orthodox mismatch of acceptable flexibility and cpo powers.
4. Helpfully, the Secretary of State’s “Planning Act 2008, Guidance on Compulsory Purchase Acquisition of Land (September 2013)” (“PA 2008 CPO Guidance”): “16. There may be circumstances where the Secretary of State could reasonably justify granting development consent for a project, but decide *against* including in an order the provisions authorising the compulsory acquisition of the land. For

example, this could arise where the Secretary of State is not persuaded that all of the land which the applicant wishes to acquire compulsorily has been shown to be *necessary for the purposes of* the scheme. Alternatively, the Secretary of State may consider that *the scheme itself* should be modified in a way that affects the requirement for land which would otherwise be subject to compulsory acquisition. Such scenarios could lead to a decision to remove all or some of the proposed compulsory acquisition provisions from a development consent order.” That is so in this Application.

5. In line with section 122 and 120(7), land can be properly and unexceptionally removed from the scope of the proposed compulsory acquisition provisions in the dDCO where, as appears below, the section 122 tests cannot be, or are not, satisfied in law and fact. Thus, in ordinary operation of the statutory machinery, whilst the dDCO provisions may include particular provisions, it cannot follow that such flexibility as may by degree be considered acceptable for the “authorised development” results in provisions enabling delivery of that same degree of flexibility by means of compulsory purchase.
6. Where compulsory acquisition of land is proposed, in light of sections 120(3)-(4), 120(8), and 122(1) of the PA 2008, the scope of that development must be “carefully scrutinized” in relation to the land of the Affected Party because, if consented, the dDCO would result to take their land and the law requires that intervention to be minimized not maximised. See *Sainsburys* [2011] 1 AC 437 at paragraphs 9 & 11: “interferes least” and may lawfully result to curtail the compulsory acquisition powers sought also. Such “careful scrutiny” may, and here does, result on lawful analysis to reduce the extent of land envisaged to be taken against the will of the Affected Party. The legal principle (colloquially summarised as “least intrusive”) - bites on the exercise of discretions under sections 120(3), (4) and 122 *because* they are envisaged to result in the taking of the land of the Affected Party against their will.
7. During CAH2, the ExA requested a Note on the Scope of Authorised Development, with Extract Plans, to assist it in the Examination of the Applicant’s Case. This is that Note. It is divided as follows:
 - Section B – The Land of the Affected Party;
 - Section C – The Scope of the Authorised Development Applied For & its Rochdale Envelope;
 - Section D – Extent of Development on Affected Party’s Land: Cables
 - Section E – Extent of Development on Affected Party’s Land: Converter Station;
 - Section F – Extent of Development on Affected Party’s Land: Transformers;
 - Section G – Extent of Development on Affected Party’s Land: Fencing & Fear of Trespassers;
 - Section H – Extent of Development on Affected Party’s Land: Volumes & Lightning Masts;
 - Section I - Extent of Development on Affected Party’s Land: Operational Access;
 - Section J - Extent of Development on Affected Party’s Land: “For Commercial Telecommunications”;
 - Section K - Extent of Development on Affected Party’s Land: Construction Access & Pond;
 - Section L - Extent of Development on Affected Party’s Land: Landscaping.

B. The Land of the Affected Party

8. The Land of the Affected Party is shown on: Sheet 1 of Figure 17.2 of [APP-295] and Figure 17.2 of [APP-426] 6.3.17.2 Environmental Statement - Volume 3 - Appendix 17.2 Agricultural Land Classification and Soil Resources; and on the Land Registry Plans in its Written Representations (attached for convenience at **Appendices NSPAD 1-3**). The Design and Access Statement, Rev 02, at [REP1-132], explains:

The Converter Station Area itself is a mixture of arable and grazing farmland. The topography of the Converter Station Area site falls from approximately 97 m to 67 m AOD. Surrounding the Converter Station Area are mixed agricultural fields with established hedgerow boundaries and hedgerow trees...

9. NPPF, paragraph 170(b) requires that planning decisions “recognise” the wider benefits from natural capital including the economic and other benefits of the best and most versatile agricultural land.

C. The Scope of the Authorised Development applied for and its Rochdale Envelope

10. The proposed authorised development is set out on the terms of the dDCO at Deadline 4, published 12th December 2020, at [REP5-009], accompanying “parameter plans” at [APP-012] 2.6 Converter Station and Telecommunications Buildings Parameter Plans, and Table 1 of [APP -359] in relation to the Affected Party’s land. Illustrative drawings show mere examples of what might, not will occur.
11. In summary, the dDCO, related Parameter Plans and Table 1, envisage three volumes on the Affected Party’s land (a Converter Building at its Northern end and two Telecommunications Buildings at its Southern end), with 6 off-the-shelf (or industry standard) manufactured cables situated alongside one other subsurface: 2 x 2 HVDC and 2 x HVAC cables 140mm diameter cables; and 2 “FOC” 30-55m diameter cables. See Plates 3.2, 3.3, 3.5 and 3.24 of [APP-118] of 6.1.3 Environmental Statement - Volume 1 - Chapter 3 Description of the Proposed Development. Each cable is of composite construction, and physically and functionally self-contained, that would be situated also physically discrete from any another cable in ducts. Plate 3.24 shows the typical arrangement of the cables as they would traverse beneath the land of the Affected Party within discrete “cement bound sand ducts” and within “ducts” situated in nearby pairs about 5m apart and with each of the 2 “FOC” cables situated within its own duct alongside the nearby pair. See attached hereto for convenience at **Appendices NSPAD 4-7**. Paragraph 3.5.3.6 of [APP-118] 6.1.3 Environmental Statement - Volume 1 - Chapter 3 Description of the Proposed Development describes that the HV cables: “are designed, manufactured and installed for a *minimum* service life of 40 years.” **Appendix NSPAD 6** is an extract from the Applicant’s website that illustrates a “Typical XLPE Cable” and its composite casing, and also a “Data Cable” and its composite casing. The “Data cables” is also described as an “FOC”. The website published text of the Applicant describes the “Data Cable” as comprising “180” fibres and in [REP1-127] the “FOC Statement”, paragraph 5.2 describes the total number of fibres in the FOC to be “192” such that 12 would be *functionally* related to the HV cables.

D. Extent of Development on Affected Party's Land: Cables

12. As it crosses the Channel, the authorised development comprised of the electricity bearing cables would, within clearly defined parameters of no less than 134 precise co-ordinates demarcating the centre line, adhere to a route within a "Marine Cable Corridor/Order Limits" in paragraph 3 of Works No. 7. No such clear parameter co-ordinates are provided in the dDCO by which to demarcate the centre line of the cables' route as it traverse dry land, and in particular the Affected Party's land. Instead, the route of 6 cables of no more than 140mm diameter each is envisaged to be situated somewhere within an "onshore cable corridor" defined by the Order limits of the dDCO itself. See the *absence* of any nor any such clear co-ordinates in the dDCO for any on-shore cable corridor, Figure 15.6 of [APP-239] (Landscape Planning Designations Onshore Cable Route, Sheet 1); and Figure 24.2, Illustrative Cable Route in **Appendix NSPAD 9**, Sheets 1-3.
13. As it traverses the land of the Affected Party, Figure 24.2, Sheets 1 and 2 show the envisaged "trenching – illustrative alignment" of the pairs of cables in ducts as they might traverse the land of the Affected Party from the nearest "joint bay" south of that land. See "Order limits" outlined in red on [APP-336], Figure 24.2 and Sheet 1, Section 1 attached hereto for convenience at **Appendix NSPAD 9**. Figure 24.2 has a scale in metres (not millimetres). The envisaged on-shore cable route for 6 x cables (4 x 140mm diameter, and 2 x 30-55mm diameter) is envisaged to be situated anywhere within the 'sea of red' coloured land shown within the parameter engendered by the Order Limits themselves. Whilst Figure 24.2, Sheet 1 "illustrates" a trenching alignment in blue cross-hatch, no parameter requires adherence to that merely illustrative route, no clear co-ordinates define the centre line of that route, and no parameters confine the width or depth or extent of that route. Rather, cables may be situated anywhere within the sea of red. However, comparison of that sea of red with the land of the Affected Party shows that the greater extent of its land would be within the Order limits red sea. Such *desired* flexibility of wide land take for relatively tiny diameter cables (the largest no more than a mere *hand span* in diameter) is rationally difficult to follow or justify. See Advice Note 9.
14. Figure 24.2 appears to reflect constraints shown on Sheets 2 and 3 of [APP-013] 2.7 Indicative Converter Station Area Layout Plans. See Key showing "exclusion zones" in cross-hatched blue West and North of the Little Denmead Farm buildings. For example, a south-west to north-east diagonal break in that hatching reflects a similar alignment in the same location as the cross-hatched blue trench alignment illustrated in Figure 24.2, Sheet 1 on the land of the Affected Party.

E. Extent of Development on Affected Party's Land: Converter Station

15. Within the sea of red, the Applicant also envisages situating three buildings within Parameter Volumes on the land of the Affected Party: one Converter Station; and two Telecommunications Buildings. See **[APP-012]** attached hereto in **Appendices NSPAD 10, 11 & 12** for convenience. Table 1 of **[APP -359]** 6.3.3.5 Environmental Statement - Volume 3 - Appendix 3.5 Additional Supporting Information for Onshore Works sets out the *maximum* parameters of the volumes envisaged to be situated within the land of the Affected Party. In essence, within the land of the Affected Party, and above ground level, there would be 3 volumes on that land. The Converter Station volume would extend upwards from its outer parameter up to either 22m or 26m in two different locations and contain a built station and equipment together with apparently up to 8 locations also encompassing a "lightning mast" 30m high exclusively bearing a lightning conductor, and 4 further 4 metre high masts in contrast with dDCO, Works No. 2(p) that envisages "up to 8 lightning masts". i.e. 8 x 30m high structures, and together with an encompassing perimeter fence.
16. Paragraph 3.5.3.18 of **[APP-118]** 6.1.3 Environmental Statement - Volume 1 - Chapter 3 Description of the Proposed Development describes that: "The Converter Station will be designed, manufactured and installed for a *minimum* service life of 40 years. Due to the dynamic nature of power electronics, the control system may need to be replaced at 15-20 years. Some equipment may need to be refurbished/replaced one or more times during the service life of the Interconnector."
17. The Converter Station Volume would be required to contain all of the equipment related to the proposed electricity infrastructure and Sheets 2 and 1 of **[REP1-018]** Deadline 1 Submission - 2.7 Indicative Converter Station Area Layout Plans - Rev 02 show the potential layout within that defined volume. As paragraph 3.6.3.4-.5 of **[APP-018]** describes: "The Converter Station consists of a number of interconnected components which need to be connected sequentially, with the built form for each dictated to a high degree by their function. The components are arranged whilst considering the most efficient connection method between them and the minimum spacing of the equipment to ensure safe operation and maintenance".
18. Further, as **Appendix NSPAD 19** notes:

The convertor features hundreds of sub-modules complete with redundant units. This maintains the station in service at full power even with multiple sub-modules out of service. A key design requirement for AQUIND Interconnector is a considerably high level of energy availability coupled with minimal maintenance requirements. To ensure that no single fault results in a complete loss of the interconnector, AQUIND will be designed as two independent 1,000 MW links. Each link will be fully self-sufficient in terms of control systems, protection systems, auxiliary power supplies and cooling systems. Very few credible faults can result in a complete loss of a 2,000 MW power capability.

