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Via email to
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FAO the Planning Inspectorate

Dear Sirs,

RE: Application by AQUIND Limited for an Order granting Development Consent for the AQUIND Interconnector Project - Response of Portsmouth City Council and Coastal Partners as Interested Parties to the Secretary of State's 3 March 2023 Request for Further Information

We write further to the Secretary of State's request for a response to his requests for further information in a letter dated 3 March 2023 (and the Secretary of State's subsequent extension of the deadline for response on 31 March 2023). Please find herein the response to that invitation to Portsmouth City Council ("PCC" or "The Council") and Coastal Partners ("CP") set out below:

1. Background

1.1 The Council would firstly take the opportunity to remind the Secretary of State of the key important contextual matters which the Council considers should aid and form the basis for his reconsideration of this DCO application. As PCC has stated in its earlier representations, Portsmouth is and remains one of the most densely populated cities in the country and, as an island city almost entirely surrounded by designated protected habitats, is particularly sensitive to any development pressures; their implications and their adverse effects.

1.2 Section 9.3 of the Examining Authority's ("ExA"'s) report describes some of the potential adverse effects of the proposed DCO related works and development including:

- significant, though temporary, effects on highway conditions and onshore transport during the construction phase,
- temporary noise and vibration disturbance,

- loss of access to and availability of formal sports facilities along the cable route during construction, in a city where the Council advises there is already pressure on very limited resources.

- Harm to the significance of the Fort Cumberland scheduled monument and its associated grade II* Listed Building

1.3 In addition to the harm identified by the ExA, the former Secretary of State in his earlier decision letter dated 20 January 2022 at paragraph 3.5 identified planning harm associated with the AQUIND scheme. This was summarised as also including "impacts on tourism receptors, sports pitches, and the Victorious Festival." In addition, the Secretary of State "considered that the compulsory purchase powers sought by the Applicant would also result in private losses and could cause delay to the North Portsea Island Coastal Defence Scheme due to the overlapping of construction compound areas between this scheme and the proposed Development."

1.4 While the overall conclusion refusing the application based upon the approach of the Secretary of State in respect of alternative route options and specifically that presented by Mannington substation has been found to be inadequate by Lieven J, the identification and assessment of harm was, and is, beyond criticism. Overall, it can be concluded therefore that the Secretary of State's analysis and the conclusions he drew - that due to the combination of adverse impacts from the proposed route through a very densely populated urban area the selected application route resulted in material harm - remains unimpeachable. The weight to accord to that also clearly remains a matter for the Secretary of State (subject to the high bar of *Wednesbury* unreasonableness).

1.5 As well as those direct negative impacts identified by the ExA which were then reflected in the assessment of the previous Secretary of State, the Council has consistently identified other harmful impacts, which we consider did not receive sufficient recognition in the ExA's final conclusions and seemingly may have been overlooked by the Secretary of State despite being clearly identified by the ExA.

1.6 We refer in particular to the potential disruption and loss of use of allotments at the Eastney and Milton Piece Allotments in the event of bentonite breakout during subsoil HDD drilling and construction works which was recognised by the ExA but then seemingly dismissed without sufficient reason. The ExA in their report at [10.7.29] concluded in terms that:
"It appears to the ExA to be difficult to judge the risk of a breakout accurately and there would therefore be the potential for one or more to occur. Many factors appear to be at play, and, while the Applicant informed the Examination that the HDD under the allotments would be through competent geology, it seems to the ExA that the poor, possibly waterlogged and variable made ground above this and immediately under the allotments could either dissipate the loss of bentonite drilling fluid or provide it with a route to the surface".

1.7 The ExA then however goes on at [10.7.30] to assert nevertheless that *"remediation measures secured through the Recommended DCO would mean that the level of disruption would be minimal and the effects reversible"* despite being unable to assess the level of risk accurately and thereafter describing it as *a "small risk and minor inconvenience"* which runs directly in the face of their earlier conclusions. This then was what the ExA balanced against the *"the public interest and benefits that would result from the Proposed Development".*

1.8 This is clearly a questionable approach by the ExA and the Council is concerned that a potentially significant localised adverse impact has been insufficiently considered or weighed in the conclusions drawn. Most especially given the fact that it was recognised that *"the use of the allotment plots is very important to their holders in many ways* [10.7.25].

1.9 Similarly the Council is concerned about the way the long-term adverse impact on wellbeing and recreation in the city, arising from the disruption of sports pitches, particularly in Farlington, likely to result in a sufficiently prolonged period preventing their use was addressed by the ExA. This impact would mean that local clubs, fixtures and users including Victorious Festival would need to be relocated and are exposed to an associated risk of failure and potential permanent loss. The Council would emphasise that the ExA at 7.4.8- 88 of the ExA Report accepted that the Applicant had not provided "*a fully effective mitigation solution"* and that the "*effects are likely to be felt by the public that use the various facilities"* and that they would be "*significant*".

