Date: 23 December 2020

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 FUNDING DELIVERED DURING COMPULSORY ACQUISITION HEARING 2

&

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

Submitted in relation to Deadline 6 of the Examination Timetable

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POST HEARING NOTE IN RELATION TO ORAL REPRESENTATIONS RELATING TO FUNDING DELIVERED DURING COMPULSORY ACQUISITION HEARING 2

ON BEHALF OF MR. GEOFFREY CARPENTER AND MR. PETER CARPENTER ("AFFECTED PARTY") &

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

SECTION A. INTRODUCTION

1. The issue of funding arose in our oral representations during Compulsory Acquisition Hearing 2 (**CAH2**) because:

    a. the discussion during Compulsory Acquisition Hearing 1 (**CAH1**) (where we note the ExA requested the Applicant to supply a copy of the KPMG Report) indicated that the Applicant had not yet provided as much information as possible on the funding situation that includes ensuring that it has adequate funds to cover compulsory acquisition costs;

    b. the brevity of the Applicant's Funding Statement **[APP-023]** compared with the requirement of paragraph 17 of the 'Planning Act 2008: Guidance related to procedures for the Compulsory Acquisition of Land' (September 2013) that requires the statement to "*provide as much information as possible about the resource implications of both acquiring the land and implementing the project for which the land is required*";

    c. the Applicant's 'Transcript of Oral Submissions for Compulsory Acquisition Hearing 1' submitted at Deadline 5 of the Examination **[REP5-034]** that is opaquely drafted and uses impenetrable general language;

    d. the Applicant limited company's (AQUIND Limited) objectively recorded current 'assets' in the 2018 accounts attached to Schedule 1 of the Funding Statement **APP-023]** and in the Applicant's 2019 accounts **[REP1-095]** appear to be less than the company's estimate for "land acquisition costs" (a term not defined by the Applicant) of approximately £4.9 million, contained in its response to the ExA's First Written Question CA1.3.103 (document reference: **[REP1-091]**

    e. the opaque scope of what the current and (so-called) 'intangible' assets of the Applicant cover (as they have been disclosed in the 2018 accounts attached to Schedule 1 of the Funding Statement [**APP-023]** and in the Applicant's 2019 accounts **[REP1-095]**;

    f. the Applicant's opaque relationship with third party funding entities, the opaque location of funds to meet enforceable compulsory purchase compensation awards, the opaque division of control of the Applicant from the relevant funds, in relation to the availability of compensation as a necessary element by which to make lawful compulsory acquisition of the Affected Land, as against the limited liability of the Applicant under English company law;

g. there appears to be a (further) gap between the Applicant's maximum estimate of approximately £4.9 million and the scope of the powers sought for compulsory acquisition under the latest draft of the dDCO **[REP5-009]**; and

h. the disparate nature and iterative emergence of the Applicant's funding case and absence of any particularisation of its case in relation to the land of the Affected Party, (our clients).

2. During CAH2, the ExA requested a Note on Funding to assist it in the Examination of the Applicant's Case. This is that Note.

3. This Note is divided into the following sections:

- Section B – Relevant compulsory acquisition powers;
- Section C – Relevant guidance relating to the availability of funding;
- Section D - The Applicant's estimate of compulsory acquisition costs;
- Section E – The Applicant's availability of funds to meet its estimated compulsory acquisition costs
- SECTION F – Applicant's responses during CAH2 to our oral submissions
- SECTION G – Practical way forward
- SECTION H - Conclusions

SECTION B. RELEVANT COMPULSORY ACQUISITION POWERS – ARTICLES 23, 27, 30(1) AND 30(4)

1. The latest dDCO **[REP5 – 009]** seeks compulsory acquisition powers.

2. Article 20(1)(a) provides a discretionary power to "*acquire compulsorily so much of the Order land within the permanent limits and described in the book of reference as is required for the construction, operation or maintenance of the authorised development or to facilitate it … and b) use any land so acquired for the purposes authorised by this Order or for any other purposes in connection with or **ancillary** to the undertaking*" (our emphasis added). These are broad powers.

3. Article 2(1) defines "Order land" as: "*means the land which is within the limits of the land to be acquired shown on and identified by plot number on the land plans and described in the book of reference*". The land of the Affected Party lies within the Order land whose scope is illustrated in Sheet 1 Figure 24.2 of 6.2.24.2 Environmental Statement – 'Volume 2 - Figure 24.2 Illustrative Cable Route, HDD sites and Joint Bays for noise and vibration assessment' **[APP-336]**; and shown on Sheet 1 of the Land Plans **[REP5-004]** . The Affected Party's land within the Order land includes land coloured: pink; purple; yellow; and green (as shown on the Land Plans **[REP5-004]**.

4. In relation to the land of the Affected Party, the Applicant exclusively relies on the following words in the definition of "Order land" in the dDCO **[REP5 – 009]**: "*required for the construction, operation or maintenance of the authorised development or to facilitate it*" and also on the word "ancillary" in the same definition. In paragraphs 4.2.1 and 4.2.2 of the Applicant's Transcript of Oral Submissions for Compulsory Acquisition Hearing 1 **[REP5-034]** , the Applicant states that Section 122(1) Planning Act 2008 provides that the Secretary of State must be satisfied that in relation to all land over which compulsory acquisition powers are

sought, the following conditions in s122(2) are met in relation to the land: "4.2.1 *it is required for the development to which the development consent relates, 4.2.2 it is required to facilitate or is incidental to that development…*" In paragraph 4.13 of the same transcript, the Applicant explains that the "*Order limits are shown on the Land Plans (REP1-011a) (CB-18) and the Works Plans (REP2-003) (CB-20), being represented by the red line on each*". Works number 2 and Works number 3 will (in part) take place on the land of the Affected Party. Paragraph 4.13 of the same transcript also states that the Works Plans (REP2-003) (CB-20) identify the areas over which the works which comprise the authorised development are to be undertaken. The Proposed Development is broken down into 5 main works as follows: "…*4.13.2 Work No.2 – Works to construct the Converter Station; 4.13.3 Work No.3 – Temporary working area of up to 5 hectares associated with Work No.1, Work No.2 and Work No.4*. ". Paragraphs 4.17, 4.21 and 4.27.1 of Applicant's Transcript of Oral Submissions for Compulsory Acquisition Hearing 1 **[REP5-034]**, explain in more detail the elements of the works that cover the Affected Party's land.

5. Article 27 of the dDCO **[REP5 – 009]** provides for sub-soil and airspace acquisition: (Emphasis added)
    1) *"The undertaker may acquire compulsorily so much of, or such rights in, the subsoil of and the airspace over the land referred to in paragraph (1) of article 20 (compulsory acquisition of land) or article 23 (Compulsory acquisition of rights and the imposition of restrictive covenants) as may be required for any purpose for which that land may be acquired under that provision instead of acquiring the whole of the land.*

    2) *Where the undertaker acquires any part of or rights in the subsoil of or the airspace over any land under paragraph (1) the undertaker shall not be required to acquire an interest in any other part of the land…"*

6. Therefore, the Applicant limited company would ***also*** become entitled to compulsorily acquire only a sub-soil strata or only an airspace strata in relation to the land referred to in Article 20(1), being: "***so much of*** the Order land within the permanent limits and described in the book of reference as is required for the construction, operation or maintenance of the authorised development or to facilitate it … ***and b)*** use any land so acquired for the purposes authorised by this Order ***or*** for any other purposes in connection with ***or ancillary*** to the undertaking".

7. Article 30 includes as follows:

    1) The undertaker may in connection with the carrying out of the authorised development —

    a) enter on and take temporary possession of —
    i) the land specified in column (2) of Schedule 10 for the purpose specified in relation to that land in column (1) of that Schedule; and
    Ii) any of the Order land in respect of which no notice of entry has been served under section 11 of the 1965 Act (powers of entry) and no declaration has been made under section 4 (execution of declaration) of the 1981 Act;
    b) remove any buildings and vegetation from that land;
    c) construct temporary works (including the provision of means of access), haul roads, security fencing, buildings and structures on that land;
    d) use the land for the purposes of a construction compound with access to the construction compound in connection with the authorised development; and
    e) construct any works specified in relation to that land in column (1) of Schedule 10 (land of which temporary possession may be taken), or any other mitigation works…

(4) Before giving up possession of land of which temporary possession has been taken under this article, the undertaker ***must either acquire the land or rights over the land subject to the temporary possession or****, unless otherwise agreed with the owners of the land,* ***remove all temporary works and restore the land*** *to the reasonable satisfaction of the owners of the land, but the undertaker is not required to —*

a) replace a building removed under this article;
b) remove any drainage works installed by the undertaker under this article;
c) remove any new road surface …;
d) restore the land to a condition better than the relevant land was in before temporary possession;
e) remove any ground strengthening works which have been placed on the land to facilitate construction and operation of the authorised development; …

9) The undertaker may not compulsorily acquire under this Order the land referred to in paragraph (1)(a)(i) nor acquire compulsorily any new rights or impose any restrictive covenants over that land ***except that the undertaker is not precluded from****— = a) a)* ***acquiring any part of the subsoil (or rights in the subsoil) of that land under article 27*** *(Acquisition of subsoil or airspace only); …*

10) Where the undertaker takes possession of land under this article, the undertaker is not required to acquire the land or any interest in it."

8. The title of Articles 20 and 30 are not relevant to its interpretation nor impose limits on the scope of the powers sought. On its face, Article 20 expressly links to Article 30, and both Articles provide powers, in addition to Article 27, to acquire land compulsorily. Article 20(1) is drawn widely to potentially encompass the taking of "any" land within the Order limit judged (after the Order is authorised by the Secretary of State) **by the Applicant limited company alone** "*as is required for the construction, operation or maintenance of the authorised development or to facilitate it … and b) use any land so acquired for the purposes authorised by this Order or for any other purposes in connection with* ***or ancillary*** *to the undertaking*" and Article 30(4) is drawn also widely so as to entitle the Applicant limited company to make a choice (after it has both entered and taken possession of any land within the Order limits and taken no other step (see A.30(1)(a)(ii)) to "either acquire" that land "or" remove temporary works.

9. Article 30(1)(a)(i) specifies certain land that includes Plots 1-57 and 1-71 that are land of the Affected Party and shown on Sheet 1 of the Land Plans **[REP5-004]**) . During CAH2, the Applicant commented that the effect of Article 30(1)(a)(i) is that the land covered by this particular article cannot be compulsorily acquired pursuant to Article 30(4), due to the effect of Article 30(9) of the dDCO [**REP5-009].** This however is not the case, as **Article 30(9)(a) does allow** the Applicant to compulsorily acquire any part of the subsoil or rights in subsoil of the land covered by Article 30(1)(a)(i).

