Date: 1 March 2021

Application by Aquind Limited for a Development Consent Order for the 'Aquind Interconnector' electricity line between Great Britain and France (PINS reference: EN020022)

Statement on the Exploration of all Reasonable Alternatives & Proportionality of Compulsory Acquisition Powers

For the Examining Authority

On behalf of

Mr. Geoffrey Carpenter & Mr. Peter Carpenter in relation to Little Denmead Farm

Registration Identification Number: 20025030

Submitted in relation to Deadline 8 of the Examination Timetable

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INTRODUCTION

1. This Statement sets out why it cannot be said that the Applicant has "explored all reasonable alternatives" as required by paragraph 8 of the Secretary of State's "Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land (September 2013)".

SECTIONS

2. This Note is divided into the following Sections:

   SECTION A – Executive Summary

   SECTION B – Legal Context & Paragraph 8 Tests

   SECTION C – Analysis

   SECTION D – Conclusions & the Way Forward

SECTION A – EXECUTIVE SUMMARY

3. This Statement sets out why it cannot be said that the Applicant has "explored all reasonable alternatives" as required by paragraph 8 of the Secretary of State's "Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land (September 2013)".

4. This Statement evidences that, contrary to the assertions of the Applicant, there have in fact been no negotiations nor exploration of "all reasonable alternatives" by the Applicant. In particular, the term "reasonable" appears in both paragraphs 8 and 9 and its ordinary meaning excludes the irrational for the reasons and submissions previously made about paragraph 9. "Reasonable" requires objective evidence and this has been provided by the Affected Party in relation to alternatives to the extent of land envisaged to be taken against its will and also the extra statutory purpose for acquisition for the field of commercial telecommunications not covered by the Planning Act 2008. By contrast, at CAH 3, the Applicant asserted that, most recently (but not previously) that it was hampered in the discharge of paragraph 8 by the Affected Party directing that negotiations occur through Blake Morgan.

5. In reality, and no doubt quite understandably for a commercial Limited Company, as opposed to a public authority itself discharging its functions in the public interest, the Applicant has a £60-80,000,000 reason to not negotiate reduction in the extent of land take from the Affected Party nor to have that "most carefully scrutinised" by the Affected Party during negotiations or at all, let alone by the ExA or Secretary of State. The Applicant is also not in a position to explore all reasonable alternatives because it (literally) cannot financially afford to do so.

6. The underlying basis for that approach by Blake Morgan on behalf of the Affected Party to the Applicant was to *facilitate and encourage* communication from the Applicant. That facilitative approach is consistent with the historic approach of the Affected Party to its electricity neighbours

and here derived from the *absence* of *any* communications from the Applicant so that Blake Morgan was seeking to *increase* communications with the Applicant by requesting in July 2020 communication through it. Incredibly, at CAH3, the Applicant chose to grossly mischaracterise that facilitative approach and instead then asserted to the ExA, misleading it, that the Party had required communications proceed exclusively through Blake Morgan so as to *impede* negotiations. Given the facilitative approach of the Affected Party to incoming electricity providers (such as National Grid), it remains incredible that the Applicant seeks to recast the Affected Party as impeding securing good neighbourly relations when the opposite is the fact.

7. Furthermore, the Applicant also deploys 'bully-boy' tactics by its agent(s) who consistently 'threatened' compulsory acquisition at every turn as part and parcel of any discussions about theoretical heads of terms. That is, the Applicant has persistently approach the discharge of its guidance obligations on the basis of a "CPO first, negotiation last" whereas the CPO guidance requires CPO to be a remedy of last and not first resort. Paragraph 8 is the heart of whether it is evidenced to be a remedy of last resort in requiring "all" reasonable endeavours to "have been" explored, and demonstrably so, by the Applicant (and not by the Affected Party).

8. Because the Applicant cannot and has not demonstrated discharge or compliance with paragraph 8, the ExA and Secretary of State are not in a position to be able to conclude that "all" reasonable alternatives "have been explored", that CPO is pursued as a "last (not first) resort" and so cannot conclusively find that CPO powers should be authorised.

9. Mr Brice has set out in Appendix 7 in the Affected Party's Deadline 7(c) Submissions at that there has been no more than a series of draft heads of terms provided by the Applicant – on a "take it or leave it" basis. That "take it or leave it" basis is consistent with the recently emerging situation of fact: that the Applicant has no funds at all to provide requisite compensation or to fund the project as a whole. Therefore, and with hindsight, unsurprisingly, the Applicant is driven to not explore "all reasonable alternatives" and driven to go to CPO as a "first (not last) resort" because it is exclusively by means of a grant of the envisaged DCO with CPO powers that the Applicant has any potential to seek funds. But that flies in the face of paragraph 8 of the Secretary of State's guidance and also leaves him in a position unable to know whether there is a need for, or for the scope of, the CPO powers sought and unable to know whether the authorisation of those powers is proportionate. The Affected Party has already made submissions that the inclusion of consent for development in the field of commercial telecommunications is outside of the PA 2008 and that authorisation of CPO powers on that basis of that extra statutory purpose is unlawful, and on funding. Therefore, the Affected Party submits that the only rational (as in, a decision based on objective evidence) conclusion here at Deadline 8 is that the Secretary of State cannot ultimately be persuaded that the considerations in paragraphs 8, 9, and the related paragraph 10 are satisfied by the Application.

