Vattenfall Wind Power Ltd

Thanet Extension Offshore Wind Farm

Appendix 12 to Deadline 8 Submission: Applicant's Final position on Arbitration

Relevant Examination Deadline: 8

Submitted by Vattenfall Wind Power Ltd

Date: June 2019

Revision A

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Date of Approval:	June 2019
Revision:	A

Revision A	Original document submitted to the Examining Authority

THANET EXTENSION OFFSHORE WIND FARM – SUMMARY OF POSITION STATEMENT RELATING TO ARBITRATION

1.1 Section 120 of the Planning Act 2008, by reference to part 1 of Schedule 5, prescribes that *"The submission of disputes to arbitration"* may be included in a DCO (see paragraph 37 of Part 1, Schedule 5). Section 120 is not qualified or conditioned and does not exclude any party.

1.2 The Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (Model Provisions), whilst no longer in force, included an arbitration article which applied to any difference and all parties under the DCO. Article 42 of the Model Provisions states:

42. Any difference under any provision of this Order, unless otherwise provided for, shall be referred to and settled by a single arbitrator to be agreed between the parties or, failing agreement, to be appointed on the application of either party (after giving notice in writing to the other) by the [insert appropriate body].

1.3 The above provision, as drafted, has appeared on the face of every order since the Planning Act 2008 came into existence. It is therefore clear that the principle of arbitration in Development Consent Orders is neither new or novel and has, for a decade, been established practice in all made Orders.

1.4 The Applicant has amended Article 42 of the Model Provisions in the draft Development Consent Order (draft DCO). The effect of the amended Article is the same as that set out in model provision Article 42, however it also includes a specific process relating to arbitration, rather than create ambiguity in how arbitration should work, which is a clear weakness in the drafting of Article 42 model provision.

1.5 In summary, the MMO, Trinity House and Natural England have raised concerns regarding the inclusion of an arbitration provision in the draft DCO, which includes the deemed marine licences.

1.6 The Examining Authority have also raised a number of questions regarding the ability of the draft DCO to allow the arbitration of a decision of the Secretary of State.

1.7 The submissions made by the MMO, Trinity House and Natural England are without legal foundation and there is no impediment to the inclusion of such provisions. This is for the following reasons:

1.7.1 It is entirely lawful to arbitrate with statutory or public bodies.

1.7.2 Statutory arbitration exists in a number of circumstances and is not unusual.

1.7.3 Since the creation of the Planning Act 2008, an arbitration provision has been included in made DCOs, and indeed such a provision is included within the Model Articles (Article 42). Such an provision, in its current form, does allow arbitration of decisions made by the Secretary of State.

1.7.4 The need for an arbitration mechanism is well recognised as part of the regime established by the Planning Act 2008, in order to ensure that nationally significant infrastructure projects are not subject to delays due to an impasse between parties. Judicial review is a lengthy, time intensive and costly exercise for all parties.

1.7.5 Other statutory bodies with statutory functions, such as local planning authorities, have their own specific appeal mechanisms and would also be subject to the arbitration provision.

1.7.6 the Pre-Action Protocol for Judicial Review is unequivocal in stating that judicial review must be a last resort, and goes as far as to state that:

The parties should consider whether some form of alternative dispute resolution ('ADR') or complaints procedure would be more suitable than litigation, and if so, endeavour to agree which to adopt. Both the claimant and defendant may be required by the court to provide evidence that alternative means of resolving their dispute were considered. Parties are warned that if the protocol is not followed (including this paragraph) then the court must have regard to such conduct when determining costs.

1.7.7 At present, there are no other applicable appeal mechanisms and so recourse to judicial review would be the only option. Turning straight to judicial review following any disagreement would leave both parties unable to claim in good conscience that alternative means of resolving their dispute was considered.

1.8 The Applicant has provided a counsel opinion dated 29 April 2019 to support submissions made through the Examination.

1.9 Trinity House, in response, engaged Rebecca Clutton of Francis Taylor Building to produce a legal opinion.

1.10 In the very brief time available since receipt of the Trinity House legal opinion, the Applicant has engaged Matthew Henderson of Landmark Chambers. In summary, nothing stated by Ms Clutton in anyway alters Mr Henderson's opinion that it is perfectly acceptable – and indeed preferable – to include an arbitration mechanism within a draft DCO, ensuring as it does a legally robust, expedient and proper way of resolving a dispute or determination under the Order. The Applicant's brief and summary response to that opinion, with the support of Counsel, is outlined below.

2. Summary response to Trinity House's Legal Opinion

2.1 The starting point is to recognise the common ground between the parties:

2.1.1 the Secretary of State may lawfully include an arbitration provision in the DCO; and

2.1.2 Trinity House may be a party to any arbitration, such that there is no express or implied statutory bar to Trinity House being a party.

2.2 In light of the common ground, there are two issues: whether Trinity House can demonstrate – at this stage and as a matter of general principle – that <u>any</u> dispute to which the arbitration provision in the DCO might apply and in which Trinity House is a party is not arbitrable; and whether VWPL can demonstrate that the inclusion of the arbitration provision is otherwise justified.

