

# TEXT\_Aquind\_CAH3\_Session2\_19022021

Fri, 2/19 4:06PM • 1:41:56

00:03

Now two o'clock, and the hearing is resumed. First of all, my apologies for the break in transmission just before lunch. Thank you, Mr. Mahon for continuing for me.

00:14

My internet connection failed completely. And I'm now on my reserve. My trust that holds out. Just before we continue. I understand, Mr. Jarvis that there are certain matters that you would like to deal with before 330. I'm aware of the circumstances around that. But just to say on that subject that I will hear what I believe are the final two allotment related representations. now. I'll then go back to the first two bullet points of agenda item 4.1, which is Portsmouth and Jeffrey and Peter Carpenter. But I'm happy to take those in the order, which the parties concerned are agreeable to. So we'll talk about that. When we've actually finished the final two allotment related representations. This Jarvis, was there anything that you wanted to say briefly about that at the moment?

01:12

nothing further at this time. So no, we get it once we've had the record deal on and hold it. Thank you. Thank you. Thank you. So on my list, then the next person on my list was Mr. Patrick O'Hara.

01:25

Mr. O'Hara, please.

01:39

Mr. Yoho. Hello. I can hear you. Yes. Mr. O'Hara, I can hear you. And now I can see you. Thank you. Brilliant. Thank you. Mr. Roscoe. Just before you start, I would if I could just ask how long do you think you're likely to be?

01:54

I hope not to be more than 10 minutes. Okay. Thank you. If you'd like to proceed, then please. Okay. So I've been an allotment holder now for 22 years.

02:07

am a member of the association, I tend the allotment

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throughout the summer, and then probably on every third day I go down to

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pick winter greens, etc. So I'm getting pretty old. And I'd like to, I'd like to start with a sort of strategic point and then go down to down to a sort of a more micro level if I may. The strategic point is that

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part two Portsmouth Harbour, Langston harbour.

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If you look at mediaeval maps, clearly masses of Reclamation have gone on,

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on both sides of the island. that's particularly true when we look here on the east side of the island, and I'm

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it's quite well known that if, in strategic planning terms, if a worst case scenario you have to get to the cities away just to climate change, the two cities you would do would be whole import, and not wishing to panic anybody. But you know, that's well documented, it wouldn't take much mercy rise to take out the allotments completely. And I would warn that, whilst there's a massive undertaking of holding the line around phortse Island, flood cell three, which is where we are, is not included in having any specific flood defences added to it. Because largely, the area is green. So you could sacrifice quite a lot up to the locks way road through brands brick Park. Again, if you just do some synchronous and basic OS. Mac regression, you'd see that if in a worst-case scenario, you would lose that. So my question really on that on a macro level is given a 16 year lifespan for this does Aquind really think this is a very wise route at all anyway?

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And then, on a micro level I think it would be helpful to allotment holders if they were given greater assurance, I think there's a vast amount of money behind this project.

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I think it's rather sad that all we seem to have is

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the

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not sure what you call it a breakout borehole breakout.

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document which seems very generic and extreme, I would have expected to have seen much more in the way of

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an analysis of what ground they're actually going to go through. Specifically. I mean, maybe it's there and but they haven't actually put it put it up the public, which I think would be helpful.

05:23

Personally, I'd like to receive a lot more in terms of borehole measurements along the route, specifically, you're dealing here with

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I know, the applicant talks about bracklesham beds, as being the geology Well, that is true, but it's overlaid with some pretty unpleasant plateau gravel, for a start, which you'd have to you'd have to transition.

05:52

I'd also like to have seen in in the applicants submission, I would like to have seen detailed map regression, which actually showed how they, you know, how they see the landscape has changed what might have been there in the past how that might mitigate their HDD operations. I particularly draw their attention to the proximity to the 1820s

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Portsmouth to our indoor canal, which locks way road, obviously

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detailed,

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and to ask them whether they're at all concerned about any

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locks, any

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associated lock features that might be South Hall, the line, the lock, because if you think about it, that's where the lock comes in. It have a uniform Langston harbour, it comes in just above the allotments. It's entirely possible that there will be

07:04

associated infrastructure connected to that early Victorian canal. And finally, I think, at the reception, and I would be interested to know what kind of ground they were working through there. I notice

07:21

at HDD six, which is on note in common, they have what they class is a difficult run out of there. I don't know why it's difficult, but I'm kind of wondering whether it's difficult because it's in made ground, made ground from dock yard clearance and slum clearance in the 60s. I suspect you have a similar makeup of ground where the reception area is and I would think that has the potential to have lots of voids and

certainly to and certainly possibly toxic and that's breakouts are more likely at reception and entry areas. I think. I hope you get my drift. I think there should be a great deal more detail.

08:12

accompanying the line, I think that

08:16

I've got the drift of what you've what you've said, I've obviously got a recording and I've made a note of what you said at various points. And the applicant has also heard and has the recording of of this.

08:28

Just one question before we before I pass it across to the applicant. There's been mentioned previously of the community hub Are you in line with Do you agree with the comments that have been made so far that describe it?

08:42

I'm sorry, I'm not actually aware of you'd like

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it is it is yes, yes. I mean, obviously, yeah. Brilliant stuff, but it's not something I'm personally involved. Thank you. Thank you, Mr. Jarvis. Just before we proceed, I should just say that Mr. O'Hara doesn't seem to be in plot 1014 and also before lunch. Miss MacFarlane also doesn't seem to be in plot 1014. Just before I do pass over to Mr. Jarvis. It may well be that a written response may be better in terms of the detail that's been given by Mr. Robot. I leave that for you. Mr. Jarvis. Sorry, Mr. Jarvis. Yes.

09:28

Mr. Jarvis.

09:30

Thank you, sir. Yes, we will recheck the position with regard to the correct persons being listed in the book of reference. And I would agree that I think it's best to address the comments that were raised by Miss O'Hara in writing a deadline. So thank you. Thank you very much. And Mr. O'Hara, thank you very much for your useful contribution. Now, thank you. Thank you.

09:52

The next on my list then is Miss Rachel Zhaan. And she's going to be represented by Miss Paula Savage. So

10:00

Miss Savage, please.

10:04

Hello. Hello. Hello.

10:10

How long do you think you'll be? Yes. How long do you think you'll be on this representation? Please? A few minutes. Thank you. All right. Thank you.

10:21

I would like to say how anxious and upset I am regarding the proposed Aquind interconnector project. I am in an allotment holder at Milton piece. I was overjoyed at getting the plot last year after being on the waiting list for four years. I don't have a garden or outside space, but I love gardening and caring for the environment. The realisation I had a space to grow my own fetch, and have fed to give to friends, herbs and flowers while encouraging pollinators and wildlife just filled my heart with joy. I could have cried the first time I stepped onto the allotment site. It was so peaceful yet so vibrant and bursting and bustling with life. It is wonderful to see and hear so many birds there. This site is a haven for wildlife plants and people go into the plot has been a great way of getting some exercise and has done wonders for my mental health, especially during lockdown. It is so therapeutic. I have been so I have seen so many people enjoying the site. And I know how valued and loved it is by the community. We must protect spice spaces like this, especially in a city like Portsmouth, which has such high levels of pollution, this Aquind project will only bring more pollution as well as devastation and disruption to the allotment site. This would cause environmental damage, as well as damaging people's wellbeing. It is so distressing to think of the disruption that would be caused to that haven of calm and beauty. Please, please don't let this project Go ahead. You're sincerely Rachel allotment holder. Milton Pease Thank you. Thank you very much. I don't really do you dealt with the allotment time, I'm not sure that you would know about member of the association or not. Yes.

12:22

Thank you.

12:25

A member. Thank you very much. So those are all the questions I've got for you. Really thank you very much for that. I'll pass it across to Mr. Jarvis and Mr. Jarvis. Was there anything that you wish to say in response?

12:37

Thank you. Right. Okay. The only thing I had to say, as well on this was that Mr. John isn't in the book of reference. So it seems if that could be checked, please.

12:49

We will check that and if we have received a response for our requests, we'll include that information. Thank you. Thank you very much. Now in terms of Thank you very much, Miss Savage.

13:00

In terms of the list that I have before me, that concludes the representation relating to allotments from affected persons. Were there any allotment related affected persons wishing to speak under that particular item?

