Date: 1 March 2021

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

Mr. Geoffrey Carpenter & Mr. Peter Carpenter (ID: 20025030) in relation to Little Denmead Farm

Note on the Financial Status of Aquind Limited

Submitted in relation to Deadline 8 of the Examination Timetable

INTRODUCTION

1. Section 104(2)(d) Planning Act 2008 states that:

   "*(2) In deciding the application the Secretary of State must have regard to …*

   (d) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision."

2. Paragraphs 7 to 19 of the Government's Planning Act 2008 Guidance on Compulsory Acquisition 2013 ("CPO Guidance") requires consideration of and evidence on the resource implications of seeking compulsory acquisition powers.

3. Paragraph 9 of the CPO Guidance requires that an applicant must demonstrate that " ***<u>there is</u>*** *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…*".

4. The words "*there is*" in paragraph 9 of the CPO Guidance is that it properly expects an applicant to be solvent during the statutory Examination Period.

5. The Applicant's approach to interpreting paragraph 9 of the CPO Guidance would have the ExA believe that it does not have to be solvent – that all it has to do is demonstrate that the money could become available at some <u>unknown point in the future</u>.

6. The Applicant's approach is incorrect, flies in the face of paragraph 9 of the Secretary of State's CPO Guidance, exposes all affected parties within the Order Limits to considerable cost unable to be apparently satisfied, and it is also a most dangerous precedent. If the ExA were to adopt the Applicant's interpretation and the Secretary of State were to agree and not agree with the Affected Party's plain reading of paragraph 9, **it would open up the floodgates to shell companies promoting Nationally Significant Infrastructure Projects from their outset without any funds whatsoever**. Is this what the Government's paragraph 9 means or was intended in the NSIP regime? Surely not.

7. It is also most surprising that the Planning Inspectorate did not itself verify the solvency of the Applicant before accepting the Application and exposing the wider public to considerable risk f costs which presently appear to go unsatisfied.

8. Insolvent companies can, by court order, be wound up.

9. Under s122(1)(f) of the Insolvency Act 1986, a company may be wound up by the court if it is "*unable to pay its debts*".

10. Aquind Limited is an insolvent company *because* it *presently* in fact meets the legal tests under the Insolvency Act 1986 for being 'unable to pay its debts'.

11. There are a number of ways a company can be deemed to be "unable to pay its debts" (or insolvent) under the Insolvency Act 1986.

12. A company can be unable to pay its debts "*on-balance sheet*" (applying the balance sheet test under section 123(2) of the Insolvency Act 1986).

13. A company can also be deemed "unable to pay its debts" based on its *cash-flow* (applying the cash flow test under section s123(1)(e) Insolvency Act 1986).

14. Aquind Limited meets both the balance sheet test and the cash flow test and is therefore for "unable to pay its debts" under the Insolvency Act. Aquind Limited could (by court order) therefore be wound up.

15. An insolvent company should not be allowed to promote a nationally significant infrastructure project.

16. An insolvent company should not be granted a development consent order.

17. Should the Examining Authority ("**ExA**") recommend the grant of the DCO, it would be setting a dangerous precedent.

18. Should the Secretary of State ("**SoS**") grant the DCO, it would be setting a dangerous precedent.

19. There is no public interest in this nor can there be a compelling case to authorise an NSIP in this situation. There is also no justification where human rights are being infringed. It would open up the floodgates to more applications for NSIPs by insolvent companies. This is an important and relevant consideration for the Secretary of State under section 104(2)(d) of the Planning Act 2008.

20. Based on this, and the evidence during Examination, the Application should therefore be recommended for refusal for that reason, and the Secretary of State should refuse development consent.

SECTION A – 'ON BALANCE SHEET' INSOLVENCY OF AQUIND LIMITED

21. The 'Balance Sheet Test ' in insolvency law, is set out under section 123(2) Insolvency Act 1986.

22. Section 123(2) Insolvency Act 1986 states (our emphasis added):

"(2*)* *A company is also* ***deemed*** *unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and* ***prospective liabilities***."

23. According to the latest accounts made available by Aquind Limited during the Examination (those to the end of 30 June 2019, attached at **[REP6-021]),** Aquind Limited suffered a loss for that financial year of over £2.3 million (the exact figure is £2,319,056) - see page 6 of the 2019 accounts.

24. Aquind Limited's 'Statement of Financial Position' on page 7 of the 2019 accounts attached to **[REP6-021]** also show that it had **net liabilities** of over £4million (the exact figure is £4,169,207). This means that in short, Aquind Limited's liabilities exceed its assets, 'on balance', **by over £4 million**.

25. Aquind Limited would therefore fail the *balance sheet test* and be *deemed* unable to pay its debts under section 123(2) Insolvency Act 1986, and be insolvent, on application to the Court.