10. In turn, as the Applicant cannot demonstrate on evidence, during the Examination, cannot demonstrate on evidence, during the Examination, that "all reasonable alternatives have been explored" (and as it cannot also demonstrate that there is a reasonable prospect of funding

becoming available), the compulsory acquisition powers being sought are not proportionate (as is also required under paragraph 8).

11. We made detailed submissions in relation to the Applicant's satisfaction of the relevant compulsory acquisition tests in the following documents:

    - REP7C-029 *'Deadline 7c Submission - Scope of Planning Act 2008 Statutory Purposes & The Development Compulsory Acquisition of AP Land'*;
    - REP7-120 *'Deadline 7 Submission - Statement in relation to the Applicant's use of Compulsory Acquisition Powers as a Last Resort'*;
    - REP6-135 – *'Deadline 6 Submission - Post Hearing Note on Scope of Proposed Authorised Development'*;
    - REP5-108 – *'Deadline 5 Submission - Oral Submission in relation to Compulsory Acquisition Hearing 2*', which was also accompanied by REP5-109 – *'Deadline 5 Submission - Protective Provisions'*;
    - REP1-232 - *'Deadline 1 Submissions - Written Representation'*.

12. However, in light of the submissions made during ISH 4 and CAH 3, we set out in this Note what the Affected Party's updated submissions are in relation to whether the Applicant has satisfied the relevant legal tests in relation to compulsory acquisition.

SECTION B - LEGAL CONTEXT AND PARAGRAPH 8 TESTS

13. Mr. Geoffrey Carpenter and Mr. Peter Carpenter, the freeholders of Little Denmead Farm, ("the **Affected Party**") **MAINTAIN** their arguments submitted at Deadline 7C (see **[REP7C-029]** and [REP7C-030]) that the Examining Authority (the "**ExA**") could not *rationally* recommend to the Secretary of State that compulsory acquisition powers should be granted in relation to the Affected Party's' land, nor could he consent to authorisation under Section 122 of the PA 2008 of any draft CPO provisions in the current draft DCO of the Applicant **[REP7-014**].

14. Section 122 of the Planning Act 2008 requires the Applicant limited company to satisfy the Secretary of State ("**SoS**") that that conditions of sections 122(2) and (3) are satisfied.

15. The conditions in sections 122(2) and 122(3) are:

> "
> *"(2) The condition is that the land—*
> *(a) is required for the development to which the development consent relates,*
> *(b) is required to facilitate or is incidental to that development, or*
> *(c) is replacement land which is to be given in exchange for the order land under section 131 or 132.*
> *(3) The condition is that there is a compelling case in the public interest for the land to be acquired compulsorily*."

16. Satisfaction of section 122 PA is evaluated *within and during* the statutory period of the Examination Period. That is because section 98(1) Planning Act 2008 states:

> "(1) *The Examining authority is under a duty to complete the Examining authority's examination of the application by the end of the period of 6 months beginning with the day after the start day*."

17. The common law requires "*most careful scrutiny*" in the discharge by the ExA and Secretary of State in that evaluation[1].

18. Paragraph 5 of the Secretary of State's guidance "Planning Act 2008: Guidance related to procedures for the compulsory acquisition" dated September 2013 ("**Planning Act CPO Guidance**" states:

> "*Applicants seeking authorisation for the compulsory acquisition of land should make appropriate provision for this in their draft development consent order*."

[1] *Prest; Sainsburys* [2011] 1 AC 437 at paragraph 10.

19. It is trite law that the Guidance must be read as a whole and at the same time the Applicant, EA, and Secretary of State cannot make the Guidance say what they want it to mean. See, for example, *Scarisbrick* [2017] EWCA Civ 787, paragraph 19:

> *… Statements of policy are to be interpreted objectively in accordance with the language used, read in its proper context (see paragraph 18 of Lord Reed's judgment in Tesco Stores v Dundee City Council). The author of a planning policy is not free to interpret the policy so as to give it whatever meaning he might choose in a particular case. The interpretation of planning policy is, in the end, a matter for the court (see paragraph 18 of Lord Reed's judgment in Tesco v Dundee City Council). But the role of the court should not be overstated. Even when dispute arises over the interpretation of policy, it may not be decisive in the outcome of the proceedings. It is always important to distinguish issues of the interpretation of policy, which are appropriate for judicial analysis, from issues of planning judgment in the application of that policy, which are for the decision-maker, whose exercise of planning judgment is subject only to review on public law grounds (see paragraphs 24 to 26 of Lord Carnwath's judgment in Suffolk Coastal District Council). It is not suggested that those basic principles are inapplicable to the NPS – notwithstanding the particular statutory framework within which it was prepared and is to be used in decision-making.*

