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When telephoning please ask for: Alex Minhinick

Dear Pinsent Masons LLP

The VPI Immingham (Land at Rosper Road) Compulsory Purchase Order 2024 - Land Negotiations

We write with reference to the draft undertaking provided by the Acquiring Authority to the Objector at 9:28am on 15 May – the third and final sitting day of the CPO inquiry's consideration of the parties' evidence.

The draft undertaking is not in an acceptable form, for the reasons outlined below.

Without prejudice to the Objector's objection and position on confirmation in stages

The comments provided within this letter are entirely without prejudice to:

- (a) The Objector's primary position that the CPO should **not** be confirmed, whether in whole or in part, for the reasons outlined in its Statement of Case, evidence before the inquiry, and opening and closing submissions to that inquiry.
- (b) The Objector's secondary position is that if the Inspector is minded to confirm that part of the Order which relates to the permanent location of the Carbon Capture Plant proposed by the Acquiring Authority (the "**Red Land**¹"), the Order should be confirmed in respect of that Red Land **only**. The Order in respect of the land needed only for temporary construction and laydown (the "**Green Land**²") — should **not** be confirmed.
- (c) The Objector's tertiary position is that, if the Inspector is minded to confirm that part of the Order which relates to the Red Land – that the Order should be confirmed in stages pursuant to s13C of the Acquisition of Land Act 1981 for the reasons explained in its letter of 15 May and which will be addressed in closing submissions to the inquiry. In particular, the Objector's position is that the Order should **not** be confirmed in respect of the Green Land at this time, and it should instead only be considered for confirmation once a Dispatchable Power Agreement (or an equivalent) has been entered into by the Acquiring Authority with Government which provides certainty on the funding of its proposals such that the Acquiring Authority can take a positive Final Investment Decision in respect of its Carbon Capture Plant.

¹ The land edged red on Appendix 1 to the Objector's Statement of Case (**CD 6.2**)

² The land edged green on Appendix 1 to the Objector's Statement of Case (**CD 6.2**)
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Classification: Confidential

Form of undertaking

As explained in our letter of 15 May, the Objector's position is that any undertaking offered should be in the form of a deed of undertaking, rather than the unilateral undertaking form proposed by the Acquiring Authority.

The primary reason why a unilateral undertaking is **not** appropriate is due to the enforcement steps which would need to be taken by the Objector should the undertaking be breached. In its proposed form, the Objector would be put to the very extensive costs of seeking an injunction from the High Court. If seeking an interim injunction, the usual expectation is that the Objector would be required to provide the Undertaker with an undertaking in damages in the event the interim injunction is not upheld at final determination. That imposes a punitive barrier to the Objector in seeking to enforce the proffered undertaking.

In contrast, enforcement of an undertaking made by deed of undertaking (i.e. a contract executed and delivered as a deed) is possible through a range of options which can be pursued, dependent on the circumstances, in a more proportionate manner and at less cost to the Objector. The Acquiring Authority will be aware that the existing Energy Services Agreement (as amended and varied from time to time) along with the related documents is subject to a Common Terms Agreement. The Common Terms Agreement contains escalating dispute resolution provisions. This enables disputes between the parties to be resolved in a reasonable and proportionate manner with a claim in the High Court being the final escalation of these provisions. This reflects that the parties have an ongoing, long and mutually beneficial relationship. A requirement to seek an injunction to enforce an undertaking would cut across these escalating dispute resolution provisions and be wholly inappropriate. The deed of undertaking should instead incorporate the Common Terms Agreement.

Binding the land

The undertaking offered does not bind the Order land. It is personal to the Acquiring Authority. In the event the Acquiring Authority exercises the CPO it can avoid the terms of the undertaking by simple transfer of the interests in land to a third party. That obviates any reliance which can be placed on the undertaking after that time.

In contrast, a deed of undertaking is capable of running with and binding the land. The Acquiring Authority would be required to obtain an equivalent form of undertaking from any transferee before parting with its interest in any part of the Order land.