10. The scope of Article 30(1)(a)(ii) (and so Article 30(4)) could encompass any land within the Order limits. The extent of those limits in relation to the land of the Affected Party is shown on Sheet 3 of **[APP-013]** of Application document reference 2.7 Indicative Converter Station Area Layout Plans Option B(ii) and those limits encompass land of all colours of the Affected Party (and by logical extension) of all other affected parties. Perhaps surprisingly, the Order limits also extend over the whole of the existing Lovedean Substation (coloured blue on the Land Plans **[REP5-003]**) and it is not understood that National Grid has itself objected to the

potential acquisition of its land by the Applicant limited company in the event that the company enters and takes possession of the western part of the Substation land.

11. Further, and with regard to Article 27, under Article 30:

    a. all land within the Order Limits that is not coloured yellow on the latest revised draft Land Plans in **[REP5-004]**; and

    b. all the *subsoil* of the yellow land on the draft Land Plans,

    are subject to a power in Article 30(4) to compulsorily acquire permanent rights and/or interests, should the undertaker decide not to relinquish possession after the relevant stage of the development has completed.

12. Article 31(1) of the latest dDCO **[REP5-009]** now provides an upper time limit of 5 years "beginning on the day on which the Order is made" for when the Applicant can enter land to be temporarily possessed for the purposes of construction.

13. The effect of Articles 30(4), 31(1) and 31(2)) appears to be to entitle the undertaker to choose to exercise compulsory purchase powers in relation to (e.g. Plot 1-32) for **an unknown period of time, after the DCO is made.** This means that in terms of meeting the requirements of paragraph 18 of the Planning Act CPO Guidance to demonstrate that adequate funding is likely to be available to enable the compulsory acquisition **within the statutory period following the order being made**, the 'statutory period' for these purposes is indefinite in relation to land that can be temporarily possessed for construction purposes (almost the entirety of the Order Limits). We explain as follows:

    a. Article 31(1) only time-limits the **authority to enter** land to be temporarily possessed for the purposes of construction – the authority **to enter land** only lasts for 5 years from the date of the DCO. As Article 31(2) states, nothing prevents the Applicant from remaining in temporary possession of land beyond this 5-year period.

    b. Article 30(3) provides that in relation to land that is temporarily possessed for construction purposes, possession must be relinquished after the end of the period of 1 year beginning with the date of completion of the work for which temporary possession of the land was taken, unless it exercises powers of compulsory acquisition over such land. We do not know how long construction can take.

    c. Therefore, so long as the Applicant has entered land within 5 years of the date of the DCO, and as we do not know when construction will end for the purposes of temporary possession, **it is not known when compulsory acquisition powers can be exercised pursuant to Article 30(4), despite the provisions of Article 30(3)**. This means that the Applicant can exercise compulsory acquisition powers at any time, for an uncertain period of time so long as temporary possession is taken within the 5-year period of time set out in Article 31(1).

    d. The fact that Article 22 of the dDCO **[REP5-009]** states that powers of compulsory acquisition can only be exercised within 5 years of the date of the DCO, does not apply here. That is because the power to enter land for temporary possession relating to construction under Article 30 also lasts for 5 years from the date of the DCO (by virtue of Article 31), and therefore cancels out the effect of Article 22 because Article 30(4) allows for compulsory acquisition powers to still be exercised **AFTER** temporary

possession is taken – i.e. **AFTER** 5 years from the date of the DCO – i.e. **AFTER** the time limit in Article 22 for exercising.

e. Therefore, if the 'statutory period' within which compulsory acquisition powers can be exercised under Article 30(4) is unknown, how can the Applicant demonstrate that there is a reasonable prospect of the requisite funds being available (the test in paragraph 9 of the Planning Act CPO Guidance), to enable compulsory acquisition **within the statutory period following the order being made** (the test in paragraph 18 of the Planning Act CPO Guidance)? It suggests that the Applicant will need to demonstrate there is a reasonable prospect of the requisite funds being available for a very long time – because the 'statutory period' is not known or controlled by the dDCO [REP5-009]. If the KPMG Report is all that the Applicant has to rely on as evidence of future funding of the project (i.e. a market intelligence report), it has not met the relevant tests in the Planning Act CPO Guidance.

f. This therefore entitles the undertaker to choose (as opposed to it being controlled by the DCO) the timing of the exercise of compulsory acquisition powers, whilst not requiring execution and operation of the electricity parts of the development, whilst remaining on our client's land. Nothing in the dDCO determines the currency of acquisition powers once triggered. This appears relevant to paragraph 18 of the Planning Act CPO Guidance because the 'statutory period' appears presently unknown. Were the fibre optic cables to be used for commercial telecommunications after erection and operation of the small Telecommunications Buildings, this would appear to allow the Convertor Station to be built subsequently or not at all.

14. It is clear therefore that the combined effect of Articles 20, 27, and 30 is such that the Applicant is seeking very wide ranging compulsory acquisition powers across all the Order Land. This is pertinent to our oral representations made at CAH2 in relation to whether the Applicant has accurately and properly estimated the amount of compulsory acquisition costs that will be incurred, and whether the Applicant has properly demonstrated that there is a reasonable prospects that requisite funds will be available for those costs. We discuss these in more detail in the next section of this Note (section D below).

15. Left to its own devices after an Order were to be made, the Applicant alone would be then entitled to decide later (but after the DCO is granted) under Article 30(4) which land, of any land, within the Order Limits is to be subject to permanent compulsory acquisition powers pursuant to Article 30(4), and for that to be **subjectively justified** by its exclusive subjective judgement (and not that of the ExA or Secretary of State) later and also after the event of its having secured the benefit of such wide powers (as opposed to their extent and justification having been "carefully scrutinised" and on the basis of objective information at this prior stage before authorisation).

16. The Affected Party requests that the ExA "carefully scrutinise", in the context of the protections afforded to that Party under English law and the exercise of discretions under sections 120(3), as subject to, and under 122(1) of the PA 2008 to include compulsory powers of acquisition be exercised against the Applicant limited company (see *Sainsbury's* case: *R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council [2011] 1 A.C. 437*), the legal scope of the compulsory acquisition powers, and whether there is (in the context of this Note), funding justification for the wide extent of the powers sought, in particular in relation to the Affected Party's land.

17. In line with our oral submissions to CAH2, the above analysis of the scope of powers sought under those sections reveals that the Applicant limited company has adopted a "Rochdale Envelope Approach" to *both* the flexible extent of dDCO authorised development *and* also the flexible extent of compulsory powers sought. However, as articulated in CAH 2, the protections afforded to the Affected Party bear on the opposite direction to the flexibility of the approach to the authorised development in requiring the "least intrusive" intervention in the Affected Party's land and not the "maximum intrusive" intervention in that land.

18. The Affected Party recognises that:

    a. Whereas paragraph 17 of the guidance issued by the Ministry of Housing, Communities, and Local Government entitled 'Planning Act 2008 – Guidance related to procedures for the compulsory acquisition of land' (September 2013) ("**Planning Act CPO Guidance**"), requires a funding statement to provide " *as much information as possible about the resource implications of both acquiring the land and implementing the project for which the land is required*", the Applicant's Funding Statement included at the date of its submission "as much information" as was then available to the Applicant about funding but that since then, further objective funding information may have arisen, and that, until the conclusion of the fact finding and evaluative Hearing for the currency of the statutory period, the Applicant limited company has an opportunity to supplement with objective information its Funding Statement with such new funding information as may come into existence after the date of that initial Statement, whilst simultaneously affording the Affected Party an Article 6 compliant opportunity to test that objective material and also the ExA to "carefully scrutinise" such recently emerging objective material;

    b. The words in Articles 20(1)(a) ("*so much of*"); Article 27(1) ("*so much of*"); Article 30(1)(a)(ii) ("*any of the land*") are widely drawn to reflect a Rochdale Envelope flexibility not appropriate to compulsory purchase of land and rights and that the ExA appears required to exercise its discretion **to minimise** the extent of those wide powers so as to match the extent or absence of the current justification (as at Deadline 6, 23rd December 2020) and may do so in its own draft DCO.

19. In conclusion at this point in the Note on Funding, the Affected Party requests that the impacts and costs need to be examined thoroughly now in advance of a dDCO being made subject to a recommendation to include compulsory purchase powers.

20. In the event that funding justification falls short of the match between the wide scope of powers sought and the currently available assets of the Applicant limited company, the orthodox (and *un*exceptional) position is to not include powers of compulsory acquisition in relation to the land of the Affected Party and in line with paragraph 16 of Planning Act CPO Guidance, which states as follows: (Emphasis added)

    "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."

21. The approach of the Affected Party also aligns with that of the ExA in other DCOs where compulsory powers were sought and objective information provided. See for example, paragraphs 4.1; 4.1.3; Section 8, and 8.1; 8.1.1-.3; and paragraphs 8.4.12 – 8.4.21 of the ExA's Report of Findings and Conclusions in the Thorpe Marsh Gas Pipeline DCO, another linear infrastructure project, and where the ExA took a properly "maximum precautionary value on the total contingent liability associated with the acquisition of land or interests". We have attached hereto extracts of that Report at **Appendix NFUND -1**.

22. The compulsory acquisition powers contained in Article 30(4) mean that that its effects need to be examined now (not later in the future). The resulting land acquisition costs that Article 30(4) would generate also need to be costed now by the Applicant, not in the future.