1.10 Portsmouth City Council, as can be seen in all the representations on this issue made to date, strongly concurs with that overall conclusion in respect of harm from disruption to the playing fields as being significant. The Council would urge the Secretary of State to similarly determine that the proposal results in significant and material harm.

1.11 As well as the concerns regarding the wide ranging adverse effects arising from the proposal to the city of Portsmouth and its residents, the Council, as referred to consistently in its submissions to the ExA and Secretary of State along with a number of other Interested Parties, takes issue with the Applicant's position at the examination that certain spare capacity within the fibre optic cables ("FOCs"), which would be laid within the cables for the specific purpose of monitoring the interconnector DCO scheme could be lawfully used for a separate commercial telecommunications purpose unrelated to the principal DCO development. The Applicant claimed this use would qualify as 'associated development' as defined by section 115 of the Planning Act 2008 ("PA 08") and in accordance with the relevant PINs Associated Development Guidance[1] ("AD Guidance").

1.12 Alternatively the Applicant argued that even if the commercial FOCs do not constitute 'Associated Development' the section 35 Direction by a former Secretary of State which confirmed the interconnector scheme should be treated as development for which development consent is required under the PA 08 had somehow, by its terms, already confirmed that the commercial FOCs was also to be treated as part of the principal development for which development consent is required.

1.13 This has a direct bearing upon the size of the Optical Regeneration Station ("ORS") proposed on PCC's land[2] the subject of compulsory acquisition ("CA") because, as noted in the ExA's report at [5.3.5], the Applicant *"estimated that two thirds of the footprint of the optical regeneration station at the landfall would be dedicated to commercial telecommunications*". The lawfulness of treating the commercial FOC use as 'associated development' under the PA 08 somehow as part of the development as defined in the s35 Direction therefore raised clear issues as to any justification of CA for the full extent (i.e., at least two thirds) of PCC's land.

[1] Planning Act 2008: Guidance on associated development applications for major infrastructure projects (publishing.service.gov.uk)

[2] Which was clearly recognised by the former Secretary of State in his Request for Further Information dated 13 July 2021 to which the Council responded in a letter date 12 August 2021.

1.14 The ExA dealt with this issue principally at section 5.3 of the report and ultimately concluded, based upon the ExA's interpretation of the s35 Direction and understanding of the law, at [*5.3.43*] that, *"all elements of the Proposed Development described in the Direction request are part of the development for which development consent is required, including the commercial use of the surplus fibre-optic cable capacity".*

1.15 The previous Secretary of State in his Decision Letter, having sought the view of the Applicant and Interested Parties in his Request for Further Information dated 2 September 2021, which asked the parties to address the implications of excluding from the application "those elements which relate to commercial telecommunication", ultimately confirmed his disagreement with the ExA's conclusions.

1.16 The Secretary of State provided a clear view at [8.3] of the Decision Letter (which was not the subject of challenge by the Applicant before the High Court subsequently) as follows:
"8.2…The Secretary of State is of the view that nothing in section 35 permits a direction to constrain, determine or oust the question of whether something is associated development or not. At the section 35 direction stage, the precise parameters of every aspect of the proposed project were not known, and it was therefore not possible for the Secretary of State to take a decision as to whether aspects of the proposed development fell to be considered as part of the 'main' development or associated development under sections 115(1)(a) or 115(1)(b) respectively. In addition, the Secretary of State is of the view that a section 35 direction cannot be construed to direct that development which does not meet the necessary section 35 criteria itself (the telecommunications equipment does not fall within the included 'fields' of development) be treated as development for which development consent is required. This does not mean, however, that such development cannot be associated development and thus be consented through a development consent order.
8.3 The Secretary of State therefore disagrees with the ExA's view that all elements of the proposed development described in the section 35 direction request, including those which are described as associated development, are part of the development for which development consent is required [ER 5.3.43]. The elements of the proposed development which therefore relate to commercial telecommunications activity were not made development for which development consent is required under section 115(1)(a) of the Planning Act 2008."

1.17 PCC notes the comment in 8.2 above that *"this does not mean, however, that such development cannot be associated development and thus be consented through a development consent order".* However, it is clear that in this case, the correct conclusion is that the commercial telecommunications FOC use and related works are not associated development, as well as not forming part of the principal development.

1.18 This is because applying the principles at [5] and [6] of the AD Guidance it is clear that the commercial telecoms related FOCs:

(i) Do not support the construction or operation of the principal development or help address its impacts.

(ii) Are an aim in themselves and are not subordinate to the principal development.

(iii) Are only necessary as a source of additional revenue for the Applicant, in order to cross-subsidise the cost of the principal development.

(iv) In light of the extent of land and buildings said to facilitate the use, are not proportionate to the nature and scale of the principal development.

(v) Are not typical of interconnector or of a kind that is usually necessary for such.

