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[redacted]

Via email to
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FAO the Planning Inspectorate

Dear Sirs,

RE: Comments from Portsmouth City Council as an Interested Party on the responses to the Secretary of State's 1 December 2021 request to the Applicant in respect of Application by AQUIND Limited for an Order granting Development Consent for the AQUIND Interconnector Project.

We write further to the Secretary of State's invitation dated 1 December 2021 for comments on the Applicant's responses to his requests for further information in a letter dated 4 November 2021 ('the Third Information Request'). This of course followed the Secretary of State's previous requests for information from the Applicant and the Interested Parties. Please find herein the response to that invitation to Portsmouth City Council ['PCC' or 'The Council'] set out below:

1. Consideration of Alternatives

1.1 PCC notes that the Applicant has not provided a response to the Secretary of State's question as to how long the connection agreement for the Navitus Bay development remained in place following the relevant refusal, and instead have answered a different question and advised that they became aware of the fact that the connection agreement was no longer in place during unrelated meetings in March 2016. It is clear from the Applicant's own statement in para 2.14 of their response that they were aware of the refusal of this application for development consent in early September 2015 was relevant to their proposal, and the Council is therefore surprised that a single, unresolved enquiry in October 2015 by the Applicant is considered by them to be adequate investigation of this highly material matter. The Applicant, in para 2.14 of their response opine that the connection agreement was likely to have remained in place for a period of six weeks after refusal, i.e. up to 23 October

2015. No other likely date beyond this is given by the Applicant for when the connection agreement would no longer have been in place. PCC note that this is a date which is prior to the completion of the cost benefit analysis exercise carried out in the Feasibility Study Report, which is listed in the applicant's para 2.16 as November 2015. It was also prior to issuing the final version of this same report in January 2016.

1.2 It would seem evident that any response to a query from Aquind from either NGET or the promoters of Navitus Bay as to this issue would have been material to the findings of the Feasibility Study report. Despite the report being well advanced, therefore, reasonable approaches made to NGET and/or the promoters of Navitus Bay could have yielded responses in a timely manner which could then have been considered in the report. It is quite possible that this could have influenced the findings and subsequent Connection Offer issued in June 2016. If the Applicant did not consider the refusal of Navitus Bay to be material, or could influence the Feasibility Study report, why would the Applicant make such inquiries of NGET in the first place?

1.3 The Council therefore shares the Secretary of State's concern that the Applicant was aware, or reasonably should have been aware, that the Navitus Bay development connection agreement was no longer a relevant impediment for the consideration of suitability of alternative sites at a material time of its optioneering and the development of the Interconnector scheme. PCC does not consider that the Applicant's response explains its failure to deal with this and is entitled to conclude that it either deliberately overlooked the matter or had closed its mind.

1.4 It is also of concern that the Applicant has failed to consider in either the Consideration of Alternatives Chapter 2 of the ES [App-117] or in the Supplementary Alternatives Chapter [APP-117] the private loss of alternative routes and considered the loss weighed against the public benefits of the scheme. The Applicant, in paragraph 9.1.1.2 of its conclusion to the Supplementary Alternatives Chapter [APP-117] states that:

'[Further], in considering the reasonable alternatives as outline the Applicant has very clearly considered the potential need for compulsory acquisition of land and the alternatives to this as part of that exercise, and has limited the need to acquire land and rights over land in so far as is possible through the careful selection of options and refinement of the Proposed Development.'

1.5 However, the Applicant does not make any assessment of the private loss to be suffered in consequence of the different options, and weighed that loss against the public benefits of the scheme. As set out in paragraph 14 of the statutory 'Guidance related to procedures for the compulsory acquisition of land' (the 'CA Guidance') the relevant and lawful approach the Secretary of State should take is to "weigh up the public benefits that a scheme will bring against any private loss to those affected by compulsory acquisition.' The

Applicant has failed to set out the private loss to be suffered and as such the Secretary of State will not be in a position properly to determine either that the route option(s) selected represents the most equitable balance of public benefit versus private loss.

