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Our ref: AMK/00584927/000006

15 December 2021

Your ref: EN020022

Dear Mr Leigh

Application by AQUIND Limited for an Order granting Development Consent for the AQUIND Interconnector Project (PINS reference: EN020022)

Mr. Geoffrey Carpenter and Mr Peter Carpenter (Registration Identification Number: 20025030)

1 As you are aware, we act for Mr Geoffrey Carpenter and Mr Peter Carpenter ("our **Clients**") who are the freehold interest owners of land known as Little Denmead Farm, Broadway Lane, Denmead, Waterlooville PO8 0SL registered at HM Land Registry with title number HP763097 (and are Interested Parties).

2 These are the representations of our Clients to the Applicant's response to the Secretary of State's letter dated 4th November 2021.

(So-called) "MICRO-SITING" OF THE CONVERTER STATION

3 The Applicant has applied for a section 35 NSIP on the basis of two different sites on our Clients' land. Throughout the Examination Period where that evidence fell to be tested, it has remained ambivalent. To mask its lack of certainty, the Applicant has characterised its inability to ensure certainty as "micro-siting" to distract from its lack of certainty about location and, in turn, the extent of land envisaged to be taken from our Clients. The Minister will recall that the Rochdale Envelope approach must not be abused and it has here because the Applicant has not applied for one large parameter volume but two separate volumes. Only since the 18th November 2021 has the Applicant been able to crystallise its own case and, consequently, it cannot be said that our Clients' have yet had a fair hearing into the taking of their land against their will. We refer to paragraph5.1 to 5.3 of the Applicant's response to the Third Information Request dated 18th November 2021 ("the **Applicant's Response**") where the Applicant suggests that negotiations for an option acquiring land rights over Plot 1-27 have progressed and that the Applicant and National Grid Electricity Transmission ("**NGET**") will shortly be undertaking internal reporting and execution.

4 The Applicant suggests the option is necessary to facilitate the location of the converter station within Option b(ii). The Applicant also suggests it is likely to enter the agreements within the next two weeks and that once the agreements have been entered into, it would have no objection to the Minister making an option which removes Option b(i). The operation of CPO powers requires certainty. After 15 months of representations and examination, the Applicant has now finally chosen a location for the converter station.

At the same time, it did not give the Examining Authority ("the **ExA**") the opportunity to carefully scrutinise this (now) identified location. The Planning Act 2008 ("**PA 2008**") requires the Minister himself to now carefully consider the evidence for taking of our Clients' land against their will but does so now without the benefit of an ExA Report. The Minister therefore cannot sanction this as it would be in breach of CPO safeguards as different considerations would apply to each location put forward by the Applicant. For example, Option B(ii) now requires the removal of landscaping along the Eastern boundary that remains ensured by the planning permission for the Western Extension to the Sub-Station to be in situ on the basis of an environmental impact assessment in light of the setting of the AONB West of the buildings and also of local effects on (for example) our Clients. The result of the location of B(ii) is that required landscape provisions for EIA purposes remain not evaluated by the Applicant.

5 At paragraph 5.6 of the Applicant's Response, the Applicant suggests it has made mistakes in references in the draft DCO which Applicant intends to correct during the period for corrections following the making of any DCO. The Applicant's proposal indicates that it recognises a need to change its draft DCO. The Applicant is not entitled to change the draft DCO and has numerous opportunities during the ExA period to do so. We remind the Minister that CPO safeguards require that our Clients have sight of DCO terms relied on before consideration by the Minister because that is the draft instrument relied on to take their land against their will. The Minister is therefore not entitled to permit the Applicant to make its suggested corrections other than to refuse the grant of the DCO. To grant a DCO on the basis of changes made to it that a person has not had the opportunity to scrutinise would be evidently not fair to a person whose land is desired to be taken against their will.

6 At paragraph 5.4 of the Applicant's Response, it confirms it has provided *two* versions of the draft DCO one including the use of fibre optic cables and the other not. We remind the Minister that it is unlawful to include a provision that provides for fibre optic cables that are not exclusively related to electricity bearing cables and the Convertor Station that are within the scope of the section 35 Direction. To make any provision for other fibre optic cables is ultra vires under the PA 2008.

7 Other changes to the DCO submitted in response to Minister's second information request have not been included in the two versions of the DCO the Applicant has now submitted. The Applicant goes on to suggest it does not have any objection to any or all of the amendments being included in any Order made by the Minister. We remind the Minister of our Clients' version of the draft DCO **[REP8-105]** submitted to assist the ExA at Deadline 8 of the Examination and which we forwarded to the Minister on 12 July 2021. We also refer the Minister to our Clients' Protective Provisions **[REP8-108]** (the provisions of which align with precedent DCOs) and our Clients' DCO Obligation **[REP8-095]** which were also submitted at Deadline 8 of the Examination. These documents were all provided by our Clients during the Examination and our Clients have consistently maintained to the Minister they remain fit for purpose. The aforementioned documents remain unchanged since the Examination.

NATIONAL PLANNING POLICY FRAMEWORK (2021)

8 There is a watercourse that traverses our Clients' land and over which it is envisaged by the Applicant to construct development comprised of a permanent accessway and supporting infrastructure but in relation to which there remains no evidence, and no evidence that has been carefully scrutinised to objectively justify its ongoing presence after the event of the conclusion of construction works. This is surprising. Section 4 of the Applicant's Response addresses its assessment of flood risk. It asserts that its original Flood Risk Assessment and the Sequential Test Addendum **[REP1-158]** to its FRA adequately applies the flood sequential test. This is not correct with regard to our Clients' land.