1.19 Given that the Secretary of State's conclusions set out above were not the subject of challenge by the Applicant, PCC considers that the Secretary of State in reconsidering this proposed DCO is in effect bound to follow his predecessor's assessment and conclusions or must provide very clear reasons why he should disagree.

1.20 The impact of the said conclusions which accords with PCC's views clearly has an impact upon the DCO and in particular the extent and nature of the development as described. In short it appears clear to PCC that the DCO needs to be amended to remove the FOC commercial telecommunications element.

1.21 This again also clearly raises the issue of the justification for the CA of the land said to be required for the ORS given as above two thirds of the size of the ORS relates to the FOC use which must be excluded.

1.22 Amended plans and submissions were sought from the Applicant on this very matter by the former Secretary of State in the First Information Request of 13 July 2021, albeit after the Examination closed. These submissions were also within the context of the absence of the clear conclusion that the commercial FOC's elements should be removed. These submissions therefore did not benefit from full scrutiny and in the said new context.

1.23 Portsmouth City Council therefore asks the Secretary of State, in the reconsideration of this decision not only that a consistent approach to this matter will be taken but that the Applicant be asked to confirm its position in light of the clear view expressed.

1.24 In the event that the Applicant seeks to amend the application, excluding the commercial telecommunications development, there will therefore clearly need to be consideration given to the impact this has upon the evidence to date and indeed would give rise to consultation requirements as well as amendments to the EIA.

2. Consideration of Alternatives

2.1 The Secretary of State in his Request for Further Information ("RFI") of 3 March 2023 has asked the Applicant, NGET and NGESO for "*any Information relevant to the feasibility of Mannington substation as an alternative, including any relevant correspondence or studies, and an explanation of whether or not Mannington is a feasible alternative location for the substation*". PCC is pleased to see that this

matter will be fully and carefully considered and anticipates the opportunity to evaluate the Feasibility Study and information which is to be provided.

2.2 While the Council notes that the Secretary of State has asked for relevant studies regarding feasibility with specific reference to Mannington Substation and the Applicant's past decisions to reject this option within their optioneering, it is essential that the Feasibility Study requested from NGET in December 2014 is included within the relevant studies to be provided. This study of course has never been made available despite the fact that the conclusions drawn from this study, the Council would contend, were and are clearly central to a full and appropriate consideration of alternatives to the interconnector route chosen. The Applicant has, to date, resisted sharing this key document with either the Secretary of State or any of the Interested Parties despite its clear relevance and the Council is of the view that full consideration of it is essential to robustly complete the task of reasonable assessment of the alternatives.

2.3 In advance of a subsequent review of the responses to this request from NGET, NGESO, and the Applicant, the Council wishes to reserve its position as to whether the correspondence and studies provided are in fact sufficiently adequate to enable the Secretary of State to discharge his obligations in respect of assessing alternatives. As part of this assessment the Council would invite the Secretary of State to consider whether feasibility assessments completed in January 2016 are sufficiently up to date to be a basis for a decision in 2023. While assessment carried out in 2016 would be appropriate for a project that commenced its pre-application work in 2018, the Council is concerned that over 7 years later the basis for that feasibility work is likely to have significantly changed. This concern extends beyond the implications for network connections associated with the previously proposed Navitus Bay offshore windfarm but should encompass all changes in the project scope that may have arisen in this lengthy period.

2.4 A significant example of such change is that the original criteria for the scheme, which gave important weight to minimising the length of cable and other factors, led to a location near Le Havre for the landfall in France. This matter was principal in the consideration of the facts in the judgment of Lieven J (see paragraph 9 of the judgment dated 24 January 2023). The French landfall was described in paragraph 2.4.2.6 of the Applicant's Environmental Statement Vol 1 Chapter 2 Consideration of Alternatives as using an assumed landfall in Fécamp, a village to the east of Le Havre, a location that PCC accepts could be reasonably described as the shortest marine cable route from a landfall in Portsmouth. Since that feasibility work, however, PCC understand that the preferred French landfall location has relocated 50km further to the east of Fécamp to Hautot-Sur-Mer outside of Dieppe.[3] This new landfall location adds a significant increase in the marine cable length and also raises queries as to whether the appropriate area for search for UK landfall should also be reconsidered and encompass locations to the east of that considered in 2014/16 in order to ensure the cable route is indeed the shortest one.

