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Dear Mr Gambles

RE: ALTERNATIVES IN APPLICATIONS FOR DEVELOPMENT CONSENT ORDER

Thank you for the useful discussion on the above matter on 16 January. You raised a number of issues that you suggested we take a view upon before we discuss this area further. In particular, you expressed concerns about 1) how we would ensure we would adequately consult on alternative proposals; 2) how we would assess the environmental impacts; and 3) the IPC's powers in this area, specifically under section 114 of the Planning Act 2008. I also raised the potential issues arising from compulsory purchase procedures.

I set out below our thinking on these issues, having taken the advice of Leading Counsel.

I should make clear at the outset that this letter is addressing the issue where an applicant for an order granting development consent (DCO) has identified alternative project options in its application. Clearly, the emergence of alternative options during the Examination process will raise different although, possibly, related issues.

Background and context

We have been examining our project development, consultation and decision making processes to ensure that we promote high quality applications for development consent.

Following an extensive consultation we have developed a new Approach to the Design and Routeing of New Electricity Transmission Lines, which fully recognises the important role of stakeholder engagement and transparency. The approach places a greater emphasis on balancing the visual impact of our proposed infrastructure with technical, cost and other environmental factors and is intended to be consistent with Government policy as set out in National Policy Statements EN-1 and EN-5.

Using our new approach, we aim to promote well defined and rigorously assessed proposals. However, whilst robust Options Appraisal methods and extensive consultation at the pre-application stage will allow opportunities to change and refine projects before an application is made for development consent, the possibility remains that an entire project could be refused development consent because (say) an alternative route alignment or form of connection (e.g. overhead line (OHL) or underground cable) may be considered preferable for a relatively small element of a very long transmission connection.

We therefore believe that it would be desirable for all concerned for there to be a mechanism to include limited alternative/variant proposals in DCO applications to allow the decision maker to be able to choose the most appropriate solution, having heard the evidence. Such an approach would promote inclusivity in the process, as it would allow interested parties the ability to argue in the examination process that a particular alternative solution should be preferred. This would help to ensure that nationally significant energy projects are not delayed where there are alternatives that can be acceptably accommodated.

Consultation

National Grid takes its consultation responsibilities seriously and recognises that there may be instances, particularly with long linear projects, where the environmental and other factors relating to alternative route alignments or forms of connection may be finely balanced. In such cases, we are keen to allow the decision-maker to consider reasonable alternatives and, at the same time, reduce the risk of a large project being refused development consent because of a small controversial section. We believe this to be consistent with the spirit of the new consent regime, with its emphasis on meaningful engagement. I emphasise that we do not regard the identification of alternatives to be a substitute for proper Options Appraisal and scheme selection, but an exceptional circumstance where alternative options are finely balanced or local opinion polarised. Indeed, even in circumstances where we did consider it appropriate to identify alternative options in an application for an order granting development consent, we would anticipate expressing a preference for one of the alternative options.

We are, of course, aware of the High Court's decision in Wheatcroft[1] and, in particular, the passage indicating that substantive changes to development proposals under the Town and Country Planning Act 1990 should not deprive those who should have been consulted on a changed development of the opportunity of such consultation. We accept that this broad approach would be likely to apply also in relation to applications for development consent and, indeed, that approach would appear to be reinforced by the pre-application consultation requirements of Part 5 of the Planning Act 2008.

It seems to us, therefore, that in relation to consultation the following approach should be adopted. In relation to any alternative option that is to be included in an application for development consent, whether the option relates to route alignment or form of connection, there should be proper consultation under sections 42 and 47 of the 2008 Act in relation to each alternative and the section 48 publicity should make it clear that the application for development consent will include identified alternatives but that only one would be granted development consent.

[1] *Bernard Wheatcroft Ltd v SSE* [1982]

We believe that full compliance with Part 5 of the 2008 Act in relation to each alternative, and making it clear at the section 48 publicity stage which alternative options are proposed to be included in the application for development consent, will ensure that no one would be deprived of proper pre-application consultation and, furthermore, that the requirements of the 2008 Act on pre-application consultation would have been complied with. We also believe that such an approach would be consistent with the decision in Wheatcroft.

Environmental Impact Assessment

We accept that there must be proper environmental impact assessment of a project that is the subject-matter of an application for development consent. It follows that if the subject-matter of the application includes alternative options, then there must be proper environmental impact assessment of any such options.

In our view there is a distinction to be drawn between the promotion of two or more alternative options, on the one hand, and flexibility within an option, on the other.

In relation to the first of these – two or more alternative options – we consider it would be necessary for any Environmental Statement to assess each alternative option both individually and together with other parts of the project and other options (as well as cumulatively with other projects etc). The important point is that, in relation to the project with each of its combination of alternative options, there should be full compliance with the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009. Whilst this would add a layer of complexity to any assessment, we believe that there could be no objection in principle to such an approach if properly carried out.

