

From: [Maguire, Ian](#)
To: [Aquind Interconnector](#)
Subject: Portsmouth City Council response to the request for information from the Secretary of State of 23rd May 2023
Date: 20 June 2023 21:24:39
Attachments: [PCC Comments re SoS Request for Furhter Info - JUNE 2023.pdf](#)

Dear Sirs,

Please find attached the response from Portsmouth City Council to the request for information from the Secretary of State of 23rd May 2023.

Should I be able to provide any assistance please do let me know.

Yours faithfully

Ian Maguire
Assistant Director, Planning and Economic Growth
Phone: 023 9283 4299 07769 286812
Portsmouth City Council
Civic Offices Guildhall Square
Portsmouth PO1 2AY

This email is for the intended recipient(s) only.

If you have received this email due to an error in addressing, transmission or for any other reason, please reply to it and let the author know. If you are not the intended recipient, you must not use, disclose, distribute, copy or print it.

This email may be monitored, read, recorded and/or kept by Portsmouth City Council. Email monitoring and blocking software may be used.

Ian Maguire
Assistant Director Planning
& Economic Growth

Floor 4, Core 2-4
Guildhall Square
Portsmouth
PO1 2AL

Phone: [REDACTED]
E-mail: [REDACTED]
Our Ref: 20230523
Date: 20/06/2023

Via email to
AQUIND@planninginspectorate.gov.uk

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 Request dated 23 May 2023 for Comments upon the Applicant's Response of 28 April 2023.

We write further to the Secretary of State's request on 23 May 2023 for any comments from Interested Parties to matters contained in his request of 3rd March 2023 and the information contained in AQUIND Ltd's ("Aquind" or "the Applicant") response dated 28th April 2023 ('the April 2023 Response'). Please find herein the response to that invitation of Portsmouth City Council ("PCC" or "the Council") and Coastal Partners ("CP") which is set out below:

1. CONSIDERATION OF ALTERNATIVES

- 1.1 The Council notes that despite the fact that the Secretary of State in his request of 3rd March 2023 at paragraph 4 specifically sought information from National Grid Electricity Transmission Plc ('NGET') and National Grid Electricity System Operator Limited ('NGESO') regarding the feasibility of Mannington substation as an alternative neither has done so. Given the importance the Applicant placed upon their assessment and advice as part of its submission before the High Court in challenging the previous Secretary of State's decision to reject this DCO application, this is not only unhelpful but immediately undermines their position.
- 1.2 As a consequence of the continued absence of this direct information the Secretary of State and the Interested Parties still only have available that which was relied upon by Aquind before the High Court together with an assertion by Aquind that "it is understood" (Aquind Response 28 April [2.2.1]) that NGET and NGESO "will confirm" that reinforcements to the National Electricity Transmission System are

required if Mannington was to serve as a substation for the interconnector scheme and will also confirm that this renders it unfeasible as an option. The Applicant in its Environmental Addendum 3 ([3.2.1.2] - ES Addendum 3 (Doc ref 7.8.3)) also reports its understanding of the sort of works that would need to be carried out at Mannington “to accommodate the connection of the Proposed Development” are again based upon enquiries made of NGET and NGESO but again without the direct information from these parties.

