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

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

Response to the Minister's Letter dated 3rd March 2023

Submitted in relation to the Minister's Letter dated 3rd March 2023

Introduction

1. These are the Representations of the Carpenters in response to the invitation in the letter from the Secretary of State dated 3rd March 2023 ("the Letter"). In short, *most recent* evidence shows there to be no actual need for the particular development. The Minister is entitled to refuse development consent and cannot lawfully confirm under section 122(2)(a) of the Planning Act 2008 the compulsory acquisition of the Carpenter's land (and, by parity of logic, others' land). See *Prest*; and Case T-295/20.

2. The Letter relates to 4 inter-related topics that concern the *current* position on Alternatives in 4 different ways that can be summarised, in essence, as follows and by reference to the paragraphs of that Letter:

    a) Under paragraph 5: Can the Minister rationally conclude that Mannington substation is <u>not</u> a reasonable alternative location suitable for the <u>purpose</u> of the envisaged interconnector connection to the English National Grid? ("**the Mannington Alternative Location**")?
    b) Under paragraph 6: Can the Minister rationally conclude that the North Portsea Island Coastal Defence Scheme will delay the carrying out of the envisaged interconnector and, if so, by how long and in what way ("**the Effect of NPICDS**") ?
    c) Under paragraph 7: what is the *current* position of the necessary Autorisation Environmentale from the Prefet of Seine-Maritime, and what is the *current* status of the envisaged interconnector from a European Trans-European energy infrastructure Project perspective ("**the European Connection Situation and Need**")?
    d) Under paragraph 8 of the Letter: is the Environmental Information up to date currently, or is there a gap in its coverage, and, if so, what is the regulation consequence ("**the EIA Situation**")?

3. Further, the publication of the Examination Authority ("ExA") Report has enabled the Carpenters' to consider *whether* the consideration by the ExA of their Objection to the taking of their land and business against their will (by means of compulsory acquisition under section 122 of the Planning Act 2008), was or was not lawful and was fundamentally flawed. Furthermore, since that Report, the High Court has decided the case of *K (oao) Aquind Limited v Secretary of State for Business, Energy and Industrial Strategy* [2023] EWHC 98 Admin - 24 January 2023 ("the High Court Case") that addressed incomplete evaluation of alternatives under National Policy Statement EN-1, paragraph 4.4.3, in particular, Bullet Point 8. This Responses takes these together, under the heading of "the **Category B and the High Court Case**".

4. Lastly, since all of the above, the General Court of the European Union (Second Chamber) on the 8th February 2023 (<u>after</u> the decision of the High Court case in January 2023) published its decision in Case T/295/20. That case was about the status of the Aquind Interconnector Project being removed from the list of "Projects of Common Interest" ("PCI"). The case also contains *evidence* about actual *current* need. This is important and relevant as the only reason that the Project is treated as requiring a DCO is by dint of a previous Minister's section 35 direction (and not because it is a qualifying energy project in itself). Thus, the factual circumstances have <u>now actually changed since</u> that direction was made and evidence from French Republic shows that there is no actual need for the Aquind Interconnector anymore.

Summary of the Situation before the Minister

5. By way of introduction, the situation before the Minister arises from a decision required by the Planning Act 2008 to be made by him alone. The decision is whether or not to grant a development consent order for a cable proposed to carry electricity to and from France. On each side of the Channel, the end of the cable is envisaged to connect to the national grid of England and of France. At the connection point there would be a converter station building that changes the current to ensure electricity transmission. There is another connection at the edge of the Channel where the cables emerges from below the seabed.

6. This type of project requires a development consent order ("DCO") under the Planning Act 2008 ("PA 2008").

7. The applicants for the project also do not own all of the land required to carry out their project. So they have included a request for compulsory acquisition powers of a vast amount of land between the landfall point in Portsmouth and the connection point situation owned by the Carpenters.

8. The process of deciding whether to grant a DCO involves 3 stages: a) an application is made and considered by an examining authority over a 6 month period through hearings and written representations; b) the examining authority has 3 months to write its report to the Minister; c) the Minister has 3 months to decide whether or not to grant the DCO. Stage (c) may be extended and was so here.

9. In this application, the former Minister decided to refuse the DCO. However, his reasoning was scrambled somewhat because he had not asked for a document from the applicant that would have ensured his reasoning was not scrambled. The applicant challenged that decision to refuse its application in the High Court. The High Court agreed that the Minister's reasoning was scrambled and that he had not sought the information he was required to, and so quashed that decision.

10. As the new Minister, the PA 2008 charges <u>you</u> with making that decision. To help you, and because so much time has passed since the hearing closed in March 2021, your Department has requested an update on all relevant information, in particular, that relating to "alternatives".

11. This project is *notionally* an energy-related DCO due to a Ministerial Direction. The starting point in terms of guidance for energy projects is "National Policy Statement EN-1" ("NPS EN-1"). EN-1 says that there is a presumption in favour of development of energy DCO projects. EN-1 expressly states that it is *not* concerned with *other legal requirements*. Thos requirements include those relating to compulsory acquisition. This energy-related DCO contains an application for compulsory acquisition powers. The Minister, therefore, also needs to follows the statutory requirements relating to compulsory acquisition in the PA 2008, and, the Minister must follow the Planning Act 2008 CPO Guidance (September 2013).

12. As there are two separate pieces of guidance, there is a fork in the road in guidance terms, as to *what* the Minister should do with regards to this application. Set out below is a clear pathway on how the Minister should apply the CPO requirements of the Planning Act 2008, and at the same time follow the two pieces of guidance. This is very important in light of the High Court decision that focused purely on the presumption in favour of development under EN-1, and made no mention of the CPO guidance or section 122. Set out below is the pathway by which the Minister can confidently contextualise the High Court decision as only applying to a very narrow set of facts and to a very narrow set of people, and, furthermore, the Minister can still confidently and lawfully refuse the grant of the DCO.

13. Since the High Court decision in January 2023, the circumstances have moved even further on. There is now no actual need for this Project. This is because in February 2023, the General Court of the CJEU (Second Chamber) in Case T-295/20 in **Appendix J**, dismissed the claim by DCO applicant company (Aquind Ltd) and its related companies seeking to reinstate the status of the DCO interconnector project as a "Project of Common Interest" ("PCI"). The Court described significant benefits to projects from that status:

> *3. The proposed Aquind interconnector was placed on the list of 'projects of common interest' ('PCIs') of the European Union by Commission Delegated Regulation (EU) 2018/540 of 23 November 2017 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest (OJ 2018 L 90, p. 38), and was thus considered to be a fundamental project in the infrastructure necessary for the completion of the internal energy market. The status of a Union PCI enables a promoter of projects, first, to benefit from a procedure for the grant of rationalised, coordinated and accelerated authorisations, secondly, to submit a request for investment and cross-border allocation of costs to the competent national regulatory authorities, in such a way that the efficiently incurred investment costs are recoverable from network users and, thirdly, to seek financing under the Connecting Europe Facility.*

14. The Court described the *evaluation* of the DCO project by the French Energy Regulator as follows:

> *29. … The Commissioner for Energy stated, first, that the French Republic considered that the four projects linking the United Kingdom and France would lead to overcapacity, secondly, that that Member State was of the opinion that the proposed Aquind interconnector was considered to be the most uncertain and, thirdly, that that Member State had accordingly requested that the project at issue should not be included in the new list of PCIs. The Commissioner for Energy stated that the Member States were entitled to approve projects which concerned their territory and that the Commission was required to respect that right…*
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> *52. … [T]he Commission de régulation de l'énergie (Energy Regulatory Authority; CRE), opposed the inclusion of that project in the final regional list. Lastly, and in any event, it must be borne in mind that the French Republic refused to approve that project for reasons connected with the risk of overcapacity and because the proposed Aquind interconnector was considered to be the most uncertain, that the high-level decision-making body of the regional group concerned and the Commission were bound by that refusal and that, in those circumstances, they cannot be criticised for not taking ACER's opinion into account.*

15. By not being a *Project of Common Interest*, Aquind's proposed interconnector cannot now benefit from: a) the French granting rationalized, co-ordinated and accelerated authorisations, nor b) can it submit a request for investment and cross-border allocation of costs, nor c) seek financing under the Connecting Europe Facility. This places, for the Minister, a very big question mark – a *real evidenced doubt* - over whether Aquind will be able to secure the necessary French consents and investments *at all*. The Minister should be aware that English law requires, in situations of doubt such as this, that the Minister must in law resolve that doubt in favour of the Objector whose land is threatened to be taken. See the *Prest* referred to below. See **Appendix F**. But, there is in reality no actual need now for the Project. See below.

16. In addition, the EU Case T-295/20 evidences a real impediment to foreseeable implementation. The English CPO Guidance referred to above, requires there to be no such impediments. See **Appendix L**.

17. Finally, and perhaps most importantly, the EU Case also evidences the following (see **Appendix J**):

> *24. Secondly, it should be noted that, in its written pleadings, the Commission stated that the reason why it had not included the proposed Aquind interconnector as a Union PCI in the contested regulation concerned the French Republic's refusal to give its approval to the inclusion of that project in the Union list of PCIs. It stated that the French Republic had justified its refusal by the existence of a risk of overcapacity on account of the existence of several projects in the same region and by the fact that the proposed Aquind interconnector was considered to be the most uncertain. However, the Commission accepts that the contested regulation does not contain any reference to the French Republic's refusal or, a fortiori, to the reasons why the latter refused to give its agreement.*

18. The importance of this paragraph is that it evidences that, from the French Republic's perspective of the cable in French waters and land, there is *no actual need* for the proposed interconnector *now* because (from 2023) there are *already* a number of *other* such interconnectors that are already under construction appearing to supply the need that the Republic considers is sufficient to ensure there is no overcapacity.

19. Indeed, so concerned were the French energy authorities by the cable project, that they evaluated the Aquind Interconnector DCO as resulting in "overcapacity" were it to be built. That, as at 23rd February 2023, the French Energy Regulator Authority evaluated there to be no actual need for the Aquind Interconnector. It is difficult to see how the Minister would not want to reach an entente cordial and agree. This is because it is difficult to see how approving a project for a cable for transmitting electricity to and from France would ever be used, given that the French energy authority has evaluated that project as being unnecessary and resulting in overcapacity. It would simply be a useless piece of cable stopping at the edge of French territorial waters in the Channel. It is challenging to identify any public benefit from disrupting the citizens of Portsmouth, elsewhere, and the Carpenters, for the sake of a cable to nowhere.

20. Understandably, the Carpenters are *surprised* that Aquind has not yet withdrawn its DCO application since there is nothing foreseeably to connect to in France and circumstances have moved on significantly since the earlier Minister directed under section 35 of the PA 2008 that the cable might be a good idea.

The Heart of this Matter – 1) Alternatives in the CPO Sphere; 2) No Actual Need

21. To help the Minister in a quite technical area, and given the heart of the matter, here is a pathway that the Minister should consider following so that he can lawfully refuse the DCO application.

22. In relation to Alternatives to CPO, the start point is that the law and guidance create two different ways of assessing alternatives depending on whether a person is affected by compulsory acquisition powers.

23. The first way to assess alternatives is where an alternative is being proposed by person who is not affected by compulsory acquisition. We will describe that as "Category A". If a person is in Category A, then the law and guidance requires that person to demonstrate that an alternative is a real alternative to the proposed project or part of it.

24. The second way to assess alternatives is where an alternative is being proposed by person who is affected by compulsory acquisition. We will describe that as "Category B". If a person is in Category B, then the law and guidance requires the applicant to demonstrate two things: 1) that there are no alternatives to its proposal; and 2) any alternative proposed by a Category B person is not possible. If there is doubt about whether there no alternatives, then the law requires the Minister to refuse the grant of compulsory acquisition powers in relation to the Category B person's land interests. Thus, it is for the applicant to always disprove the *possibility* of alternatives. This is because, if does not rule out *possible* alternatives, then the law requires that evidenced doubt to be resolved in favour of the Category B person and against the grant of compulsory acquisition. By possible alternatives, the law means alternatives of the same *nature* rather than a *cardon copy*. The law describes that as being an alternative that is "wholly suitable for the same purpose".

25. The Minister should himself consider in full the alternatives proposed by the Carpenters, in particular their proposed protective provisions and section 106 planning obligation, which taken together, would enable Aquind to proceed with its project of he same nature but without using compulsory acquisition powers. These alternatives were not evaluated by the ExA in its report. All the ExA did was to summarise the Carpenters' proposed alternatives and the Aquind responses. The ExA: failed to itself grapple with the arguments , and evidence before it, as well as the gaps in Aquind's evidence; failed to set out its own reasoning before stating an arbitrary conclusion without having first tested Aquind's response; and failed to apply English CPO law (*Prest*) despite purporting to have read and understood the law on CPO and in the face of repeated reminders about the *Prest* case and its meaning.

26. Therefore, it is not legally safe for the Minister to rely on the ExA's report. He must be personally satisfied. See the *Stonehenge* case.

27. The next consideration for the Minister is how to deal with the recent High Court judgment. In short, the High Court evaluation of alternatives should be read by the Minister as only applying to alternatives proposed by a Category A person. i.e. people who are not affected by compulsory acquisition powers. The Minister, therefore, as explained in detail below, can confidently and lawfully treat the High Court decision in a limited way as apply in to only a narrow group of people (who are in Category A) that excludes the Carpenters (who are in Category B).

28. The final consideration at the heart of this matter is what pathway the Minister should follow when applying the requirements of the Planning Act 2008 relating to compulsory acquisition, the Planning Act guidance on compulsory acquisition, and how they both sit next to the presumption in favour development contained in NPS EN-1 guidance.

29. The starting point is that this an energy-related DCO. That triggers NPS EN-1. NPS EN-1 states that all energy DCO applications must be decided in accordance with its guidance. There is a presumption in favour development contained in that guidance. However, this DCO application also request compulsory acquisition powers. That request triggers the requirements of section 122, Planning Act 2008 to be satisfied. It also triggers the Planning Act 2008 compulsory acquisition guidance. At this point, the Minister faces a "fork in the road" in terms of which guidance to follows: the presumption in favour of development contained in NPS EN-1 versus the "balance" exercise required by the Planning Act 2008 compulsory acquisition guidance (there is no presumption in favour of development in the Planning Act 2008 compulsory acquisition guidance). The pathway the Minister should follow in this respect at this fork in the road is that there is no presumption in favour of development in the evaluation of whether compulsory acquisition powers be granted. This is made very clear, and described in detail below, when NPS EN-1 is read together with the Planning Act 2008 compulsory acquisition guidance. Importantly, that compulsory acquisition guidance requires a "balance" to be struck between public benefit and private loss; whereas NPS EN-1 requires a presumption but does not consider compulsory acquisition at all. A balance and a presumption are mutually exclusive concepts.