SECTION C. RELEVANT GUIDANCE RELATING TO THE AVAILABILITY OF FUNDING

1. As mentioned above, the Planning Act CPO guidance contains the relevant guidance against which we measure the Applicant's Funding Statement **[APP-023].**

2. Paragraphs 9, 17 and 18 of the Planning Act CPO Guidance provide: (Emphasis added)

"*9. The applicant must have a clear idea of how they intend to use the land which it is proposed to acquire. They should also be able to demonstrate that* ***there is a reasonable prospect of the requisite funds for acquisition becoming available.*** *Otherwise, it will be difficult to show conclusively that the compulsory acquisition of land meets the two conditions in section 122 (see paragraphs 11-13 below)…"*

"17. Any application for a consent order authorising compulsory acquisition must be accompanied by a statement explaining how it will be funded. This ***statement should provide as much information as possible about the resource implications of both acquiring the land and implementing the project for which the land is required****…It may be that the project is not intended to be independently financially viable, or that the details cannot be finalised until there is certainty about the assembly of the necessary land. In such instances, the applicant should provide an indication of how any potential shortfalls are intended to be met. This should include the degree to which other bodies (public or private sector) have agreed to make financial contributions or to underwrite the scheme, and on what basis such contributions or underwriting is to be made.*

"18. The timing of the availability of the funding is also likely to be a relevant factor. Regulation 3(2) of the Infrastructure Planning (Miscellaneous Prescribed Provisions) Regulations 2010 allows for five years within which any notice to treat must be served, beginning on the date on which the order granting development consent is made, though the Secretary of State does have the discretion to make a different provision in an order granting development consent. ***Applicants should be able to demonstrate that adequate funding is likely to be available to enable the compulsory acquisition within the statutory period following the order being made, and that the resource implications of a possible acquisition resulting from a blight notice have been taken account of****."*

3. Therefore, we have set out in this Note our assessment of:

a. the Applicant's Funding Statement (to which its 2018 audited accounts are attached) **[APP-023];**

b. the Applicant's 2019 audited accounts **[REP1-095]**;

c. the Applicant's response to the ExA's First Written Question CA1.3.103 (document reference: **[REP1-091];** and

d. the Applicant's representations at CAH1 and CAH2, against the Planning Act CPO Guidance,

in relation to whether there is a reasonable prospect of the requisite funds for acquisition becoming available, and, whether the information provided to date by the Applicant is sufficient to satisfy the requirement to provide "*as much information as possible*" about the resource implications of both acquiring the land and implementing the project for which the land is required.

SECTION D. APPLICANT'S ESTIMATE OF THE REQUISITE FUNDS REQUIRED FOR COMPULSORY ACQUISITION COSTS

1. Our oral representations during CAH2 covered the effect of the relevant compulsory acquisition powers (as set out in Section B of this Note), including the effect of Article 30(4) of dDCO **[REP5 – 009],** on whether:

    a. the Applicant's calculation of its compulsory acquisition costs **covers the correct extent of land, subsoil and airspace affected** by the compulsory acquisition powers sought. Phrased another way – does the estimate cover the right land?; and

    b. whether as a consequence, the Applicant's **estimate** of compulsory acquisition costs is therefore certain and accurate.

2. This is pertinent as it throws considerable doubt over whether the Applicant satisfies the requirements of paragraphs 9 and 17 of the Planning Act CPO Guidance. If it is unclear what the Applicant's compulsory acquisition costs will be and what they cover, how can the Applicant meet the requirement in paragraph 9 of the Planning Act CPO Guidance that <u>there is a reasonable prospect of the requisite funds for acquisition becoming available</u>, and <u>how</u> can the Applicant therefore provide as much information as possible about the relevant resource implications (as required by paragraph 17 of the Planning Act CPO Guidance)?

3. **Does the estimate cover the right land?** On behalf of the Applicant limited company, Mr Jarvis orally confirmed during CAH 2 that the Applicant limited company had <u>only</u> financially evaluated (within the Order limits) the "pink land" shown on the Land Plans **[REP5-003]**, in its estimate of compulsory acquisition compensation in paragraph 5.4 of **[APP-023]** of 4.2 Funding Statement: "land acquisition costs: estimate £4m". However, having regard to the scope of powers sought above as explained in Section B of this Note, and comparing (e.g.) Land Plan Sheet 1 **[REP5-003]** showing the defined extent of the "pink" land and also Sheet 3 of the Indicative Converter Station Area Layout Plans **[REP1-018]** which show the wider extent of the Order limits (including the existing Lovedean substation), this reveals a substantial gap or absence of evidence of the Applicant's financial estimate of funding for acquisition of all land within the Order limits (above ground, not coloured yellow), including sub-soil and air

rights under Articles 20(1), 27, and 30(4). In light of Mr Jarvis' oral response to the ExA in CAH 2, the estimate of the Applicant limited company in paragraph 5.4 of its Funding Statement of £4m for compulsory acquisition costs (amended to £4,970,755.54 million in in its response to the ExA's First Written Question CA1.3.103 [**REP1-091]** cannot cover the extent of acquisition costs engendered by the acquisition of land that could be so acquired after the Order sought may be authorised by the Secretary of State. Further, in addition to the land of the Affected Party including both yellow land (whose sub-soil and air rights may be also acquired), and purple and also green land, and also air rights over the pink land that may also be acquired, the Order limits includes existing nationally critical infrastructure (such as National Grid's Lovedean electricity substation) which in principle should not be at risk of permanent compulsory acquisition as the impacts of this have not been consulted on or assessed. Based on Mr Jarvis' oral response, the Applicant limited liability company has incorrectly estimated its maximum exposure to potential acquisition costs.

4. The Applicant's oral evidence during CAH2 that its estimated compulsory acquisition costs only covered the "pink land" on the Land Plans **[REP5-003]** (and that includes our client's land in Plot 1-32 whilst the Land Plans show other colours of land within the Order Limits) also appears in *direct conflict* with the scope of what the latest Funding Statement **[APP-023]** states. Paragraph 7 of the Funding Statement indicates that the £4 million figure provided at paragraph 5.4 of the Funding Statement is intended to cover the costs of the exercise of **ALL types of compulsory acquisition powers and powers of temporary possession**. Paragraph 7.1.2 of the Funding Statement states: (Emphasis added) " *…the following land and rights over land are sought for the purposes of the Proposed Development:*
(A) Acquisition of all freehold and leasehold interests over land required for the construction of a Converter Station at Lovedean;
(B) Rights to plant and maintain landscaping, including maintaining existing hedgerows, on parcels of land necessary to mitigate the visual and ecological impact of the Proposed Development;
(C) Easements authorising the laying, operation and maintenance of the HVAC onshore cables between the converter station and the existing National Grid substation at Lovedean;
(D) Easements authorising the laying, operation and maintenance of the HVDC onshore cables between the Converter Station at Lovedean and the landfall site at Eastney;
(E) Temporary use of land in connection with the construction and maintenance of the Proposed Development;
(F) Easements of access necessary to construct and maintain the Proposed Development;
(G) Acquisition of all freehold and leasehold interests over land required for construction of two optical regeneration stations near to the landfall at Eastney."

5. Paragraph 7.2.1 of the Funding Statement goes on to state that: "*The total estimated maximum costs **to acquire the land and rights required in connection with the Proposed Development and for which powers of acquisition in the Order are sought in relation to are approximately £4m….**The Applicant considers that the actual cost of acquiring land and rights required will be less than the above sum*." (our emphasis added). As paragraph 7.1.2 sets out the land and rights "***sought for the purposes of***" Application development and this includes powers of compulsory acquisition of rights, easements, and temporary possession (i.e. the land shaded yellow, green, blue, green and purple on the Land Plans **[REP5-003]**), and paragraph 7.2.1 refers to the "*total estimated maximum costs **to acquire the land and rights required in connection with the Proposed Development",*** it is clear the £4 million figure provided (and subsequently updated estimate of £4,970,755.54) is intended to cover the costs of the exercise of all types of compulsory acquisition and temporary possession powers over all the land within the Order limits, with the exception of the sub-soil to land to be temporarily

possessed pursuant to Schedule 10 of the dDCO **[REP5-009]**. The figure of £4,970,755.54 therefore appears to be a gross underestimate compared to the amount of land it covers.

6. **Is the estimate of compulsory acquisition costs reasonably certain and adequate?** In short, if the Applicant's calculation does not cover the correct *extent of land* on the Land Plans [REP5-003], the calculation of compulsory acquisition costs cannot be reasonably certain nor adequate. During our oral representations at CAH2, we noted the contents of the Funding Statement **[APP-023],** the 2018 accounts for AQUIND Limited attached to Schedule 1 of the Funding Statement, and the 2019 audited accounts for AQUIND Limited **[REP1-095]** (which we had understood from the disparate nature of the documentation and the absence of a particularised case in relation to the Affected Party, that the ExA did not possess). The Applicant helpfully clarified orally during CAH2 that a copy of its 2019 accounts was submitted to the ExA by the Applicant as part of its responses to the ExA's First Written Questions [REP1-091]. We have attached to this Note for ease of access copies of the 2018 and 2019 accounts at **Appendices NFUND-2 (2018 accounts), and NFUND-3 (2019 accounts).**

7. The Applicant has to date provided two different estimates of its compulsory acquisition costs; a lower estimate in the Funding Statement **[APP-023]**, and a later higher estimate in its response to the ExA's First Written Questions **[REP1-091],** in relation to Question CA1.3.103.

8. In paragraph 5.4 of the Funding Statement, the Applicant estimates that of the total capital cost of the development will be £622 million, of which "land acquisition costs" will be £4 million.

9. However, this £4 million estimate has most recently changed. In the Applicant's response to the ExA's First Written Question CA1.3.103 **,** the Applicant stated that its land acquisition costs will be now higher than its initial estimate , at £4,970,755.54, which is broken down by the Applicant as follows:

    - Land acquisition: £1,277,000.00
    - Land rights: £1,973,775.21
    - Disturbance compensation: £664,980.33
    - Injurious affection: £645,000.00
    - Professional fees: £410,000.00

    Total: £4,970,755.54

10. The Affected Party, therefore, now reads the "£4m" stated in paragraph 5.4 of the Funding Statement to be an underestimate by over half a million pounds - £560,755.54 (i.e. excluding fees). The Applicant's estimate has increased by more than 20% from £4m since 14th November 2019.

11. We also question to what extent is the latest estimate adequate, given that paragraphs 5.1 and 6.2 of the Funding Statement **[APP-023**] reinforces that the Applicant *itself* is unclear as to how much compulsory acquisition costs and development costs could be and this appears to be iteratively unfolding even at Deadline 6. They state (our emphasis added):

"*5.1 The Applicant **continues to work with its delivery partners to understand the** costs of implementing the Order, which includes **costs** **associated with** obtaining development consent, construction and **land acquisition**."*

*"6.2 The Applicant **intends** to raise equity capital and project debt financing to meet the estimated costs of the Proposed Development. It is anticipated that the proportions of funding will be 20% equity and 80% debt."*

12. Given:

    a. the conflicting representations and information provided;

    b. the Applicant's estimate of compulsory acquisition costs appears to be inaccurate as it does not cover the full scope of land affected;

    c. the Applicant itself appears to still be understanding what those costs could be; and

    d. the Funding Statement remains not updated by the Applicant limited company,

    we reasonably understand that the Applicant's uncertainty, its intention, and its seeking to "understand" costs remains as at Deadline 6.