- 1.3 In the circumstances the Council suggests this is wholly inadequate and would suggest that the Secretary of State require direct information and evidence from NGET or NGESO in order for this matter to be properly determined.
- 1.4 The Council considers that without confirmation or further corroboration in respect of the comparative costs of Mannington as an alternative and its feasibility as an alternative substation, PCC is unable to provide further comment at this stage and awaits any further information from NGET and NGESO if and when it is provided
- 1.5 PCC also notes that the Feasibility Study requested from NGET in December 2014 has not been included within the 'relevant studies' in response to the Secretary of State's request. Consequently once again the Council has not had the opportunity properly to understand the basis for the comparative assessment of alternative substation options (nor has the Secretary of State). This is again both unhelpful and surprising given the reliance Aquind clearly declared before the High Court that it has upon this study to support its position.
- 1.6 The Applicant at [3.4.1.4] of the ES Addendum 3 (Doc ref 7.8.3) suggests, “for completeness”, that “options to the east of Lovedean required the same reinforcements as a connection to Lovedean, plus additional reinforcements to either get the power to Lovedean, or further on the east coast”. Again, no interrogable detail to explain or support this statement has however been provided. This also does not appear to be consistent with the high level assessment of (NG)ESO’s analysis to support Ofgem’s Third Cap and Floor Window and MPI Pilot Regulatory Framework – National Grid ESO (August 2022)” (referred to by Aquind as ‘the ESO Interconnector Report’) referenced in footnote 6 p13 of the Needs and Benefits Third Addendum (Doc ref : 7.7.19). This analysis makes a finding that “the highest capacity available for HVDC interconnector connection is at substations in Northwest England, North Wales and Southeast England” and “the lowest availability of capacity for HVDC interconnector connection being Southwest Scotland and Northeast Scotland” (see annotation to Fig 13 page 22 of the ESO Interconnector Report. The same passage concluded that “there may be a need for additional investment in the network” in the latter locations, not the Southeast.
- 1.7 Setting aside the question of Mannington on its own as an option, PCC in its response of 28th April 2023 referred to the fact that Aquind’s preferred French landfall location has now relocated 50km further to the east of the originally preferred location of Fécamp to Hautot-Sur-Mer outside of Dieppe.

- 1.8 Notwithstanding this the Applicant in its ES Addendum 3 (Doc Ref 7.8.3.) in its consideration of alternatives relies upon the search area that was used in the original optioneering exercises over seven years ago. In doing so and in explaining the rejection of a number of alternative landfall locations relies upon the comparable length of cable that would need to be laid as well as other factors. These distances will however now have changed from the original assessment and the conclusions therefore no longer relate to the current landfall in France. This is quite clearly a relevant consideration and needs to be acknowledged and addressed.

2 NORTH PORTSEA ISLAND COASTAL DEFENCE SCHEME ("NPICDS")

- 2.1 In addition to the comments provided in our response of 28th April 2023 the Council is able to update the Secretary of State that negotiations with the Applicant continue in relation to a Co-Operation Agreement to avoid delay to the North Portsea Island Coastal Defence Scheme through implementation of the Aquind scheme, without prejudice to Portsmouth City Council's continued opposition to the grant of a DCO. In particular, PCC is concerned to ensure that tree planting is not removed by Aquind once planted by Coastal Partners, only for Aquind to have to replace it again. Any delay to the provision of permanent tree planting is a negative impact in the planning balance.

3. EU EXEMPTIONS AND FRENCH LICENCES AND CONSENTS

- 3.1 PCC draws attention to the fact and remains concerned that Aquind has consistently either overstated its position on the potential resolution of French consenting matters to the Examining Authority and the Secretary of State or failed to provide a correct and up to date position in this highly important and relevant regard.
- 3.2 This is heightened by the European Union regulations and exemptions thereto that Aquind has sought on the basis that they are critical to the project's development in France¹ without which Aquind has stated clearly that " the project cannot and will not progress" but which have been denied to it. In addition, it has also been denied the assumed financial and regulatory benefits as a result of the decision by the European Commission on 31 October 2019 to rescind the project's status as one of Common Interest ('PCI'). Further the issue of the availability of exemptions in France and the EU has also clearly been removed as a consequence of the withdrawal of the UK from the European Union (which it has now been determined means that the EU Agency for the Cooperation of Energy Regulators ('ACER') lacks competence to grant Aquind's exemption request). On this point, PCC refers to its submission of 28 April 2023.
- 3.3 The Council notes from Aquind April 2023 Response [4.18] that Ofgem has confirmed that the project is eligible for consideration in the UK to apply for an award

¹ See Aquind's Exemption Request 2020 available publicly through Ofgem's website https://www.ofgem.gov.uk/sites/default/files/docs/2020/12/request_for_exemption_executive_summary_and_document_summary.pdf and https://www.ofgem.gov.uk/sites/default/files/docs/2020/12/section_5_-_exemption_request_and_rationale.pdf - first paragraph

within the Third Cap and Floor Window regime for interconnectors which regulates and limit interconnector developers' exposure to electricity market price risk².