30. The only reason this proposed project is being treated as a DCO application is because the Minister at the time made a direction under Section 35 of the Planning Act 2008 designating it to be "treated" as so (and not because it was in atual fact a development requiring consent under that Act). Since that time, however, most recently, there has been a ruling by the EU General Court (Case T-295/20) that, in light of evidence from Member States (notably the French Republic itself) evaluating there to be no actual need for this

"most uncertain" project, the Minister can and should conclude that – on balance and in *current* reality from February 2023 - there is no public benefit, foreseeable or otherwise, to the UK for this project, which is, in reality, a cable to nowhere. Therefore, the request for compulsory acquisition powers sought cannot satisfy the legal and guidance tests under the Planning Act 2008 and its compulsory acquisition guidance.

Background

31. The Carpenters have made detailed Representations to the application previously and the Minister is referred to *all* of these and to acquaint himself with *all* of them as they contain relevant and important information in them including as to the then unsound financial footing of Aquind revealed by analysis of its filed accounts. The ExA appears from its report to have paid mere lip service to the Carpenters' concerns at the prospect of their land being taken against their will for what is now revealed as an unnecessary project. It is clear from the report that the ExA did not in fact scrutinize the Aquind proposals as the law required the ExA to do as a safeguard to protect the Carpenters from compulsory acquisition but instead merely accepted the Aquind case hook line and sinker and placed (unlawfully) the onus on the Carpenters to defend the taking of their land rather than placing the onus onto Aquind to prove the land was required for the development for which consent was applied for: an interconnector (identified recently by the French Republic and Regulator as not necessary). With lawful scrutiny, the ExA could and should have recognized the same during the Examination of the Project by the ExA.

32. At the time of the hearing and its report stage, the ExA could have, as paragraph 16 of the Guidance allows, modified the extent of the compulsory acquisition requested so as to exclude the land covered by the Protective Provisions and planning obligation, being the workable alternatives advanced by the Carpenters, but the ExA did not take these forwards. More and most recently, the EU General Court case of 23rd February 2023 has radically altered the factual base of the proposed cable project to remove the need for it *per se*.

Legal Framework for the Minister's Decision under Section 103 and 114 of the Planning Act 2008

33. The Legal Framework for the Minister's Decision under Section 103 and 114 of the Planning Act 2008 is set out in **Appendix 1** hereto, and that **Appendix** cross-refers to statutory provisions, case law, and guidance.

Detailed Responses to Each Paragraph of the Minister's Letter

34. The detailed responses of the Carpenters' are as follows and cross-refer to **Appendices** attached to this Response.

Paragraph 5: The Mannington Alternative Location

35. The core question under the request in paragraph 5 of the Minister's Letter is: Can the Minister rationally conclude that Mannington substation is not a reasonable alternative location suitable for the purpose of the envisaged interconnector connection to the English National Grid? ("**the Mannington Alternative Location**")? By reference to all of their previous Representations to date and to the whole content of this Response herein below, the Carpenters' respond that the Minister cannot conclude that the Mannington is not a location that is *wholly suitable for the purpose of the envisaged interconnector*. See the relevant legal test in *Prest* in **Appendix F** hereto, affirmed by the Supreme Court in the *Sainburys'* case in **Appendix G** hereto.
36. The situation of Mannington is shown in **Appendix M** hereto at the Northermost end of the onshore cable envisaged to transmit power from an offshore wind farm to the National Grid, via landfall at the Taddiford Gap. The cable route, convertor building and landfall locations were subject to expert evaluation in an environmental impact assessment ("EIA"). Relevant extracts from the non-technical summary of that EIA ae in **Appendix N** hereto. See Figures 1, 8, and 9. Section 5.2 explains the Onshore situation including the Onshore substation at (c) at the "existing Mannington Substation". The envisaged cable connection was subject to careful evaluation by an examining authority panel in its report to the Minister. Extracts about the Onshore aspects of that evaluation are in **Appendix O** hereto. See, for example, paragraphs 4.3.31 – 4.3.9, including relative risks including posed by Mannington at paragraph 4.3.36. But the applicant evaluated none of the risks as "insurmountable". See paragraph 4.3.37: "The applicant explained that the risks identified were not insurmountable". The examining authority conclusions are in paragraphs 4.3.44—49, in particular, 4.3.45 that resulted in Mannington, as the "less burdened" location, and the "balancing" act of competing factors referred to in paragraph 4.3.46.
37. The examining authority evaluated the potential use of compulsory acquisition powers and concluded, at paragraphs 22.0.3-4 and 22.4.56 that: "The cable route selected seeks to minimize or avoid urban areas, residential properties and utilities. The extent of any private loss has therefore been mitigated both through selection of the route and the undergrounding of the cables".
38. The opposite and contrasting situation arises in relation to the Aquind envisaged interconnector: a route has been selected by Aquind through the dense city of Portsmouth that results in significant disruption to the population of that historic Naval City.

39. The law remains clear in *Prest* in **Appendix F**: In *Prest*, the Court of Appeal set out the correct legal test for the evaluation of a location alternative to the compulsory acquisition of land: (Emphasis addd)

> *I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands… If there is any reasonable doubt on the matter, the balance must be resolved in favour of the citizen … This principle was well applied by Mr. Justice Forbes in Brown v. Secretary of State for the Environment (1978) P. & C.R. 285 , where there were alternative sites available to the local authority, including one owned by them…*
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> > *"It seems to me that there is a very long and respectable tradition for the view that an authority that seeks to dispossess a citizen of his land must do so by showing that it is necessary … If, in fact, the acquiring authority is itself in possession of other suitable land other land that is wholly suitable **for that purpose** – then it seems to me that no reasonable Secretary of State faced with that fact could come to the conclusion that it was necessary for the authority to acquire other land compulsorily for precisely the same purpose."*

40. "Reasonable" means rational, as in evidenced, doubt and does not mean merely subjectively reasonable accorinding to one party or another.

41. The law remains as set out in *Prest* and was recently affirmed by the Supreme Court in the *Sainsburys* case [2011] 1 AC at paragraph 10 as remaining good law. See **Appendix G** hereto.

42. Paragraph 8 of the correct and relevant guidance applicable under section 122 of the Act (the "Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land" (September 2013) in **Appendix L** hereto describes the statutory test as "requires" and also places under paragraphs 7 (and 11(i)) the exclusive burden in the compulsory acquisition sphere onto Aquind, including under paragraph 8, that Aquind (not a third party) "demonstrate to the satisfaction of Secretary of State that *all reasonable alternatives* (including modifications to the scheme) have been explored" and that the land is "required" (not "reasonably required") to be compulsorily taken from third parties including the Carpenters.

43. The available *evidence* shows that the Minister is unable to *rationally* conclude that the public interest "decisively" demands the taking of third party land of the Carpenters (and that of Portsmouth citizens). It cannot be said that there is no evidence of an alternative landfall location, cable route or connection location to that advanced for the Aquind interconnector as described in **Appendix N** and evaluated in **Appendix O**. There is, therefore, an evidenced (and so, rational) doubt that the law requires be resolved in favour of the Carpenters (and other people at threat of compulsory acquisition in Portsmouth also) because Aquind is unable to show or persuade the Minister that there is no rational doubt about Mannington as an alternative location. Aquind's cannot exclude Mannington (nor the alternative cable route from the Gap) that avoid urban areas, as a reasonable alternative that is wholly suitable for the purpose of the interconnector.

44. At its highest, Aquind *asserts* (but no more) that:

    a) the *degree* of reinforcement that may be necessary for Mannington may be higher than other substations. See the NGET documentation referred to in the High Court case and Appendix O hereto;

    b) (unevidenced) financial matters are conclusive in its favour. But Aquind has refused to disclose into the public domain – even to the High Court in its recent case in 2023 – any figures at all about costs or costs to the public, nor has Aquind disclosed any unredacted figures that can be tested. It merely asserts – without evidence to sustain it – that financial matters are a conclusive factor for the Minister. But, in this respect, paragraph 13 of the CPO Guidance in **Appendix L** calls for "compelling evidence" and not for assertion.

45. It follows that Aquind advances no *evidence* to justify commercial or financial or technical matters as being able to be placed in the balance.

46. By contrast, Aquind is envisaging significantly altering the existing substation at Lovedean. See the Carpenters' previous Representations in this respect.

47. Thus, on the evidence in front of him, the Minister in law cannot conclude that Mannington location is *not* a suitable location for the same *purpose* as the proposed interconnector because the evidence now before him shows that it is wholly suitable for the same purpose. It follows that the law requires him to refuse under section 122 of the Planning Act 2008 the inclusion of CPO powers in the DCO. See *Prest* in **Appendix F** hereto.

48. In the sphere of compulsory acquisition, the law does not require a "precise match" and that an alternative location be precisely the same as the application site, and it would be plainly unrealistic to assert that such a granular degree of precise match must be shown for an alternative to be qualify as an alternative to compulsory acquisition of a site. That unrealistic approach remains adopted by Aquind in its responses to *all* of the Carpenters' detailed objections. But that unrealistic approach is not the law. The law remains clearly set out in *Prest* (and as recently affirmed by the Supreme Court in the *Sainsburys* case [2011] 1 AC at paragraph 10 as remaining good law). See **Appendix G** , paragraph 10.

49. In more detail, it remains clear that: the evidence before the Minister shows that all substations of NGET require *some degree* of reinforcement because of the chosen 2,000MW size of the interconnector. The evidence before the Minister also shows that it is in fact technically feasible to reinforce any sub-station to accommodate the proposed interconnector. See eg paragraphs 4.3.32-33, 4.3.36-4.3.37 in **Appendix O**: "the risks identified were not insurmountable"; 4.4.41 and 4.3.45: "the Mannington location was less

burdened with technical and engineering difficulties than the Chickerell or Fawley sites"; 4.3.45 "There is no other detailed or cogent evidence before the Panel to enable an assessment of the suitability of discounted sites over the Mannington grid connection point… The final choice of connection is a matter of balancing the extent of harm and potential for mitigation against the engineering and economic feasibility of the three options").

50. Ergo, the ExA evaluated the Mannington location for a grid connection as "feasible", albeit there may be "technical and engineering difficulties" and these were "not insurmountable". There is no *evidence* before the Minister to show that such "technical and engineering difficulties" are today "insurmountable".

51. There is also no financial evidence nor that has been disclosed to any party at all (including the Minister) to place in the balance of "economic feasibility". Rather, Aquind asserts the proposed interconnector is viable notwithstanding the accounting evidence previously submitted shows that company to be currently insolvent.

52. Ultimately, the very size of the proposed interconnector requires *some* reinforcement in all sub-stations. No published financial figures enable the Minister to evaluate whether and how the cost of reinforcement may be proliferated. Figure 9 of the Navitus Bay Onshore Development Area in the Non-Technical Summary (Document 6.3) shows remains a complete, evidenced and recently already carefully evaluated, answer as a rational alternative to the proposed interconnector route as to landfall, onshore route, and convertor building and sub-station location. See **Appendix N** hereto.

53. The law in *Prest* requires the Minister to refuse the proposed interconnector because the rational possibility of an alternative location wholly suitable for the purpose of the proposed interconnector to the compulsory taking of the Carpenters' land location (and that of many Portsmouth citizens) for the same "purpose" as the proposed interconnector, on the available evidence of the Applicant before the Minister shows that Aquind cannot rule out that alterative location as not rationally possible.

Category B and the High Court Case

54. The High Court case [2023] EWHC 98 (Admin) in **Appendix J** hereto is not relevant to the consideration of alternatives in the sphere of compulsory acquisition under Part 7 of the Planning Act 2008 and the CPO Guidance in Appendix L hereto. That case concerned consideration of alternatives under NPS EN-1, paragraph 4.4.3, in particular, Bullet point 8, whereby a third party (not threatened by compulsory acquisition) advances an alternative. See **Appendix K** hereto, and internal pages 49-50.

55. It will be recalled that the sole basis of the High Court quashing the former Minister's decision under section 114 of the Planning Act 2008 was the failure by the Minister to call for a further document by which to shed light on a situation that Aquind had confused by the drafting of its representations.

56. That case concerned the consideration of alternatives. But, importantly, the different requirements for the consideration of alternatives goes to the heart of this proposed interconnector application for a DCO, because there are two categories of consideration of alternatives.

57. As has been summarised above, the start point is that the law and guidance create two different pathways (or categorises) of assessing alternatives depending on whether a person is affected by compulsory acquisition powers. Each pathway has different requirements and onus such that it cannot be said that the result of an evaluation under each pathway can be or would inevitably be the same.

58. The first way to assess alternatives is where an alternative is being proposed by person who is not affected by compulsory acquisition. We will describe that as "Category A". If a person is in Category A, then the law and guidance requires that person to demonstrate that an alternative is a real alternative to the proposed project or part of it.

59. The second way to assess alternatives is where an alternative is being proposed by person who is affected by compulsory acquisition. We will describe that as "Category B". If a person is in Category B, then the law and guidance requires the applicant to demonstrate two things: 1) that there are no alternatives to its proposal; and 2) any alternative proposed by a Category B person is not possible. If there is doubt about whether there no alternatives, then the law requires the Minister to refuse the grant of compulsory acquisition powers in relation to the Category B person's land interests. Thus, it is for the applicant to always disprove the *possibility* of alternatives. This is because, if does not rule out *possible* alternatives, then the law requires that evidenced doubt to be resolved in favour of the Category B person and against the grant of compulsory acquisition. By possible alternatives, the law means alternatives of the same *nature* rather than a *cardon copy*. The law describes that as being an alternative that is "wholly suitable for the same purpose".

60. In this matter, the ExA erred in its evaluation of the Carpenters' Objection by unlawfully categorizing them as Category A whereas the law and guidance required them to be categorised as Category B persons.