20. Paragraph 7 of the Planning Act CPO Guidance requires the Applicant (not the ExA or any objector) to:

> "*…justify their proposals for the compulsory acquisition of any land to the satisfaction of the Secretary of State. They will also need to be ready to defend such proposals throughout the examination of the application…*"

21. "*Paragraphs 8-19 of the Planning Act CPO Guidance set out some of the factors which the Secretary of State will have regard to in deciding whether or not to include a provision authorising the compulsory acquisition of land in a development consent order*" (this is stated in paragraph 7 of the Planning Act CPO Guidance).

22. As per paragraph 8 of the Planning Act CPO Guidance (our emphasis added):

> "*The Applicant should be able to demonstrate to the satisfaction of the Secretary of State that all reasonable alternatives to compulsory acquisition (including modifications to the scheme) have been explored. The applicant will also need to demonstrate that the proposed interference with the rights of those with an interest in the land is for a legitimate purpose, and that it is necessary and proportionate.*"

23. Further, paragraphs 24 and 25 state:

24. Applicants are required under section 37 of the Planning Act to produce a consultation report alongside their application, which sets out how they have complied with the consultation requirements set out in the Act. Early consultation with people who could be affected by the compulsory acquisition can help build up a good working relationship with those whose interests are affected, by showing that the applicant is willing to be open and to treat their concerns with respect. It may also help to save time during the examination process by addressing and resolving issues before an application is submitted, and reducing any potential mistrust or fear that can arise in these circumstances.

25. Applicants should seek to acquire land by negotiation wherever practicable. As a general rule, authority to acquire land compulsorily should only be sought as part of an order granting development consent if attempts to acquire by agreement fail. Where proposals would entail the compulsory acquisition of many separate plots of land (such as for long, linear schemes) it may not always be practicable to acquire by agreement each plot of land. Where this is the case it is reasonable to include provision authorising compulsory acquisition covering all the land required at the outset3 .

24. Paragraph 9 of the Planning Act CPO Guidance states:

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

25. Paragraph 10 of the Planning Act CPO Guidance states (Emphasis added):

"*The Secretary of State must ultimately be persuaded that the purposes for which an order authorises the compulsory acquisition of land are legitimate and are sufficient to justify interfering with the human rights of those with an interest in the land affected. In particular, regard must be given to the provisions of Article 1 of the First Protocol to the European Convention on Human Rights and, in the case of acquisition of a dwelling, Article 8 of the Convention*."

26. In addition to establishing the purpose for which compulsory acquisition is sought, section 122 requires the Secretary of State to be satisfied that there is a compelling case in the public interest for the land to be acquired compulsorily.

13. For this condition to be met, the Secretary of State will need to be persuaded that there is compelling evidence that the public benefits that would be derived from the compulsory acquisition will outweigh the private loss that would be suffered by those whose land is to be

acquired. Parliament has always taken the view that land should only be taken compulsorily where there is **clear evidence** that **the public benefit** will outweigh the private loss.

14. In determining where the balance of public interest lies, the Secretary of State will weigh up the public benefits that a scheme will bring against any private loss to those affected by compulsory acquisition.

15. In practice, there is likely to be some overlap between the factors that the Secretary of State must have regard to when considering whether to grant development consent, and the factors that must be taken into account when considering whether to authorise any proposed compulsory acquisition of land…

19. The high profile and potentially controversial nature of major infrastructure projects means that they can potentially generate significant opposition and may be subject to legal challenge. It would be helpful for applicants to be able to demonstrate that their application is firmly rooted in any relevant national policy statement. In addition, applicants will need to be able to demonstrate that:

• any potential risks or impediments to implementation of the scheme have been properly managed;

• they have taken account of any other physical and legal matters pertaining to the application, including the programming of any necessary infrastructure accommodation works and the need to obtain any operational and other consents which may apply to the type of development for which they seek development consent…

SECTION C - ANALYSIS

27. The paragraph 8 guidance comprises two criteria that are pre-conditions to authorisation of compulsory purchase powers. The Applicant cannot satisfy paragraph 8 of the Planning Act CPO Guidance because it has not been able to demonstrate, **during the Examination**, that:
    a) it has explored all reasonable alternatives to compulsory acquisition (including modifications to the scheme); and
    b) its proposed interference with land interests is both necessary and also proportionate.

