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c/o The A30 Chiverton to Carland Cross Case Team
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Our ref: JA09/JB13/15536.25/ARTHU

Your ref:

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When telephoning please ask for: John Arthur

Dear Sir

**The A30 Chiverton to Carland Cross Development Consent Order Application
Update on discussions between Highways England and ScottishPower Renewables**

We act for Highways England Company Limited ('**Highways England**') in relation to its application for development consent for the A30 Chiverton to Carland Cross scheme in Cornwall ('**the Scheme**').

ScottishPower Renewables (UK) Ltd ('**SPR**') submitted an objection to the application on 8 November 2018. At the close of the examination on 6 August 2019 that objection had not been withdrawn.

Since SPR submitted its objection Highways England and SPR have been in extensive discussions and have been negotiating an agreement designed to resolve SPR's concerns and allow it to withdraw its objection. It had originally been anticipated that the agreement would be completed before the end of the examination but that proved to not be possible. Highways England is writing to summarise the engagement that has taken place between the parties and to provide an update on the status of the agreement and associated matters.

The discussions between Highways England and SPR have included extensive discussions at a technical level to agree the details and design of works having, or having the potential to, impact on SPR's assets. A number of changes were made to the dDCO and associated documents during the examination to reflect the outcome of these discussions: see primarily the dDCO and Sheet 8 of the Works Plans submitted at Deadline 3, as explained in more detail below.

Summary of engagement including Protective Provisions

Discussions between the parties commenced in earnest in April 2018. An initial meeting was held in Glasgow in **June 2018**.

SPR submitted a detailed Relevant Representation on **8 November 2018** (RR-092). It explained a number of concerns it had with the application and the potential impact of the Scheme on its undertaking at the Carland Cross Wind Farm. It summarised its concerns as relating to: (1) restrictions on access to the Wind Farm during the construction and operation of the Scheme; and (2) the diversion of Wind Farm infrastructure (cables).

On 5 February 2019 (the day before the Preliminary Meeting) Highways England and SPR submitted a Joint Position Statement (AS-036) setting out the status of engagement between them. Amongst other things it noted that a number of meetings had taken place and that discussions had focused on the issues raised in SPR's Relevant Representation. Subject to SPR's confirmation, Highways England considered that nine of the fourteen issues raised in SPR's Relevant Representation had been resolved at that stage, with the remaining five (relating to the phasing of works) to be dealt with via an agreement.

At **Deadline 1 on 19 February 2019** SPR submitted a short Written Representation (REP1-024). It reiterated that its principal concerns related to: (1) restrictions on access to the Wind Farm during the construction and operation of the Scheme; and (2) the diversion of cables. It stated it would maintain its objection unless and until:

- (a) *A technical solution is agreed between Highways England and SPR which mitigates the impacts of the Scheme on the Wind Farm.*
- (b) *Any agreed solution is secured within a legal agreement.*
- (c) *SPR's position is adequately protected through protective provisions within the DCO.*

SPR noted that updated works plans and works descriptions would likely be submitted by Highways England as a result of ongoing technical discussions between the parties, which would demonstrate that its concerns had been resolved. A concern about rights was also raised where the relevant land is to be adopted by Cornwall Council.

SPR also submitted at Deadline 1 a summary of oral representations made on behalf of SPR at the Preliminary meeting and Issue Specific Hearing on 6 February (REP1-023). The summary noted at 2.4 that SPR reserved its position in relation to the potential need for an Issue Specific Hearing in relation to the Wind Farm. It stated: *"If both parties are able to reach agreement on the technical matters then it is unlikely that an ISH will be necessary however at this stage the focus is on trying to resolve the issues."*

At **Deadline 3 on 24 April 2019** SPR submitted a summary of oral representations made on behalf of SPR at the Issue Specific Hearing into the draft DCO on 3 April 2019 (REP3-030). Importantly, the summary noted at 2.7 and 2.8 that the overarching technical issues had been resolved and that updated plans would be submitted at the next deadline. SPR noted the importance of progressing to finalise matters through an agreement and potentially through protective provisions. It stated at 2.11: *"Following receipt of the draft legal agreement, SPR will consider the extent to which protective provisions are required within the DCO to protect SPR's interests and will provide the Examining Authority with an update in this regard accordingly."*