26. Blight liability and claims are also prospective liabilities. **No actual blight claim need to be made in order for a blight claim to be a 'prospective liability' under section 123{2) Insolvency Act 1986.** Prospective liabilities form part of the balance sheet test under section 123(2) Insolvency Act 1986. This is encompassed by the Planning Act 2008 CPO Guidance (2013) that states:

"*The timing of the availability of the funding is also likely to be a relevant factor….Applicants should be able to demonstrate that …* ***that the resource implications of a possible acquisition resulting from a blight notice have been taken account of***'.

27. Expert evidence of Mr Stott from Gateley Hamer supports this. Mr Stott stated at paragraphs 3.93, 5.4, 5.5, 5.6 and 5.7 that (at Appendix 8 to **[REP7C-030])** that:

"*3.9.3* *Aquind has not demonstrated that it has funds available to respond to blight notices (for which it could be liable from any point since the dDCO was submitted)…*"

"*5.4* *Government Guidance states:*

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

5.5 In view of this Guidance it is important to note that ***blight notices may be submitted by qualifying parties from the date on which a dDCO is submitted****. The Explanatory Notes to the PA explain as follows:*

"281. A national policy statement identifying a location as a suitable (or potentially suitable) location for a nationally significant infrastructure project may create blight at that location, reducing land values and making it hard to sell the land. Blight may also result from an application being made for an order granting development consent authorising the compulsory acquisition of land or from such authorisation being given.
282. Section 175 amends TCPA 1990 (which extends to England and Wales), so as to allow owner occupiers adversely affected in this way to have the benefit of the existing statutory provisions relating to blight. The effect of subsection (6) is that the “appropriate authority” (who should receive the blight notice) in the case of blight caused by a national policy statement is the statutory undertaker named as an appropriate person to carry out the development in the national policy statement, or the Secretary of State where there is no such named undertaker. The Secretary of State is to determine any disputes as to who should be the appropriate authority. Subsection (4) prevents the appropriate authority from serving a counter-notice to a blight notice on grounds of having no intention of conducting the development. Subsection (7) makes it clear that the “appropriate enactment” for a blight notice is the development consent order, or the draft order in the terms applied for.

5.6 The Town and Country Planning Act 1990 specifies that blight notices may be served by qualifying parties, including owner occupiers of residential property, owner-occupiers of business premises with a net rateable value not exceeding £44,200 in Greater London and £36,000 in the rest of England) and an owner-occupier of an agricultural unit or part of an agricultural unit.

5.7 ***As such, Aquind has a live compensation liability in relation to blight, not least in the context of my Clients’ Property****. To place that in context, Mr Henry Brice MRICS FAAV of Ian Judd & Partners LLP, acting on behalf of my Clients, has assessed the market value of my Clients’ Property to be £2.87m. As far as I am aware,* ***Aquind has not demonstrated that adequate funding is currently available to service that liability***."

28. The accounts for Aquind Limited (see **[REP6-021]**) show that in fact the company has not, and does not, take into account prospective liabilities such as blight claims. This further means that Aquind Limited has also materially underestimated its prospective liabilities and they are likely to be far more than what is stated in its accounts.

29. Aquind Limited itself states in section 4.5 of its Exemption Request relating to EU Regulation 2019/943 that:

"*AQUIND is not in a position to finance the Project* ***on “balance sheet”*** *as national TSOs and utilities may be in a position to do.*"

"*Without the flexibility provided by the exemptions requested in this Request for Exemption, AQUIND Interconnector will not be able to attract non-recourse debt finance or equity*."

30. Aquind Limited was set up solely to deliver this project. It has no other income-generating business.

31. Therefore, **Aquind Limited has itself in effect admitted that it is 'on-balance sheet' insolvent**. Aquind Limited could therefore also be wound up on this basis under section 122(1)(f) of the Insolvency Act 1986.

32. The insolvency of Aquind Limited in this context is also a significant impediment to the delivery of the project under paragraph 19 of the CPO Guidance.

33. This is a matter that is therefore both "important" and "relevant" for the Secretary of State's decision under section 104(2)(d) Planning Act 2008, as to whether to grant the DCO. Will the Secretary of State grant a DCO and compulsory acquisition powers to an insolvent company?

SECTION B - 'CASH FLOW' INSOLVENCY OF AQUIND LIMITED

34. The Cash Flow Test comes under s123(1)(e) of the Insolvency Act 1986.

35. Section s123(1)(e) of the Insolvency Act 1986 states:

"*a company is deemed unable to pay its debts ….(e) if it provided to the satisfaction of the court that the company is unable to pay its debts as they fall due*."

36. The Supreme Court held in the *Eurosail* case[1] that the cash flow test was <u>not</u> concerned only with presently-due debt but also with debts falling due from time to time in what was, depending on *all the circumstances*, but especially on the nature of the company's business, the **reasonably near future**.