13. This in turn however, makes it difficult for the ExA to itself be able to conclusively be satisfied that compulsory purchase of the Affected Party's land can be lawfully justified because so far, Applicant is not yet in a position to, and has not yet demonstrated, that there is a reasonable prospect of the requisite funds for acquisition becoming available **if it currently cannot adequately estimate what its liability to all compulsory acquisition costs could be under the dDCO terms and has only estimated the value of pink land acquisition also.**

SECTION E. AVAILABILITY OF APPLICANT FUNDS TO MEET ESTIMATED COMPULSORY ACQUISITION COSTS

1. The common law protections summarised in the *Sainsbury's* case where land taking powers are under consideration include a requirement for there to be "careful scrutiny", in this matter, of "how" nationally significant infrastructure projects are to be funded where compulsory acquisition powers are being sought. The correct tests of paragraphs 9, 17 and 18, of the Planning Act CPO Guidance (as we have set in Section C of this Note) fall to be applied in relation to availability of funds (and not those of the guidance relating to locally made acquisition orders under the Town and Country Planning Act 1990).

2. Under the Town and Country Planning Act 1990 where compulsory acquisition powers are being sought, the relevant test for compulsory acquisition funding appears in the Ministry for Housing, Communities, and Local Government's guidance issued in July 2019 *'Guidance on compulsory purchase process and the Crichel Down Rules*' (**Crichel Down Guidance**). The Crichel Down Guidance describes that there are 6 stages during the compulsory purchase process. Stage 1 is selecting the right compulsory purchase power. Stage 2 concerns justifying a compulsory purchase order. In relation to Stage 2, the Crichel Down Guidance states at paragraph 13 that: (Emphasis added)

"*If an acquiring authority…cannot show that all the necessary resources are likely to be available to achieve that end within a reasonable time-scale, it will be difficult to show conclusively that the compulsory acquisition of the land included in the order is justified in the public interest, at any rate at the time of its making*."

3. The test referred to above is a different and lower test than that referred to in paragraphs 9 17 and 18 of the relevant Planning Act CPO Guidance set out above. The test of funds being "likely to be available" is not the relevant test under the 2008 Act that concerns national (not local) projects. National projects that include compulsory acquisition powers require objective certainty of available funds: "how it will be funded" not "how it might be" or "how it is likely to be" funded. See paragraphs 9 and 17 of the Planning Act CPO Guidance. Further, the term "reasonable" in paragraph 9 of the same guidance excludes the irrational (such as subjective intention) and calls for objective evidence concerning funding.

4. As the ExA is aware, with regard to nationally significant infrastructure projects that are governed by the Planning Act 2008, the relevant test to be applied when scrutinising funding in a compulsory acquisition context is different. See paragraphs 9, 17 and 18 of the Planning Act CPO Guidance as set out in Section C of this Note.

5. In addition to showing how acquisition costs will be funded, paragraph 9 of the Planning Act 2008 Guidance requires also the Applicant's "Funding Statement" to "*provide as much information as possible about the resource implications of both acquiring the land and implementing the project for which the land is required".*

6. The Affected Party notes that from paragraph 5.5 of the Funding Statement **[APP-023],** the cost of interest and other debt servicing will be met from revenues generated by the Project. Paragraph 6.1 of the Funding Statement similarly states that the Application development is to be funded through project finance funded and secured against the operational profits (revenues) of the Project.

7. Paragraphs 6.2 and 6.3 of the Funding Statement also state that: "*The Applicant **intends to raise** equity capital and project debt financing to **meet the estimated costs of the Proposed Development**. It is anticipated that the proportions of funding will be 20% equity and 80% debt*. Whilst we applaud the good intentions of the Applicant Limited Company, we note that it is anticipates in due course seeking to fund the project and by use of funding comprised of equity capital derived from leading international infrastructure funds, and that project debt financing will be secured from various banking sources and/or institutional investors. **Therefore, this present evidence appears to helpfully confirm that the Applicant does not currently have the necessary resource funds to pay for the estimated costs of the project, including compulsory acquisition costs AND that there is no clear indication or certainty of the timing of the availability of the requisite funds. No funding is guaranteed presently nor available. This does not meet the requirements of the Planning Act CPO Guidance and, consequently, it appears difficult to show conclusively that the compulsory acquisition of the land included in the order is justified in the public interest, at any rate at the time of its making.**

8. The Affected Party made representations during CAH2 relating to how the 2018 accounts attached to the Funding Statement **[APP-023]** and the subsequently released 2019 Accounts for AQUIND Limited **[REP1-095]** revealed that, objectively, time-limited unsecured loans provided by OGN Enterprises Limited (a company incorporated in the British Virgin Islands with no control over or shareholdings in AQUIND Limited) were to be relied on to fund the initial development costs (including compulsory acquisition costs). We also argued that as the

source of funds was located offshore and AQUIND was a limited liability company, there was no guarantee or mechanism in place to enable the enforcement of the payment of those funds for compulsory acquisition. We explain further as follows.

Uncertainty over how estimated costs will be funded

9. The submissions made by the Applicant to date through the Funding Statement **[APP-023],** the Applicant's response to the ExA's First Written Question CA1.3.103 **[REP1-091],** the Applicant's 2019 audited accounts **[REP1-095],** and the Applicant's statements about funding at CAH2 , reveal that the project is hoped to be funded by finance that is hopefully to be obtained in the future and that there is no current real tangible prospect of secured funding (or what its timing is) as at Deadline 6.

10. At present, at most, only a market intelligence report by KPMG exists (currently undisclosed), that we understand indicates there ***might*** be interest for this general ***type*** of project (based on the Applicant's response to the ExA's First Written Question CA1.3.103 **[REP1-091])**. No further details of who would fund these costs, and when, are provided. This is therefore not adequate to satisfy the test in paragraph 9 of the Planning Act CPO Guidance that there is a **reasonable prospect** of the requisite funds being available nor is there evidence of the timing of the availability of those funds because they have not yet been raised in the market.

11. In light of this, it appears impossible to conclude whether adequate compulsory acquisition costs are already currently held by the Applicant, or whether such resources **too** will also fall to be raised hopefully also through project finance in the future (in which case, its funding would be equally uncertain on that basis also).

Reasonable prospect of current funding?

12. We have therefore looked to see what evidence the Applicant has submitted to date to show it may already hold (or has secured) the funds to cover the estimated compulsory acquisition funds of £4,970,755.54 (if this is indeed the true cost of exercising the very wide range of compulsory acquisition powers the Applicant seeks). This is especially important because: the national guidance requires as much information as possible to be included in the Funding Statement (and therefore, there is no reason to assume that the Applicant has held back information previously available to it), and there is a disconnect between who has control over the Applicant (which is currently unclear given the person with significant control is a 'Protected Person' – we explain that phrase further below), and who is loaning the money to the Applicant limited company to ensure it is a going concern and to cover what the Applicant has termed in its audited 2018 accounts attached to the Funding Statement **[APP-023]** as the "initial development costs of the Application development" (which may or may not cover compulsory acquisition costs).

13. Note 12 on page 10 of the 2018 audited accounts attached to the Funding Statement **[APP-023]** indicates that OGN Enterprises Limited (incorporated in the British Virgin Islands) was the 100% shareholder in AQUIND Limited until 15 February 2019 (i.e. after the period the 2018 audited accounts cover). Since 15 February 2019, Aquind Energy S.a.r.l has owned 100% shares in Aquind Limited.

14. Note 3 of page 8 of the 2018 audited accounts states that:

"*The company has been and is dependent upon the shareholder in providing funding to cover the initial project development costs. A number of shareholder loans have been provided to*

the company which are for a fixed term of one year. The shareholder has agreed to roll-over each loan and to extend for one further year. A budget has been prepared covering one years required project development and overhead costs to 31 March 2020. The shareholder has provided a letter of comfort to the company that the budget will be funded by additional shareholder loans and that all individual loans made to date to the company will be extended for one further year. The shareholder is therefore committed to provide continued funding to the company for the current project development phase. The directors are also investigating alternative sources of finance, including commercial banks, other financial institutions and strategic partners to fund subsequent project stages."

We have assumed that references to "the shareholder" here are **NOT** to Aquind Energy S.a.r.l (as it did not own shares in AQUIND Limited as at 30 June 2018), but to OGN Enterprises Limited**.** No definition of 'initial development costs' is provided in the 2018 accounts, and it is therefore not known whether they include funds for estimated compulsory acquisition costs.

15. What Section 3 of page 8 of the 2018 audited accounts show is that as at the date of the application for the Development Consent Order, the 'initial development costs' (which is unclear as to whether they include compulsory acquisition costs or not) were being funded by time-limited loans by OGN Enterprises Limited (i.e. off-shore funds) that only lasted for 12 months at a time, made on a year rolling basis, and secured only by a letter of comfort by OGN Enterprises Limited.

16. The 2018 audited accounts also do not reveal the value of the loans AQUIND Limited benefitted from at the time, from OGN Enterprises Limited, so it difficult to determine whether AQUIND Limited did at the time hold funds to cover its estimate of 'land acquisition costs'. There is a reference to "intangible assets" on page 6 of the 2018 accounts, valued at £12,169,613 with a 'Note 6' connected to it. Note 6 appears on page 9 of the 2018 accounts, and it breaks down AQUIND Limited's 'intangible assets' into the following components: (i) 'Development Costs'; (ii) intellectual property rights; and (iii) 'other intangibles'. 'Development costs' are not defined. Intangible assets are however typically items that are not able to be touched or seen, though money may have been paid to purchase them. Examples of intangible assets include goodwill, patents, copyrights, trademarks, loan fees and organisation costs. Loans are not intangible assets. Short term loans are usually recorded separately as borrowings. Therefore, whilst there is no definition of 'Development Costs' provided, **it is unlikely that the shareholder loans would be included in the intangible assets figure of £12,169,613 in the 2018 accounts**.

17. With regard to the 2019 audited accounts for AQUIND Limited **[REP1-095],** our conclusions are the same, albeit different sums make up those accounts.