13:15

Okay, nothing heard. Thank you. This is Langley. I see your hand raised. Yeah. Just a question. When is it my turn to speak? Right? Yes, you are. Yes, you are under agenda item 4.2. Okay, thank you. So to speak to that. Thank you very much. So what I'm doing now is I'm returning to the first part of agenda item 4.1, which has as bullet points, Portsmouth city council and geoffrion. Peter carpenter, as I said, in the beginning of this part of the hearing, I'm happy to hear parties in whatever order in this particular section. And I'm happy to hear from the applicant that whatever best interjection points there are.

13:53

I'm willing to hear from any of the three parties at the moment as to how it's best to actually take that

13:59

section of work in terms of the first two bullet points of agenda item 4.1. Is there anything anybody wishes to say on this subject, Miss Colquhoun?

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Thank you, sir. Good afternoon.

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So I had the opportunity to speak to Mr. Swart earlier.

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And whilst we really we didn't actually reach an agreement, but

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given I mean, Portsmouth's view is that given

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Mr. Carpenter has, in fact, not had

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the opportunity to discuss these particular these particular interests as an affected person.

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And indeed, we understand that there are a number of submissions that Mr. zwack wishes to make, I think it would, it would be Portsmouth's preference to go after.

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Mr. Carpenter and Mrs. Waters put their representations simply because

15:01

And sorry, the other thing was obviously the we understand the applicant has last word anyway. So that was it. Thank you. Thank you very much. Mr. Schwartz. I also see your hand up.

15:16

Thank you, sir. Yes, Boston city council and our client had a quick discussion about the order of

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discussion this afternoon because we don't have a specific agenda and it would be helpful to help you Marshal the afternoon.

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It seems from what Portsmouth have said that it would be sensible for us to go first, because Portsmouth, we're going to be quite short.

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But although we had thought they may want to follow on from the allotments, so we're happy to first in relation to what we want to discuss at this meeting, in effect, just in very, very broad terms, there seem to be three points, which are to just before you, if I can just hold you then this is before you start. How long is this is a question I've asked everybody else, how long are you likely to be? Well, I hadn't got that point yet, because we were talking about how to marshal the afternoon first. So can I just outline what I was about to just have that? Is there an overall length that you have in it that you have in mind? Yes, I would imagine about that you're gonna say into context, then? Yes, it? Yes. Thank you in relation to what essentially there are three topics, which the first two relate to change to. And the third relates to the leftover matters from ice age to the first two, I would imagine, we could accommodate about half an hour each, because I need to take you through some various documents. Yeah, maybe about an hour. And hopefully that will collapse as we go through. And the third item, because we want to hear from Please, Mr. Stop, and Mr. Bryce, yeah. And for reasons which will become apparent, or anticipate maybe up to about an hour and a half. But that may mean we chip into Monday. So we'll have to just wait and see. The reason for dividing it at this point in two topics, is it may help to, in the absence, as I say, have a specific agenda to help restructure the situation because my understanding had been from the

17:19

the agenda that this hearing was exclusively about change, too. But understand from Mr. Wallace this morning, it was broader. And I also understand from the leftover matters from Wednesday that there are funding and TCPA matters as well. So doing the best we can. We're trying to formulate some sort of strong case. Thank you. Thank you, Mr. Jarvis. You've heard what Mr. Waters just said. Any comments on that, please?

17:46

So as you're aware, we have Miss Bilko. Goldberg is a participant that Mr. Goldberg is only available until half past three. Yes.

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We'll be addressing regulatory method.

18:00

I

18:02

I can't say exactly how long it will take to speak and are allowed to explain that. But I think, given the silica would have to leave if we could address any element relevant to regulatory matters. That would be helpful. So I proposed to Goldberg first and concerns the current position with regards to the exemption and provides an update in relation to the trade cooperation agreement. And then there's the opportunity for Portsmouth City Council, and the carpenters, their representatives, Mr. Schwartz, and any of the other parties to comment on that matter. The remaining matches in the hearing data.

18:36

Right, okay. So that is that is actually cutting out then the regulatory matters, which presumably would be part of Mr. watts, ah, I sh to business. And to do that first, so that it can be dealt with when the parties before 330 and then go back on to possibly any related matters relating to is to and then see two or three or whatever order the remainder, the parties see fit really

19:03

likely. Okay. This is what you thought that? Yes. If it were convenient, I would mark it would be more orderly to hear from at Queen's in relation to the TCPA matters. And then the person could could go if they have to go at 330 because as I say, I had understood the

19:30

agenda to be concerned with change request to and we had an agenda which simply was on particularised as to what in my concern and all the letters from pins. It said its change request to so I'm having to re Marshal from this morning, what we're actually going to be talking about there can't be any prejudice, I don't think to the applicant because as I understand it, they representative would simply be addressing what we previously stated on Monday no in our bed on seven see submissions. Yeah, and it

20:00

They can always come back in due course in relation to what we say today anyway, because we'll just be amplifying certain aspects. So that's probably the most convenient way of dealing with it. Thank you. Okay. Thank you. So just to confirm, then I see Miss Calhoun, you've got your hand raised. I'm not sure if that is a legacy one or not, this Colquhoun. So now I was just going to comment. So

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I was just going to comment on what's being suggested now, which is, as I understand it, that we're going to hear from

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Miss Greenberg about

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the provisions from the TCPA, which is a matter that was raised earlier, also by Portsmouth. Yeah. And that relates to the French consensus, I think it's been called at different times. Yeah. So

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is it Are we to therefore understand that any questions on this are to come after Miss Greenberg has presented her case? Or are we just to

21:07

what how do you want Portsmouth's to fit into that process? So I want to be helpful. Thank you. I'll deal with that. In a moment. Mr. Jarvis. Comments on what was said by Mr. Swart.

21:20

Just to note that it was specifically stated that these matters would be left over to today. When would they were discussed in stage four, sir? Yep. Yep. So comments on what Mr. Schwartz said in terms of timings and order.

21:34

I think we should go first, and then allow questions, sir, if that's okay. Right. Okay. So, a little bit unorthodox in terms of a CA hearing, but here we go. It looks as though it's an IT IS Miss Goldberg. I got that correct.

21:50

That's correct, sir. Thank you. Miss Goldberg first, on behalf of the applicant. That would be responses made by the carpenters and by Portsmouth City Council, that would then deal with those TCPA and related matters, we then will consider then how to handle the remaining at matters in which order out of C two c three and is two. And I presume is the job is that in terms of those matters, you're able to represent the applicant, together with other members of your team minus Miss Goldberg. Is that correct? Yeah, that's correct, sir. Thank you. Thank you. Right. Okay, then. So we start off then with the statement from his Goldberg, and I see that you're on the screen. So if you'd like to proceed,

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please. I could just see it just before you do. I could just see one hand up for Mrs. Langley.

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Mrs. Langley. And I just asked the question, because I've got the agenda in front of me here after 4.1 4.2. So when am I very likely to speak? Right? Okay. 4.2. Is it of course, as you've said, After 4.1 and after we have finished with this, this section of the compulsory acquisition hearing, we will come on to you then, just as interest How long are you likely to be? Maximum between eight and 10 minutes, I would say Max, eight and 10 minutes, right. Okay. Mr. Jarvis, bearing in mind that we now have an order for the room for Miss Goldberg and carrying on with that, and that the time is not yet 230. I would wish to hear from Mrs. Langley briefly with our eight to 10 minutes first, and then proceed on to miss Goldberg. does that fit in with Miss Goldberg's timings? And I can see her nodding her head.

23:45

That's fine. Thank you. Mr. Jarvis.

23:49

Good to say that sounds fine, sir. Thank you, Miss Langley, would you like to proceed?

23:55

Just put it on. Okay.

23:58

The examiners I recognise the responsibility I have today as I speak for myself and for the other people of the Facebook group and of the 1000s of people who still feel unheard. I thank you for your tolerance and your understanding. Personally, myself and my husband have an allotment plot 62 and [REDACTED] [REDACTED] So we are actually doubly affected.