Exercise of discretion

To the extent that any discretion is to be exercised by the Acquiring Authority or the Objector in respect of the terms of the undertaking it should incorporate a dispute resolution mechanism. The appropriate form would be to incorporate the Common Terms Agreement. That drafting can be readily incorporated into a deed of undertaking.

Access to land for works to pipework (paragraph 1(a)(i))

Paragraph 1(a)(i) of the draft undertaking purports to address the commitment offered by the Acquiring Authority to allow the Objector access to the Order land for the purposes of inspecting, maintaining, and if necessary repairing its existing pipeline apparatus situated adjacent to the Order land. The drafting offered is subject to the restrictions at paragraph 1(b), which would rely on the exercise of discretion by the Acquiring Authority.

The parties have previously agreed the manner in which access to the Order land should be allowed for such purposes. It appears in the draft lease between the parties which in this respect is accepted to have been in a substantively agreed form at the draft lease at **CD 8.24 MW R10** page 144:

The following rights:

- 1.1 (a) To use and connect into all Services and all Conducting Media serving buildings and premises on the Refinery Site and other land, whether belonging to the Landlord or not, adjoining or near to the Premises through Conducting Media which are in existence at the date of this Lease or which are installed or constructed during the Term over or under the Premises together with the right at any time on giving reasonable notice (except in emergency) to enter the relevant parts only of the Premises to connect into inspect and clean maintain repair test or renew such Conducting Media.

That drafting (in substance), without the additional restrictions proposed by the Acquiring Authority it its draft undertaking, should be used for this purpose.

Access to land for inspection of drain (paragraph 1(a)(ii))

Paragraph 1(a)(ii) purports to address the commitment offered by the Acquiring Authority to allow the Objector access to the Order land for the purposes of inspecting and monitoring its effluent discharge to the drain which crosses the Order land (whether on its present or new alignment).

The drafting offered is subject to the restrictions at paragraph 1(b), which would rely on the exercise of discretion by the Acquiring Authority, and are therefore unacceptable in principle for the reasons explained by the Objector in its evidence.

The drafting of any undertaking relating to this matter must enable the Objector to access the land for these purposes urgently and without prior notice, if for example temperature fluctuations in the discharge of the Objector's effluent reach a level where immediate inspection is required under its existing monitoring regime associated with compliance with its Environmental Permit for the Humber Refinery.

Provision for pipe bridge installation (paragraph 2(a))

Paragraph 2(a) of the undertaking purports to address the commitment to allow the Objector access to the Order land for the first year of the Acquiring Authority's construction period for the purpose of installing an extension to the Objector's existing pipeline bridge over the railway on the western edge of the Order land. The present drafting is unacceptable as it limits that period to 6 months, and is expressed in terms which are inconsistent with the manner in which it had previously been identified by the parties.

The parties have previously agreed the manner in which access to the Order land should be allowed for such purposes. It appears in the draft lease between the parties at **CD 8.24 MW R10** page 144 which has not been challenged by the Acquiring Authority as being in an acceptable form in voluntary negotiations to date:

(b) Subject to the consent of the Tenant, such consent not to be unreasonably withheld or delayed, to a works plan relating to the same, access to and over the Premises with contractors, workers, officers, servants and agents of the Landlord with or without contractors, surveyors, employees and others and with or without motor or other vehicles plant, apparatus and materials to carry out works of alteration and installation of new Conducting Media install a new piperack tier to the existing piperack owned by the TenantLandlord (being located to the Northwest of the Premises and crossing the railway line) and shown marked XX on the Plan, for the purpose of installing new services in connection with the Landlord's Humber Zero project.

That drafting (in substance), without the additional restrictions proposed by the Acquiring Authority its draft undertaking, should be used for this purpose.