18. Note 3 on page 9 of the 2019 accounts **[REP1-095]** states that "*OGN Enterprises Limited has provided a number of shareholder loans to the company over the years. OGN Enterprises Limited has confirmed its commitment to provide funding to cover the initial project development costs irrespectively of the sale of 100% of shares of the company to Aquind Energy S.a.r.l . OGN Enterprises has agreed to roll-over each loan and extend them until 1 June 2021. OGN Enterprises Limited is therefore committed to provide continued funding to the company for the current project development phase. The directors are also investigating alternative sources of finance, including commercial banks, other financial institutions and strategic partners to fund subsequent project stages*." Therefore the same issues with time-limited off-shore funds being provided on a rolling yearly basis only by an entity in relation to which no corporate information or accounts have been provided, remain. There is also no

evidence that the loans from OGN Enterprises Limited are secured in any way, which leads us to question why OGN is making unsecured loans for a nationally significant infrastructure project. Note 12 on page 11 of the 2019 accounts (Related party transactions) states that "*During the year, the Company received loans from OGN Enterprises Limited of £11,910,079 (2018: £8,678,425). The outstanding amount at the reporting date was £24,105,908 (2018: £12, 195, 829)….OGN Enterprises Limited has agreed to roll-over each loan and to extend them until 1 June 2021*". This loan value information does not however appear to be reflected in the primary financial statements in the 2019 accounts (i.e. we cannot see where they are represented in the numbers). This loan value information only appears as supplementary information, and under normal accountancy principles, **supplementary information is not normally audited**. Therefore, it remains unclear how these loans are being treated for accounting purposes and questions remain (as no information has been provided) as to what the loan amounts will be used for, and whether those loans cover compulsory acquisition costs. If the loans only last until 1 June 2021, there is no evidence that they will be in place therefore by the time compulsory acquisition compensation would be payable, and are therefore unlikely **to be intended to** cover compulsory acquisition costs.

19. At this point therefore, there is nothing in the 2018 accounts **[APP-023]** or the 2019 accounts **[REP1-095]** to show objectively that AQUIND Limited actually holds funds to cover the estimated land acquisition costs (which at the time of both accounts, was £4 million). This leaves us to look at the amount of cash AQUIND Limited recorded as held by that limited company.

20. Page 6 of AQUIND Limited's 2018 audited accounts **[at Schedule 1 to APP-023]** shows that the Applicant had £1,065,118 as cash in the bank and to hand. This figure *decreased* to £1,049,684 as at 30 June 2019 as shown on page 7 of the Applicant's 2019 audited accounts **[REP1095]**.

21. Therefore, the anticipated *liability* of the Applicant limited company for its estimated compulsory acquisition costs (at approximately £4.9 million) is **roughly £3.9 million more than the most recent objective record of the cash the Applicant has in its bank account** (assuming the theoretical estimated £4.9 million being enough to cover all compulsory acquisition costs and not just those exercised over exclusively the pink land on the Land Plans **[REP5-003]**).

22. It is therefore objectively clear from both the 2018 accounts **[APP=023]** and the 2019 accounts **[REP1-095]**, that **the Applicant limited company does not currently hold the requisite funds to cover all its compulsory acquisition costs. It is also clear that the loan terms that the Applicant will depend on to cover the initial development costs (which may or may not cover the compulsory acquisition costs) will be too short for there to be a reasonable prospect of the requisite for compulsory acquisition becoming available during the period of time they can exercise compulsory acquisition powers**. **Based on this, we can only conclude that the Applicant limited company must be looking to secure funding to cover the costs of its estimated compulsory acquisition costs from future financing.**

Reasonable prospect of requisite funding becoming available?

23. If the Applicant is relying on securing future funding to cover its estimated compulsory acquisition costs, it must meet the relevant tests in paragraphs 9 and 18 of the Planning Act CPO Guidance – that that <u>there is a reasonable prospect of the requisite funds for acquisition becoming available</u> (paragraph 9) **AND** that that adequate funding is likely to be available to enable the compulsory acquisition within the statutory period following the order being made (paragraph 18).

24. During CAH1 and CAH2, the Applicant was invited by the ExA to supply the objective evidence of a “KPMG Report” in relation to the “likely availability” of funding, and the Applicant is considering whether the KPMG report (or extracts of it) can be supplied to the ExA on a (so-called) “confidential basis”.

    The Affected Party also clarified that the nature of the ExA request related to paragraph 18 of the Planning Act – CPO Guidance that is exclusively concerned with the *timing* of the availability of funds and not with their *availability* per se. In this respect, paragraphs 9, 17, and 18 of the Planning Act CPO Guidance (as quoted in Section C of this Note) set out this difference and that approach was expressly supported by Mr Cunliffe on behalf of Portsmouth City Council.

25. The Affected Party would have its land taken against its will. The Applicant indicates that "confidence" may be relied on to prevent disclosure publicly of the KPMG Report but it cannot prevent the Affected Party being provided with a full unredacted copy of the "KPMG Report" in so far as the Applicant limited company seeks to rely on its in relation to paragraph 17 of the above Guidance or the ExA seeks to rely on it in relation to making recommendations about powers which would authorise the taking of land of the Affected Party. A different approach could not be compliant with Article 6 of the Convention. The approach of the Affected Party aligns also with the general situation under the Town and Country Planning Act 1990 case law on the public open nature of viability assessments relating to applications for planning permission. The Data Protection Act 2018 contains an exemption relating to the release of information in the context of court proceedings. Here, those proceedings include this administrative hearing as part of the scope of such proceedings.

26. In its response to the ExA's First Written Question CA1.3.95 **[REP1-091]**, (and as is stated in Paragraph 6.3 of the Funding Statement [APP-023] we note that in 2019, KPMG assessed and discussed the bankability and investment attractiveness of the ‘project’. with potential project finance lenders and equity capital providers. KPMG reviewed rates of return required by investors in comparable infrastructure projects, possible forms of lending arrangements and conditions and positively assessed the feasibility of financing the Project. However, the Applicant's description of the nature and content of the KPMG Report reinforces the absence of any presently available (or indeed likely) funding for £622m, which includes its estimated compulsory acquisition costs. At most, it appears that AQUIND Limited has secured at present is *market intelligence* on what levels and types of funding might theoretically be generally in the future market place for the type of project applied for as opposed to the particular application development.

27. With regard to the use of future profits for the development as a possible cross-subsidy, this in principle would not work as we would assume that the exercise of compulsory acquisition powers would need to occur before the development is operational and starts to generate profit. The Applicant has also clarified that the use of (180) strands of fibre optic cable envisaged to be included within the industry standard “FOC” cable (but not providing a support function to the separate cables of the authorised development) would both supply a resource stream to it as a private limited company and at the same time not provide any cross-subsidy to the application development (Applicant's responses to ExA First Written Question CA1.3.3. in [**REP1-091]).** . The Applicant’s clarification is consistent with the Funding Statement including no reference at all to resources engendered by the “use for commercial telecommunications” of “spare fibres” (or dark fibres) and, consistent with that absence of resource cross-subsidy, the Applicant’s CAH 1 Oral Transcript **[REP5-034].**

28. No further details of exactly who could fund the compulsory acquisition and development costs and when those funds will be available, are provided. **This is therefore not certain enough to satisfy the test** in paragraph 9 of the Planning Act CPO Guidance that there is a **reasonable prospect of the requisite funds being available,** or the test of timing in paragraph 18 of the Planning Act CPO Guidance that adequate funding is likely to be available to enable the compulsory acquisition **within the statutory period following the order being made**.

29. This therefore appears to be a wholly speculative project. At most, the Applicant can only present an intention to secure funding in the future, which is irrational. We invite the ExA to therefore please ask the Applicant to clarify the rational basis upon which it thinks there is a genuine reasonable prospect of the requisite funds becoming available to enable compulsory acquisition within the statutory period following the DCO being made.

Enforcement of compulsory acquisition claims?

30. Issues with the accuracy of the estimates and reasonable prospect of funding aside, there is also an issue in relation to against whom any claim for compulsory acquisition compensation could be enforced. Any award of compensation resulting from the compulsory acquisition of the land of the Affected Party would fall to be enforced against the Applicant limited company (this is in line with the statements made on behalf of the Applicant during CAH2, that it will only be the Applicant who will exercise all compulsory acquisition powers). However, the Applicant has limited liability and control of the limited company and its current 'assets' resources remain opaque at Deadline 6.

31. Paragraph 2.1 of the Funding Statement at **[APP-023]** states that it sets out how "***the shareholders*** *of the Applicant and* ***their parent companies*** *expect that the construction of the Proposed Development and, as necessary, the acquisition compulsorily of land and rights over land as are required in connection with the Proposed Development and authorised by the Order will be funded*".

32. Paragraph 4 of the Funding Statement sets out the corporate structure of AQUIND Limited. It states that:

    a. AQUIND Limited is a company registered in England and was incorporated with the sole purpose of promoting and developing the Application development; and

    b. The sole shareholder of AQUIND Limited (holder of 100% shares in AQUIND Limited), is a company incorporated in Luxembourg, called Aquind Energy S.a.r.l.

33. Although paragraph 2.1 of the Funding Statement refers to there being *more than one* shareholder and *more than one* parent company, it appears that, in fact and contrary to the assertions of the Funding Statement, there is only one shareholder and only one parent company, who are both currently Aquind Energy S.a.r.l..

34. However, whilst paragraph 17 of the Planning Act CPO Guidance requires the Applicant to include in its Funding Statement as much information as possible about the acquisition resource implications, no further information or accounts are provided in the Funding Statement or in later submissions by the Applicant relating to AQUIND Limited or Aquind Energy S.a.r.l. .

35. The Affected Party's investigations of the public information available at Companies House website disclose the following additional information relevant to Funding, and to control and resources:

    a. (a) On 26 March 2019, OGN Enterprises Limited transferred 330001 ordinary shares to Aquind Energy Limited. This is revealed in a Confirmation Statement received by Companies House on 22 November 2019 (please see Appendix NFUND-4 to this note).

    b. The Companies House records show currently at Deadline 6 there to be three directors of AQUIND Limited: Mr. Alexander Temerko, Mr. Kirill Glukhovskoy, and Mr. Richard D. Glasspool. This correlates with the information in the audited accounts to year ending June 2018 attached at Appendix 1 to the Funding Statement.

    c. The Companies House records show currently at Deadline 6, however, that notwithstanding the existence of 3 directors, there is one person with "significant control" over the Applicant limited company and who is also 'Protected person with Significant Control' over AQUIND Limited. The Companies House website states: "The person with significant control's details are not shown because restrictions on using or disclosing any of the individual's particulars are in force under regulations under section 790ZG in relation to this company". Section 790ZG of the Companies Act 2006 gives the Secretary of State the power to make regulations to protect material in relation to persons with significant control over a company. that Government guidance entitled 'Applying to protect your personal information on the Companies House register' (https://www.gov.uk/guidance/applying-to-protect-your-personal-information-on-the-companies-house-register#what-protection-means) states that "You can apply to protect your personal details if you (or someone living with you) are at serious risk of violence or intimidation because of your company or LLP's activities."

    d. However, the public information in (c) contrasts with the public records that do not show a human being as holding 100% of the Applicant shares but record Aquind Energy Limited S.a.r.l to be the 100% shareholder and also the parent company of Aquind Limited.