F. Extent of Development on Affected Party's Land: Transformers

19. Plate 3.6 [sic] of [APP-118] 6.1.3 Environmental Statement - Volume 1 - Chapter 3 Description of the Proposed Development shows a 3-dimensional illustration of the potential disposition within that Volume and a helpful Key shows the relevant parts. See attached in **Appendices NSPAD 10 & 11** for convenience. Key items 3, 4 and 17 of **Appendix NSPAD 12** show 6 transformers and a spare transformer within the Parameter Volume, the single lightning mast, and a "perimeter fence". The transformers are about 5m x 3m x 4m high and "weigh about 350 tonnes". See paragraph 4.27.5 [REP5-034] Deadline 5 Submission - Late Submission - 7.9.18 Applicant's Transcript of Oral Submissions for Compulsory Acquisition Hearing 1, and the oral evidence of the Applicant's land valuer, Mr Sullivan, at CAH 2:

4.27.5 A transformer has a typical size of 5 m length x 3 m width x 4 m height and seven of these will be located at the Converter Station (six in active use with three required in connection with each HVDC Cable Circuit, and a spare which is critical for the operation of the [application] Development). Where a transformer fails for any reason, it will be replaced by the spare, and in those circumstances the transformer which has failed will be removed and replaced with another spare transformer.

20. The disposition of the transformers, entrance, fence, and lightning mast, are shown on scale CAD drawing Sheet 1 of **Appendix NSPAD 11** and in some detail. 6 transformers are shown and a "spare transformer" is identified. It is evident that there is a space immediately south of the 3 transformers on the North side of the Volume and that that available area is mirrored on the South side of that Volume. The Affected Party reasonably concludes, and the ExA is entitled to similarly (rationally) conclude, that a further spare transformer could be situated adjacent to the existing spare envisaged, and at least a *further* two spare transformers could be situated in the mirror location so as to enable 4 spare transformers to be stored in the Volume for at least 40 years. Mr Sullivan gave oral evidence in CAH 2 that it was not "standard" practice to retain more than one spare on site but, consistent with the disposition shown in **NSPAD 11**, did not dissent from the rational basis that it was possible in this particular situation to keep spare transformers on site. In practical terms, with regard to the efficient equipment layouts indicated on **NSPAD 11**, it cannot be rationally said that: a failed transformer could not (in some way) be unwired and the wires be re-wired to a close by spare (operational) transformer whilst leaving the then redundant transformer in situ. This would obviate any craneage need to relocate a transformer; or that the Volume contains no space where a crane (in whole or unassembled parts), could not be stored were the sole theoretical possibility to be that a transformer had to be unwired, removed off-site, a spare transformer moved to that location and then wired into the then existing cabling in that precise location. The Affected Party notes the theoretical fears expressed by the Applicant's about further spares being theoretically necessary during the 40 year design life of the Converter Station but requests that the ExA can properly resolve those fears by the imposition of a **Requirement** upon Works No. 2(f) to ensure that at least 4 spare transformers be situated within the Volume to address such feared need (if any).

G. Extent of Development on Affected Party's Land: Fencing & Fear of Trespassers

21. Whilst appearing experienced in electricity infrastructure, the Applicant has expressed in paragraph 4.24.5 of its [REP5-034] of Deadline 5 Submission - Late Submission - 7.9.18 Applicant's Transcript of Oral Submissions for Compulsory Acquisition Hearing 1, *fears about trespassers* seeking to access the Converter Station Volume. That Volume would be adjacent to the existing Lovedean Substation operated by very experienced national electricity infrastructure providers knowledgeable of protecting national infrastructure from trespassers. The Substation (and its proposed Western Extension) is encompassed by a perimeter fence that appears to have successfully deterred trespassers since about 1964 when erected, with the Affected Party living cheek by jowl with mutual incident. The Extension would be directly adjacent to the Converter Station Volume and functionally related to it in due course. The Extension permitted by planning permission, reference 13/01025/FUL, includes, on an approved plan, "CAT 2 security fence", i.e. electrified perimeter fencing to deter access. See paragraph 2.6.9 of the Design and Access Statement relating to that that planning permission: "Electrified security fencing, including a new access gate, will be installed during Phase 1 and this will be replaced and extended during Phase 2. The fencing will be given a powdered coating to reduce its visual impact on the landscape." See Final Site Plan, drawing Reference 13/SWA/5547006, Rev P2 identifying the "CAT 2 Security" perimeter Fence around that Extension and also location plan reference 16/SWA/5547021, Rev P0 (identifying the location of the Extension) attached hereto for convenience in **Appendix NSPAD 15** (see Key and perimeter dot/line). The Affected Party notes the theoretical fears expressed by the Applicant's in this location about trespassers near to the Volume but requests that the ExA can properly resolve those fears by the imposition of a **Requirement** upon Works No. 2(t) to ensure that within the Volume, the Converter Station is encompassed by at least a CAT 2 Security Fence, being an electrified fence. Such a Requirement would resolve, within a clear parameter, any desire for adequate control of land outside of the built Station and within that wider Volume.
22. Whilst not yet in the dDCO nor Development Description, such a Requirement would align with the [REP1-031], Design and Access Statement, Rev 02 and resolve the Applicant's fears and desires:

5.2.7 PERIMETER FENCE

5.2.7.1 *A perimeter fence will enclose the Converter Station with an external steel palisade fence and inner electrified fence of approximately 3.0 m height and 4.0 m in height, respectively... The perimeter fence will be 200 m wide x 200 m long, which is the footprint of the [CS].*

5.2.7.2 *To ensure safety from electrical equipment a minimum of 2 m separation must be maintained between the fence and the main earth system and equipment connected to it (this is applicable where a perimeter fence is independently earthed). A minimum 2.0 m wide path shall be provided within the [CS] fenced compound to allow for future vehicular access for maintenance and inspection.*

5.2.7.3 *The [CS] perimeter security (fencing and gates) will be designed to National Grid Technical Specifications which state that the overall height of the perimeter fence (external fence) should be 3 m above base level with an electric pulse fence installed within the security fence (internal).*

H: Extent of Development on Affected Party's Land: Converter Station Volumes & Lightning Masts

Volumes

23. The Parameter Plans envisage the built Converter Station to be situated within an essentially accordion-like Parameter Volume expressed by: a choice of Options B(i) and (ii) for the location of the Volume; and a choice of heights of either 22m or 26m; and with “up to 8 lightning masts” situated in as yet unidentified volumes extending a further 4m metres above either the 22m high volume or above the 26m high volume, of sufficient volume to each contain a mast structure within it together with further volumes to contain cables suspended between each such volume.
24. The Affected Party requests that the ExA impose a **Requirement** to ensure, upon an appropriate and objectively verifiable trigger point, concertina of the accordion-like Converter Station Volume Parameters to ensure, within the land of the Affected Party that would otherwise be blighted during a period of indecision by the Applicant:
- a) Of B(i) and B(ii), the said Option B not resulting to be executed is required to be deleted from the dDCO and from the Certified Plans so that no reliance can be placed on it at thereafter;
 - b) Of the choice of 22m or 26m high Converter Station Volume, the resulting Option B height choice is required to truncated to match the to be as-built Converter Station, so that, if a 22m high building is executed, no reliance can be placed on the balance of 4m (up to the ceiling of the 26m high volume) of resulting air space remaining within the land of the Affected Party.
25. The trigger point should be very early on in the dDCO gateway provisions or upon the initial grant of a DCO as it otherwise appears that the Affected Party's land would be practically blighted during the currency of the availability of choice of Option B(i) and (ii) locations but simultaneously unable to claim blight compensation due to the Applicant being able to *not* rely on the Option resulting in added blight.

Lightning Masts

26. As the Design and Access Statement notes, the proposed Authorised Development appears to “need” lightning masts to safeguard the electricity infrastructure from strikes and notwithstanding that the ES Major Disasters Chapter appears not to include strikes as a cause of ongoing supply issues or disaster.
27. dDCO Works No. 2(p) envisages “up to 8 lightning masts”. [APP-118], 6.1.3 Environmental Statement - Volume 1 - Chapter 3 Description of the Proposed Development, describes:

3.6.3.12 The lightning masts can generally be up to 4 m taller than the tallest building, are tall, narrow structures, with catenary wiring strung between them to shield the outdoor equipment from direct lightning strikes. These are likely to be located around the HVAC yard (see item 14 in Plate 3.7).

28. Plate 3.7 is in **Appendix NSPAD 12** and identifies only one “14” and not “up to 8” “14’s”. On further scrutiny, there appear to be “8” structures around the switchyard shown as thick black lines similar to “14”. **[REP1-032]**, Design and Access Statement, Rev 2, recently further explains: (Emphasis added)

5.2.3.14 Within the AC switchyard lightning masts will be installed to protect the outdoor high voltage equipment from direct lightning strikes. These will consist of steel masts, from 26 – 30 m in height located around the switchyard, as shown in Plate 5.8. Depending upon the design of the switchyard, thin steel wires may be strung between the masts, to provide additional protection from lightning strikes. Shorter lightning masts, about 4 m high, will be installed on the Converter Building to protect it from direct lightning strikes...

5.3.1.6 There will be a need for lightning protection masts at locations within the compound to be determined by detailed design. These are required to be 4 m above buildings and equipment. The masts are shown indicatively at 30 m high, but this may reduce if building heights are reduced. The lightning masts will be the only equipment which extends above +111.10m AOD and has been assessed on this basis...

9. Lightning masts of up to 30m in height, will be needed and could be attached to the Converter buildings Buildings and/or located within the compound defined on the Parameter Plans.

7. “Lightning masts of up to 30m in height, will be needed and could be attached to the Converter Hall Buildings and/or located within the compound defined on the Parameter Plans.”

- *The indicative elevation (Plate 7.87.9) shows potential lightning masts (the two high structures on the left of the image) in relation to the heights of the Converter Station buildings.*

Reflects a functional requirement of the type of infrastructure (NPS EN-1, Para 4.5.1)...

29. Plate 5.8 illustrates a General Electric “Typical Lightning Mast” structure and an apparent volume.

30. The Affected Party recognises that **[APP-359]** 6.3.3.5 Environmental Statement - Volume 3 - Appendix 3.5 Additional Supporting Information for Onshore Works, includes in Table 1 (a so-called) “Parameter Table”. However, row 4 merely refers to “Height of tallest element” as “Maximum 30m” and Notes: “Lightning conductors” and without more. No parameter, let alone a clear parameter, defines the dimensional volume of that element outside of the Converter Station Parameter Volume, nor fixes its number. By contrast, structures that have a volume are clearly defined. See row 6 and 8 of Table 1.

31. In fact, as must have been known by the Applicant for some time now, the *Application* Converter Station Parameter *Volume* for which it seeks consent currently does *not* match the height apparently required for its taller envisaged development nor the shape in 3 dimensions of all of envisaged external works’ volumes. The Affected Party is unaware of any environmental impact evaluation or objective visual evaluation of up to a 30m high structure(s) on the Volume perimeter but notes that lightning masts appear necessary to the functioning of the CS and their absence appears to engender a likely significant functional effect in respect of, for example, major accidents or disaster from lightning strike.

32. The Affected Party has submitted previously evidence relating to the Lovedean Substation planning permission, reference 32642/003, for a 30m high telecommunications mast, and this includes plans

showing the nature of a 30m high structure in an approved scale plan, reference 1250/100/GA/303, Rev B. See attached hereto at **Appendix NSPAD 13** for convenience. Applying the wording of Works No. 2(p), this indicates that there could be up to 8 such similar structures in this nearby location within and around the perimeter of the Eastern side of the Converter Station Parameter Volume but that could not currently *fit within* the 22m high or the 26m high Parameter Volume shown in either Option B(i) or (ii).

