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Dear Sir / Madam

AQUIND Interconnector: proposed process for sensitive representations

We write on behalf of our client, AQUIND Limited ("**AQUIND**"), further to the letter from the Secretary of State for Energy Security & Net Zero ("**SoS**") dated 16 May 2024. That letter proposed a process by which the Ministry of Defence ("**MoD**") may submit representations relating to purported sensitive matters of national security in relation to the AQUIND Interconnector project (the "**Project**"). In this letter we set out comments on the proposed process on behalf of AQUIND.

1. **COMMENTS ON PROPOSED PROCESS**

1.1 We note the process provided for in section 95A of the Planning Act 2008 (the "**2008 Act**") and the intention of the SoS that "*the process shall be equivalent to that which would have applied under section 95A of the 2008* Act". It is agreed that this is an appropriate starting point for the proposed process. We also note the similarity to the closed material procedure in Part 82 of the Civil Procedure Rules ("**CPR**"), which has itself been shaped by common law on how sensitive matters of national security should be dealt with in decision making processes.

1.2 Whilst this provides an appropriate starting point, we emphasise the following considerations which must be addressed to ensure procedural fairness and natural justice, by facilitating AQUIND's necessary ability to meaningfully participate in the proposed process to the full extent required by law.

Alternatives to the closed procedure

1.3 It is well-established as a general principle that the use of a closed process from which a relevant party (here, AQUIND) is excluded save for an appointed representative will only

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be procedurally fair (and therefore lawful) in exceptional circumstances. In this regard we note the remarks of Richards LJ in *Sarkandi v Secretary of State for Foreign and Commonwealth Affairs* [2015] EWCA Civ 687 at [57], citing Lord Neuberger in *Bank Mellat v HM Treasury (No. 2)* [2014] AC 700 (in relation to the closed material procedure in CPR Part 82), that a private hearing may only be held if:

1.3.1 *"it is strictly necessary to have a private hearing in order to achieve justice between the parties";* and

1.3.2 *"if the degree of privacy is kept to an absolute minimum".*

1.4 Those remarks related to a private hearing from which the public and press were excluded but both parties were able to participate. A closed hearing, from which a party is also excluded, was said to be *"even more offensive to fundamental principle than a private hearing"* [57].

1.5 Further, Richards LJ cited at [34] Bean J, the High Court judge in the case, who said: *"It cannot, therefore be in the interests of the fair and efficient administration of justice to make a declaration allowing a CMP [closed material procedure] unless it is necessary to do so, and it will not be necessary to do so if there are satisfactory alternatives."*

1.6 Noting the above established principles, which are reflected in section 95A(2) of the 2008 Act which requires the SoS to take a decision as to whether to issue a direction that representations of a specified description may be made only to specified persons (instead of being made in public), the process must ensure that the withholding of material from AQUIND and the appointment of a representative on their behalf (paragraph (c) of the SoS' letter) is only used to the extent that is strictly necessary because:

1.6.1 the making of the confidential representations to the public would be likely to result in the disclosure of information as to defence or national security;

1.6.2 the public disclosure of that information would be contrary to the national interest; and

1.6.3 no part of those confidential representations could be dealt with by any means other than a closed process.

1.7 Accordingly, the officials from the Department for Energy Security & Net Zero ("**DESNZ**") that review the confidential representations of the MoD on behalf of the SoS must consider and assess those (with legal advice if required, and taking into account the representations of AQUIND's appointed representative – see 1.13 onwards below) and reach a conclusion on each of the above matters, in addition to first reaching a conclusion on whether the representations constitute material planning considerations (as per the end of paragraph (b) of the SoS' letter).

1.8 The MoD claiming that the disclosure of any submitted confidential representations which relate to matters of defence or national security would be contrary to the national interest does not absolve the SoS of the responsibility to uphold procedural fairness – only where all of the above matters at paragraphs 1.6.1 – 1.6.3 are proven can bespoke arrangements for the consideration of the information submitted by the MoD be justified and lawful. This is a well-established legal requirement which is absent from the SoS' letter, but which must, in the interest of procedural fairness and natural justice, be incorporated into the process.