28. The scope of "all reasonable alternatives" includes provision of funding because the absence of funding informs whether it can be legitimate, necessary or proportionate to authorise compulsory acquisition of land in the absence of demonstrating that there is a reasonable prospect of requisite funds becoming available and, in turn, the absence of present or presently ensured funds informs modifications to the scheme by which to seek to ensure that it can be made presently viable and funded. Otherwise, as appears to be the case here, compulsory purchase powers appear to be sought (and envisaged to be granted) on an irrational (as in, no evidence) basis. That would be unlawful and could not be proportionate. Resulting breaches of the HRA and Convention Rights would arise.

29. We have made previous submissions about the extent of land take being objectively unjustified and in part extra-statutory, and also not necessary for permanent land take of the extent envisaged. We do not repeat the same here.

30. As at Deadline 8, it has now become clear that the Applicant:

    a) Cannot, and has not been able to, demonstrate that there is a **reasonable prospect of funding**; and
    b) Cannot, and has not been able to, demonstrate it has **explored all reasonable alternatives**.

31. The Affected Party makes these submissions in light of the Issue Specific Hearing 4 on Wednesday 17 February 2021 ("**ISH4**"), the Open Floor Hearing 3 on Friday 19 February 2021 ("**OFH3**"), and the Compulsory Acquisition Hearing 3 ("**CAH3**") on Friday 19 February 2021.

32. These submissions summarise the oral submissions made by the Affected Party at ISH4, OFH3, and CAH3, as well as draw together the different strands of the Affected Party's arguments in relation to these matters to assist the ExA understand where the Affected Party is at this stage of the Examination.

Paragraph 8: absence of "reasonable prospect" of funding in the context of satisfying Paragraph 8 of Guidance

33. The existence of a reasonable prospect of requisite funds informs both paragraphs 8 and 10 of the Guidance. In essence, the actual absence of funds, or of presently secured funds, has resulted in the Applicant being driven to have a closed mind to the requirements of paragraph 8.

34. As part of its oral submissions at Compulsory Acquisition Hearing 3 on Friday 19 February 2021 ("**CAH3**"), the Affected Party reiterated its position put in detail by writing at Deadline 7C of the Examination (see Statement on Funding document reference **[REP7c-030]**) that the Applicant has no money to fund land acquisition costs and the costs associated with developing the scheme only after any development consent order is granted. The Applicant did not deny this during its oral submissions during CAH3. In those stark financial circumstances, the Affected Party submits to the Secretary of State that he could not lawfully authorise compulsory purchase powers in the DCO without breaching the HRA and Convention Rights of the Affected Party. The absence of any funds presently also objectively informs why the Applicant has not begun to explore (let alone, consider "all") reasonable alternatives – because it can neither finance any alternative nor has it funds by which to explore alternatives. This informs why the Applicant also has not sought to negotiate any agreement with the Affected Party – because it cannot afford to negotiate since it has no funds to do so, and must, therefore approach any discussions with a closed mind, whilst 'presenting' as having an open mind.

35. The Affected Party also, as part of its oral submissions at CAH3 reiterated its position previously put in detail writing at Deadline 7C in **[REP7c-030]**, that, because the Applicant intends to rely wholly on unidentified and unsecured project finance funds at some unidentified point in the future, it cannot be said, using the words of the Guidance: "that **there is** a reasonable prospect of the requisite funds becoming available".

36. The Affected Party explained during its oral submissions at CAH3 that this actual absence of present funds and absence of any present secured funds, cannot and does not, satisfy the test in paragraph 9 of the Planning Act CPO Guidance because:

    a) The UK (and thus the Applicant limited company) no longer benefits from the exemption process applying to EU Regulation 2019/043, due to Brexit and the Ofgen and CRE joint statement made on 28 January 2021. The Applicant had stated in its Exemption Request relating to the EU Regulation that there was no prospect of it obtaining any project finance at all unless it secures the exemption (and the benefits that would flow as a result) under EU Regulation 2019/943; and
    b) The Trade and Cooperation Agreement dated 24 December 2020 ("**TCA**") between the UK and the EU did not put in place an alternative exemption process referred to in the Applicant's Deadline 6 Funding Statement (document reference **[REP6-021]**) that offered

the same benefits the Applicant limited company stated it needed. The TCA exemption process is also not fully in place yet (more agreements are needed between the UK and the EU), and it was unclear when it would be in place in the future.

37. The Applicant did not disagree with analysis of the effect of the TCA exemption process during its oral submissions during CAH3. (Further to the Applicant's further submissions on TCA and ACER matters, the Affected Party has provided a further Note on the TCA and ACER litigation with its Deadline 8 submissions).

38. Instead, and to the Affected Party's surprise, the Applicant confirmed as part of its oral submissions during CAH3 that a changed and brand new approach was to be adopted towards securing project finance funding, never before Deadline 7c ever articulated in any previously submitted document. The Applicant explained that it would not (as at the CAH3 date) be relying on the exemption process under the TCA going forwards (at all) but that it would (now and instead) seek to rely on securing a successful outcome in ongoing ACER litigation. Such litigation relates to an application for exemption for the entire Project submitted by the Applicant in December 2017 and which was rejected by the Agency for the Cooperation of Energy Regulators ('**ACER Litigation**'). The Applicant confirmed during CAH3 that only if the ACER Litigation failed then the Applicant would consider looking again the partial exemption process under the TCA.