61. In particular, critically revealing its legal error, the ExA said this in its Report: (Emphasis added)

> *5.4.31. The ExA is mindful of references to the consideration of alternatives in NPS EN-1 including, at paragraph 4.4.3 (bullet 8), that where third parties are proposing an alternative, it is for them to provide the evidence for its suitability. In such instances it is not necessarily expected that the Applicant would have assessed every alternative put forward by another party. In this case, the Applicant has detailed a considered approach and provided additional commentary [REP1-152] to explain its position. Whilst*

offering criticism of the Applicant's approach, no party has submitted substantive reasoned evidence to demonstrate that an alternative would be technically feasible or would lead to lesser environmental effects compared to the Proposed Development…

Conclusions on Alternatives …

5.4.34. The ExA concludes that there are no policy or legal requirements that lead it to recommend that consent be refused for the proposed development in favour of another alternative.

62. It is evidentially clear that the scope of "no party" can but also encompass the Carpenters. But, as is analysed herein, as Category A people in relation to "alternatives", the guidance and law precludes them being in Category A. The guidance and law requires the Carpenters to have been in Category B.

63. It follows that the ExA erred in law in its evaluation of "alternatives", in the same way that the ExA in the *Stonehenge* case did also: by failing to recognize that the scope of paragraph 4.4.3 in NPS EN-1 is not exhaustive and in law the ExA evaluation remained subject to other legal requirements (e.g. those in *Prest*) and to logically prior policy and legal requirements other than and logically prior to Bullet 8 of paragraph 4.4.3. The genesis of the error lay in Aquind's representations that mislead the ExA into error, compounded by the ExA purporting to 'read the Carpenters' cases' but in fact playing incompetent lip service to them and fundamentally misreading them or simply not understanding the law.

64. The ExA erred in failing to recognise the fork in the decision making pathway that paragraph 4.4.3 expressly signposts (eg with "subject to" and by reference to "policy and legal requirements) and as a result, failing to recognize the existence and difference between Category A and B requirements.

65. The outcome of that unlawful evaluation is that the Minister cannot lawfully rely on the ExA evaluation of "alternatives" in relation to any third party (including the Carpenters) as a result of the unlawful consideration of such alternatives gauged under the incorrect category. This is a further reason by which the Minister is entitled to disagree with the ExA as to compulsory acquisition powers being justified here. They remain unlawful and unjustified.

66. There is at present no lawful evaluation before the Minister of any third party who is threatened by compulsory acquisition by Aquind.

67. The ExA was required to have instead pre-categorised all third parties into either: Category A or Category B. An objector who is subject to a threat of compulsory purchase was required in law to have been within Category B. Only a third party not so threatened could be in Category A. The ExA erred in not evaluating that difference in advance of its considering "alternatives" so that it could lawfully direct itself at the fork in the decision recommending pathway: Category A or Category B or some Category A and some Category B. Consequently, the ExA meshed A and B and subverted unfairly the protections afforded by the first two

sentences of paragraph 4.4.3 pf NPS EN-1 (as to onus, burden of showing the case, and different policy and legal requirements to those of a mere objector to a scheme).

68. An example, of the unlawful reversal of the onus by the ExA is in paragraph 10.7.101 of its Report: (Emphasis added)

> *10.7.101. The ExA finds nothing to dissuade it from agreeing with the Applicant's response to the objection in all areas. The ExA's positions on the main points of the AP's objection are as follows. These positions, although briefly reported, take fully into account the cases made by the AP and the Applicant.*

69. In law, the ExA unlawfully reversed the onus (i.e. unlawfully applied Bullet point 8 of paragraph 4.4.3 of NPS EN-1 to its consideration of "alternatives" despite this being a compulsory acquisition situation resulting to require categorization of the Carpenters (and others) as Category B.

70. It is clear from paragraph 10.7.101 that the ExA in fact (in error as below) was applying Bullet point 8 of paragraph 4.4.3 *because* it implicitly placed the onus onto the third party Carpenters in paragraph 10.7.101 ("The ExA finds nothing to **dissuade** it **from** agreeing with the Applicant's response to the objection in all areas.") Consistent with its approach evidence in paragraph *5.4.31., it is evidentially clear* that the ExA applied unlawfully the requirement of Bullet pint 8 of paragraph 4.4.3 to its whole evaluation of "alternatives" in this matter. That was: unlawful, unfair, and I breach of Article 6 of the Human Rights Act. It was also incompetent of the ExA.

71. Properly directing itself in law, the ExA (and now the Minister) was required to have scrutinised and tested the *Applicant's* evidence and placed the burden (or "onus") upon Aquind *because* the Carpenters remain threatened by the taking of their land against their will and, in law, cannot bear the onus of proving it should not be taken. The ExA unlawfully reversed the policy and legal test required to be applied.

72. In more technical language and by reference to the guidance in **Appendix K** and **L** hereto, the Categories A and B arises as follows:

    a) Category A: without more, NPS EN-1, paragraph 4.4.3, and its bullet points, in particular, Bullet point 8, relate to the evaluation of alternatives to the proposed DCO in circumstances where a third party objector (who is not subject to threatened CPO) contends there is an alternative, and that may also concern EIA evaluation of alternatives. Thus, the 8 bullet points reflect the underlying case law of the Town and Country Planning Act 1990 evaluation of alternatives;

    b) Category B: with more, NPS EN-1, paragraph 4.4.3 expressly makes the 8 bullet points "subject to" legal requirements, and the first sentence expressly provides for compliance by the applicant with

"policy requirements" and with "legal requirements" if those first and second sentence provisions are triggered.

73. The "more" is the fact of a person being threatened by compulsory acquisition under a DCO. That threat triggers the very different guidance (and legal requirements) of **Appendix L** different to, and over and above **Appendix K**¸ for the purposes of section 122 in **Appendix E** hereto.

74. In Category B in respect of "policy requirements" that must be adhered to by the applicant (Aquind) and that Bullet point 8 is expressly "subject to", thus:

    a) Parliament has ensured that – before the 8 bullet points in NPS EN-1 can arise as a Category A process - if the fact trigger (resulting from a compulsory acquisition request in a DCO) is hit, then the Category B consideration of alternatives must apply and the Category A consideration cannot apply to the consideration of Category B because Category A and B are mutually exclusive;

    b) sentence two of paragraph 4.4.3 provides an example ("e.g.") of the Habitats Directive. But, as in the *Stonehenge* case in **Appendix I** (that concerned a similar NPS provision (NPSNN, paragraphs 4.26 and 4.27)) about alternatives – see in that case paragraphs 41, 251, 256, 257, 259, 260, 277 and 277, and as was ajudged in paragraph 259 the category of "legal requirements" is "not exhaustive" (i.e. closed) in paragraph 4.26 of NPSNN, and, by logical extension, nor is it closed in paragraph 4.4.3 of NPS EN-1. The Habitats Directive is but one example of a legal requirement;

    c) the first sentence of paragraph 4.4.3 requires the applicant to comply with "a policy or legal requirement to consider alternatives". But, as in the *Stonehenge* case, the trigger category of "policy … requirement" and "legal requirement" is not closed in paragraph 4.4.3;

    d) the Secretary of State's "Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land (September 2013)" in **Appendix L** hereto contains policy requirements in paragraph 6, 8, 10, 11, and 16:

        1. Paragraph 6 states the express statutory test without watering it down;

        2. Paragraph 11 contains guidance on how the statutory test may be met and without watering down the statutory test but instead reinforces the express test by requiring the applicant (not the third party) to demonstrate the land is "needed" for the development. Neither paragraph 6 nor 11 introduce the term "reasonably" as a condition. Both paragraphs 6 and 11 require the "onus" on the applicant "to demonstrate" and that placement is consistent with *Prest* case law as well as being diametrically opposed to the placement of the "onus" onto a third party (not subject to CPO) under Bullet 8 of NPS EN-

1, paragraph 4.4.3. The said opposition reinforces that the Carpenters' analysis of paragraph 4.4.3 as comprising two categories is legally correct and that Aquind's persistent reliance on Bullet point 8 against the Carpenters cannot be legally correct;

3. Paragraph 11 also refers to a requirement under (i) that the "Secretary of State will need to be satisfied that the land to be acquired is no more than is reasonably required for the purposes of the development". There is no express test of "proportionality" for the first part of section 122(2)(i) and the guidance requirement does not water down or condition section 122(2)(i) with a gloss of proportionality under (i). That guidance requires a specified approach to evaluation of "need" and of the "requirement" and simultaneously that the approach be through the correct lens of "purpose" of the development (and not its detailed minutiae) that mirrors the correct legal test in the Prest case (see below). The reference to "reasonably" in the phrase "reasonably required" is a reference to rationally required, as in, there is objective evidence on which the Secretary of State can form a lawful judgement as to whether or not the land is required. Properly interpreted, "reasonably required" cannot equate to "the asserted subjective view of the applicant that it is required" because that would be self-serving. Something more, and objective, is required. Indeed, the ordinary meaning of "reasonable" is "rational". Thus, it is obvious that the lawful interpretation of the last sentence of paragraph 11(i) flows from the prior sentence of a requirement upon the applicant (Aquind) that the it is able to demonstrate that the land is needed. If it has demonstrated that the land is needed, then it should be objectively obvious that "the land to be acquired is no more than is reasonably [as in, rationally] required for the purposes of the development";

4. By contrast with paragraph 11(i) requirements of "Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land (September 2013)", paragraphs 11(ii) and (iii) contain a different test for application under sections 122(2)(ii) and (iii) that adds to the end of the phrase "no more than is reasonably necessary" the further phrase ", and that is proportionate" (under paragraph 11(ii)) and the phrase ",and that what is proposed is proportionate" (under paragraph 11(i)). In law, therefore, the guidance requirement under paragraph 11(i) does not require a test of "proportionately" as a condition of section 122(2)(i) satisfaction. The difference in the Secretary of State's guidance under paragraph 11(i) as against (ii) and (iii) must be deliberate because (ii) and (iii) use "proportionate" in different ways whereas (i) contains no reference to "proportionality". In addition, (i) refers to a test f "required" whereas (ii) and (iii) refer to a test of "need". "Required" is not the

same as "need": "required" means "demand" a thing or "insist", or "needing a thing for a particular purpose"; whereas "need" means "necessary or needful"; and that difference reflects the difference in logical sequence of what sections 122(2)(i), (ii) and (iii) provide for. That is, (i) is first and (ii) logically assumes (i) has been evaluated beforehand;

5. In paragraph 10, of "Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land (September 2013)", the Secretary of State refers to the Human Rights Act but that guidance paragraph makes no mention of "proportionate" in its express terms;

6. In paragraph 8, he also refers in paragraph 8 to an interference being "necessary and proportionate" but the "need" test is not part of the paragraph 11(i) guidance test (that uses "required" and not "need") and nor is "proportionate" part of the paragraph 11(i) guidance test.

Therefore, on its correct construction, "proportionate" cannot, in law, be part of the test in paragraph 11(i); nor can "proportionate" be used to water down or add a gloss to the clear Guidance policy "requirement" under paragraph 11(i). "Proportionate" is a different test under different guidance. Indeed, section 104(6) of the Planning Act 2008 provides for the Human Rights Act compliance rather than section 122(2).

75. It follows from the above analysis that the ExA Report before the Minister evidences that the ExA erred:

a) in its purported evaluation of the Carpenters and of "alternatives". In essence, the ExA unlawfully categorised the Carpenters as Category A third parties whereas the law requires them to be exclusively in Category B; and

b) by adopting a non-guidance and extra-statutory test that watered down the section 122(2) test from "required" to "reasonably required and proportionate".

76. It further follows that the Carpenters' Objection has not yet been lawfully evaluated by any ExA and the Hearing of their Objection was inherently unfair and unlawful as a result.

77. The above only matters if the Minister seeks to grant a DCO and grant it with CPO powers. If he decides to not grant the DCO and to not grant it with CPO powers, then the concerns of the Carpenters sound only in their costs application and the CPO Guidance would entitle them to their costs in any event.

78. In this matter, the ExA erred:

a) in paragraph 10.2.1 of its Report because it <u>added a non-guidance requirement of "proportionate"</u> to the section 122(2)(i) Guidance criteria notwithstanding that the "Planning Act

2008: Guidance related to procedures for the compulsory acquisition of land (September 2013)" expressly does not apply a test or condition of "proportionate" as a factor "in respect of land required for development". Instead, the Guidance only expressly introduces a test of "proportionate" under (ii) "[in respect of] the land is required to facilitate or is incidental to the proposed development" under or (iii) "[in respect of] the land is replacement land". The error of the ExA fundamentally taints and undermines the *whole* of its consideration of alternatives in the compulsory acquisition sphere under Part 7 of the Planning Act 2008, as is evidenced by the ExA describing in paragraph 10.2.2. of its Report that "A conclusion on this matter is reached *later* in this Chapter";

b) In paragraphs 5.4.5, 5.4.31, and 10.7.101, of its Report because the latter paragraph evidences that the *start* point for the ExA considering the Objection by the Carpenters was the Applicant's position and Bullet 8 of paragraph 4.4.3: (Emphasis added)

> *5.4.5 In terms of alternatives, NPS EN-1 advises that their relevance is, in the first instance, a matter of law and that alternatives that are not among the main alternatives studied by the Applicant, as reflected in the ES, should only be considered if they are believed to be important and relevant to the decision. If an application gives rise to adverse impacts, alternative options could be important and relevant considerations. Where there is a policy or legal requirement to consider alternatives, this should be done in a proportionate manner and in consideration of whether there is a realistic prospect of the alternative delivering the same infrastructure in the same timescale…*
>
> *5.4.31 The ExA is mindful of references to the consideration of alternatives in NPS EN-1 including, at paragraph 4.4.3 (bullet 8), that where third parties are proposing an alternative, it is for them to provide the evidence for its suitability. In such instances it is not necessarily expected that the Applicant would have assessed every alternative put forward by another party. In this case, the Applicant has detailed a considered approach and provided additional commentary [REP1-152] to explain its position. Whilst offering criticism of the Applicant's approach, no party has submitted substantive reasoned evidence to demonstrate that an alternative would be technically feasible or would lead to lesser environmental effects compared to the Proposed Development…*
>
> *10.7.101. The ExA finds nothing to dissuade it from agreeing with the Applicant's response to the objection in all areas. The ExA's positions on the main points of the AP's objection are as follows. These positions, although briefly reported, take fully into account the cases made by the AP and the Applicant.*

The language of paragraph 5.4.5 appears to reflects that of paragraph 4.4.1 and Bullet points 1 and 2 of paragraph 4.4.3. The language of paragraph 5.4.31 reflects that of NPS EN-1, paragraph

The use of "dissuade" in paragraph 10.7.101 by the ExA evidences that the ExA unlawfully reversed the legally correct "onus" from the Applicant in a Category B matter such as their Objection and instead unlawfully adhered to the Category B i.e. the ExA unlawfully applied

Bullet point 8 of NPS EN-1 paragraph 4.4.3 to the consideration of alternatives posited by the Carpenters as a "third party" (but as a third party not threatened by compulsory acquisition), whereas the Carpenters can only ever have been in Category B (and Bullet point 8 can in law never have applied to their Objection *because* their Objection related to the threat of compulsory acquisition).