9 As the Applicant itself (properly) confirms in paragraph 1.1.1.4 of the Sequential Test Addendum **[REP1-158]**, both the provisions of the NPPF and EN-1 apply to the application of the flood sequential test. But since then the national guidance of the NPPF (2021) has been radically changed in respect of flood risk.

10 The Sequential Test Addendum **[REP1-158]** provided by the Applicant only extends to consider the Landfall ORS building and therefore the Applicant's Response in respect to that document cannot be used to apply to our Clients' land which is situated some considerable distance from the ORS. Paragraph 1.1.1.3 of REP1-158 asserts: "*This Addendum confirms that the Sequential and Exception Test is passed for the Proposed Development for the Landfall ORS. The principles and assessment of the Sequential and Exception Test, set out in the FRA (APP-439) for the Onshore Cable Corridor and Converter Station, remain unchanged and valid, and are therefore not considered further within this Addendum*".

11 Document reference APP-439 entitled "*Environmental Statement – Volume 3 –Appendix 20.4 Flood Risk Assessment*" is therefore (based on the Applicant's explanation above) to be treated as the document that is asserted to consider our Clients' land. But it does not. Nor does it do so with respect to the application of the flood sequential test.

12 Document reference APP-439 (dated 14 November 2019) contains a section relating to the application of the flood sequential test (on page 20). However, it contends that it has only applied the flood sequential test to one part of the red line area – the ORS. This is most surprising. It also accepts that our Clients' land remains not yet evaluated for the risk from flooding from the envisaged development. The flood sequential test in APP-439 (see section 3.3) has not been applied to our Clients' land on which the converter station is proposed to be located.

13 This failure to assess our Clients' land is a critical omission and breaches the requirements of policy.

14 This is because paragraph 162 NPPF 2021 states:

> *The aim of the sequential test is to steer new development to areas with the lowest risk of flooding from any source.* ***Development should not be … permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding****. The strategic flood risk assessment will provide the basis for applying this test. The sequential approach should be used in areas known to be at risk now or in the future from any form of flooding*. (our emphasis added).

15 Nowhere in APP-439 is there *any* evidence or analysis or evaluation to demonstrate how the requirements of paragraph 162 NPPF 2021 have been satisfied, and whether or not the flood sequential test has been passed, **in relation to the choice of the site for the converter station itself or the permanent use of an accessway road across a watercourse crossing diagonally our Clients' land.**

16 As paragraph 162 NPPF 2021 states, development **should not be … permitted** if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. The proposed development with respect to our Clients' land is the construction of the converter station and the permanent situation of an access way over their land. There is no analysis as to what other sites the Applicant considered in flood risk terms to prove that our Clients' land is indeed a site at the lowest risk of flooding for the proposed location of the converter station. There is no evidence of what catchment area the Applicant used in flood risk terms that led it to conclude that our Clients' land is an area of the lowest risk of flooding from all sources of flooding (the opening sentence of paragraph 162 NPPF). We consider this an important and relevant matter of national guidance required to be evaluated by the Minister under section 104 of the PA 2008 but that he has no evidence to carefully scrutinise. Therefore, this demonstrates a refusal of consent for the proposal in the absence of that evidence.

17 The construction of the converter station and the permanent accessway over our Clients' land is new development. The reference to "areas" means that it is not the case from July 2021 that, where a site is in 'flood zone 1', a developer does not need to look at other better sites in terms of lower flood risk in flood zone 1, that is, areas at less risk of flood in what was previously described as 'flood zone 1'. In other words, the flood sequential test is not passed just because a new development is on a site located in flood

zone 1. The focus and relevant gauge of the changed national guidance is now on **areas** and not flood zones (this was an amendment to paragraph 163 of the NPPF in July 2021, which the Applicant's Response did not identify), which captures any size of land (– it is not those or those described as a 'flood zone').

18 Furthermore, the requirement in paragraph 162 NPPF 2021 is that when applying the flood sequential test, the 'area' selected must be **of the lowest flood risk**. This is not the same as having a low flood risk per se. In order to assess whether a site is at "lowest risk of flooding from any [other] source", best available information on present and future risk should be consulted, including the SFRA and EA/LLFA data. 7-018 of the current PPG includes: "*According to the information available, other forms of flooding should be treated consistently with river flooding in mapping probability and assessing vulnerability to apply the sequential approach across all flood zones*". Table 1 identifies that flood zone 1 is where the annual probability of river/sea flooding is "less than 1 in 1,000". Thus, at the present time, the objective is to demonstrate that a site does not have a 1 in 1,000 annual probability (or worse) of flooding from any source (or that there is no evidence to suggest that the site has any such risk). If this objective can be achieved, flood-risk experts should prepare a report explaining why, and if this is accepted by the LPA, there will be a robust basis for not conducting a sequential assessment and for resisting any judicial review complaining about its absence. None of this analysis has been provided by the Applicant in relation to the proposal to locate the converter station, or a permanent accessway road, on our Clients' land.