39. We have reasonably assumed that, as per paragraph 8.4 of the Applicant's Deadline 6 Funding Statement **[REP6-021]**, should the Applicant revisit the TCA partial exemption process of the ACER Litigation fails, *further* and new regulatory terms and arrangements (on presently *unknown* terms) would be required in the UK to in the future sometime hope to provide for the UK portion of the Project. In this regard, paragraph 8.4 of the Applicant's Deadline 6 Funding Statement [**REP6-021**]: (Emphasis added)

> " *the Applicant intends to apply for a cap and floor regime, or its equivalent/replacement, as soon as applications are invited following the conclusion of Ofgem's present interconnector policy review and the Applicant has advised Ofgem of this intention*. "

40. This sudden change of direction by the Applicant and new information is most surprising and evidences grasping at straws to assert a funding case. Together with it not disclosing to the ExA or Secretary of State its Request for Exemption documentations, this change of tack was also not divulged by the Applicant when it responded at Deadline 7 (25 January 2021) to the ExA's Second Written Question CA2.3.6 (see pages 1-16 to 1-18 of document reference **[REP7-038]**), which asked: (Emphasis added)

> "*During CAH1, the ExA asked the Applicant 'what more can you give me on this' when referring to funding availability and security for its estimated Compulsory Acquisition Costs. The Applicant is now invited to list the additional information provided during the Examination and*

explain, against each item, why further information on this item cannot be provided to the Examination".

41. The Applicant responded on page 1-18 of **REP7-038** in relation to "Regulatory submissions to both CRE and ofgem" that:

"….The Trade and Cooperation agreements (TCA) agreed on December 24, 2020 dedicates specific attention to the cooperation between the UK and the EU on efforts to combat climate change. As part of this cooperation, the TCA established a new regulatory framework for energy infrastructure linking the member states of the European Union and the United Kingdom, including an exemption regime similar to that in Regulation 2019/943 under which AQUIND submitted the ongoing Exemption Request. Following discussions with the Energy Regulatory Commission (CRE) and its British counterpart Ofgem, AQUIND expects that the NRAs will shortly publish a decision as to how the TCA impacts on the ongoing Exemption Request. "

42. No mention was made in [**REP7-038]** that the Applicant will not be using the TCA process as its next approach and no mention was made of relying on the ACER Litigation as a way forward in the first instance to secure project finance.

43. With regard to the ACER litigation, there is no certainty over when the decision will be made and what the decision will be: it cannot be prejudged by definition. The ExA and the SoS cannot prejudge the outcome of the ACER Litigation, no matter what subjective views the Applicant may submit. The Applicant is in no better position than the ExA and the SoS to know what outcome the ACER litigation will deliver.

44. On the assumption that the ACER Litigation fails to favour the Applicant, then there will be multiple further regulatory obstacles for the Applicant to overcome through the TCA partial exemption process (further agreements are needed between the UK and the EU and only partial benefits will be generated – please see our full written submissions on this at Deadline 7C (document reference [**REP7C-030]**). The Applicant also explains the following at paragraph 8.4 of its Deadline 6 Funding Statement (document reference **[REP6-021]**) where it states:

"*If the second 'partial' exemption is granted, further regulatory arrangements would be required for the UK portion of the Project. In this regard, the Applicant intends to apply for a cap and floor regime, or its equivalent/replacement, as soon as applications are invited following the conclusion of Ofgem's present interconnector policy review and the Applicant has advised Ofgem of this intention*."

45. The Affected Party has also updated its Note on TCA and ACER matters for Deadline 8, taking account of the more recent submissions at CAH3 and Note from the Applicant.

46. Therefore, in essence, neither the ExA and the SoS can be in a position to be able to prejudge the outcome of the ACER litigation, nor to know what terms (if any), any UK exemption process may look like. These matters are mere speculation and cannot be lawfully relied upon.

47. Expert evidence was also presented orally during CAH3 on behalf of the Affected Party by Mr. Henry Brice of Ian Judd & Partners and by Mt. Jonathan Stott of Gately Hamer (written details of which are set out in full in Appendices 7 and 8 in document reference **[REP7C-030]).** The oral submissions by Mr. Brice and Mr. Stott also highlighted how the Applicant's calculation of the quantum of the 'requisite funds' that is the subject of the reasonable prospect of funds test in paragraph 9 of the Planning Act CPO Guidance, is incorrect and the result of a flawed calculation. The expert evidence by Mr. Brice and Mr. Stott shows two independent opinions that the Applicant's calculation of 'requisite funds' is wrong by a long shot. As that is the position, the Applicant's entire funding case cannot be relied on.