36. The Affected Party notes that the ultimate control of the Applicant limited company, who would be authorised to take our client's land against their will and so be enforced against for compensation, remains opaque. This is in contrast to the orthodox position where the sole shareholder and parent company would have all or at least significant control over the envisaged undertaker AQUIND Limited. There is no objective evidence to show who ultimately controls the Applicant limited company and whom ultimately an award could be enforced against. We contrast this with the orthodox position of the ExA in the Thorpe Marsh Report who could only be satisfied (where there were company inter-relationships) as follows (**see Appendix NFUND-5 to this note**) : (Emphasis added)

    "8.4.12 The application was accompanied by a Funding Statement [APP-016] to indicate how the draft DCO is proposed to be funded. The 2013 guidance Planning Act 2008: procedures for the compulsory acquisition of land recommends at paragraph 17 that the statement should provide as much information as possible about the resource implications of both acquiring the land and implementing the project for which the land is required.
    8.4.13 The funding statement reports professional advice that puts a maximum precautionary value on the total contingent liability associated with the acquisition of land or interests in land of £5million…

8.4.15 On 11 February 2015, a revised Funding Statement [AS-004] advised differently in respect of ownership; that the Applicant company was, subsequent to the application being made, a wholly owned subsidiary of Carlton Power, with funding to be provided by Wainstones Investments, another company of the same group. The accounts of Waintsones Investments were supplied.
8.4.16 In my first written questions [PD-006] I sought further details of the structure of the company group and the interrelationships between its consistent companies, which were provided at deadline 1 [REP1-014]; the financial statements of Carlton Power were provided following my second round of questions at deadline 4 [REP4-015]."

37. We respectfully request that the ExA seeks objective clarification on this issue from the Applicant and for the Funding Statement to be updated (with "as much information as possible") in this respect and with sufficient time for the Affected Party to fairly be able to consider the material that was required to have been provided at the outset of the Examination Period in line with paragraph 17 of the Planning Act CPO Guidance (see above).

38. Uncovering who controls the Applicant is opaque, appears to relate to an offshore entity, and also appears to involve a Protected Person. All these unknowns lead us to question who would a claim for compulsory acquisition compensation be enforced against, especially as the Applicant is a limited liability and does not hold (and it is opaque when it will secure) the requisite funds to cover all compulsory acquisition costs.

SECTION F. APPLICANT'S RESPONSES DURING CAH2 TO OUR ORAL SUBMISSIONS

1. We note that during CAH2, the Applicant responded to our above arguments by stating that most of our arguments were irrelevant, and that it would be nonsensical for it to estimate what the compulsory acquisition costs would be in relation to its exercise of compulsory acquisition under Article 30(4). It is therefore clear that the Applicant accepts that it will be entitled to exercise compulsory acquisition powers across all of the land within the Order Limits (other than the land coloured yellow on the Land Plans but not the subsoil to that land) pursuant to Article 30(4). It is also clear from that response that the Applicant accepts that it has not estimated all the CPO costs it would incur pursuant its exercise of compulsory acquisition powers under Article 30(4) – i.e. the estimated £4 million in the Funding Statement does not include the compulsory acquisition costs that would be triggered by the exercise of the powers in Article 30(4). We therefore submit that based on the Applicant's responses to our points during CAH2, the Applicant has no reasonable prospect of the requisite funds becoming available. It is hence difficult to see how the ExA and the Secretary of State could be satisfied that the scope of Article 30(4) is justified, and we submit that Article 30(4) should either be amended to delete the powers of compulsory acquisition, or as an alternative, to make Article 30(4) subject to our Clients' proposed protective provisions.

2. The Applicant also stated during CAH2 in that it was irrelevant that the company making the loans to the Applicant to fund the initial costs of the development (OGN Enterprises Limited) is located in the British Virgin Islands. The Applicant stated that only AQUIND Limited was the undertaker as a company incorporated in England, that only AQUIND Limited was bound by the obligation to fund the development, that only AQUIND Limited was the entity that would exercise the powers under the DCO, and that AQUIND Limited was the only entity that would exercise the compulsory acquisition powers under the DCO. We therefore submit that there is therefore no need for the powers to transfer the benefit of the development consent order under Article 7 given the strong assertion that only AQUIND Limited will be exercising all

powers under the DCO (including compulsory acquisition). The Applicant has avoided the point raised: it is the **source of funds** that is of concern. AQUIND Limited is a limited liability company, and its liability in relation to its compulsory acquisition costs will be limited. The parent company controller of AQUIND Limited (Aquind Energy S.a.r.l) is not subject to any formal obligation *under* the DCO to fund any of the compulsory acquisition costs and the Application development, nor has the parent company provided *any guarantee* in relation to such funding. The *time-limited* loans being provided to AQUIND Limited by OGN Enterprises Limited (based in the BVI) appear to be *unsecured*. If AQUIND Limited does not have the requisite funds for compulsory acquisition costs and development costs, the Funding Statement is silent on who would pay and who must pay and who controls who pays what to the Affected Party.

3. The Applicant's response to our arguments during CAH2, was to direct us to its answer the ExA's First Written Question CA1.3.1 (document reference REP1-091) provided at Deadline 1 of the Examination (though we note the Funding Statement has not yet to date been updated to reflect the Applicant's response). The Affected Party has considered the Applicant's response to the ExA's First Written Question CA1.3.1 **[REP1-091**]. Taking each asserted Response in turn below, we do not agree that the Applicant's Funding Statement has met the relevant tests under the Planning Act 2008 CPO Guidance in relation to resources. The Applicant's Response to the ExA's First Written Question CA1.3.1 was as follows: (Emphasis added)

    a. "***The Applicant has secured from its current investors financing sufficient to support the Project until the completion of the development stage, which includes obtaining all necessary permissions and authorisations, including the DCO***."

        The Affected Party notes:

        (i) Who are the current investors? No information about their identity has been provided. Is this a reference to OGN Enterprises Limited, who is named in the 2019 audited accounts for AQUIND Limited **[REP1-095]** as being (at that time) the entity who will be providing time-limited unsecured loans? OGN Enterprises (and its loan money) is located in the British Virgin Islands and thus cannot be enforced against under English law. Therefore, are the funds "secured" now onshore (which can be enforced against under English law)?;

        (ii) How is the finance secured? We have demonstrated in section E of this Note that finance has not been secured to date. There is no clarity as to the nature of the financing secured, or the amount of the financing secured. We note from a later part of the Applicant's answer that the amount asserted as "secured" does not cover the total estimated capital cost of £622 million (see our comments at (c) below);

        (iii) What is meant by "*secured*". Is AQUIND Limited currently in funds? Or is it a mere intention to finance, or expression of interest to finance, that has been secured?;

        (iv) What is meant by securing finance "*sufficient to support the Project*"? ;

(v) What is meant by "*support*" – does it cover only costs to secure the relevant legal consents and not the construction and compulsory acquisition costs?; and

(vi) It is unclear whether financing for the compulsory acquisition costs incurred under Article 30(4) is also in place. The Applicant refers to securing sufficient financing to support the project until completion of the development stage without mention is made of whether financing to cover compulsory acquisition costs incurred after the development stage has been secured. Compulsory acquisition costs can be incurred after a particular constructional development stage has completed in light of Article 30(4). It does not appear from the Applicant's response that such financing has been secured.

Therefore, the Applicant's written answer is incomplete and opaque vague. We respectfully request that the ExA asks the Applicant to update the Funding Statement **[APP-023]** with objective details.

b. "***The Applicant has invested approximately £35m in the development of the*** Project as of 30 June 2020. The residual cost of completing the pre-construction ***stage of the Project is forecasted at £7m***."

The Affected Party considers that remains unclear what the Applicant means by 'pre-construction stage'; does it include costs associated with land acquisition?

We respectfully request the ExA requires the Applicant to objectively clarify this element of its response in an updated funding statement.

c. "***The Applicant has been engaging with a number of potential investors since the start of the Project directly, including British and international investment funds and international energy companies. The engagement with a group of debt providers and equity investors completed for the Applicant by KPMG in 2019 showed that subject to obtaining necessary approvals investors consider interconnectors to be an attractive type of future investment. The Applicant expects that the financing will be arranged on the basis of project finance debt with the tenure of 15 to 25 years constituting circa 70% of the total capital costs of the Project, with the remainder to be financed with equity. Possibilities of export financing by export agencies of the countries of origin of key components of the Project are also being considered as part of the public tender process***." (Emphasis added)

The Affected Party considers that:

(i) It is clear that AQUIND Limited's case for funding is based on only its engagement with potential investors, non-binding expressions of interest to finance, and its own subjective expectations of what the funding "possibilities" are; not actual finance commitments that can be enforced against when compulsory acquisition powers are exercised;

(ii) It is unclear whether the financing that AQUIND Limited is (merely) 'hoping' to secure is to cover compulsory acquisition costs; and

(iii) Furthermore, if finance from international sources is to envisaged to be relied on, it is difficult to see how off-shore sources can be enforced against

in the event of an award of compensation for taking of land of the Affected Party.

d. "***The Applicant and its advisors are continuing to assess the impact of COVID-19 pandemic on the financial markets. While the activity in the area of financing large infrastructure project has expectedly slowed down during the months of the stricter lockdown in key markets, infrastructure financing with the focus on infrastructure that enables the green transition will become one of the key drivers of recovery and it is therefore expected the slow-down will be temporary in nature only. Noting the above regarding the finance secured for the Project to date and the expected appetite for future investment in interconnectors as part of the green transition, and that it is not unusual for the securing of funding in connection with the delivery of a project to be dependent on the securing of a development consent order, it is considered the Applicant has demonstrated that funding for the Project is likely to be available to enable the compulsory acquisition within the 7-year period provided for in the dDCO (APP-019) for the exercise of such powers following the Order being made***." Our comments are:

The Affected Party considers:

(i) it is unclear what finance has been "secured" (see our comments at (a) above), and whether that already covers all the compulsory acquisition costs (including those incurred pursuant to Article 30(4));

AQUIND Limited appears to rely upon an "expected appetite" to invest into this project. Perhaps importantly, this evidence demonstrates that the project (as at Deadline 6) is wholly speculative. The Applicant's financial position at Deadline 6 appears, in the absence of objective evidence otherwise, that nobody 'has agreed' to make financial contributions to underwrite the £622m estimate of the scheme;

(ii) Whereas the Applicant states that "it is not unusual for the securing of funding in connection with the delivery of a project to be dependent on the securing of a development consent order", this further evidences to the ExA that the application development as at Deadline 6 remains currently unfunded.

