AQUIND Limited

AQUIND INTERCONNECTOR

Response to Submissions made on behalf of Mr Geoffrey Carpenter and Mr Peter Carpenter

The Planning Act 2008

Infrastructure Planning (Applications: Prescribed Forms and Procedure)

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WSP

WSP House

70 Chancery Lane

London

WC2A 1AF

+44 20 7314 5000

www.wsp.com

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APPLICANT'S RESPONSE TO THE DEADLINE 8 SUBMISSIONS ON BEHALF OF MR GEOFFREY AND MR PETER CARPENTER

1. INTRODUCTION

1.1 This note sets out the Applicant's response to following submissions made by Blake Morgan LLP on behalf of Mr Geoffrey and Mr Peter Carpenter (the "**Affected Party**" or "**AP**") submitted at Deadline 8 of the Examination:

1.1.1 Statement on Alternatives & Proportionate CPO Powers (REP8-096) ("**Statement A**");

1.1.2 Note on Paragraph 19 of the Guidance related to procedures for the compulsory acquisition of land (REP8-100) ("**Statement B**");

1.1.3 Note on non-compliance with obligation to take account of liability for blight claims (REP8-093) ("**Statement C**");

1.1.4 Note on the Financial Status of AQUIND Limited (REP8-097) ("**Statement D**");

1.1.5 Post-hearing note in relation to Compulsory Acquisition Hearing 3 (REP8-102) ("**Statement E**");

1.1.6 Compulsory Acquisition Hearing 3 Note on Planning Obligation (REP8- 104) ("**Statement F**");

1.1.7 Statement on Change Request 2 (REP8-106) ("**Statement G**");

1.1.8 Response to Deadline 7c Submissions (REP8-107) ("**Statement H**");

1.1.9 Revised Applicant's Funding Statement (REP8-094) ("**Statement I**"); and

1.1.10 Costs Application (REP8-099) ("**Statement J**").

1.2 In providing responses to these submissions the Applicant has sought to proportionately respond to matters raised where it is considered it will be of assistance to the Examining Authority ("**ExA**"). As such, this response does not seek to address all points raised, noting many of the points raised are repeats of previous submissions made on behalf of the AP and have already been addressed, either in the written submissions of the Applicant, or on behalf of the Applicant at the hearings into the application for the AQUIND Interconnector Order (the "**Application**") held in the weeks commencing 7 and 14 December 2020 and 15 February 2021.

1.3 The following submissions made on behalf of the AP are responded to within the schedule of changes requested to the draft DCO at Deadline 9 and the Applicant's position in relation to those (Document Reference: 7.3.1) which is also submitted by the Applicant at Deadline 9:

1.3.1 Draft DCO (REP8-105); and

1.3.2 Revised Protective Provisions (REP8-108)

1.4 In addition, the following submissions made on behalf of the AP are addressed in the Applicant's Written Summary of the Oral Case at Open Floor Hearing (OFH3) and Compulsory Acquisition Hearing 3 (CAH3) (REP8-056):

1.4.1 Open Floor Hearing 3 Speech by Mr Henry Brice of Ian Judd & Partners (REP8-098);

1.4.2 Summary of Oral Submissions by Ian Judd & Partners (REP8-101);

1.4.3 Open Floor Hearing 3 Speech by Geoffrey Carpenter (REP8-103); and

1.4.4 Open Floor Hearing 3 Speech by Peter Carpenter (REP8-109).

1.5 The Applicant would also highlight the copious volume of the submissions made on behalf of the AP at Deadline 8, one week before the close of the Examination and 4 days before the Applicant is required to respond at Deadline 9. Further, the Applicant informs the ExA

that despite the ExA's requests otherwise, no documentation was provided to the Applicant by the representatives of the AP either before or following Deadline 8.

2. RESPONSE TO STATEMENT A

2.1 The central theme of Statement A is that the Applicant has not explored all reasonable alternatives to compulsory acquisition in accordance with paragraph 8 of the Guidance related to the procedures for the compulsory acquisition of land (Sept 2013, DCLG) (the "**Guidance**") in respect of the Proposed Development on land in the ownership of the AP. This assertion is strongly rejected by the Applicant.

2.2 In addition, representatives on behalf of the AP seek to reiterate information previously submitted to assert:

2.2.1 there is not a reasonable prospect of funds for compulsory acquisition becoming available;

2.2.2 the estimate of land acquisition costs contained in the Applicant's Funding Statement (REP6-021) is not accurate; and

2.2.3 a lack of present full funding prevents the exploration by the Applicant of reasonable alternatives and its ability to negotiate to acquire the land required for the Proposed Development.

Exploration of all reasonable alternatives

2.3 The Applicant has undertaken a robust assessment of the alternatives to compulsory acquisition as part of the overarching consideration of the alternatives. This has involved the assessment of the available alternatives at a strategic level, for example the selection of the connection location for the Proposed Development (explained in detail in the Supplementary Alternative Chapter (REP1-152)), and at a more local level where the Applicant has carefully considered the infrastructure required for the Proposed Development for which consent is sought and to facilitate this, and the extent of the land needed for this purpose.

2.4 The Applicant has in multiple previous submissions clearly explained why the AP's land is required for the Proposed Development, and further why the alternative proposals put forward by the AP, which in the main comprise alternative drainage proposals premised on the removal of the permanent Access Road and the removal of landscape planting, are not reasonable alternatives. In particular, the Applicant would draw attention to paragraph 3.1 of the Applicant's Post Hearing Notes for CAH1 (REP6-063) which sets out a detailed explanation of the reasons why Plot 1-32 is required for the Proposed Development.

2.5 In summary, and as set out in the Applicant's responses previously, a permanent access road is required for operational and safety purposes and the Proposed Development could not be operated safely without this. The drainage and landscaping measures are also necessary and required for/to facilitate the Proposed Development. The reasonable alternatives to providing these elements of the scheme have been explored, and it has been determined that there is not a reasonable alternative to providing these whilst providing for an acceptable scheme in respect of landscape and drainage matters and an operationally sound and safe scheme with regard to access. This is the reason why the alternatives proposed by the AP are not accepted by the Applicant.

2.6 The Applicant draws attention to paragraph 4.4.3 of NPS EN-1 which at the 6th bullet point provides "*alternative proposals which mean the necessary development could not proceed, for example because the alternative proposals are not commercially viable or alternative proposals for sites would not be physically suitable, can be excluded on the grounds that they are not important and relevant to the [SoS]'s decision*".

2.7 The alternative access arrangements proposed by the representatives of the AP would not be physically suitable. The permanent Access Road is required for the potential removal and emergency replacement of high voltage plant such as transformers and reactors and for emergency response vehicles to attend where necessary to do so.

2.8 The alternative drainage proposals put forward on behalf of the AP are based on the permanent Access Road not being delivered and their appropriateness in terms of location and scale has not been proven to be suitable[1]. In any event, the Applicant's maintains its position set out at paragraph 6 of Appendix A to the Applicant's Responses to Deadline 6 Submissions – Hearings – Appendices (REP7-075) that the attenuation pond and its associated ancillaries are placed in the most appropriate location and that the land on which these features are proposed to be located is the minimum amount required to provide the necessary sustainable drainage system.

2.9 The alternative landscaping proposals (i.e. the removal of the landscaping) would not provide the necessary landscape mitigations and enhancements required in connection with the Proposed Development. The proposed landscaping has been developed in close collaboration with LPAs and SDNPA and will provide an important and necessary visual screening function.

2.10 With that in mind, it is not considered the alternatives promoted by the AP are 'reasonable alternatives', and therefore they are not important or relevant to the SoS decision.

2.11 With regard to discussions with the AP during the design evolution of the scheme prior to the submission of the Application and the exploration of the alternatives for the proposals, the Applicant has been engaged with AP since 2016 in relation to the proposals and during this time has consulted with them on the development of the proposals for the scheme. Heads of terms to acquire the land required for the Proposed Development have been issued as discussions have progressed over a number of years, with updates made to reflect amendments to the scheme as a result of ongoing consultation, including to reflect feedback received from the Affected Party, such as In relation to the siting of the attenuation ponds.

2.12 With regard to paragraph 4 and paragraphs 59 – 61 of Statement A, it is not correct that the Applicant stated it has been hampered in the consideration of the reasonable alternatives by the AP directing that negotiations on the acquisition of land required for the Proposed Development and in their ownership be negotiated solely through the AP Solicitors. The Applicant highlighted this only to confirm the reasons why the Applicant's land agent has not been in direct contact with the AP's agent in light of criticism in this regard.

2.13 Irrespective of the position in respect of all correspondence more recently being required to be through solicitors, as is outlined above the Applicant has been engaged with the AP since 2016 and during that time has explored all reasonable alternatives, has sought the views of the AP on these and has accommodated changes requested to the scheme where appropriate to do so.

2.14 Noting the above, it is appropriate also to identify that many of the proposed alternatives now suggested on behalf of the AP have only been suggested at a late stage, subsequent to the appointment of representatives with the principal aim of objecting to the Application. It is certainly not the case as is asserted by representatives on behalf of the AP at paragraph 53 of Statement A that "*the Affected Party has from the outset proposed to roll back the extent of land take from its land put forward multiple alternative options relating to landscaping, access and the management of Ash Dieback in relation to Stoneacre Copse*".

2.15 With particular regard to paragraph 7 of Statement A, the characterisation of the Applicant's land agent and the approach to seeking to secure an agreement voluntarily is strongly rejected. The Applicant, including their land agent, has sought in good faith to negotiate the voluntary acquisition of the land in the AP's ownership required for and to

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[1] See 8th bullet point of paragraph 4.4.3 to EN-1 in this regard which provides "*it is intended that potential alternatives to a proposed development should, wherever possible, be identified before an application is made to the [SoS] in respect of it (so as to allow appropriate consultation and the development of a suitable evidence base in relation to any alternatives which are particularly relevant). Therefore where an alternative is first put forward by a third party after an application has been made, the [SoS] may place the onus on the person proposing the alternative to provide the evidence for its suitability as such and the [SoS] should not necessarily expect the applicant to have assessed it*".

facilitate the Proposed Development. That there is a potential for CPO is inevitable taking into account that powers for this are sought in the DCO. That such powers are included in a DCO does not in any way serve to evidence any failure of the Applicant to seek to acquire land by negotiation where practicable. Further information regarding the Applicant's attempts to negotiate for the land required for the Proposed Development is provided at section 2 of the Applicant's response to the submissions on behalf of Mr Geoffrey and Mr Peter Carpenter at Deadline 7 (REP7c-014).

Reasonable prospect of funds becoming available

2.16 Representatives on behalf of the AP seek to assert at numerous places throughout Statement A that there is not a reasonable prospect of funds becoming available for the compulsory acquisition of land, and moreover that the Applicant has not provided evidence of this.

2.17 Information regarding the correct interpretation of the reasonable prospect test and confirming how the Applicant has clearly demonstrated that there is a reasonable prospect of funding becoming available, and moreover where the Applicant has demonstrated that the requirements of section 122(1) and the Guidance itself are met, is provided at section 3 of in the Applicant's response to the Deadline 7c submissions of Mr Geoffrey and Mr Peter Carpenter (REP8-065).

2.18 As is set out therein, the updated Funding Statement (REP6-021), the Applicant's response to the further written question of the ExA with reference CA2.3.2, submitted at Deadline 7 (REP7-038), Appendix B of the Applicants Responses to Deadline 6 Submissions - Hearing Appendices (REP7-075) and Applicant's response to Deadline 7 and 7a Submissions on Behalf of Mr Geoffrey Carpenter and Mr Peter Carpenter at Deadline 7 (REP7c-014) set out the basis on which it is expected regulatory status will be obtained and project financing secured and the Applicant has clearly demonstrated the rational basis upon which it has properly concluded that there is a reasonable prospect of the requisite funds becoming available within the statutory period.