Nature of the confidential representations

1.9 If the SoS determines that the confidential representations:

1.9.1 do not constitute material planning considerations, they should be disregarded for the purposes of determining AQUIND's DCO application and the SoS must proceed promptly to determine the application;

1.9.2 are material planning considerations but are not, in whole or in part, information as to defence or national security the disclosure of which would be contrary to the national interest then the SoS must publish the non-sensitive information, such that AQUIND may consider and respond to it as necessary. This would include any opinion of the MoD or information or details not in and of themselves sensitive information which are derived from sources of information which must be kept confidential for reasons of national security where disclosure would not reveal the source; or

1.9.3 are material planning considerations and are wholly information as to defence or national security the disclosure of which would be contrary to the national interest, the officials must consider whether any summary of the type or nature of the representation could be published in a manner which would not be contrary to the national interest and, if so, provide for this.

1.10 With regard to the nature of the confidential representations and whether the disclosure of them would be contrary to the national interest, we again want to take the opportunity to highlight that the fact of any concerns (if there are such concerns) relating to individuals involved in or related to AQUIND would not of itself be information the disclosure of which would be contrary to the national interest. It would therefore be expected that the SoS would publish an explanation that the MoD's concerns were of this nature if that were the case. Given the need for AQUIND to be as fully informed as possible regarding the apparent concerns of the MoD we also request that it is openly confirmed by the MoD if this is not the basis of the concern held.

1.11 Any such concerns would also not be material planning considerations and would not be relevant to the SoS' decision on AQUIND's DCO application. This is because it is not the role of planning to consider who can be an applicant and awarded development consent. Processes are provided for by the requirement for Ofgem to consider whether applicants for electricity licences required to participate in the operation of electricity infrastructure are "fit and proper" to be granted those (noting AQUIND has been granted an Interconnector Licence), and processes are also provided for in the National Security and Investment Act 2021 to ensure adequate scrutiny of future investments or acquisitions. If such concerns form the basis of the MoD's confidential representations, the SoS must disregard them for the purposes of its decision on the application for development consent for the Project (as per 1.9.1 above).

1.12 Lastly in relation to this particular issue, we note at paragraph 5 of the SoS' letter it is stated "*and where disclosure of them* ***<u>might</u>*** *be contrary to the national interest"* (our emphasis). We want to highlight now that this is a less stringent test than that provided for in section 95A of the 2008 Act, which imposes the higher bar of requiring the SoS to determine that "*the public disclosure of that information* ***<u>would</u>*** *be contrary to the national interest*" (our emphasis). It is expected that the necessary legal standard for considering whether a closed hearing will be followed will be adhered to and that the SoS will satisfy themselves that this more stringent test is met before proceeding to a closed process in respect of any information submitted by the MoD, despite an incorrect less stringent test having been stated in the SoS' letter.

Appointed representatives

1.13 Having had regard to the proposed process set out in the SoS' letter, it is considered that procedural fairness and natural justice requires that the Attorney General appoints representatives to represent AQUIND's interests at two stages of the proposed process:

1.13.1 where the MoD has submitted confidential representations to DESNZ and the SoS must decide whether they constitute (i) material planning considerations and (ii) are of such sensitivity that they cannot be dealt with by any means other than a closed procedure (by reference to the matters at paragraphs 1.6.1 – 1.6.3 above), to submit representations on these points (the "**Gateway Representative**"); and

1.13.2 where the SoS has concluded based on the above that a closed procedure is necessary, to respond to the substance of the confidential representations themselves (the "**Information Representatives**").

1.14 It is necessary for these representatives to be distinct to ensure that the Information Representatives can take instructions from AQUIND prior to viewing any confidential representations to which substantive responsive representations are required, but after it has been confirmed that the representations are material planning considerations and are appropriate to be dealt with in a closed process.

1.15 It is envisaged that the Gateway Representative would be a legal expert with specialist planning law experience. Once the Gateway Representative has reviewed the confidential information, they must be able to make representations to the SoS regarding whether information is (i) a material planning consideration or (ii) information of such sensitivity to defence or national security that a closed procedure is necessary. The SoS must reach a conclusion on such matters before the closed procedure continues, including the provision of reasons to the Gateway Representative. AQUIND must also be able to be made aware of the fact that the Gateway Representative either agrees or disagrees with the decision of the Secretary of State, whilst not being made aware of any of the confidential reasons on which this view was reached.