19 Even if an area is chosen for the converter station, or for permanent accessway road, in flood zone 1, the Applicant must still apply the flood sequential test to prove that that particular area is at <u>the lowest flood risk and that there are no other areas within flood zone 1 with a lower flood risk</u>. This has not been done in relation to our Clients' land for the location of the proposed converter station. The Applicant has not looked at sequentially preferable sites to our Clients' land for the proposed local of the converter station. There is no evidence nor analysis of such evidence to enable the Minister to lawfully evaluate whether the NPPF(2021) has been complied with.

20 The Applicant's Response in section 4 of that document is therefore flawed in two respects. Firstly, the Applicant has completely missed the point we have been making, which is that the flood sequential test needs to be applied to justify the location of the converter station as new development. The Applicant has not applied the flood sequential test to our Clients' land in either its previous or the current submissions. Secondly, section 4 of the Applicant's Response reflects a fundamental misunderstanding of how the flood sequential test works and needs to be applied. Instead, section 4 of the Applicant's Response seeks to misdirect the Minister's attention to the requirements of the NPPF to look at all sources of flooding.

21 The Applicant has therefore not demonstrably satisfied the flood sequential test with respect to the selection of our Client's land for the proposed converter station.

NORTH PORTSEA ISLAND COASTAL DEFENCE SCHEME

<u>PCC Report Recommendations</u>

22 We refer to the paragraph 7.11 of *PCC and Coastal Partners Risk Report – Impacts of the AQUIND project on the scheme* dated 11 August 2021 ("the **PCC Report**"), which sets out the Coastal Partners responses to the Applicant's proposed solutions.

23 With regard to Compounds 3, 4 & 5: site access, welfare, material and equipment storage, the PCC Report states that the *Applicant* (not PCC) should: *"<u>re-programme</u> their works to avoid the NPI occupation periods rather than force the NPI works to cease."* However, this has not been secured. The Applicant's Response summarises information provided in an updated Memorandum of Understanding ("the **MoU**") which indicates delays to the NPI scheme (for the protection of PCC citizens and property from risk of flood inundation) will occur and suggests the temporary reorientation of the compounds. This is, therefore,

confirmation that the Applicant's scheme (of approved) will result in and cause delay to the delivery of the coastal defence scheme, putting Portsmouth's citizens lives and property at ongoing risk from inundation. The public interest in the protection of those citizens and property is relevant and important, and weighs heavily in favour of a refusal of consent under section 104.

24 At paragraph 3.6.2 of the Applicant's Response (in relation to CP Compound 3), the Applicant suggests a maximum overlapping duration of 2 weeks. Further, at paragraph 3.6.3 of the Applicant's Response, which relates to CP Compound 4, the Applicant suggests the temporary reorientation of CP Compound 4 to accommodate the construction of the Proposed Development rather than re-programming the works. The Applicant also acknowledges an estimated 12 week overlap period between the Proposed Development and the NPI scheme in relation to Compound 4. Additionally, at paragraph 3.6.4 of the Applicant's Response, which relates to CP Compound 5, the Applicant suggests temporary reorientation of CP Compound 5 to accommodate the construction of the Proposed Development rather than revising its timetable whilst acknowledging an estimated 17-week overlap between the two schemes. The Applicant's response has, therefore, failed to address the concerns raised by the PCC Report. Furthermore, it is not clear from the Applicant's Response what temporary reorientation would involve and whether this could lead to further delays of the necessary NFI scheme putting Portsmouth's citizens lives and property at ongoing risk.

25 Paragraph 10.12 of the PCC Report highlights the proposed timescales for confirming a programme conflict and references agreeing Method Statements. This leaves the NPI scheme at risk as well as the PCC citizens and property. This is due to seasonal working restrictions, time required for site set-up, and the nature of the work, where certain elements must be finished in their entirety to maintain adequate flood protection. We also note that clause 3.2 of the draft Co-operation Agreement requires the parties to use *reasonable endeavours* to agree a Method Statement within 20 working days of provision by the Applicant and where any Method Statement has not been agreed within 30 working days (of the date of its provision) either party may refer any dispute to an Expert. Under clause 7.2.3, the Expert then has to give the parties 10 working days notice of their appointment during which submissions can be made. The process then allows for responses 5 working days thereafter before the Expert is required to make a decision within 15 working days of receipt of counter submissions. Whilst we understand that a contract might contain a dispute resolution mechanism, were this process to be followed by the partiers, it would likely lead to further delay to the delivery of the NPI scheme, again putting Portsmouth's citizens lives and property at risk of inundation whilst there remains no pressing need for an electricity cable that still requires consents from the French authorities.

26 The PCC Report also suggests the Applicant should pay all associated costs with delays which if programming cannot be resolved, including re-applying for planning condition approval or marine licence variations and any associated delays. This is evidence that the Applicant is placing its scheme as having more importance than a coastal flood defence scheme designed to protect lives and property. We struggle to see the public interest in such a hierarchy. This is also evidence that the Applicant accepts that its scheme will delay the flood defence scheme. It is also noted that clause 5.6 of the draft Co-operation Agreement provides that the Applicant must reimburse PCC and/or Coastal Partners for additional costs which are incurred as a result of its works being carried out within any of the overlapping areas. We make the same points as above in terms of delay and allocating less importance to a flood defence scheme. We note there is no specific reference made by the Applicant in the draft Co-operation Agreement to the costs of re-applying for a planning condition or a marine licence as requested in the PCC Report.