24:24

One thing my husband forgot earlier to say is that we actually waited for our allotment, four and a half years, and I am at the allotment nearly every day, throughout the because I love being down there and you can grow all the way around. Now may I quote, to detach nature from economic reasoning is to imply that we consider ourselves to be external to nature. The fault is not an economics, it lies on the way we have chosen to practice it. Humanity now faces a choice. We

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can continue down a path by our demands on nature, far exceed nature's capacity to supply them on a sustainable level basis. Or we can take a different path. One way our engagements with nature are not only sustainable, but also enhance our collective wellbeing and the wellbeing of our descendants. I finished the cloud, we in 2021 need to contemplate on these words and need to listen and act. I did not intend to address this issue today. However, two maybe three weeks ago now, the Dasgupta report entitled The Economics of biodiversity was published. The 600-page report was commissioned by the Treasury. Having studied this document has made me reappraise the Aquind interconnector project is the Treasury not forcing us to reconsider our present and future policies. We all of us have lost our way and need to write a new story, a story with respects nature and does not exploited, the economic compass needs resetting. And in the Dasgupta report, we find proposals thought provoking and challenging.

26:17

In the Dasgupta report, traditional economic analyses are challenged and judged failures because of the continued damage done to our biosphere. Now, that's the Aquind project needs to be revisited and we evaluated to avoid contributing to the same out excesses. You might ask yourself whether this applies to the current interconnector very much. So we are looking at a changed worlds. We said this before the interconnector project has been rejected by us local communities, countless MPs, who all know the local conditions much better than the government in London and to some extent, to yourselves the examine us our allotments are of vital importance to all of us and to my family personally, resistance towards this project has been demonstrated at every possible level. But it seems this resistance has not been taken seriously. What is more important to protect and safeguard our

environment here and now or to instal an electric and fibre optic cables been there already other interconnect has built and proposed, we could just follow the same old way add at increased consumption and not being concerned about the damage.

27:38

The interconnector would cause nothing but damage to our citizens and our biodiversity and in particular, to our allotments. This has not been acknowledged us in Britain, but in France, too, you must ask yourself to examine and why is there such resistance? We do this because we care for our children and future generations are habitats and species. We want our planet to thrive we want our allotments to thrive. Reading Aquind's environmental and sculpting report I found an analysis of environmental impacts graded high medium and low recognition that this project will do harm and cause damage. So why should we do this? Who is benefiting from this? It is not about mitigation because mitigation and this incident is not an option for our local environment not for our allotment. Let us take one example from this week's hearing, Brent geese, and we have been following all the hearings. [REDACTED] [REDACTED] to the allotments I walk Milton common past the university grounds the Milton nature reserves at allotments every day at different times. I observed the Brent geese and let us not forget all the other migratory birds like ranching, dunlin, plover, sanderling, just to mention a few. I see firsthand where they feed and rest. How can an employee of Aquind give an accurate picture of our brand keys on a one day observation. The geese feed and dress differently at different times of the day according to the tides. You observe the verbs on the legs on the common on the university ground ports with college, on the sea and on the lake and many other places. PCC is trying to put a management plan together to safeguard our brand keys to help biodiversity recover. How is this going to be held by the enormous destruction?

29:35

You the examiner have been informed about the few green spaces, particularly about the allotments we have left on the overcrowded Island. This is why the residents and allotment holders asked you not to deprive us of them, not even for a day. Have you got any idea how busy these green areas are now with COVID-19 COVID has taught us the importance of the great outdoors

30:00

We who live along the route have allotments take this interconnected project very seriously and have looked at the many issues involved. We say again, we I am not an expert, we are not planners, but we do care deeply for our environment and for our allotments. And therefore for ourselves, we are part of nature. This threat to obey diversity is an existential threat and Portsmouth fear that intensity and the allotment holders even more, I know of residents of Portsmouth who have written to you about their submissions,

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they have been rejected as they are not interested affected parties. If you read the Dasgupta report, you will read about inter connectedness we are all interconnected. Certainly we residents we allotment holders along the route. All people habitat species and beyond are affected. So why were all residents of Portsmouth not allowed to take part in the dialogue about this project? I would suggest the process perhaps has built in failure in this case institutional failure. The consultation process was totally

inadequate. Please forgive me for repeating myself, as I have mentioned this before my audio submissions, but this is too important not to repeat. We all learn by repetition or making mistakes. We've challenged I know, the funding of this project that donations and PS had to recuse themselves because they got too near to the applicant. We are told that this issue is not part of this examining process. We've taken it to our MPs and they have raised it in Parliament, at what stage in the examining process or elsewhere. Can this be discussed or given the attention it needs? There's not a lot of time left. So where does this leave us now, you have pockets full of information from the applicant and other interested party. We, whether it is let's stop Aquind residents allotment holders have done our best to counterbalance this enormous amount of data and present you the examiner has the opportunity to reach an unbiased position. We heard Mr. Jobs this week referring to laws enacted over the past 30 years which are being used and considered relevant to this application. These old laws are of course useful points of reference, but circumstances have radically changed. There was no climate emergency then there was no awareness of biodiversity loss, there was no pandemic and what else has fundamentally changed too much to list here. But these change, circumstances should now change our focus. We know that as a new office for environmental protection and an environmental bill waiting to be enacted. This should be considered when making recommendations. This matches the Dasgupta report from the Treasury and the P FM's frequent reference to sustainability. yet here we are three weeks of the end of the examining process rushed through it, it seems, and so many questions unanswered.

33:15

Are we not being rushed through this examination process? Under current circumstances should this examination process not being given more time? It is all very well for Aquind who's employed Herbert Smith Freehills WSP and other contractors. Our over work council officers have to deal with Aquind and additional problems in the area. No wonder there is a time delay in their response to documents. And as for the allotment holders who still say to me, I don't understand one word from the letter I received. This week, 15th of February, Aquind's work timetable arrives on the examination side help, q3 2021 work to begin at Fort Campbell and copper. If I could just told you there for a moment, please. Yes, it just on the 10 minutes now, How much longer do you think you have one minute? Go on then? Can this be true? Where are we then? No recommendations yet from yourself? no agreement in France, not even a planning process started COVID way for predicted climate change, loss of biodiversity, possibly damage to our allotment spaces? This is your moment your opportunity the examiners? There is is there not enough evidence, enough resistance, enough objections, enough dodgy dealings to refuse this application? Could your recommendation be the beacon of hope leading to a better, more sustainable world? And that's it. This is Landry. Thank you. Mr. Jarvis. Was there anything briefly in response to the moment or would you come back and writing? We'll come back and write and say thank you. Thank you, Mrs. Langley. Thank you very much.

35:00

So we return now to Miss Goldberg.

35:12

One moment, please. My, it seems that my team's connection is a little bit shaky. Right? Just bear with me for please bear with me for a few seconds. Yes, yes.

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Just for the other participants in this particular section, it would be my intention now, unless anybody has real difficulties with this to run through, it's now just gone past 230

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to run through for an hour and a half from the lunchtime break. So that's through to 330 or maybe shortly after.

35:48

Does anybody have any particular concerns about that? Just looking across the board? Okay, nothing heard.

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Miss Goldberg, how?

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How long do you think you'll be? I don't think I will be very long at all. So my understanding is that I will briefly address the position of interconnectors in the TCPA to briefly speak to the regulatory position. Right. So you're talking about 10 minutes or something like that? Yeah. Okay. Thank you. Please proceed. Okay. Thank you very much. Good afternoon. I'm here to address the position of interconnectors and the availability of exemption under the exemptions for interconnectors.

36:28

Under the TCPA, the trading cooperation agreement, which was concluded just before Christmas, I can also briefly give an update as to the regulatory proceedings in front of Isa the European regulator.

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Let me start by saying that the trading cooperation agreement is very much in favour of interconnectors. It provides a number of positions in which exhorts the parties the European Commission, the European Union and the United Kingdom, to cooperate for the development of gas into gas and electricity, interconnectors.

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The in title eight of the TCA no article nr 13. In particular talks about the parties cooperating for the efficient use of interconnectors.

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Article 16 of title eight provides for close cooperation pertaining to the timely development and the interoperability of new energy infrastructure and in particular electricity, interconnectors.

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The areas there are a number of other areas of cooperation which effectively take the essence of what we have under the European Union directives and continue to apply that to the development of energy

infrastructure Under the TCA. The institute or the legal Institute of the exemption, such as we discussed in the last at the last hearing or on this topic is one such example.

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annex three to title eight provides specifically for the possibility of parties granting exemptions to new energy infrastructure in particular to interconnectors

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from the provisions of the TCA in particular, for exemptions from third party access and the requirement to be unbundled these the structure of the exemption follows exactly the European Union

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regulation to the on this point, the same criteria are applicable and therefore, the availability of an exemption Under the TCA is is a given.