2.3 There appears to be no dispute between Trinity House and VWPL as to the principles which should apply in considering this issue, namely those set out by the Court of Appeal in ***Fulham Football Club (1987) Ltd v Richards*** [2011] EWCA Civ 855, [2012] Ch 333. Nevertheless, it appears that Trinity House overlook the high hurdle to demonstrate non-arbitrability on the public policy grounds. Accordingly, the Applicant notes the following principles stated by the Court of Appeal:

2.3.1 At [40] *per* Patten LJ: "*It is necessary to consider in relation <u>to the matters in dispute in each case</u> whether they engage third party rights or represent an attempt to delegate to the arbitrators what is a matter of public interest which cannot be determined within the limitations of a private contractual process*."

2.3.2 At [84] *per* Patten LJ (see also [103] *per* Longmore LJ): *"… jurisdictional limitations on what an arbitration can achieve are not decisive of the question whether the subject matter of the dispute is arbitrable. They are no more than the practical consequences of choosing that method of dispute resolution…*"

2.3.3 At [97 – 99] *per* Longmore LJ: *"… does public policy prohibit or invalidate an agreement to refer to arbitration [?] … It is this question that is at the heart of the appeal and I would, for my part, derive some guidance from the principle set out in section 1(b) of the 1996 Act namely 'the parties should be free to agree how their disputes are*

resolved, subject only to such safeguards as are necessary in the public interest'. To the extent therefore that public policy has a part to play it can only be as a 'safeguard … necessary in the public interest'. This is a demanding test…"

2.4 As a preliminary point, considering the approach of Trinity House, the Applicant notes

(a) Trinity House's approach is not based on a case-by-case consideration of the matters in dispute, rather it is to consider all disputes involving Trinity House as being indistinguishable (in fact, it is to consider all disputes involving Trinity House and the MMO) as being indistinguishable); and

(b) Trinity House do not acknowledge the "demanding" nature of demonstrating that a dispute is not arbitrable on the basis of public policy.

2.5 Trinity House's generalised approach can properly be characterized as being more extreme than that of VWPL.

2.6 In addition, Ms Clutton argues at [49] that "*it is simply not possible to know precisely what those factors [in dispute] are and the extent to which they have been considered without knowledge of the particular nature of any dispute arising*"; yet at the same time, Ms Clutton adopts a generalised approach to all possible disputes involving Trinity House. This is inconsistent, and is also inconsistent with the case by case approach set out by the Court of Appeal. Moreover, the uncertainty which Ms Clutton considers exists is supportive of VWPL's approach.

2.7 Trinity House's argument on public policy is that "*matters which are ordinarily subject to the exclusive jurisdiction of Trinity House"* should not be the subject of arbitration. This is supported by reference to "*Parliament's intention … that the expert, public, open transparent regulatory and advisory bodies it created … should be the bodies which ultimately make decisions*". Notwithstanding the terms in which Ms Clutton puts this argument, it is clear that Trinity House's motivation is to preserve as much autonomy as possible and to avoid scrutiny other than by way of judicial review, in respect of which the nature of the supervisory jurisdiction, cost and delay makes it an unattractive course for a developer to pursue.

2.8 Furthermore, Trinity House's argument sits uncomfortably with the acceptance that there are no express or implied statutory limitations on its ability to be a party to an arbitration. If Trinity House are correct, then as a general principle no public body whose decisions are not subject to a statutory appeal mechanism could engage in arbitration on those decisions. There is not authority for this proposition. Again, this is an extreme position in comparison to VWPL. It is also at odds with the fact that in drafting the model provisions, the Secretary of State must have envisaged the arbitration provision applying to public bodies; as well as the express power in the Planning Act 2008 to include an arbitration provision (without any limits on that power).

2.9 Trinity House also overlook the obvious advantages of arbitration in terms of speed and cost, particularly in comparison to judicial review. These factors are consistent with the purpose of the Planning Act 2008. Further, they are matters which are justification for the inclusion of such a clause. In this latter regard, the Applicant notes that Trinity House's arguments against inclusion of the arbitration clause turn on the question of arbitrability – there are no additional arguments outside of the issue of arbitrability.

2.10 Finally, addressing the other pertinent matters in Trinity House's submission and Ms Clutton's Opinion:

2.10.1 As to section 31 Arbitration Act 1996 (AA 1996): an arbitrator with technical expertise may appoint legal advisers – see section 37 AA 1996 and ***National Boat Shows v Thameside Marine (1 August 2001) QBD*** referred to in Russell on Arbitration at [4-086]. Accordingly, an arbitrator with technical expertise would be able to decide a question of jurisdiction pursuant to section 31 AA 1996.

2.10.2 As to section 32 AA 1996: the limited circumstances for referral to the courts is consistent with arbitration being quick and decisive – entirely in accordance with the operation and purpose of the Planning Act 2008.