27 Paragraph 11.2 of the PCC Report suggests that any delay to or risk of the NPI scheme failing to reach completion gives rise to risk of flood events and the damage associated with such events, both financial and health- related, including potential loss of life. The PCC Report explains that in the event of there being an insoluble programme conflict, the NPI scheme should, in light of the continuing existing risk to the public take precedence, and they would want to see a clause within any Cooperation Agreement to

this effect. The Applicant's revised draft Co-operation Agreement contains no such provision to ensure the concerns raised in the PCC Report are adequately protected against.

28 The Applicant has therefore failed to incorporate the recommendations of PCC's Report.

Memorandum of Understanding & draft Co-operation Agreement

29 With regards to the updated MoU provided by the Applicant which, as explained above, forms the basis of the Applicant's suggestion the two schemes can be carried out in parallel provided cooperation between the parties is adopted, we remind the Minister of PCC and Coastal Partners comments at paragraph 4.5 of the PCC Report where PCC correctly point out that the ***"Memo is a unilateral statement of Aquind's views"***.

30 The revised MoU issued by the Applicant acknowledges in its Introduction that *"the objective of this Memo is to reach a point where AQUIND and Coastal Partners are content to enter into a Works Co-operation Agreement."* The MoU is therefore not binding, has no legal basis, and cannot be treated as a document that confirms the PCC are happy with its terms. It not, in reality, reflective of any "understanding" between the Applicant and the PCC in this regard. It is a misleading label.

31 The Applicant goes on to confirm in the MoU's Introduction that the information provided in the MoU is based on *"the indicative programmes for both projects available at the time (11 November 2021)… The duration of AQUIND works provided below represents the maximum duration of the works in the whole of an overlapping area."* The Applicant therefore simultaneously admits its programme is indicative but suggests the timescales it provides in the MoU are the *"maximum"* for overlapping areas.

32 However, the timescales the Applicant suggests are the *"maximum"* for works in overlapping areas is not represented in the current draft of the proposed Co-operation Agreement. We draw the Minister's attention to section 3.1 of the draft Co-operation Agreement which says:

*"Prior to the submission of any Method Statement by the Undertaker to CP pursuant to Clause 3.2 below the Undertaker shall inform CP of the intended date for the commencement and the **anticipated** duration of the **Undertaker's Works** in any Overlap Area and request CP to confirm: [..] during the **anticipated** period of the Undertakers Works and within not more than 10 Working Days of any such request CP shall confirm the CP Works which it anticipates will be undertaken and/or will be located in the relevant Overlap Area during the anticipated period of the Undertaker's Works and provide drawings showing the location of such works.*

The definition of the *"Undertaker's Works"* within the Co-operation Agreement includes reference to the defined term *"Authorised Development"* which means the scheme for which the Applicant is seeking the grant of the DCO by the Minister. Therefore, the effect of clause 3.1 is, firstly, to confirm that the duration of the Applicant's proposed works to the compound areas is *"anticipated"* only in relation to the compounds and secondly to give effect to the Proposed Development on the terms currently before the Minister. We suggest this is a deliberate attempt by the Applicant to allow it to implement its own scheme in favour of the NPI within timescales of its own choosing whilst pretending to work collaboratively with PCC and Coastal Partners under the cloak and guise of the draft Co-operation Agreement.

33 Additionally, we refer the Minister to Clause 3.2 of the draft Co-operation Agreement which says:

"Subject to Clause 3.4, not less than 3 months prior to the intended date of the commencement of the Undertakers Works in any Overlap Area the Undertaker shall provide CP with a Method Statement confirming the Undertaker's proposals for the Undertaker's Works and the CP Works to be carried out within the relevant Overlap Area ."

Part (c) of the Co-operation Agreement's definition of "*Method Statement"* explains the term means: *"details of the **estimated** programme for the undertaking of the Undertaker's Works and the CP Works within the relevant Overlap Area including the programme for the reconfiguration of any CP Works work compound areas;".*

This definition therefore confirms that the programme for the Applicant's works in the compound areas will be estimated only. Again, we suggest this has been done deliberately by the Applicant to allow it to implement its own scheme in favour of the NPI within timescales of its own choosing under the pretence of cooperation with PCC and Coastal Partners.

34 We also refer the Minister to clause 4.1 of the draft Co-operation Agreement which says: *"the Memorandum of Understanding identifies **indicatively** proposals for the Undertaker's Works and the CP Works to be carried out within the relevant Overlap Areas;*

[…]

4.1.3 the proposals for the Overlap Areas detailed in the Memorandum of Understanding may form part of the Method Statement to be agreed in relation to the relevant Overlap Areas in the future (but not are not required to do so)."

This clause therefore confirms that any proposals put forward by the Applicant in the MoU are indicative only and any proposals contained therein are not required to form part of the Co-operation Agreement. As explained above, the contents of the MoU is non-binding by its very nature. The proposed drafting of the Applicant affords it the flexibility to omit the proposals set out in the MoU (which already fails to meet the requirements of PCC and Coastal Partners in the PCC Report). This shows the Applicant is using the MoU and Co-operation Agreement as means of giving the appearance to the Minister that it is working collaboratively with PCC and Coastal Partners when on careful scrutiny it is not. The Minister should consider the true effect of the proposed agreement put forward by the Applicant as we have outlined because this is also relevant to the question of deliverability and, in turn, whether the Applicant can justify the taking of our Clients' land against their will. As in the *Prest* case (to which we have referred before), any reasonable doubt is required to be exercised in favour of the landowner, our Clients.