ACER exemption request

2.19 Matters relevant to the process to be followed to obtain the necessary regulatory approvals are also set out in section 3 of AS-069 and these are not repeated in this submission. The Applicant does however take issue with the characterisation that the Applicant's submissions in respect of the ongoing ACER Exemption process following the decision of the General Court of the European Court of Justice to annul the decision of the ACER Board of Appeal to refuse the Applicant's exemption request is new information.

2.20 Matters relevant to the ACER Exemption request are addressed in the Applicant's response to the ExA's first written question (REP1-091) in response to CA1.3.2, which confirmed "*The Applicant further contested the conclusions of ACER and its Board of Appeal in respect of its interpretation of Article 17(1)(b) of Regulation (EC) 714/2009 and Regulation (EU) 347/2013 in the General Court of the European Court of Justice. The decision in this regard is pending".*

2.21 Paragraph 5.15 of the Applicant's Transcript of Oral Submissions for Compulsory Acquisition Hearing 1 (REP5-034) very clearly explained the position at that time, being that the General Court on 18 November 2020 "*found in favour of AQUIND and annulled the decision of the ACER Board of Appeal. That exemption application is now pending before the ACER Board of Appeal who will need to take into account the General Court's findings and reconsider their previous rejection*". Furthermore, at paragraph 5.16 it is clearly stated "*AQUIND is liaising with ACER In this regard and it is therefore possible that an exemption may be granted pursuant to the application made in 2018*".

2.22 This matter was then discussed at CAH1 with Ms. Goldberg, and the Applicant expanded on its response in the Applicant's written summaries of oral submissions at ISH1, 2 and 3, and CAH1 and 2 (REP6-062). Specifically in that document, reflecting the discussion on this matter at CAH1, it is stated that "*There is a clear pathway to a regulatory status in 2021 on the basis of the 2018 ACER application which, following the judgment of the*

General Court, is being considered by the Board of Appeal once more" and "*Should, against all expectations, the 2018 application for an exemption not be granted, the Applicant has, by way of mitigation, also applied for a partial exemption (which is limited to France) to CRE and Ofgem*". It is acknowledged that position has now changed following the UK leaving the EU and the TCA being entered into. Those matters are addressed in Post hearing note to Compulsory Acquisition Hearing 3 in respect of the non-UK Planning Consents and Approvals required (AS-069), and also further below in the Applicant's response to Statement B.

2.23 The Applicant's funding statement (REP6-021) at paragraph 8.3 also very clearly explains that the application to ACER had been remitted to the ACER Board of Appeal following the General Court of the European Court of Justice annulling the previous decision of ACER, and at paragraph 8.4 that "*either of these exemption applications would allow the Project to operate in France*".

2.24 It is therefore evidently completely wrong to state that the Applicant confirmed as part of its oral submissions during CAH3 that "*a changed and brand new approach was to be adopted… never before Deadline 7c ever articulated in any previously submitted document*". The Application for the exemption has been ongoing for some time, and the Applicant has provided updates in relation to the ACER exemption request when appropriate to do so.

Estimate of land acquisition costs contained in the Applicant's Funding Statement

2.25 At paragraph 47 of Statement A representatives on behalf of the AP reiterate their position that the Applicant's calculation of the land acquisition costs is not correct. For the reasons set out at paragraph 3.16 – 3.22 of the Applicant's response to the Deadline 7c submission on behalf of the AP (REP8-065) this is not agreed with. The Applicant's assessment of its potential maximum exposure to compulsory acquisition costs is robust.

Lack of funds preventing the consideration of reasonable alternatives

2.26 Representatives on behalf of the AP also seek to characterise that the Applicant has no money to explore reasonable alternatives or to negotiate for the acquisition of land required in connection with the Proposed Development. This assertion is strongly rejected. As is explained in the Applicant's Funding Statement (REP6-021) the Applicant has invested £35m in the development of the Project as of June 2020. The expenditure of those funds has involved the exploration of the reasonable alternatives. The Applicant also has further funds available to complete the pre-construction stage of the Project, including in relation to negotiation of option agreements to acquire the land required for the Proposed Development. It is on this basis that the Applicant has over a number of years sought to negotiate such an option agreement with the AP, incurring the costs of doing so, and has concluded and entered into option agreements with other parties (most recently for example with Network Rail in respect of the micro-tunnel beneath the railway on 1st March 2020).

2.27 That it has been confirmed that post the development stage the Proposed Development, and more broadly the Project, is to be funded through project finance secured against the operational profits (revenues) of the Project, and that the exercise of the powers of compulsory acquisition is proposed to be funded through such project financing, with such powers only being exercisable following any DCO grant, in no way supports a conclusion that the Applicant does not have sufficient funds available now to progress the Proposed Development (i.e. through the pre-construction stage). The Applicant has progressed the Project over a number of years which has required significant investment, and it continues to do so. Further information with regard to the Applicant's financial status is contained in the letter from the Applicant dated 5 March 2021 in response to the Rule 17 Request of the ExA dated 3 March 2021 (Document reference: 7.9.52).

3. RESPONSE TO STATEMENT B

3.1 Statement B seeks to argue that, on the representatives of the AP's approach to the interpretation of paragraph 19 of the Guidance, the Applicant has not demonstrated that it has taken into account the need to obtain any operational and other consents and, in consequence the Secretary of State is "unable to know" whether a number of potential risks or impediments to the implementation of the Proposed Development are being properly managed (Statement B paragraphs 5, 25 and 26).

3.2 The particular impediments referred to are funding, the need for a TCA or ACER exemption, the financial status of the Applicant, the need for further consents for the substation extension, the possible need to seek the local exercise of powers of acquisition under section 226 of the Town and Country Planning Act 1990 and the need for Crown Estate and Ministry of Defence letters of consent.

3.3 The Applicant rejects this contention. Firstly, the AP persists in its inappropriate attempt to re-write the language of the Guidance to support its submissions. Secondly, the Applicant has provided ample evidence to demonstrate that the residual impediments to the scheme progressing, none of which is unusual for a scheme of this kind, are being properly managed and that there is, at the very least, every prospect of them being resolved within a relatively short time frame.

3.4 In relation to the Guidance, the Applicant has explained its proper interpretation in Section 3 of the Applicant's response to the Deadline7c submissions of Mr Geoffrey and Mr Peter Carpenter (REP8-065). The AP now expressly accepts that the Guidance must be read as a whole (paragraph 11 of Statement B) but then seeks to rely on this principle to inappropriately to elide paragraphs of the Guidance and thus effectively to re-write it.

3.5 The AP's re-writing in fact makes no substantive difference either to the approach to the assessment of the Applicant's request for CPO powers or to the conclusion. It has demonstrably shown that the Secretary of State can be satisfied that the requirements of section 122 of the PA 2008 are met. However, for completeness the Applicant responds as follows to the principal issues raised in Section A of Statement B.

3.6 Paragraph 9 of the Guidance sits under the heading "General Considerations" and, in terms of funding advises applicants inter alia that they should be able to demonstrate that "*there is a reasonable prospect of the requisite funds for acquisition becoming available*" as part of satisfying the Secretary of State that the section 122 requirements are met. Further guidance on funding appears, as would be expected, under the heading "*Resource implications of the proposed scheme*" and is provided by paragraphs 17 and 18. The two paragraphs identify factors which are relevant to assessing whether or not the reasonable prospect test set by paragraph 9 is met.

3.7 The Guidance then turns to "*Other matters*", which must mean matters other than the "*Resource implications of the proposed scheme*" which are dealt with in the previous section. The AP is therefore wrong to contend (see Statement B paragraph 22) that the funding can qualify as an impediment for the purposes of paragraph 19.

3.8 Further, the AP is wrong to contend by reference to the wording of paragraphs 9 and 17 that the Guidance applies a higher test for acquisition funding than for project funding and that the reasonable prospect test excludes the exercise of judgement (Statement B paragraph 16 -18). Paragraph 17 of the Guidance relates to both funding for acquisition of land and implementation. Together with paragraphs 18, it provides guidance on the evidence which is likely to be required by the Secretary of State in forming the judgments required by section 122 of the PA 2008. Contrary to what is said in paragraph 18 of Statement B, paragraph 17 does not set an "*implications*" test. It is concerned with the evidence likely to be required in the generality of cases to enable the Secretary of State to be satisfied that the statutory tests are met and does not itself set a test. The word "implication" is simply used as a noun. There is, therefore, no conflict between paragraphs 9 and 17.

3.9 Finally, the AP addresses paragraph 19 of the Guidance in paragraphs 20 to 26 of Statement B. Paragraph 19 is a simply worded paragraph which neither requires, nor

benefits from, detailed linguistic analysis. It stresses that applicants will need to be able to demonstrate that potential risks and impediments have been properly managed and that any other physical and legal matters have been taken account of.

3.10 As the Applicant has repeatedly demonstrated, the requirements and guidance of paragraphs 9 and 17-19 of the Guidance have been satisfied.

3.11 The following paragraphs address the specific matters raised in Section B of Statement B.

Lack of Funding as an impediment to implementation - paragraphs 29 to 31

3.12 The Applicant has responded to this point at paragraph 2.16 to 2.18 above

The Trade and Cooperation Agreement as a Funding Solution - Section B paragraphs 32 to 39

3.13 Paragraphs 32 to 39 of Statement B refer to the Trade and Cooperation Agreement between the UK and the EU ("**TCA**") and the possibility of an exemption pursuant to the terms of the TCA. Appendix 1 to Statement B also refers in a number of places to "Retained EU Legislation" and its implications for the Applicant's opportunities for securing an exemption. The following paragraphs clarify the nature and interaction of these exemption procedures.

3.14 In the first instance, it is helpful to clarify the distinction between the exemption regime under the TCA and that under Regulation (EU) 2019/943 (the "**EU Electricity Regulation**", which following the expiry of the transition period has been retained in UK law with a number of modifications, such modified retained version being the "**UK Electricity Regulation**").

3.15 The Applicant previously submitted a partial exemption request to Ofgem and CRE pursuant to the EU Electricity Regulation. This exemption request was brought to an end by Ofgem and CRE on the basis that they no longer had legal powers to assess such an exemption as the UK is no longer an EU Member State (and such exemption regime applies to interconnector projects between EU Member States).

3.16 For the reasons set out below and in section 3 of the Applicant's post-hearing note CAH3 (AS-069), this reasoning does not impact on the ongoing exemption proceedings before ACER.

3.17 Paragraph 33 of Statement B and paragraphs 1.4 and 1.5 of Appendix 1 to that Statement B refer to uncertainty as to what the terms of English regulations would be in relation to the availability of an exemption regime. The UK Electricity Regulation actually retains an exemption regime in a similar form to that set out in Article 63 of the EU Electricity Regulation save that this regime can apply to UK-EU interconnector projects and the Applicant can either rely on this regime to secure exemption or on the cap and floor regime once the policy review is completed by Ofgem in summer 2021.

3.18 Statement B suggests (paragraph 34) that a lack of scope of the TCA exemption process makes it impossible to prejudge when the process will properly be in place. Paragraph 35 of Statement B goes on to suggest that a TCA exemption does not deliver the same benefits as would have been realised under the EU Exemption Regulation. The Applicant has confidence in the possibility of an exemption under the TCA and would dispute the above arguments for a number of reasons:

3.18.1 the TCA is in force, and as an international agreement between the UK and EU, takes precedence over national and EU regulations;

3.18.2 the TCA commits the UK and the EU to cooperate to facilitate the timely development and interoperability of energy infrastructure connecting their respective territories (i.e. interconnectors); and

3.18.3 the conditions for the grant of an exemption regime in the TCA are familiar to regulators as they are closely aligned with the EU Electricity Regulation regime. The Applicant therefore has no reason to consider that they would be applied in a

manifestly different manner or to think that an exemption could not deliver similar benefits to the project.

