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Applicant's Response to Deadline 7 and 7a Submissions – Appendix B Applicant's Response to the Submissions on Behalf of Mr Geoffrey Carpenter and Mr Peter Carpenter at Deadline 7

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APPLICANT'S RESPONSE TO THE SUBMISSIONS ON BEHALF OF MR GEOFFREY CARPENTER AND MR PETER CARPENTER AT DEADLINE 7

1. INTRODUCTION

1.1 At Deadline 7 the following submissions were made by Blake Morgan LLP on behalf of Mr Geoffrey Carpenter and Mr Peter Carpenter (the "**Affected Party**"):

1.1.1 statement in relation to the Applicant's use of compulsory acquisition powers as a last resort (REP7-120) ("**Statement 1**");

1.1.2 statement in relation to proposals for Alternative Accesses and Protective Provisions in relation to Little Denmead Farm (REP7-119) ("**Statement 2**"); and

1.1.3 statement on funding (REP7-116) ("**Statement 3**").

1.2 The Applicant sets out its responses to each of those statements below where it is considered it will be of assistance to the Examining Authority ("**ExA**") to do so. As such, this response does not seek to address all points raised, noting many of the points raised have already been addressed, either in the written submissions of the Applicant, or on behalf of the Applicant at the hearings into the application for the AQUIND Interconnector Order (the "**Application**") held on the weeks commencing 7 and 14 December 2020.

2. RESPONSE IN RELATION TO STATEMENT 1

2.1 The Applicant considers that a number of the representations made within Statement 1 are misleading and the purpose of this response is to identify these and to explain why they are misleading.

Failure to explore "all reasonable alternatives"

2.2 On a number of occasions Statement 1 alleges that the Applicant has failed, and continues to fail, to explore "all reasonable alternatives" to compulsory acquisition and that it has been paying "lip service" to the heads of terms. The Applicant strongly rejects these allegations. The Applicant's land agent and legal representatives have been attempting to negotiate heads of terms since March 2017 and at no point has the Applicant behaved in breach of the Guidance or with "*heavy handedness*". They have at all times acted in a professional manner and with good will.

2.3 The latest allegation of a "threat" from the Applicant is a reference to correspondence from the Applicant's legal representatives on 21 January 2020 which set out the Applicant's "best and final offer" and suggested that if the heads of terms could not be agreed shortly, further engagement may not be productive.

2.4 This is not a threat, but merely an accurate representation of the current position. Despite the Applicant's best efforts to explore all reasonable alternatives and negotiate by private agreement for a number of years, the Affected Party remain unreceptive to negotiating on reasonable terms.

2.5 The Applicant would highlight that the heads of terms have been revised on a number of occasions to take into account the Affected Party's concerns and the Applicant has explored a number of ways to try and reach voluntary agreement, including by putting forward revised offers in excess of land value. Statement 1 does not acknowledge any of this and gives a false impression of the actual engagement between the parties to date.

2.6 The Applicant maintains that "*all reasonable alternatives to compulsory acquisition (including modifications to the scheme) have been explored*" and that the statutory tests and Guidance in relation to compulsory acquisition have been complied with.

Negotiation of Heads of Terms

2.7 Statement 1 contends that the Applicant's engagement with the Affected Party between 2016 and 2019 was in relation to its consultation activities and how the proposals have

evolved up until submission of the DCO application and not about negotiating to avoid the need for compulsory purchase powers. However, heads of terms were first sent to the Affected Party on 9 March 2017 and the earlier discussions serve to demonstrate the Applicant's willingness to explore "all reasonable alternatives" since the inception of the Project through ongoing consultation.

2.8 It is acknowledged that revised heads of terms have been sent to the Affected Party on a number of occasions. For the avoidance of doubt, the Applicant has provided Heads of Terms to the Affected Party on the following dates; 09 March 2017, 17 December 2017, 15 September 2018, 15 November 2018, 19 November 2019, 03 November 2020 and 21 January 2021.

2.9 The Affected Party claim that each time revised heads of terms have been provided these constituted a new set of terms and required them to start their consideration again. However each set of revised terms has been provided in the spirit of negotiation following discussions between the parties and is reflective of those discussions. The fact that heads of terms have been updated to reflect amendments to the scheme as a result of ongoing consultation, including to reflect feedback received from the Affected Party, such as in relation to the siting of the attenuation pond, is not unusual and is not something which affects the Applicant's case for compulsory acquisition.