35 Furthermore Clause 5.6 of the draft Co-Operation Agreement says: *"The Undertaker agrees to reimburse the Council and/or CP additional costs which are reasonably and properly incurred by them in connection with the CP Works as a consequence of the Undertaker's Works being undertaken within any of the Overlap Areas (for the avoidance of doubt including costs incurred by the Council and/or CP by reason of the CP Works being delayed as a consequence of the Undertaker's Works being undertaken and impacting the CP Works) subject to the receipt of proper invoices and evidence in relation to those costs being incurred as a consequence of the Undertaker's Works."*

36 The Co-operation Agreement therefore anticipates delay to NPI scheme as it provides for compensation mechanism to PCC and Coastal Partners.

37 To summarise, we remind the Minister that the proposed timescales the applicant describes as the *"maximum"* for the overlap period of the works in the MoU does not carry any legal weight and is not required to form part of the Co-operation Agreement as drafted. Additionally, the Applicant's suggested *"maximum"* timescales referred to in the Applicant's Response and MoU are not documented in the draft Co-operation Agreement that indeed permits the Applicant to notify PCC and the Coastal Partners of *"anticipated"* and *"estimated"* periods during which overlapping works will be carried. Further, the Co-operation Agreement itself says that the Memorandum of Understanding proposals are indicative only and the MoU is not required to form part of the Co-operation Agreement. Finally, the Co-operation Agreement acknowledges delays are likely and offers a compensation mechanism.

Precedence of the Applicant's Proposed Development over the NPI Scheme

38 In light of our Clients' analysis at paragraphs 29-34 above, were the Co-operation Agreement (as drafted) adopted; the effect would be to give the Proposed Development precedence over the current NPI programme of works.

39 The provision of the MoU evidences that the Applicant recognises that there is an issue regarding the overlapping of proposals with the NPI scheme for the protection of the citizens of Portsmouth. However, the MoU is not binding and the Co-Operation Agreement is drafted in a manner which provides no safeguards by which locals can ensure that their necessary defence works proceed unmolested by the Applicant's proposed national works running in parallel. The concern is that the Applicant will assert that a section 35 NSIP, trumps a mere local defence scheme notwithstanding that local citizens of Portsmouth will rely upon that flood defence measure to protect their lives and property. The Minister therefore has no binding safeguards from the Applicant that the citizens of Portsmouth will be appropriately protected.

40 Our evaluation is echoed in the submissions of PCC and Coastal Partners. We refer to paragraph 10.8 of the PCC Report where PCC and the Coastal Partners express concern that in light of physical constraints there may be unresolvable conflict between the Proposed Development and the NPI scheme meaning the Applicant would utilise its rights under the DCO to displace PCC and Coastal Partners and the NPI project would be fundamentally affected.

Additional relevant and important issues

41 We note that at paragraph 3.11 of the Applicant's Response, the Applicant suggests it considered to secure co-operation through the issue of a unilateral undertaking but, for *"obvious reasons"*, an obligation securing the co-operation of parties needs to be multi-lateral to have sufficient effect. The Applicant therefore accepts it is not a landowner and thus cannot provide a DCO obligation. We refer to our previous submissions on this and remind the Minister that the benefits required to be secured (to justify the grant of a DCO) cannot be logically taken into account without prior guarantee of those benefits. The Applicant would therefore need the unilateral undertaking in place first before the Minister can take any benefit under it into account.

42 At paragraph 12 of the Applicant's Response it suggests the Co-operation Agreement can be finalised, subject to the provision of outstanding information by PCC and Coastal Partners. This is yet another example of the premature nature of this DCO application being premature (as has been submitted by our Clients and other parties throughout the Examination). The Applicant simultaneously suggests that a private contract cannot be reached with NGET regarding the alternative Mannington substation with its adjacent converter station site whilst at the same time asserting to the Minister that the absence of a cooperation agreement is not problematic. We remind the Minister that such private matters are not relevant to whether it is reasonable to conclude there is an alternative site (as opposed to how it might be operated in practice).

43 We remind the Minister that, to date, there has been no progress whatsoever on private agreement negotiations with our Clients since we last reported on this to the Examination (see paragraph 4 of our letter 25 January 2021 **[REP7-115]**). This illustrates how slow the Applicant is when it comes to private negotiations supporting the assertion made by PCC and Coastal Partners with regard to the NPI scheme.

ALTERNATIVE INTERCONNECTOR SITE AT MANNINGTON

44 We refer to paragraphs 2.1 and 2.2 of the Applicant's Response which relate to the Supplementary Alternatives Chapter (" the **SAC**") **[REP1-152].** Chapter 5 of the SAC considered the national grid point

connection. We remind the Minister of our Clients' submission dated 18 November 2021, and specifically Appendix D in relation to the Chapter 5 of the SAC.