3.19 Statement B appears to quote the Applicant at paragraph 37 and further at paragraphs 3.4 and 3.5 of Appendix 1 that the exemption request pursuant to Article 63 of the EU Electricity Regulation is the Applicant's "only" option (paragraph 37 refers to the TCA, but given the context and the reference to the partial exemption we understand this to refer to the exemption pursuant to the EU Electricity Regulation). However, such quote is contained within the Applicant's exemption request of June 2020, which therefore pre-dates the General Court's decision in relation to the exemption request before ACER (see below) and also pre-dates the TCA. This does not therefore reflect the options currently available to the Project and other extracts from the Applicant's exemption request that have been included in Statement B should accordingly be viewed in this context.

3.20 Paragraph 1.16 of the Appendix to Statement B further notes that the TCA "does not offer an exemption to the provisions on which the Applicant sought to rely upon for its exemption". This is further expanded in section 6 of Appendix 1 to Statement B. The Applicant does not dispute that the TCA exemption mechanism does not refer to an exemption from use of revenues provisions (as applied for by the Applicant in the exemption request recently discontinued by Ofgem and CRE). The scope of the Applicant's recent exemption request is different to that in the proceedings before ACER, where a partial exemption from third party access rules and a conditional exemption from unbundling rules was also requested. The exact scope of the exemption can be varied depending on what is required to enable the investment to take place under the existing regulatory regime. An exemption from third party access or unbundling provisions pursuant to the exemption regime in the TCA is therefore capable of providing the Applicant with the necessary regulatory certainty.

3.21 Statement B also suggests that the lack of a possibility of an exemption from use of revenues provisions will prevent the Applicant attracting the necessary investors (see eg paragraph 1.8 and section 6 of Appendix 1). While it is correct that an exemption from use of revenues is not referred to in the TCA, such an exemption from use of revenues is not essential to the Applicant being able to secure sufficient funding in this circumstance. In this regard, the Applicant notes the judgment of the European Court of Justice in the Baltic Cable case (C-454/18) in relation to regulator decisions on the use of revenues for transmission system operators that merely operate a cross-border interconnector (such as the Applicant will be): "*it is for that authority to authorise that TSO to use part of its congestion revenues to make a return as well as for the operation and maintenance of the interconnector, in order to prevent it being discriminated against by comparison with the other TSOs concerned and to ensure that it is in a position in which it is able to carry out its activity in financially acceptable conditions, which includes making an appropriate profit*". Even without an exemption relating to use of revenues, the Applicant is therefore still entitled to make an appropriate profit for the benefit of its investors and the regulatory certainty provided by an exemption regime would assist the Applicant in attracting investors. As was the intention in relation to the discontinued partial exemption request, the Applicant could also seek a regulated regime for a portion of the project (e.g. a cap and floor in GB) which would provide further revenue certainty.

3.22 Please refer to paragraphs 3.16 to 3.24 of the post-hearing note CAH3 (AS-069) for further clarification of the exemption route under the TCA.

3.23 There is ample evidence before the Secretary of State on which he can form a judgment as to the prospects of an exemption under the TCA being granted to the Applicant. The risk has been both taken into account and properly managed. There has been no inconsistency in the Applicant's position in relation to regulatory approvals. It has made it clear that there is more than one pathway to securing the necessary exemption, both have a reasonable prospect of success and both are being pursued. That is proper management of risk as required by the Guidance.

ACER Exemption as a funding solution Section B paragraphs 40 to 41

3.24 Statement B (paragraphs 40 and 41 and Appendix 1) refers to the Applicant's ongoing proceedings before ACER in relation to its prior exemption request. Such proceedings are presented in Statement B as litigation which it is not possible to prejudge. While there is inherent uncertainty before a regulatory application is approved, this application has been remitted to the ACER board of appeal following the Applicant's successful appeal to the General Court of Justice of the European Union. The ACER board of appeal is bound to follow the judgment of the General Court and the Applicant therefore justifiably considers that it is in a strong position with regards to this exemption application (see paragraphs 3.3 to 3.7 of the post-hearing note CAH3 (AS-069) for further details).

3.25 In relation to this ongoing exemption application, the Applicant would also reiterate that such process is unaffected by the UK's departure from the EU or the TCA – ACER must place the Applicant in the position it would have been in if the annulled act had not been adopted and the exemption must therefore take effect from the date of the exemption request (see paragraphs 3.8 to 3.15 of the post-hearing note CAH3 (AS-069) for further details).

3.26 In this context, it should be noted that the matter is currently being actively considered by the board of appeal of ACER who have resumed proceedings. Unless and until a contrary decision is taken, there must be a presumption of competence of the board of appeal of ACER and that it is not for another administrative body to presume that it is not competent.

3.27 As set out in the Applicant's deadline 7c response to Mr Geoffrey and Mr Peter Carpenter (REP8-065), the Guidance is carefully worded to avoid the need to pre-judge the outcome of the Applicant's "Request for Exemption". There is ample evidence before the Secretary of State on which he can conclude that the Applicant's Request has a reasonable prospect of succeeding. The Applicant has demonstrably taken into account the impediment and managed that risk. It has provided a fully reasoned basis for its assessment that its appeal is likely to succeed.

3.28 The reference to the "discrete 'commercial telecommunications' development" in paragraph 41 of Statement B, has no relevance to the Applicant's ability to fund the Proposed Development. It has repeatedly explained that the commercial telecommunications element of the Proposed Development is not required in order to provide cross subsidy.

The Insolvent Applicant - Section B paragraphs 42-50

3.29 The Applicant is not an insolvent and nor is there any reason why the Applicant would become insolvent in the future. Further information with regard to the Applicant's financial status is contained in the letter from the Applicant dated 5 March 2021 in response to the Rule 17 Request of the ExA dated 3 March 2021 (Document reference: 7.9.52)]

3.30 The AP contends that the solvency of the Applicant is specifically relevant as the Applicant is said not to have taken into account "*live compensation liabilities such as blight claims*". In an attempt to evidence this, the AP relies on its claimed "*subsisting entitlement to issue a blight notice*".

3.31 Contrary to the repeated and numerous assertions of the AP, there is no evidence of any "*subsisting entitlement*" to issue a blight notice. Whilst there is power under section 150 of the Town and Country Planning Act 1990 for an affected land owner to serve a blight notice having regard to the effects of a proposed NSIP, that owner can only do so in the carefully prescribed circumstances set out in section 150(1) of the 1990 Act.

3.32 The Applicant gave careful consideration to whether any land owner would be likely to be able to satisfy the statutory pre-conditions for the service of a blight notice in consequence of the draft and made DCO and concluded that this was not likely. No evidence has been produced by the AP or indeed any other party, that the effects of the draft or made CPO would be such as to enable them to serve a blight notice. There is therefore no subsisting liability and no likelihood of any such liability. It is noteworthy in this context that the AP's Statement C, a fuller response to which is provided below, very carefully avoids any attempt to consider the full set of statutory pre-conditions for the service of a blight notice.

Further Consents - Statement B paragraphs 51 to 53

3.33 Contrary to the assertion made in paragraph 51 of Statement B, the Applicant is not reliant on a separate grant of planning permission for the delivery of the Lovedean Substation Extension. The extension is, and always has been, part of the works for which development consent is sought (see Section 6 below in relation to Statement E). There is therefore no such impediment.

3.34 The AP's contention (Statement B paragraph 52) that the Applicant should have given consideration to the risk of not obtaining the powers of compulsory acquisition necessary to deliver the project is an illogical one. The Secretary of State must consider whether there is an impediment to the scheme progressing in deciding whether to include the powers of compulsory acquisition in the made order. He is not required to consider for the purpose of paragraph 19 of the Guidance whether excluding the powers of acquisition would be an impediment. Given that the Applicant has demonstrated that the inclusion of the powers meets the requirements of section 122 of the PA 2008, it could not sensibly argue that the Proposed Development could still be delivered with none of them.

3.35 In paragraph 53 of Statement B, the AP repeats its contention that there is no evidence that the scheme would be attractive to the market without the commercial telecommunications development. That is incorrect. The applicant has demonstrated that the scheme is not dependent for funding on the commercial telecommunications development, including in the Applicant's statement in relation to FOC (REP1-127).

3.36 Furthermore, the AP contends that the "scheme" applied for is very different to the "scheme" at the end of the Examination. The Applicant acknowledges Change Request 1 and Change Request 2 which have added land to the Order limits, and it is also acknowledged that land has been removed as a result of Change Request 1 and Change Request 3. However, none of those changes have resulted in the "scheme" being amended. It is evidently not correct that the Proposed Development at the end of the Examination is different to the Proposed Development which the Application was submitted in relation to, it is the same development in the same locations.

Crown Estate & Ministry of Defence Letters of Consent – Section B paragraphs 54-61

3.37 The AP seeks to speculate as to what might be the position in relation to land acquisition in the event that neither the Crown Estate or Ministry of Defence Consents are obtained. The Applicant has been properly managing these impediments and has secured the necessary Ministry of Defence consent and the Crown Estate consent in relation to the escheat land (REP8-059 and REP8-060).

3.38 In relation to the remaining Crown Estate consent required, the Applicant is in advanced discussions with the solicitors representing the Crown Estate to obtain the letter to confirm that the Crown Estate are content for the Order to be granted with powers of compulsory acquisition in relation to Crown land included within the Order limits. It is anticipated that the Crown Estate will issue correspondence to the ExA directly in this regard shortly

4. RESPONSE TO STATEMENT C

4.1 Statement C argues that it would be contrary to paragraph 18 of the Secretary of State's Guidance on Compulsory Acquisition under the Planning Act 2008 for the DCO to be made, because the Applicant does not currently hold cash to cover any blight claims which might be made. In particular, the Statement highlights text in paragraph 18 of the Guidance which states that applicants should be able to demonstrate that "the resource implications of a possible acquisition resulting from a blight notice have been taken account of."

No live claims for blight

4.2 Paragraph 3.2 of Statement C incorrectly states that "from the date of its Application for its order being made, and subsisting in fact at this time" there exists a "live compensation liability in relation to blight". No such liability currently exists.

4.3 It is accepted that the AP could, in principle, serve notice on the Applicant under s150 Town and Country Planning Act 1990 with a view to requiring the Applicant to acquire their land immediately and at its unblighted value. However, the onus would be on the AP to evidence that due to the Applicant's proposals the AP had been unable to sell the land at its unblighted value. The AP would need to demonstrate he has made reasonable endeavours to sell the land as set out in s150(1)(b) TCPA 1990 and it would ordinarily be necessary to unsuccessfully market the land for 3 to 6 months before there was sufficient evidence to serve a blight notice with any hope of success.

4.4 Importantly, upon receipt of any such notice from a land owner, the Applicant would be entitled to serve counter-notice on the AP to dispute the blight claim on one of seven specified grounds set out in s151(4) TCPA 1990. Ultimately, the Upper Tribunal would decide whether the blight claim was valid, if the parties could not reach agreement. Only at such time as the Upper Tribunal had made a ruling would the Applicant have any actual liability to acquire the land from the AP at the amount determined to be its unblighted value.

Basis upon which the Applicant considers blight claims are unlikely

4.5 In accordance with paragraph 18, the Applicant did consider the resource implications of blight notices. Avison Young advised the Applicant that they considered the likelihood of such claims to be 'negligible'. The basis of this assessment by Avison Young was that:

4.5.1 the number of land owners who held 'qualifying interests' (s149(2) TCPA 1990) was extremely limited;

4.5.2 for the majority of land within the Order limits the impacts are temporary and limited to the installation of the onshore cable (a significant proportion of which will be sub-highway) – this making it highly unlikely that blight claims could be made

4.5.3 engagement with the great majority of land owners who would have an ability to serve blight notices had demonstrated that the necessary land interests could be secured by agreement.

4.6 Further, no blight notices have to date been served on the Applicant; no land owners with qualifying interests have (until now) raised the topic of blight notices in discussions with Avison Young; and the Applicant is not aware of any persons with qualifying interests marketing their land for sale, which would be a necessary pre-cursor to making a blight claim.