2.10 Paragraph 4.1.4 of Statement 1 states that "*no progress or discussion by the Applicant was made or offered for 10 months of 2020*." This is a further misrepresentation by the Affected Party's representatives. On 28 January 2020, the Applicant's agent requested feedback via email from the Affected Party's agent on the heads of terms issued on 19 November 2019 and discussed in a meeting between the parties on 16 December 2019. A Zoom call between the Applicant's and Affected Party's agents, organised by the Applicant's agent on 06 May 2020, took place on 18 May 2020 to attempt to progress matters. A response was not received from the Affected Party's agent in relation to the 19 November 2019 heads of terms until 23 June 2020, 7 months after they had been provided. Further engagement also took place between the parties during this period in relation to request for access in relation to site surveys.

2.11 Revised and improved heads of terms, taking into account concerns raised by the Affected Party in relation to their ability to access their property, were issued to the Affected Party's agent on 3 November 2020, along with a draft Option Agreement and associated documents. At paragraph 4.1.6 of Statement 1 the Affected Party state that they do not agree that any of the revised heads of terms have been "improved", however this is clearly a subjective view. The Applicant's statement that the heads of terms were 'improved' was based on the consideration for the land being higher than in the previous version issued to the landowner. Each time the Applicant has provided revised heads of terms it has sought to address the Affected Party's concerns and the Applicant maintains that it has accurately represented the position in the Statement of Reasons (REP6-019).

2.12 Despite the Applicant issuing revised heads of terms to the Affected Party on 03 November 2020, engagement between the parties has been limited to discussions in relation to access for surveys during November as no feedback was provided by the Affected Party's representatives on the heads of terms. The Affected Party's agent emailed the Applicant's agent on 06 January 2021 and asked whether the Applicant was in a position to issue revised Heads of Terms to his clients, despite the fact that no feedback had been received in relation to the heads of terms issued on 03 November 2020. The Applicant's solicitor has also requested updates from the Affected Party's solicitor, including requests for meetings to take place to discuss the heads of terms issued on 03 November 2020 on 18 November 2020, 2 December 2020, 4 December 2020 and 7 January 2021.

2.13 The Applicant remains willing to engage with the Affected Party, however on 12 January 2021 the Affected Party's legal representative responded to the Applicant stating that the parties are still far apart on a number of points in the Heads of Terms. Particular issues raised were the extent of land and rights sought and the scope of the DCO and CPO powers. The Applicant in response confirmed the land and rights which it is seeking to acquire is the land and rights that are required for the Authorised Development, and

therefore the extent of the land and rights to be acquired was not a matter which remained open to negotiation at this time.

2.14 Paragraph 25 of the Guidance provides that "*Applicants should seek to acquire land by negotiation wherever practicable. As a general rule, authority to acquire land compulsorily should only be sought as part of an order granting development consent if attempts to acquire by agreement fail*" (our emphasis added). It is regrettable that in light of the Affected Party's most recent counter-offer, meaningful negotiation may not be "practicable" and it is entirely possible that attempts to acquire by agreement may "fail". However, the Applicant will continue to negotiate in good faith with the Affected Party in attempt to reach agreement.

2.15 On a number of occasions Statement 1 refers to the Applicant reserving within the heads of terms a right to seek and use compulsory acquisition powers in relation to the Affected Party's Property and that this is in breach of the Guidance. The Applicant has made it clear in correspondence to the Affected Party that it may be possible to dis-apply certain DCO and CPO powers as part of a legal agreement, however it is clearly not something it would be appropriate for the Applicant to agree to until such time as an agreement is reached.

Compensation

2.16 Paragraph 4.4 of Statement 1 discusses the matter of compensation and land value in an attempt to demonstrate that the Guidance is not being complied with.

2.17 Paragraph 30 of the Guidance states:

> *"The applicant may offer to alleviate concerns about future compensation entitlement by entering into agreements with those whose interests are directly affected. These can be used as a means of guaranteeing the minimum level of compensation which would be payable if the acquisition were to go ahead (but without prejudicing any future right of the claimant to refer the matter to the Upper Tribunal (Lands Chamber), including the basis on which disturbance costs would be assessed.)" (our emphasis added).*

2.18 Matters relating to compensation may be disregarded by the Secretary of State for the purposes of his decision, but this matter will be relevant to the extent that it may demonstrate a genuine attempt by either side to reach agreement. The Applicant, advised by their land agent, considers that the amount of compensation they have offered is more than the market value, and in any event does not prejudice any future right of the claimant to refer the matter of compensation to the Upper Tribunal should they not wish to settle by agreement.

2.19 Compensation is a matter on which the parties remain far apart, with the Affected Party's most recent counter offer being many multiples greater than the Applicant's previous offer. The Applicant understands the basis on which the Affected Party's land has been valued for the purpose of this counter-offer is not as agricultural land.