- 3.4 This of course only applies to the UK element of the project. For the French element Aquind must now accept that, despite its assertion that it still 'expects' to "be regulated under the exempt status" it cannot seek any exemption from ACER under Article 63(5) of Regulation (EU) 2019/943 (formerly Article 17(5) of Regulation No 714/2009). To be clear the exemption would have been from the operation of Article 19 of the Regulation in respect of how income from interconnectors is addressed.
- 3.5 In Aquind's post hearing note to the ExA following CAH3 (AS – 069) dated 23 February 2021 (referred to at [4.1] of its April 2020 Response) it had in the alternative to the ACER EU exemption route sought to make the case that the provisions of the then unratified EU-UK Trade and Cooperation Agreement ("TCA") would offer the equivalent exemption route.
- 3.6 Aquind now clearly has to rely upon the TCA (now ratified) to provide the necessary exemptions, the importance of which to the future of this project have been made fundamentally clear by Aquind (see again its submissions to Ofgem referred to above at footnote 1) but provides scarce if any detail or explanation of how or whether the exemption will or can arise the TCA.
- 3.7 As the Council understands the submissions made at [4.19] of its April 2023 Response the Applicant relies upon "the arrangements provided for in Articles 310 to 312 [sic] and Annex 29 [sic]" .This is confusing (and appears to be in error) because Annex 29 relates to the TCA relates to the "Allocation of Electricity Interconnector Capacity at the Day -Ahead Market Timeframe" .
- 3.8 Annex 28 by contrast relates to the "Non application of Third Party Access and Ownership Unbundling to Infrastructure" and also equates to Annex ENER-3 which was referred to (and attached) to AS-069. Further Annex 28 makes specific provision for a party to the TCA to "decide not to apply Articles 306 and 307" (not Articles 310 and 312 of the TCA. Articles 306 and 307 also equate to Articles ENER.8 and ENER.9.
- 3.9 These Articles (ie 306 and 307) require the parties "ensure the implementation of a system of third-party access to their transmission and distribution networks based on published tariffs that are applied objectively and in a non-discriminatory manner" and "ensure that transmission system operators carry out their functions in a transparent, non-discriminatory way" respectively.
- 3.10 What Aquind cannot now rely upon (which it sought to do in AS-069) is the provision now in Article 309 of the TCA that existing exemptions for interconnectors shall still apply as it has no relevant exemption.
- 3.11 What the Council understands Aquind wants the Secretary of State to accept (based upon what it said in AS-069) is that the TCA (through Annex 28 not 29) "effectively

² See eg Ofgem Guidance file:///C:/Users/ccco/Downloads/Regime%20Handbook%20(1).pdf

introduces a new exemption regime in relation to GB-EU interconnectors, based on the provisions of...under Article 63 of Regulation (EU) 2019/943” (see [3.22] AS-069).