In relation to flexibility within an option, our view is that the principles established by the Rochdale decisions[2] would apply as envisaged in the IPC's *Advice Note 9: Rochdale Envelope*. The use of the Rochdale Envelope approach might allow some flexibility within the project to accommodate issues arising from the consideration of evidence at the examination stage. Again, it would be important that there was full compliance with the 2009 Regulations, but we do not foresee any objection in principle to such an approach.

Compulsory purchase

As I indicated in our conversation, we accept that compulsory acquisition would have to be carefully considered in relation to alternatives within DCOs.

We note first of all that section 122 restricts the power to include the compulsory acquisition of land in a DCO. Section 122(1) provides that *"an order granting development consent"* may include provision authorising the compulsory acquisition of land only if the decision-maker is satisfied that the 'conditions' in subsections (2) and (3) are met; note that in section 122 both conditions must be met. The conditions are (a) that the land is 'required' for the development, or is 'required' to facilitate or is incidental to that development (section 122(2)), and (b) that there is a compelling case in the public interest for the land to be compulsorily acquired (section 122(3)). The first point to note is that the restriction and conditions in section 122

[2] R. v Rochdale MBC ex parte Milne (No. 1) and R. v Rochdale MBC ex parte Tew [1999]; R. v Rochdale MBC ex parte Milne (No. 2) [2000]

relate to *“an order granting development consent”* and not to the draft order that must accompany an application. In other words, these are conditions that the decision-maker must be *“satisfied”* about in making the DCO, they are not in themselves restrictions on what may be included in a draft order.

Clearly there would be evidential difficulties for a decision-maker in being ‘satisfied’ that two alternative areas of land were both ‘required’ and, indeed, in being ‘satisfied’ that there was a ‘compelling case in the public interest’ for acquiring both alternatives. It seems to us, therefore, that the decision-maker would have to choose between the alternatives based on all material considerations. Thus the selection of one project alternative over another, based on all material considerations (including the environment etc, but also any considerations going to the compulsory acquisition of land itself), would itself form the basis for the decision-maker to be ‘satisfied’ in relation to the conditions in section 122(2)/(3). In other words, the very reasons for selecting one project alternative rather than another would themselves be the grounds for satisfying the conditions in section 122.

Again, we accept that having alternative options in ‘land plans’ and the ‘book or reference’ etc may pose practical challenges for those drafting any such order, but we do not think these matters raise issues of principle.

Decision making powers under section 114

In our discussions you indicated that the question of the IPC’s powers under section 114 of the Planning Act 2008 was one of your primary concerns with any approach that involved making alterations to a draft DCO. For this reason we have dealt with this issue in a little more detail.

We understand that the requirement under section 114(1) for the decision maker to *“either – (a) make an order granting development consent, or (b) refuse development consent”* has been argued by some to mean that amendments cannot be made to a draft Order once submitted; we believe that that analysis is wrong for a number of reasons.

First, we note that section 114(1) relates to circumstances where the decision-maker has *“decided an application for an order granting development consent”* and grants that decision-maker power to *“make an order granting development consent”*. There is nothing in section 114, or elsewhere in the 2008 Act, that requires the ‘development consent order’ granted to be in the form of any ‘draft’ order; indeed, the concept of a ‘draft’ order does not appear in the 2008 Act itself. Section 37(3)(d) does require an ‘application’ for a DCO to be *“accompanied”* by prescribed documents and information, and such documents and information are indeed prescribed by the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009. Regulation 5(1)(b) of those regulations states that an ‘application’ must be ‘accompanied’ by the *“draft proposed order”*. Thus, returning to section 114, there is nothing in that section, or elsewhere in the 2008 Act, that requires the decision-maker to grant the DCO only in the form of the draft order that the regulations state must ‘accompany’ the application.

Secondly, we note that section 114(1) gives the decision-maker power to *“make an order”* granting development consent; it is not a power to ‘confirm’ the draft order that accompanies the application.

Thirdly, section 114(2) gives the Secretary of State ‘power’ (see the use of the word *“may”*) to make provision *“regulating the procedure to be followed”* if the decision-maker proposes to make an order granting development consent on terms which are materially different from those proposed in the application. Thus it is made clear (a) that the decision-maker does have ‘power’ to make an order granting development consent on terms which are materially different from those proposed in the application, and (b) that the Secretary of State ‘may’ make regulations relating to the ‘procedure’ to be followed. Section 114(2) does not itself grant ‘power’ to make a development consent order on terms which are materially different from those proposed in the application – that power already exists under section 114(1) – section 114(2) simply grants the Secretary of State ‘power’ to prescribe a ‘procedure’. In the absence of a ‘prescribed’ procedure, however, the decision-maker is able to follow whatever procedure it considers appropriate, subject to normal public law principles.