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

3.1 Since the original Secretary of State decision of 20th January 2022, the NPICDS has been progressing well and works scheduled to re-commence on 1st April

[3] As illustrated by the attempts of the Applicant to acquire land in the location of Pourville-sur-Mer described as a "50m x 50x area on the seafront car part at Hautot-sur-Mer" within para 4.24 'Post Hearing Note in respect of the non UK Planning Consents and Approvals required in connection with AQUIND Interconnector' of 23 February 2021

2023, following the over-winter period of restriction on works. The programme for the NPICDS works has extended slightly and some construction activities are now likely to be undertaken between 1st April – 30th September 2024. At the time of the original Sectary of State's decision, construction works were predicted to end by September 2023, with only soft landscaping and public realm works taking place in 2024. Notwithstanding this slight extension in programme, with construction works due to be fully completed by the start of October 2024 and landscaping works by December 2024, it appears that there is now no predicted direct conflict between the construction of the coastal defences and the proposed AQUIND works. The AQUIND works are, according to the Applicants, currently programmed to start in Spring 2025. With the construction of NPICDS works due to complete before the AQUIND works start, then this removes the risk of impact of the AQUIND works upon the NPICDS construction programme.

3.2 As with any large-scale construction projects, unforeseen delays can occur and therefore should the NPICDS programme be delayed to 2025, then the previous conflict risks to the NPICDS would still be very much applicable.

3.3 The remaining risk to the NPICDS from the AQUIND project is the direct impact to the completed works. The exact alignment of the AQUIND cables has not been confirmed but PCC considers it is necessary that the works must avoid impact to the newly built sea defence structure. The cables should also be routed away from the footprint of the structure and must be outside the 45degree angle from the toe of the structure and new coastal footpath (a minimum of 10m distance from the new sea wall for any excavations). This in PCC's view is essential to avoid any impact to the loading of the new seawall.

3.4 The NPICDS is introducing improved habitat through specified landscaping, including sowing of wildflower seed mix (including annual overseeding for a further 2 years), planting trees and native scrub mix. Should the AQUIND project impact any of the landscaping (i.e., through digging up during construction) or impact any of the permanent works not part of the sea defence (new paths and ramps), then in PCC's view AQUIND must reinstate like for like including a 2-year maintenance plan of weeding, watering and replacing specimens that have failed to thrive.

3.5 In light of the above concerns, CP/PCC still believe that it is important to seek an agreed way forward through a Co-Operation Agreement. It has been confirmed by AQUIND's legal representative this this is something they are agreeable to.

3.6 Consequently, the parties are negotiating a Co-Operation Agreement to de-conflict the works as much as possible and minimise wasted costs to all parties (and it should be noted that this negotiation is occurring without prejudice to PCC's objection to the AQUIND scheme). The inclusion of both project programmes is fundamental, along with flexibility should works to the NPICDS be delayed. In particular, the Agreement seeks to minimise the wasting of public money through agreement relating to the appropriate timing and method of planting of the soft landscaping required under the planning approval for the NPICDS (19/01368/FUL, approved 20th February 2020).[4] In particular, Coastal Partners have a planning condition on this approval which states:

[4] https://publicaccess.portsmouth.gov.uk/online-applications/applicationDetails.do?keyVal=PXD79WMOJ6G00&activeTab=summary

15) All planting, seeding or turfing comprised in the approved details of landscaping shown on AWSC Sports Field - footpath realignment Dec 2019 (002) - 628060-LA-6000 and Landscape Plans 1-8 (inclusive) references 0081Rev.T02, 0082Rev.T02, 0083Rev.T02, 0084Rev.T02, 0085Rev.T02, 0086Rev.T02, 0087Rev.T02 & 0088Rev.T02 and agreed planting schedule (included in Appendix U of the ES) shall be carried out no later than the first planting and seeding season following the completion of the development; and any trees or plants which, within a period of 5 years from the date of planting die, are removed or become seriously damaged or diseased shall be replaced in the next planting season with others of similar size and species. requires the planting of the landscaping areas

3.6 PCC considers that provision ought to be made in the event that any AQUIND related works overlap with this planting. It would clearly not be appropriate for public money to be spent on planting and trees in one season, only for those species to be removed and replaced the following season.

4. French Licences and Consents

4.1 The Secretary of State has asked the Applicant for "an update on any progress made towards securing the principal licences and consents that are or may be required in France and French Waters", with specific attention to l'autorisation environnementale.

4.2 PCC notes a rejection by the Préfet de la Seine-Maritime relating to l'autorisation environnementale, dated 18 January 2021, suggesting a route of appeal to the "tribunal administratif de Rouen". PCC asks in particular, that the Secretary of State has regard to the Préfet decision, attached to this letter, in order to scrutinise the Applicant's narrative and case as argued (and that a translation of that decision be made public). PCC considers it is clearly relevant and important to understand whether or not the Applicant has challenged, or whether it intends to challenge, this decision (if indeed it is still possible to do so).

4.3 The Applicant explained to the ExA on 23 February 2021[5] that the lack of land rights over the plots tabulated in that decision of 18 January 2021 is a practical impediment to development in France that it intended to overcome by private negotiation. Of course, there are no deadlines to private negotiation, so the question remains how does the Applicant assure the Secretary of State that there will be any final resolution of this matter?