- 3.12 On the assumption (but which is not clear) that Annex 28 can be read in the way Aquind suggests it is a matter of fact that no such new exemption regime has been introduced. This remains a possible matter for the future and again as the Council understands it, for the Specialised Committee on Energy which has yet to raise or even consider such a matter.
- 3.13 The Applicant’s assertion at [4.22] of the April 2023 Response that its “ability to secure an exemption in accordance with the TCA remains...unaffected” is therefore an extraordinary statement . Currently it has **no ability** to secure an exemption from the EU Regulations as they apply in France in accordance with the TCA or any regime.
- 3.14 In accordance with its own assessment of its position when it sought an exemption under Art 63 of the EU Regulations therefore, the Secretary of State and the public must in fact conclude that the project **cannot and will not progress** based upon the existing circumstances. There can be no lawful or practical assumption made about the nature and timing of any exemption regime.
- 3.15 Setting the matter of exemptions aside, with respect to Aquind’s latest description and assessment of the current status of the specific French consents in the 'Applicant's Response to SoS Further Information Request – March 2023', dated 28 April 2023 ("April 2023 French Licences and Consents Submission"), Aquind signally fails to provide the Secretary of State with any specific dates for anticipated receipt of each consent, even on a 'worst case scenario' basis.
- 3.16 It may be noted that in Aquind’s submission to the ExA at Deadline 6 dated 23 December 2020 (REP6-024) 'Other Consents and Licences' document did not refer to the fact from the Examining Authority that it was having difficulties in relation to the Autorisation d'Occupation Temporaire ('AOT') required from the Mayor of Hautot-Sur-Mer.
- 3.17 Subsequently in an Additional Submission document (AS- 069) submitted as a post hearing note following compulsory acquisition hearing CAH3 (not an amendment to REP 024) the Applicant reported the fact that the Mayor had in fact rejected the Autorisation d'Occupation Temporaire ('AOT') in October 2020 (see [4.21] AS -069), and thereafter with regard to the application for Autorisation Environnementale confirms at [4.24] of AS-069 that the Préfecture it as a direct consequence of the AOT refusal on 18 January 2021 as “ *the project owner was unable to provide evidence that the easement required for the works to take place at landfall (a 50m x 50m area on the seafront car park at Hautotsur-Mer) had been secured*”.
- 3.18 The ExA however only recorded the following in the Examination Reportat [10.8.67]:
"10.8.67. The French single environmental authorisation includes regulatory approvals to allow confirmation of the rights required for the Proposed Development and compliance with the relevant environmental assessment regulations following a validated application and a public inquiry. The application was submitted in October 2019 and prevalidation consultation is ongoing."
(emphasis added)

- 3.19 The reference to "prevalidation consultation" rather than the rejection of 18 January 2021, without any reference to the role of the AOT as a factor in the process, means the ExA either misunderstood or overlooked the evidence set out above in AS-069. This means that its conclusions in respect of justification for compulsory acquisition ('CA') at [10.8.70 -71] are highly questionable. These passages state:
"10.8.70 The Applicant has been engaged in obtaining the French consents since 2017. It is of the view that there is a reasonable prospect of the above French consents being obtained in line with the envisaged making of the Order.
10.8.71. As a result of the above and all other matters raised, the ExA is satisfied that the Applicant has demonstrated that any potential risks or impediments to funding and implementation have been properly managed and that any legal matters, including the need for any operational or other consents, have been taken into account in accordance with paragraph 19 of the CA Guidance."(emphasis added)
- 3.20 The Council urges the Secretary of State to be highly circumspect of the ExA's assessment at the time and must also temper Aquind's narrative which seeks to suggest that the likely progress of French consenting matters is as positive and clear as it suggests. In particular whilst the Interested Parties can do their best the language and foreign jurisdiction mean of these consents means that it is only the Applicant who has the resources to retain specialist French lawyers. The passage of time has nevertheless exposed the confidence that the ExA was willing to place upon the Applicant's evidence and assurances on these matters to be inaccurate and misplaced. PCC would urge the Secretary of State carefully to question and examine the issues still surrounding the necessary consents required in France most especially in light of the open opposition by certain relevant authorities there.
- 3.21 In light of the fundamental conclusions that must be drawn as a consequence of the absence of any exemption to the EU regulations being available and the position to date of the French authorities in respect of the Aquind project PCC reiterates its surprise that Aquind has chosen to continue with this scheme and urges it to withdraw its application.