2. North Portsea Island Coastal Defence Scheme ('NPICDS')

2.1 These comments relate specifically to Section 3 of the Applicant's Response (dated 18.11.21). In Paragraphs 3.1-3.2, there is a discrepancy between the Applicant's account of matters and PCC's own view as set out in PCC's 12 August 2021 submission, the relevant information in respect of the programme of construction works and compound details in relation to the NPICDS was made available to the Applicant at a meeting on 12 August 2020, albeit in a slightly different format than it is now. Notwithstanding this discrepancy as to the relative states of knowledge of the issues these facts do not in PCC's view contribute to the progression of the key issues and we therefore do not wish to comment further. Moving forward, both parties are aware of the known conflicts and issues to be resolved, and PCC is committed to working through them

2.2 Regarding the Memorandum of Understanding as part of the Co-operation Agreement, we do not wish to comment on the specific details set out in the Applicant's Response at Section 3.6, as this is a developing document and the Council acknowledges progress has been made since 18 November 2021. This is necessarily a work in progress and both parties are working to create a version of the MOU and Co -operation Agreement that is mutually acceptable.

2.3 There are, at this time, specific issues that are still unresolved.

2.4 As per PCC's previous submissions, PCC and Coastal Partners ('CP') feel strongly that any resulting project delays should be absorbed by the Applicant and the Applicant has, thanks in part in PCC's view to the Secretary of State's acknowledgement of this matter following PCC's submission, acknowledged this to an extent. However, PCC is concerned that the Co-operation Agreement cannot go far enough given the significant flood protection that the NPICDS works are bringing to an area already at risk of severe flooding and the potential for damage to property and loss of life in the absence of or delay to the NPICDS. Despite this being raised many times by PCC/CP, it is not a point that has ever been acknowledged by the Applicant. PCC/CP will continue to raise this matter and will be seeking to address this with the Applicant during the planned discussions and iterations of the Co-operation Agreement and MoU. The submission of relevant plans by the Applicant to assist with these discussions is welcomed, along with measures such as night-working. Again, these details will be picked up in the MoU.

2.5 The key concern with drafting the Memorandum of Understanding (as part of the Co-operation Agreement), and which is acknowledged by the Applicant, is that there is very little information from the Applicant's position that can be described as definitive or certain. It is therefore in some respects being

approached with an abundance of optimism and nothing more concrete. Whilst the NPICDS works have commenced with an accurate programme and methods in place, there is very limited confirmed information for the Aquind project. This means any resulting agreement can only be based on principles in the hope of workable solutions arising in order to avoid delay. It is essential for PCC/CP that these principles do effectively provide adequate assurances that the NPICDS will not be delayed when direct conflicts arise.

2.6 The Co-operation Agreement has been subject to discussion at meetings between the Council/CP and the Applicant. The Applicant matured the draft Co-operation Agreement of Feb 2021 into a draft of 2 November 2021. Comments were provided by the Council on 10 December 2021, with responses given by the Applicant's solicitor on 14 December 2021. The parties will meet in early January 2022 to discuss the Co-operation Agreement further and the aim will also be to consider the related Land Option Agreement to the extent that the Co-operation Agreement could interact with it.

2.7 The fundamental concerns of the Council in respect of negotiating the Co-Operation Agreement are two-fold;
1) The Co-Operation Agreement should not be allowed to change the compensation provisions relating to compulsory acquisition within the DCO.2) the Co-operation Agreement is effectively 'an agreement to agree' as it, directs the detail of any co-operation to Method Statements which themselves need to be agreed prior to works commencing in "Overlap Areas" (flood defence work areas that the Applicant would like to use for its works). Any disagreement is proposed to be settled by an application for an Expert determination. Again, this is clearly premised on an abundance of optimism that there will in fact always be a solution. It is important to recognise that the most obvious solution is for the Applicant simply to wait another year before commencing these potential overlapping works but the Applicant does not wish to consider this.