33. Similarly, it appears envisaged that there would be a number of “shorter masts”, 4m high and also of unknown volume, on top of the Converter Station Halls not referred to in the ES Volume 1, Description of Development **[APP-018]** but now recently referred to in the revised Design and Access Statement, paragraph 5.2.3.14. However, the Converter Station Parameter Volume height of 26m cannot encompass higher volumes than 26m and 4m high masts could only be situated on top of the 22m high Volume as the Application stands at Deadline 6. Situating 4m high lightning masts would both be outside of: Application Volume red line compass; the “Rochdale Envelope” sought; and outside of the dDCO Works No. 2(p) number of “up to 8 lightning masts” (whereas Plate 3.6 [sic], Indicative Converter Station Layout, in the Description of Development in **[APP-018]**, illustrates 8 x Item 14). See the red line areas, Volumes and plans at **[APP-012-017]**, **[REP1-009]**, **[REP1-017]** that show no development higher than 26m (let alone no less than 8 additional volumes) extending above that Volume into the airspace of the land of the Affected Party. There appear to be no fixed or clear *plans* or parameters showing the certain disposition or plans showing the nature of the 8 masts in the Application, nor clear parameters within which their 3 dimensional volume, construction type or colour, nor breadth, may be regulated or executed. The inclusion of a clear parameter volumetric “roof zone” above the Converter Station Volume in which such 12 clearly defined features could appear and whose height may be clearly fixed would resolve this if the design remains at this time still unknown.
34. Aside from EIA considerations, because the Design and Access Statement describes, at paragraph 5.2.3.14, the 26-30m high masts as being “installed *to protect* the outdoor high voltage equipment from direct lightning strikes”, it appears that there is a *functional* need for an additional 4m height x 8 of the Parameter Volume so as to potentially accommodate a 26m high Converter Station building. The Affected Party contends that it is difficult to see how such *additional* volumes of necessary equipment could not be otherwise than *material* by reason of the functional need and safe operation of the proposal deriving from lightning masts, in addition to their presence on the land of the Affected Party. Similarly, the addition of an increase in number of hall mounted lightning masts 4m high (also above the maximum parameter volume of 26m height) and the change of the authorised development to *increase* the Works No. 2(p) mast numbers from “up to 8” to such number as appears recently now necessary.
35. The Affected Party recognises that the ExA has already had to grapple with changes to the Application envelope, in particular, where an affected party own land relating to that envelope. In line with a

number of post-Application increases in red line areas (that in themselves evidence an unresolved and apparently premature Application), the Affected Party recognises that the Applicant may seek during the remaining Examination Hearing period an opportunity to *enlarge* the red line volume of its Application so as to enable to it encompass within an appropriately profiled top of the Converter Station Parameter Volume a 'crown-like' series of volumes within the land of the Affected Party that could contain higher structures or a roof zone parameter for certain lightning mast structures and catenary wires. This would not be unorthodox even if necessary. For example, a similar mid-Examination enlargement to the parameter volume was undertaken to increase the turbine hall volume of the South Hook CHP Station DCO to enable a turbine hall pipe to pass diagonally between two application volumes. That enlargement occurred within land owned by the then applicant whereas the current situation concerns land *of* the Affected Party, and in particular, their air rights above and around the Converter Station Parameter Volume. The Affected Party reserves its position pending sight of clear parameters for the proposals for 8 x 30m high mast structures (and related cabling) and the comments, if any, of regulators.

36. The Affected Party has considered, but rejected, the potential for theoretical reliance by the Applicant on the dDCO Article 27 (air rights) by which to seek to resolve its misfit Volumetric situation. Reliance would be misconceived because the *presence* of the Converter Station Parameter Volume would be rendered purposeless if any reliance could be placed on Article 27. i.e. the presence of the Volume demonstrates that the air rights of the Affected Party remain their land going forwards. Further, potential; reliance on draft Article 27 would reinforce the degree of flexibility sought here of "Rochdale Envelope" parameters as an abuse under Advice Note 9 since, as referred to above, if Article 27 could be so relied upon, it would obviate the need for *any* Parameter Volumes above ground level *per se*.
37. In the absence of an application to enlarge the Parameter Volume to accommodate lightning mast volumes, the Affected Party anticipates resolution of outside of the Hearing by facilitative private treaty.

Interim Conclusions on Converter Station Parameter Volume

38. The burden of showing the extent of land envisaged by the Applicant to be taken against the will of the Affected Party remains fully and wholly on the Applicant. See, for example, paragraph 7 of the PA 2008 CPO Guidance: (Emphasis added)

7. Applicants must therefore be prepared to justify their proposals for the compulsory acquisition of any land to the satisfaction of the Secretary of State. They will also need to be ready to defend such proposals throughout the examination of the application...

39. The Affected Party has shown above, at this point, that the extent of land sought to be taken is not justified to the extent illustrated in the Land Plans within the Order Land and is objectively excessive.

40. Subject to regularization of its Application and to the above, the Affected Party recognises:

- a) the national need for the Converter Station, with the electricity bearing cables, as part of the Authorised Development directed by the Secretary of State under section 35 of the PA 2008, and also the proposed location of *one* Parameter Volume footprint on part of its land against its will;
- b) the Southernmost extent of land take for that single Volume as being justified to not South of a line parallel to the Southernmost face of the Volume identified on **[REP1-017]**, Sheets 1 and 2; and
- c) the nature of the landfall in the location of the single Volume results in a need for cut and fill to create a level platform for the Volume, resulting in a need for a steep slope, or bunding, along its Southern face due to land fall on that side outside of it but close by that Southern face. Consequently, **Appendix K** of the Affected Party's Oral Transcript to CAH 2 (appended hereto for convenience as **Appendix NSPAD 14**);
- d) the need for drainage (and an attendant attenuation pond) can be properly resolved by adopting the same Rochdale Envelope approach as does the Applicant and providing a slim linear area immediately South of the envisaged bunding to the South face of the Volume and a linear area West of that Volume into which water may drain both from the East (from the centre line of the Volume) and the South (from the bunding drainage) along appropriately levelled new drainage ditches as part of the cut and fill operations. A black oval on **Appendix NSPAD 14** illustrates the potential location for such an attenuation pond and drainage ditch.

41. The outcome of the above is that the Affected Party requests that the ExA recommend the retirement, Northwards, of the *permanent* land acquisition of its Plot 1-32, shown on **[APP-008]** of Land Plans, Sheet 1, so that *permanent* land acquisition aligns with a line between the West and East boundaries and that is parallel with: the Southernmost face of Converter Station Volume B(i) together with a zone to the South of that face comprised of some 35m of bunding. See below under **Access During Operation of the Converter Station**. See the black dashed line in that location on **Appendix NSPAD 14**.

I: Extent of Development on Affected Party's Land: Operational Access to the Converter Station

42. Following its erection and cessation of temporary use of the land of the Affected Party for construction purposes, operational access to and from the Converter Station building would be period and rare – some 3-4 times a year.
43. “During energised operation, the Converter Buildings are not accessible as it is a high voltage environment, with air temperatures around 50 – 60 °C, and would, therefore, be unsafe even for trained personnel. Any attempt to enter the building would result in an instant switch-off of the complete station, as all access doors to HV areas are protected against accidental access for the safety of site personnel.” See paragraph 5.2.4.26 of **[REP1-032]** Deadline 1 Submission - 5.5 Design and Access Statement - Tracked Rev 002.
44. “The Converter Station will be unmanned, with 3-4 staff on 24-hour emergency call out. Maintenance will be required on 3 – 4 days per year. These operations will only require access by light vehicles, with parking provided within the compound....” “The control and protection equipment to run the Proposed Development has been designed such that it could be unmanned,...”. See paragraphs 5.3.6.5 and 5.2.5.6 of **[REP1-032]** Deadline 1 Submission - 5.5 Design and Access Statement - Tracked Rev 002.
45. Just as spare transformers are envisaged to be kept at the Volume, so too would there be other spares. Within the Converter Station Volume, “the spare parts building (item 9 in Plate 3.7) will comprise a maximum 15 m high single storey steel frame structure with cladding to match the adjacent buildings.” See paragraph 3.6.3.11 of **[APP-118]** 6.1.3 Environmental Statement - Volume 1 - Chapter 3 Description of the Proposed Development.
46. “During general maintenance and operational outages, access by maintenance staff is typically light vehicles (e.g. cars, vans) and use of HGVs or AILs will only be required in the rare event of a major equipment failure.” See paragraph 3.6.3.28 of **[APP-118]** 6.1.3 Environmental Statement - Volume 1 - Chapter 3 Description of the Proposed Development.
47. “Traffic during operation will be minimal and consist of *light vehicles...*” . See paragraph 5.3.6.3 of **[REP1-032]** Deadline 1 Submission - 5.5 Design and Access Statement - Tracked Rev 002.
48. On the 13th November 2020, the Affected Party agreed licence terms for access to the location of the Converter Station Volume and Telecommunication Volumes on terms known to the Applicant and along an existing route over the land of the Affected Party shown in yellow on Schedule 1, Plan, to that licence for types of vehicle. See **Appendices NSPAD 16 and 17**. Paragraph 3.5 of the Method Statement of that licence describes the agreed vehicles able to use that existing route:

Access to the site will be via agreed routes.

The transport to the site and around the site will be by the use of transit vans and 4x4 trucks... The Drilling equipment shall be transported by trailer and or small lorry with ramps. Where applicable, vehicles that are not used on site shall be parked in the rea/car park designated by [the Affected Party], this being the site compound at Grain Store at Denmead Farm...

49. The Affected Party described in CAH 2, by reference to **Appendix NSPAD 14**, the situation of access within and across its land to and from the Converter Station Parameter Volume from the highway to the East of the land, westwards and then Northwards, and then South-Westwards (along the pylon line) to about the location where the access to the Volume is shown indicatively on **[APP- 018]** the Converter Station Layout Plans, Sheet 3, Rev 2.
50. The access is shown on Appendix NSPAD 1 for convenience and runs around the Eastern boundary of the land of the Affected Party. In more detail, as the access moves North and then West, the Final Site Plan, plan reference 13/SWA/5547006, Rev P2 accompanying the planning permission for the Substation Western Extension, referred to above the Design and Access Statement for that Extension, shows, in its bottom right hand corner, the detailed situation of the access as it turns South Westwards along the pylon line and within the land of the Affected Party. That Site Plan shows that route as traversing *between* the woodland on either side of it and not *through* either. The Applicant has also visited under agreed *licence* the land of the Affected Party for the purposes of making boreholes and used heavy trucks to gain access along that *same route*. Schedule 1 of that licence shows, in yellow, the route of access agreed to be taken that follows the access outlined above to the Converter Station Volume and, without prejudice to this submissions in this Note, and in Schedule 3 to the Affected Party's Deadline 4 Submissions also enabled, and could enable, access to the location of the Telecommunications Buildings. These plans are attached hereto for convenience in **Appendices NSPAD 1**, (brown land from the highway) **15, 16** and **17**.
51. The *subsisting* route traversing the land of the Affected Party and identified, at Deadline 5, for enabling facilitative access using light vehicles and 4x4 trucks and trailers, during its operational phase, to the Converter Station from the highway for its intermittent periodic maintenance is anticipated to be ensured by means of a unilateral development consent planning obligation relating to maintenance use of that route and by reference to the plan in Schedule 1 to the agreed licence.
52. The resulting conclusion is:
- a) The Eastern extent of the retirement Northwards of the envisaged permanent acquisition of the Affected Party's land would be a diagonal line from North-East to South-West in about the location of the dotted black line on **Appendix K** of the Affected Party's Deadline 5 Submissions. See the diagonal black dashed line on **Appendix NSPAD 14** hereto;

- b) The precise angle of the dashed diagonal line can be resolved in the framework of the Rochdale Envelope in line with the particularly high degree of flexibility sought by the Applicant in this particular Application, taking account of, for example, the envisaged contours (and access for light vehicles and 4x4 trucks and trailers) discernible from Sheets 2 and 3 of **[REP1-018]** Deadline 1 Submission - 2.7 Indicative Converter Station Area Layout Plans - Rev 02 (that show a rise in the land on the South-East corner of the Converter Station Volume close by to the route running parallel with the pylons just South of that corner (see **Appendix NSPAD 15**, southern part of drawing);
 - c) The dashed line in **Appendix K (Appendix NSPAD 14)** accommodates sufficient land to its North to enable detailed design with the proposed Parameter Volume of a drainage ditch South of the bunding draining from both or either immediately West from the Volume and/or also West and Northwards from the Southernmost und area *down* into a newly excavated *attenuation* pond along the Western face of the Volume of different and appropriate shape to that situation.
53. In light of the above, the diagram in **Appendix K (Appendix NSPAD 14)** illustrates the extent of land take for *permanent* acquisition as North of the dashed line but not South of it.