(iii) The Affected Party requests that ExA seeks objective clarification as to whether a grant of the dDCO is the sole condition to the Applicant receiving £622m of enforceable funding for compulsory acquisition costs and total development costs (noting that the Applicant's assertion as to conditions to ensure £622m of funding appears to conflicts with the Applicant's earlier part of its response that it has no more than 'expressions of interest' to fund the project).

SECTION G. PRACTICAL WAY FORWARD

1. If the Applicant is unable to satisfy the ExA, and the Secretary of State in due course, in relation to funding all compulsory acquisition costs related to its dDCO and all costs of the development, all compulsory acquisition powers relating to our Clients' land should be deleted

from the draft DCO **[REP5-009],** Book of Reference **[REP5-015]** , and Land Plans **[REP5-004]** . Removing compulsory acquisition powers from development consent orders is not unique nor exceptional and is recognised by the Secretary of State in his national guidance: there may be circumstances where the Secretary of State may grant a development consent order and simultaneously *decide against* granting compulsory acquisition powers – i.e. disconnect the DCO powers from the compulsory acquisition powers. And, "They should also be able to demonstrate that there is a reasonable prospect of the requisite funds for acquisition becoming available. Otherwise, it will be difficult to show conclusively that the compulsory acquisition of land meets the two conditions in section 122".

2. In the alternative to paragraph 1 of this Section G, a provision may be inserted into the dDCO **[REP5-009]** to ensure that the authorised development could not commence under section 155 of the Planning Act 2008 in the absence of verified funding and no steps that could result in any exercise of acquisition powers could be exercised in the absence of verified funding. And its guaranteed timing. The Affected Party has considered, and recognises, the lawful potential for inclusion of a carefully worded Provision in the draft Development Consent Order that in relation to the development envisaged of its land, essentially, that no power in the dDCO could be exercised nor obligation relating to that land discharged unless and until an objective guarantee to pay the correct maximum compensation liability under an Order or an alternative form of security was provided to the satisfaction of the Secretary of State. This would preclude, for example, exercise of Articles 3, and 7 (transfer of the benefit of any part of the dDCO) as well as prevent discharge of Requirements concerning or relating to its land.

3. The ExA requested of the Affected Party during CAH2 that it provide a comparative analysis of applications for development consent orders that involved similar funding situations in which AQUIND Limited finds itself and similar issues with satisfying the Planning Act 2008 funding test of 'reasonable prospect of requisite funds'. Our analysis shows that the funding position of the Applicant is uniquely speculative in that there is no evidence that it has funds to discharge potential liabilities set out in the dDCO were it to be authorised. By contrast, where there has been evidence of sufficient funds before the ExA and also the Secretary of State, but some residual doubt about relevant factors, even then, the Secretary of State has still imposed a provision ensuring guaranteed funding before exercise of any acquisition power. The closest similar example that the Affected Party can ascertain to the Applicant's under and unfunded situation is the Able Marine DCO. In particular, the scope of the provision is wider commensurate with the lack of reasonable prospect of funds. See below.

4. The Affected Party's concerns about the current objective absence of funding are shared by Portsmouth City Council (at CAH2) and our orthodox concerns reflect those of ExA, and the Secretary of State, in other DCO Examinations. Examples are as follows:

    a. **Rookery South DCO**: There, a private applicant for an energy from waste facility who was relying on securing funding in the future. Its parent company was incorporated in the U.S. and the funding to be relied on was also located in the U.S. Representations were made to ensure enforceability of a future compensation award against off-shore funding by the applicant complying with the Planning Act CPO Guidance by moving bonded funds to Jersey where they could be enforced against under English law. A copy of the Rookery South DCO Funding Statement is not publically available – we assume it has been archived by PINS).

b. **Thorpe Marsh Gas Pipeline**: we have referred to this above (and a copy of the relevant extracts from its Funding Statement are at **Appendix NFUND-5** to this Note). The ExA was satisfied that: (Emphasis added)

"8.4.15 On 11 February 2015, a revised Funding Statement [AS-004] advised differently in respect of ownership; that the Applicant company was, subsequent to the application being made, a wholly owned subsidiary of Carlton Power, with funding to be provided by Wainstones Investments, another company of the same group. The accounts of Waintsones Investments were supplied…
8.4.17 In its response to my first questions, the Applicant provided a letter from Carlton Power [Appendix 3, REP1-014] confirming its willingness to enter into a guarantee agreement, escrow arrangement, bond or other suitable alternative security…
8.4.18 In the Compulsory Acquisition Hearing held on 17 June 2015, I questioned a representative of Thorpe Marsh Power Ltd concerning the decision making processes within Carlton Power, its financial standing and its access to funding. In its Note of Oral Representations at the Compulsory Acquisition hearing [REP3-013] the Applicant stated that the Applicant is not dependent on third party financing to provide the security and considers that the Secretary of State can be comfortable that the relevant resources are already in place and will be available in order to provide the necessary guarantee or alternative security without the need for any alternative financing."

The DCO included a provision to ensure payment of compensation.

c. **Manston Airport expansion**: In relation to The Manston Airport Development Consent Order 2020 (SI 2020/716), the funding statement (copy attached at **Appendix NFUND-6** to this Note) stated, at paragraph 12, that RiverOak Investments (UK) Limited ("RIU"), as undertaker was a UK-registered company. The ultimate beneficial owners of RIU were resident in Switzerland *and* the United Kingdom. RIU was managed and administered by Helix Fiduciary AG ("Helix"), a Swiss registered company on behalf of the beneficial owners. RIU had the *same directors* as M.I.O Investments Ltd, a *Belize* registered company, who were the *funders* of the project. M.I.O were committed through a *joint venture agreement* to fund the compulsory acquisition costs of the project. Paragraph 13 of the Funding Statement revealed that, whilst some of the land acquisition and project costs had been secured, there was still a shortfall which was to be met by private sector investors once the DCO had been granted. Details of future private sector finance could not be finalised before the DCO was granted. Helix (the managers of RIU) had provided an explanatory letter about its role in the funding of the project, together with a confirmatory letter from PwC that the **investors had unencumbered funds** substantially in excess of the funds required for the completion of the DCO. RiverOak could *immediately draw down funds* under the Joint Venture Agreement to cover the land acquisition costs once the DCO was granted. However, notwithstanding all of that objective evidence, due to the uncertainty of future funding becoming available to plug the *shortfall* (and notwithstanding *expressions of interest* from potential private sector investors), all of the above objective evidence nevertheless resulted in the DCO being made subject to a section 120(3) PA 2008 provision that construction could not commence and powers of compulsory acquisition could not be exercised until a guarantee to pay compensation under the Order or an alternative form of security was provided to the satisfaction of the Secretary of State.

d. **Wylfa Nuclear Project**: In relation to The Wylfa Newydd (Nuclear Generating Station) Development Consent Order, the Funding Statement (copy attached at **Appendix NFUND-7** to this Note) stated that the *majority* of the order land was *already* under the control of the undertaker, Horizon Nuclear Power Wylfa Limited (a UK incorporated company).The ultimate parent company of Horizon Nuclear Power Wylfa Limited was Hitachi, incorporated in Japan. Financial resource for developing the project was historically provided by Hitachi through a mixture of equity subscriptions and loan arrangements. Hitachi funded the project whilst discussions continued with the UK Government and the Government of Japan on funding. An agreement was not reached and on 17 January 2019, Hitachi and Horizon announced that they were *suspending* the project until satisfactory funding arrangements with the UK Government were agreed. That is, there was no objective evidence of an agreement for funding nor its being secured. The appropriate funding framework to be developed was envisaged to likely involve external finance, potentially from both equity and debt sources to fund the construction of the project. To allay any such concerns, Horizon proposed two new articles to the draft Order restricting the exercise of the powers of compulsory acquisition under the Order until certain requirements were meet. The wording of those articles are set out at Schedule 1 to this note.

e. **Able Marine DCO:** The funding statement for this DCO stated that the cost of implementing the works was to be financed with a combination of the Group's resources, borrowing from external sources, and possible funding from government business incentives such as the Regional Growth Fund and the European Regional Development Fund. Due to the *uncertain* nature of future funding, the funding statement provided that in relation to land acquisition costs: "*The Applicant will provide appropriate guarantees to the relevant planning authorities that it will pay compensation under the compulsory acquisition provisions of the development consent order before implementing them, and that the compensation will be met from Group's existing funds.*" A copy of the funding statement is attached at **Appendix NFUND-8** to this Note and appears similarly Spartan to that of this Applicant.

5. Examples of DCO wording from these development consent orders are reproduced at **Schedule 1** to this Note.

6. With regard to our suggested wording for the draft DCO [**REP5-009]** to reflect our concerns in relation to funding as an Affected Party, we note that in relation to the comparative DCOs we have considered where there was some funding available but uncertainty over future funding remained during the Examination, very bespoke wording was inserted to reflect the ExA's or Secretary of State's particular concerns. At this stage therefore, we offer the following more general wording for insertion as a new Article in the draft DCO, subject to more detailed amendments the ExA may wish to add following its own careful scrutiny of the issues we have raised in this Note.

7. The preliminary general wording we would suggest is as follows:

"*The authorised development must not be begin for the purposes of section 155(1) of the Planning Act 2008 and the undertaker must not begin to exercise any powers of this Order that may lead to acquisition powers being able to be exercised, unless either a guarantee in respect of the liabilities of the undertaker to pay all compensation that may be payable under this Order or an alternative form of security for that purpose is in place which has been approved in writing by the Secretary of State.*

(2) A guarantee given in respect of any liability of the undertaker to pay compensation under this Order is to be treated as enforceable against the guarantor by any person to whom such compensation is payable."