4. ENVIRONMENTAL INFORMATION

- 4.1 The Applicant, at para 5.10 of their April 2023 Response, confirms that they it has identified 10 new developments which need to be included in its updated cumulative impacts assessment ('CIA') in respect of the proposed development.
- 4.2 The Council must advise the Secretary of State that the Applicant has however overlooked the imminent submission of a Development Consent Order application in Quarter 1 of 2025 for the Hampshire Water Transfer and Water Recycling Project. This proposes a water pipeline that crosscuts the Aquind proposal and, if consented would be anticipated to be constructed simultaneously with it.
- 4.3 The cumulative impacts on traffic management and disruption from this DCO scheme should therefore, the Council contend, also be taken into account as part of the updated CIA.

5. OTHER MATTERS

Commercial use of fibre optic cables ('FOCs') and CA Justification for ORS related land

- 5.1 The Applicant's stated position before the ExA was that it need not be subject to constraints within the DCO preventing it from commencing works or implementing its CA powers granted by the DCO until the project had received all the relevant consents for it to be lawfully developed in France.
- 5.2 The concerns of PCC and others, in particular Winchester City Council, led to the proposal of a requirement within the DCO, in a form similar to that now contained in Article 52 of the latest draft DCO which the Applicant has now acceded to. The Applicant says that it has included this new article having acknowledged the comments of the Secretary of State's advisors in documents disclosed in preparation for the judicial review hearing.
- 5.3 Whilst the Council welcomes this change in attitude, this is another example where through the effluxion of time the ExA's faith in the Applicant's submissions as reflected in its report has been shown to be misplaced and unsustainable.

Book of Reference amendments

- 5.4 The Secretary of State is referred to the submissions of PCC dated 12 August 2021 and 30 September 2021 in response to the Secretary of State's first Request for Further Information in a letter dated 13 July 2021 ('the First Information Request 2021') when he specifically raised the issue of "excluding those elements" from the DCO "which relate to commercial telecommunication" (i.e. the commercial fibre optic cable ('FOC') elements) and asking the Applicant to address how these changes might "affect the compulsory purchase provisions" .
- 5.5 The Applicant of course maintained through the examination, and during the Secretary of State's post examination consultations, that the optical regeneration station ('ORS') compound required the inclusion of an 8m wide stand-off space inside the compound fencing to allow for the protection of the ORS from established trees to the North which could fall. This was whether or not the FOC elements were included.
- 5.6 Thus, as argued by the Applicant, the compound as proposed by the Applicant needed to have dimensions comprising 35m long x 18m wide in order to include the 8m stand-off. Those dimensions generated an area of 630m².
- 5.7 The Council would first note that the Applicant now identifies an area of 559m² area within the Book of Reference (as updated) and the 630m² previously identified and maintained (even in the absence of the commercial FOC as an element) has been reduced. Whilst it is welcome that less of the Council's land is said to be required, no explanation has been given for this.
- 5.8 Furthermore the matter of the stand-off within the suggested area was challenged by PCC previously (see its response of 30 September 2021) and these points were never satisfactorily concluded. PCC would therefore repeat its concerns that, even though the Applicant has reduced the area required it has not explained or identified

how this is the minimum area necessary for the scheme in order to help satisfy the justification for the compulsory acquisition ('CA') of this land.

- 5.9 The latest Book of Reference in respect of the ORS itself 'without commercial FOC' identifies a CA area of 492 m²; this accords with an ORS compound with dimensions 30m x 16.4m (including 8m stand-off at rear). However, the Council contends that a smaller compound (and CA area) of, for example 30m x 9.4m = 282m² (allowing for 1m rear stand-off to fence) would be more appropriate with a separate restriction on the land agreed (although of course without prejudice to PCC's general position) to prevent trees being planted in the 7m gap north of the ORS compound.
- 5.10 The Applicant purports to have conceded to the position of Portsmouth City Council (and others) that it would be "unwise" for any DCO to permit the use of commercial FOCs on the basis that it was a contentious matter, not that it would have been unlawful. For the avoidance of doubt PCC's position has always been and remains that the commercial FOCs cannot lawfully be included in the Order, contrary to the apparent assertion made by the Applicant at Para 7.3 of their April 2023 Response.