1.16 If the SoS concludes that a closed procedure is necessary, having undertaken the decision-making processes outlined above, it is accepted that the Attorney General will then need to appoint Information Representatives to act on behalf of AQUIND, but the procedure must ensure that at all times AQUIND's rights, including under Article 6 of the European Convention on Human Rights, are respected.

1.17 With regard to the appointment of Information Representatives:

1.17.1 Subject to the issues raised, it may be necessary that at least two Information Representatives are appointed, one being a technical expert who can make submissions regarding any technical or design related matters in relation to the Project, and the other being a legal expert with specialist planning law experience who can make representations on planning and public law.

1.17.2 There must be an opportunity for these representatives to take instructions from AQUIND prior to viewing the confidential representations, by way of briefing on elements of the Project which may be relevant to the confidential representations. This mirrors equivalent provision in paragraph 5(2)(a) of Part 3 of the Schedule to the Infrastructure Planning (Examination Procedure) Rules 2010 ("**IPR**") and CPR Part 82.11(1).

1.17.3 Once the Information Representatives have viewed the confidential representations, there should be a process by which they can take instructions from AQUIND in relation to technical or planning elements of the Project, provided that the representatives remain under an express duty not to disclose any of the confidential information itself. If considered necessary, it could be required that any such requests for instructions from the representatives be reviewed by DESNZ officials prior to being provided to AQUIND. This mirrors similar provision in CPR 82.11(4).

1.18 We also note for completeness with regard to paragraph (e) of the SoS' letter that the SoS must comply with Rule 19 of the IPR, and paragraph 13 of Part 3 of the Schedule to the IPR.

Costs

1.19 Given that any need for appointed representatives arises from the introduction of new information into the redetermination process at a very late stage by the MoD (having not previously indicated any concern with the Project during the examination), AQUIND reserves its position on the matter of the costs of the process and considers that it will be for the SoS to direct a fair allocation of costs in due course in light of conclusions reached through the process as to the sensitivity and relevance to planning of the MoD's representations. In this regard it is noted that section 95A of the 2008 Act provides that the SoS ***"may"*** direct a person to pay the fees of an appointed representative, rather than requiring them to.

Interested Parties

1.20 It is not expressly apparent from the SoS' letter whether it is intended that other interested parties will participate in the proposed process. For completeness and in anticipation of any such submissions, AQUIND's view is that, given the purportedly confidential and sensitive nature of the MoD representations which is specific to the MoD, there is no need for any other parties to be involved in this process, and as few parties as possible should be involved. If the SoS considers that any other parties must be involved, this should be supported by genuine reasons why it is necessary for them to be, and AQUIND should also be given an opportunity to comment further on this.

2. TIMESCALES

2.1 Given the already significant delay to the redetermination of AQUIND's application, it is imperative that the process now proceeds at pace whilst affording sufficient time for all persons to properly carry out their functions. We therefore set out below appropriate time periods for each stage of the proposed process:

By 23:59 on 7 June 2024	Comments due from the MoD on the proposed process.
Within 14 days	The SoS confirms the process to be followed and arranges for the Attorney General to appoint the Gateway Representative for AQUIND.
Within a further 7 days	The MoD sets out the nature of its concerns in public and confidential representations to DESNZ (with the timescale provided for taking into account that the MoD has already had a very significant period of time to

	produce representations detailing its apparent concerns and should have already, acting reasonably, considered an appropriate form of expressing its concerns in public and confidential settings. In this regard it is also noted that in the MoD's letter of 7 March 2024 it stated that it had *"started to prepare its representations"*). *In parallel,* the Gateway Representative takes instructions from AQUIND.
Within a further 21 days	AQUIND considers and responds to the MoD's public representations. *In parallel,* the Gateway Representative considers the confidential representations and makes representations to the SoS on whether they (i) raise material planning considerations and (ii) are information as to defence or national security the disclosure of which would be contrary to the national interest. Taking account of the Gateway Representative's representations, the SoS concludes whether the confidential representations satisfy (i) and (ii). The fact of this conclusion should be notified to AQUIND as should whether the SoS conclusion was agreed with the by the Gateway Representative, this not itself being sensitive information.
Within a further 21 days	*If the SoS concludes that the confidential representations are not material planning considerations, the SoS proceeds to make a decision on AQUIND's DCO application.*
Within a further 7 days	If any confidential representations satisfy (i) and (ii) above, the Attorney General appoints Information Representatives for AQUIND.
Within a further 7 days	The Information Representatives take instructions from AQUIND.
Within a further 21 days	The Information Representatives view the confidential representations and prepare written representations in response on behalf of AQUIND. *The Information Representatives may request an appropriate extension of this deadline from the SoS if they consider that specialised expertise is needed to address the MoD's representations and may propose a procedure for securing such specialised expertise.* *The Information Representatives may also request an extension should they determine that it is necessary*