4.7 **Meeting blight costs if a claim were upheld**

4.8 In the event that a blight claim made by the AP or another land owner was upheld by the Upper Tribunal, the cost of meeting this claim (and in so doing, acquiring the land) would be met in the same way in which all other development costs have been met to date. We refer to ExA to the letter from the Applicant dated 5 March 2021 in response to the Rule 17 Request of the ExA dated 3 March 2021 (document reference 7.9.52), which confirms that the Applicant is solvent and explains the nature of its funding arrangements and that the Directors of the Applicant have every confidence that financing will be available to address any blight claims which may be advanced.

4.9 Statement C refers to the Applicant's Funding Statement (REP6-021), which states that as of June 2020, the Applicant's investors had spent £35m on the project's development and had budgeted for a further £15m of development costs. Statement C points to the fact that the Funding Statement states that no blight claims are anticipated, and from this the AP deduces that liability for blight could not have been accounted for within the £15m of future costs, or that if this £15m were to be used to cover blight claims it would leave a hole in the funding of other matters.

4.10 As set out above, the Applicant has been advised by its professional advisers that it is extremely unlikely that blight claims would be made or be successful. For this reason, no budget for blight has expressly been made by investors within the current year's budget. However, all experienced investors are aware that development costs cannot be forecast

with complete accuracy, and therefore if it were necessary to acquire the AP's land early, via settlement of a blight claim, this is something which the investors would clearly be willing to fund as an essential project cost. As a matter of common sense, having invested £35m and budgeted and arranged for a further £15m in respect of a £1.3bn project it is fanciful to imagine that investors would not settle a relatively small claim of this nature, in respect of land which is essential to the project and would in any event need to have been acquired in due course.

4.11 Not all infrastructure projects requiring compulsory acquisition powers are promoted by commercial businesses which are making profits from existing assets and therefore have ready cash to settle blight claims. Many DCO projects, even those promoted by an established utility company, will be made in the name of a special purpose company which will not itself have cash on its balance sheet available to cover blight claims. We are not aware that the Secretary of State has refused to grant DCOs in such cases, or required guarantees in respect of blight (only compulsory acquisition costs). Equally, if the interpretation the AP seeks to put on paragraph 18 of the Guidance were correct, it would be impossible for private investors to provide early funding for projects which they intend ultimately to finance with debt and equity during the construction phase (as in this case), where there was a possibility of blight notices being served. This is plainly absurd. The Applicant's funding model is a common approach to project finance, and one which is essential to the development of UK, and indeed global, infrastructure.

4.12 **Correction**

4.13 For the record, the Applicant wishes to state that contrary to the statement at paragraph 3.3 of Statement C it is **not** common ground that the market value of the entirety of the AP's landholding is in excess of £2.1m.

5. RESPONSE TO STATEMENT D

5.1 With regard to Statement D, please refer to the letter from the Applicant dated 5 March 2021 in response to the Rule 17 Request of the ExA dated 3 March 2021 (document reference 7.9.52), which confirms that the Applicant is solvent, provides further information in relation to the Applicant's funding arrangements and its business and financing model and provides clarifications in respect of the Exemption request which has been misconstrued by representatives of the AP. A correct explanation of the balance sheet insolvency test is also provided therein.

5.2 The Applicant strongly rejects all points made in Statement D for the reasons set out in the letter from the Applicant dated 5 March 2021 in response to the Rule 17 Request of the ExA dated 3 March 2021 (document reference 7.9.52).

6. RESPONSE TO STATEMENT E

Description of Work No.1

6.1 Statement E seeks to assert that the Applicant and National Grid Electricity Transmission Plc ("National Grid") have sought to include within the description of the development at Schedule 1 to the draft DCO development which is not assessed with in the environmental statement submitted in support of the Application. The Applicant confirms this is not correct.

6.2 It is correct that the draft DCO submitted at Deadline 6 (REP6-015) included an amendment to the description of Work No.1 to include an additional limb which states "*extension of the existing substation, including site establishment, earthworks, civil and building works"*. This addition was made at the request of National Grid, who wanted to ensure the full scope of the works described in the environmental statement were reflected in the description of the development. This is because, in National Grid's view, the provision of the additional electrical infrastructure described in the Description of the Development (APP-118) and in Appendix 3.5 Additional Supporting Information for Onshore Works (APP-359) constitutes an extension to the existing substation, and further

National Grid were keen to ensure the ground levelling works (detailed at paragraph 1.1.2.8) were also more clearly provided for.

6.3 It is not correct to state, as the representatives on behalf of the AP have sought to do so, that the amendment is seeking to somehow introduce a new extension to the substation, or rather is seeking to provide permission anew for a previous extension to the substation. The extent of the "extension" remains that which is detailed in the environmental statement, being the provision of the eastern and western connection bays to facilitate the HVAC connection and the earthworks, civil and building works required for those.

6.4 As can be seen in the letter issued by WSP to National Grid dated 17 December 2020 which is located at Appendix 1 to the Deadline 6 Statement of Common Ground (REP6-051), there is no suggestion that any additional infrastructure or buildings to those shown in the ES are proposed. Specifically, it is confirmed that the assessments which have been undertaken are based upon the output of the Front End Engineering Design (FEED) study provided by National Grid in April 2019, and a National Grid Drawing with reference PDD-33585-LAY-001 is referred to in this regard. For information purposes only, a copy of this drawing is located at Appendix 1 to this submission. As can be seen on that drawing, the new equipment, shown in red, comprises the electrical equipment which are the connection bays to facilitate the HVAC connection.

6.5 Furthermore, as is clear from Table 1-1 of the 17 December 2020 letter – Inputs and approach to the AQUIND Environmental Statement – the extension works are confirmed for the purposes of the environmental statement to be those which are contained in FEED study plan (drawing number PDD-33585-LAY-001) and description at Section 1.1.2 of Additional Supporting Information for Onshore Works (ES Appendix 3.5). This is accepted by National Grid as evidencing that the works required to be delivered are those which have been assessed, as is evident from the agreement between the parties on the description of Work No.1 following the confirmatory audit in respect of Work No.1.

6.6 Noting the above, the Applicant confirms that the works comprised in Work No.1, as described in Schedule 1 to the draft DCO, are the works which have been assessed in the environmental statement, as is confirmed in Table 1-1 to the letter located at Appendix 1 of the Statement of Common Ground with National Grid submitted at Deadline 6 (REP6-051).

6.7 As the ExA will now be aware following the Deadline 8 submission, an additional paragraph has been added to Requirement 5 at Schedule 2 to the draft DCO which confirms that "*Any building or equipment comprised in Work No. 1 must not exceed a height of 15 metres above existing ground level and for the purposes of this sub-paragraph (1) of this requirement 'existing ground level' means 86 metres above ordnance datum*". The rationale for this inclusion is explained at paragraph 2.5 of the Applicant's Post-Hearing Notes submitted at Deadline 8 (REP8-057). It was also confirmed in updates made to the draft DCO at Deadline 8 for completeness that Work No.1 must be located within the area shown on the Works Plans (REP7-006) for Work No.1.

6.8 It is also acknowledged that the DCO may not permit works which are not within the scope of the environmental statement, and where any works which are not within the scope of the environmental statement were purported to be delivered pursuant to the DCO they would be unlawful.

Landscape and visual impact assessment of Work No.1

6.9 Within Statement E it is also submitted that because the assessment of landscape and visual impacts was undertaken on the basis that the National Grid Lovedean substation had planning permission to extend further west (separate to the extension/connection works which form part of the Proposed Development) and this formed part of the assessment of the future baseline, but that the planning permission referred to may now have lapsed, the assessment of landscape and visual impacts is somehow flawed because that separate development would not come forward as part of the future baseline.

6.10 In response, the LVIA is robust and did not rely on mitigation planting associated with the previously consented Lovedean Substation Extension in the assessment of visual effects.

6.11 To inform the LVIA, a review was undertaken of the planting proposals referred to in the Lovedean Substation Extension Vol 1: Environmental Report and supporting Design and Access Statement (2013) against the existing planting on-site, as observed on site visits carried out by the Applicant from 2017 onwards. This identified that:

6.11.1 existing trees planted in 1963 would be removed along the western boundary;

6.11.2 a 20m wide strip of native planting would be undertaken which would link with retained woodland to the north west of the existing substation and run around the northern and western perimeter of the substation extension;

6.11.3 a new hedgerow would be planted to the south of the substation extension;

6.11.4 part of the extension site would be planted as a wildflower meadow; and

6.11.5 a row of fastigiated tree species immediately adjacent to the substation extension to provide a faster growing screen than the other slower growing but longer lived native trees, which would be thinned and felled at a later date to allow space for the more naturalistic broader canopies of the other proposed tall growing species.

6.12 It was evident, following site visits in September 2017, March 2018, May 2018, October 2018, June and July 2019 (as referred to in Section 15.4.3 the LVIA APP-130), that planting both along the western and northern boundary had been undertaken, which it was understood had been undertaken following the grant of planning permission dated 6 August 2013 for the '*Extension of the existing substation to include additional electrical equipment - shunt reactor, static var compensator and super grid transformer*' (Application Ref. 13/01025/FUL).

6.13 As part of the assessment of the Converter Station for both Option B(i) and Option B(ii), the LVIA considered the loss of observed existing National Grid mitigation planting on the western boundary as part of its current baseline. This is because existing mitigation planting on National Grid land running north-south between the Converter Station Options (Options B(i) and B(ii)) and the existing Lovedean Substation will be lost as a consequence of re-profiling and the installation of HVAC.

6.14 This is evident in paragraph 1.3.1.27 of Appendix 15.8 Assessment of Landscape and Visual Effects (APP-406) which states that "***For both Options National Grid mitigation planting close to the Converter Station's eastern boundary would be lost*** *not just to accommodate the Converter Station Area but also in response to ESQCR Regulations*".

6.15 This is reflected on the indicative landscape mitigation plans which only show the northern and southern edge of National Grid mitigation planting - Figure 15.48 - Indicative Landscape Mitigation Plan Option B(i) (north) (REP8-17), Figure 15.49 - Indicative Landscape Mitigation Plan Option B(i) (south) (REP8-18) and 7.7.8 Indicative Landscape Mitigation Plan Option B(ii) WQ (REP8-52).

6.16 The LVIA therefore excluded the visual screening function of National Grid's observed mitigation planting from the conclusions associated with visual effects, on the basis that all planting along the western boundary of National Grid's land would be lost, and that other existing National Grid planting to the north and south may be changed based on future National Grid safety zone requirements.

6.17 This assessment formed the basis of the conclusion in relation to National Grid's mitigation planting at paragraph 15.8.4.25 of the LVIA (APP-130) in relation to residential receptors to the north west of the Converter Station, which states: "*Mitigation planting for Lovedean Substation extension should contribute a visual screening function, but as this is dependent on its maturity this assessment concludes that the effects would remain unchanged over time*".

6.18 In summary, no landscape screening benefit was assigned to the mitigation planting which it was identified may remain in situ, but which also may be lost, to ensure robust conclusions in respect of the screening function that may be offered by this.

6.19 For clarity with regard to the future baseline position, the Applicant also identifies paragraph 1.3.1.21 of Appendix 15.8 Assessment of Landscape and Visual Effects (APP-

406) which states "*For a future baseline it is assumed that landform on National Grid land would alter to accommodate the Lovedean Substation Extension.* ***Works would be concentrated within a localised area and whilst the extent of re-profiling may be slightly greater than the current baseline it would not alter the level of effect***", thereby identifying that the delivery/non-delivery of the separate substation extension as part of the future baseline does not alter the conclusions of the assessment.

7. RESPONSE TO STATEMENT F

7.1 Statement F is a note on planning obligations. The submissions on behalf of the AP are noted, however it is also identified that the issues regarding chronology raised therein have been addressed by the Applicant at Deadline 8.

7.2 This matter is fully explained in the Development Consent Obligations – Explanatory Note (REP8-043), and in summary the position is as follows:

7.2.1 Three development consent obligations have been submitted at Deadline 8 and included in Schedule 14 to the draft DCO as certified documents.