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If I may, if I may briefly. Comment on the

38:46

on the applicability, rather than the availability or the regulatory procedures in front of Acer. Sir, I can report that the Board of appeal of Acer has reopened following the successful judgement in front of the general court of the European Union for a safer Aquind has reopened the exemption procedure. And we are proceeding with the next steps

39:12

in the next few days. We have also taken advice from a number of additional parties, including a former member of the of the ECJ as to the chances of an exemption. We remain very optimistic. And indeed their optimism is it as a point of realism in this point here that we have a good route to an exemption in front of the board of appeal of Acer. Failing that.

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As an alternative, an exemption Under the TCA pursuant to annex three would be available. Thank you.

39:48

Thank you.

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Mr. Jarvis. Was there anything else on this particular point? Or would you be happy to put this to Mr Zwart and Miss Colquhoun at this position?

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I have nothing further to add. Thank you. Right. Okay. This is what do you have anything to say in response to what you've just heard?

40:10

Thank you very much. We have set out our position different representations. And we won't be adding anything to them. But I do have a couple of questions for Miss Goldberg. If I may have clarification, they would need to be through me. Of course, I was going to just about to say so I'm so sorry. I paused. And before I'd have the chance to say that they were through you, sir. They just questions of clarification, because the primary vehicle of this examination is, of course, written representations. It's just helpful. Mr. or Mrs. Goldberg is here today, in our in our appendix tend to our funding statement, where we provide

40:47

our own commentary and set up this from the TCGA. We refer in paragraph 17, to a note by Herbert Smith, free hills, on key tcaa issues for the energy sector. And this isn't a memory test. So if you don't know, you don't know. But first, there are two questions. Firstly is the briefing notes so described,

41:11

says that it was a post first published on the Herbert Smith free hills energy blog. And I wanted because Miss Goldberg and her colleague Chris Davis identified as authors, she might remember more or less when the blog was first published, whether it was for example, early January, or sometime in December or some other time. Right. This is what Thank you.

41:34

Miss Goldberg, did you have anything that you could say on that or not?

41:39

Yes, sir. Mr. Roscoe, I am happy to reply to Mr. Novak on that. I believe that block was probably I wrote it over the Christmas holiday.

41:50

And I don't recall when exactly it was uploaded to the website. So if that is helpful, Thank you. Thanks at some point in January. Thank you, Miss Goldberg. Mr. Ward, I should just emphasise at this stage, this is a hearing and that cross examination isn't allowed. And that is why it will be a particular point and then a response to the point. So if you'd like to move on to the next point, please. Yes. So I am more than alive to the procedure and the presence. I am sure.

42:19

Thanks for the reminder. And Miss Cobra. The second point is of clarification through you, sir. Was there?

42:27

Can I take it from what you've said that the brief is essentially, obviously is not legal advice, but it's the expression of view

42:38

of the position that you set out in your blog that you said that you drafted, sir.

42:46

Let's go back. Is that a question that you can answer or not? I'm so I'm afraid I might have lost what you say I usually write things that I

42:55

could you perhaps asked that? What is the precise question? Yes, I'm so sorry.

43:01

So if I could just by way of background, amplify

43:06

law firms are in the habit like many firms of publishing their the thoughts of parties not as advice but of expressions of view to stimulate debate into the public domain. Understand from Miss Goldberg the what's described as a briefing on quote, key TCPA issues for the energy sector was published originally as an energy blog. simply trying to clarify with Miss Goldberg whether what we see as the briefing is, is her authorship her typing out, or whether it's Mr. Davies is both it both of the individuals are at

43:46

it. Now, I can't see that. So can you please put it down? The relevance is what? Yes. Well, the relevance is this really read out this paragraph, it says basically, that that is expressing a view on the likely impact on the energy sector of this TCPA provisions. And it says that the impact of these provisions on individual projects will depend on how the provisions are implemented in UK and EU law. For example, it is not clear how a decision by the UK or the EU not to apply the new exemption regime of the TCPA. This allows the UK or the EU to decide not to apply TPA and unbundling requirements would impact the application resisting requirements of UK and EU law unless the relevant regulations are modified in order to implement the TCPA. And the question, sir, because it's obviously relevant to paragraph 19 of the CPA guidance is whether that's that's simply an expression of you authored by Miss Goldberg, or it's by Mr. Davis, that was all good because that question you can answer or not? I can answer that question. I can also expand on that because the point at which I wrote it is perhaps relevant. Yeah, please. The key point I was making in the blog together with my colleague Chris Davis, and

45:00

Mr. Davis and I regularly advise together and also co author papers.

45:06

The TCPA provides the framework however, it will need practical implications practical implementation. One of the features through institutions through which its practical application will be delivered is the specialised Committee on Energy. This specialised Committee on Energy when I wrote the blog had not been constituted in had not been fully constituted. The specialised Committee on Energy is now in the process of being constituted, and therefore provides the appropriate forum, which I was hinting there at which I was hinting. Thank you very much that you there on the end of your second question.



45:47

I think it's probably one for Mr. Bird, Mr. Bird.

45:54

If most if Mr. Bird is there, there I am here just waiting for the cameras to catch up. I don't need the camera.

46:02

You're obviously can hear and see everything that's going on. I am conscious that the questions are getting quite detailed. And I don't consider that they have in any way gone over into cross examination at the present time. But I'm interested to hear your views on that. And I would wish to have if you believe that it gets anywhere close to cross examination, I would wish you to inform me immediately, please. Yes, I think I think as you pointed out, that was sailing very close to the wind, if I can put it in that way.

46:35

And if there are points of that kind, which are going to be made, then then I would request the least they're put clearly in the first instance, rather than that rather than in a circuitous way. And then I'll intervene if I feel that they have overstepped the market.

46:50

So I think that's as far as it should go.

46:53

Thanks. When you say that, could you just expand on that last point?

46:58

In terms of I use, are you questioning the are you

47:05

expressing a concern about further questions?

47:09

No, sir. I mean, obviously, if they go through you, it's the nature of the questions and whether the questions are effectively cross examination. Yeah. Yeah. I mean, clearly, I don't want to prevent either you or other parties raising questions which we can respond to. But

47:25

it is in the form of cross examination, which is very close to Yes, I will leave it for you. I was conscious of that. And that's why I've asked you to speak. I will leave it for you to intervene. If you if you believe that the question is getting close to cross examination. I'm grateful. Thank you very much. Thank you.

47:46

Thanks. I was merely asking two questions. for clarification. I'm very used to the area and I've done to me this is what if I could just told you that I don't wish to get into a chewing and throwing over procedure here. If we could just move obviously, we are to a certain extent type of time this afternoon. If we could move on to your next point, please. So I said I had two questions. And that was the end of my second. Sorry, I thought I thought you said three. Sorry. I'm sorry to thank you. Right. Okay. Okay. Right.

48:14

Mr Jarvis then, was there anything?

48:18

I'll deal with Miss Colquhoun first, actually, Miss Gordon, was there anything that you wish to respond to in what Miss Goldberg has just said? Yes, please, sir. I won't be long. It'll probably take me five minutes at most. And it may not take that much.

48:32

Let's go. But thank you very much. I'm sorry, asking questions through. Of course, you sir. I had understood that, from what you said Miss Goldberg, that, of course, we must have reference solely to the TCPA at the moment, which of course doesn't provide exemptions or doesn't provide for the survival of existing have existing applications for exemptions, but only through article nr 11 provides for the continued life of existing exemptions. So

49:10

it and the second thing is that the in terms of there being a process available, I believe that what was confirmed just now was that there are no there is no structure. There are no criteria. There is there is only whilst there is there is only the committee currently sitting are there. There are two energy committees. I think that the there is a committee that deals specifically with annex three that deals with energy and there is a separate one that's supposed to be set up in relation to energy separately. No, I think it's DNR 25. But the in terms of available process. Now that in effect replaces the 2019 regulations. There is nothing that is available to Aquind

50:03

Sir, thank you. I'm afraid that it's not correct.

50:08

There it is correct that the TCPA does not provide for the survival of existing applications. However, the application of a certain sort of act in relation to ESOs survives because it is a buy by operation of law, because in fact it is a reprisal of the board of appeal hearing of October of 2018.

50:33

In European law, there is a principle of restate you at intake home. And this is the principle that is being applied in these circumstances. The general court of the European Union has ruled that aces the European Union agency has acted wrongfully and unlawfully in not granting the exemption

50:56

in in the way that it applied the criteria in the in the first decision and in its appeal.