Fourthly, we note that the Secretary of State has exercised his ‘power’ under section 114(2) to prescribe a procedure where it is proposed to include certain ‘additional land’ in DCO authorising compulsory acquisition and that procedure is set out in the Infrastructure Planning (Compulsory Acquisition) Regulations 2010. The prescribed procedure in these regulations is made for the purposes of the ‘condition’ in section 123(4) of the 2008 Act: see regulation 4 of the Regulations. Section 123 does not grant a ‘power’ to compulsorily acquire land; it imposes a ‘restriction’ (see the words *“only if the decision-maker is satisfied that”*) on the power granted by section 120(3)/(4) and Part 1 of Schedule 5, subject to a number of exceptions to that restriction set out in the three ‘conditions’. Thus a DCO may not include a power of compulsory acquisition unless one of three conditions is satisfied, being either (a) the application for an order included a request for the compulsory acquisition of ‘the land’ (section 123(2)), <u>or</u> (b) all persons with an interest in ‘the land’ (i.e. land <u>not</u> included in the ‘request’ in the draft order) consent to the inclusion of the provision (section 123(3)); <u>or</u> (c) the prescribed procedure has been followed (section 123(4)). The prescribed procedure in the 2010 Regulations relates to ‘additional land’ where the landowner does not consent. From this it can be seen that a draft DCO can be changed by the inclusion of new land if those with an interest consent to its inclusion (section 123(3)) or, if they don’t consent, by following the procedure which has been prescribed in the 2010 Regulations (section 123(4)). Thus the 2010 Regulations ‘procedure’ does not create the ‘power’ to include ‘additional land’ in a DCO, it is simply a ‘condition’ restricting the exercise of the power of compulsory acquisition in section 120(3)/(4) and Part 1 of Schedule 5. In short, the exercise of the power under section 114(2) to prescribe a procedure for the purposes of section 123(4) does not indicate that a procedure must be prescribed in all cases where it is proposed to grant a DCO on terms materially different from those in an application; indeed, section 123(3) demonstrates the contrary.

Fifthly, we note that the Commissioner in relation to the Rookery South application recommended a number of amendments to the draft order, as submitted, which were then accepted by the Secretary of State in making the DCO. In our view the Commissioner and the Secretary of State were right not to consider themselves constrained by anything in section 114, or any other provision in the 2008 Act, to make the DCO only in the form of the draft order accompanying the application. Clearly these changes were not corrections to errors in a DCO under section 119, or changes to a DCO under section 153. Furthermore, the fact that section 114(2) only gives the power to prescribe a ‘procedure’ for making a DCO on terms which are *“materially”* different from those proposed in the application did not inhibit the

Secretary of State from making what might be considered ‘immaterial’ changes in the absence of a prescribed procedure. This again emphasises that the power to make an order on terms different from those in an application derives not from the existence of a procedure under section 114(2), but from the power inherent in section 114(1).

Finally, we consider our position to be completely consistent with that of the Government, as expressed in a letter of 28 November 2011 from the Parliamentary Under-Secretary of State for Communities and Local Government to the IPC. In that letter Bob Neill MP stated that section 114(1):

“clearly places the responsibility for making a development consent order on the decision-maker, and does not limit the terms in which it can be made. It follows from this that the decision-maker has the power under section 114(1) to make a development consent order which is different from that originally applied for, and that no regulations are needed under section 114(2) in order to do so.”

For the reasons stated above, we believe that the Government’s view on this is entirely correct.

In conclusion, we believe that a decision-maker does have the power under section 114(1) to make a DCO on terms which are materially different from those proposed in the application, in the absence of any procedure having been prescribed in section 114(2). That does not mean, however, that the exercise of the decision-maker’s power to make such an order is entirely unfettered. The normal public law principles, which I will briefly summarise as ‘lawfulness’, ‘reasonableness’ and ‘fairness’, will of course still apply to the exercise of any decision to make a DCO under section 114(1).

In the light of the above, we believe that an application for an order granting development consent could be accompanied by a draft order that identified alternative ‘works’ and, indeed if necessary, alternative ‘ancillary matters’. As stated above, these would have had to have been the subject-matter of proper pre-application consultation and environmental impact assessment. Such an approach would then allow the decision-maker, subject to normal public law principles, to make the order including the selected options(s) and, in effect, to strike out the alternative(s).

Conclusion

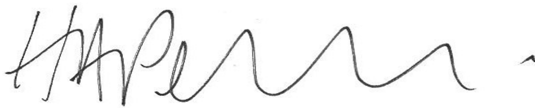
We believe that in some cases it would be desirable to offer choices for the decision-maker in order that arguments for alternative solutions could be heard fully at examination and so that important infrastructure projects are not delayed. Such an approach would, however, only be used in exceptional circumstances as, in most cases, we anticipate that our Options Appraisal and pre-application consultation process will identify a single project option.

Although there are clearly some practical challenges to overcome, our advice suggests that the Planning Act 2008 and subordinate legislation does not prevent a decision-maker being presented with alternative project options, so long as pre-application consultation, environmental impact assessment and compulsory purchase requirements are properly discharged.

We would therefore welcome further discussion on these matters.

Thank you for your help in this matter.

Yours sincerely



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