It remains an error law for the ExA to have considered the Objections by the Carpenters (and likely others also) to a compulsory acquisition from the stance of an Objector having to persuade the ExA from the Applicant's position (i.e. "dissuade" the ExA). To dissuade the ExA is a paragraph 4.4.3 Bullet point 8 or Category A case; whereas those third parties (including the Carpenters') threatened by compulsory acquisition can only qualify as a Category B case. Indeed, the reference in paragraph 4.4.3 Bullet pint 8 to "not necessarily" adverts to the existence of the logically prior policy and legal requirements that safeguard those third parties who (like the Carpenters) are Objecting to the compulsory acquisition of their land.

79. In Category B in respect of "legal requirements" under paragraph 4.4.3 of NPS EN-1 that must be adhered to by the applicant (Aquind) and that Bullet point 8 is expressly "subject to", thus:

a) For the reasons give above, the *guidance* in Bullet point 8 of paragraph 4.4.3 of NPS EN-1 is diametrically opposed (in relation to the relevance of alternatives and to the placement of the "onus" onto the third party threatened by compulsory acquisition) to the "legal requirement" in *Prest* case that: (Emphasis added)

> *"It is clear that no Minister or public authority can acquire any land compulsorily except the power to do so be given by Parliament: and Parliament only grants it, or should only grant it, when it is necessary in the public interest. In any case, therefore, where the scales are evenly balanced — for or against compulsory acquisition w the decision — by whomsoever it is made — should come down against compulsory acquisition. I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands… If there is any reasonable doubt on the matter, the balance must be resolved in favour of the citizen. This principle was well applied by Mr. Justice Forbes in Brown v. Secretary of State for the Environment (1978) P. & C.R. 285 , where there were alternative sites available to the local authority, including one owned by them. He said (at page 291):*
>
> > *"It seems to me that there is a very long and respectable tradition for the view that an authority that seeks to dispossess a citizen of his land must do so by showing that it is necessary … If, in fact, the acquiring authority is itself in possession of other suitable land other land that is wholly suitable for that purpose – then it seems to me that no reasonable Secretary of State faced with that fact could come to the conclusion that it was necessary for the authority to acquire other land compulsorily for precisely the same purpose."*

Prest is authority for the proposition that the legal onus of showing that compulsory purchase is justified lies *exclusively* on the applicant. *Prest* was affirmed by the Supreme Court in the *Sainsburys'* case and remains good law: "*an authority that seeks to dispossess a citizen of his land must do so by showing that it is necessary"*. That is, the third party threatened with compulsory acquisition need do nothing. There is no legal requirement for such an Objector to "dissuade" anybody; instead, it remains exclusively for the applicant to "show" (or "persuade") the decision making Minister that the compulsory acquisition (here) satisfies the section 122(2)(i) Planning Act 2008 statutory test of "required". Indeed, paragraph 8 of the "Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land (September 2013)" requires that the applicant "should be able to demonstrate to the satisfaction of the Secretary of State that all reasonable alternatives to compulsory acquisition (including modifications to the scheme) have been explored". As has been referred to above, "reasonable" means "rational". In this matter, the Carpenters advanced a range of rational alternatives to the taking of all of their land, and proposed to modify the scheme rationally. Instead of requiring the Applicant to show the land was required and to resolve doubt in favour of the Carpenters, the ExA applied an erroneous non-guidance test, the erroneous "onus" onto the Carpenters, and evaluated the rationally made and advanced Objection (including as to modifications to the scheme) from the wrong start point (of Bullet point 8 of paragraph 4.4.3 of NPS EN-1.

b) It is no answer to assert that NPS EN-1 engenders a presumption in favour of the development. This is because the scope of EN-1 can only cover Part 6 of the Planning Act 2008 and cannot extend to cover Part 7 that relates to compulsory acquisition. Hence, the "Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land (September 2013)" relates to Part 7 and reflects the law of compulsory acquisition; whereas EN-1 is totally silent on any "compulsory acquisition" , save for paragraph 1.4.4 with a single descriptive reference to the most general description of the Act as including compulsory purchase. Thus, "Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land (September 2013)" aligns with NPS-EN-1, and via the gateway terms of paragraph 4.4.3 "policy or legal requirements" and "subject to any relevant legal requirements" by which the consideration is required to fall into Category A or into Category B.

80. The final legal requirement also stems from *Prest*: the legal requirement to exclude rationally evidenced alternatives ways of achieving the *wholly same purpose of the scheme* so that it can be rationally concluded that the taking of third party land is lawfully justified "*decisively*". This is because the use of

compulsory acquisition must be a remedy of "last resort" else the requirement for "decisive" cannot be rationally satisfied. That is, the need for "last resort" derives from the Prest requirement that land can in law only be taken from a citizen "if the public interest decisively so demands". Only by showing there to be no possible alternatives can, in law, an applicant meet the legal requirement for "decisively" demanding acquisition. That is, the existence of a potential rational (i.e. objective) alternative means for the wholly same "purpose" as the scheme precludes , in law, the required decisiveness from arising. Hence, in the July 2019 "*Guidance on compulsory purchase and the Crichel Down Rules"* (July 2019), page 6: (Emphasis added)

> *Compulsory purchase is intended as a last resort to secure the assembly of all the land needed for the implementation of projects…*

81. The legal requirement to show that the compulsory acquisition of the Carpenters land was in fact a remedy of last resort required the Applicant Aquind to exclude the potential in fact for all rational objective alternatives to its land being taken against the Carpenters' will, including as to *location* of the convertor station on their land, and the extent of the land take if to be on their land.

82. The ExA erred in their consideration of the Objection the Carpenters (including their proposed Protective Provisions) because the ExA categorised the Carpenters (in legal error, as a Category A party) as having to "show" the proposed interconnector and convertor station were not justified on their land (ie applying paragraph 4.3.3, Bullet point 8 of NPS EN-1 to the Carpenters), instead of requiring the applicant Aquind to itself justify as a "last resort" the location and extent of land required for the proposed project, it entailing third party land take.

83. The erroneous approach of the ExA (in breach of the legal requirement in *Prest*, and in breach of the EN-1 Category B requirement), is evidenced starkly as follows by the ExA in its Report to the Minister: (Emphasis added)

> *5.4.31. The ExA is mindful of references to the consideration of alternatives in NPS EN-1 including, at paragraph 4.4.3 (bullet 8), that where third parties are proposing an alternative, it is for them to provide the evidence for its suitability. In such instances it is not necessarily expected that the Applicant would have assessed every alternative put forward by another party. In this case, the Applicant has detailed a considered approach and provided additional commentary [REP1-152] to explain its position. Whilst offering criticism of the Applicant's approach, no party has submitted substantive reasoned evidence to demonstrate that an alternative would be technically feasible or would lead to lesser environmental effects compared to the Proposed Development.*

84. Paragraph 5.4.31 by the ExA reveals the fundamental legal flaw in its purported evaluation of the proposed development: Any third party that was threatened by compulsory acquisition was required by EN-1, paragraph 4.4.3, (first sentence and by reference to the phrase "subject to" in the second sentence) to be

categorised by the ExA into Category B and could not be placed in Category A because A and B are mutually exclusive categories with different competing onus and requirements. Thereby, the evidence that "no party" "submitted substantive evidence … compared to the Proposed Development". The "comparison" by the ExA was the wrong way around and (again) placed (i.e. reversed) the burden onto the third party threatened with compulsory acquisition. That resulted to unlawfully categorise such a party into Category A instead of Category B with its own requirements for evaluation and the approach to that evaluation, including the correct placement of the "onus" onto Aquind instead of onto the Carpenters.

85. The ExA Report (and the High Court case) refers to a "presumption" in favour of the proposed development. See, for example, paragraph 4.4.8 of the ExA Report. At paragraph 4.4.11 then evidences: (Emphasis added)

> *Paragraph 4.1.2 of NPS EN-1 says that the Secretary of State should start with a presumption in favour of granting consent for applications for energy NSIPs, and that the presumption applies unless any more specific and relevant policies set out in the relevant NPSs clearly indicate that consent should be refused.*

86. The heart of this matter is *how* the policy *presumption* inter-faces with the statutory requirement in Part 7, section 122(3), of the Planning Act 2008.

87. Section 122 of the Act states, as set out in **Appendix E** hereto: (Emphasis added)

> 1) *An order granting development consent may include provision authorising the compulsory acquisition of land only if the Secretary of State is satisfied that the conditions in subsections (2) and (3) are met.*
> 2) *The condition is that the land—*
> *a) is required for the development to which the development consent relates,*
> *b) is required to facilitate or is incidental to that development, or*
> *c) is replacement land which is to be given in exchange for the order land under section 131 or 132.*
> 3) *The condition is that there is a compelling case in the public interest for the land to be acquired compulsorily.*

88. How does, if at all, the "presumption" interface with section 122 in Part 7 of the Planning Act 2008 where compulsory acquisition powers are sought and alternatives are required to be considered?

89. It will be recalled that NPS EN-1 derives from section 5(1) of the Act and the presumption is stated only in the *guidance* and not in the Planning Act 2008. See **Appendix K**.

90. Paragraph 1.1.1 explains that EN-1 is "policy". See **Appendix K**. It remains trite law that policy cannot trump the language of the primary legislation because, obviously, guidance cannot trump the law.

91. Indeed, paragraph 4.1.2 above notes that the presumption may not apply at all, even as a start point. Further, in EN-1, paragraph 1.1.2. policy provides exceptions to the requirement to decide an application

in accordance with EN-1. The exceptions include under bullet 4 that there is no requirement to decide an application in accordance with EN-1 if to do so "would result in adverse impacts from the development outweighing the benefits". See **Appendix K**.

92. An example of such a result would be the adverse impact on the Carpenters farm land (or the land of Portsmouth citizens) from the development that, for them, would outweigh the benefits.

93. Furthermore, EN-1, paragraph 4.1.2 expressly states that the presumption is "subject to the provisions of the Planning Act 2008 referred to at paragraphs 1.1.2 of [that] NPS]". See **Appendix K**.

94. Consequently, and unsurprisingly therefore, the *guidance/policy* presumption is not expressly referred to in the Secretary of State' "Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land (September 2013)". See **Appendix L**.

95. The complete and simple answer (in the guidance) is provided by the Secretary of State's "Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land (September 2013)", paragraphs 12-13 that make no mention of a "presumption" being a relevant factor under section 122(3). Indeed, paragraphs 14-16 describe the "*balance*" of public interest against private loss. See **Appendix L** hereto.

96. The relevant guidance requires there to be a "balance" whereas the EN-1 guidance provides a policy "presumption" as a "start" point. See **Appendix K**. The concepts of "balance" and "presumption" are mutually exclusive and, therefore, the EN-1 "presumption" must "end" *before* the 'start' of the consideration of compulsory acquisition decision making under section 122. See **Appendix L**.

97. Indeed, this analysis is consistent with paragraph 16 of the "Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land (September 2013)" illustrates the *balance* (and not a presumption). See **Appendix L**: (Emphasis added)

> *There may be circumstances where the Secretary of State **could reasonably** justify granting development consent for a project, but **decide against** including in an order the provisions authorising the compulsory acquisition of the land. For example, this could arise where the Secretary of State is not persuaded that all of the land which the applicant wishes to acquire compulsorily has been shown to be necessary for the purposes of the scheme. Alternatively, the Secretary of State may consider that the scheme itself should be modified in a way that affects the requirement for land which would otherwise be subject to compulsory acquisition. Such scenarios could lead to a decision to remove all or some of the proposed compulsory acquisition provisions from a development consent order.*

98. The phrase "could reasonably justify" at odds with the presumption in favour of the scheme. This is because the concept of having to justify a decision implies a decision could go either way, rather than there being a presumption in favour of the scheme. Indeed, the scheme (that may have been presumed) can be properly modified under paragraph 16. See "Alternatively…" in that paragraph.

99. The phrase "decide against" evidences the *absence* of a presumption operating in favour of the developer in the compulsory acquisition sphere of the Planning Act 2008 under Part 7.

100. Thereby, the relevant guidance applicable to an objector threatened with compulsory acquisition of their land is that the EN-1 "presumption" has no part to play in the evaluation of whether or not to grant powers of acquisition under section 122. Thus, the operative planning act policy is the policy under "Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land (September 2013)". Further, the guidance presumption is, therefore, irrelevant to the evaluation under section 122. This is reinforced by paragraph 13 that cites "compelling *evidence* that the public benefits … will outweigh the private loss". "Presumption" plays no part.

101. That guidance is consistent with the presumption in EN-1 being *unable*, in law, to inform the evaluation under section 122, including (3) of the Planning Act 2008, in order to supply any of, or the whole of, the answer to the statutory question of whether or not there is a "*compelling* case in the public interest". If it were otherwise, then "compelling case" would invariably be satisfied by *the presumption* in favour of the scheme. That cannot be the case. Nor does the Secretary of State's "Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land (September 2013)" suggest that that is so. The guidance does not say anywhere that "there is a presumption in favour of compulsory acquisition of land".

102. As has been summarised above, the Judge in the High Court case was exclusively concerned with consideration of Alternatives under Category A (as referred to above), being consideration of Alternatives in NPS EN-1, paragraph 4.4.3 in circumstances where the ExA is exclusively considering the contentions of third parties who are <u>not</u> threatened by compulsory.

103. The Minister should therefore bear in mind that the High Court case did not concern Category B, being third parties threatened by compulsory acquisition and in relation to whose views, NPS EN-1, paragraph 4.3.3 Bullet points are wholly irrelevant.