45 At paragraphs 2.3 and 2.4 of the Applicant's Response, the Applicant suggests it submitted a request to NGET (now NG ESO) in December 2014 for a Feasibility Study covering a number of sites. The Study formed part of a Connection and Infrastructure Operations Note (CION) process used to identify a connection location following an application for a connection agreement. The Feasibility Study was prepared by NGET. The Applicant suggests the CION process is collaborative between developer, Transmission Operator and NGET and this is confirmed in a response submitted by NGET at Deadline 7C **[REP7-109]**. We have been *unable* to find a copy of the actual Feasibility Study in the application documents and it was not considered by the Examination by the ExA nor have our Clients' had the opportunity to consider it, nor, it appears, does the Minister have a copy of this document before him in evidence. Therefore, a decision by the Minister about this document would be made on the basis of the Applicant's assertion alone in its suggested undertaking of an alternative sites' assessment as above. In the context of a threatened CPO, the absence of such a document, but that is asserted to consider alternative sites, our Clients' land can only be taken against their will as a last resort after all other alternative sites have been excluded as potential alternatives. Further, the absence of the opportunity to carefully scrutinise such a Feasibility Study (including by it being kept out of Application) which would be prejudicial to our Clients. It remains surprising that the Applicant has deliberately kept from its application documents, kept from the ExA, kept from our Clients, and kept from the Minister a Feasibility Study relating to alternative sites to the taking of our Clients' land. We remind the Minister that in the *Prest* case (see below), the evidence of a doubt is required to be resolved in favour of the land owner where the land taker envisages compulsorily acquiring land – because such acquisition is a remedy of last resort in England and not a remedy of commercial convenience as the Applicant is treating it.

46 We refer to paragraph 2.6 of the Applicant's Response where the Applicant asserted that the Mannington Substation was not taken forward for system analysis following some kind of initial evaluation. The Applicant refers to details in a letter submitted by NG ESO dated 25 January 2021 to the Examination **[REP7-109]** which suggests options to the West of Lovedean all or nearly the same network reinforcements as a connection at Lovedean plus additional reinforcements to either get power to Lovedean or reinforcements to the west to Exeter substation. NG ESO explains these sites would likely have resulted in more overall reinforcements, but not no reinforcement, which would therefore lead to more environmental impact, and increased costs to the GB consumer. But there is no evidence of that increased cost to the consumer as opposed to NG ESO. We would request that the Applicant provide evidence of the additional environmental impacts and also the increased costs to the consumer as there is currently no evidence before the Minister of the same. We note that all alternatives would result in some reinforcement to the National Grid substation connection. There is, therefore, evidence of similar sites that remain not excluded for the siting of a convertor station to that location on our Clients' land. Applying the case of *Prest* (a copy of the judgment can be found at Appendix B of our Clients' submission dated 18 December) which requires that where there is uncertainty, any uncertainty needs to be resolved in favour of our Clients. The very existence of an alternative site requires (as a result of the application of *Prest*) for the alternative location to be chosen in preference to a compulsory land taking of the same to in order to safeguard against the CPO of our Clients' land. We have already identified alternative that reduces the CPO of our Clients' land. Therefore, if the Mannington site proves to be an alternative site then the Minister must chose the alternative site.

47 We also refer to paragraph 2.7 of the Applicant's Response where the Applicant explains its (subjective and) *preliminary* view on the situation of a site at Mannington's was that the share connection point with the Navitus Bay offshore wind farm raised (only) technical concerns. "Technical concerns" remains unexplained and seems to evidence the Applicant's recognised lack of experience in the electricity field. The Minister refused the DCO for Navitus Bay and as a result, the potential sharing of Mannington with another electrical input became and remains not relevant. The Mannington Substation will therefore not have congestion issues because Navitus Bay infrastructure will not be now connected. Therefore, the site

at Mannington was and remains a reasonable, as in an *evidenced doubt,* alternative site. In line with the *Prest* case, such a reasonable doubt as an alternative to acquiring our Clients' land **must** , in law, be resolved in favour of the landowner and against the land taker. This is an aspect of ensuring that compulsory acquisition powers can only be granted as a last resort and in the *absence* of alternatives. Given the evidence existence (and thus, a reasonable basis for the same) of an alternative site at Mannington that remains not evaluated and not ruled out, there can only be a reasonable doubt for the Minister and his decision must therefore be in favour of our Clients as the party whose land is being taken. We also remind the Minister that CPO powers should only be used as a last resort.

48 The same analysis applies to the alternatives to permanent land take evidenced before the Minister in the Protective Provisions **[REP8-108]** submitted by our Clients, together with the unchallenged evidence of alternative temporary haul road provision during construction (and, theoretically) able to be further provided in the event of a future (as yet unevidenced) need, results to require the Minister, in law, to refuse consent for permanent land take from our Clients of any land for a haul road. No more is necessary nor objectively evidenced before the Minister as necessary. The Protective Provisions we have advanced, with executed development consent planning obligations relating to and enabling maintenance access, preclude, in law, permanent acquisition of our Clients' land (otherwise than to the North, in the demonstrable absence of alternative sites elsewhere, for the convertor station) otherwise than for temporary construction accessway over it, and after which that temporary accessway must be removed, their land restored to agricultural land, and the increased flood risk from the water course (that would otherwise result from a permanent accessway) would be avoided in line with the NPPF(2021) requirements of the sequential test.