37. The 2019 accounts for Aquind (attached to **[REP6-021]**) show on page 7 of those accounts that Aquind Limited had only £1,049,684 as 'cash in bank and in hand'.

38. Based on Mr Stott's expert evidence at paragraphs 3.93, 5.4, 5.5, 5.6 and 5.7 that (at Appendix 8 to **[REP7C-030]**, blight claims of millions of pounds can be made now**.**

39. Aquind Limited therefore has, according to Mr Stott's evidence, **live compensation liabilities** in relation to blight. The claim itself does not have had to be made – it is a live liability that should be taken into account because if a claim were made tomorrow, it would fall due in the

[1] *BNY Corporate Trustee Services Ltd v Eurosail* - UK 2007-3BL Plc [2013] UKSC 28 1 WLR 1408

reasonably near future. This would satisfy the test in the *Eurosail* case as being a debt that could fall due in the reasonably near future.

40. Aquind Limited does not have enough cash at this time during the Examination Period to meet those debts as they fall due however were, for example, the Carpenters to make a blight claim for their property tomorrow (or even were *all* properties affected to make blight claims, which is possible in theory).

41. On this basis, Aquind Limited is also insolvent as it is "unable to pay its debts" as defined by the cash flow test under section s123(1)(e) of the Insolvency Act 1986.

42. Aquind Limited could therefore also be wound up on this basis under section 122(1)(f) of the Insolvency Act 1986.

43. The insolvency of Aquind Limited in this context is also a risk of and significant impediment to the delivery of the project under paragraph 19 of the CPO Guidance.

44. This is a matter that is therefore both "important" and "relevant" for the Secretary of State's decision under section 104(2)(d) Planning Act 2008, as to whether to grant the DCO.

SECTION C – WRONGFUL TRADING BY AQUIND LIMITED AND MISFEASANCE BY INDIVIDUAL DIRECTORS OF AQUIND LIMITED

45. There is a real risk that Aquind Limited has apparently engaged in wrongful trading. This is because knowing that it is insolvent under both the on-balance sheet test and the cash-flow test under the Insolvency Act 1986, Aquind Limited has not done everything it can to protect its creditors (the Carpenters being potential creditors should they make a blight claim or apply for costs). Aquind Limited has continued to rack up potential costs liability through these potential claims but it has not done anything to ensure that it has the funds to cover those possible claims.

46. Under section 214 Insolvency Act 1986, wrongful trading occurs when the directors of a company have continued to trade a company past the point when they: "*knew, or ought to have concluded that there was no reasonable prospect of avoiding insolvent liquidation*"; and they did not take "*every step with a view to minimising the potential loss to the company's creditors*".

47. There is a risk that Aquind Limited could be deemed be have wrongfully traded because of its gross miscalculation in relation to potential blight claims. In paragraph 7.11 of its latest Funding Statement ([**REP6-021**]), the Applicant states:

"7.*11 It is not anticipated that any claims for blight will arise. Should any claims for blight arise as a consequence of the Application the cost of meeting such claims will be met from the sources of funding described above at section 6 to this Statement*."

48. Firstly, the Applicant is incorrect about there being no risk of blight claims arising. These are (in the words of Mr. Stott) live blight compensation liabilities – at this present time and in advance of a DCO being granted because the foreshadow of the DCO results in blight at this time to land within the Order Limits.

49. Secondly, the Applicant is clearly seeking to rely on future project finance to meet any *current* blight claims. But that would be too late. Blight claims can be made now. When "will" the project finance be available? No-one knows – not the Applicant, not the ExA and not the Secretary of State. Despite this, Aquind Limited continues to trade and pursue this application for a presently unfunded DCO.

50. Not is the Applicant completely mistaken about the potential for blight claims to arise NOW, its proposed approach to fund those claims through future project finance is evidence it does not have any contingency to protect blight claimants now (as they would become creditors).

51. It is therefore possible that if it is wound up under section 122(1)(f) of the Insolvency Act 1986, it is possible that Aquind Limited could also be prosecuted for wrongful trading in insolvency.

52. This is a matter that is therefore both "important" and "relevant" for the Secretary of State's decision under section 104(2)(d) Planning Act 2008, as to whether to grant the DCO.

CONCLUSIONS

53. Aquind Limited is an insolvent company and this is an important and relevant consideration for the Secretary of State under section 104 (2)(d) the Planning Act 2008.

54. It cannot be the case that the CPO Guidance envisaged allowing insolvent companies to obtain compulsory acquisition powers – this goes against the logic of the guidance under paragraphs 7 to 19 of the CPO Guidance that requires all applicants to demonstrate during the Examination what the resource implications are and that "there is" (not "there is aspired to be" or "the Applicant hopes there may be") a reasonable prospect of the requisite funds becoming available.

55. It would be a fundamental re-write of the CPO Guidance were the ExA to recommend grant of the DCO to an insolvent company that is at risk of being wound up.