J: Extent of Development on Affected Party's Land: "For Commercial Telecommunications"

54. Within the Affected Party's land the Applicant envisages siting *operational development* against the will of the Affected Party "for commercial telecommunications" land use and comprised of: two Telecommunications Buildings and particular fibre optic cables emanating from the illustrative route of the various cables shown in the sea of red in **Appendix NSPAD 9**, Sheet 1, to which those Volumes are envisaged to relate, and car parking related to those Volumes. The basis of this operational development on the land of the Affected Party cannot justify compulsory acquisition for that development under section 122(2)(b), is not within "ancillary" in section 120(3), and cannot be within the scope of section 115(1)(a) of the PA 2008 for the reasons previously given and herein, in particular for want of a common purpose with the few fibre optic cables supplying a monitoring function in relation to the electricity bearing cables and intra-Convertor Station telecommunications. The result is that compulsory acquisition powers under section 122 cannot be authorised in relation to the land of the Affected Party, that that particular development also falls to be excluded from the extent of permanent land take (or any land take) from the Affected Party, and also from the dDCO by reason of an expressly extra-statutory purpose "for commercial telecommunications" and not for the purposes of energy supply infrastructure.

Section 122 of the Planning Act 2008

55. The Applicant's CAH 1 Oral Transcript, paragraph 4.30.1, **[REP5-034]** Deadline 5 Submission - Late Submission - 7.9.18 Applicant's Transcript of Oral Submissions for Compulsory Acquisition Hearing 1 - Accepted at the discretion of the Examining Authority, describes:

The Proposed Development includes a compound containing two Telecommunications Buildings which house equipment associated with the Fibre Optic Cables (FOCs).

56. The Telecommunications Buildings Parameter Volume is shown on Sheet 2 of **Appendix NSPAD 10**.

57. The Plan at **Appendix NSPAD 11**, **Sheets 2 and 3**, show the illustrative *near* confluence of the discrete Telecommunications Buildings Parameter Volume and the discrete electricity cables route to its West. The cables' route includes, as set out above, a series of cables running alongside one another in apparently discrete ducts below ground level that include an "FOC" cable or "Fibre Optic" cable that runs "alongside" and separate from the (also separate) electricity bearing cables. When below the Affected Land, it appears that the "FOC" cable would be situated in its own duct adjacent to other ducts containing other cables. See **Appendices NSPAD 4-8**, in particular Plate 3.24.

58. The Applicant's FOC Statement at **[REP1-127]** Deadline 1 Submission - 7.7.1 - Statement in Relation to FOC - Rev 00, evidences: (Emphasis added)

5.4 The Telecommunications Buildings are required solely in connection with the commercial use ...

59. The FOC Statement further explains that “commercial use”. On the basis of that paragraph 5.4 and paragraph 4.30.1, referred to above, there is no discrete “requirement” for the Telecommunications Buildings. Rather, the asserted “requirement” for those Buildings is *exclusively reliant on* the commercial telecommunications use to which the Applicant desires to put spare or unused fibre optic cables. In this respect, whereas the Applicant asserts in its CAH 1 Transcript that the “Telecommunications Buildings” are “*required for the development*”, the Applicant’s evidence to the *contrary* is that:

- a) in fact, the “Telecommunications Buildings” “*are required solely in connection with the commercial use*” (Emphasis added) and, thereby, cannot in themselves be “required” “for” the authorised development. See: paragraph 5.4 of [REP1-127];
- b) in fact, the “utilisation” of “spare capacity” “for commercial telecommunications” is “desirable” and not a requirement or need “for the development”. See: paragraph 5.2 of [REP1-127]; paragraph No.17, Row 2, page 2-9 of [REP3-014] of Deadline 3 Submission - 7.9.6 Applicant's Response to Deadline 2 Submissions;
- c) in fact, the availability of some 180 “spare” fibre optic cables in the two “FOC” cables results not from the “design” of the authorised development but by happenstance industry standard sized composite manufactured cables of set (not bespoke) diameter. See: paragraph 3.6.3.22 of [APP-118] of 6.1.3 Environmental Statement - Volume 1 - Chapter 3 Description of the Proposed Development.

60. Paragraphs 1.3 and 5.2 of [REP1-127] evidence the envisaged “commercial use” and its extent:

1.3 This statement has been prepared in response to the ExA written question with reference DCO1.5.2 in relation to the proposed commercial use of the spare capacity in the fibre optic infrastructure...

5.2 Within the required outer diameter for the fibre optic cables, 192 glass fibres may be installed. Each fibre optic cables is required to include a sufficient amount of glass fibres for its use in connection with the primary use of the interconnector and as redundancy for this purpose in the event of individual glass fibre failures. The number of glass fibres required in connection with the primary use of the interconnector and as redundancy for this purpose is less than 192, though this is a multiple of fibres that is commonly produced by manufacturers of such cables. Noting that the outer diameter must be of sufficient size to withstand the impacts to which it is likely to be subject, and the use of standard size cable components for this purpose, the size of the cable itself would not change if the number of glass fibres within it was reduced from 192 to a lesser multiple. Therefore, whilst it would be possible to install a cable with fewer glass fibres (and thus less spare capacity), this would not reduce the impacts to any degree.

61. The FOC cable is illustrated by the Applicant on its website whose extract is in **Appendix NSPAD 6** (“Data Cable”) and shows “optical fibres”. Of the 192 optical fibres, some 180 would be “spare” or dark”. See **Appendix NSPAD 6**. Therefore, only 12 fibre optics within the “optical fibres” illustrated in **Appendix NSPAD 6** would be required for the monitoring and support of the electricity bearing cables (referred to

in paragraph 3.5.3.7 of the ES Chapter 3 in **Appendix NSPAD 5**) whereas the balance of 180 could not be. This is because the pre-manufactured cables are physically discrete from one another and there can be no actual physical relationship as between them. Therefore, the sole means by which there can be any relationship is by virtue of (if any) a function (as in, a land “use”). In this respect, the Affected Party recognises that the 12 fibre optic cables within the “FOC” cable would support the electricity bearing cables by their monitoring and also enable intra-Convertor Station telecommunications. See **Appendix NSPAD 5**, paragraph 3.5.3.7. However, the balance of 180 fibre optic strands *could not* (without more) have a use or function and would remain necessarily *merely operational development* comprised of *composite cable*. In respect of “use, a function (“for”) “for commercial telecommunications” cannot be a function *related* to the NSIP in the field of energy for the reasons given by the Affected Party in its previous Submissions to the ExA.

62. The Applicant’s evidence is that the 180 fibres are “dark”, “spare”, as in, use-less and not used for a purpose relating to the NSIP authorised development. Rather, the Applicant desires to apply otherwise spare or use-less material of the cable (i.e. the 180 fibre optic strands) to a use, in particular a use “for commercial telecommunications”. Further, the very theoretical availability in those 180 fibres of a potential alternative use to a monitoring function, and in the event of realization of that alternative, results to mutually exclude the availability of the 180 fibres for any function of monitoring support for the electricity bearing cables or intra-Convertor Station telecommunications because (as the separation between the Station and Telecommunications Buildings further evidences), those two purposes are mutually exclusive, uncommon, or dissociative. Hence, the absence of common purpose here precludes the commercial telecommunications use of particular development qualifying as “associated development”.

63. The evidence *of the Applicant* relating to function, purpose, or use of the development is that:

- a) The authorised development would include 2 circuits of 2 high voltage (“HV”) cables bearing electricity and that would “have a diameter of approximately 140mm”. See e.g. **Plate 3.2**, page 3-15 of **[APP-118]** 6.1.3 Environmental Statement - Volume 1 - Chapter 3 Description of the Proposed Development, in **Appendix NSPAD 4**. These are authorised development;
- b) “two FOCS, each 30-35mm in diameter” would be “laid together with” the authorised development cables “within a shared trench” (under sea but in discrete pipes under land). “Each FOC will include fibres for a Distributed Temperature Sensing (“DTS”) system as well as protection, control and communications”. See, e.g. paragraphs 3.5.3.7 and .8, and also 3.6.3.21 and .22 (line 1), and **Plate 3.3**, page 3-16 of **[APP-118]** 6.1.3 Environmental Statement - Volume 1 - Chapter 3 Description of the Proposed Development, appended hereto in **Appendix 5**. That purpose is described as “the primary

function of the fibre optic cable (i.e. control and monitoring)". See paragraph 5.2 of [REP1-127]. The reference to "primary function" is misplaced because, without more, the 180 cables remain merely operational development as part of the composite manufactured FOC cable. The so-called "primary function" aside, the Affected Party accepts that the 12 fibre optic cables would be lawful associated development (operational development and a material land use by reason of support function);

c) The two "FOCs" in fact each comprise *many individual* fibre optic cables within each "FOC" cable sheath: about "192 glass fibres". See paragraph 5.2 of [REP1-127], 7.7.1 - Statement in Relation to FOC - Rev 001. *Not all* of those fibres would be "necessary" for the support and maintenance purpose referred to in paragraphs 3.5.3.7 and .8 of [APP-118]. The diameter of the two "FOC" cables results in "spare capacity" and it "would be possible to install a cable with fewer glass cables (and thus less spare capacity)". See paragraph 5.2 of [REP1-127]. The ordinary meaning of "spare" is "not presently in use" (see Shorter Oxford Dictionary, 6th Edition). Therefore, the Applicant's evidence is that the 180 cables have no *present* use, i.e. they are use-less. The Applicant uses the reference to "spare" to also mean "dark". See paragraph 5.1.4.6 of [REP1-136] of 7.7.7 Needs and Benefits Addendum ("spare FOC capacity or 'dark fibre'), being fibre optic cable *material not* conveying data through light within such glass fibre and so remaining merely *glass material* devoid of any or any separate *function* (i.e. planning "use"). A material without a function or use remains merely operational development and no more than a manufactured composite layer of materials forming the engineering operational development encompassing the operational development and the land use comprised of the fibre optic cables supporting and monitoring the authorised development). The Affected Party does not accept that operational development comprised of composite cable material lacking a function and that would lack a function (being "spare" or use-less) can be itself "associated development". It is also the Applicant's case (through the oral evidence of Mr Jarvis) that the FOC are not "part of" the authorised development;

d) **Appendix NSPAD 6** evidences that the not "necessary" or presently use-less fibre optic material within the FOC cables number at least 180 fibre optic strands. In relation to the quantum, and presently use-less nature of the "spare" fibres viz data transmission unrelated to the proposed authorised development, the Affected Party notes that the Applicant maintains a website about the project at <http://aquind.co.uk/> and this includes a diagram of one "FOC" cable. See extract print out in **Appendix NSPAD 6** as well as the following text that accompanies it: (Emphasis added)

Using the latest subsea and optical technology, [the project] will deliver high speed connectivity between England and France. Up to 180 "dark" fibres in each of the two data transmission cables may be available for third-party access enabling the high data transfer rates of up to 100 Gbps per fibre pair. The [project] fibre optic transmission link offers a shorter route than some of the existing systems, ensuring the low latency time of approximately 2.622ms. The system will

be capable of connecting the French and English shores without the need for amplification by subsea repeaters.