2.8 Although the Applicant has included in its latest draft of the Co-operation Agreement revised provisions for costs, the Council still has concerns that any delay (even a small delay of a few weeks) could have significant impacts on a constrained NPICDS programme, and as such works may need to be deferred by a year, into 2024. In such circumstances, a flooding event could arise that would result in claims (for damages to property etc.) being potentially brought against the Council who would have no option but to tolerate such a delay through the Co-Operation Agreement as best mitigation against (rather than avoidance of) DCO powers. The Council, therefore, needs to be indemnified against any such claims/losses, ideally through the DCO. In turn, the Secretary of State when reaching his decision on this DCO application under s104 of the Planning Act 2008 needs to carefully consider whether he has suitable and sufficient information before him to allow him properly to weigh the Aquind scheme benefits against the potential adverse impacts to the NPICD scheme, the benefits of which were articulated in August 2021 by PCC/CP.

2.9 PCC/CP would nevertheless emphasise despite its misgivings and the absence of clarity remains committed to working with the Applicant to resolve conflicts and agree a Co-operation Agreement, including the Memorandum of Understanding. There needs to be genuine recognition by the Applicant and serious consideration given to the potential for conflicts to arise which cannot be resolved. For example, if Compound 1 could not be shared as per PCC/CP's previously submitted comments, the Applicant's preferred approach is not to make provision for this but to defer the difficult conversations to a future point in time, post the Secretary of State's decision in respect of the application. This would obviously be too late in PCC/CP's view.

2.10 Again, discussions are ongoing and constructive but neither party can guarantee that concrete solutions for both schemes to work side-by-side can be identified through the Co-operation Agreement, which remains in truth merely an aspirational framework.

3. Micro-siting of Converter Station

3.1 PCC would not wish to provide a detailed response in respect of the micro-siting of the Converter Station outside of the City's boundaries, other than to note that the Applicant has acknowledged that the removal of Option b(i) from a potential DCO would mean some likely significant effects would no longer arise and/or would be lessened [para 5.9 of the Applicant's response]. Having now confirmed that agreements with NGET have been completed, in their further response of 6th December 2021, PCC would support the Local Authorities in that area in their preference for Option b(ii).

4. Other matters raised and commented on in the Applicants submissions

4.1 At section 7 of its letter the Applicant seeks to respond to the points made by PCC about the justification for the ORS buildings; their size and the justification for the landtake in the absence of telecommunication fibre optic cables as part of this Interconnector scheme.

4.2 PCC notes that the Examination of Aquind's application formally closed in March 2021. That was supposed to be the opportunity for the Applicant to present its case in a full and timeous fashion and allowing for the Interested Parties time also to absorb the arguments put forward as well as for the examining authority to test all of the evidence. The fact that so many fundamental issues have been raised by and with the Secretary of State implies that the examination process failed.

4.3 With regard to Aquind's latest response, which once again raises new evidence which should have been tested earlier, PCC takes the position that an extensive rebuttal to the Applicant's comments it has chosen to submit to the Secretary of State in addition to the information requested is in fact inappropriate and lends legitimacy to this extension to the examination which is not provided for under the Planning Act 2008.

4.4 To be clear however the Council remains of the opinion that the retrospective justifications provided by the Applicant for the elements of their development within Portsmouth remain weak and poorly addressed, as well as failing to explain adequately the process and reasons for the extent of land the Applicant still asks for powers to compulsorily acquire, despite the need to show a compelling case to remove such land from the public benefit.

Compulsory acquisition as a last resort

4.5 While the Secretary of State did not request further information from the Applicant in respect of comments from Interested Parties, they have nevertheless sought to provide commentary regarding principles of compulsory acquisition to the Secretary of State.