7.2.2 In respect of the development consent obligations with Hampshire County Council and South Downs National Park, the Applicant has agreed bilateral terms with those parties and separately agreements securing the entering into of those bilateral development consent obligations in the future were entered into on 3 March 2021 (copies of which are otherwise provided as part of the Applicant's submission at Deadline 9).

7.2.3 In respect of the development consent obligation with Portsmouth City Council, this is unilateral and therefore may be entered into by the Applicant alone.

7.2.4 A new Article 50 has been added to the draft DCO, drawing on the precedent approach taken in the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014, which requires the three certified forms of development consent obligation to be entered into before the authorised development may begin for the purposes of section 155(1) of the 2008 Act.

7.2.5 Article 8(4) of the draft DCO has been revised to confirm that, once the DCO is made, the undertaker shall be deemed to be a person interested in the Order land, and a new Article 8(b) is added to confirm the South Down National Park Authority shall be deemed to be a local planning authority in respect of the Order land for the purposes of the South Downs National Park Authority development consent obligation.

7.2.6 Accordingly, the SoS may take their decision with full confidence that the development consent obligations must be entered into, and therefore are secured, and that there is no impediment to those being entered into in the future when the necessary formalities of section 106 of the Town and County Planning Act 1990 will be complied with.

7.3 The Applicant also identifies with regard to holding a relevant interest in land now that there are only limited areas where freehold acquisition is proposed within the Order limits, and which any agreement in relation to could be utilised for the purpose of entering into a development consent obligation. An option to acquire an easement for a cable would not be a sufficient proprietary interest for the purposes of section 106 of 1990 Act. That land in the main is owned by the AP, who despite continued efforts it has not been possible to reach an agreement with to acquire the land required.

8. RESPONSE TO STATEMENT G

8.1 Statement G is a statement in relation to Change Request 2 submitted by the Applicant and is principally focused on alleging various procedural errors by the Applicant and the ExA in relation to that. In particular, representatives on behalf of the AP raise various points in relation to the Infrastructure Planning (Compulsory Acquisition) Regulations 2010 (the "**CA Regs**") and the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (the "**EIA Regs**"), and go so far as to the state that the Applicant has

purposefully misled the ExA, and that the ExA has fundamentally failed to ensure compliance with relevant procedures and to make rational evidence based decisions in relation to Change Request 2.

8.2 Having considered the content of Statement G, it is considered that the matters which it will be of most assistance to address in the limited time available are as follows:

8.2.1 In relation to the CA Regs:

(A) whether they allow for land outside the originally submitted Order limits to be "additional land"; and

(B) Procedural Compliance – the Applicant and the ExA;

8.2.2 Examining Authority's Procedural Decision; and

8.2.3 Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 – Regulation 20.

8.3 These matters are therefore addressed below.

Whether the CA Regs allow for land outside the originally submitted Order limits to be "additional land"

8.4 Section 123 of the 2008 Act details the land to which authorisation of compulsory acquisition can relate. Section 123(1) provides "*An order granting development consent may include provision authorising compulsory acquisition of land only if the Secretary of State is satisfied that **one** of the conditions in subsection (2) to (4) is met".*

8.5 Of relevance to the particular circumstances, section 123(4) provides *"The condition is that the prescribed procedure has been followed in relation to the land*". Therefore, where the prescribed procedure is followed in relation to land, an order granting development consent may include provision authorising the compulsory acquisition of that land.

8.6 The prescribed procedure referred to in section 123(4) is that which is provided by the CA Regs, with those regulations being made under section 123(4).

8.7 Regulation 4 of CA Regs sets out the prescribed produce for the compulsory acquisition of additional land, providing that:

> "*Regulations 5 to 19 prescribe the procedure for the purposes of the condition in subsection (4) of section 123 … and apply where:*
>
> *(a) it is proposed to include in an order granting development consent a provision authorising the compulsory acquisition of additional land; and*
>
> *(b) a person with an interest in the additional land does not consent to the inclusion of the provision.*"

8.8 The term "additional land" is defined for the purposes of the CA Regs at Regulation 12(1) as meaning "*land which it is proposed shall be subject to compulsory acquisition and which was not identified in the book of reference submitted with the application as land*".

8.9 The term Book of Reference is defined at Regulation 2(1) to mean "*the book described in regulation 7 (meaning of "book of reference") of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009*".

8.10 Regulation 7 of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 is defined by reference to section 57 of the 2008 Act, with Parts 1 and 2 of a Book of Reference being required to include the names and addresses for service of persons within the categories provided for within section 57 of the 2008 Act.

8.11 Section 57 of the 2008 Act provides that persons are within Category 1 and Category 2 if the applicant after making diligent inquiry knows that the person is an owner, lessee, tenant (whatever the tenancy period) or occupier of the land, or is interested in or has powers to sell and convey or release the land. Section 57(7) of the 2008 Act identifies that "*In this section "the land" means the land to which the application relates or any part of that land*".

8.12 Accordingly, all land that is within the Order limits for an application must be included in the Book of Reference, as was the case for the Application, and the term additional land in accordance with Regulation 2(1) of CA Regs means land not identified in the book of reference. Such land therefore may be land which is outside of the original Order limits, as it is not identified in the book of reference. There is nothing in the CA Regs, or other legislation or common law, which the Applicant is aware of which provides that land not within the original Order limits cannot be authorised for compulsory acquisition where the test at section 123 of the Planning Act 2008 are satisfied.

8.13 For the avoidance of doubt, it is also confirmed that the land to which Change Request 2 relates was not included in the Book of Reference before Change Request 2, and therefore that land is clearly "additional land" for the purposes of the CA Regs.

Procedural Compliance – the Applicant and the ExA

8.14 The ExA proposed provision checklist is document reference AS-028.

8.15 **Regulation 5** details the information which an applicant must send to the Secretary of State in relation to a proposed provision. This must be in the form of a book of reference or, where a book of reference has been submitted to the Secretary of State, a supplement to that book of reference. The supplement to the book of reference for Change Request 2 is document reference AS-053.

8.16 The proposed provision must also be accompanied by:

8.16.1 a plan identifying the land required as additional land, or affected by the proposed provision; and

8.16.2 a statement of reasons as to why the additional land is required and a statement to indicate how an order that contains the authorisation of the compulsory acquisition of the additional land is proposed to be funded.

8.17 As identified in AS-028, the statement submitted by the Applicant accompanying the submission included plans showing the proposed changes to the Order limits, a statement of reasons as to why the rights over the Additional Land are required to be acquired in connection with the Proposed Development, and a statement to indicate how the Proposed Development, included the acquisition of the additional land, is to be funded. That information was included in document reference AS-051 (Letter to the Examining Authority (Change Request 2)).

8.18 Accordingly, and is detailed in AS-028, the information provided was sufficient to satisfy the requirements of Regulation 5 of the CA Regs and therefore Regulation 5 has been complied with.

8.19 **Regulation 6** of CA Regs relates to the acceptance of a proposed provision, and provides that the Secretary of State must by the end of the period of 28 days beginning with the day after the day on which it receives details of the proposed provision, decide whether or not to accept the proposed provision as part of the application. The Secretary of State may only accept a proposed provision if the Secretary of State is satisfied it complies with the requirements of Regulation 5, which it is confirmed Change Request 2 did. The ExA accepted the proposed provision on 11 January 2020, as detailed in PD-026 and PD-025. Accordingly, Regulation 6 has been complied with.

8.20 **Regulation 7** contains provisions in relation to the notices which the Applicant must give to the prescribed persons and **Regulation 8** provides the duty for the Applicant to publicise the proposed provision in the specified manner. The Applicant issued the required notice and publicised the proposed provision in accordance with Regulation 7 and 8. Further information regarding compliance with Regulations 7 and 8 is provided in the table included at section 4.5 of the Applicant's Post Hearing Notes (REP8-057).

8.21 Having complied with Regulations 7 and 8, **Regulation 9** provides that an applicant must within the period of 10 working days immediately following the deadline set under regulation 7(2) send to the Secretary of State a notice in the form set out in Schedule 3 of the persons who the Applicant knows is interested in the additional and the certificate of

compliance in the form set out in Schedule 4 to the CA Regs. Both of the notices are included within document OD-009, issued on 29 January 2021. The deadline set under regulation 7(2) was 28 January 2021. Regulation 9 has therefore been complied with.

8.22 **Regulation 10** contains information in relation representations made in response to a notice under Regulation 7(1). All such representations received by the ExA by not later than 28 January 2021 have been treated as relevant representations, including the relevant representation of the AP received on 25 January 2021.

8.23 **Regulation 11** relates to the initial assessment of issues to be undertaken by the ExA. Regulation 11(1) provides that "*The Examining authority must make an initial assessment of the issues arising in connection with the proposed provision within 21 days of the deadline specified in the notice under regulation 7(2)*".

8.24 The initial assessment of issues is contained in the ExA's letter to all Interested Parties dated 11 January 2021 (which dealt with both Change Request 1 and 2) at Annex C (PD-032). Within that initial assessment of issues the ExA confirmed that they *"have made the Procedural Decision not to hold meetings to discuss how the proposed provisions should be examined (Reg 11(2))*", as they are entitled to do so in accordance with Regulation 11(2), which confirms after making the initial assessment the ExA **may** hold a meeting to discuss how a proposed provision should be examined.

8.25 That the ExA may choose to do also means that they may choose to not do so. Where the ExA do not choose to hold such a meeting, the remainder of Regulation 11 is not engaged. There are no issues of compliance with Regulation 11 of CA Regs in relation to Change Request 2.

8.26 **Regulation 12** of the CA Regs relates to the meeting to be held to discuss how a proposed provision may be examined. Regulation 12(1) states "*At the meeting referred to in regulation 11 if one is held, or as soon as practicable after the end of that meeting, the Examining authority must set the timetable for its examination of the proposed provision…*". As is evident, in the circumstances the ExA made the procedural decision, following undertaking of the initial assessment of issues, not to hold that meeting. Where no such meeting is held, Regulation 12 is not engaged, as is the case in respect of Change Request 2.

8.27 **Regulation 13**(1) provides that "*An additional affected person, additional interested party, or interested party must ensure that any written representation that party may wish to make about the proposed provision is received by the Examining authority by the date specified in the timetable set under regulation 12, or otherwise under this rule, by the Examining authority*".

8.28 Regulation 13(2) provides that *"The Examining authority **may** at any time specify the date (being a date not earlier than the end of a period of 21 days) by which a written representation to be submitted from the applicant or an additional affected person must be received by the Examining authority*". Again, the word may is used providing the ExA with discretion as to whether to request written representations. It therefore is optional, and the ExA may also choose not to do so. There is no absolute requirement for written representation to be required to be submitted. That the ExA did not request written representations is not a matter of non-compliance.

8.29 **Regulation 14** relates to any issue specific hearing which may be required in relation to a proposed provision. No issue specific hearing was required in relation to Change Request 2, and therefore Regulation 14 is not engaged in the circumstances.

8.30 **Regulation 15** relates to the notice required for a compulsory acquisition hearing in relation to the proposed provision in respect of the additional land. Regulation 15(4) provides that:

> "*Except as mentioned in paragraph (3), the Examining authority must ensure that at least 21 days' notice is given by it of any hearing to each additional affected person and each affected person*."

8.31 The ExA issued notice of Compulsory Acquisition Hearing 3 on 11 January 2021 (PD-032), which included a request for qualifying Interested Parties or Affected Persons to be heard at Open Floor Hearing 3 and Compulsory Acquisition Hearing 3, together with a summary of the topics to be raised, to be received before Deadline 7b, which was Monday 1 February 2021. This deadline was 21 days following the issue of the letter on 11 January 2021

8.32 In that same letter the ExA confirmed that the hearing date of Friday 19 February 2021 had been reserved for both of Open Floor Hearing 3 and Compulsory Acquisition Hearing 3, and these would both take place virtually online. Annex B to PD-032 is the notice of those hearings, together with the request to appear and procedure to be followed. In effect, the ExA provided notice to each additional affected person on 11 January 2021, 39 days in advance of Open Floor hearing 3 and Compulsory Acquisition Hearing 3. Accordingly, at least 21 days' notice of the hearing was given by the ExA and Regulation 15(4) of the CA Regs has therefore been complied with.