The updated plans were in fact submitted at Deadline 3. Document REP3-019 (Response to Hearing Action Points – ISH2 on draft DCO) sets out from paragraph 2.1.14 onwards the changes that were made to the General Arrangement and Section Plans, Rights of Way and Access Plans and Works Plans and the draft DCO as well as proposed changes to be made to the Environmental Masterplans at Deadline 4. The Response reiterated at 2.1.15 that following extensive discussions, technical matters had been resolved between Highways England and SPR.

At **Deadline 5 on 18 June** SPR submitted a short representation (REP5-033) expressing concern that the agreement may not be concluded prior to the end of the examination and requesting that protective provisions therefore be included in the DCO for the protection of the Wind Farm.

At **Deadline 6 on 4 July** SPR submitted its preferred protective provisions (REP6-026). Highways England expressed surprise at this (REP6-022) on the basis that much progress had been made with the agreement and that Highways England had been waiting for comments on the draft agreement from SPR since 13 May.

As SPR's preferred protective provisions were only provided to Highways England two days before Deadline 6, Highways England submitted its detailed comments on them at **Deadline 7 on 15 July** together with Highways England's preferred protective provisions, which were included as Appendix A to document REP7-012. In its submissions Highways England stated: *"If however Highways England is unable to reach agreement with SPR by the end of the examination it accepts that [protective provisions] may need to be considered as an alternative"*.

The Agreement

An initial draft agreement was circulated by Highways England on 27 July 2018. This was superseded by technical discussions and a 'general principles' document that entered circulation in January 2019. The general principles document was subject to negotiation between January and April 2019 and was subsequently agreed.

The first draft of the revised agreement, based on the agreed general principles document, was circulated by Highways England on 13 May 2019. Highways England chased SPR for comments on 28 May and 14 June.

On 25 June, following SPR's Deadline 5 submission, Highways England suggested a meeting or call to SPR to discuss the agreement. No response was received until 2 July, when SPR suggested a meeting to take place week commencing 8 or 15 July.

A revised draft agreement was received from SPR on 11 July, more than two months after the first draft was circulated. This was followed by a meeting between the parties on 17 July.

A revised draft agreement was circulated by Highways England on 25 July.

A revised draft agreement was received from SPR on 2 August.

A revised draft agreement was circulated by Highways England on 12 August.

A revised draft agreement was received from SPR on 4 October after a delay of almost eight weeks. The revised draft included significant and extensive changes and comments.

A revised draft agreement was circulated by Highways England on 7 November. A letter from Cornwall Council was provided to SPR on the same day to address the concern briefly raised by SPR in its Written Representation.

On 21 November SPR proposed a meeting in Glasgow on 9 or 12 December to discuss the outstanding issues in the draft agreement. That meeting took place on 9 December. Unfortunately it was not possible for all of the outstanding issues to be agreed at that meeting, despite both parties agreeing that that should be the aim, and further discussions are required before it can be finalised.

Highways England cannot currently say with certainty how much longer it will be before the agreement can be completed, but it will continue engaging in good faith with SPR, as it has done for the last 20 months, with the aim of completing the agreement before the Secretary of State's decision on 6 February 2020. If that is achieved then Highways England will immediately write to the Secretary of State with confirmation, which will be followed by the withdrawal of SPR's objection.

Highways England's Submissions

Despite indicating early in the examination that it was reserving its position on the need for an issue specific hearing, at no point during the examination did SPR request an issue specific hearing to discuss its concerns with the Examining Authority.

It is evident from the Joint Position Statement submitted on 5 February that significant engagement had taken place between the parties prior to the examination and that by that early stage all technical issues raised by SPR had, from Highways England's perspective at least, been resolved.