8. We consider that the wholly speculative nature of this Application and that it may affect our client's land results in it being appropriate to safeguard under section 122 that land and insert, in line with the Able DCO, a prohibition on the ability of the dDCO to begin under and for the purposes of **section 155 of the Planning Act 2008** (instead of using the non-statutory "commencement" definition in dDCO Article 2. This is because the definition of dDCO "commence" under Article 2 carves out "onshore site preparation works", thus allowing the undertaker to still take temporary possession of our client's land under Article 30 for the purposes of onshore site preparation works. This must be prohibited because Article 30(4) allows for the exercise of compulsory acquisition powers over land temporarily possessed, and would therefore allow the undertaker to still speculatively take initial steps leading to exercise compulsory acquisition powers 'through the back gate' if the dDCO trigger were to be relied on instead of the statutory trigger.

SECTION H. - CONCLUSIONS

1. The Funding Statement **[APP-023]**, the Applicant's response to the ExA's First Written Question CA1.3.103 **[REP1-091],** the Applicant's 2019 audited accounts **[REP1-095],** and the Applicant's statements about funding at CAH2 are the Applicant's best statement as at Deadline 6 on funding, and is based on the only information it can have had available to then date (because paragraph 19 of the Planning Act CPO Guidance requires the Applicant to have included in that Statement "as much information as possible" so far).

2. Based on this and the reasons we provide in this Note, we are of the view that the Applicant has not satisfied the tests in the Planning Act CPO Guidance to sufficiently demonstrate that there is a reasonable prospect of the requisite funds becoming available to enable compulsory acquisition within the statutory period following the DCO being made. There are significant question marks over whether the Applicant is accurately calculating the costs of compulsory acquisition, and whether the Applicant limited company currently holds or will secure funding in the future.

3. Furthermore, given the lack of information on the Applicant limited company's corporate structure and true ownership, the question of against whom claims for compensation can be enforced cannot be answered.

4. This therefore appears to be a wholly speculative project. At most, the Applicant can only present an intention to secure funding in the future, which is irrational.

5. We however note the Applicant's statement in paragraph 5.2 of the Applicant's Transcript of Oral Submissions for Compulsory Acquisition Hearing 1 [REP5-034], which confirms that the Applicant will "seek to" update the Funding Statement after CAH1.

6. We therefore respectfully request the ExA to "carefully scrutinise" the concerns we have raised in this Note in relation to funding and to consider the practical way forward we have suggested.

SCHEDULE 1

EXAMPLE PROVISIONS FROM OTHER DCOs

The Rookery South (Resource Recovery Facility) Order 2011 (SI 2013/680)

Guarantees in respect of payment of compensation

8.—(1) The authorised development must not be commenced and the undertaker must not begin to exercise the powers of articles 17 to 27 of this Order unless either a guarantee in respect of the liabilities of the undertaker to pay compensation under this Order or an alternative form of security for that purpose is in place which has been approved by the relevant planning authorities.
(2) A guarantee given in respect of any liability of the undertaker to pay compensation under this Order is to be treated as enforceable against the guarantor by any person to whom such compensation is payable.

The Able Marine Energy Park Development Consent Order 2014 (SI 2014/2935)

Guarantees in respect of payment

14.—(1) The authorised development must not be commenced and the undertaker must not begin to exercise the powers conferred by Part 5 (powers of acquisition) unless either guarantees or alternative forms of security for that purpose in respect of—
(a) the liabilities of the undertaker to pay compensation under this Order; and
(b) the liabilities of the undertaker to construct and maintain the compensatory environmental habitat referred to at paragraph 4(a) of Schedule 1 (authorised development) and any additional compensatory habitat identified in the compensation environmental management and monitoring plan, are in place which have been approved by the relevant planning authority.

(2) A guarantee given in respect of any liability of the undertaker to pay compensation under this Order is to be treated as enforceable against the guarantor by any person to whom such compensation is payable.

The Swansea Bay Tidal Generating Station Order 2015 (SI 2015/1386)

Guarantees in respect of payment of compensation, etc.

7.—(1) The authorised development must not be commenced, and the undertaker must not exercise the powers in articles 24 to 37, until—
(a) subject to paragraph (3), security of £10.5 million has been provided in respect of the liabilities of the undertaker to pay compensation under this Order; and
(b) the City and County of Swansea Council has approved the security in writing.

(2) The security referred to in paragraph (1) may include, without limitation, any 1 or more of the following—
(a) the deposit of a cash sum;
(b) a payment into court;
(c) an escrow account;
(d) a bond provided by a financial institution;
(e) an insurance policy;
(f) a guarantee by a person of sufficient financial standing (other than the undertaker).

(3) The City and County of Swansea Council may agree to the substitution of a different sum to that of £10.5 million referred to in paragraph (1), having regard to the liabilities of the undertaker to pay compensation under this Order existing at the time of the approval referred to in that paragraph.

(4) The authorised development must not be commenced until—
(a) the undertaker has provided to the City and County of Swansea Council written evidence (which may comprise a written certificate given by a professional firm) of—
(i) the construction contracts in respect of Works No. 1a, 1b and 2a and a contract for the procurement of hydroturbines for installation in Work No. 2a; and
(ii) financial provision to secure the delivery of the works and procurement referred to in paragraph ((i); and
(b) the City and County of Swansea Council has given written confirmation that it is satisfied that such financial provision is sufficient.

(5) The undertaker must pay to the City and County of Swansea Council the reasonable and proper costs,
charges and expenses that the City and County of Swansea Council may reasonably incur in obtaining legal
or financial advice in respect of giving the confirmation of satisfaction referred to in paragraph (3)(b).

(6) The City and County of Swansea Council is to have no liability to pay compensation in respect of the
compulsory acquisition of land or otherwise under this Order.

Thorpe Marsh Gas Pipeline Order 2016 (SI 2016 No. 297)

Guarantees in respect of payment of compensation

35.—(1) The undertaker must not begin to exercise the powers of compulsory acquisition set out in articles 20 to 32 in relation to any land unless it has first put in place either—
(a) a guarantee in respect of the liabilities of the undertaker to pay compensation under this Order in respect of the exercise of the relevant power in relation to that land; or
(b) an alternative form of security for that purpose which has been approved by the Secretary of State.
(2) A guarantee or alternative form of security given in respect of any liability of the undertaker to pay compensation under this Order is to be treated as enforceable against the guarantor by any person to whom such compensation is payable and must be in such a form as to be capable of enforcement by such a person.
(3) The guarantee or alternative form of security must be in place for a maximum of 15 years from the date that the relevant power of this Order is exercised.

Manston Airport Development Consent Order (SI 2020/No. 716)

Guarantees in respect of payment of compensation, etc.

9.—(1) The authorised development must not be commenced, and the undertaker must not exercise the powers in articles 19 to 33, until—

(a) subject to paragraph (3), security of £13.1 million has been provided in respect of the liabilities of the undertaker—

(i) to pay compensation to landowners in connection with the acquisition of their land or of rights over their land by the undertaker exercising its powers under Part 5 of this Order; and

(ii) to pay noise insulation costs and relocation costs as required by requirement 9 of Schedule 2; and

(b) the Secretary of State has approved the security in writing.

(2) The security referred to in paragraph (1) may include, without limitation, any one or more of the following—

(a) the deposit of a cash sum;

(b) a payment into court;

(c) an escrow account;

(d) a bond provided by a financial institution;

(e) an insurance policy;

(f) a guarantee by a parent company or companies of the undertaker;

(g) a guarantee by a person of a sufficient financial standing (other than the undertaker).

(3) The Secretary of State is to have no liability to pay compensation in respect of the compulsory acquisition of land or otherwise under this Order.

The Wylfa Newydd (Nuclear Generating Station) Order [version at the end of the current examination]

Guarantees in respect of payment of compensation

82.—(1) The undertaker must not exercise the powers conferred by the provisions referred to in paragraph (3) in relation to any land within the Order Limits unless—

(a) the Secretary of State has approved in writing a sum of money to cover the liabilities of the undertaker to pay compensation under this Order in respect of the exercise of the relevant power in relation to that land; and

(b) the undertaker has put in place either—

(i) a guarantee for the sum of money that has been approved by the Secretary of State under sub-paragraph (1)(a) above; or

(ii) an alternative form of security for the sum of money that has been approved under sub paragraph (1)(a) above.

(2) The undertaker must provide the Secretary of State with such information as he or she may reasonably require to enable the Secretary of State to determine the adequacy of the sum of money referred to in subparagraph (1)(a) above, such information to include—

(a) the interests in land affected; and

(b) the undertaker' s assessment of the proper level of compensation and its justification for the same.

(3) The provisions are—

(a) article 25 (Compulsory acquisition of land);
(b) article 27 (Compulsory acquisition of rights);
(c) article 29 (Private rights);
(d) article 31 (Acquisition of subsoil only);
(e) article 32 (Acquisition of land limited to subsoil lying more than 9 metres beneath the surface);
(f) article 34 (Rights under or over streets);
(g) article 35 (Temporary use of land for carrying out the authorised development); and
(h) article 36 (Temporary use of land for maintaining the authorised development).

(4) A guarantee or alternative form of security given in respect of any liability of the undertaker to pay compensation under this Order is to be treated as enforceable against the guarantor or person providing the alternative form of security by any person to whom such compensation is payable and must be in such a form as to be capable of enforcement by such a person.

(5) Nothing in this article requires a guarantee or alternative form of security to be in place for more than 10 years after the date on which the relevant power is exercised.

(6) The undertaker is entitled to reduce amount of the guarantee or alternative form of security to be maintained under paragraph (5) where—

(a) the undertaker has made a payment of compensation under paragraph (4) to a claimant and provided evidence to the Secretary of State that such payment has been made; and
(b) the Secretary of State is satisfied that the reduced amount of the guarantee o alternative form of security proposed by the undertaker will cover the remaining liabilities to pay compensation under this Order in respect of the exercise of the powers in paragraph (3) over the remaining affected land and interests within the Order Limits.

Funding for implementation of the authorised development

83.—(1) Except for Work No. 12, the authorised development must not be commenced unless and until—

(a) the undertaker has provided the Secretary of State with written information to enable the Secretary ofState to be satisfied that the authorised development is likely to be undertaken and will not be prevented due to difficulties in sourcing and securing the necessary funding; and
(b) the Secretary of State has given the undertaker written confirmation that the Secretary of State is satisfied that the authorised development is likely to be undertaken and will not be prevented due to difficulties in sourcing and securing the necessary funding.

(2) Work No. 12 must not be commenced unless and until—

(a) the undertaker has provided a guarantee or an alternative form of security, the amount to be approved by the Secretary of State, in respect of liabilities under the restoration scheme approved under Requirement SPC13 in Schedule 3 (Requirements) of this Order; or
(b) the Secretary of State has given written confirmation under sub-paragraph (1)(b) above.