51:05

Accurate is therefore applying that for in the reopened procedure that the exemption is granted in on the basis of the 2018 application and then 2018 II hearing.

51:21

That that is the European Union the function of European Union law and has therefore survived the TCPA.

51:27

Indeed, if I survive Brexit and the TCPA is therefore not material for the current ongoing, ongoing procedure, should this ongoing procedure fail? Then the TCPA procedure is indeed available. My comments in the Christmas blog or the what was written over Christmas has bowed by now being overwritten by developments of time. So that by the time that if that, first of all, there is a procedure for new for new exemptions available in nr three, and as the specialised committee for energy as well as all the other committees, and relevant 404 interconnected development, and cooperation between the parties are in fact being constituted. I do not see a procedural issue here.

52:13

Thank you, Miss Calhoun, was there anything else?

52:17

Well, I am confused. I'm afraid by that because there is no procedure available now. I think there is

52:25

drew the blue eye. This is what was speaking previously, and I obviously had this conversation with Mr. bird that you heard it got very close to cross examination in terms of the exchanges between the parties. Do you have a specific question that you can ask through me?

52:44

Also that

52:48

I'm trying to but I

52:52

if we're being told that there's a procedure available through the annex

53:00

right. So if I may help my Leonard friend, right, right, okay. Miss Goldberg, you offered to help in that respect, please continue, whether on sort of in the first instance whether or not there is a procedure Under the TCPA is irrelevant, because as accurate has an existing procedure, which is currently

running its course, we submitted only yesterday relevant correspondence to Acer the European regulator in order to overreach for the for the hearing of 2018 to be revived. So, this will run its course should that against all our expectations fail, then there is a procedure that is available Under the TCPA sort of in those in those circumstances which I do not foresee will become of of any relevance because the just the judgement of the general court was very clear as to the illegality of aces decision. So, if I may add, it is very rare that the general court apportion costs or rules on costs for

54:13

foreigners applicant. The in this case accurate was awarded costs because the decision of the of a CEO or the board all these matters before so yeah, both of them a little bit. Okay. So, on that basis, so I'm very confident that the current procedure will continue will conclude successfully for the applicant should against all expectation that not be the case, then a tcaa procedure is available, by which time any committee that might not have been constitute constituted at the moment will be constituted. I have no doubt. Thank you.

54:50

I think to summarise what where we are is that there will be a procedure available not there is a procedure available. That's

55:00

There is no

55:03

right.

55:05

position now. Okay, I've got the positions of both parties here in front of me at the moment. In my mind, they've both been given, there are updates to previous information that has been given. And I'm aware of that there is repetition of information that's already been given. And so if there were further questions that you had, then I'm happy to hear them. But I can see the position of the City Council, and I can see the position of the applicant on this particular matter. Was there anything else? One more thing, we have understood that there would be no approach to the French authorities to seek a further partial exemption, given the ruling of, of German and enqueue?

55:49

Right, Goldberg, is there anything that you can say on that, that may be something that you aren't aware of?

55:57

So thank you, I can confirm that. The current procedure of relevance is the one in front of Acer. Acer has the power to grant an exemption which would apply in France, United Kingdom. So therefore, individual approaches to individual national regulators are not necessary at this point in time. Thank you, Miss Calhoun, was there anything else? No, thank you very much.

56:20

Thank you. Mr Zwart

56:27

Mr Zwart I see your hand raised. Thanks. So yes, very quickly not to ask Goldberg any further questions in case they're taken to be cross examination. But to ask you, sir, whether you might ask the applicant to provide a note to the ExA and the Secretary state on two things. One is what is the current available procedure? And what are the proposed available procedures? Thank you.

56:50

This is what I should just say for information that

56:54

I already have that question in mind and think when actually complete this particular section. That will be coming into the into the hearing your enemy, sir, thank you. No, I wouldn't say that. But it's something that we'd already fought off.

57:11

Thank you.

57:17

Mr. Jarvis. Was that all? Miss Goldberg? Was there anything else from you in the first instance? No, sir. Thank you, Mr. Jarvis. Was there anything else on this particular part of the agenda? If I can call it that?

57:32

No, thank you, sir. And thank you for accommodating as you have done today.

57:40

This, if that is actually this part of the agenda, then I can, I can actually

57:47

put the panel's request examining authorities requesting in terms of a post hearing note to actually pull together the matters, which are being discussed in matters that have been raised previously in the examination as well. And this is directed at you, Mr. Jarvis, for your initial comment on it.

58:11

There is obviously an unfolding situation in terms of exemptions and related matters, you know, we've already said that we discussed it at the ISH on Wednesday and just discussed it again here.

58:25

This is what has already mentioned the CA guidance. And obviously, we need to be looking at this in terms of the management, if I could call it that of potential impediments to implementation, which, in our view, in terms of the examination exists at the end of the examination. And also linked to that are the resource implications of implementing the project. So as a panel and as an examining authority, what

we're looking for is a post hearing note covering information on I might call it potential routes and options for the applicant in terms of overcoming what could be seen as impediments from now until the going to the market. That's been suggested, going to the market with the project for the funding for the project. Now, this is more than the post hearing note. I'm getting a little bit of feedback. I just want to check that you can hear me Mr. Jarvis. I can hear you sir. Right. Okay. Thank you. So,

59:36

the we there was a post hearing note requested and agreed to at the SH on the tcaa arrangements.

59:46

But this probably goes a little bit this does go further than that in respect of the available options and a route by which potential impediments can be managed.

1:00:00

Now, is that Mr. Jarvis? Is that fairly clear in what I've asked in those couple of sentences?

1:00:09

I believe, I believe you're looking for a post hearing note on the route to address the regulatory position and the consents in France and the options to do so prior to funding, sir, at the time at the end of the examination on the eighth of March, yes, yes. Now, when I say the end of the examination, obviously, it would, it would need to come in as a post hearing note, which is actually as soon as possible. So I'm not saying as of the eighth of March, I'm saying really, as of now being the end of the examination, so that the post hearing note can be done. Following today, obviously, it can be dated as as you wish, so that if something happens the following day, then obviously there is there a reason for it not being included.

1:00:57

So, Mr. Jarvis, is that something that you believe can be done? In terms of that posting note? Yes, that's fine. So we'll deal with that as soon as we can. Right. Thank you. Now, just on that, and just to be clear, although we've taught this entity to discussions both Wednesday and today, already. The dcl goes as far as the French border situation at that border has inspected the matters that we've been discussing has changed during the examination. So it, it seems as though from what's being put to us so far, that a project that goes to the market seems to be both on the UK and the French sides. And so the information in terms of potential impediments would actually cover both the UK and French sights in saying that, and Mr. Jarvis, you made this point yesterday, we, we don't wish to get involved in too much of the detail on French law and process, because the object of this exercise would be related to the

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the management of potential impediments, as I've said before,

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so again, having added that on, is that still fairly clear and something that can be done? Mr. Jarvis?

1:02:22

Yes, that's fairly clear. The note will be drafted with paragraph 19. If the guidance in mind, sir.

1:02:28

Thank you. And also, if there are other elements that that you consider are relevant within the guidance relevant to this subject, this subject matter, then? It's not a it's not simply that paragraph?

1:02:46

No, that's just recognising. Yeah, of course. Yeah. Thank you. And that's where it is. Yeah, yeah. Okay. Right. Okay. So what I'm doing at the moment, I'm just looking around the virtual room to ask if the parties that are involved at the moment to ask whether there was anything else on this particular subject that they wish to raise?

1:03:12

And I don't see any hands raised. Now I'm coming back to Mr. Swartz, then initial breakdown into the three points. One is the is h two. And the other is a C two and the C three. On the ISH to Mr. Ward.

1:03:31

What were the other? Were there any other matters that you wished to deal with? This afternoon outside of what's just been discussed?

1:03:43

So on is h2, I was going to please clarify matters in relation to funding

1:03:54

with you. Yeah. Because it's no long complicated. And it might be helpful to amplify, albeit taking as read what we've submitted. And we have Mr. Bryson, Mr. Stott, here who have got feeds in to be able to just clarify some of the things they've said to assist you, sir.

1:04:15

Just in terms of sequence, though, would you prefer to hear

1:04:21

contributions on funding now or go back chronologically to change request to?