Installation in the same trench as the power cables and alongside them, together with separation of the two cable systems, ensure [sic] consistent protection against fishing and anchor damage as well as natural hazards.

- e) Further, the evidence of the Applicant that the 180 cables are presently use-less (“spare” itself evidences that the presence of dark fibres in the FOC is entirely speculative beyond the 12 that have an express purpose referred to in paragraph 3.5.3.7 of **Appendix NSPAD 5** .

64. It is also evident that:

- a) of the one hundred and ninety-two (192) individual fibre glass fibres within each of the two “FOCs”, *only* twelve (12) of the 192 (192-180) will in fact be *physically and functionally* necessary or required for (the purpose or function) the support and maintenance as described in paragraphs 3.5.3.7 and .8 of **[APP-118]**. i.e. 12 fibre optic cables would comprise *both* operational development *and* have a land use whereas 180 would remain compositely melded to the engineering operational development encompassing the 12 fibres without a purpose or function or use *supporting* the authorised development of electricity bearing cables. 12 of 192 equates to no more than some 6.25% of the fibre optic cables being required physically *and* functionally *for* that support and maintenance;
- b) By contrast, in themselves and without more, of the 180 of 192, that 93.75% of the fibre optic cables could and would be only *unnecessary* for a data transmission function *supporting* the authorised development (i.e. otherwise not remaining dark) and, if such an industry standard size of cable were chosen, the 93.75% of the central element of the “FOC” cable would remain melded material inseparable from the composite casing of each “FOC” cable around the 12 functional fibre optic cables (that would be both operational development and land use development). That is, in the absence of function, there could be no *relationship* between the 180 fibre optic cables and the electricity bearing cables separate from and “alongside” that FOC itself; and
- c) In the absence of a function, the 180 fibre optic cable strands remain no more than (use-less) operational development cable around the 12 strands that have a use (where “use” refers to the status of the cable as “development” within the meaning of section 55(1) of the TCPA 1990 as applied by sections 31 and 32(1) of the PA 2008 here.

65. Further:

- a) the percentage of *necessary* functional fibres appears likely to *reduce* because the industry standard appears to “increase” fibres in standard cables as a result of those fibres being able to

be reduced in size whereas the percentage of “spare” fibres would likely increase without a change in the overall diameter of the “FOC” cable. See paragraph 3.6.3.22 of [APP-118]);

- b) whilst within a notional ‘sea of red’ (see **Appendix NSPAD 9**, Sheet 2), the Affected Party’s land is not below the sea nor subject to potential transiting by vessels with anchors, and that Party is unaware of any fishing on the Affected Land requiring boats with anchors. Therefore, protection from “anchors” by the envisaged industry standard diameter of “33-55mm” is not required to be ensured against such fanciful theoretical threat to cables under the Affected Party’s (solid) farmland. The protection afforded by a particular diameter of “FOC” from “fishing and anchor damage” is not relevant to the situation of the diameter of fibre optic cables envisaged within their land. It would follow, as paragraph 5.2 of [REP1-127] properly recognises, that a fibre optic cable “with fewer cables” could be situated on the land whilst retaining the outer diameter but fewer fiber optic cables resulting in no fibre optic cables “for commercial telecommunication” purposes being situated on the Affected Party’s land and no such cables on their land as operational development in itself. See below; and
- c) to protect cables from a damage, a **Requirement Parameter** could ensure that all cables situated on the Affected Party’s land must be below the lowest level at which damage from ploughing may occur. See Plate 3.24 of [APP-118] where “900mm” minimum depth is shown to the top of the “cable cover” plate. The Affected Party anticipates drafting such a **Requirement Parameter**. As well as ensuring practical protection of below-ground cables envisaged by the application on that land, such ensured protection would also enable “FOC” cables of overall reduced diameter to be used on that land.

66. Further, the Updated Table in **Appendix NSPAD 20**, evidences that there is no domestic project where the purpose of “commercial telecommunications” has not been expressly excluded from the scope of the instrument by means of expressly *confining* (by use of the term “for”) the use to a use “for” a support function *related to* the authorised development so as to thereby exclude a disparate “commercial” purpose. See Column 7. Rather, where telecommunications are advanced with a proposed development, they are expressly *premised* on being lawful associated development by reason of having an express support monitoring function in relation to the authorised development. See, for example, Thorpe Marsh Pipeline DCO and the Associated Development Report accompanying that application that identified (where a gas pipeline was physically separate from telecommunications cables) the overhead cables for “telecommunications” as being “for” support purposes in relation to support works. In the instant application, there is no Associated Development Report but there is an “FOC Statement” whose terms evidence that the number of fibres *not* used for support purposes cannot be associated development. This is because, ultimately, the 180 fibre optic cables cannot share a *common purpose*

with the other 12 of the 192, instead serve a discrete separate unassociated purpose, and this absence of common purpose precludes, in law, the theoretical potential of the 180 being lawful associated development within the scope of section 115(1)(b) of the PA 2008. See the ordinary meaning of “associated” in that statutory provision. The failure of the 180 cables to satisfy the Associated Development Guidance reinforces that basic legal premise.

67. Lastly in conclusion in respect of compulsory acquisition, section 122 of the PA 2008 requires the development to be “required for the authorised development” or to be “required to facilitate that development” and, in the absence of which being satisfied, section 122(1) cannot in law be satisfied. It is the Applicant’s evidence (in relation to the separate function (for planning purposes, the separate “use” under section 32(1) of the PA 2008 and section 55(1) of the TCPA 1990) of the 93.75% (180) of the FOC “for commercial telecommunications” purpose) that:

the Applicant is desiring of utilising the [spare fibre optic cables] to its full design capacity and benefit ...

(see page 29, Row 2, para No. 17 of [REP3-014] 7.9.6 Applicant’s Response to Deadline 2 Submissions). A mere “desire”, however laudable or great, remains no more than a desire and could not in law begin to satisfy the statutory criteria of section 122(2)(a) or (b) relied on by the Applicant in its CAH 1 Transcript. Similarly, the FOC Statement refers extensively to the ability to use less numbers of fibre optic cables and does not contend that all 192 cables are “required” for the authorised development.

68. It follows that the highest the Applicant puts its case “for commercial telecommunications” use of the operational development that is sought on the land of the Affected Party is that that development is “desirable” to apply other use-less operational development comprised of a not wholly useable off-the-shelf cable, and that there can be less of it. A *desire* to make some use of use-less operational development is the opposite of satisfying a *requirement* for at least 192 fibre optic cables. It further follows that the operational development of the FOC cable branch containing 180 otherwise useless fibre optic cables (leading from the FOC cable alongside the electricity bearing cables to the Telecommunications Buildings) on that land cannot be lawfully justified under section 122 of the PA 2008.

69. Because the Telecommunications Buildings Parameter Volumes are required exclusively in relation to the commercial use of the 180 fibre optic cables, it follows that the availability of compulsory acquisition powers to deliver those Buildings (in the alternative to private terms) is reliant upon satisfaction by the Applicant of section 122(1) and (2)(b) (“required to facilitate”) but the Applicant’s evidence cannot satisfy that statutory requirement. The ExA must exclude from the dDCO powers to acquire the land of the Affected Party that would otherwise enable situation of the Telecommunications Buildings Parameter Volumes on that land.

Section 120(3) & “Ancillary”

70. The Telecommunications Buildings Parameter Volumes and part of the FOC cable bearing 180 fibre optic cables on the land of the Affected Party also falls to be excluded from the scope of the dDCO [REP5-009] and so from the potential presence on the land of the Affected Party for the following further reasons. The Applicant appears to contend that the dDCO can lawfully include, as associated development, the use of spare (use-less) fibre optics for telecommunications as “ancillary”, but, this is misconceived in itself and so far as the Applicant also relies on the commercial use of fibre optic cables as being “ancillary” in some way justifying compulsory acquisition of the land of the Affected Party or lawfully part of the proposal.
71. The FOC refers to the Telecommunications Buildings Parameter Volumes and the “commercial use” of the fibre optic cables being “ancillary” on page 8 of [REP1-127]: (Emphasis added)

The commercial use of the spare capacity (and thus the Telecommunications Buildings) is ancillary to the primary use of the Proposed Development, being the transfer and conversion of electricity.

72. Whilst “ancillary” appears in section 120(3) of the PA 2008, that subsection is expressly “subject to” subsequent provisions including section 122. “Ancillary” does not appear as a relevant statutory test under section 122. Thus, the logically prior test under section 122 remains “required” and not “desired”.
73. The Affected Party has made previous submissions in Deadline 4 on the scope of associated development. Further to those submissions, and in relation to section 120(3), the reliance by the Applicant upon “ancillary” in section 120(3) is in contrast with the presence of “relating to” in that same subsection not relied on. The placed reliance aligns with Mr Jarvis’s oral evidence in CAH 2 confirming on behalf of the Applicant that it considers (subjectively) that the “FOCS” are “not *part of*” the proposed development and instead are considered to be “authorised development”. That is, the Applicant does not rely on “relating to” but on “ancillary” to the development. This reinforces the absence of the “commercial telecommunications” use as “relating to” the authorised development because, if there were a relationship, the Applicant would have relied on “relating to” and not on “ancillary”.
74. In this respect, the Applicant’s reliance on “ancillary” (and not on “relating to”) reinforces the actual *absence* of a particular *relationship* as between the 180 fibre optics (envisaged “for commercial use”) and the “development for which consent is granted”. As outlined above, there is no evidence upon which the ExA could lawfully conclude that the 180 fibre optics were “ancillary” to the “development for which consent is granted”. Rather, the 180 fibre optic strands would make up no less than 93.75% of the “FOC” cable which cannot be said to be “ancillary”. The Applicant’s oral evidence to CAH 2 (through Mr Jarvis) was that the “commercial use” of the FOC cable would be “significant” whereas the benefits of the NSIP itself are also variously described as “significant”. It is difficult to see how the 180 fibre optic

cables could in law or fact qualify as “ancillary” to the “development for which consent is granted” in the presence of that evidence and the absence of other evidence.

75. Applying the “ancillary” test of the Applicant to its own section 120(3) case:

- a) There would be 180 spare fibres having no functional *use* for data transmission supporting the 12 fibre optic cables whose functional *use* would be to monitor the electricity bearing cables and intra-convertor station communications. Thus, empirically, the Applicant fails its own test;
- b) The spare fibres would account for 93.75% of *all* of fibres in an FOC cable whereas the remaining 6.75% of functioning fibre optic cables would be for supporting data transmission. It is difficult to see how the lower percentage could be the primary data transmission whereas the higher percentage of useless fibres could be ancillary to the lower. Rather, it appears that “commercial telecommunications” dog is sought to be disguised as the “commercial telecommunications” tail for the “supporting data transmissions” dog whereas the reverse appears true. Thus, the Applicant fails its “ancillary” test;
- c) Applying the Applicant’s own non-statutory and no-guidance test of “ancillary”, and notwithstanding the absence of common function, there is no evidence before the ExA by which to evaluate that the “use for commercial telecommunications” of 180 of 192 (or of 93.75% of the total fibres) could be ancillary to the “Proposed Development”. On behalf of the Applicant, Mr Jarvis confirmed to the ExA in CAH 2 that the “use for commercial telecommunications” would be “significant... benefit” (as an asserted public benefit) whereas paragraph 3.1.1.2 of **[REP1-136]** 7.7.7 Needs and Benefits Addendum Rev 001 simultaneously contends that the “Aquind Interconnector will significantly increase the cross-border capacity between GB and France delivering an additional 2GW of capacity on the congested GB-French border. AQUIND will be the largest interconnector built since IFA in the 1980s”. Thus, the Applicant fails its “ancillary” test;
- d) There is no evidence of the financial benefits arising from the use of 180 fibre optic cables “for commercial telecommunications” as opposed to those arising from the 12 that have a supporting function. Further, the **[REP1-136]** and Table 1, e.g. Executive Summary of **[REP1-102]** Deadline 1 Submission - 7.4.1.11 First Written Question Responses - Appendix 11 Euro Figures Converted to Pounds Sterling (CA1.3.58) provide extensive financial information on the electricity financial benefits of the authorised development but there appears to be no such information about the 180 fibre optic cables. It is impossible to rationally evaluate the financial benefits to the Applicant or the financial savings to the members of the public from commercial telecommunications in order to be able to rationally conclude the Applicant’s “ancillary” test.