8.33 It is also noted that the AP and representatives on their behalf did attend both Open Floor Hearing 3 and Compulsory Acquisition Hearing 3, and at both of those provided submissions in relation to Change Request 2, having provided notification of their wish to be heard having received the invitation to that hearing and having provided their relevant representation on this matter.

8.34 **Regulation 16** relates to the notice required for a compulsory acquisition hearing in relation to the proposed provision in respect of the additional land. Regulation 16(4) provides that:

> "*Except as mentioned in paragraph (3), the Examining authority must ensure that at least 21 days' notice is given of any hearing to each additional affected person, each additional interested party, and each interested party.*"

8.35 The notice of the open floor hearing was included in the notice issued on 11 January 2021 (PD-032) as set out above. Therefore the position with regard to compliance is the same.

8.36 **Regulation 17** relates to the availability and inspection of documents, providing that representations or documents must be made available by the Secretary of State, and that a representation or document shall be taken to be available where additional affected persons, additional interested parties and interested parties are notified of:

- 8.36.1 publication of the representation or document on a website;
- 8.36.2 the address of the website;
- 8.36.3 the place on the website where the representation or document may be accessed, and how it may be accessed;
- 8.36.4 details of where and when copies of representations or documents may be inspected;
- 8.36.5 details of where and when representations or documents may be copied; and
- 8.36.6 whether a charge will be made for copying any of the documents available for inspection and, if so, the amount of any charge.

8.37 All documentation has been made available on the project webpage on the Planning Inspectorates website and all persons have been notified of their availability on that website, and that copies can be obtained from the website. Regulation 17 has therefore been complied with.

8.38 **Regulation 18** provides requirements in relation to the service of notices, and it is understood the ExA has issued notices as permitted by and in accordance with Regulation 18.

8.39 **Regulation 19** allows for the Secretary of State or ExA to allow further time for the taking of any step which must or may be taken by virtue of these Regulations. This is not a matter which is relevant for the purpose of confirming compliance for Change Request 2.

8.40 Accordingly, it is apparent to the Applicant from reviewing the processes followed in relation to Change Request 2 that the procedure prescribed by Regulations 5 to 19 of the CA Regs has been complied with, and therefore in accordance with section 123(4) of the 2008 Act, the Order for the Proposed Development may include provision authorising the compulsory acquisition of the additional land which is the subject of Change Request 2 (and furthermore Change Request 1).

8.41 Therefore, contrary to the statement made at paragraph 27 of Statement G, the prescribed procedure has been followed in accordance with the individual regulations of the CA Regs, and no prejudice has arisen to the Affected Party in this regard, noting the AP has been involved in all of the processes which have been correctly followed, has participated in both of the open floor hearing and compulsory acquisition hearing in relation to Change Request 2, and has indeed made copious submissions on the matter and therefore evidently had ample opportunity to raise any matters that it wishes to in relation to Change Request 2 for the consideration of the ExA.

Examining Authority's Procedural Decision

8.42 Paragraph 66 of Statement G alleges that the ExA incorrectly considered the implications of Change Request 2 for the outcome of the environmental impact assessment when determining the materiality of the changes. This on the basis of the following statements made in the ExA's procedural decision of 18 December 2020 (PD-027):

> "*In Chapter 4 of its statement, the Applicant summarises the implications of the proposed changes for the outcome of the environmental impact assessment of the Proposed Development, as presented in the Environmental Statement ([APP-116] to [APP-145]) and the Environmental Statement Addendum [REP1-139]. In brief, in the Applicant's view, the proposed changes to the Order limits do not worsen the outcome of the assessment and, from a few receptors, the predicted visual effects of the proposed Converter Station will be reduced against a new future baseline that has been set by the Applicant due to the accelerated progress of ash die-back disease in the area.*"

> "*The Applicant's submission in relation to the environmental impact assessment concludes that the proposed changes do not generate new or different likely significant effects, though, in a few instances, they are predicted to result in a slight reduction in the scale of adverse visual effects compared to the future baseline that might exist following the progression of ash die-back disease. We concur with this approach and view and are content that the environmental impact assessment's conclusions around significance of effects would remain the same...*"

> "*We agree with the Applicant that the proposed changes do not materially alter the original application and that the development now being proposed remains in substance that which was originally applied for. We are therefore satisfied that the proposed changes would not amount to a different project being proposed.*"

8.43 It is important to note that, as is confirmed in the first paragraph of the section entitled "*The Examining Authority's reasoning and decision*", the ExA's comments in the procedural decision (PD-027) stated above are in relation to their consideration of the materiality of the changes, and moreover whether the proposed changes materially alter the original application or amount to a different project being proposed. This is the context in which those paragraphs must be read.

8.44 The Applicant does not agree with the AP's characterisation of the procedural decision or that the ExA incorrectly considered the implications of Change Request 2 when considering whether the proposed changes would materially alter the original application. The reasons for this are as follows:

8.44.1 It is entirely correct that the proposed changes to the Order limits do not worsen the outcome of the assessment. In this regard it is important to note that the proposed changes are the addition of the areas of woodland to the Order limits. The addition of those areas of woodland to the order limits do not worsen the outcome of the assessment (i.e. their addition does not have an adverse impact). Rather, the limited changes identified in terms of the assessment are identified because of the presence of Ash Dieback and how this has progressed over the year or so since the Application was submitted, and which is beyond the control of the Applicant.

8.44.2 Further, the reasons for including the additional areas of woodland in the order limits is so that they can be managed so as to improve the visual screening function of the existing woodlands in the vicinity of the Converter Station. Therefore where they are included, it is correct that the predicted visual effects of the proposed Converter Station will be reduced against a new future baseline that has been set by the Applicant due to the accelerated progress of ash die-back disease in the area. The ExA very clearly understood the proposed changes and the implications of them in terms of materiality when making this statement.

8.44.3 It is also therefore correct that the Applicant's submission in relation to the environmental impact assessment concludes that the proposed changes do not generate new or different likely significant effects, though, in a few instances, they are predicted to result in a slight reduction in the scale of adverse visual effects compared to the future baseline that might exist following the progression of ash die-back disease.

8.44.4 Information in the above regard is included at section 5.4.2 of the statement in support of the request to change the Order limits (AS-054) which clearly states at paragraph 5.4.2.1 that the Applicant's team do not consider the proposed changes generate new or different likely significant environmental effects. The Applicant goes in paragraph 5.4.2.2 to confirm a likely significant effect previously identified that will be more adverse, but further then confirms in paragraph 5.4.2.3 that "*It is important for the ExA to note, however, that this change in impact is not a result of the Proposed Changes, but rather the result of ash dieback (as now better understood by the Applicant) notwithstanding the beneficial impact of Proposed Changes 1 and 2, which are designed to minimise the impact of this disease in LVIA terms*".

8.44.5 Paragraph 5.4.2.5 of the statement in support of the request to change the Order limits (AS-054) then concludes "*Accordingly, the changes to the Order limits and rights sought do not generate new or different likely significant environmental effects, they simply avoid the occurrence of worse landscape and visual effects than those set out in the original ES (due to ash dieback changing the future baseline from that set out in the original ES). It is considered that this supports the position put forward by the Applicant that from a perspective of the assessment of environmental effects, the Proposed Changes are not material.*"

8.45 Noting the above it is very clear to the Applicant that having considered the information submitted by the Applicant, and having in summary provided the reasoning for the purposes of determining whether the changes sought are material, the ExA has correctly summarised that information and has correctly taken it into account when determining that the proposed changes do not materially alter the original application and that the development now being proposed remains in substance that which was originally applied for.

Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 – Regulation 20

8.46 The submissions made by representatives on behalf of the AP are not correct. As the Applicant has set out, there is no specified procedure for the submission of and

consultation on further environmental information submitted by an Applicant without request from the ExA within the EIA Regs.

8.47 Regulation 20 of the EIA Regs does provide a procedure where the Examining authority is of the view that it is necessary for the statement to contain further information, but that procedure is not engaged in the circumstances because the ExA has not issued any written statement to that effect. This is discussed further below in the response to Statement J.

8.48 Further, it is not correct as representatives of the AP contend at paragraph 48 of Statement J that the submission of environmental information by the Applicant triggers Regulation 20(2)(a), or that this in turn triggers the need for the ExA to form a view under Regulation 20(2)(b) as to whether it is necessary for the environmental statement to contain 'further information'.

8.49 Regulation 20(2) in essence provides that where an environmental statement has been submitted, and following the submission and review of that the ExA are of the view that it is necessary for that statement to contain further information, i.e. "*additional information which, in the view of the Examining authority, the Secretary of State or the relevant authority, is directly relevant to reaching a reasoned conclusion on the significant effects of the development on the environment and which it is necessary to include in an environmental statement or updated environmental statement in order for it to satisfy the requirements of regulation 14(2)*", Regulation 20(1) will be engaged.

8.50 There is nothing in Regulation 20(2) which requires the ExA to follow the procedure set out in Regulation 20(1) where other information is submitted by an applicant during an examination. Of course, the ExA may review the information submitted by the Applicant and determine whether it is of the view in respect of that information that it is necessary for it to contain further information, and indeed it is incumbent on them in their role of the ExA to review the information submitted on this basis, but given no such request has been made in accordance with Regulation 20(1) it is understood the ExA did not consider further information was necessary to be contained in the environmental statement.

8.51 Regulation 20 is clearly not engaged in the circumstances, and therefore it is not the case the necessary relevant procedures provided for by the EIA Regs have not been complied with in relation to the submission of the ES Addendum's by the Applicant.

8.52 It is of course necessary for the ExA to more broadly consider procedural fairness issues in relation to the submission of information throughout an Examination, and the Applicant has provided its views on matters relating to procedural fairness throughout the course of the Examination where relevant to do so.

9. RESPONSE TO STATEMENT H

9.1 The submissions within Statement H contend that the Applicant has misapplied the Planning Act 2008 Guidance related to procedure for the compulsory acquisition of land in its approach to the consideration of alternatives and not properly considered the alternatives advanced by it (Sections A and C of Statement H), that on funding grounds the powers of compulsory acquisition should be removed from the DCO (Section B of Statement H), that the Applicant has "no legal answer" to the AP's submissions on the inclusion of the commercial telecommunications element of the Proposed Development (Section D of Statement H) and that the Applicant has not re-assessed the impacts of the Proposed Development on the AP's residential properties taking into account the effects of Ash Die Back and a realistic worst case baseline and did not take account of the AP's alternative proposal that they would manage Stoneacre Copse against the impact of the disease (Section E and Appendix 1 of Statement H).

Sections A and C - Alternatives

9.2 In Section A of the Submissions, the AP seeks to argue that the Applicant has sought to place the onus of demonstrating that there are alternatives to the Applicant's proposed compulsory acquisition of land and rights on the AP. That is a mischaracterisation of the Applicant's position. In accordance with paragraph 7 of the Applicant has justified and

defended its proposals throughout the examination. It has demonstrated why none of the AP's alternative proposals are reasonable alternatives and, in consequence why they are not important or relevant matters for the Secretary of State to take into account. The Applicant's position in this respect is summarised at paragraphs 2.3-2.15 above.

Section B - Funding

9.3 In Section B of the AP's submissions it persists with its contention that the Guidance requires an applicant for a DCO including powers of compulsory acquisition to demonstrate that during the Examination period, it has existing funds or has secured funds for the acquisitions and project implementation. The AP also mischaracterises the funding evidence before the Examination. The Applicant has explained the proper construction of the Guidance and what it requires in Section 3 of its response to the AP's Deadline 7c submissions (REP8-065).