4.4 In that connection, if the Applicant is not challenging this refusal in the French administrative courts and private treaty negotiations to acquire land rights have stalled in France, the Secretary of State will need to know if the Applicant has any alternative proposals for landfall locations in France and therefrom to connect with the French electricity grid, and what impact this has on the UK cable route. It would clearly not be appropriate in such circumstances to conclude that such a change has no effect on feasibility and environmental impact evidence relied upon to date.

[5] 'Post Hearing Note in respect of the non UK Planning Consents and Approvals required in connection with AQUIND Interconnector' - https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN020022/EN020022-003749-AQUIND%20-%20Post%20hearing%20note%20-%20CAH3.pdf

4.5 Equally, PCC considers it is important for the Secretary of State as well as Interested Parties (and the public) to understand what, if any, progress the Applicant has made since February 2021 in relation to the 'Convention d'Utilisation du Domaine Public Maritime', to permit the laying of cables in French waters.

4.6 A detailed update should be required in respect of :

a. the Building permit – being the permit required to build the Converter Station
b. Autorisation d'Occupation Temporaire – being the grant of temporary occupation, which PCC notes that on 9-10 January 2023 the National Commission for Public Debate, a French government agency, observes AQUIND has made an appeal against refusal by the Council of Hautot-sur-Mer in the tribunal administratif de Rouen/Administrative Court of Rouen.[6] We understand that judgment was made public on 9 March 2023 requiring that the decision be re-taken by the relevant local authority, and we append a copy.
c. Archaeological approvals – marine and offshore; and
d. Convention d'occupation temporaire vis. French national rail operator

4.7 PCC also notes that there have been a number of judgments from the courts of the European Union where the Applicant has repeatedly lost appeals challenging important and relevant regulatory refusals. These cases and their implications were the subject of PCC representations in the 30 September 2021 response to the Secretary of State's Second Information Request.

4.8 Through these cases the French government has made its concerns (if not objection) clear with respect to regulatory consents and its broader attitude to the scheme, particularly with regard to the need for the AQUIND scheme and the high level of risk that the French government considers inherent to the AQUIND scheme in comparison with other interconnector projects.

4.9 Most notably, this position led the French government to veto the inclusion of the AQUIND Interconnector on the European Union's Projects of Common Interest ("PCI") list for 2020 (having initially been included in 2018). The General Court of the European Union notes that AQUIND challenged this decision in the French courts prior to the proceedings in the General Court of the EU.[7] PCC considers the Secretary of State should also procure a copy of this French domestic judgment, duly translated. PCC has sought a copy of the judgment but to no avail.

4.10 PCC considers that the Secretary of State should seek the Applicant's assistance in providing this and any other relevant information in respect of these proceedings.

4.11 To assist the Secretary of State, PCC sets out below its understanding of the significant series of judgments of the courts of the European Union on 2 themes:

[6] [redacted]; 9/10 January 2023, '4ème Rapport intermédiaire de la concertation continue', page 8 (accessed 28-03-2023).
[7] T-295/20 at para 56 refers to an undated challenge "before the Tribunal Administratif de Paris", i.e. the Administrative Court of Paris.

firstly, the PCI list, and, secondly, the request by AQUIND for exemptions from certain regulatory requirements. It is PCC's understanding that both affect the progress and in particular the financial position of the scheme.

Litigation concerning the European Union's Projects of Common Interest List ("PCI List")			
Decision Date	**Case/ Decision Ref**	**Decision-maker**	**Details**
22 April 2020	T-885/19 R - Interim relief application	General Court	AQUIND sought interim relief further to their application of 25 Dec 2019 (see below) to annul the new, 2020 PCI list in so far as it excludes them, or else to annul the whole PCI list. Application dismissed for lack of urgency; the PCI list stands (with AQUIND excluded).
5 March 2021	T-885/19 - Action for annulment	General Court	This was the first main application (lodged 25 Dec 2019) to annul the PCI list permanently in as far as it removed AQUIND, or in the alternative the entire PCI list. The action was dismissed for being manifestly inadmissible for prematurity: "[32] … [the PCI list] could not be regarded as definitive as at 25 December 2019 and could not be regarded as an act producing binding legal effects capable of affecting the applicants' interests on that date." France, Germany and Spain intervened to argue against AQUIND.
5 October 2021	T-295/20, interim application: (Confidentiality – Challenge by the interveners)	Order of the President of the Second Chamber of the General Court	AQUIND issued a second application (T-295/20) to annul the PCI List on 21 May 2021 (once the PCI list had entered into EU law). This was an interim application by AQUIND "for confidential treatment" leading to an order of the Court concerning the basis for release of documents with certain redactions to the governments of France and Germany. It was an interim application because the Members States believed AQUIND held and was claiming confidentiality over documents material to the second main annulment application. France and Germany challenged the application for confidential treatment on 27 April 2021. The Court considered the justification for information to be redacted from the Member States as pleaded by AQUIND, permitting certain redactions but finding that AQUIND had overstated its claim to commercial confidentiality in a number of regards and permitting those aspects to be released. Extracts from this Order indicate that AQUIND is seriously considering alternate landfall points *in other EU Member States* due to apparent legal and consenting difficulties in France:

			"[30] As regards, in the first place, the third sentence of paragraph 41, paragraph 42, footnotes 44 and 45 and Annex A7 (and its corresponding entry in the schedule of annexes), AQUIND Ltd, AQUIND SAS and AQUIND Energy submit that that information is protected by business secrecy *and that its disclosure could affect alternative development routes for the AQUIND Interconnector and endanger its position in discussions vis-à-vis other Member States*. … [33] *Similarly, in so far as AQUIND Ltd, AQUIND SAS and AQUIND Energy state that they could 'pursue alternative development routes*', that information is in no way specific in that it does not mention what type of route it might be or *whether AQUIND Ltd, AQUIND SAS and AQUIND Energy have a clear intention of pursuing it*. Owing to the vague and imprecise nature of that information, it must be held that it is not 'commercial information'." … [39] The same is true of the information that the loss of PCI status would affect the ability of AQUIND Ltd, AQUIND SAS and AQUIND Energy to acquire all the required approvals, authorisations and permissions to construct the AQUIND Interconnector, *in particular in France*. These are solely legal consequences which are known, or at least conceivable, for undertakings and for France, owing to the high probability that they will occur. … [44] The statement of reasons of AQUIND Ltd, AQUIND SAS and AQUIND Energy merely indicates the commercially sensitive nature of the material contained therein, and states that *disclosure may affect alternative development routes for the AQUIND Interconnector and compromise its position in discussions with the Member States*. Such a statement of reasons is, at least, general and vague and therefore does not satisfy the requirements laid down by the case-law." [emphases added] Further, at para [46], the Court referred to: "ongoing legal proceedings in France concerning those [PCI] issues". The Secretary of State must have regard to the reasoning of this Order and the application material released to the governments of France and Germany. An alternate landfall

			location anywhere, let alone *a different country,* undermines any business case, let alone technical feasibility study or Environmental Statement (and therefore the consideration of alternatives and justification for compulsory acquisition), presented to date. Additionally, this litigation before the European Court shows that the Applicant's financial position is sensitive to and weakened by the loss of PCI status. The reference to litigation in the French courts is also important and relevant, and the Secretary of State must require the Applicant to provide an update, with translated copies of French domestic judgments to understand the risk to the project.
1 August 2022	C-310/21 P	Court of Justice of the EU	Application made 17 May 2021 appealing Order of the General Court in T-885/19. The Court of Justice dismissed AQUIND's appeal in its entirety, upholding the Order of the General Court that the PCI list cannot be impugned before it has taken legal effect.
8 February 2023;	T-295/20	General Court	AQUIND issued another application on 21 May 2020 to annul the latest PCI list insofar as it excluded them. This second application appeared to be spurred by the realisation that T-885/19 was premature to the PCI list entering into binding law (and indeed it was: see decisions of 5 March 2021 and 1 Aug 2022). This application consisted of 7 grounds for annulment for various reasons of procedural unfairness, all of which were dismissed by the General Court. The PCI list stands (without AQUIND). It follows that AQUIND does not benefit from the benefits of the PCI list: "[3] …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." Para 56 of the judgment shows that the French Republic informed the General Court that AQUIND challenged the French government's decision to exclude AQUIND from the PCI list before the French courts, namely the Administrative Court, Paris. The clear inference to be drawn is that AQUIND lost its French administrative law challenge,

			and the French government was justified in barring AQUIND from the PCI list, firstly due to "overcapacity" and secondly because the "AQUIND interconnector was considered the most uncertain" (see para 52). The Secretary of State should ask the Applicant to provide a translated copy of the judgment of the Administrative Court in Paris to fully understand the risks canvassed in that judgment. Indeed, the Secretary of State is asked to note the General Court's statement at para 65 that "The reason why the Commission did not include the proposed AQUIND interconnector in the [PCI list] relates to the French Republic's opposition to that project…". If the considered view of the General Court is that the French Republic *opposes the continental half of this scheme*, not only as a Member State of the EU but as a matter of domestic policy, this can only be fatal to the Applicant's ambitions. It would be no wonder if the Applicant is considering other EU Member States to host the continental half of the interconnector. The Secretary of State should ask the Applicant to confirm whether or not it will appeal judgment T-295/20 to the Court of Justice of the European Union. We reiterate that the Secretary of State should require sight of the judgment of the Administrative Court of Paris.

4.12 It follows from this litigation that the French Republic has exercised its "veto" at the European level to deprive the Applicant of crucial advantages to make it competitive in the market. This veto is justified because, as the General Court states, the project "touches upon town and country planning, which is an area that traditionally falls within the sovereignty of the Member States".[8]

4.13 PCC considers it is clear that the French government is not in favour of this project proceeding in France. This is of significant relevance to the scheme as a whole, let alone the fact that the Applicant asks the Secretary of State to allow the DCO and thereby blight English land for a project that has no clear continental footing.