Funding Concerns

- 5.11 PCC refers the Secretary of State to the passages above which set out the clear questions which arise over the viability of the project in light of the issues over exemptions and the French consents. These clearly have implications upon the justification for CA as likely impediments but also raise fundamental questions about the financial position of this scheme.
- 5.12 PCC has reviewed the submissions made on behalf of Messrs Carpenter dated 18 April 2023 and can endorse much of that submission. Like the Carpenters, PCC has returned to the conclusions of the ExA to take stock of how submissions previously made to the ExA, and the ExA's own conclusions, have borne out since on the question of financial and regulatory impediments to the scheme.
- 5.13 At [10.8.66 and 10.8.70] of the ExA Report (and in connection with the EU regulatory exemption issues and French consents) the ExA concluded:
"10.8.66. The Applicant has also advised that it would not envisage seeking funding for the Proposed Development until the relevant French consents are in place.
...
10.8.70. The Applicant has been engaged in obtaining the French consents since 2017. It is of the view that there is a reasonable prospect of the above French consents being obtained in line with the envisaged making of the Order."
- 5.14 Notwithstanding certain representations made on behalf of the Applicant that funding has been sought and interest shown from investors in the project, prior to French consents being in place³, the Applicant is now willing (and seemingly in light of there

being currently no reasonable prospect of obtaining French consents) to accept limitations placed on its consent rather than withdraw its application.

- 5.15 Portsmouth City Council submits that the ExA's conclusions were as a clear consequence of the Applicant consistently overstating its prospects of receiving French and EU consents. To that end the Applicant's concession to Art 52 is to be seen as a response to the damning developments on the continent for this project and in PCC's view must lead inexorably to the absence of any justification for CA and also the refusal of the DCO.
- 5.16 The ExA continued in the report at [10.8.71] :
"10.8.71. As a result of the above and all other matters raised, the ExA is satisfied that the Applicant has demonstrated that any potential risks or impediments to funding and implementation have been properly managed and that any legal matters, including the need for any operational or other consents, have been taken into account in accordance with paragraph 19 of the CA Guidance."
- 5.17 PCC identifies that, with respect, such a conclusion was clearly flawed and premature. The ExA's recommendation would have brought about a white elephant in England without a trace in France.
- 5.18 Further, the ExA at 10.8.72. of the ExA Report concluded:
"10.8.72. The Applicant would also provide security for the CA element of the estimated costs, and the ExA is content that this would accord with the CA Guidance."
- 5.19 PCC notes that Article 51 refers to a requirement for "security of £4.97 million has been provided in respect of the liabilities of the undertaker to pay compensation to landowners in connection with the acquisition of their land or of rights over their land or the temporary use of land by". This security amount has not been index linked, and inflation has increased significantly since March 2020 meaning that it would be incumbent on the Secretary of State to review this figure and take a wholesale review of the finances of the Aquind project.
- 5.20 The ExA at [10.8.73] of the ExA Report concluded:
"10.8.73 The ExA has not seen anything to suggest that the Applicant is not of sound financial standing and that the necessary funds would not be available to finance the project [REP9-020]. The ExA therefore considers that there is a reasonable prospect of funds for CA becoming available."
- 5.21 PCC notes the Carpenters' 'Response to the Minister's Letter dated 3rd March 2023' in this respect. The Council in particular considers it must concur with the Carpenters' contention at para 44(b) that the Applicant's own assertions of good financial standing of the project are not enough to satisfy the relevant CA tests in accordance with s122 of the PA 2008 and the statutory Guidance 'Planning Act 2008 - Guidance related to procedures for the compulsory acquisition of land' September 2013⁴.
- 5.22 The burden is clearly upon the Applicant to justify the proposed compulsory taking of land and PCC contends that any "real evidenced doubt" must be resolved in the favour of the affected persons. No detailed financial path has been provided to the

⁴ Provided to the Secretary of State at Appendix L of the response of Messrs Carpenter dated 18 April 2023

Secretary of State, only a speculative and inconsistent one. PCC's submissions to date have noted the financial difficulties that the Applicant faces just in relation to securing regulatory financially related exemptions and again in its own words in their absence the project "cannot, and will not, progress".