9.4 As to the funding for the Project, the Applicant has set out in the updated Funding Statement (REP6-021), the Applicant's response to the further written question of the ExA with reference CA2.3.2, submitted at Deadline 7 (REP7-038), Appendix B of the Applicants Responses to Deadline 6 Submissions- Hearing Appendices (REP7-075) and Applicant's response to Deadline 7 and 7a Submissions on Behalf of Mr Geoffrey Carpenter and Mr Peter Carpenter at Deadline 7 (REP7c-014) the basis on which it is expected regulatory status will be obtained and project financing secured, and the Applicant has clearly demonstrated the rational basis upon which it has properly concluded that there is a reasonable prospect of the requisite funds becoming available within the statutory period. There is therefore no proper basis for the AP's contention that without funds already being secured powers of compulsory acquisition may not be included in a DCO.

Section D – Commercial Telecommunications

9.5 The Applicant has set out its clear legal answer to the submissions made by the AP at Deadline 7c as to why the DCO as applied for may lawfully be made under the Planning Act 2008 (REP8-065). There is nothing it needs to add.

Section E and Appendix 1 Stoneacre Copse

9.6 The AP argues variously that the AP's residential properties were not included in the re-assessment of visual effects having regard to the effects of Ash Die Back (paragraphs 11-18, 24), that it proposed an alternative to the Applicant's proposed acquisition, namely that they would manage Stoneacre Copse against Ash Die Back itself (paragraph 23); that the ES and LVIA were prepared without recognition of Ash Die Back and, in consequence they relied on a flawed baseline (paragraph 26). It further argues that the revision of the description to Work No.1 and its reference to an extension to the existing substation, further casts doubt on the robustness of the ES and LVIA (paragraph 37-42) and compliance with the EIA Regs (paragraphs 26).

9.7 The Applicant has demonstrated the need for the inclusion of Stoneacre Copse within the Order limits and the landscaping rights which it seeks to acquire over it. There appears to be no dispute from the AP that if the DCO is made, it will be necessary for Stoneacre Copse to be managed as proposed in order acceptably to mitigate the effects of the Proposed Development. The extension of the Order limits to include these woodlands allows areas of additional screening planting (suitable non-ash native species) to be planted; and management of the decline of ash trees and replacement planting within the woodland blocks. The New Landscaping Rights are required to ensure that essential mitigation is provided.

9.8 The Applicant has, notwithstanding considerable efforts on its part, not been able to secure by voluntary agreement in respect of any of the AP's land or rights over that land which are essential if the Project is to proceed. In consequence, it is essential that the New Landscaping Rights are included within the DCO. The AP's suggestion that there is an alternative, namely their self-management of Stoneacre Copse, is not a reasonable alternative as it is not secured and there can be no guarantee that it would deliver the necessary mitigation. It would therefore create an impediment to the Proposed Development proceeding. Notwithstanding this, engagement with the landowners will

continue with a view to securing acquisition of the necessary rights by agreement if possible.

9.9 Contrary to the assertions made by the AP, the potential effects of Ash Die Back have been assessed, however, the progression of the disease is not possible to estimate with any certainty and the results of the 2020 Ash Die Back survey confirmed that its progression had been greater than originally assumed. For that reason, the ES Addendum 2 undertook a re-assessment of the future baseline taking account of the extent of Ash Die Back as now known. That re-assessment was a proportionate one, assessing the effects on those receptors which were likely to experience a difference in magnitude of effect as a result of the revised baseline.

9.10 In respect of the exclusion of the AP's property in relation to Ash Dieback, the Applicant's response is covered in Table 3.5 of the Applicant's Response to Deadline 7 and 7a Submissions (REP7c-012) which states:

"With specific reference to the exclusion of the Carpenter's properties, properties 10 and 12 were not considered as part of the ash dieback assessment. The LVIA concluded that receptors at No 12 would have a direct open view across to the Converter Station, whilst receptors at No 10 would experience a direct view from their rear dormer window and balcony as referred to in Appendix 15.6 Visual Amenity (APP-404) and explained further in paragraph 1.4.2.23 Appendix 15.8 Assessment of Landscape and Visual Effects (APP-406). Whilst the presence of Stoneacre Copse would be noticeable in part of the view, the majority of the view would be of the Converter Station and Access Road. As referred to in Tables 15.11 of the LVIA (APP-130), the assessment concluded that there would be Major adverse effects on visual receptors during construction associated with No 10, 11, 12 and 13. At year 0 there would be Moderate-major to Major adverse effects on No 10 and Major on No 12. Over time proposed mitigation planting would provide visual screening in the foreground in the form of woodland and hedgerow planting, however due to the nature of the change of the view (altering the composition and depth) the LVIA judged that the effects experience by receptors of No 12 would be Moderate-major neutral in year 10 and 20. For receptors of No 10 effects would diminish to Minor-moderate significant at year 10 and Minor-moderate (not significant) by year 20. The presence of ash dieback and its continued impact on Stoneacre Copse would not alter the magnitude of impact or significance of effects on properties 10 and 12.

9.11 There is therefore no inadequacy in the assessment of the landscape visual impacts of the Proposed Development and the information available allows the ExA and the Secretary of State as well as all other parties, to assess the likely significant effects of the Proposed Development as required by the EIA Regulations.

9.12 As to the substation extension, it is not correct to state, as the representatives on behalf of the AP have sought to do so, that the amendment is seeking to somehow introduce a new extension to the substation, or rather is seeking to provide permission anew for a previous extension to the substation. The extent of the "extension" remains that which is detailed in the environmental statement, being the provision of the eastern and western connection bays to facilitate the HVAC connection and the earthworks, civil and building works required for those (see the response to Statement E in section 6 above).

9.13 The Applicant confirms that the works comprised in Work No.1, as described in Schedule 1 to the draft DCO, are the works which have been assessed in the environmental statement, as is confirmed in Table 1-1 to the letter located at Appendix 1 of the Statement of Common Ground with National Grid submitted at Deadline 6 (REP6-051).

9.14 As the ExA will now be aware following the Deadline 8 submission, an additional paragraph has been added to Requirement 5 at Schedule 2 to the draft DCO which confirms that "*Any building or equipment comprised in Work No. 1 must not exceed a height of 15 metres above existing ground level and for the purposes of this sub-paragraph (1) of this requirement 'existing ground level' means 86 metres above ordnance datum*". The rationale for this inclusion is explained at paragraph 2.5 of the Applicant's Post-Hearing Notes submitted at Deadline 8 (REP8-057). It was also confirmed in updates made to the

draft DCO at Deadline 8 for completeness that Work No.1 must be located within the area shown on the Works Plans (REP7-005) for Work No.1.

9.15 There is therefore no Rochdale envelope issue and no issue with compliance with the EIA Regs.

10. RESPONSE TO STATEMENT I

10.1 The AP's revised Version of Applicant's Funding Statement Rev 004 asserts that the Applicant's Funding Statement (REP6-021) does not accord with paragraph 17 of the Guidance in not referring to the importance of the making of the DCO and the securing of a relevant Exemption for the funding of the Proposed Development. This is said to be "a clear breach" of paragraph 17 of the Guidance (Statement I paragraphs 10). The AP further contends that paragraph 17 of the Guidance was breached in that the Applicant has not produced evidence of actual funds or ensured funds becoming available or a statement the Applicant lacks any funds to deliver the Proposed Development including its acquisitions (also Statement I paragraph 10).

10.2 These criticisms are not accepted. The Applicant's Funding Statement complies with the requirements of paragraph 17 of the Guidance by providing as much information as possible about the resource implications of both acquiring the land and implementing the project for which the land is required. It has demonstrated that adequate funding is likely to be available within the statutory period following the order being made as required by paragraph 18. Further, the importance of the settlement of regulatory status is expressly referred to in the Funding Statement. Paragraph 6.10 of the Funding Statement states in terms that:

> *"Financing of the Project is therefore to be subject to grant of the development consent order and the settlement or regulatory status of the Project".*

10.3 Paragraph 8.1 of the Funding Statement expressly acknowledges that securing the regulatory status is required to enable the Project "to operate in the UK and in France", thereby explaining the importance of regulatory status to the future funding and delivery of the Project.

10.4 In short, the Applicant made it quite clear in the Funding Statement that funding was contingent on the making of the DCO and securing regulatory status. To the extent that the AP contends that this has not been stated by the Applicant (Statement I paragraph 20) it is simply wrong. Further, the Funding Statement is consistent with the Applicant's evidence in support of its Exemption request and the Applicant saw no need to burden the Funding Statement with further text to the same effect. What is important for the purposes of the Secretary of State's decision is that there is at least a reasonable prospect of the Project securing an exemption through one of the two routes addressed at Paragraph 8 of the Funding Statement.

10.5 The AP is also wrong in claiming that the Applicant did not include the capital costs of construction in the Funding Statement (Statement I paragraph 12). The estimated capital costs are indeed set out at paragraph 5.5 of the Funding Statement. Further, the Funding Statement makes it clear that the Applicant has secured sufficient funding to support the Project until the completion of the development stage i.e. the obtaining of all necessary permissions and authorisations (paragraph 6.1) and that post the development stage, the Project is to be funded through project finance secured against the operational profits (revenues) of the Project. The Applicant has confirmed, to the extent that any confirmation was necessary, that the costs associated with compulsory acquisition would be secured following the making of the DCO (see REP5-034). The criticisms of the Funding Statement are, in consequence, wholly unjustified.

10.6 The AP also persists in its attempt to imply that funding is contingent on the commercial telecommunications element of the Project (Statement I paragraph 20(c). As the Applicant has explained on numerous occasions that is simply wrong.

10.7 Finally, for the reasons set out in the Applicant's response to the AP's Deadline 7c submissions (REP8-065) (in particular paragraph 3.8 of that document), the AP is wrong to

argue that the Funding Statement is inadequate in not identifying "*actual*" or "*ensured*" funds. That argument is based on a misreading and misapplication of the Guidance as previously explained.

10.8 Read fairly and in context, the Funding Statement follows the Guidance and criticism of it is unjustified. The additions which the AP has suggested add nothing of substance and the Applicant rejects, in particular, the AP's suggested land acquisition costs for its land which has no evidential or proper valuation basis.

11. RESPONSE TO STATEMENT J

Company Solvency

11.1 As is very clearly explained in the letter from the Applicant dated 5 March 2021 in response to the Rule 17 Request of the ExA dated 3 March 2021 (document reference: 7.9.52), the Applicant is a solvent company and there is no sound basis on which to assert otherwise.

Blight

11.2 The Applicant's position regarding blight, in particular that:

11.2.1 there is not any "live compensation liability in relation to blight";

11.2.2 the Applicant did consider the resource implications of blight notices and continues to be of the view that any blight claims are unlikely; and

11.2.3 if it were necessary to acquire the AP's land early, via settlement of a blight claim, this is something which the investors would clearly be willing to fund as an essential project cost,

is more fully detailed in the response to Statement C at section 4 of this response. Document.

11.3 There is therefore no basis on which to state the Applicant is insolvent, or that any blight claim where made would result in the Applicant being insolvent, and therefore no basis on which to seek an award of costs based on those assertions.

Compliance with the EIA Regulations

11.4 The Affected Party at paragraph 4 of Statement J alleges that the Secretary of State is barred by Regulation 4(2) of the Infrastructure Planning (Environmental Impact Assessment) Regulation 2017 (the "**EIA Regs**") from granting development consent because of a failure by the Applicant to provide a certificate pursuant to regulation 20(3) of the same regulations in relation to the submission of further environmental information during the course of the Examination.

11.5 Regulation 4(2) provides that "*Where this regulation applies, the Secretary of State or relevant authority (as the case may be) must not (in the case of the Secretary of State) make an order granting development consent or (in the case of the relevant authority) grant subsequent consent unless an EIA has been carried out in respect of that application*". The regulation applies to applications for an order granting development consent for EIA development received by the Secretary of State, which the Application is. An EIA has been carried out in respect of the Application.