49 Returning to the (undisclosed) evidence of an alternative site for the sonvertor station, at paragraphs 2.8 and 2.9 of the Applicant's Response it describes that as part of the systems analysis, NGET undertook costs benefit analysis in relation to the Bramley and Lovedean substations and that in addition to the Feasibility Study undertaken by NGET, the Applicant was running its own analysis of reasonable alternative connection points. At the same time as the Feasibility Study and the Applicant's own analysis, and before the outcome of that Study, the Applicant applied for the connection at Lovedean in October 2015 which was issued by NGET in February 2016 and signed by the Applicant in June 2016. Our Clients note that the Applicant's possession of a private connection agreement with National Grid at Lovedean is not relevant (it being private commercial agreement) save to demonstrate that the Applicant has avoided actively to exclude alternative sites due to its private commercial considerations and not as a result of what the law in *Prest* requires it (and now the Minister) to do. The principle of agreement for a connection already had, and has, been accepted by (the same) National Grid with regard to the Mannington Substation, thus there is no difference in relation to these private matters with regard to alternatives. Additionally, given the Applicant has no necessary French consent, this is not a situation where there is any urgency about concluding private terms.

50 We refer next to paragraphs 2.15 and 2.16 of the Applicant's Response where the Applicant asserts that it became aware the Navitus Bay connection agreement was no longer in place in January 2016 *following* the issue of the final version of the (as yet undisclosed) Feasibility Study and *prior* to the issue of the CION in March 2016. The Applicant asserts that the Feasibility Study included some kind of 'cost benefit' analysis and to include the Mannington Substation in the shortlist of grid connection points at that stage would have required the Applicant to have restarted the Feasibility Study process which would resulted in 10-12 months of work meaning that, as a matter of mere convenience to the Applicant, the Applicant could not progress with regulatory and other submissions for the development in the DCO Application. We consider the approach and choices of the Applicant surprising – particularly given that it has no necessary French consents to enable ultimate delivery of its desired proposal – and because it has chosen to not rule out known alternative sites and to seek to use compulsory purchase powers as a remedy of first and not last resort. The Minister is reminded that *Prest* requires the Minister to rule out the existence of *evidenced* alternative sites (and as opposed to only ruling out "suitable" alternative sites, because "suitable" is not the test in *Prest*).

51 Additionally the Applicant asserts that the positioning of the Proposed Development in the sequence of the *list* of future connections would have been, and would be, lost if it considered and evaluated so s to exclude Mannington site as an alternative location for its Convertor Station. The Applicant asserts also that the effect on the Proposed Development would be to significant delay and (private) commercial disadvantage as well as cost in the form of NGET's fees and costs to the Applicant. We submit to the Minister that the Applicant's assertions are very surprising indeed and would set a dangerous precedent in the DCO sphere as well as in the sphere of compulsory acquisition law. The evidence from the Examination Hearing is the opposite of any pressing need for the Proposal because it cannot deliver any electricity unless and until the French consent (if at all) a connection on mainland Europe. We would remined the Minister that the private location of the Proposal on some kind of "list" document is not relevant to the considerations of taking our Clients' land against their will because the list does not relate to the land and is immaterial. The assertion by the Applicant of increased cost to it is understandable given that it continues to trade insolvent and so cannot bear costs (nor blight nor compensation costs nor costs awards resulting from its Application through the DCO process) but these cost matters are private commercial matters that cannot be relevant to the considerations capable of justifying the taking of our Clients' land against their will. Rather, these factors are immaterial. The Applicant has, to date, failed to demonstrably rule out the alternative site at Mannington for the Convertor Station and has disabled the Minister from himself evaluating that alternative. The current situation mirrors that in *Prest* where the Court of Appeal quashed the order confirmed by the Minister because he had not excluded the availability of alternative sites. We invite the Minister to read closely *Prest* and its requirements that the common law places into the Minister as constitutional safeguards against the taking of land from a landowner.

52 The Applicant also asserts that its Feasibility Study *costs* would also have been abortive. Such an assertion is not relevant and is irrelevant. It demonstrates by inference that the Applicant is well aware that the Mannington site is an alternative site to the Convertor Station desired to be situated on our Clients' land against their will. Here the Applicant has provided a (another) 'list' of timing and private commercial reasons for it to choose out of commercial convenience its use of the Mannington Site. The Applicant failed to include Mannington in its shortlist of grid connection points and thus excluded Mannington from consideration and evaluation by the Minister also. On the basis that National Grid Electricity Transmission PLC is <u>also</u> the registered proprietor of the freehold of Mannington Substation (Land Registry title number DT360491) <u>and</u> is the owner of the Lovedean Substation <u>and</u> has previously accepted the a converter station connection to Mannington and the principle of a connection at Lovedean it is difficult to see how NGET would not agreed similar terms at Mannington **<u>if approached on terms</u>** by the Applicant. Additionally, the (again) private commercial (so-called) "reasons" put forward by the Applicant here are not relevant to a section 35 NSIP and also the *Prest* case. The relatively small private costs described by the Applicant underscores the lack of its current financial status and financial standing, and its financial precariousness, that the Applicant has and continues to have. To date we have not seen any evidence the Applicant can fund this scheme and refer the Minister to our submissions at Deadlines 6, 7, 7c and 8 of the Examination Timetable (Examination Library references: **REP6-138, REP7-116, REP7C-031** and **REP8-094**). Rather, this is a purely speculative DCO application in which the Applicant company is demonstrably unable to bear the costs of a refusal of a DCO and likely (if not already) to be bankrupted by a refusal. The Minister appears to have accepted our representations on funding having asked no further questions on that topic. We submit that the Minister not set a dangerous precedent for bank rolling bankrupt companies of straw through use of the DCO process as a kind of financial bagatelle.