4.6 The Applicant in particular take issue with PCC's reference for the Secretary of State to be satisfied that those seeking CA powers do so as a matter of 'last resort'. In doing so Aquind refer to the "Compulsory purchase process and the Crichel Down Rules" ("the CPO Guidance") and seek to suggest that the use of the expression is in fact misplaced and that the term last resort only relates to circumstances where negotiations have broken down after the decision to acquire land is made by an acquiring authority.

4.7 This is to misapply the well understood approach to justification for CA (and CPO) powers which is a question of demonstrating a compelling case in the public interest; actual justification that all the land is required and that there are no less draconian means of achieving the aim behind the CPO/CA powers (ie alternatives).

4.8 PCC agrees that the relevant statutory guidance that the Secretary of State is required to have regard under the Planning Act 2008 is the Planning Act 2008 '*Guidance related to procedures for the compulsory acquisition of land*' ('the CA guidance') however that guidance itself references CPO Guidance which, as indicated in the footnotes to the Planning Act Guidance, was superseded by the 2019 guidance published by MHCLG, as relevant 'Further guidance' (paragraph 45 of the CA Guidance). The Applicant's submission indicates the CPO Guidance is of no relevance, and this is clearly not the case.

4.9 The Council is of course well aware of the CA Guidance, and has referenced it a number of times when highlighting the Applicant's failure to satisfy the relevant legal tests as set out therein, not least in the Applicant's failure (as outlined in paragraph 25 of the Guidance) to '*seek to acquire land by negotiation wherever practicable*.' As the Applicant itself notes, '*As a general rule, authority to acquire land compulsorily should only be sought as part of an order granting development consent if attempts to acquire by agreement fail.*'

4.10 We reject, categorically, the Applicant's suggestion that it has satisfied the requirements of the Guidance but in particular it has failed to "*demonstrate…[that] all reasonable alternatives to compulsory acquisition (including modifications to the scheme) have been explored"* [as per [8] of the

CA Guidance as well as failing to "*demonstrate that the proposed interference with the rights of those with an interest in the land is for a legitimate purpose, and that it is necessary and proportionate.*"

4.11 This requirement that an Applicant for CA powers under the Planning Act 2008 within a DCO must show that all reasonable alternatives to CA have been explored, which must include taking as little land as reasonably possible ties in directly with the requirement to show CA (or CPO) has been resorted to as a matter of last resort. It is therefore clearly relevant for the Secretary of State to ask himself whether Aquind can show it requires each and every part of the plots it has identified for CA and has also shown it has properly considered and explored the alternatives to CA which are not limited to purchase by private treaty

4.12 It is also correct to observe that Aquind has failed to show its '*attempts to acquire by agreement'* have failed'. This clearly requires proper engagement and proper attempts to acquire by agreement in the first place. Those attempts in the instance of this DCO application were only initiated in any meaningful way with PCC when the Heads of Terms for an Option Agreement were issued in February 2020 and prior to that, at best, only once the Application had been accepted for examination (12 December 2019).

4.13 The Applicant did not therefore make any efforts at all to satisfy the CA Guidance. Efforts need to have been made before an application is submitted to the Secretary of State and the Applicant needs to show that only if they fail, should an application including CA powers in respect of the relevant land be made.

4.14 Aquind has significantly failed in this regard.

4.15 The Council has also highlighted through its submission the lack of response from the Applicant in respect of the Heads of Terms; a critical schedule to the terms relating to methods of working was issued to the Applicant by the Council in February 2021, with the (heavily) marked up document only returned by the Applicant on 15th October 2021. There has therefore been no indication at all from the Applicant that it wishes to pursue a private treaty agreement with the Council prior to this point.

We trust that the above will assist you in your considerations. Should you require any additional information or clarification, please do not hesitate to contact me.

Yours sincerely,

[redacted]

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Assistant Director Planning & Economic Growth