Substantive changes were made to the draft DCO, Works Plans and other plans at Deadline 3 to secure the outcome of the detailed technical discussions with SPR. Importantly, SPR confirmed in writing at Deadline 3 that its overarching technical issues have been resolved. This resolved point (a) in SPR's Written Representation.

Based on SPR's written representations this left just a handful of issues outstanding relating to the phasing of the works and the adoption by Cornwall Council of land and how that might affect SPR's rights. The latter point has been addressed by the provision of a letter from Cornwall Council on 7 November.

It is apparent from both Highways England and SPR's written submissions during the examination that protective provisions for the benefit of SPR are seen as an alternative to the agreement, to be relied on only if full agreement cannot be reached.

Despite being the party delaying the progress of the agreement at that time, SPR notified the Examining Authority of its request for protective provisions at Deadline 5, with its preferred draft provisions following at Deadline 6. The provisions were submitted due to SPR's concern that an agreement might not be concluded.

Highways England submitted its detailed comments on SPR's preferred protective provisions, together with Highways England's preferred protective provisions, at Deadline 7. Highways England explained in its submission the significant issues with SPR's preferred protective provisions, which in summary are that they would give SPR the power to delay the Scheme or stop it from proceeding by failing to respond or to act reasonably in approving plans and documents; and that they include unreasonable indemnity provisions that are unacceptable to Highways England.

It is Highways England's view that the inclusion of protective provisions in favour of SPR in the DCO negates the need for the agreement. The protective provisions proposed by Highways England at Deadline 7 would ensure that SPR's undertaking is adequately protected from the impacts of the Scheme. Highways England's preferred protective provisions are closely aligned with the protective provisions that apply for the benefit of other electricity undertakers, as set out in Part 1 of Schedule 9 to the dDCO. Although the failure to conclude the agreement as of the date of this letter is regrettable, Highways England considers that it has been more than reasonable in its engagement with SPR, as demonstrated by the timeline of engagement set out above, and that it has done everything that it reasonably can to try and conclude the agreement in a timely manner.

Highways England therefore considers that points (b) and (c) in SPR's Written Representation have also been resolved, with the changes to the application documents and the protective provisions in the DCO under (c) negating the need for an agreement under (b).

Conclusions

Highways England has been engaged in extensive discussions with SPR since April 2018. It considers that it has done all that it reasonably can to secure an agreement with SPR and the consequent removal of SPR's objection.

The considerable number of technical issues raised in SPR's Relevant Representation were resolved early on in the examination, leaving a handful of issues about the phasing of works and the adoption of land by Cornwall Council. The agreed changes to the Scheme design in the vicinity of the Wind Farm were secured via updated documents submitted at Deadline 3.

Despite very extensive engagement since Deadline 3 it has not yet been possible for the few remaining issues to be resolved via the completion of an agreement. Given the amount of time and effort that has gone into the draft agreement this is regrettable. However, progress has been repeatedly frustrated by a very slow turnaround time from SPR, at times extending to months, and by SPR frequently requesting new and significant changes to the draft documents despite them already having been through several iterations.

Both parties have expressed the view that protective provisions provide an alternative to the agreement. The parties submitted competing protective provisions at Deadlines 6 and 7. Highways England has explained the justification for its preferred protective provisions and has also explained the significant issues with SPR's preferred provisions.

In light of the above, despite the present lack of a completed agreement Highways England's view is that there is no risk of serious detriment being caused to SPR's undertaking due to the Scheme. The draft DCO and associated plans secure a revised design layout for the Wind Farm that is acceptable to SPR. The protective provisions submitted by Highways England would provide at least the same significant level of protection to SPR as is afforded to other electricity undertakers, including as to costs and potential losses. In combination, these measures ensure that SPR's undertaking would be adequately protected.

In the event that the agreement is completed before 6 February Highways England will immediately write to the Secretary of State with confirmation.

Yours faithfully

A large black rectangular redaction box covering the signature area.

BURGESS SALMON LLP

Copy to: Colin Innes, Shepherd and Wedderburn (on behalf of SPR)