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Right, we are at a stage in this particular hearing, and indeed, in the hearings, as a whole, where the,

1:04:38

the structure can be amended to suit the circumstances to a to a degree. All right, if that happened at the start of the hearing, I wouldn't allow it to happen because it would just unravel. We are at a stage now where more flexibility can be brought in, in our view. And so therefore, I'm happy to hear them in the order that you would see

1:05:00

Because effectively now, we've dealt with Mr. Jarvis's point, in terms of the regulatory arrangements are just go to Mr. Jarvis to ask if that is correct.

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Mr. Jarvis.

1:05:13

Thank you, thank you, I didn't know that you didn't put your hand up before. So I assume that I just want to check that you had heard. So that's, that's dealt with Mr. Jarvis's points. And so it's back to you as to what as to how you would wish to take these particular items, your very concept, since we are going in sort of reverse order to assist you, I'm going to go straight to funding because it makes more sense to do with that as we're in the territory of paragraph 19, and so forth. And then to do with points one and two is discrete elements at the end.

1:05:45

Not least, because I understand that Portsmouth city council may have contributions to make on funding and may want to end interject at appropriate moments through the raising arm process. And and you should be alert to that, as I understand. Okay, it's as a result of

1:06:05

that would make sense then, sir. Right. Happy to do that. Is that raising hands things as a result of discussions that you've already had with Portsmouth?

1:06:14

No. So it's my essential idea, because we know that Portsmouth we're going to speak today. But you know, they have things to say about funding. So rather than hit us then then it may suit examination of the topic for us to set out our classifications tool and for them to intervene at that point to help you sir. Right. Okay. I can just see Mr. colas, hand raised. So Mr. Collins, I could hear from you at this point. Good afternoon to everyone coming up on behalf of Portsmouth City Council. If it's helpful I am, I'm aware that we have points where we align with the carpenters. And between us, we've discussed that it might be helpful to hear those points at the same time. So if it was appropriate for me to raise my hand and support any of those points raised by Mr. SWAT, then that is what we thought we might offer to the panel as an option. Thank you for that clarification. Yes, that option would be useful in terms of making progress in an unordered, or in an ordered way across the fence. Just before you start, which is what I had

1:07:17

just two points that I'd just like to flag up to Mr. Jarvis in terms of

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related and other matters, Mr. Jarvis.

1:07:28



This has come up and I suspect may come up

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later during the hearing, but I'll raise it I'll raise it now.

1:07:38

We are interested in a lot of discussions is centred around the fibre optic cables and their use.

1:07:47

We are interested in further I could call them termination details at the telecoms buildings. In other words, the fibre optic cables then split into two branches, the ones for monitoring and the ones not used for monitoring. And I was interested in the practical aspects of actually terminating those cables following construction, bearing in mind that there may well be a lag between construction or installation and their final use. And also in terms of the carpenters land.

1:08:22

There's been referenced to the purpose of the parking for instance, Jason to telecoms building, and the extent of that parking. So it has been considered before the request on that is if there's any further detail that can be given. Final thing then was in terms of the in terms of carpenters submissions, that deadline set and see the comparison between thought March where we are here and thought Marsh and swanzy Bay. I suspect the response to that would be coming anyway. But I would just like to emphasise it so that we are sure that our response comes back on those points.

1:09:06

Was that clear?

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Yes, thank you, sir. Thank you. We may well come back to those at various times during the afternoon, but I just wanted to put them out there

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so that maybe others can think about them in the meantime.

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Mr. Ward funding.

1:09:23

Thank you very much, sir. And so I'm going to assume that all documents are taken as read. And that this exercise this afternoon is clarification to assist examine authority on certain matters. So there will be obviously opportunity for you to ask questions, and we hope to be able to respond to them and help you as do Mr. Bryce and Mr. Stop. So please do take that opportunity. And we're also alive, that in due course we will be providing as needs be a written sub supplement out of today of what's been said. Thank you. So you're seeing sir essentially that there's an emerging

1:10:00

issue between the app applicant developer and other parties if I could read neutrally, about

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whether and what funds they have to show and at what time in real time they have to show it. And the question you're going to have to consider, it seems to us is whether or not the secretary state's guidance under paragraph eight reading context mandates the holding of actual funds during the course of examination or the holding of some form of obligation framework, which will ensure that you can rationally say there are such funds going to come in due course, because of that existing framework, or, as the applicant seems to suggest, no, it will be alright on the night. At some point in future, it's okay. Now, you've seen our contention in relation to that. We say to the applicant, you cannot rationally lawfully CPO, third party land, our clients land on the basis of speculative funds, and in the TCPA 1990 context. So you'll be well aware that in the ordinary domestic local administrative authority situation, if a local authority came forward with a regeneration and CPR in the middle of town centre, and they said we've got no money to the rescue state, he'd throw them out, so having a lot of money. And we're in a different scale order of magnitude. But the same point applies and is reinforced by sector sets guidance. So you'll be having to focus quite hard CERN and most carefully scrutinise what the applicant

1:11:41

says about that says about subverting the tests into something else that they're not because the words are clear on the side of the tenor of the guidance, and take a view in relation to your recommendation. That's the thesis as to why we respectfully invite deletion or severing of the CPO powers in Part Five completely, but with the practical fallback position of the availability on application by the developer to the local authorities, Portsmouth, Winchester, for example, in due course, when they've got money, or got a framework.

1:12:15

And they can apply for local CPAs to enable execution of their

1:12:21

grant for the DCM for the energy project or put neutrally. So we're trying to be as practical as we can to assist you, sir, to guide you to a lawful recommendation. As we've said, from the outset, we recognise that there's a presumption in favour under guidance for the energy project. And that obviously doesn't apply in relation to the compulsory acquisition of land that they're competing. And the presumption in the one guidance cannot override the lawful presumption against taking land. So so that that that's the first point. That the second point is,

1:12:54

we are trying to assist the XA in reaching a lawful decision, we recognise the practicality that it would be senseless to try and defeat DCO for an energy project, which the secretary state has required in his direction be treated as an asset. But it's entirely appropriate to refine the scope of it, and the order terms to align with the scope of the statute sets in jurisdiction and to align with a justification advanced by the applicant so that you grant or you recommend granting no more than what has been objectively

justified. And that objective justification encompasses funding. And so we remind you, under paragraph nine of the CPA guidance, that absence of funding or difficulties on funding, go to the heart of the CPA process, because as the Secretary of State's guidance spells out, in the absence of reasonable prospect of requisite funds for acquisition, it will be difficult to show conclusively that compulsory acquisition of land meets the two conditions in section one to two. That's both conditions. That's both one to two is required for development, and one two to three compelling case.

1:14:15

So that's his guidance, not our guidance. We haven't rewritten it. That's what he says. So our submissions you've had already, we rely on the the clear statement, the applicant must demonstrate, quote, that there is a reasonable prospect of the requisite funds for Acquisition becoming available. And you will seen from the applicants

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submissions that they rely on the end of the phrase becoming available, and they say that's enough. And we say No, it can't be enough because there's no objective material before the XA inside the statutory six month period, which ends in eighth of March of the requisite funds, which we'll come to in a moment.

1:14:57

That's in contrast with the local position

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under local administrative area CPOE, where there is a different test with more slack in it under the critical data rules with which you'll be familiar, and that does advert to prospect of funds, but even in a local CPA, so you will be familiar that'd be development agreement, a developer, the developer agreement with the local authority all tied up. And so to so we provide you with example, the RF Manston, which, which I'll come to in a moment. And RF Paxton, sir is a is an example for you, of application in the Orthodox way of the CPO guidance for the secretary under the 2008 plan is not the 1990 plan yet where that applicant had a funding agreement in place actually in front of the examining authority executed, and its terms provided for the drawdown of funds. And that is why the zakra state will rationally able to say that there is brackets during the currency of the statutory examination period, a reasonable prospect the requisite funds were coming available. That is not a position the applicant is in before you. Similarly, we've seen statements in the

1:16:14

RF Manston documentation have a lot of funds behind the scenes as well and guarantees. So all of that was the genesis. Even in the face of that evidence over an article, I think it was, as you point out the other day, sir, of nevertheless having to verify those funds. But the important point is that there was evidence upon which the x A yourselves and the Secretary could rationally conclude that the test of that there is a reasonable prospect, quote, unquote, could be met in law. So the dispute between us and the applicant is they say, we hoped to go to market, we hope to get project financing, we hope KPMG will open the bag and give us loads of money in due course, and we say, hope, desires, it's irrational. The

scope of reasonable expressly excludes the irrational. And so it doesn't matter what they hope, for the purposes of this guidance. So that that's the big point. So

1:17:13

that leads us on to the question of how is the XA to deal with a situation where they have in front of them what is on the face of it 100%, speculative, DCF DCO, also seeking CPOE powers.