2.20 The Applicant also directs the ExA to paragraph 4.4.3 below, which identifies that the representatives of the Affected Party themselves estimate the cost of acquiring the Affected Party's land to be significantly less than its counter-offer (in fact being an amount which is more in keeping with the Applicant's offer for compensation).

Conclusion

2.21 The Applicant has invested significant time and effort and negotiated in good faith with the Affected Party in an attempt to reach a private agreement. The Applicant had also made modifications to the design of the scheme taking into account feedback received from the Affected Party. Statement 1 submitted to the Examination on behalf of the Affected Party is misleading and by no means an accurate reflection of the Applicant's actions.

2.22 The Applicant maintains that it has complied with the relevant law and Guidance at all times, and it will continue to negotiate in good faith with the Affected Party in attempt to reach agreement.

3. RESPONSE IN RELATION TO STATEMENT 2

3.1 Statement 2 is focused on the need for the Access Road to the Converter Station to be present on the Affected Party's land (specifically Plot 1-32) during the Operational Period, with representatives on behalf of the Affected Party setting out a position that this is not necessary and the reasons why.

3.2 The content of Statement 2 is in the main repetitive of the position put forward on behalf of the Affected Party in the Post Hearing Note on the Scope of the Authorised Development (REP6-135). The Applicant responded to this at Deadline 7 at Appendix A to the Applicant's Responses to Deadline 6 Submission – Hearings (REP7-075), and more particularly paragraph 2 of that document which provided the Applicant's response to comments made regarding the provision of additional spare transformers and a disassembled crane at the Converter Station.

3.3 Noting the repetition within the Affected Party's submission and that the Applicant has already clearly explained that the proposals are not in any way a technically feasible or an appropriate suggestion and evidence a continuing lack of understanding of the infrastructure which is to be provided, the Applicant does not seek to re-address the matters raised. The Applicant does however consider it helpful to provide a few clarifications in response to Statement 2, which are as follows:

3.3.1 the laying of an emergency temporary access road for in the event of an emergency situation is not a feasible or safe solution in connection with the operation of Nationally Significant High Voltage Electricity Infrastructure to which a permanent means of access is required;

3.3.2 the Applicant has very clearly evidenced why the alternative perimeter access road suggested is not suitable for the installation and replacement of transformers which by necessity requires large vehicles, and it has clearly evidenced why the Access Road is required on Plot 1-32 for that purpose both in connection with the construction of the Converter Station and throughout its Operational lifetime;

3.3.3 it is entirely rationale to contend that a failed transformer cannot (in some way) be unwired and the wires re-wired to a close by spare (operational) transformer whilst leaving the then redundant transformer in situ. Safe industry practice in connection with high voltage electricity infrastructure does not involve the simple re-wiring and the leaving in situ of a faulty transformer, as suggested on behalf of the AP; and

3.3.4 there is no space for a disassembled crane at the Converter Station Area, and even if there were this does not assist the Affected Party because any failed transformer would need to be removed from the Converter Station Area, with an Access Road of suitable width and construction being available to do so.

3.4 The alternative position advanced on behalf of the Affected Party in relation to access requirements during the operational period would prevent the safe operation of the Converter Station, and in consequence the Proposed Development could not proceed.

3.5 Furthermore, where an alternative is first put forward by a third party after an application has been made, and the Applicant notes this alternative proposal was not advanced until December 2020 being a year after the Application was made, the ExA may place the onus on the person proposing the alternative to provide the evidence for its suitability. It is clear from the submissions made on behalf of the Affected Party that the alternative access position advanced is not a suitable alternative, because it would not allow for the safe operation of the Proposed Development.

3.6 For these reasons, and in accordance with paragraph 4.4.3 of NPS EN-1, the alternative access position advanced on behalf of the Affected Party is not a reasonable alternative, and it is therefore not important or relevant to the Secretary of State's decision and should be given no weight in the decision making process.

4. RESPONSE IN RELATION TO STATEMENT 3

4.1 In a similar vein to Statement 2, Statement 3 is largely repetitive, both of itself and of the Affected Party's post hearing note on Funding (REP6-138). The Applicant responded to this at Deadline 7 at Appendix B to the Applicant's Responses to Deadline 6 Submission – Hearings (REP7-075) and in so doing has already responded to the points made in Statement 3.

4.2 The position advanced on behalf of the Affected Party in Statement 3 can be distilled into one point, which is that the Affected Party submits there is not a reasonable prospect of funds becoming available for the project within the statutory period following the Order being made. The Affected Party seeks to focus on the availability of funding now and to advance that the absence of full funding at this time should somehow mean the tests to be applied are not met, however these submissions are based on a continued misreading and/or misunderstanding of the relevant tests which are to be applied.