	take instructions from AQUIND in relation to technical or planning elements of the Project, as provided for at paragraph 1.17.3 above. Where they do so DESNZ officials must decide whether to allow this request within 7 days. The period for the preparation of the written representations by the Information Representatives shall be extended by the time that is necessary for DESNZ officials to decide on whether to allow the Information Representatives to take instructions from AQUIND, even if it is decided not to allow such a request, and the time necessary for AQUIND to respond and provide instructions.
Within a further 14 days	The MoD responds as necessary to any written representations from AQUIND or AQUIND's Information Representatives.
Within a further 14 days	AQUIND and/or its Information Representatives respond to the MoD's responsive submissions, if considered necessary by DESNZ officials.
Within a further 21 days	The SoS makes a decision on AQUIND's DCO application, taking into account all additional representations made, to the extent that they are material planning considerations.

2.2 Excluding the contingent process in italics above whereby the Information Representatives request an extension of time to seek specialised expertise, the full process should take no longer than 18 weeks from 7 June 2024 until a decision on the DCO application is made. If any stage is completed before the respective deadline (e.g., if AQUIND and/or the MoD (as relevant) have submitted their representations for a particular stage), the process should move to the next stage without waiting for that deadline to pass.

2.3 As per our previous letters of 2 January, 17 January and 1 February 2024, the SoS remains under a duty pursuant to section 107 of the 2008 Act to set a deadline by which to make her decision on the application. Given the above timings, the SoS should set a deadline of **11 October 2024** as the deadline by which to make her decision, by way of a statement to the House of Commons pursuant to section 107(3) of the 2008 Act at the earliest opportunity.

2.4 If there are unforeseen delays to the process, the SoS can set a later deadline pursuant to section 107(3) and (5).

3. CLOSING COMMENTS

3.1 It is vital that the proposed process is procedurally fair and therefore lawful, and that certainty is provided through the setting of a clear timetable by which that process will proceed at pace.

3.2 As we have emphasised in our previous letters, delay and uncertainty signals to industry that processes in place for the fair and effective consenting of significant national infrastructure cannot be relied upon, deterring investment at a time when delivery of such

infrastructure is critical for energy security and meeting Net Zero. Uncertainty as regards the Project in particular also threatens to negatively impact other marine users in and around Portsmouth and the South Coast, including other interconnectors, renewable energy project and fisheries.

3.3 We also note the announcement by the Prime Minister on 22 May 2024 that Parliament will be dissolved on 30 May 2024 and an election held on 4 July 2024. While it is acknowledged that no political decisions can be made by the SoS during the pre-election 'purdah' period, this should not inhibit or delay the confirmation of the process to be followed as regards the MoD's representations, nor the progression through that process as set out above.

3.4 The SoS' decision of today, 24 May 2024, to extend the deadline for comments on the proposed process to 23:59 on 7 June 2024 is noted. AQUIND has provided its comments well in advance of this deadline such that the MoD can incorporate any responsive comments on AQUIND's proposals into its response, to avoid the need for a further exchange of comments and resultant further delay.

3.5 Finally, we reiterate that AQUIND remains willing to directly engage with the MoD outside the proposed process and would be amenable to entering into a co-operation agreement with the MoD if this would be capable of alleviating the MoD's concerns.

We look forward to the SoS' confirmation of the process to be adopted, incorporating AQUIND's comments set out above, within 14 days of 7 June 2024 or receipt of the MoD's response, whichever is earlier.

Yours faithfully

Herbert Smith Freehills LLP

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