Why the commercial telecommunications development makes a difference to the Affected Party

76. It is incorrect for the Applicant to assert in paragraph 5.2 of [REP1-127] that there is no benefit to *not* situating commercial telecommunications fibre optic cables and related Telecommunications Buildings on the land of the Affected Party. Firstly, the land is that *of the* Affected Party and that *not of* the Applicant. Secondly, such cables and buildings are self-evidently “operational development” and, if in due course they were to be put to actual use for commercial use of the 180 fibres and the equipment in the buildings), this would be engender a material change in the use of the agricultural use of the land of the Affected Party. Thirdly, as the Affected Party made clear in the Open Floor Hearing, the presence of buildings (and other development) on their land is incompatible with the agricultural use of that land.
77. The authorised development and the “FOC” cables would be laid in part under the sea of the Channel and in part under the Affected Party’s land leading from a nearby “joint”. See paragraph 3.6.4.64, **Plate 3.24**, page 3-59, and **Plate 3.25**, page 3-61, of [APP-118] 6.1.3 Environmental Statement - Volume 1 - Chapter 3 Description of the Proposed Development. The authorised development and the “FOC” cables, as so “jointed”, would then be situated within and under the Affected Party’s land. See paragraph 3.6.4.64, **Plate 3.24**, page 3-59, and **Plate 3.25**, page 3-61, of [APP-118] 6.1.3 Environmental Statement - Volume 1 - Chapter 3 Description of the Proposed Development, appended in **Appendix NSPAD 8 , & 9, Sheets 1-3**). The cables would extend from a cable jointing location south of their land and progress northward so as to be laid within the Order Limits and, theoretically, along the line of the illustrative route underground on their land. See the blue cross-hatching “trenching – illustrative alignment” on the scaled drawing of Sheets 1 & 2 of Figure 24.2 Illustrative cable route, of [APP-336(a)] 6.2.24.2, Environmental Statement, Volume 2, HDD sites and joint bays for noise and vibration assessment Sheet 1 of 15, appended hereto in **Appendix NSPAD 9**. Sheet 2 shows the nearest jointing location to the land as a green triangle to the South of the Affected Land.
78. The authorised development and the “FOC” cables would be situated within the Affected Party’s land inside individual pipes (1 per cable) situated within two parallel trenches “backfilled with indigenous material where suitable” and ensuring physical cable separation. See **Plate 3.24** page 3-59, of [APP-118] 6.1.3 Environmental Statement - Volume 1 - Chapter 3 Description of the Proposed Development, appended hereto in **Appendices NSPAD 8**. As referred to above, to protect cables from a damage, a **Requirement Parameter** could ensure that all cables situated on the Affected Party’s land must be below the lowest level at which damage from ploughing may occur. See Plate 3.24 of [APP-118] where “900mm” minimum depth is shown to the top of the “cable cover” plate. The Affected Party anticipates

drafting such a **Requirement Parameter**. As well as ensuring practical protection of below-ground cables envisaged by the application on that land, such ensured protection would also enable “FOC” cables of overall reduced diameter (from 35-55mm to a lesser diameter) to be used on that land.

79. The *illustrated* route of the two trenches that would traverse the Affected Party’s land are shown on:

- a) Sheets 1 & 2 of Figure 24.2 Illustrative cable route, of **[APP-336(a)]** 6.2.24.2, Environmental Statement, Volume 2, HDD sites and joint bays for noise and vibration assessment Sheet 1 of 15 that shows a blue hatched linear area envisaged to contain two cable trenches; and
- b) Sheets 2 and 3, of 3, of **[APP-013]** Indicative Convertor Station Layout Plans (Option B(i) and (ii)) that includes a blue cross-hatched “exclusion zone” area that reflects the route in (1) above; and
- c) Plate 2.14 on page 2-52 of **[APP-117]** 6.1.2 Environmental Statement - Volume 1 - Chapter 2 Consideration of Alternatives.

80. **Appendix NSPAD 11**, Sheets 2 and 3 show the situation of the buildings on what are presently fields that can be seen in **Appendices NSPAD 1** and **3**.

81. The evidence shows that the presence of operational development would change the land from agricultural land to a mixed use as well as being incompatible with agricultural land.

Section 115(1)(b) of the PA 2008

82. Mr Jarvis confirmed on behalf of the Applicant at CAH2 that it considers (subjectively) that the “FOCS” are “not *part of*” the proposed development and instead are considered to be “authorised development”. Therefore, the Applicant relies exclusively on section 115(1)(b) of the PA2008.
83. In addition to the absence of justification under section 122(1), or under section 120(3), the scope of the application development cannot encompass the commercial telecommunications use of development in this Application under section 115(1)(b) of the PA 2008.
84. The simple response to the question of the ExA at the DCO ISH: “what *precludes* the commercial telecommunications use of otherwise spare fibre optics from qualifying as “associated development”, is: the absence of common purpose. A *purpose* of those fibre optics *common* with those whose purpose is monitoring of the electricity bearing cables remains absent as a matter of fact and this is reinforced by the proposal for a wholly separate purpose for use of spare fibres for commercial telecommunications which is uncommon or disassociated from the stated purpose of the monitoring fibres. See the statutory term “associated” and the ordinary meaning of that term. Thus, section 115(1)(b) cannot be satisfied.
85. The Affected Party has made Legal Submissions in relation to “Associated Development” in Schedule 3 to its Deadline 4 Submissions [REP4-047]. So far as the Applicant contends that the use of a functionally use-less layer (of the otherwise exclusively operational development comprised of the “FOC” cable) is to be regarded as “ancillary” and, thereby, “associated development”, and as contended in para 5(i), Row 2, Annex 1, page 8, of [REP1-127], (“The commercial use of the spare capacity (and thus the Telecommunications Buildings) is [asserted as being] *ancillary* to the primary use of the Proposed Development, being the transfer and conversion of electricity”), the Affected Party notes:
- a) “ancillary” is not the relevant test under section 115(1)(b) of the PA 2008 and nor is “primary”. Those terms are an extra-statutory gloss on the face of the PA 2008. “ancillary” appears only in section 120(3) and in contradistinction to “relating to” the development;
 - b) Within section 115(1)(b) of the PA 2008, Parliament has used the term “associated” and not used either “ancillary” nor “primary” as a statutory test. The ordinary meaning of the term “associated” does not include the term “ancillary” nor “primary” either. Reliance on “ancillary” or “primary” as a relevant test is, as a matter of ordinary language, misconceived and seeks to re-write the statutory test of “associated”. “Associated” requires a common function but admits of having a secondary or subordinate status, i.e. “associated” requires *both* a common function *and* a secondary or subordinate status. It is legally misconceived to contend that the requirement for commonality of *function* can be avoided by reliance on secondary status. The absence of a function of the 182 fibre optic cables with that of the 12 fibre optic cables for monitoring the electricity bearing cables and

supplying intra-Convertor Station telecommunications, and the presence of an envisaged discrete function for commercial telecommunications of 182 cables, precludes the non-12 fibre optic cables qualifying in law as “associated development”;

- c) Section 115(1)(b) of the PA 2008 does not expressly include the term “ancillary” nor “primary” and Parliament has not used those terms as a relevant legal criteria or test. Reliance on “ancillary” or “primary” as a relevant legal test is legally misconceived and seeks to re-write the statutory test;
- d) The PA 2008 Guidance on Associated Development does not itself use within its terms either term “ancillary” nor “primary”. Reliance on “ancillary” or “primary” as a relevant guidance test is legally misconceived and seeks to re-write the guidance criteria.

86. An illustration of the relevance of common purpose or function is as follows. In the Thorpe Marsh DCO, whereas the telecommunications cables above ground were isolated physically from the gas pipeline comprising the authorised development in that situation, the presence of the telecommunications cables was, as the AD Report 2014 described “essential” to the functioning of the gas pipeline (likely to have arisen from the enabling communication between equipment supporting the pipeline across country).

87. The Affected Party also refers to its Table of Interconnectors in **Appendix NSPAD 20**. That Table shows, consistently, that where “commercial telecommunications” function has been envisaged in the *English* legal context of orders, or there has been implicit doubt as to the scope of the function envisaged to be authorised, then the express terms of the relevant order have expressly confined to ensure that the function (i.e. planning “use”) of the relevant development remains confined to electricity and excludes the potential for “commercial telecommunications” function or use of the authorised development.

88. The Affected Party has updated that Table of Interconnectors having recently ascertained that a DCO entitled The Thorpe Marsh Gas Pipeline Order 2016, SI 2016 No. 297 for authorised development described in Schedule 1 as “*the construction of an up to 24 inch (609.6 millimetre) external diameter cross-country gas pipeline (to be known as the Thorpe Marsh Gas Pipeline) for the conveyance of gas and covering a distance of approximately 19.1 kilometres*”. Article 2(1) defined the undertaker as a private limited company: “Thorpe Marsh Power Limited” means Thorpe Marsh Power Limited (company registration number 06637894). None of the Works Nos. in Schedule 1 refer to “commercial”. Instead, “commercial” appeared only in Schedule 9, Protective Provisions, paragraph 10(6) referred to “commercial” in the context of “commercial operation of the authorised development” (being in the statutory field of energy gas supply), and in Article 19(1), in relation to decommissioning. Unsurprisingly where a DCO in the statutory field of energy gas supply is undertaken by a private limited company, the DCO terms include a reference in Requirement 19 (decommissioning) to “commercial operation” in

particular provisions, but not otherwise. For example, Articles 3 and 4 do not on their face authorise other than operation of the Schedule 1 development.

89. That DCO includes references also to “telecommunications”. For example, Works Nos. 4 and 7 includes: “telecommunication cables” (but not “commercial” telecommunication cables). By contrast, Schedule 5, and Article 23, permitted acquisition of rights for “telecommunication cables” in Plots 5 and 176. It is notable that no rights entitling land acquisition “for commercial telecommunication” purposes were authorised and notwithstanding Requirement 19 and the Network Rail Protective Provisions that included the term “commercial” in their particular contexts. In this respect, the ExA Report summarised at paragraph 8.2.2 the purpose of the acquisition rights as relating to: “the installation of the pipeline; the acquisition of permanent rights to install the pipeline and associated development, to facilitate access for the installation and for the on-going maintenance of the pipeline and associated development” and “where the electrical cables and free-standing infrastructure are installed, a restrictive covenant to protect the infrastructure and access to it.”