4.14 With particular reference to the Applicant's position in the 'Post Hearing Note in respect of the non UK Planning Consents and Approvals required in connection with AQUIND Interconnector' of 23 February 2021, the Applicant claimed:

[8] Case T-295/20, para 39

"4.26 Further, and in any event, the Applicant is continuing in its efforts to obtain the relevant regulatory approvals. Whilst those approvals would not render the Applicant as a public utility, *such approvals would allow the French central government to declare the project to be in the public interest*, which would then allow for the prefect (the state's representative) to take a decision to confirm that the rights required for the project may be provided to the Applicant." [emphasis added]

4.15 In light of the foregoing position of the French government set out in EU court records, it would seem preposterous to continue to argue that the French central government has any intention of declaring the project to be in the public interest.

4.16 The Secretary of State in PCC's submission should also investigate as a matter of urgency whether the continental route of the project is or is not as stated in the application before him.

4.17 The second strand of European Union litigation concerns a concerted, but ultimately now impossible, effort by AQUIND to obtain an exemption request from the European Agency for the Cooperate of Energy Regulators ("ACER"), which would also give it competitive advantages in the energy market.

Litigation concerning AQUIND's Exemption Request to the European Union Agency for the Cooperation of Energy Regulators (ACER)			
Decision Date	**Case/ Decision Ref**	**Decision-maker**	**Details**
18 Nov 2020	T-735/18	General Court	On 17 May 2017 the applicant submitted a request for an exemption for the AQUIND interconnector. On 26 April 2018 the AQUIND interconnector obtained PCI status (which it subsequently lost, as detailed in the above table). ACER considered the exemption request and by Decision No 05/2018 of 19 June 2018 ACER refused the request it. AQUIND appealed to ACER's Board of Appeal ("BoA"), who issued decision A-001-2018 of 17 October 2018. The BoA upheld ACER's original decision, refusing the request for an exemption for the AQUIND interconnector. Notably, the General Court summarised AQUIND's claim at para 21, including: "The applicant claims that the Court should… rule on the main pleas in law raised in the application, namely… the sixth plea alleging that the Agency and the Board of Appeal failed to take account of the fact that, *without an exemption, it was legally impossible for the applicant to operate the proposed AQUIND interconnector in France*." [emphasis added]

			AQUIND succeeded and the BoA decision of 17 October 2018 was annulled by the General Court because 1) the BoA had not brought sufficient scrutiny upon the original ACER decision, and 2) an error of legal interpretation was made in relation to the possibility of AQUIND's eligibility for cross-border cost allocation.
4 June 2021	A-001-2018_R	ACER's Board of Appeal	The Board of Appeal ("BoA") 'relaunched' (note the 'R' suffix) its decision in light of the T-735/18 judgment from the General Court, which annulled the first BoA decision dated 17 October 2018. The BoA decided that it now lacked legal competence in AQUIND's application for an exemption request because the Electricity Regulations govern relationships between Members States only, which by that time excluded the UK.
15 February 2023	T-492/21	General Court	This was a challenge by AQUIND against ACER's re-hearing of the Board of Appeal ("BoA") appeal of 4 June 2021, necessitated by the General Court's ruling of 18 Nov 2020, T-735/18. AQUIND made 2 pleas: Firstly that the BoA should have held itself competent to decide an exemption request even post-Brexit, and thereby failed to comply with judgment T-735/18; and, secondly that the BoA did not follow its own procedures in conducting the re-hearing. The General Court held at para 59 that "following Brexit, it [the BoA] was no longer competent to rule on ACER's decision by taking the necessary measures to comply with the judgment of 18 November 2020, *AQUIND v ACER* (T-735/18…". Consequently it was not necessary to consider the second plea (paras 61-66).
9 March 2023	C-46/21 P	Court of Justice of the European Union	ACER challenged the General Court's decision (T-735/18), which held that ACER's BoA misunderstood its own powers when considering ACER's initial refusal of the exemption request. ACER lost this appeal as the CJEU agreed that the General Court was correct to hold that it took an unduly limited approach to reviewing AQUIND's request and ACER's refusal. This judgment in AQUIND's favour however does not change the position confirmed above on 15 February 2023 that the ACER lacks the legal power to grant an exemption request to a project between an EU Member State and the UK.

4.18 In summary, the Applicant's prediction in its 'Post Hearing Note in respect of the non UK Planning Consents and Approvals required in connection with AQUIND Interconnector' of 23 February 2021 that "the Applicant is in a strong position and expects to be awarded an exemption decision either by the BoA or the BoR within the timeframes indicated above"[9] was only correct if the decision in respect of T-492/21 it anticipated was correct and it was successful.