2.10.3 As to Ms Clutton at [50], the setting of boundaries is the protection of the public interest. This is in fact a good example of where the public interest has been taken into account by the DCO and thus does not require further protection.

2.10.4 It cannot be presumed that an arbitrator would be less "expert" than Trinity House or the MMO.

2.10.5 The arbitration rules could easily accommodate "public scrutiny" – i.e. via publication of decisions and even the ability to submit representations. It is difficult to see how Trinity House – who on their own argument are subject only to the supervisory jurisdiction via judicial review – is in any sense subject to greater "public scrutiny".

2.11 Finally, with regards the Tilbury 2 ExA Report, the Applicant maintains that this cannot be said to be conclusive on the issue in question and is entirely distinguishable as a project from that of Thanet Extension Offshore Wind Farm.

2.12 In any event, the suggestion that DMLs should not be treated differently from marine licenses under the MCAA is not an argument of principle given the wide powers of the Secretary of State in making a DCO – i.e. to modify the usual regulatory framework as it applies to a DCO.

2.13 Mr Henderson confirms that - for the reasons above, his view – as expressed in his earlier Opinion – has not changed.

3. Article 5 of the draft DCO and Appeals

3.1 The Applicant was asked to respond to the Examining Authority's Rule 17 Q 4.4.2 at Deadline 8 in relation to the drafting of Article 5. At Deadline 6, the Applicant amended Art 5(11), and inserted a new Schedule 14 to include a new provision for what amounts to an either way optional mechanism for the Applicant to submit an appeal or to take a matter to arbitration.

3.2 Having considered the Examining Authority's comments and questions, the Applicant confirms that either arbitration **or** the appeals procedure should be referenced in Article 5(11), but not both. The Applicant's preferred position is the use of arbitration to resolve any dispute arising pursuant to Article 5, albeit if the Secretary of State does not deem this to be an acceptable mechanism for dispute resolution, the Applicant considers the appeal procedure to be an acceptable alternative to arbitration. Article 5 of the draft DCO has been updated with square brackets to show that only one reference should be included in the final DCO, if granted.

3.3 The Applicant should add that, for any other aspect of the draft Order requiring Secretary of State approval, if the Examining Authority found arbitration to not be an acceptable procedure – the Applicant submits that the appeal procedure should apply to any provisions requiring approval by the Secretary of Statement.

4. Relationship with Norfolk Vanguard and Final Submissions

4.1 The Applicant is aware of the submissions made by Norfolk Vanguard Offshore Wind Farm and attaches, at Appendix One, the Joint Position Statement with the MMO relating to Arbitration and Appeal mechanisms.

4.2 In order to ensure some consistency in relation to decision making between the two draft Orders, the Applicant has been content to amend certain provisions within the draft Order to allow a resource to an appeal mechanism, rather than an arbitration mechanism. This is contained at Conditions 13 and 14 of Schedule 11, Conditions 11 and 12 of Schedule 12 and Article 5, as explained above.

4.3 The Applicant however strongly maintains that certain provisions contained within the deemed marine licences should be subject to arbitration.

4.4 The current draft DCO therefore currently provides for the following – and this is the Applicant's preferred drafting:

4.5 Arbitration applies throughout the entirety of the draft DCO and the DMLs, subject to the following exceptions:

4.5.1 Conditions 13 and 14 of Schedule 11 and Conditions 11 and 12 of Schedule 12; and

4.5.2 Those requirements subject to Schedule 10.

4.6 The DMLs are also subject to a deemed approval mechanism at Conditions 13 and 14 of Schedule 11 and Conditions 11 and 12 of Schedule 12.

4.7 If the Examining Authority are minded to recommend any alternative to the Secretary of State, the key points for the Examining Authority to note are as follows:

4.8 If the Examining Authority are minded to exclude arbitration from any decision made by the MMO, the Applicant fully supports the submissions made by Norfolk Vanguard Offshore Wind Farm in relation to the necessity of including an appeal mechanism in the relevant conditions of the draft Order in the deemed marine licences.

4.9 It is important to note that certain provisions exist within the draft DCO that absolutely necessitate some form of arbitration or method of resolving differences between parties. Particularly, the Applicant draws the Examining Authority's attention to Requirement 30 of the draft DCO, which relates to a scheme of mitigation to be submitted to the Secretary of State for approval. This is an unusual provision that also allows for the provision of evidence from different parties. The important point to note here is that if parties are seeking to agree, or consult upon, certain aspects of the draft Order and differences arise, that arbitration could be used to settle those differences. Applicant would not support any, which would mean that if parties were seeking to agree a specific plan, sitting within a requirement or condition, then the entirety of that provision would arguably not be subject to any form of arbitration, not simply the approval.

4.10 The Applicant has included within the deemed marine licences a deemed approval mechanism. The Applicant supports the submissions of Norfolk Vanguard on the use of a deemed approval, as opposed to a deemed refusal mechanism, as set out in Appendix One. In addition, the Applicant questions whether a deemed refusal mechanism is legally robust, particularly given the requirement for a reasons based approach for any refusals as a matter of law under the town and country planning regime.