104. Lastly, the High Court described in paragraphs 4 and 34 of its Judgment there the ExA found there was a need for the project and that the harm found was outweighed be the need, having "accepted the Claimant's need case". This is addressed by the Carpenters below under Need. See **Appendix A**.

Paragraph 6: The Effect of NPICDS

105. This is a matter for Portsmouth City Council to evidence further.

106. The Carpenters' have previously made submissions on the impact of the proposed interconnector delaying the provision of important sea flood risk infrastructure for the protection of the citizens of Portsmouth.

107. By contrast, the landfall location, route and connector building location identified in Figure 9 (referred to above) (see **Appendix M**) has been evaluated by an expert Examining Authority in its Report at paragraphs 4.3.31-4.3.49 on the Navitus Bay DCO. See extracts at **Appendices N** and **O** hereto.

108. A critical aspect of the acceptability of the route for that cable connecting the landfall location at Taddiford Gap and connector location at Mannington was that the "cable route selected seeks to minimize or avoid urban areas" (see paragraph 22.4.57 of the Examining Authority's Report on Navitus Bay, in **Appendices N** and **O** hereto). By contrast, the Aquind proposed interconnector does precisely the opposite and charts landfall and much of the cable route through a densely populated urban area of the City of Portsmouth. It would be inconsistent for the Minister to have agreed with paragraph 22.4.57 of that Report and then to agree with the ExA in this matter that <u>not</u> minimizing or avoiding urban areas is acceptable.

Paragraph 7: The European Connection Situation and Need

109. Three important and relevant matters require to be brought to the attention of the Minister in respect of the current position: the lack of necessary French authorisations; the evidence of over capacity and evidence of no contribution by the Project to energy security nor other benefits described in the EU Case published in February 2023 (see **Appendix J**); and European Commission evaluation evidence of no actual need for the project described both in the EU case itself as "overcapacity" and also gauged against an identified need by the Commission that is described in a different interconnector project known as GridLink (see **Appendix W**, paragraph 4.1.3, bullet two).

110. The first matter relates to the need for an environmental authorisation from the relevant French authority in order that the envisaged interconnector can – foreseeably – proceed on the South side of the Channel; and to the EU Case hand down in February 2023.

111. It will be recalled that the authorisation environmental was <u>refused</u> on the 18th January 2021. See **Appendix P** hereto.

112. The Carpenters have been unable to identify any further environmental consent since then and reasonably conclude that the need for an authorisation environmental remains necessary.

113. It follows that the need for such authorisation remains, and foreseeably so, an impediment to the realization of the envisaged interconnector going forwards.

114. The second matter, however, is a structural change in the legal and evidential basis on which the envisaged interconnector falls today to be evaluated by the Minister himself.

115. It will be recalled that the sole basis for the envisaged interconnector being before the Minister at all is by dint of a section 35 direction made by a former Minister under the Planning Act 2008. That is the envisaged interconnector cannot be said to be "necessary" as a result of the project inherently qualifying as a nationally important project in its own right. Instead, as a result of the section 35 direction the project is treated as notionally being a nationally important project.

116. The law requires the Minister to have and consider the relevant information available before him when he makes his decision under the Act.

117. The most recent relevant – and very important – information is that evidence of fact contained in the recent Judgment of the General Court (Second Chamber), Case Reference T-295/20 in **Appendix Q** hereto ("the EU Judgment"). The third matter is related to the second and reinforces that the second is correct. The third comprises evidence of actual need that was not put before the Examining Authority by Aquind nor before the Secretary of State. This is summarised in paragraph 4.1.3, bullet two, of **Appendix W** where the identified need for 5.4GW of capacity at the GB-French border results to reveal the "over capacity" of the Aquind Interconnector when the current projects are subtracted from the 5.4GW need and evidence that there is no remaining capacity (i.e. need) for the 2GW proposal of the Aquind Interconnector.

The EU Judgment published on 8th February 2023 (after the January 2023 High Court Judgment in Appendix A)

118. The EU Judgment concerned the removal of the envisaged interconnector from the pan-European list of "Projects of Common Interest" ("PCI"). In dismissing the current Applicant – Aquind Ltd – complaint to that Court about the removal of its project from that list, the Court summarised two things:

a) The real importance of the *status* of a project as a PCI (and by necessary implication, the catastrophic difference to a project that results from it not being on the list);

b) The evaluation in fact by the French Republic (and the French Energy Regulator) of the envisaged interconnector.

Importantly for the Minister in reaching his own decision in this application, none of the foregoing information and evidence was before either the ExA (nor in its report) or the Judge in the High Court

case. That is, the Minister is in the privileged position as the decision maker as being appraised of wholly new and relevant information about the envisaged interconnector project before him now.

119. In essence, the evidence of fact in the EU Judgment evidences to the Minister that:

a) There is no actual need for the envisaged interconnector (regardless of the *notional* need described in NPS EN-1);

b) The French Republic has evaluated that to proceed with the envisaged interconnector would result in "over capacity", because there are 4 other interconnectors that are less risk projects than that of Aquind and that are being carried out currently;

c) He can rationally evaluate that the loss of status of the envisaged interconnector as a PCI would result in it losing all of the financial and stream lined authorisation benefits attendant on PCI status such that, he is not unable to conclude that there are no impediments to implementation of the envisaged interconnector project for the purposes of paragraphs 14 and 17-18 of the "Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land" (September 2013) in **Appendix L** hereto. Given that the envisaged interconnector was removed from a list of projects that is reviewed only every two years, and has in 2023 been conclusively expelled from the list, for the reasons given by the French Republic, it can b reasonably concluded by the Minister now that it is not reasonably foreseeable that there will be no likely impediments to implementation (including resources and necessary consents) during the coming 5 year period.

120. The Minister may recall that, on the 23rd November 2017, the proposed interconnector was placed on the "list of projects of common interest" ("PCIs") of the European Union by Commission Delegated Regulation (EU) 2018/540 of 23rd November 2018. On the 31st October 2019, the Regulation was amended to remove the proposed interconnector from that list. On the 8th September 2020, the ExA began to examine the proposed interconnector until 8th March 2021. In June 2021, the ExA reported to the previous Minister. Turning to the ExA Report, the Minister will recall the following. Under "Impediments to Implementation", the ExA Report explains as follows:

10.7.78. The AP suggests many impediments to the implementation of the Proposed Development which it says could place the Applicant in conflict with the CA Guidance and undermine the justification for CA. The AP argues that the Applicant has not demonstrated that it has taken into account the need to obtain any operational and other consents and the Secretary of State is therefore 'unable to know' whether a number of potential risks or impediments to the implementation of the Proposed Development are being properly managed ([REP8-100] paragraphs 5, 25 and 26).

10.7.79. The Applicant responds that it has explained its interpretation of the CA Guidance ([REP8-065] section 3). Paragraph 9 of the CA Guidance lies under the heading of 'General Considerations' and advises applicants that they should 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 s122 of PA2008 requirements are met. Further guidance on funding appears under the heading 'Resource implications of the proposed scheme' in paragraphs 17 and 18. These paragraphs identify factors that are relevant to assessing whether the 'reasonable prospect' test in paragraph 9 is met….

10.7.84. The AP suggests that the Applicant's exemption application to the EU Agency for the Cooperation of Energy Regulators (ACER) cannot now be progressed ([REP8-100] paragraphs 40 and 41, and Appendix 1).

10.7.85. The Applicant responds that 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 EU ([REP9-019] sections 2 and 3). The ACER board of appeal is bound to follow the judgment of the General Court and the Applicant therefore considers that it is in a strong position on this exemption application ([AS-069] section 3, [REP1-091] CA1.3.2, [REP5-034], [REP6-021] paragraphs 8.3 and 8.4, and [REP6-062]). The board of appeal of ACER has resumed proceedings, and the board must be presumed to be competent to take a decision on the exemption application [REP8-065]….

The availability of funding for Compulsory Acquisition and implementation

10.7.108. In terms of matters raised by the AP and the Applicant's responses, the ExA has not seen anything to suggest that the Applicant is not of sound financial standing and that the necessary funds have not been, and would not be, available to finance the project, including any potential for blight claims. The ExA is satisfied that the Applicant's cost estimates, including the matter of blight claims, have been appropriately compiled in a justified manner and sufficient information on funding has been provided. Furthermore, the Recommended DCO secures CA funding outside the need to source project and CA funding from the market…

Impediments to implementation and Compulsory Acquisition

10.7.112. The ExA finds nothing in this objection to suggest that the Applicant has not properly managed potential risks or impediments to funding and implementation in accordance with the relevant guidance. Furthermore, the ExA has already found the EIA to be appropriate and in accordance with the relevant guidance and is satisfied that the ES reflects the Proposed Development at the close of the Examination. The AP's representations do not change this finding in any way.

121. In January 2023, the High Court quashed the decision of the previous Minister for refusing the DCO under section 114(1) of the Planning Act 2008 because the reasons given in relation to consideration of alternatives had left out consideration of aspects of Mannington as a location for an alternative place to situate the convertor building.

122. Most recently, on the 8th February 2023, the General Court, Second Chamber handed down judgment in Case T-295/20. In that case, the Court dismissed Aquind's case for re-inclusion on the list of PCI.

123. The Carpenters refer the Minister to **Appendix J** hereto. And, in particular, to the following extracts: (Emphasis added)

In Case T-295/20,
***Aquind Ltd,** established in Wallsend (United Kingdom),*
***Aquind SAS,** established in Rouen (France),*
***Aquind Energy Sàrl,** established in Luxembourg (Luxembourg) …*

1. By their action based on Article 263 TFEU, the applicants, Aquind Ltd, Aquind SAS and Aquind Energy Sàrl, seek annulment of Commission Delegated Regulation (EU) 2020/389 of 31 October 2019 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest (OJ 2020 L 74, p. 1; 'the contested regulation').

Background to the dispute

2. The applicants are the promoters of a proposed electricity interconnector linking the electricity transmission networks of the United Kingdom and France ('the proposed Aquind interconnector').

3. The proposed Aquind interconnector was placed on the list of 'projects of common interest' ('PCIs') of the European Union by Commission Delegated Regulation (EU) 2018/540 of 23 November 2017 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest (OJ 2018 L 90, p. 38), and was thus considered to be a fundamental project in the infrastructure necessary for the completion of the internal energy market. The status of a Union PCI enables a promoter of projects, first, to benefit from a procedure for the grant of rationalised, coordinated and accelerated authorisations, secondly, to submit a request for investment and cross-border allocation of costs to the competent national regulatory authorities, in such a way that the efficiently incurred investment costs are recoverable from network users and, thirdly, to seek financing under the Connecting Europe Facility.

*4. The list established by Delegated Regulation 2018/540 was replaced by the one established by the contested regulation. In the new list in annex to the contested regulation, **the proposed Aquind interconnector appears in the table of projects which are no longer considered to be Union PCIs**.*

124. By not being a Project of Common Interest, Aquind's proposed interconnector:

a) cannot now benefit from the French granting rationalized, co-ordinated and accelerated authorisations;

b) cannot submit a request for investment and cross-border allocation of costs;

c) cannot seek financing under the Connecting Europe Facility.

This places, for the Minister, a very big question mark over whether Aquind foreseeably will be able to secure the necessary French consents and investments at all. There is not no significant risk of the project not securing funding. Indeed, as the French Republic evaluated:

> *24. Secondly, it should be noted that, in its written pleadings, the Commission stated that the reason why it had not included the proposed Aquind interconnector as a Union PCI in the contested regulation concerned the French Republic's refusal to give its approval to the inclusion of that project in the Union list of PCIs. It stated that the French Republic had justified its refusal by the existence of a risk of overcapacity on account of the existence of several projects in the same region and by the fact that the proposed Aquind interconnector was considered to be the most uncertain. However, the Commission accepts that the contested regulation does not contain any reference to the French Republic's refusal or, a fortiori, to the reasons why the latter refused to give its agreement.*

The Minister should be aware that English law requires, in situations of actual evidenced doubt such as this, that the Minister must resolve that doubt in favour of the Objector whose land is threatened to be taken. See the *Prest* in **Appendix F** hereto.

125. In addition, the EU Case T-295/20 evidences a real impediment to foreseeable implementation. The English CPO Guidance referred to in **Appendix L**, requires in paragraph 19, it to be demonstrated by the Applicant (Aquind) that: "any potential risks or impediments to implementation of the scheme have been properly managed; they have taken account of any other physical and legal matters pertaining to the application, including the programming of any necessary infrastructure accommodation works and the need to obtain any operational and other consents which may apply to the type of development for which they seek development consent.". In light of the EU Case, Aquind cannot demonstrate that its project would be re-instated with PCI status, and, in further consequence, neither Aquind nor the Minister is in a position to be able to conclude on evidence (rather than bare assertion) that the deprivation of PCI status has no impact on the project resulting in its facing insurmountable hurdles to securing operational and other consents for this interconnector.

No Evidence of Need & Evidence of Over-Capacity

126. Finally, and perhaps most importantly, the EU Case also evidences the following – the actual absence of need for the envisaged project, and that, were it to proceed, it would result in "over capacity" as paragraph 24 evidences to the Minister:

> *24. Secondly, it should be noted that, in its written pleadings, the Commission stated that the reason why it had not included the proposed Aquind interconnector as a Union PCI in the contested regulation concerned the French Republic's refusal to give its approval to the inclusion of that project in the Union list of PCIs. It stated that <u>the French Republic had justified its refusal by the existence of a risk of overcapacity</u> <u>on account of the existence of several projects in the same region</u> and by the fact that the proposed Aquind interconnector was considered to be the most uncertain. However, the Commission accepts that the contested regulation does not contain any reference to the French Republic's refusal or, a fortiori, to the reasons why the latter refused to give its agreement.*

127. The importance of this paragraph is that it evidences that, from the French perspective of the cable in French waters and land, there is <u>no actual need now</u> for the proposed interconnector because there is *already* a number of other such interconnectors that are already under construction. It further follows that the French Republic also evaluates – as at March 2023 and after the event of the ExA evaluation in the Aquind DCO Application and after the event of the High Court Judgment - there to be no actual need *and no foreseeable actual need* for the Aquind envisaged interconnector. The Minister is entitled to agree with that evaluative evidence, to attribute to it significant weight, and to refuse DCO consent for the entire project as a result. The Minister is also entitled to evaluate that the evidence of overcapacity and risk to not securing finance means that he is not persuaded by Aquind that the asserted public benefits would come to fruition within 5 years or at all. He is further entitled to evaluatively conclude that the result of the *evidence* relating to such benefits means that the "balance" under paragraph 14 of the Guidance in

Appendix L hereto weighs in favour of not confirming the compulsory acquisition powers under section 122 of the Act being confirmed and so to a refusal to grant CPO powers in this matter.