- 5.23 Further, the Applicant in response to the Secretary of State's request at, para 5 of the Statement of Matters dated 3 March 2023 as noted above, in fact declined to provide the full Feasibility Study that originally provided the relevant feasibility information in order to permit a side-by-side comparison between Mannington and Lovedean and would allow interrogation of such matters now. The disclosure of commercially sensitive materials to the Secretary of State as decision-maker is possible and appropriate, and must be disclosed to the public with minimal redactions.
- 5.24 In that connection, as noted Portsmouth City Council is also surprised and disappointed that there have been no responses to date from NGET or NG ESO, despite the Secretary of State's specific request that they do so. Their views are also likely to shed light on the finances and feasibility of the project, without which the Secretary of State cannot determine that the Applicant has met the relevant legal tests to justify CA.

DCO amendments

- 5.25 Amendments to the DCO relating to the reduction of land take for CA in relation to the removal of commercial Fibre Optic Cables are addressed in the Council's comments above.
- 5.26 The newly proposed Article 52 erroneously refers to "Work No. 2(bb)" when no such work is detailed in the draft DCO, version 12. The error is replicated in para 4.15 of the 'Applicant's Response to SoS Further Information Request – March 2023', dated 28 April 2023. It is therefore unclear what work this is intended to affect.
- 5.27 Furthermore, PCC queries why only the works landwards of mean high water springs ('MHWS') are barred from commencement pending French approval of an Autorisation Environnementale,
- 5.28 This omission appears to give the Applicant the avenue as a consequence to commence works at sea under the DCO, and under the deemed marine licence, which would act to preserve the whole DCO beyond its 5-year period for implementation:
"[Draft DCO version 12, Article 2 'Interpretation:]
"commence" means (a) in relation to any works seaward of MHWS, the first carrying out of any licensed marine activity authorised by the deemed marine licence save for preconstruction surveys approved by the deemed marine licence and (b) in respect of any other works comprised in the authorised development beginning to carry out any material operation, as defined in section 155 of the 2008 Act (when development begins), forming part, or carried out for the purposes, of the authorised development other than operations consisting of onshore site preparation works and the words "commencement" and "commenced" are to be construed accordingly; "
[underlining added]
"[Draft DCO version 12, Article 2 'Interpretation:]
"onshore works" means Work No's 1 to 5 (inclusive) described in Schedule 1 and any other works landwards of MLWS in connection with those Works

authorised by this Order or, as the case may require, any part of those works and “onshore work” refers to any one of the onshore works;”