48. Both paragraphs 8 and 9 of the Guidance refer to “reasonable” and this assumes objective evidence and excludes the irrational (as in, the subjective). Paragraph 7 reminds the Applicant that it (not the Affected Party nor ExA nor Secretary of State) must be prepared to justify their proposals for acquisition “throughout the examination of the application”. The ExA and SoS must also comply with its duty under section 98 of the Planning Act and "…*complete the Examining authority's examination of the application by the end of the period of 6 months beginning with the day after the start day*".

49. The ExA and SoS are faced with a difficult crossroad with regard to deciding whether the test under paragraph 9 of the Planning Act CPO Guidance has been satisfied – whether there is a reasonable prospect of funds becoming available but without any objective information to show “that there is” a reasonable prospect of the same and, in turn, being asked to recommend and authorise <u>without</u> funds or evidence of secured funds, both exploration of all reasonable alternatives and that an unfunded cpo could in law be lawfully authorised. It could not be authorised lawfully. This includes because the necessary availability of funds to place in the balance against the private loss envisaged is simply absent at this tie. Therefore, the Secretary of State is not in a position to know what weight to give that factor in evaluating whether the requirements of paragraphs 8-10 (and also 19) can be satisfied. He cannot know whether he can “ultimately be persuaded that the purposes for which an order authorises the compulsory acquisition of land <u>are</u> legitimate and <u>are</u> sufficient to justify interfering with the human rights of those with an interest in the land affected”. Therefore, paragraph 9 prevents a decisive or conclusive situation arising.

50. The ExA and SoS also have in the said Appendices 7 and 8 expert evidence on why the Applicant's calculation of 'requisite funds' is fundamentally wrong and too low.

51. Thus, during the Examination:

a) **nobody knows** what the outcome of the ACER Litigation will be;
b) **nobody knows** whether there will be a partial exemption process under the TCA process and on what terms and when;
c) the Applicant has now run out of time to recalculate (and it has not offered to recalculate) what the actual requisite funds ought to be. Thus, **nobody knows** how much the 'requisite funds' will be;
d) the Applicant cannot therefore demonstrate, that there is a reasonable prospect of funds becoming available and so cannot show that all reasonable alternatives have been explored.

Paragraph 8: the requirement to have explored all reasonable alternatives

52. Paragraph 8 requires the Applicant to demonstrates the envisaged use of acquisition powers is the last and not any prior resort. Here, the absence of any evidence in the Statement of Reasons regarding any step at all by the Applicant to show that it has explored reasonable alternatives with each land owner, and the presence merely of "Heads of Terms" evidences that the Applicant has gone straight to compulsory acquisition – first – and without having first explored reasonable alternatives with each land owner or interested person.

53. By contrast, the Affected Party has from the outset proposed to roll back the extent of land take from its land and put forward multiple alternative options relating to landscaping, access and the management of Ash Die Back in relation to Stoneacre Copse.

54. The Applicant has not been able to produce any reason (save that it desires to take the land of the Affected Party so as to require the view or outlook from the Applicant's property to be differently vegetated to that that exists presently. There is no credible reason as to why these are not reasonable alternatives – save that the Applicant strongly "desires" the £60-80,000,000 profit referred to in Mr Stotts evidence from commercial telecommunications together with the retention of a large tract of the farm land of the Affected Party for a road that (assuming reasonably the Converter Station is not designed to break down, and the Applicant's website records the potential for break down as follows: (extract from Applicant's website at https://aquind.co.uk/): (Emphasis added)

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

*result in a complete loss of a 2,000 MW power capability.*ing systems. Very few credible faults can result in a complete loss of a 2,000 MW power capability.

55. The Applicant has not demonstrated what is has done to avoid the use of compulsory acquisition powers with regard to the Affected Party beyond the actual footprint of the Converter Station (and the below-ground level electricity cables). However, the reliance of an extra statutory purpose (or aim) for provision on the Affected Party's land results in paragraph 8 (legitimate purpose) being in law and fact to be satisfied. Consequently, the subsequent questions of need and proportionality for paragraph 8 purposes cannot arise. For completeness, there remains no evidence from the Applicant to show that the use of fibres for commercial telecommunications is essential to the project in the field of energy, nor that the Telecommunications Building(s) and related parking are "necessary" for the energy project. Therefore, paragraph 8 cannot be satisfied, and nor too ca paragraph 10 in this respect. For like reason, it is not necessary nor proportionate for a large area of farmland to be permanently acquired to underwrite the design contract that would likely govern the Station systems and recognising the systems would have "very few credible faults can result" and that there is no evidence in front of the ExA or Secretary of State as to what even those few faults may be. For example, there is no evidence before the Examination that the repair of any such fault would necessitate heavy vehicles for component delivery, nor that could not be stored and erected or installed in situ.