Green Land (paragraph 3(a))

Paragraph 3(a) of the undertaking purports to address the commitment to transfer the Green Land³ (or a part of it, or rights over it) back to the Objector on conclusion of the Acquiring Authority's construction works.

However, the drafting of that provision is subject to the proviso that such land is "*not reasonably required by VPI for the purposes of the continued operation of the VPI Project*". The Acquiring Authority has been abundantly clear (see e.g. its Statement of Reasons (**CD 1.3**) at paragraph 5.5) that the Green Land **is not** required permanently for the continued operation of its project. This proviso should therefore be deleted entirely from any drafting of this commitment.

The timing of the obligation to offer back is made contingent on commercial operation of the Acquiring Authority's proposals. The Acquiring Authority only requires the land for the construction of the project. It has been explained that such works must have been completed by 2030 (see for example **CD 8.20** paragraph 2.11). Accordingly, the obligation should operate unconditionally from that date at the latest. It has also been explained that the Objector is likely to require access to the southern, eastern and western outer perimeter of the Green Land prior to 2030 to construct and lay one or more pipelines to connect the Humber Refinery to the Uniper Project and/or other projects planned on land east/north east of Rosper Road. The land required for this will be minimal and the Objector may be willing to offer alternative land equal to the size of the land needed to lay such pipelines for use as construction laydown.

Appropriate drafting should refer to the Acquiring Authority's obligation to offer the Green Land back being triggered from the earlier of (a) use of the land for purposes associated with the construction of the Acquiring Authority's development; or (b) 31 December 2030; or (c) the parties agreeing an appropriate swap of a similar sized parcel of land near the Order land for use for laydown purposes for the relevant parcel of the Order land required to construct and lay a pipeline to connect the refinery to land east/north east of Rosper Road.

The obligation should specify that the transfer of land back to P66 should be on terms which are unrestricted and for a value of £1.

Absence of funding and implementation of the CPO (paragraph 4(a))

Paragraph 4(a) of the undertaking purports to address the commitment offered by the Acquiring Authority that the CPO would not be implemented until such a time as the Acquiring Authority has entered into a Dispatchable Power Agreement or an equivalent with Government to secure the funding necessary for it to take a final investment decision and commence the construction of its proposed development on the Order land.

That position has been expressly articulated by the Acquiring Authority. Paragraph 5.3 of Mr Briggs' witness statement (**CD 8.3**) states that:

"If the Order is confirmed before the grant of the [Dispatchable Power Agreement] DPA by Government, powers would not be exercised until the DPA was issued to guarantee to debt and equity funders that the project was financeable."

During the afternoon of Wednesday 14 May Mr Briggs was asked whether he was willing to commit to the Objector that unless and until the DPA was entered into with Government, powers under the Order would not be exercised. Mr Briggs' response was to say "*I believe so. Why would we acquire the land without using it for this project. We wouldn't use it for anything else. [There is] no other use for this land [other than] for the project which we have been working on for 5 years.*"

³ Being the area edged green on the plan at Appendix 1 to the Objector's Statement of Case

Unfortunately the form of undertaking offered does not reflect that commitment, made in Mr Briggs' witness statement and repeated in oral evidence. It would allow for the implementation of the CPO prior to funding being secured. The drafting should be amended to reflect the commitments made by the Acquiring Authority in its evidence to the CPO inquiry.

Next steps

Without prejudice to its primary, secondary and tertiary positions outlined above, the Objector remains open to reviewing a revised draft of the Acquiring Authority's undertaking, reflecting the comments made in this letter. To the extent that can be provided in good time, it may be possible to provide an update on that to the Inspector during or before closings.

The Objector has received the Acquiring Authority's letter of 16 May at 4.10pm and will endeavour to reply to any points in that letter which are not addressed in the above on Monday 19 May, or in closing submissions.

The Acquiring Authority is asked to confirm that it will add this correspondence to the inquiry core documents.

Burges Salmon LLP

Yours faithfully

BURGES SALMON LLP