4.19 Likewise, the Applicant's claim that "An exemption for the Applicant taking effect from the date of the Exemption Request would therefore be unaffected by the United Kingdom's withdrawal from the European Union"[10] has been shown to be entirely incorrect.

4.20 Consequently, the Secretary of State needs to be apprised of the progress of establishing any relevant exemption regime under the provisions of the Trade and Cooperation Agreement (through the Specialised Committee on Energy), and if so the implications of those timescales for the AQUIND project. We reiterate the words of the General Court that "without an exemption, it was legally impossible for the applicant to operate the proposed AQUIND interconnector in France."[11]

4.21 The AQUIND interconnector project has stumbled at virtually every regulatory hurdle set by the EU institutions and the French government. The passage of time and the repeated frustration of obtaining these necessary regulatory consents mean that the Applicant cannot seek to rely on past feasibility studies which have assumed this process in Europe would be supportive.

4.22 This clearly affects the rationale for the Applicant's consideration of alternatives, which it placed before the Examining Authority and the Secretary of State (as well as the Court).

4.23 Further, PCC highlight again that AQUIND is persisting with an application for development consent through Portsmouth to Lovedean, despite having conceded in the EU courts that it may not even land in France and there are doubts over precisely where in France the Applicant intends to land. At worst, its feasibility and environmental studies produced to the Secretary of State under this 'Request for Information' will be wholly unreliable. At best, no credence can now be given to the Examining Authority's simple dismissal of this issue by suggesting that it was not even necessary for a requirement to be imposed on the DCO preventing commencement of the landward development until French consents are secured [11.3.62 of the ExA report]. The commercial orthodoxy behind the Examining Authority's reasoning is not something that the Applicant can be assumed to adhere to. The Applicant is seeking to blight English land without a clear path to ever realising its development, contrary to the long-established and demanding requirements of compulsory acquisition. The application should be refused.

[9] Para 3.7
[10] *Ibid.* at para 3.15
[11] T-735/18 para 21

4.24 In that connection, we trust that the Secretary of State will, as noted above, approach the question of the issue of whether the commercial telecommunications related fibre-optic cables can be treated as associated development or part of the 'development' the subject of the s35 Direction with equal rigour as the previous Secretary of State who rejected its inclusion (which the applicant did not challenge before the High Court). We repeat that this must affect the justification for the land sought for the ORS.

4.25 PCC submits that there are now fundamental changes to the circumstances of this project which mean that the application can be shown to be entirely flawed. This is significant again when the DCO consenting system is to be a 'front-loaded' one. When the base assumptions however about the entirety of the project are unsound it is quite obvious that this warrants refusal of a Development Consent Order in the face of the planning harm, but also the fact that the justification for any CA simply cannot be made out.

4.26 PCC submits that in the face of this the Applicant should consider withdrawing the application when it is not clear how these matters can be overcome as part of this reopened process following an examination of evidence which no longer applies. This renders the application and any Orders in effect impossible legally to be granted.

5. Environmental Information

5.1 The Secretary of State has asked the Applicant to provide an update on any new environmental information that has come forward since the former Secretary of State's decision. The Council does not attempt to provide a definitive list of updated projects and plans that may be likely to occur within the timetable for delivery of the AQUIND Interconnector Project though it is aware of some emerging projects that may require consideration. Noting that the timetable for redetermination and, if granted, delivery, especially in light of the uncertainty regarding French consents and licences (as well as the threat to the project in light of the ACER and PCI decisions), is unknown, the Council would urge the Secretary of State to take a precautionary approach to scoping matters that should be included in a cumulative or in-combination assessment.

5.2 To this end PCC would draw attention to two significant projects occurring in proximity to the proposed scheme route.

5.3 The first is the A 49.9MW solar development which is currently under consideration on land directly overlapping the termination of the Interconnector Project in Winchester/East Hampshire. Details of this application are available on the Winchester City Council website under reference 22/00447/FUL. Secondly, the Council would also draw to attention another DCO project of which the Secretary of State for Environment, Food and Rural Affairs has been notified and which will intersect with the AQUIND project. Southern Water are currently undertaking the preapplication steps for the Hampshire 'Water Transfer and Water Recycling Project'. Whilst the application is likely not be submitted to the Planning Inspectorate until Q1 2025, Southern Water have been engaging with the public and relevant stakeholders

through a number of consultation exercises and it is clear that the two schemes would conflict in north Portsmouth.

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

Yours sincerely,

[redacted]

Ian Maguire
Assistant Director Planning & Economic Growth

Attachments:

1. Rejection by the Préfet de la Seine-Maritime relating to l'autorisation environnementale, dated 18 January 2021 (in French);

2. Judgment of the Administrative Court of Rouen relating to l'autorisation d'occupation temporaire du domaine public, heard 23 February 2023 with judgment issued 9 March 2023 (in French).