128. The Carpenters' highlight to the Minister that, so concerned was the French *energy* authorities by the cable project, that they evaluated it as resulting in "overcapacity" were it to be built. That, as at 23rd February 2023, the French energy authority evaluated there to be no need for the Aquind interconnector. The EU Judgment includes the following evidence: (Emphasis added)

> *18. First, the recitals of the contested regulation contain a brief summary of the content of Regulation No 347/2013, they refer to the Commission's power to adopt delegated acts in order to draw up the Union list of PCIs, they reiterate the obligation to draw up a new list every two years and they state that the projects proposed for inclusion in the Union list of PCIs were evaluated by the regional groups and that those groups confirmed that the projects in question satisfied the criteria set out in Article 4 of Regulation No 347/2013…*
>
> *25 In the second place, it is therefore necessary to examine whether, despite that lack of an explicit reference to the reason for the French Republic's refusal in the contested regulation, the applicants were in a position to know the reasons why their proposed Aquind interconnector had not been included in the Union list of PCIs. That involves determining whether, for the purposes of the case-law cited in paragraph 13 above, the project was not included in circumstances known to the applicants which would enable them to understand the scope of the measure taken concerning them, and whether the view may be taken that there was implied reasoning in the contested regulation…*
>
> *29. 29 Next, at the meeting of 5 December 2019 of the European Parliament's Committee on Industry, Research and Energy, the Commissioner for Energy replied to a question put by two Members of the European Parliament from the United Kingdom concerning the reasons for the removal of the proposed Aquind interconnector from the Union list of PCIs. The Commissioner for Energy stated, first, that the French Republic considered that the four projects linking the United Kingdom and France would lead to overcapacity, secondly, that that Member State was of the opinion that the proposed Aquind interconnector was considered to be the most uncertain and, thirdly, that that Member State had accordingly requested that the project at issue should not be included in the new list of PCIs. The Commissioner for Energy stated that the Member States were entitled to approve projects which concerned their territory and that the Commission was required to respect that right…*
>
> *31 Lastly, in response to another written question from the Court, the applicants stated that, in response to their letter of 24 October 2019, the Deputy Director-General of the Commission's Directorate-General (DG) for Energy informed them, by letter of 20 February 2020, that the Commission was not empowered to include any projects in the Union list of PCIs after the decisions of the regional groups had been taken, and stated that the French Republic had raised an objection to the proposed Aquind interconnector.*
>
> *32 It follows from all of the foregoing that the applicants became aware of the reason why the Commission did not include the proposed Aquind interconnector in the Union list of PCIs in the contested regulation, in so far as that reason related to the fact that the French Republic had not approved that project. In addition, they were able to note that, according to that Member State, there was a risk of overcapacity due to the existence of a number of projects and that the proposed Aquind interconnector was the most uncertain…*
>
> *42 In the present case, the minutes of the meeting of the technical decision-making bodies and of the meeting of the high-level decision-making body indicate that the French Republic had given reasons for its refusal to approve the inclusion of the proposed Aquind interconnector in the fourth list of PCIs and that no Member State of the regional group concerned had requested an examination of those reasons.*

> *43. The Commission therefore satisfied the obligation to state reasons by referring to the French Republic's refusal to give its approval to the inclusion of the proposed Aquind interconnector in the Union list of PCIs. Similarly, it cannot be criticised for not having asked the French Republic for explanations of the detailed reasons for that refusal…*
> *52 First of all, in general terms, the contested regulation states, in recital 5, that the high-level decision-making body of the regional group concerned did in fact take account of ACER's opinion when it adopted its final regional list. Next, the ACER opinion includes a section A.4.1.3 specifically devoted to the proposed Aquind interconnector, which highlights the differences between the regulatory authorities of the French Republic and the United Kingdom, and the reasons why the French regulatory authority, namely the Commission de régulation de l'énergie (Energy Regulatory Authority; CRE), opposed the inclusion of that project in the final regional list. Lastly, and in any event, it must be borne in mind that the French Republic refused to approve that project for reasons connected with the risk of overcapacity and because the proposed Aquind interconnector was considered to be the most uncertain, that the high-level decision-making body of the regional group concerned and the Commission were bound by that refusal and that, in those circumstances, they cannot be criticised for not taking ACER's opinion into account.*

129. It is difficult to see how the Minister would not want to reach an *entente cordial* and agree with the French Republic, and its energy authority evaluation that the Aquind envisaged interconnector is the most uncertain of all of the interconnector projects described in the EU Judgment, and, if approved by the French regulator and Republic would result in "over capacity" of intra-State interconnectors.

130. This is because it is difficult to see how approving a project for a cable for transmitting electricity to and from France would ever be used, given that the French energy authority has evaluated that project as being unnecessary and resulting in overcapacity. It would simply be a useless piece of cable stopping at the edge of French territorial waters in the Channel. It is challenging to identify any public benefit from disrupting the citizens of Portsmouth, elsewhere, and the Carpenters, for the sake of a cable to nowhere.

131. In respect of an entente cordial, the evaluation of 'need' by the ExA in the Aquind Application also warrants both scrutiny and light shedding on it as follows.

132. The Aquind Interconnector is *only* a DCO application *because* of a Ministerial Direction under section 35 of the Planning Act 2008. That Section 35 Direction resulted to require the project to be "treated" as development for which development consent is required. See **Appendix C**. The Section 35 Direction, on page 4 of Appendix Q, directed that the Aquind Interconnector be treated as "equivalent" to being an application for construction of a generating station under section 14(a) of the Planning Act 2008. See **Appendices B** and **Q**. Thus, this was not an application where there was (or is) an actual need but a case where the project was both notionally treated as a generating station and the Guidance in EN-1 established under that guidance a need for generating stations.

133. The ExA evaluated the Aquind Interconnector on the foregoing basis. See **Appendix X**, Section 5 and paragraphs 5.2.3 and 5.2.29. It can be seen from the documents cited in paragraph 5.2.9 and also from

paragraphs 5.2.28 and 5.2.6, that Aquind and the ExA regarded the nature of the Interconnector as an Interconnector an important and relevant consideration.

134. If one goes to the documents referred to in paragraph 5.2.29, the following can be seen from them in **Appendices R, S** and **T** as follows.

Appendix R.

135. Section 2.2 asserts the need for more GB Connectors. Paragraph 2.2.1.1 relies on the assertion that "the need to build to build more Interconnectors between GB and Europe is well understood". Paragraph 2.2.1.2, bullet 2, asserted that "the interconnection between GB and France of 8.8GW (including Aquind Interconnector) would be socially beneficial". Paragraph 2.2.1.3 asserts there to be a "residual gap to meeting the EU-wide targets that could be bridged by Aquind Interconnector". Paragraph 2.3.2.1 asserts that the Aquind Interconnector will provide three types of service [that include]: transmission of electricity between GB and France and vice versa". Paragraph 2.3.2.2 described the French whole electricity market. Paragraph 2.3.2.2 and Plate 1-2, described the asserted attractions of the "flows through Aquind Interconnector in the opposite direction i.e. *from GB to France, are expected to grow*…".

136. Within **Appendix R** lies Appendix 1 – GB Interconnectors. Appendix 1 identified in a table on page 2, the "IFA" project delivered in 1986 between GB and France and delivering 2GW capacity. On pages 3-4, a table identified "Planned Interconnectors" that included to France: "ElecLink" to France with a capacity of 1GW that was under construction; "IFA 2" to France with a capacity of 1GW that was under construction; and "Gridlink" to France with a capacity of 1.4 GW that was proceeding through scoping. Importantly in light of the EU Judgment referred to above, both IFA 2 and Gridlink are identified in Appendix 1 on pages 5-6 as having "PCI status".

137. From the above, it can be seen that there was three (3) projects that are on foot to connect between GB and France: 1) "ElecLink"; 2) "IFA 2"; and 3) "Gridlink". The "fourth" project is that to which the EU Judgment refers: Aquind Interconnector, and refers to as resulting in "overcapacity" and also as being the most risky and the most uncertain. Thus, the French Republic divested Aquind Interconnector of its PCI status and the EU Court upheld that decision as legally sound in March 2023.

138. Of course, the ExA also relied on Aquind's **Appendix R** that asserted in *November* 2019 that the Aquind Interconnector "has been awarded the status of Project of Common Interest ("PCI") and page 2 of the Executive Summary in Appendix R described the significant benefits to the Aquind Interconnector resulting from that "status" . In fact, as must have been known to Aquind at that date, in October 2019, Commission Regulation (EU) 2020/389 of 31st October 2019 had – in fact – removed from the list of projects of community interest. See paragraph 1 of the EU Case in **Appendix J**: (Emphasis added)

> *1. By their action based on Article 263 TFEU, the applicants, Aquind Ltd, Aquind SAS and Aquind Energy Sàrl, seek annulment of Commission Delegated Regulation (EU) 2020/389 of 31 October 2019 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest (OJ 2020 L 74, p. 1; 'the contested regulation').*

139. Compared to the bold statement in **Appendix R**, a document dated "14 November 2019", Executive Summary, it is apparent that the assertion by Aquind of its status as a "PCI" after the 31st October 2019 was not true in fact, was apparently a false statement of fact by the applicant company, was significantly misleading of the ExA and Secretary of State, and was considered necessary by Aquind to advance as a necessary status underpinning its project.

140. In respect of "residual capacity" that Aquind had referred to, that too was misleading. The reference in Appendix 1 to **Appendix R** by Aquind to "Gridlink" is to a then planning application for an Interconnector between GB and France. See **Appendices U-W**. Gridlink secured planning permission shortly after the ExA Closed the Hearing of the Aquind Interconnector and so the ExA could not have had sight of that fact before the Hearing Closed. But, the prior application included a Planning and Design Statement dated October 2020. See **Appendix W**. Section 4 of that Statement described the need for that project in the application (not for a DCO but) for planning permission for an Interconnector between GB and France. Paragraph 4.1.3 of that Statement described the *relevant* capacity as between GB and France (as opposed to between GB and the whole of Europe) as having been evaluated by: the European Commission's Ten Year Network Development Plan 2020 as being 5.4GW by 2030 (and 6.8GW by 2040) "at the GB-Fr border"; by National Grid as being 5.8GW at that border by 2030; and that the current level of GB/FR Interconnector capacity (without Gridlink) "is 5.4GW, taking into account those projects in operation of construction". The Statement also describes, at paragraph 1.1.2, that the Gridlink is a 1.4GW electricity interconnector between the UK and France (including a convertor building near to Kingsnorth power station site). That is, the gap between the current 4GW and evaluated 5.4GW (or 5.8GW at 2030) as between GB and France, would be satisfied by the Gridlink project for 1.4GW. This is because 4GW + 1.5GW = 5.4GW. This would result in a "residual gap" of actual need for only .4GW at best. Indeed, on the 23rd March 2021, outline planning permission was granted for Gridlink and it is since proceeding to secure all approvals under conditions. See **Appendix U**. However, the fact of that "GB/France" capacity was not reported in evidence by Aquind to the ExA or to the Secretary of State. The fact of "overcapacity" resulting from Aquind Interconnector identified by the French Republic in its EU Case judgment is borne out by the facts of the Gridlink Statement. The building out of Aquind Interconnector would result in evaluated overcapacity. There is no foreseeable current need for Aquind Interconnector. That absence of need has been a known fact to Aquind since at least the date of the Gridlink Statement of October 2020.

141. It follows that the assertion in paragraph 3.1.1.1. of **Appendix S** (dated 6th October 2020) – that the "evidence in favour of increasing interconnection between the GB and European markets *is compelling*", and at paragraph 3.1.1.2, that "Aquind Interconnector will significantly increase the cross-border capacity between GB and France delivering an additional 2GW of capacity on the congested border", was simply not true in fact and was also misleading in circumstances where Aquind was cogniscent of the Gridlink project. Even if one excluded the Gridlink project, the *evidence* in paragraph 4.1.3-4 that the available capacity to 2030 was (and remains) only 1.4GW (European Commission evaluation to 2030) (at most, 1.8GW (National Grid's evaluation to 2030)). Therefore, the evidence of actual need on the basis of the European Commission analysis showed (and shows today) that the Aquind Interconnector proposal of "2.2GW" would result in overcapacity at 2030 (by .4GW). *Because* an interconnector necessarily connects between two places, it is logical that evaluated need reflect the lowest common denominator (and not arbitrarily pick the highest of one side of the connection as the relevant need evaluation). Thus, the National Grid evaluation of 8.8GW by 2040 is not relevant. At most, at 2040, the European Commission evaluated a need at 2040 of 6.8GW. Even then, 4GW + 1.4GW (Gridlink) + 2GW (Aquind) = 7.4GW. That figure is also above the European Commission evaluation to 2040 by .6GW. That is, the Aquind Interconnector is just too big, is not actually necessary, and that must have been known to Aquind since 2020 when the European Commission published its Ten Year Network Development Plan 2020.

142. In particular, when one compares: a) paragraph 4.1.3 and bullet 2 of the Gridlink Planning and Design Statement (that shows a gap of only 1.4GW to 2030 and of 2.8GW to 2040), and where Gridlink would supply 1.4GW of that gap, with b) **Appendix R**, paragraph 2.2.1.3 "there is a *residual gap* to meeting the EU-wide targets that could be bridged by Aquind Interconnector"; the italicised assertion is significantly misleading because the reverse is the true situation: - a GB-France interconnector would connect GB with France (and not *each country in Europe*) but the European Commission evaluation shows there would be in fact no "residual gap" between GB and France (if one includes Gridlink – as Aquind itself has in Appendix 1 to **Appendix R**). There would be in fact "overcapacity", or <u>no need</u>. In fact.

143. In light of the foregoing, it remains understandable why the French Republic evaluated, and rationally so based on the European Commission evaluation as to capacity) in the EU Case Judgment (and based on the *relevant* European Commission evaluation) that the Aquind Interconnector would result in "overcapacity" viz France. The French Republic was entitled to evaluate there to be no need for the Aquind Interconnector. Today, the Minister is equally entitled to evaluate there is no need for the Aquind Interconnector on the basis of material that could have been put before the ExA by Aquind if it had wanted to show actual need, but failed to put before the ExA before the close of the Examination Hearing. Consequently, the Minister is entitled to depart from the ExA's evaluation of need, from the findings of

the ExA on the (incomplete) evidence of actual need put before the ExA by Aquind, and also need not be concerned about the recent High Court decision that recites part of the ExA evaluation process.