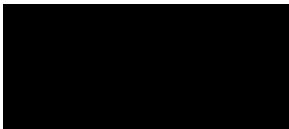
- 5.29 The Council contend that if this is left unaddressed it permits Aquind cynically in PCC’s view, to blight English land which would be subject to CA powers beyond the 5-year period by undertaking works seaward of MHWS, which would not engage the proposed Article 52 as the Applicant has drafted it. The 5-year limit is an important one and is imposed to provide certainty concerning a promoter’s inaction to accord with Human Rights and common law fairness of those affected, so that they might have some predictability around the duration of blight to their property rights. It is obviously more generous than the period available in respect of compulsory purchase orders under the Acquisition of Land Act 1981 which is limited to 3 years.
- 5.30 The effect of this proposed new provision seeks in the Council’s submission to allow for a prolonging of the threat of CA powers ad infinitum. In this connection, such a provision if allowed to stand as drafted would have serious ramifications for oversight and enforcement of the DCO given the equipment and expertise (clearly beyond the means of citizens affected by compulsory acquisition) required to verify whether or not works have in fact taken place at sea. The Council therefore objects to it in its current form.
- 5.31 It must further be noted that the Applicant initially asked for a 7-year period in its initial draft DCO, but this was reduced to 5 years in the course of the examination. This amendment bears out PCC’s statement of 28 April 2023 that: “The commercial orthodoxy behind the Examining Authority’s reasoning [for refusing to accommodate a requirement like that suggested by the previous Secretary of State’s advisors] is not something that the Applicant can be assumed to adhere to.” Aquind appears by its drafting of Article 52 to be positioning itself to lay an amount of cabling within UK territorial waters in order to commence the DCO and preserve it indefinitely.
- 5.32 Additionally, the drafting of proposed Article 52 is curious in its imprecision as to the identity of the French authority that should grant the Autorisation Environnementale. In accordance with PCC’s observations in its Response of 28 April 2023 that Aquind has suggested in the European Union courts that it may be looking further afield in France for other landfall sites, Article 52 must in PCC’s view be limited to the relevant Préfecture for the current landfall, namely the Préfet of Seine- Maritime. Further, the Autorisation Environnementale should relate to a fixed French landfall location to ensure that the French half of the scheme is not fundamentally different from the work underpinning the English consent.
- 5.33 In light of the above PCC would recommend that Article 52 must be amended to read as follows:
"French environmental authorisation
52.—(1) The authorised development must not commence and the removal of hedgerows, trees and shrubs must not be undertaken and the undertaker must not exercise the powers in articles 20 to 30 until an Autorisation Environnementale under Article L. 181-1 of the Environmental Code (or such environmental authorisation as is required pursuant to any successor legislation) in France has been obtained *from the Préfet of Seine- Maritime* in respect of the parts of AQUIND Interconnector which are to be located in France and in French Waters." [additions in italics, removed words not shown]
- 5.34 This drafting suggestion is without prejudice to PCC’s opposition to the grant of a DCO in any form. In any case, we suggest that the Secretary of State must satisfy

himself with direct evidence (i.e. not merely the Applicant's assertions) that the 'Autorisation Environnementale' is the proper and timely trigger to afford due protection to Affected Persons.

- 5.35 PCC notes that the new draft DCO at Sch 2 - Requirements, para 1(8) purports to address the issue of commercial FOCs as part of the project by rendering "null and void" references to commercial use of the FOCs "within the documents certified by the Secretary of State". This is however in PCC's view categorically not a mandatory prohibition on the use of commercial FOCs, it merely 'shifts the dial' back to a neutral position of not referencing commercial FOCs. It would seem that the Applicant is seeking now to craft a DCO whereby in future it can 'bring online' any spare FOC capacity which it will ensure is provided within the project cables in a fashion that would not involve development, be that a material change of use or operational development or "prohibited activity", within the meaning of the TCPA 1990 or the PA 2008 respectively. This would therefore prevent the enforcement provisions within those statutes from being brought to bear on the commercial FOC use.
- 5.36 For that reason, in PCC's view, and the Council believes the view of Winchester City Council, it is necessary to prevent this from happening by 'shifting the dial' into the negative so that there is an active prohibition on commercial FOCs by way of a further substantive Requirement, not just the interpretative provision at Paragraph 1(8) of Schedule 2. In the absence of such amendments the DCO still allows Aquind (or the future operator of the project) to secure this commercial FOC use as part of this project when on its face Aquind is purporting to abandon this element. This would in PCC's view amount to an abuse of the PA 2008 process.
- 5.37 As part of the SoS's review of the provision of FOCs as part of the proposal, and the Applicant's purported concessions in respect of FOCs the Council would invite the SoS to consider whether the Applicants choice of not using in-line regeneration systems and instead choosing to include a monopole system that requires Optical Regeneration, and its associated additional land take remains justified. The Council does not have the expertise to make this technical assessment, but it is noted at para 7.10 of the Applicants response that the only justification for this choice is the difficulty for repair and restoration of service, which is why monopole systems are not encouraged for 'critical infrastructure'. The Council would query whether the proposal as a commercial interconnector should be considered critical infrastructure where such guidance should be applied.

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,



Ian Maguire
Assistant Director Planning & Economic Growth