56. All the Applicant stated during CAH3 (n the context of alternative access arrangements over plot 1-32 during the operation of the converter station, is that they are not alternatives because they do not deliver the land the Applicant needs and that the Applicant therefore felt no further reasons were necessary. No specific reasons were given by the Applicant as to WHY each of the alternatives put forward were not workable.

57. As referred to above, the absence of evidence of any exploration by the Applicant of any reasonable alternatives, as opposed to their mere dismissal from the outset evidences that the Applicant has a closed mindset – and is perhaps an ingénue to the construction of Converter Stations. By contrast, the evidence before the Examination from experienced erector Vanguard already shows that no spare transformers beyond the single one on site appear necessary throughout the lifetime of the authorised development. We recognise the fears and concerns of the Applicant but the subjective force with which they are pressed and the absence of objective evidence that can be scrutinised for any need for a permanent road reinforces the absence of any need and a strong 'desire'. But desire cannot equate to need nor to a proportionate need. The Applicant's lack of evidence and its closed approach cannot, and does, not satisfy objectively the legal requirement in paragraph 8 of the Planning Act that the Applicant must demonstrate to the satisfaction of the Secretary of State that **all reasonable alternatives** to compulsory acquisition (including modifications to the scheme) have been explored – as a precondition to authorisation of powers in itself.

58. Paragraphs 25 and 8 also require negotiations “wherever practicable” and it cannot be sensibly said that the Applicant cannot undertake negotiations with its future direct neighbour – as National Grid has done on various occasions. That fostering of good neighbourliness resulted in the agreement by the Affected Party with the Grid to use of the accessway along its Eastern Boundary for maintenance access to the Lovedean Sub-station and to the Grid also reinforcing that accessway with hoggin for its purposes. Use of that accessway is being offered as a similarly reasonable alternative by the Affected Party to its new envisaged neighbour – the Applicant – but the Applicant (perhaps because it is not, unlike National Grid, an experienced provider in the field of energy) refuses to countenance similar use of such accessway for maintenance and instead insists on asserting the presence of a haul road designed for abnormal loads of heavy machinery to be used no more than 3-4 times a year by “light vehicles”. The Applicant’s approach is absurd. There is no need for a haul road designed for heavy construction loads to remain *in situ* to convey “light vehicles” on 3-4 annual occasions nor merely because of the fear and concern of the Applicant that unevidenced faults might or might not occur. It is equally absurd, in England, to compulsorily take land from its own so as to compel them to view out onto a different kind of vegetation. The “reasonable alternative” remains to the Affected Party to retain (in due course after construction) its view of open farmland (that it farms) and of pylons on the skyline – it makes no difference to the Affected Party that they may view through pylons structures more electricity infrastructure adjacent to the existing National Grid Lovedean Substation with which they have lived cheek-by-jowel for decades.

59. Further, in relation to paragraphs 25 and 8, it was asserted by the Applicant – to very considerable surprise – that the Affected Party itself had in some way impeded negotiations *because* they had required negotiations to be made exclusively through lawyers. That assertion was absurd and evidences further straw grasping by the Applicant and its agents as they realise tardily that they cannot demonstrate their own compliance with paragraphs 25 or 8 to the Secretary of State.

60. During Open Floor Hearing 3 ("**OFH3**") the Applicant asserted that the reason why it had not been engaging with the Affected Party privately because the Affected Party's solicitors asked the Applicant not to make direct contact. In fact, the Applicant was misleading the ExA and the Secretary of State and the Affected Party remains most surprised by the Applicant’s assertion.

61. What the Applicant, misleadingly, did however in so asserting that statement during OFH3 is omit to state two important *facts*:

    a) that the Affected Party's solicitors only made such a request in late July 2020 (i.e after the Affected Party endured over three years of very little (if any) communication by the Applicant's agent) actually requesting some communication from the Applicant after 11 months of radio silence by the Applicant and so as to **encourage some increased communications after such a long silence from the Applicant**, and because on behalf of the Applicant, its agent – Mr Sullivan - had in fact stopped communicating with to Ian Judd & Partners at all and so Blake

Morgan was seeking to facilitate and stimulate some contact from the Applicant. We also note that the Applicant states in 3.5 on page 4 of REP7C-014 that: "*Furthermore, where an alternative is first put forward by a third party after an application has been made, and the Applicant notes this alternative proposal was not advanced until December 2020 being a year after the Application was made*….". If the Applicant had engaged properly with the Affected Party in 2020, then it would have been able to explore this alternative during the previous months of radio silence. The Affected Party had no choice but to start proposing alternatives during Examination when the Applicant was not engaging with it privately. The Applicant has therefore made the Affected Party's point for them; if the Applicant was indeed properly engaging with the Affected Party before and after December 2020, why did the Applicant not explore these alternatives with the Affected Party?; and

b) the Affected Party's solicitors request did not state all communications by the Applicant should stop, but rather that they should all go through Blake Morgan LLP. Nobody representing the Affected Party stopped or delayed any communication by the Applicant, which was sadly turned out to be the case since July 2020. Rather, because there was most limited, if any, communications from the Applicant, the Affected Party was seeking to take the initiative and stimulate discussions and negotiations.