Appendix S

144. On the 6th October 2020, Aquind published a "Second Addendum" (dated 25th January 2021) to its Needs and Benefits report of **Appendix R**. See **Appendix S**.

145. **Appendix S** described the **Appendices T** and **R** as "key reports … which support the consensus for increased GB interconnection. **Appendix S** for the first time identified the European Commission's evaluation referred to in paragraph 4.1.3, bullet two, of the Planning, Design and Access Statement supporting the Gridlink planning application. See page 1 of the Executive Summary in **Appendix S**.

146. **Appendix S** contains two Appendices. Appendix 2 describes "Optimal Interconnector Capacity" but that is a private *market* assessment and is not the evaluation by the European Commission (2020). The Aquind "Market" assessment "assumes a total GB-French cross-border capacity of 5.4GW, with Aquind taking the total capacity to 7.4GW from 2024". What the Aquind "Market" assessment failed to disclose to the ExA and then Secretary of State is that the European Commission's evaluation referred to in paragraph 4.1.3, bullet two, of the Planning, Design and Access Statement supporting the Gridlink planning application in **Appendix W** evaluated the GB-French interconnector capacity to 2030 as "5.4GW". Therefore, in Appendix 2 to Appendix S, Aquind is simultaneously excluding from account as not important and not relevant the European Commission's evaluation of 5.4GW and at the same time evidencing that Aquind accepts (against the gauge of the European Commission's evaluation) that the result of the Aquind Interconnector would be "overcapacity" by 2GW as at 2024. That is, when regard is had to the European Commission's evaluation, *then* the evidence of Aquind is that there is no actual need for its project and that (in turn) the land of the Carpenters cannot in fact or law be "required" for the development.

147. Table 1 in Appendix 2 shows in stark terms how Aquind excluded from account of its "Scenario/Sensitivity" the European Commission's evaluation. This is because the European Commission's evaluation of "5.4GW" is absent from Row 1, Column 2. Aquind has asserted capacity above the level independently evaluated by the European Commission of 5.4GW to 2030. That assertion was irrational (as in, was based on no evidence or excluded from account relevant evidence of the European Commission's evaluation). Aquind has then relied on that amplified capacity to assert to the ExA that there is a "need" notwithstanding independent evidence from the European Commission's evaluation that shows the result of the Aquind Interconnector would be "overcapacity" above 5.4GW, and as the French Republic also recognized as a reason in **Appendix J** to remove the Aquind Interconnector from the status of "PCI" project.

148. **Appendix S** contains further significantly misleading information about the *capacity* of GB-French border capacity for interconnectors (when compared to paragraph 4.1.3, bullet 2, of Appendix W (the Gridlink Planning, Design and Access Statement). This is because **Appendix S**, a series of bullet points on pages 1-5 and 2-5 create a misleading assessment of the capacity at the GO-French border. In **Appendix S**, on page 1-5, bullet 4, refers to the National Networks Options Assessment (2020) ("NOA") (also referred to in bullet 1 of paragraph 4.1.3 of **Appendix W**), and explains that the "existing interconnector capacity between GB and European markets stands at only 5.0GW [whereas the NOA Assessment identified between 18.1 to 23.GW by 2030]"; bullet 5 on page 1-5 then applies that NOA Assessment to the "GB-French border" and asserts that the NOA Assessment analysis "supports analysis by Aquind which concludes that the optimal capacity on the GB-French border is in excess of 8GW" whilst cross-referencing to Appendix 2 referred to above. Bullet 6, on page 1-6, then describes the interconnectors under construction ("ElecLink" and "IFA 2") providing "1GW each", and "two further planned development FAB Link and GridLink would provide 1.4GW", and then describes that the "total capacity between GB and France would be 6.8GW and short of the forecast requirement". The "forecast requirement" is that referred to by NOA Assessment. But the NOA Assessment is a GB assessment whereas the European Commission's evaluation is an assessment that takes account of the European market and in particular GB-French border capacity.

149. Returning to bullet 5, on page 1-6, Aquind then contends that:

> *Taking into account those existing, under construction and planned (even including the FAB Link) interconnectors the total capacity between GB and France would be 6.8GW and short of the [NOA Assessment] forecast requirement. Aquind would take this total operational and planned interconnector capacity between GB and France to a total of 8.8GW.*

However, when the Minister does not exclude from account but regards the European Commission's evaluation as important and relevant (particularly in light of the EU Judgment in **Appendix J**), then, gauged against the *relevant* European Commission's evaluation of 5.4GW by 2030 and of 6.8GW by 2040 that would apply to the French part of the Aquind Interconnector, the figure in bullet 6 at the top of page 1-6 of Appendix S of "8.8GW" is *evidence* of exceedance above and beyond the European Commission's evaluation capacity of 5.4GW by 2030 and of 6.8GW by 2040. See **Appendix W**, paragraph 4.1.3, bullet 2.

Indeed, 8.8GW less 5.4GW = 3.4GW and shows a significant over capacity that would result from the Aquind Interconnector. 6.8GW less 1.4GW = 1.4GW and shows also that the Aquind Interconnector capacity of 2GW would also result in over capacity at 2040.

It follows that, when account is in fact taken of the European Commission's evaluation, *then* it evidences that there is no need for the Aquind Interconnector (even on Aquind's own case in Appendix 2 and on

pages 1-5 and 1-6 of **Appendix S**. It follows that the Minister would be entitled to refuse development consent under section 114(1)(b) of the Planning Act 2008.

The *Prest* case in **Appendix F** also requires the Minister to give the benefit of any doubt to the person whose land is proposed to be acquired. Here, those persons include the Carpenters. Thus, the common law requires the Minister to not confirm the CPO element of the DCO under section 122(2)(a) of the Planning Act 2008. Here, this would be because Aquind has not on the evidence persuaded the Minister that the land is "required" for the proposed development".

150. Furthermore, the approval to **Appendix S** was the Aquind Director called Mr Temerko. It is noteworthy that he has both left out of account when identifying the European Commission's evaluation report of 2020, Mr Temerko chose to not disclose the actual capacity assessment that is recorded in paragraph 4.1.3, bullet two, of **Appendix W**; and that Mr Temerko – as at 6th October 2020 – chose to also not disclose to the ExA or Secretary of State in the "Needs and Benefits Addendum" of Appendix S that the Aquind Interconnector had been removed from the "Projects of Community Interest" a year earlier on the 31st October 2019. See paragraph 1 of **Appendix J**. The absence of Mr Temerko's disclosure of that fact of the changed status of the Aquind Interconnector by its removal from PFI status, was misleading to the ExA and Secretary of State because a reader would otherwise have assumed that the express statement in paragraph 3 of page 2 of the Executive Summary of **Appendix R** (that the Aquind Interconnector "has been awarded the status of a Project of Common Interest") remained in fact correct. As at the date of **Appendix S**, the status of the Project was, in fact, not correct or true. It was untrue and appears to have been then false.

151. **The actual capacity for interconnectors as between GB and France was and remained an (obviously) important and relevant consideration for the Minister to evaluate and take into account under both section 104(2)(d), (7) and was necessarily required to have been satisfied by Aquind under section 122(2)(a) ("the land … is required for the development") of the Planning Act 2008. That that consideration was left out of account of the evidence before the ExA (and chosen to be left out of account by Aquind) results to mean that the ExA evaluation of actual need (as opposed to *notional* need) was necessarily absent. Put another way, the ExA (and Minister) are not in law entitled to conclude that section 122(2)(a) can be lawfully satisfied by *notional* need. Rather, and consistent with paragraph 13 of Appendix L describes, the Secretary of State will need to be persuaded "that there is compelling evidence" and that Parliament has "always taken the view that land should only be taken where there is clear evidence that the public benefit will outweigh the private loss". Reliance on the *notional* need simply stated in EN-1 cannot be regarded in law as "clear evidence" that the particular DCO application has in fact satisfied paragraph 13 or section 122(2)(a) because, if that were so, then that paragraph and**

section would invariably be satisfied simply by a direction under section 35 or an application under the Planning Act 2008 for a DCO *per se*. That approach must be incorrect in law because it would render the term "requirement" in section 122(2)(a) otiose and change in paragraph 13 the phrase "clear evidence" to say "clear evidence (including guidance)". Further, in this matter, the Section 35 Direction described the Aquind Interconnector be treated as "*equivalent*" to a generation station. Consequently, it cannot be lawful to satisfy section 122(2)(a) by *proxy* notional need of a different type of development to that which section 122(2)(a) requires be evaluated: the "development" is an Interconnector and not a power generating station. A section 35 direction could not (and could not result) to modify the terms of section 122(2)(a) of the Planning Act 2008. Instead, paragraph 13 of Appendix L, and section 122(2)(a) of the Planning Act 2008 require to be satisfied by evidence of actual need and cannot be satisfied by EN-1 guidance notional need, nor by an "equivalent" project as opposed to the actual development for which the DCO application was made – here, an interconnector.

152. Thus, whereas the Ministerial Direction under Section 35 of the Planning Act 2008 (see **Appendices C** and **Q**) required the Aquind Interconnector to be notionally "treated" as "equivalent" to a generating station for the purposes of EN-1 guidance, that Direction could not change the clear terms of section 122(2)(a) of the Planning Act 2008 that require the actual development (not its "equivalent") to be evaluated, nor the terms of (2)(a) that require the "land is required" for that actual development. Nor could the Direction change the terms of paragraph 13 of the Planning Act 2008 – Guidance for CPO Procedures (in **Appendix L**) to entitle the scope of "clear evidence" to be satisfied by EN-1 guidance *per se*.

153. In conclusion, therefore, the Minister would be entitled in law to evaluate the need for the Aquind Interconnector differently to the (narrower evaluation and evaluation based on notional (not actual) need undertaken by the) ExA in his matter. Indeed, the *Prest* case in **Appendix F** requires – in the sphere of compulsory purchase - the Minister to resolve any doubt in favour of the Carpenters. In this case, paragraph 4.1.3 and bullet two of **Appendix W**, and the EU Judgment in **Appendix J**, *evidence* there to be both no actual need for the Aquind Interconnector and also that thar Interconnector would result in "overcapacity" viz the GB-France border. It follows that the Minister is not entitled to conclude that section 122(2)(a) can be satisfied on the evidence that is in front of *him* (as opposed to the more limited evidence that was placed in front of the ExA by Aquind to assert that section 122(2)(a) of the Planning Act 2008 was satisfied. The Minister would be entitled to conclude that Aquind had not persuaded him that all of the land was required for the Aquind Interconnector and, therefore, he would be entitled to not confirm the CPO aspects of the DCO here sought.

154. The now available and now submitted evidence of absence of actual need for the project would also entitle the Minister to refuse to grant consent for the DCO under section 114(1)(b) of the Planning Act 2008.

Appendix T

155. **Appendix T** was provided (and also approved by Mr Temerko on behalf of Aquind) as an "update". See paragraph 1.1.1.2. Paragraph 1.1.1.7 also described the European Commission's "Ten Year Network Development Plan (November 2020)" (but leaves out of account the evaluation by that Commission referred to in bullet two of paragraph 4.1.3 of **Appendix W**).

156. In paragraph 1.1.1.8 of **Appendix T**, Aquind contends that the publications referred to, that include that in paragraph 1.1.1.7, "all further support the compelling need for the Aquind Interconnector …". But, Aquind makes no mention of the "European Commission's "Ten Year Network Development Plan (November 2020)" referred to in paragraph 4.1.3, bullet 2 of **Appendix W** that "identified a need for of 5.4GW by 2030 and 6.8GW by 2040 at the GB-FR border" nor does **Appendix T** address that identified need capacity.

157. In more detail, **Appendix T,** paragraphs 2.4.1.1 – 2.4.1.4 describe parts of the "Ten Year Network Development Plan (November 2020)". But, in **Appendix T** Aquind makes no express mention of the capacity (as identified in paragraph 4.1.3 and bullet 2 of **Appendix W**) to 2030 or 2040 in those paragraphs. Instead, Figures 1 and 2 on pages 12 and 13 of **Appendix S** focus on "Total Monetised Benefits" and "Comparative Impact of Interconnectors", whilst making no express mention at all of the evaluated capacity for interconnection to 2030 and 2040 referred to in paragraph 4.1.3 and bullet two of the aforesaid Gridlink Statement. It follows that Aquind consistently failed to draw to the attention of the ExA (and now, the Minister) the actual *absence* of real need for its Aquind Interconnector gauged against the "identified need" referred to in bullet 2 of paragraph 4.1.3 of **Appendix W**.

158. Furthermore, rather than disclose and draw to the attention of the ExA and Secretary of State the fact that, on 31st October 2019, the Aquind Interconnector was removed from the list of projects accorded the status of "Projects of Common Interest" (see paragraph 1 of **Appendix J**) , in **Appendix T**, paragraphs 2.4.1.1 and .2 contend that the European Commission evaluation included Aquind "and provides very positive results in all core scenarios". Paragraph 2.4.1.4 asserts that "the results for Aquind Interconnector reflects those trends very well and also show further increases in benefits of the Project".

159. However, as remains clear from paragraph 1 of Appendix J, the French Republic has lawfully removed the Aquind Interconnector from the status of "Project of Common Interest". It follows that, on and from 8th February 2023, the contention in **Appendix R**, page 2 of the Executive Summary, that: that status

"recognizes that the Project will: have a significant positive impact on energy markets and market integration; boost competition on energy markets; and help the EU's energy security and contribute to climate and energy goals by integrating renewables" no longer applies. Indeed, the deprivation of the status of PCI from the Aquind Interconnector results in those aspects no longer being evidenced and the positive features of PCI status now operating in reverse. This is because, the *removal* from the list of PCI projects evidences that the Aquind Interconnector "will [not]: have a significant positive impact on energy markets and market integration; [will not] boost competition on energy markets; and [will not] help the EU's energy security and contribute to climate and energy goals by integrating renewables".

160. In **Appendix ZA** we have provided a web extract from National Grid showing that IFA2 is now live and transmitting electricity between GB and France. The French Republic and its Energy Regulator make no criticism of this project nor dispute its need.