11.6 Regulation 20 of the EIA Regs is entitled "*Accepted application – effect of environmental statement being inadequate*". Regulation 20(1) provides as follows:

> "*Where an Examining authority is examining an application for an order granting development consent and paragraph (2) applies, the Examining authority must—*
>
> *(a) issue a written statement giving clearly and precisely the reasons for its conclusion;*
>
> *(b) send a copy of that written statement to the applicant; and*
>
> *(c) suspend consideration of the application until the requirements of paragraph (3) and, where appropriate, paragraph (4) are satisfied.*"

11.7 Regulation 20(2) states:

> "*This paragraph applies if—*
>
> *(a) the applicant has submitted a statement that the applicant refers to as an environmental statement; and*
>
> *(b) the Examining authority is of the view that it is necessary for the statement to contain further information.*"

11.8 As has been explained above, at no point during the Examination has the ExA issued any written statement that it is of the view that it is necessary for the environmental statement submitted in support of the Application to contain further information.

11.9 Regulation 20 of the EIA Regs has at no stage been engaged in relation to the Application and the examination of it. Accordingly, there has not at any time during the Examination been any requirement for the Examination to be suspended or for the Applicant to comply with the requirements of Regulation 20(3) or to provide any certificate evidencing compliance with the notification requirements provided for by Regulation 20(3).

11.10 The assertion of the representatives of the AP that this procedure should have been complied with and has not been is therefore without any foundation in law. Furthermore, at no point has the Applicant misled the ExA in relation to the procedures that need to be followed in respect of the submission of environmental information during the course of the Examination.

11.11 It is also understood that the ExA will ultimately be reliant on its own legal advice for the purpose of ensuring regulatory compliance throughout an examination of an application for an order granting development consent, rather than relying solely on the submissions of an applicant.

11.12 Taking the above into account, the ExA has an EIA for the Application, including the information submitted over the course of the Examination, and it is fully expected that the ExA and the Secretary of State will consider that information for the purposes of the recommendation and the decision. Clearly then Regulation 4(2) provides no bar to the making an order granting development consent in respect of the Application.

Compliance with the Infrastructure Planning (Compulsory Acquisition) Regulations 2010

11.13 For reference, paragraph 4.5 of the Applicant's Post Hearing Notes (REP8-057) provides information regarding procedural compliance in relation to Change Request 1 and Change Request 2.

11.14 The position with regard to compliance with the CA Regs is otherwise clearly explained at paragraph 8.14 to 8.41 of this response.

11.15 Noting those submissions, it is not considered there has been any non-compliance with the relevant engaged provisions of the CA Regs, and therefore contrary to the assertions of the representatives of the AP otherwise there is not any procedural reason why powers of compulsory acquisition may not be granted over the land which Change Request 2 relates to where the Secretary of State is satisfied it is appropriate to do so in accordance with Regulation 122 of the 2008 Act.

Section 106 – Person Interested in Land

11.16 The Applicant has submitted an explanatory note entitled "Development Consent Obligations – Explanatory Note" at Deadline (REP8-043) together with three development consent obligations (REP8-040, REP8-041 and REP8-042). The explanatory note explains the approach that is to be taken to securing the entering into of the development consent obligations at the time when the Applicant is deemed to have the necessary interest in land and prior to the authorised development beginning for the purposes of section 155(1) of the 2008 Act. This matter has therefore been addressed by the Applicant prior to the end of the Examination, and adequately provided for within the final draft DCO submitted by the Applicant.

Failure to negotiate

11.17 The representatives on behalf of the AP also assert that the Applicant has failed to negotiate the acquisition of land interest from the AP, and that this is a reason on which costs may be awarded. The Applicant would identify in response that it has negotiated, and continues to negotiate, with the AP to acquire the land required for the Proposed Development. Information regarding the Applicant's attempts to negotiate with the AP to acquire the land required for and to facilitate the Proposed Development is provided at paragraphs 2.7 – 2.15 of the Applicant's response to the submissions on behalf of the AP at Deadline 7 (REP7c-014).

Conclusion

11.18 Noting the above, it is not the actions of the Applicant that have resulted in the AP incurring wasted costs in relation to the Application, and further as is confirmed in the letter from the Applicant submitted at Deadline 9 (document reference 7.9.52) the Applicant is a solvent company and there is no basis for any award of costs on the basis that the Applicant is insolvent.

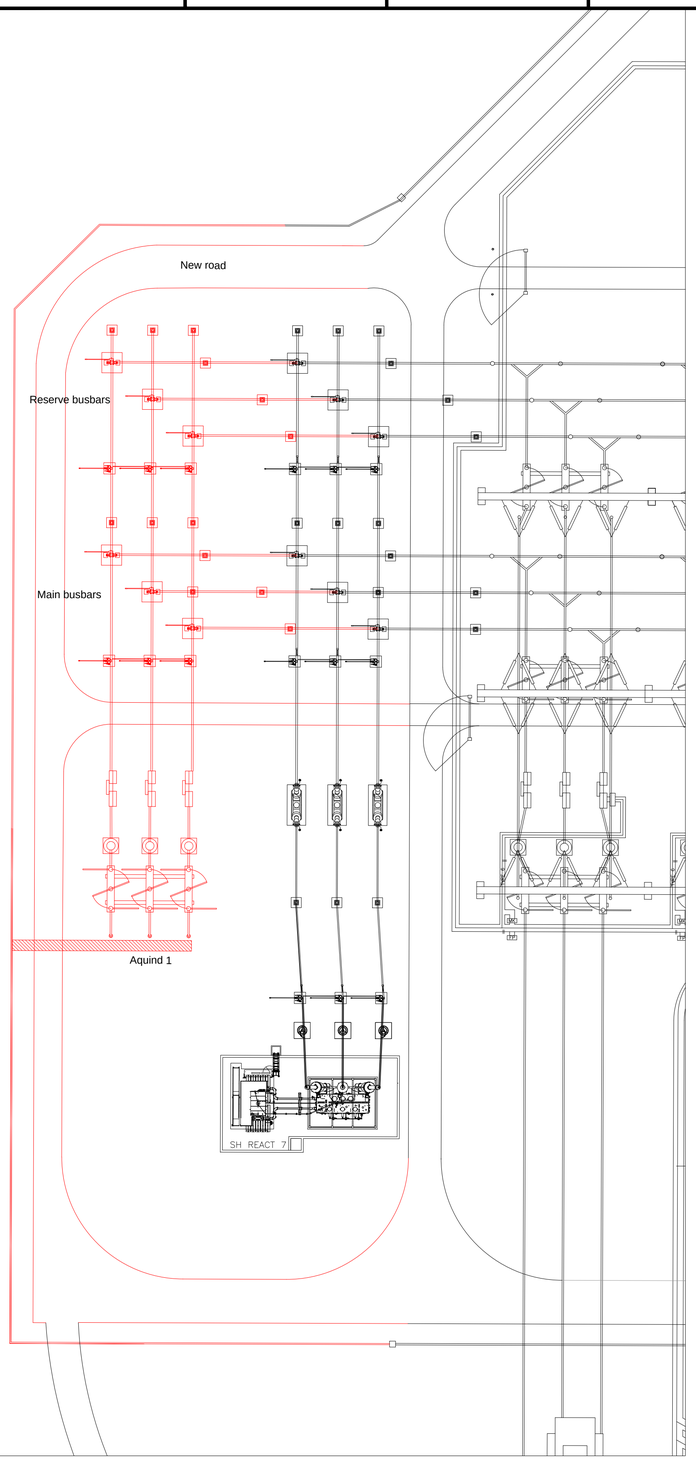
Herbert Smith Freehills LLP

5 March 2021

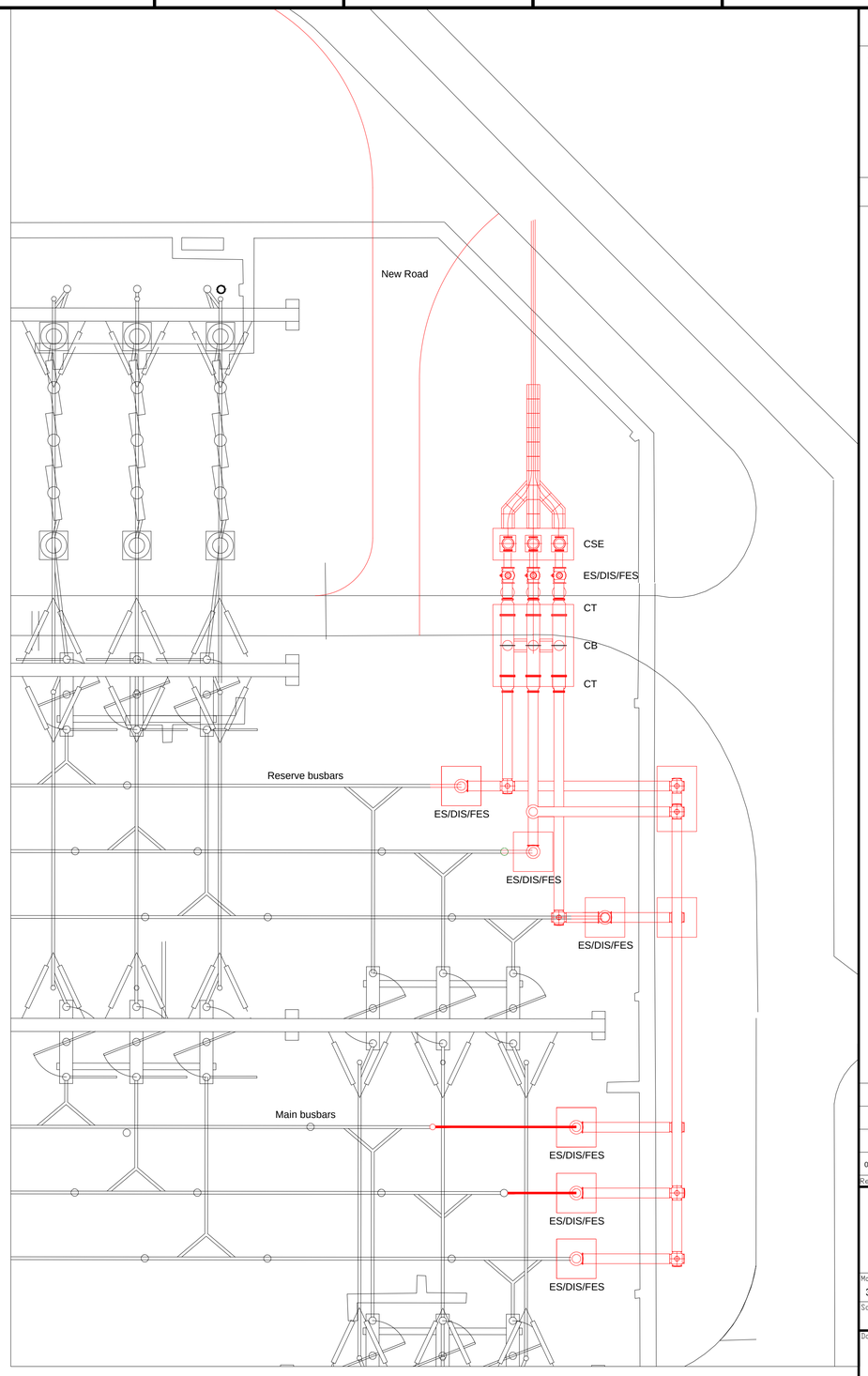
2461/18857/30985781

APPENDIX 1

National Grid Drawing with reference PDD-33585-LAY-001



AQUIND 1
SCALE 1:400



AQUIND 2
SCALE 1:200

NOTES

1. All dimensions are in millimetres unless otherwise stated.
2. This is a 4.2 drawing and is for development purposes only.

LEGEND

Existing equipment

New equipment

Rev	Description	Cre'd	Chk'd	App'd	Date
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nationalgrid

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33585	N/A	LOVEDEAN 400kV SUBSTATION

Scheme Name:
AQUIND INTERCONNECTOR - LOVEDEAN

Document Title:
ELECTRICAL
PLANT LAYOUT AND ELEVATION
OPTION 1

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