90. That DCO included in Article 2(1) a definition of “authorised development” that encompassed the development and associated development described in Part 1 of Schedule 1 and “any other development authorised by” that Order. The ExA report summarised “associated development”, including under paragraphs 1.1.3; 2.1.1; 2.1.5; 8.2.2.2; 9.2.1; and at Library Reference APP-034, the applicant’s “Associated Development Report” (“the AD Report 2014”). The AD Report 2014 expressly explained that all of the described works were “essential” and in Section 3 set out a table describing those works and justifying them as associated. For example:

The project cannot progress without the site office and pipe dump. It is necessary to store materials for the construction and therefore this work is inherently related to the project. However, it is a temporary use and not directly providing an integral part of the pipeline...

91. The telecommunication cables were described under Work No 7: (Underline and Bold emphasis added)

*Facilities **for the benefit of Work No. 5 and Work No. 6 including access roadway, car parking and hard standing, perimeter landscaping and the planting of trees and shrubs, mains power and telecommunication cables** (suspended from wooden poles with a maximum height of 6.0 metres metres), freestanding electrical meter cabinet and transformer unit serving Work No. 5 and Work No. 6*

and justified as: (Emphasis added)

These permanent works are essential to the functioning of the principal development as component parts of the A[bove] G[round] I[nstallation]. They are not, however, integral to the pipeline.

92. There is no evidence that the envisaged use for commercial telecommunications of “spare” fibre optics nor the Telecommunications Buildings is in any way “essential” for the functioning of the electricity bearing cables or of intra-Convertor Station telecommunications. Indeed, as referred to above, the

“commercial use” for telecommunications appears self-evidently to be mutually exclusive use of the same material for the monitoring of electricity bearing cables and that intra-Station telecommunication.

93. In like way to the “essential to the function” test in Thorpe Marsh, the Affected Party in the instant Aquind Application properly recognises that, based on the Applicant’s own evidence:

- a) Where (as here), the development comprises manufactured *cables that are necessarily physically discrete one from another by reason of their cable-like linear nature and cannot directly relate to each other physically as they traverse the land*, then only a *functional* relationship can supply the necessary “association” for the purposes of section 115(1)(b) of the PA 2008;
- b) the “FOC” cables cannot be “integral with the [electricity bearing cables]” because the 12 fibre optic cables, but no more, of the 192 individual cables within each of the two “FOC” cables can be and are properly to be recognised as “associated development” in light of the evidence of essential associated functioning described including in paragraphs 3.5.3.7 and 3.6.3.21 of **[APP-118]** of 6.1.3 Environmental Statement - Volume 1 - Chapter 3 Description of the Proposed Development; whereas, by contrast;
- c) the presence, within each of the two “FOC” cables, of some 180 glass fibre optic *material* in cable or strand form cannot qualify as “associated development” because that material or those glass strands can have *no function* essential to the monitoring the nearby but discrete authorised development comprised of the two discrete electricity bearing cables, nor essential to intra telecommunications between two Converter Station buildings, but the 180 strands of glass material are instead use *less*, being “spare” or “dark”, in relation to any *function* essential to the authorised development comprised of the two discrete electricity bearing cables;
- d) as Plates 3.2, 3.3, and 3.24 of **Appendices NSPAD 4, 5, 6, 8** illustrate, *because* the “FOC” cable *itself* is physically isolated and separate from each of the two other adjacent, but also physically isolated and separate HVDC cables, then, at most, the presence (in the centre core of the manufactured composite “FOC” cable), of 180 individual strands of glass, (isolated as part of the composite outer manufactured layers of the “FOC” cable from the separate HVDC cables whilst being directly adjacent to the 12 fibre optic cables), can result in no more than the presence of those 180 resulting to remain operational development devoid of function or purpose related to the electricity bearing cables and that theoretically would link to a Telecommunications Buildings wholly separate from the electricity infrastructure of the Converter Station.

94. The exclusion of commercial use of fibres has other consequences for land take elsewhere. The “FOC” cables would progress via an “Optical Regeneration Station” (“ORS”) and *an* ORS is asserted to be “required to support the primary function of the [application development] were the commercial use

not proposed". See paragraph 6.2 of [REP1-127], 7.7.1 - Statement in Relation to FOC - Rev 001. Paragraph 5.3 of [REP1-127] evidences that "approximately two thirds [2/3rds] of the cabinets within the ORS will be available for commercial use. The remaining cabinets in the ORS will house key control equipment required to support the primary function of the fibre optic cable (i.e. control and monitoring)". The Applicant's evidence is that "there is a direct connection between the proposed commercial use of the FOC ... and the size of the ORS". See paragraph 5.3 of [REP1-127]. Overall, therefore, the commensurate extent of the ORS function (and so "use" in terms of section 32(1) of the PA 2008 and section 55(1) of the TCPA 1990) that relates to some 2/3rds of its equipment appears evidenced as *not necessary*. Conversely, the actual reduction of the ORS (such as by a **Requirement** parameter) so as to exclude function (and so use) of the unnecessary equipment "for commercial telecommunications" would have no affect on the function of the application development for electricity infrastructure but would reduce the ORS size. A **Requirement Parameter** could so ensure the same.

Conclusion on Telecommunications Buildings and Fibre Optic Cables on the Affected Land

95. In light of the foregoing, the Affected Party requests that, within its land, the ExA:
- a) Preclude acquisition powers from applying to the Telecommunications Buildings Parameter Volume; related compound parking; and fibre optic cable linking the Volume and cable route;
 - b) Remove from the dDCO the Telecommunications Buildings Parameter Volume, related compound parking area, and fibre optic cable between the cable route to that Volume as not "associated development".

K: Extent of Development on Affected Party's Land: Construction Access & Pond

96. In light of the foregoing, the Affected Party recognises that a temporary access road within the scope of Parameter Zone 1: Access Road in **Appendix NSPAD 10**, Sheets 1 and 2, remains required in order to, and exclusively for the purposes of erection of the Converter Station building.
97. However, once erected, by reason of the foregoing, there remains no need for permanent presence nor maintenance of a temporary access road in perpetuity (or at least 40 years).
98. The Affected Party requests that the ExA draw the dDCO accordingly and require restoration of the Affected Land immediately following practical completion of the Station to the status shown in **Appendix NSPAD 3**: Grade 3a (good quality) and Grade 3b, that would otherwise be inaccessible and sterilized from agricultural use from the ongoing presence of an access road upon that same land.

L: Extent of Development on Affected Party's Land: Landscaping

99. The Affected Party prefers the restoration of its existing view (with a new Converter Station in it) to the taking of its land against its will as the price of a changed view.

100. The Applicant asserts the basis of the permanent acquisition of the land of the Affected Party, following temporary use of the agricultural land for construction purposes, as follows:

4.31.1 Landscaping and ecological enhancements are to be provided at the Converter Station, primarily to assist with the visual screening of the Converter Station by receptors in closer proximity to it, but also to improve the ecological function of the area by providing new habitats and increasing connectivity for biodiversity features...

4.31.3 Where new planting and ecological enhancements are to be provided in close proximity to the Converter Station the permanent acquisition of land is sought (see Plots 1-20, 1-23, 1-29 and 1-32 on Sheet 1 of the land Plans (REP1-011a) (CB-18). This is because the restrictions that would otherwise apply to such areas would need to provide that no rights could be enjoyed over these areas in light of the need for the landscaping and ecological enhancements to be maintained and otherwise not disturbed. It is not the case that the land could be used to continue the activities currently undertaken on it where an approach of acquiring rights and restrictions is taken instead of permanent acquisition of the land. For this reason, as is appropriate, freehold acquisition of the relevant areas is proposed...

4.31.5 It is also the case that these areas are to be acquired for security purposes, allowing the Applicant to have exclusive possession of and control over the immediate surrounding area, and thus more adequately being able deter any potential for interference with the Converter Station and the Telecommunications Buildings.

101. In reverse order, the fears of the Applicant about security have been addressed above under Fencing and can be properly resolved by a Requirement for CAT 2 Security Fencing in line with the Applicant's Design and Access Statement.

102. The desire to maintain land restoration after constructions works upon the Affected Party's land by way of landscaping and ecological enhancements presupposes the new existence of such so-called enhancements.

103. The core basis for permanent acquisition of the land of the Affected Party remains merely to compulsorily impose on the Affected Party – on the basis of taking their land against their will – a change of view, and being a view that the Applicant asserts by proxy, on behalf of the Affected Party, would be a preferred view to retention of the existing view with the Converter Station within it, behind two rows of pylons.

104. In English planning law, there is no right to a view and so it is difficult to see how the preference for a different view could legally justify the permanent acquisition of Plot 1-32 (save for the extent required for the footprint of the Converter Station Parameter Volume referred to above and a small extent of land for bunding and drainage to its South. See **Appendix NSPAD 14**, and the land North of the black dashed line.

105. The PA 2008 CPO Guidance remains clear under paragraph 11(ii), that land can *theoretically* be required to facilitate the authorised development, and an example given is: the acquisition of land for the purposes of landscaping the project. In such a case the Secretary of State will need to be satisfied that the development *could only* be landscaped to a satisfactory standard *if* the land in question were to be compulsorily acquired, *and* that the land to be taken is no more than is reasonably necessary for that purpose, *and* that is proportionate.
106. However, in this Application, it remains evident that the *permanent* acquisition of a large area of the Affected Party's land so as to execute a mere change of vegetation *from farm plants to unfarmed plants* is not necessary, not proportionate, is unreasonable, and, regrettably, irrational. In English planning law, there is no right to a view. Therefore, whilst the "local" visual screening of the Convertor Station from Little Denmead Farm is a laudable desire of the Applicant, the price of having the land taken from them against their will in order to have superimposed upon them a changed view and maintenance of different plant species on their former land is disproportionate, manifestly unreasonable and irrational.
107. The envisaged landscaping of the Affected Party's land evidences no more than an acceptance by the Applicant of necessary restoration works of existing agricultural land arising from the Applicant's construction works. That is, the *requirement* to landscape is not engendered otherwise than by the destruction of landscape by the construction compounds and excavation works and development of the land of the Affected Party in order to erect the Convertor Station. In turn, there is then a mere preference as to the visual amenity of the re-instated landscape.
108. Self-evidently, following construction of the Convertor Station, the Affected Party's land *could* be (and could be Required by a Requirement) reinstated to its pre-construction area status by removal of all construction-related development and the reinstatement of the land to the relevant Grade pre-construction. Alternatively, the higher Grade soil stripped as part of the cut and fill exercise could be applied to lower Grade parts of the land of the Affected Party so as to result in a net benefit of increased area of higher Grade agricultural land. Compare **Appendix NSPAD 3** with Sheet 1 of the Land Plans at **[REP5-003]** at Deadline 5 Submission - Late Submission - 2.2 Land Plans - Rev03; and Sheet 1 **[REP5-037]** Deadline 5 Submission - Late Submission - 7.9.18.3 Compulsory Acquisition Hearing 1 - Appendix 1-Exhibit 3 - Drawing showing indicative split between use for storage of subsoil and topsoil separately.
109. The South Downs advisor expressed the following views on page 8 of **[REP1-099]** in an email dated 18th October 2018, 15:12 from a Ruth Childs: (Emphasis added)

Mitigation Approach

- *The principle of retaining existing vegetation is our preferred option – this vegetation marks key landscape elements which are contributing to the site's character and many are historic, reinforcing time-depth...*

Vegetation

• *I think the approach of locating vegetation to strategically address impacts from key viewpoints is a positive one. But I would like to see the scheme deliver more benefits and respond better to its local landscape...*

On a more general note, I understand that option B is preferred from a Landscape point of view. I'm tentatively inclined to agree, but with the following comments/caveats:

o B is more in-line with and closer to the existing Sub-station and therefore will be seen in this context. Essentially keeping a tighter footprint.

o A affects the setting of both farmsteads – are these historic? What are their sensitivities?

o B would work well if it was truly dug into the ground – as opposed to a level platform being dug and a bund put around it. The building would require a protective membrane/retaining wall where soil touched it, so the current ground levels remain unchanged.

o B generates the need for a huge track which I do not support. I would be inclined to reconsider my view if this was not resolvable. It is generating additional and in my view unnecessary landscape and visual harm. This impacts the landscape in the following negative ways:

- Cutting across historic field boundaries
- Negatively affecting the character of Broadway Lane – becoming more industrial and less rural/agricultural and reducing the GI ability of the hedgerows along it.
- Preventing the re-connection/improvement of nationally important habitats (Ancient Woodland).
- Running through the centre of fields, contrary to character and dissecting the inherited field pattern and being more obvious in views compared to following existing hedgelines/field boundaries.