161. In **Appendices U-W** we provide evidence of the consented Gridlink interconnector project that is also a Project of Community Interest. The French Republic and its Energy Regulator make no criticism of this project nor dispute its need.

162. In **Appendices Y** and **Z** we provide the most recent Government publications on energy trends.

163. As the French Republic evidenced in the EU Case in **Appendix J**:

> *3. The proposed Aquind interconnector was placed on the list of 'projects of common interest' ('PCIs') of the European Union by Commission Delegated Regulation (EU) 2018/540 of 23 November 2017 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest (OJ 2018 L 90, p. 38), and was thus considered to be a fundamental project in the infrastructure necessary for the completion of the internal energy market. The status of a Union PCI enables a promoter of projects, first, to benefit from a procedure for the grant of rationalised, coordinated and accelerated authorisations, secondly, to submit a request for investment and cross-border allocation of costs to the competent national regulatory authorities, in such a way that the efficiently incurred investment costs are recoverable from network users and, thirdly, to seek financing under the Connecting Europe Facility.*

The removal of the Aquind interconnector on and from 31st October 2019 means that the Aquind interconnector was, and remains to date, and remains for the reasonably foreseeable future, not a Project of Community Interest, and is now unable to secure all of the benefits accruing to such a project.

The List of Projects is only revisited every 3 years. Given the EU Case, it is not credible for the Aquind Interconnector project to secure re-listing as a PCI project within the statutory 5 year period of a DCO.

164. The basis for the removal of the Aquind Interconnector project is evidenced in the EU Case as follows:

> *24. … the Commission stated that the reason why it had not included the proposed Aquind interconnector as a Union PCI in the contested regulation concerned the French Republic's refusal to give its approval to the inclusion of that project in the Union list of PCIs. It stated that the French Republic had justified its refusal by the existence of a risk of overcapacity on account of the existence of several projects in the same region and by the fact that the proposed Aquind interconnector was considered to be the most uncertain…*
> *29… The Commissioner for Energy stated, first, that the French Republic considered that the four projects linking the United Kingdom and France would lead to overcapacity, secondly, that that Member State was of the opinion that the proposed Aquind interconnector was considered to be the most uncertain and, thirdly, that that Member State had accordingly requested that the project at issue should not be included in the new list of PCIs. The Commissioner for Energy stated that the Member States were entitled to approve projects which concerned their territory and that the Commission was required to respect that right…*
>
> *50. The Commission was not able to include the proposed Aquind interconnector in the new Union list of PCIs on the ground that the French Republic had not given its approval, that Member State having considered that there was a risk of overcapacity and that the proposed Aquind interconnector was regarded as the most uncertain. The issue of the consistent application of the criteria and the cost-benefit analysis across regions therefore had no effect on the decision not to include that project in the Union list of PCIs…*
>
> *52. … it must be borne in mind that the French Republic refused to approve that project for reasons connected with the risk of overcapacity and because the proposed Aquind interconnector was considered to be the most uncertain, that the high-level decision-making body of the regional group concerned and the Commission were bound by that refusal and that, in those circumstances, they cannot be criticised for not taking ACER's opinion into account…*
>
> *74. Furthermore, contrary to what is claimed by the applicants, there was no infringement of point (a) of the second subparagraph of Article 3(3) of Regulation No 347/2013, since the Commission correctly found, in the present case, that the French Republic had presented the reasons for refusing to approve the inclusion of the proposed Aquind interconnector in the Union list of PCIs. The respective minutes of the meeting of the technical decision-making bodies and of the meeting of the high-level decision-making body of the regional group concerned mention that the French Republic considered that the four proposed interconnectors between France and the United Kingdom would lead to overcapacity and that the proposed Aquind interconnector was the most uncertain of those projects.*

165. The Minister is invited to agree with the EU Case and the summary of the French Republic justification that it records.

166. The now available and now submitted evidence of absence of actual need for the project, and the evidence in Appendix J within the EU Judgment about the loss of PCI status (and the loss of related positive and evidenced features) of the Aquind Interconnector, would also entitle the Minister to refuse to grant consent for the DCO under section 114(1)(b) of the Planning Act 2008.

Paragraph 8: The EIA Situation

167. In light of paragraph 5 of the Minister's Letter and the Response above, the law requires that Aquind was required to have included in its EIA (but did not) the EIA evaluation of the Figure 9 route in **Appendices M** and **N** hereto as a rational "main alternative". EIA law requires DCO consent be refused as a result of that gap in Aquind's EIA. See section 104 of the Planning Act 2008. Instead, the Navitus Bay EIA was required to have been included as part of the Aquind EIA as part of the baseline information affording third parties the opportunity to comment upon. See, in particular, paragraph 4.4.2, NPS EN-1, Bullet point 1:

- *applicants are obliged to include in their ES, as a matter of fact, information about the main alternatives they have studied. This should include an indication of the main reasons for the applicant's choice, taking into account the environmental, social and economic effects and including, where relevant, technical and commercial feasibility;*

and in paragraph 4.4.3, Bullet point 34

- *alternatives not among the main alternatives studied by the applicant (as reflected in the ES) should only be considered to the extent that the IPC thinks they are both important and relevant to its decision;*

Conclusion

168. In conclusion, therefore, the Minister would be entitled in law to evaluate the need for the Aquind Interconnector differently to the (narrower evaluation and evaluation based on notional (not actual) need undertaken by the) ExA in his matter. Indeed, the *Prest* case in **Appendix F** requires – in the sphere of compulsory purchase - the Minister to resolve any doubt in favour of the Carpenters. In this case, paragraph 4.1.3 and bullet two of **Appendix W**, and the EU Judgment in **Appendix J**, *evidence* there to be both no actual need for the Aquind Interconnector and also that thar Interconnector would result in "overcapacity" viz the GB-France border. It follows that the Minister is not entitled to conclude that section 122(2)(a) can be satisfied on the evidence that is in front of *him* (as opposed to the more limited evidence that was placed in front of the ExA by Aquind to assert that section 122(2)(a) of the Planning Act 2008 was satisfied. The Minister would be entitled to conclude that Aquind had not persuaded him that all of the land was required for the Aquind Interconnector and, therefore, he would be entitled to not confirm the CPO aspects of the DCO here sought.

169. The most recent (February 2023) and now available evidence of absence of actual need for the particular development would also entitle the Minister to refuse to grant consent for the DCO under section 114(1)(b) of the Planning Act 2008. Circumstances have changed since the Section 35 Direction. There is now no need for the development. Section 122(2)(a) cannot be lawfully satisfied. See *Prest*.

APPENDIX 1

LEGAL FRAMEWORK

170. The Carpenters recognize that the recent case of Aquind in **Appendix A** will be at the forefront of the Minister's mind and will no doubt be heavily relied on by Aquind. Therefore, the Carpenters' have set out below the Legal Framework to assist the Minister (and those advising him) with the correct approach.

171. The Planning Act 2008 ("PA 2008") provides in Parts 6 and 7 the decision-making framework in this matter for projects of national significance ("NSIPS"). If a project does not in itself qualify within section 14 of the Act as an NSIP, then, as here, the Minister may make a direction under section 35 that the project be "treated" as an NSIP. See section 35 within **Appendix C** hereto. That was so here. See **Appendix Q**. But the statute does no more than create a legal fiction that the project be *"treated", ie notionally,* as an NSIP.

172. Within the Act, Part 6 relates to the development consent for the project. Part 7 relates to compulsory acquisition powers, in particular, section 122 in **Appendix E** hereto.

173. The genesis of the one of the pieces of guidance in this matter – "NPS NE-1" – is section 5 of the Act. Within Part 2, section 5 provides for National Policy Statements. Parliament has published guidance under section 5(1), Part 2 of the Act, that "sets out national policy in relation to one or more specified descriptions". See **Appendix B** hereto.

174. Section 5(2) *defines* such a statement to *mean* a national policy statement for the purposes of the Act. That is, section 5(2) is a *definition* and does not extend the *scope* of the policy relating to "specified descriptions" *wider* that section 5(1). Section 5(1)(b) necessarily relates back to the specified descriptions under section 14. Those descriptions include under section 14(1)(a) a generating station; and under section 14(6)(b) the field of energy. Thereby, the legal compass of policy under section 5(1)(b) cannot lawfully extend beyond a "specified project description". See sections 5 and 14 in **Appendix B** hereto.

175. Extracts from the "NPS EN-1" are in **Appendix K**. In this matter, it remains common ground that NPS EN-1 is relevant to Part 6 of the Act *because* of the direction of the Secretary of State under section 35. However, it ought also to be common ground that:

a) the Applicant's interconnector proposal is not in itself a generating station and is not a project of a "specified description" under the Act;

b) the envisaged Interconnector is only *notionally* treated as an NSIP because of the previous Minister's section 35 direction and not otherwise; and

c) NPS EN-1 provides policy on the merits of projects of specified descriptions and about their evaluation under Part 6 of the Planning Act 2008 and provides *no guidance* on compulsory acquisition of land.

176. Extracts from the Secretary of State's "Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land" (September 2013)" are in **Appendix L**. It will be common ground that this guidance applies to Part 7 and to section 122 of the Act.

The Minister's Decision under Section 103 of the Planning Act 2008

177. It ought to be common ground with all participants of the DCO process, and the Minister will recall that, under section 103 of the Planning Act 2008 ("the PA 2008"), the Minister is *himself* charged to make the decision under section 114. See Appendices

178. See paragraph 64-65 *R(oao Save Stonehenge World Heritage Site Ltd) v Secretary of State for Transport* [2021] EWHC 2161 (Admin) ("*Stonehenge*") in **Appendix I** hereto: "if the Minister relies entirely on a departmental summary which fails to bring to his attention a material fact which he is bound to consider, and which cannot be dismissed as insignificant or insubstantial, the consequence will be that he will have failed to take that material fact into account and will not have formed his satisfaction in accordance with law… To some extent, the preparation of a ministerial briefing involves judgment on the part of officials about the material to be included. In this respect, there is a broad analogy to be drawn with the approach taken by the courts to challenges to an officer's report prepared to brief the members of a local authority's committee on a planning application."

179. Thus, and further, in law, the *Minister* cannot be bound by the Examining Authority's Report, nor indeed by any expert judgments. See paragraphs of 81-82 *R (oao Morge) v Hampshire County Council* [2010] EWCA Ci 608 ("*Morge*") in **Appendix H** hereto:

> "*81…Mr George … submits that the Local Planning Authority must be guided by its experts and that it is irrational to disagree with them. This point underpins his whole submission. 82. It is an attractive but beguiling submission. In my judgment, however, it goes too far. It confuses a conclusion which is reached against the weight of evidence and a conclusion which is unlawful. The foundation of the argument is the assumption that reaching a contrary conclusion constituted an error of law because as a matter of law the Committee must willy nilly accept the experts' opinions, no other option being available to it. That must be wrong because it would emasculate the members' duty themselves to decide the question. It is their decision to make, not the experts. Whilst of course they must pay high regard to the evidence before them, they are not bound to follow it. The weight to give the reports is a matter for the members to assess. "Significant" is, after all, a value laden word and views may reasonably differ as to whether an effect truly is significant or not. The members must exercise their independent judgment about the significance of the effects looking at the information overall…".*

180. That Report, is the *view* of a *reporting* Examining Authority ("ExA") panel alone. Instead, the "function" under section 103 of the Act is for the Minister to reach his own decision under section 114(1).

181. The Minister, in law, is entitled, to reach his own decision, *including* by agreeing or disagreeing with the ExA on any particular matter. In reaching his own decision, the Minister is entitled, in law, to evaluate, form, and attribute such weight as *he* considers appropriate to *any* particular matter because the evaluation of *weight* is a matter for him as statutory decision-maker (and not for the ExA as reporter (not being the decision maker)). Weight is exclusively for him and the Courts cannot interfere with that.

182. The *adequacy* or *sufficiency* of *evidence* is also a matter for the *Minister himself* to evaluate. Unlike the reporting ExA, the *Minister* may or may not be persuaded on certain evidential matters. See paragraph 82 and 90 of *Morge* in **Appendix H** hereto: (Emphasis added)

> "82… [M]*embers must exercise their independent judgment about the significance of the effects looking at the information overall…[D]isparity of view makes it in my judgment a case more accurately characterised as one where there is a generous ambit for reasonable disagreement, and not a case where no reasonable member could have concluded that the effects were other than significant …*" *…90. There was no certain answer. Views may reasonably differ. That is demonstrated by the votes cast. This was quintessentially a matter for the Committee to exercise its planning judgment and form its independent opinion"*.

183. As the Minister will appreciate from the foregoing, the law requires *him* to exercise *his own* mind, and *independently* so. The Minister cannot in law be bound by the ExA Report, or particular aspects of it.

184. The Minister, in law, is entitled to attribute different *weight* to factors to the weight *recommended* by the ExA be attached any particular factor. A difference in weight may result in a different outcome.

185. The Minister is also required to take account of all relevant information available at the time of his decision. See the *Tameside* duty. See *Secretary of State for Education v Tameside MBC [1977] AC 1014* at 1066, and referred to in paragraph 106 the High Court case of *Aquind* [2023] EWHC 98 Admin (24th January 2023) at **Appendix A** hereto:

> *"The general principles on the Tameside duty were summarised by Haddon-Cave J in R (Plantagenet Alliance Ltd) v Secretary of State for Justice [2014] EWHC 1662 (Admin) at paras. 99-100 . In that passage, having referred to the speech of Lord Diplock in Tameside, Haddon-Cave J summarised the relevant principles which are to be derived from authorities since Tameside itself as follows. First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a Wednesbury challenge, it is for the public body and not the court to decide upon the manner and intensity of enquiry to be undertaken: see R (Khatun) v Newham LBC [2004] EWCA Civ 55, [2005] QB 37, at para. 35 (Laws LJ) . Thirdly, the court should not intervene merely because it considers that further enquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the enquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further enquiries if no reasonable authority possessed of that material could suppose that the enquiries they had made were sufficient. Fifthly, the principle that the*

decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant but rather from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that he has all the relevant material to enable him properly to exercise it."

186. Lastly, the correct approach in law to the interpretation of policy terms is set out in Appendix 1 to the Stonehenge case in **Appendix I** hereto. See paragraph 1(a) and (c) in particular.