4.3 The Applicant does not wish to repeat the submissions previously made, and therefore directs the ExA to paragraph 11 of Appendix B to the Applicant's Responses to Deadline 6 Submission – Hearings (REP7-075), which explains how the Applicant has very clearly evidenced the rational basis on which there is a reasonable prospect of funds becoming available within the statutory period, and that in light of the statement of the Government in the Energy White Paper that they "*will work with Ofgem, developers and our European Partners to realise at least 18GW of interconnector capacity by 2030*", it would be irrational to conclude there is anything but a reasonable prospect of the funding being secured for the Project, including for the land acquisition costs, within the statutory period.

4.4 The Applicant does nonetheless consider there are points raised which it will be helpful to the ExA for the Applicant to respond in relation to, which are as follows:

4.4.1 at paragraph 8(b) of Statement 3 the Affected Party's representatives state that the Funding Statement (REP6-021) does not provide any indication of how any potential shortfalls are to be met. This is correct, and this is because there are no such potential shortfalls. The Applicant has explained the levels of revenues which are to be generated from the Project and the levels of the costs associated with the operation and maintenance of the Project in its response to ExA first written question with reference CA1.3.10 (REP1-091). This confirmed that in light of the operational costs being up to 2% of the capital costs of delivering the Project, it is expected the operational revenues will leave sufficient cash flows available to repay project finance debt and provide adequate returns to investors. This response also explained that information on project revenues and profits has been provided to national regulatory authorities in accordance with relevant regulations, where it is treated as confidential and commercially sensitive information. Making such information available in public domain would significantly prejudice the Applicant's commercial interests, and for that reason more specific information will not be made available in a public forum;

4.4.2 the Applicant rejects the assertion that the Applicant has not clearly quantified the estimated land acquisition costs as put forward on behalf of the Affected Party at paragraph 23 of Statement 3. The Applicant would direct the ExA to paragraph 7 of Appendix B to the Applicant's Responses to Deadline 6 Submission – Hearings (REP7-075) in this regard which provides information in relation to the estimated land acquisition costs, and more particularly to paragraph 7.3 where the Applicant confirms that it would be incorrect to include in the cost estimate the cost of acquiring all freehold and leasehold interests in all land within the Order limits when that is not what consent is sought for and is not what the DCO as drafted would authorise;

4.4.3 at paragraph 44 of Statement 3 it is stated "*Mr Jarvis in CAH2 also gave evidence on behalf of the Applicant that that it had assessed all of the pink land within the Order Limits and it can be inferred that the £1,277,000 equates to all of the pink land within the totality of those Limits. But the Affected Party's own estimate makes up the majority of that sum (leaving very little further sums for any other*

affected party within the Order Limits)". There are two important and relevant points to make with regard to this statement:

(A) as can be seen from reviewing the Land Plans (REP7-003) the Affected Party's land does make up the majority of the 'pink land', with other smaller parcels being located at the Converter Station and one small area being located at the Landfall. Accordingly, the Affected Party has in turn verified the accuracy of the Applicant's estimate of the costs of land acquisition in connection with the Proposed Development; and

(B) the Applicant notes the acknowledgement by the representatives on behalf of the Affected Party that the Affected Party's own estimate of the cost of acquiring the Affected Party's Land is below £1,277,000 (in stating that their estimate makes up the majority of that sum). It is therefore not clear on what reasonable basis the Affected Party has provided a counter-offer to the Applicant in voluntary negotiations for the acquisition of the Affected Party's Land which in no way reflects that amount (being many multiples higher). Whilst it is noted that section 106(1)(c) of the Planning Act 2008 provides the Secretary of State in deciding an application for an order granting development consent may disregard representations relating to compensation for compulsory acquisition of land, it is not the case that all matters relating to compensation must be disregarded, and it is submitted on behalf of the Applicant that in the circumstances this is a matter which the Secretary of State should properly take into account as being important and relevant when considering whether to authorise the Compulsory Acquisition of the Affected Party's land,

4.4.4 at paragraph 48 the Affected Party asserts that no explanation has been provided to justify that there will be an equal split of project costs between the UK and France. The Applicant highlights its response to ExA first written question with reference CA1.3.76 (REP1-091) in this regard; and

4.4.5 At paragraph 51 representatives on behalf of the Affected Party assert that all land within the Order limits and which powers of temporary possession apply to is at theoretical risk of being permanently acquired. This assertion is wholly wrong and based on a misunderstanding of Article 30 of the dDCO and misreading of the Land Plans (REP7-003) and the Book of Reference (REP7-019).

Herbert Smith Freehills LLP

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