53 At paragraph 2.17 of the Applicant's Response it asserts it took the view there would need to be a *"convincing justification"* for why Mannington may have been preferable. This inverts the burden of proof and unlawfully so. The landowner is not required to prove anything. The burden of proving the basis for acquisition powers remains exclusively on the Applicant company. We remind the Minister to closely read *Prest* and again of the importance of the *Prest* case which requires hat where there is a reasonable doubt regarding whether land taken against an owner's will then the doubt **<u>must</u>** be resolved in favour of the landowner against the land taker. Therefore, the subjective views of the Applicant as to the needing a *"convincing justification"* both subvert legal safeguards and also apply a subjective view of the land taker

for not evaluation as required alternative sites and to exclude them in order to be able to rely on CPO powers be sought. We remind the Minister that CPO powers should only be used as a last resort.

54 We refer to paragraph 2.19 of the Applicant's Response where the Applicant suggests it was aware that potential Jurassic Coast landfall locations were not preferable to those for a grid connection to Lovedean. We have seen no evidence of (if which is not evidenced), the Mannington site would require landfall on such a Coastline and nor is there any before the Minister. The Applicant asserts that it would have been necessary for submarine cables to be *longer* than to a landfall location at Lovedean and that the cables would also have had to cross the English Channel shipping lane, the IFA2 Interconnector and be subject to additional constraints resulting from difficult subsea conditions and increased environmental protection. We consider that the increased length of a small diameter cable cannot possibility begin to be a justification for not looking at an alternative site and instead again underscores the real financially precarious nature of the Applicant company if it is genuinely 'concerned' at the increased price of a little more cable length that it already envisages crossing the whole England Channel. Again, the financial standing and situation of the Company is a relevant and important consideration here under section 104 of the PA 2008 that militates against a grant of the DCO because it is evidently highly speculative and the DCO process appears to be being used to lift an opaque company of straw out of bankruptcy.

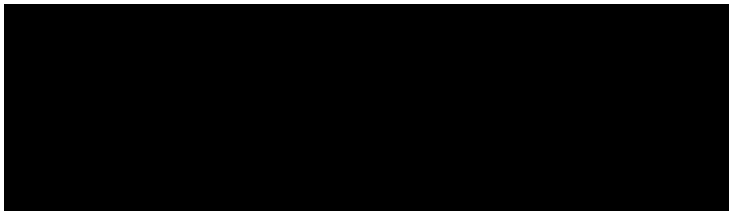
55 Again, applying the case of *Prest,* the provision of cross channel cables and subsea conditions appears not dissimilar wherever a cross channel cable may be situated along the coast of the English Channel. Whether or not Mannington required a connection that traversed a Jurassic Coast location, this was not a hurdle that the promoters of Navitus Bay DCO saw as insurmountable to the provision of their connector cable under the sea, over the beach, to Mannington and to the converter station site. Indeed that appears preferable to considerable disruption for a considerable period to the citizens of Portsmouth and to our Clients and without any guarantee of the asserted "significant public benefits" being actually provided to that public, for example, by means of a binding DCO obligation.

56 Finally, we refer to paragraph 2.20 of the Applicant's Response where it asserts it was not reasonable or necessary for it to consider the Mannington site as the grid connection point following the completion of the Feasibility Study. We disagree. See Prest. Prest requires the Applicant to rule out alternative sites and instead the Applicant has accelerated a private agreement to avoid its own evaluated and excluding of an objectively alternative site. Our Clients agree with the Minister that the Mannington Converter Station site remains an alternative site that has not been evaluated by the Applicant as land taker on material that is before the Minister to enable him to **rationally** (as in, evaluate on and exclude based on relevant evidence proven by the Applicant) conclude that CPO powers are justified here. The case of *Prest* requires that the DCO cannot include CPO powers as they have not been objectively demonstrated to be a remedy of *last resort* as opposed to a commercial preference of first resort.

57 As far as not including CPO in the DCO informs whether or not the converter station may be delivered within a 5 year period, submissions have been made by our Clients and others that an operational converter station will also require consent from France in order to become operational and there is no sight of that occurring in the foreseeable future. Therefore, there remains a lot of time to make a further DCO application to situate the convertor station at Mannington, whilst simultaneously seeking still necessary French consents. The Applicant (who bears the exclusive burden of proving CPO powers can be objectively justified) has not (and cannot) discharge that burden on the objective evidence chosen to be put before the Minister and the evidence chosen to be excluded from the Minister's hand.

58 We respectfully submit that: a) the CPO powers be refused; b) the DCO be refused for want of CPO powers; c) the Minister find that the Applicant has failed to discharge the burden of proof on it to show that CPO powers are a remedy of last resort as required by the law; c) the Minster award our Clients' their costs of their Objection in the usual way and ensure that the Applicant has the (onshore) funds to satisfy the same.

Yours sincerely



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