1:17:30

And when we promoted the idea of trying to help examining authority and say, Look, this is a difficult position, how do you deal with it practically? We suggested Well, look, here's number of examples. This is what they've done in those other situations. This is the evidence of funds that they had in place. And that's what led us to suggest these articles to help you. So

1:17:52

you will recall that we were looking at the accounts to try and work out what was going on because they were quite carefully drafted of the applicant's accounts. And we had assumed that they had both money and some funding and therefore could sustain that sort of approach. Lo and behold, shortly after Christmas, I think it was for the very first time they expressed this spell out in simple plain language rather than inference or relying on deduction, that they actually have no money at all.

1:18:21

And we put that into our submissions to sir. So you're faced with a very unorthodox situation in many ways of a developer seeking a DCO with attendance, CPA powers, but no money. Now, our simple answer to that is, that's fine, because the scheme contemplates that sort of approach can happen.

1:18:44

And that that is responded to by the Secretary state under paragraph 16. You simply sever and delete the CPO powers. It's as simple as that.

1:18:53

Because in the absence of any rational, objective basis, on which to be able to conclude that there is a reasonable prospect, and that excludes the irrational

1:19:06

you have no evidence before you have requisite funds becoming available.

1:19:12

You know, we can all hope you know, I hope I get a brief tomorrow. I hope I someone instructs me next week. Well, that's great. But so what? How does that allow me to buy my bar of chocolate today? It just doesn't.

1:19:25

So that's the analysis before you which we put out in our submissions. And that's for you to consider. In terms of practicality, how would you go forward from there?

1:19:37

We are struggling ourselves to ascertain whether one can have in a DCO some sort of framework that could enable

1:19:50

objective provision of funds in a situation where there is a developer who has no money at all, but at the moment, we can't

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concluded that it's even possible to have that sort of framework. And that's why we took issue with requirement 26 other days, because the genesis of that requirement assumed at least some funds on which to premise it, but we now know confirmed expressive by Aquind, they have no money at all,

1:20:19

at all.

1:20:22

So they're just a piece of paper on someone's desk somewhere.

1:20:26

So

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the Orthodox situation, because the Secretary of State's guidance, as we've indicated before, doesn't look at this as an exceptional position. So we don't need to say it's exceptional, we just say that's what happens in the situation, you serve her and you delete the CPR powers completely. So that in our draft DCO. So you will see part five simply been deleted.

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And that's that, that those that that will be our approach going throughout. And the next step is to is to look at the question of the number in requirement 26 in isolation. And we were trying to through the account analysis to see whether and how Aquind might get the money and all they've done is they said, We haven't got it yet. We haven't got it yet. We'll have it sometime, perhaps in the future. So we then looked at the position of their paragraph 5.6, I think with their table of what their evaluation of requisite funds might be. And you've seen evidence from Mr. Bryce, and you've seen evidence from Mr. Scott.

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I needed a nutshell, this is not evidence to say one must give X amount of money. It's not about valuation of land, because of course, the statute bars consideration that what is to show is how much money how many requisite funds the developer is likely to need in order to be able to cover the paragraph eight requirements for what are the requisite funds.

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So even if paragraph 19 considerations are resolved, there is still a number which has to be evaluated in order to get past paragraph eight. Because if it's not,

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then it would be difficult to show conclusively the composite acquisition of land meets sections one two to two and three. That said chimes with you recall the press case for your CPR experience, that as Sainsbury's case, and the Supreme Court held in 2011. you're obligated to most carefully scrutinise at Queen's case, most carefully scrutinised at Queen's case. And the onus lies exclusively on them. So although we're helping the examining authority, there is no onus on us to do anything at all. It's all on them to show you. What we've done to show you, sir, is that their evaluation of requisite funds is fundamentally flawed, for the reasons Mr. Price has set out in his statement. And he will come in shortly and explained the position and he's done his best to try and extrapolate the figures for you to give you an idea. We're going to hear shortly, also from Mr. Stott. He's going to address you on the commercial telecoms points, and also on questions of market value and blight. And so it may introduce that section in this way.

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There is a, a fundamental flaw we say in relation to the approach by Aquind to the evaluation of requisite funds. And it works in this way.

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If we're right, and the central state's guidance is right. And paragraph eight requires consideration today

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during the examination period, circumscribed by the statute under Section 98. What is the position today? And then it follows that when one is evaluating requisite funds, one can't look forward to what might happen. one's got to look at the position today. Today Aquind is not a commercial telecoms Undertaker. Today, of the 19th of February 2021. Aquind, has not satisfied and cannot satisfy the direction from off comms because it hasn't got a DCR granted.

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So it can't take the benefit of the ECC code. And it can't exclude from the scheme world to arrive at a position of a no scheme world. So it's driven to evaluate requisite funds on the basis of nothing that can exclude the scheme to create a no scheme world. And what Mr. stotts is therefore done is he's evaluated the requisite funds today as taking account of for example,

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pool, the market value the scheme world for commercial telecoms. And that's why you see what he said that when we hear from him, you will also know that he was the former chair of the capacity purchase Association. He also advises telecoms providers. And so far as it's relevant at all, because he's giving expert advice, not legal advice. And he is buttressing and reinforcing our position in law, which is simple, sir. It is outside the jurisdiction of the secular state, to grant this DCO to include a purpose for commercial telecoms, it's extra jurisdictional.

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Mr. Just where you are at the moment, I was going to bring this in at some stage, and I suspect that it might be relevant at the moment, looking at document seven c dash zero 29, which is the the document the 70, document titled, scope of the Planning Act statutory purposes on compulsory acquisition of land. And I'm looking at paragraph 33. In that document, that deals with

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compensation and deals with the commercial, the position of the commercials, commercial telecom operator, let me call it that.

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And I'm just wondering if what you have just been saying was related to that particular paragraph, because I was going to ask for an explanation of that paragraph in that document. I don't have document to answer, but I can come back in due course. Right. Okay. So it's 3333. The document that I've just said, which is in our examination library is rep seven c dash zero 29. And it's the affected parties official statement on the scope of Planning Act 2008 statutory purposes and the development compulsory acquisition of AP land. Yeah.

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So what we sought to do, sir, is because we're not here to destroy the project, but rather to bring it exclusively within the field of energy, which is what the section 35 direction covers. And you've picked up the point. So in relation to tidal Bay, is we've sought to navigate a practical route through for you to potentially include physically additional fibres, but that don't have a purpose for telecoms. So in due course, on application in the usual way, the local planning authorities and application could be made to change the use of those other fibres, which have no practical purpose, because they're simply material into use for telecoms. But that's for another day, sir. So we're, again, we're not trying to destroy the project, we're trying to refine it back into jurisdiction into the compass of the field of energy. So it aligns with section 14, six, eight of the Planning Act 2008. I missed the start will describe that and talk to you, sir about that. And he'll also explain an amplifier think that

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had

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said that it is striking that the planet 2008 scope does not include any provision for the field of commercial telecoms or telecommunications at all.

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So these are not unorthodox points being made.

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So the that that's the practical way through so we've sought to navigate through with a tidal lagoon situation, a similar point that arose there, as you saw where there's an education purpose building, and that was essentially severed from the development, but they allowed the reinforcement of the title of a

wall. So there wasn't any retrofitting required. So they enable practically the position, but they allow the project remain introduced in jurisdiction. And that's we're not going the same approach here. And I understand your question about people and terminate the cables. At the end before they branch off to the telecommunications building. That's exactly what we had in mind. So in due course, they can come back. And we said from the outset, and consistent with our position, we're not trying to stop the electricity project.

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In relation to it, we're simply trying to refine it so we can have our line back off. It's been built. That's a separate question.

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So that deals with I think, scope of jurisdiction, sir, and I think you have our points on that. And so you have the clear situation to have to report on and consider.

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The next question is, I think in relation to the scope of requisite funds. And just before Mr. Moore just before we move on, Mr. Jarvis, I'm conscious that there's quite a lot in here, although much of it has already been put in representations. Is it your wish to make any any points on what's being said at this stage?