110. The Design and Access Statement “Landscape Design Principles” on page 61 provide:

1. *“The design will seek to minimise the loss of existing vegetation of ecological, landscape character and / or screening value as far as practicable and will include management repair measures where appropriate with reference to the indicative landscape mitigation plan”.*
2. *“Species rich woodland glades would be created within areas of new planting, taking into consideration soil types, seeding mixes and management regimes”.*
3. *“New woodland, scrub and hedgerow planting, within locations broadly indicated upon the indicative landscape mitigation plans, will be introduced within the Order Limits to provide appropriate screening from sensitive receptors, enhance landscape character and improve biodiversity”.*

The illustrative landscape mitigation plans (Plate 7.10 and 7.11) show how the designs have sought to maximise the retention of existing vegetation with Option B(ii) proposed to aid the retention of a greater amount of existing vegetation. Where vegetation is retained the indication landscape mitigation plans look to add to and enhance this vegetation, such as the ancient woodland buffer to the south east of the converter station. The plans also show the creation of species rich woodland glades and new woodland, scrub and hedgerow planting.

111. These principles are mere aspirations, unclear, and silent about reinstatement of the former construction site of the land of the Affected Party. Clear parameters for reinstatement are absent and by contrast, draft Article 30(4) does not require removal of new road surface, access road or related attenuation ponds. The Affected Party requests that the ExA impose a Requirement to ensure the reinstatement of the land of the Affected Party to match the status shown in **Appendix NSPAD 3**. This will ensure that the facilitative approach of the Affected Party to the continued growth of “Electricity City” remains sustainable and aligns with paragraph 170(b) of the NPPF.

Annex 1

Legal Framework

112. The PA 2008 includes as follows.
113. Within Part 7, Orders Granting Development Consent, Chapter 1, by section 120:
- 3) *An order granting development consent may make provision relating to, or to matters ancillary to, the development for which consent is granted.*
 - 4) *The provision that may be made under subsection (3) includes in particular provision for or relating to any of the matters listed in Part 1 of Schedule 5...*
 - 7) *Subsections (3) to (6) are subject to subsection (8) and the following provisions of this Chapter.*
114. Part 1 of Schedule 5 includes under paragraph 1: The acquisition of land, compulsorily or by agreement.
115. Also within Part 7, Chapter 2, by section 122, Purpose for which compulsory purchase acquisition may be authorised: (Emphasis added)
- 1) *An order granting development consent may include provision authorising the compulsory acquisition of land only if the Secretary of State is satisfied that the conditions in subsections (2) and (3) are met.*
 - 2) *The condition is that the land —*
 - a) *is required for the development to which the development consent relates*
 - b) *is required to facilitate ... that development, ...*
 - 3) *The condition is that there is a compelling case in the public interest for the land to be acquired compulsorily.*
116. It is clear that the power under section 120(3) is expressly “subject to” section 122(1).
117. Section 122(1) notably *distinguishes* between the conditions of (2) and the freestanding requirement of (3) that there *also* be a “compelling case in the public interest”. That is, the Applicant’s assertion or evidence that (in its subjective view) the land may be required or required to facilitate the development cannot in law under section 122(3) in itself *equate to* a “compelling” case nor a compelling case “in the public interest”. If it were otherwise, section 122(1) would have to be rewritten from “*the conditions in subsections (2) and (3) are met*” to read “*the conditions in subsections (2) ~~and (3) are~~ [is] met*”. Rather, section 122(1) shows authorisation to be a two stage process and that each consideration requires *separate* consideration. For example, howsoever much an applicant’s “requirement” may be for land, it cannot follow in law that that degree or force of “requirement” simultaneously satisfies the freestanding criteria of section 122(3): that there be a “compelling” case “in the public interest” and not “in the private interest” veiled as public interest.

Compulsory Purchase Case Law

118. In *Sainsbury's* [2011] 1 AC 437, the Supreme Court held: (Emphasis added)

9. *Compulsory acquisition by public authorities for public purposes has always been in this country entirely a creature of statute: Rugby Joint Water Board v Shaw-Fox* [1973] AC 202, 214. The courts have been astute to impose a strict construction on statutes expropriating private property, and to ensure that rights of compulsory acquisition granted for a specified purpose may not be used for a different or collateral purpose: see Taggart, "Expropriation, Public Purpose and the Constitution", in *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade*, (1998) ed Forsyth & Hare, p 91.

10. In *Prest v Secretary of State for Wales* (1982) 81 LGR 193, 198 Lord Denning MR said:

"I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands ..."

and *Watkins LJ* said, at pp 211–212:

"The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinised. The courts must be vigilant to see to it that that authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought."

11. Recently, in the High Court of Australia, French CJ said in *R & R Fazzolari Pty Ltd v Parramatta City Council* [2009] HCA 12, paras 40, 42, 43:

"40. Private property rights, although subject to compulsory acquisition by statute, have long been hedged about by the common law with protections. These protections are not absolute but take the form of interpretative approaches where statutes are said to affect such rights."

"42. The attribution by Blackstone, of caution to the legislature in exercising its power over private property, is reflected in what has been called a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights ...

"43. The terminology of 'presumption' is linked to that of 'legislative intention'. As a practical matter it means that, where a statute is capable of more than one construction, that construction will be chosen which interferes least with private property rights."

Rochdale Envelope

119. The Applicant has adopted a "Rochdale Envelope" approach to its proposals and its dDCO terms will result on a consent that cannot be drawn more widely than the likely significant effects identified and assessed. The wider the flexibility sought, the wider an EIA evaluation will be required and vice versa.

120. Advice Note 9 (July 2018) summarises the law in relation to that approach. In particular, there must be a match between the likely significant environmental effects evaluated and the terms of the relevant consent document to ensure that what is consented mirrors what has been assessed. Consent cannot be granted that results in unevaluated such effects. See *Tew* [2000] Env LR 1 and *Milne* [2000] Env 22 at paragraphs 93 and 114: (Emphasis added)

... *Provided the outline application has acknowledged the need for details of a project to evolve over a number of years, within clearly defined parameters, provided the environmental assessment has*

taken account of the need for evolution, within those parameters, and reflected the likely significant effects of such a flexible project in the environmental statement, and provided the local planning authority in granting outline planning permission imposes conditions to ensure that the process of evolution keeps within the parameters applied for and assessed,...

121. Smith 2003] Env LR 32 summarised the relevant principles at paragraphs 25-33 and added:
(Emphasis added)

33. In my view it is a further important principle that when consideration is being given to the impact on the environment in the context of a planning decision, it is permissible for the decision maker to contemplate the likely decisions that others will take in relation to details where those others have the interests of the environment as one of their objectives. The decision maker is not however entitled to leave the assessment of likely impact to a future occasion simply because he contemplates that the future decision maker will act competently. Constraints must be placed on the planning permission within which future details can be worked out, and the decision maker must form a view about the likely details and their impact on the environment.

122. In this application, the dDCO is the consent, its terms must express clearly defined parameters, the parameters must result in no likely significant effect being able to occur outside of them, and the ExA (and Secretary of State) must *prior to consent* form their own view about the likely outcome of details. Their evaluation results in testing of the envisaged parameters against what has been assessed and potential refinement of the express terms to ensure a match between what has been assessed.

Guidance on CPO and the Scope of Development

123. The PA2008 CPO Guidance includes: (Emphasis added)

1. *The Planning Act 2008 (“the Planning Act”) created a new development consent regime for major infrastructure projects¹ in the fields of energy, transport, water, waste water, and waste.*
2. *This guidance is designed to assist those intending to make an application for a development consent order under the Planning Act where their application seeks authorisation for the compulsory acquisition of land or rights over land². Its aim is to help applicants understand the powers contained in the Planning Act, and how they can be used to best effect. This guidance also advises on application of the correct procedures and statutory or administrative requirements, to help ensure that the process of dealing with such orders is as fair, straightforward and accurate for all parties as possible...*
7. *Applicants must therefore be prepared to justify their proposals for the compulsory acquisition of any land to the satisfaction of the Secretary of State. They will also need to be ready to defend such proposals throughout the examination of the application. Paragraphs 8-19 below set out some of the factors which the Secretary of State will have regard to in deciding whether or not to include a provision authorising the compulsory acquisition of land in a development consent order...*
8. *The applicant should be able to demonstrate to the satisfaction of the Secretary of State that all reasonable alternatives to compulsory acquisition (including modifications to the scheme) have been explored. The applicant will also need to demonstrate that the proposed interference with the rights of those with an interest in the land is for a legitimate purpose, and that it is necessary and proportionate..*
11. *Section 122 of the Planning Act sets out two conditions which must be met to the satisfaction of the Secretary of State before compulsory acquisition can be authorised. The first of these is*

related to the purpose for which compulsory acquisition is sought. These three purposes are set out in section 122(2):

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

For this to be met, the applicant should be able to demonstrate to the satisfaction of the Secretary of State that the land in question is needed for the development for which consent is sought. The Secretary of State will need to be satisfied that the land to be acquired is no more than is reasonably required for the purposes of the development.

(ii) the land is required to facilitate ... the proposed development.

An example might be the acquisition of land for the purposes of landscaping the project. In such a case the Secretary of State will need to be satisfied that the development could only be landscaped to a satisfactory standard if the land in question were to be compulsorily acquired, and that the land to be taken is no more than is reasonably necessary for that purpose, and that is proportionate...

12. In addition to establishing the purpose for which compulsory acquisition is sought, section 122 requires the Secretary of State to be satisfied that there is a compelling case in the public interest for the land to be acquired compulsorily.
13. For this condition to be met, the Secretary of State will need to be persuaded that there is compelling evidence that 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. Parliament has always taken the view that land should only be taken compulsorily where there is clear evidence that the public benefit will outweigh the private loss.
14. In determining where the balance of public interest lies, the Secretary of State will weigh up the public benefits that a scheme will bring against any private loss to those affected by compulsory acquisition.
15. In practice, there is likely to be some overlap between the factors that the Secretary of State must have regard to when considering whether to grant development consent, and the factors that must be taken into account when considering whether to authorise any proposed compulsory acquisition of land.
16. There may be circumstances where the Secretary of State could reasonably justify granting development consent for a project, but decide against including in an order the provisions authorising the compulsory acquisition of the land. For example, this could arise where the Secretary of State is not persuaded that all of the land which the applicant wishes to acquire compulsorily has been shown to be necessary for the purposes of the scheme. Alternatively, the Secretary of State may consider that the scheme itself should be modified in a way that affects the requirement for land which would otherwise be subject to compulsory acquisition. Such scenarios could lead to a decision to remove all or some of the proposed compulsory acquisition provisions from a development consent order...
19. The high profile and potentially controversial nature of major infrastructure projects means that they can potentially generate significant opposition and may be subject to legal challenge. It would be helpful for applicants to be able to demonstrate that their application is firmly rooted in any relevant national policy statement.