62. The Applicant's statements during OFH3 were misleading by it of the Examination and of the Secretary of State.

63. The Applicant is also refusing to give proper reasoned consideration of the Affected Party's reasonable alternatives to compulsory acquisition. In fact, so-called “private negotiations” are not taking place (the Affected Party has been waiting weeks for the Applicant to respond to an alternative private offer). Rather, the Applicant merely sends changed heads of terms periodically and on a take it or leave it basis. There is, in fact, no “negotiation” at all and it cannot be said that it is not practicable to negotiate with the key landowner and who is also directly adjacent to National Grid with whom the Applicant is in fact negotiating.

64. The reality is, that because the Applicant has no money, and has not secured any money to be available at this time, the only position it can take privately (and expressed publicly by a lack of demonstrable satisfaction of paragraph 8, first sentence), is a very strictly closed minded/ "take it or leave" approach to private negotiations with the Affected Party. This results in the Applicant (on whom the burden continues to lie) being unable to also demonstrably satisfy paragraphs 25 and 8 of the Secretary of State’s Guidance and to discharge the burden that lies, exclusively, on the Applicant. The Applicant chooses to not in a position to explore all reasonable alternatives because it (literally) cannot financially afford to do so, and, perhaps understandably so, because it has a £60-80,000,000 reason to not negotiate reduction in the extent of land take from the Affected Party nor to have that “most carefully scrutinised” by the Affected Party during negotiations or at all, let alone by the ExA or Secretary of State. This also explains in Spartan Funding Statement devoid of

important, relevant and financial information despite the clear requirements of paragraph 17. That sum is pure profit as confirmed the Funding Statement of the Applicant. Why would it want to forego land take if its price was £60-80,000,000 (see Mr Stott's Expert Valuation Evidence). The Applicant is a commercial limited company and devoid *itself* of any public interest inherently within itself (unlike a local authority promoting a compulsory purchase order or other public body).

65. The Applicant can only stick with one particular scheme and it cannot deviate by accommodating any modifications (even though it is required to consider modifications under paragraph 8 of the Planning Act CPO Guidance) as follows:

> "*The applicant should be able to demonstrate to the satisfaction of the Secretary of State that all reasonable alternatives to compulsory acquisition* ***(including modifications to the scheme)*** *have been explored*."

SECTION D – CONCLUSIONS AND THE WAY FORWARD

66. As the Applicant cannot justify compulsory acquisition due to matters relating to funding (paragraph 9 of the Planning Act Guidance) and the non-exploration of all reasonable alternatives (the first limb of paragraph 8 of the Planning Act Guidance, read as whole also with paragraph 25), the Applicant also fails to satisfy the second limb of paragraph 8, that:

> "…*the proposed interference with the rights of those with an interest in the land is for a legitimate purpose, and that it is necessary and proportionate*."

67. It is not proportionate or necessary to exercise compulsory acquisition powers over the Affected Party's land when the Applicant:

    a. **cannot** demonstrate on evidence, **during the Examination**, that there is a reasonable prospect of funding becoming available; and

    b. **cannot** demonstrate on evidence, **during the Examination**, that "all reasonable alternatives have been explored".

68. The Applicant has therefore failed to satisfy the requirements of paragraph 8.

69. We would respectfully remind the ExA that the Planning Act CPO Guidance was published by the Secretary of State and cannot be made to state what it does not state. That Guidance falls to be read as a whole as opposed to the manner in which the Applicant stated during its oral submissions during CAH3, which effectively cherry-picked certain words to suit its situation. Contrary to the Applicant's assertions during CAH3, the Secretary of State's words in the Guidance cannot be re-written by Applicant or by the ExA to sidestep the problematic issues the Applicant currently faces.

70. It is for these reasons that the Affected Party has no choice but to propose through the Examination modification of the Applicant's scheme to exclude all development in the field of commercial telecommunications, to reduce the extent of land take further in line with the following and to act as a proxy to discharge of paragraphs 25 and 8, first sentence (having made separate Submission on lawful purpose, need and proportionality):

    a) That the Affected Party's proposed reasonable alternatives relating to access, landscaping, and the management of Stoneacre Copse be adopted in line with its Protective Provision terms; and
    b) That the Applicant's scheme be modified through the incorporation of the Affected Party's draft Protective Provisions and proposed executed development consent obligation submitted at Deadline 8 that reflect the Affected Party's reasonable (as in, objectively evidenced)

alternatives, on the basis that this is the only way to properly take account of all reasonable alternatives and satisfy the first limb of paragraph 8 (modify the scheme); or

All compulsory acquisition powers be not authorised in the draft DCO, in particular in relation to the land of the Affected Party.