1:30:00

It's a job. It's like it for some reason. It's a burden. But yeah, I think may help us. We break it down in stages. And as you purpose to start addressing the guides and the test set by the guidance, it might be helpful to just briefly address you on that aspect. Okay.

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So it's important the guidance is correctly applied and the applicants application of it is not mischaracterized. And so it's not my intention. During these brief moments to rise, Mr. Foot starts, date in relation to how he's characterise the applicants position. But it is our position is as set out in the funding statement. And Mr. Jarvis can speak to it more in due course as necessary. But contrary to a number of the submissions that you've just heard, and indeed, they're repeated in the written material of the carpenters. It's not a requirement for satisfaction, satisfaction of the section one two to one test, or have the guidance that the applicant should be able to demonstrate immediate availability of drawdown funds that can be forced against or a binding and certain framework to ensure on terms that requisite funds become available, or indeed secured identifiable funding for land acquisition costs at the point of an examination of the development consent order. And those are all descriptions you'll find in the carpenters written material. And the affected persons contentions rests on a misinterpretation and deed a misapplication of the secretary state's guidance. Firstly, the point at which the sector state must be satisfied as to the requirements of Section 122 of the 2008 Act is the date of the decision on the application to the developed concerned order.

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The issue of scheme cost funding is relevant to the second of the statutory test I whether the Secretary of State is satisfied that there is a compelling case in the public interest for the compulsory acquisition. And as paragraph seven of the guidance stresses, applicants must be prepared to justify their proposals for compulsory acquisition of any land to the satisfaction of the secretary of state as the ultimate decision maker. Separately, they also need to defend such proposals throughout the examination of the application.

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And as paragraph seven of the guidance also states paragraph eight to 19 set out some of the factors which sector state and of course us and the rest of the panel will have regard to in deciding whether or not to include the powers of compulsory acquisition in the developed consent order. And those paragraphs eight to 90 of the guidance must be read as a whole. And as is clear from paragraph nine of the guidance, the sector state considers that a clear idea of how an applicant intends to use land which is proposed to require and a reasonable prospect of the requisite funds becoming available for Acquisition are both important considerations in satisfying the two statutory tests.

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And the reasonable prospect wording is carefully and deliberately chosen. The word prospect indicates that the decision maker must look to the future eye after the order is made. The word reasonable means objectively reasonable, and recognises that there may be more than one reasonable view.

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And the decision maker is therefore required to make a present judgement as to what is reasonable in the future.

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And paragraph 18 of the guidance provides sector states guidance as to what is a reasonable horizon for that judgement as to the future state of affairs is that the applicant should be able to demonstrate that adequate funding is likely to be available to enable compulsory acquisition within the statutory period following the order being made, and that reps and that resource implications of a possible acquisition resulting from a flight notice had been taken account of that is not a requirement that the applicant has to be able at examination to demonstrate the existence of immediately available drawdown funding, or a binding and certain framework for funding. And that is self evident from the paragraphs where there's a home. It's also so self evident from the use of the reasonable prospect test. And in the paragraph 17 that the guidance which expressly recognises that the details of funding may not be capable of being finalised until there is certainty over the assembly of land. And in such circumstances, the requirement is the applicant should indicate how it is intended. The project and acquisition will be funded and that is precisely what the applicant has done in this case.

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For the reasonable prospect test is carefully chosen to avoid imposing on applicants the impossible task of demonstrating that n sips are free of all constraints and all the possible

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impediments to delivery. Again, the carefully chosen wording requires the judgement to be made as to the likely outcome of outstanding applications and consent. Having regard to all of the evidence before the decision maker, are not selected extracts relied upon by those opposed to the making of an order. There is no requirement for the sector state to prejudge other decisions, because the reasonable prospect test does not require that. And as paragraph 19 of the guidance makes clear, the sector state requires evidence as to how those

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are being properly managed. And so you've heard already this afternoon in relation to the exemption and we've indicated will give you a post hearing note in terms of the French consents, I just pass over to Mr. Jarvis just to touch him a little bit more detail on the French consent so that you have a flavour of where the applicant is, if I may. Thank you, Mr. Jarvis.

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In relation to the French consensus, I would just like to provide a a brief update on those more generally than I did on Wednesday. And so there are very various relevant processes that need to be gone through in France. I'm conscious that we have at the outset said we're not going to stray too much into French law, but it is helpful for me to outline what the position is to evidence the reasonable prospects and how they are being managed in terms of potential impediments that need to be routed through. So firstly, there is a public consultation that's required to be undertaken, and that began in September 2017, when the applicant submitted their application and approach the commission for public debate. In October 2017, the Commission's public debate appointed the necessary person to consider that and following the consultation, the individual issued a report stating the product owner spared no efforts to raise awareness among a population that generally felt a little concerned, because the little impacted by the project, works with key stakeholders and engagement with the public continued over the course of 2018 2019 and 2020. And therefore, we have been managing the impediments for some time now, sir. In January 2021, the CMDB issued a secondary report concluding that the project owner has ensured this conversation is taking place in accordance with the cndp values of transparency and sincerity of fully respecting the right to information and the right to public participation, whilst identifying a marked contrast between the project owner which demonstrated a clear desire to provide explanation. And some members of the public who have family opposed and make dialogue difficult or even confrontational. In parallel, the project owner engaged actively with key stakeholders, notably the fisheries committee, so as to better understand local concerns and integrate them in the project development. And so as to come up with cements this commitment, our first convention was signed with the fisheries committee in 2017, this cooperation has continued positively. And the job is I wonder if I could just hold you there. If this can be put in, in in some in some other other way, really, because what we're actually doing here is going through a list of of events, if you like, and I feel that the thrust of the hearing has moved as we move forward, and then those may well already be included, or if they haven't, can be included in the structure document that I requested before.

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Unless you very nearly almost finished, and then when you'd finished I would call a break.

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No, I think that's fine. I'm happy to provide it in writing. Thank you, sir. Thank you, Mr. Bird. Was there anything else on this particular point in response to what Mr. Walters said so far? No, thank you. So anything extra we will address in our deadline? aid responses? Thank you. Right. I'm conscious that we've been at our screens for it really is an hour and 40 minutes almost now and longer for those who were in the joining and don't sign them an hour and 40 minutes since lunch? My mind had to take the break. Just before I do. Mr. Ward, you. Can I just wrap up in one minute, a very brief response that without going to the entities tit for tat, you have one minute. Thanks. So recognising that written representation is the primary vehicle for this examination. There are there are three points. One is

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the funding question doesn't only go to the second part of the test, it goes to both parts, see paragraph nine and the guidance where that's what the Secretary's guidance says so

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secondly, of course, when I mentioned immediate requirement for funds and some sort of framework, there's simply me paraphrasing examples, we see that they are a monster and I'm not suggesting that one losses to the test that that would be frankly silly.

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And thirdly, of course, one has to read the guidance as a whole but that's not a justification by diluting the clear terms of the guidance. Thank you, sir. Thank you rice just before I call the break.

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This is what when we started out the Saturday and I think you gave me an hour and a half for the

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the regulatory bits if you like and then

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Two half hour sessions on C two and C three from your side. How much more do you think you wouldn't need on the iOS Ah, overhang issues that we're dealing with at the moment. So I think when we return we probably have missed, stop pretty much immediately submit your question I want to put through you, maybe for about 10 minutes, and then Mr. Price, maybe about five minutes, and then me five or 10 minutes wrapping up, and then then we will be done in relation to funding because everything has been written down previously. I'm just trying to ensure you have our situation. So thank you. Okay. So, I mean, if I was to adjourn now and resume at 10 to four, that would be 30 minutes, which would take us to 20. past four, we've obviously got the applicants responses on that. And then we've got c two and C three. So it still seems to us just taking an overview that we should be able to finish the business today. That is certainly my expectation in my view. I'm just now going back to Mr. Bird just to see and Miss Colquhoun that we should be able to finish the business in this hearing today. Mr. Byrd First of all,

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very much be on

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this call whom?

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Yes, I would, I would hope so. We haven't got very much today. Right. So we're now at 1541.

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I'll take I'll take a break until 1540 1555 possibly a slightly longer break. 15 1555. So

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it's now 1541. What I will do, I will adjourn the hearing to be resumed at five to 450 and 55. Thank you very much