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** In cooperation with
Trench, Rossi e Watanabe
Advogados

02 March 2020

Government Legal Department
102 Petty France
London. SW1H 9GL

Attention: The Secretary of State

Dear Sirs/Mesdames

Letter before Claim - Energy National Policy Statements

The Proposed Claimants:

- (a) Dale Vince is the Founder of Ecotricity, an electricity company relying on renewable energy;
- (b) George Monbiot is a journalist and campaigner on the environment; and
- (c) Good Law Project Limited supports and brings strategic litigation.

The Defendant: The Secretary of State

This letter is served on the following emanations of the Secretary of State¹:

- (a) The Secretary of State for Business Energy and Industrial Strategy (The Rt Hon Alok Sharma MP);
- (b) The Secretary of State for Housing, Communities and Local Government (The Rt Hon Robert Jenrick MP); and
- (c) The Secretary of State for Environment, Farming and Rural Affairs (The Rt Hon George Eustice MP).

¹ There is in constitutional law a single office of the secretary of state.

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If the Defendant would prefer to consolidate under a single Secretary of State, we would suggest that the SoS for BEIS would be appropriate. Please tell us if you consider that any party should be named as an interested party.

What You are Asked to Do

The purpose of this letter is to ask the Secretary of State whether he thinks it is now appropriate to review all or parts of each of the National Policy Statements for Energy Infrastructure (EN-1 to EN-6) (the "**Energy NPSs**") pursuant to section 6(1) of the Planning Act 2008. Further, if he thinks that it is appropriate to do so, to confirm that the Energy NPSs will be reviewed forthwith.

Further, our clients' position is that the Secretary of State must immediately think about whether it is appropriate to review the Energy NPSs and whether a failure to do so would be unlawful. Further, it would be irrational not to conclude pursuant to such consideration that the Energy NPSs must be reviewed.

Remedy to be Sought

Failing a satisfactory response to this letter, the Claimants will seek orders from the High Court declaring that in light of the significant changes of circumstance since 2011 it is irrational for the Secretary of State to fail to think about and to fail to decide whether it is appropriate to now review all or part of the Energy NPSs. The Claimants will seek a declaration that the only rational decision for the Secretary of State is that it is appropriate to review all or part of each of the Energy NPSs for Energy Infrastructure now and that he must therefore do so. Alternatively, the Claimants will seek a declaration that the suite of Energy NPSs are now unlawful in that they operate so as to subvert the intention of Parliament in enacting the Netzero target in section 1 of the Climate Change Act 2008.

Summary

The essence of this proposed claim is that, since the suite of Energy NPSs for Energy Infrastructure were designated in 2011, there have been a number of changes of circumstance related to the basis on which that policy was decided that are obviously significant. Such changes were not anticipated in 2011 and if they had been, policy would have been framed materially differently. A failure by the Secretary of State even to think about whether it is now appropriate to review the Energy NPSs is in the circumstances irrational and/or would thwart and run counter to the policy and objects of the Planning Act 2008 and Climate Change Act 2008. If he did think about it, the only rational decision would be that it is appropriate to review the policies now.

Sections 6(1) and 6(2) of the Planning Act 2008 provide that the Secretary of State must review all or parts of the National Policy Statements whenever the Secretary of State

considers it appropriate to do so. Section 6(3) of the Planning Act 2008 further provides that, in deciding when to review a National Policy Statement, the Secretary of State must consider whether:

- (a) since the time when the National Policy Statement was first published or (if later) last reviewed, there has been a significant change in any circumstances on the basis of which any of the policy set out in the National Policy Statement was decided;
- (b) the change was not anticipated at the time; and
- (c) if the change had been anticipated at that time, any of the policy set out in the statement would have been materially different.

In thinking about whether it is now appropriate to review the Energy NPSs, the Secretary of State will be guided by the considerations in section 6(3) of the Planning Act 2008.

Significant Changes in Circumstances Related to the Basis of the Policies

Some of the principal significant changes of circumstance since the Energy NPSs were adopted in 2011 (which are related to the basis of those statements) are as follows:

- (a) In 2011 when the Energy NPSs were introduced, the Climate Change Act 2008 committed the United Kingdom to reducing greenhouse gas emissions by at least 80 per cent by 2050 when compared to 1990 levels. This target was set to ensure the UK played its role in limiting global temperature rise to 2°C. On 27 June 2019 Parliament passed the Climate Change Act 2008 (2050 Target Amendment) Order 2019/1056 by which section 1 of the Climate Change Act 2008 was amended so as to ensure that the net UK carbon account for the year 2050 is at least 100% below the 1990 baseline (“**Netzero**”).
- (b) In December 2015 the Paris Agreement was concluded as an agreement within the United Nations Framework Convention on Climate Change and adopted by consensus on 12 December 2015 by all 195 participating states and the European Union, bringing about a strong international commitment to mitigating climate change. In particular, article 2 establishes not only a firm commitment to restrict the increase in the global average temperature to “*well below 2 degrees Celsius above pre-industrial levels*”, but also to “*pursue efforts to limit the temperature increase to 1.5 degrees Celsius above pre-industrial levels*” and an aspiration to achieve net-zero greenhouse gas emissions during the second half of the 21st century. On 22 April 2016, the United Kingdom signed the Paris Agreement and then ratified it on 18 November 2016. The Paris Agreement was accompanied by pledges of action to 2030. These international commitments were not made in 2011. On 27 February 2020 the Court of Appeal in *R (Friends of the Earth) -v- Secretary of State for Transport and others* [2020] EWCA Civ 213 directed that the Airports National Policy Statement would have no legal effect until it was reviewed

pursuant to section 6 of the Planning Act 2008 to take account of the Paris Agreement, which the Court regarded as a matter that was obviously material to the designation of that National Policy Statement.

- (c) On 8 October 2018 the Intergovernmental Panel on Climate Change (the "IPCC") published their special report on the impacts of global warming of 1.5 degrees above pre-industrial levels. This report deepens the scientific evidence base on the implications of pursuing efforts to limit global warming to 1.5 degrees above pre-industrial levels, as set out in the Paris Agreement.
- (d) On 13 October 2016 the Committee on Climate Change published "UK climate action following the Paris Agreement" which made recommendations for the United Kingdom including that it amend the 2050 target to net zero. On 15 October 2018 the UK, Welsh and Scottish governments wrote to the Chairman of the Committee on Climate Change to request, pursuant to s3(1) and s7(1) of the Climate Change Act 2008, an update to the advice the Committee provided in October 2016, as part of that committee's report on UK climate action following the Paris Agreement. The UK, Welsh and Scottish governments requested options for the date by which the UK should achieve a net zero greenhouse gas target and/or a net zero carbon target in order to contribute to the global ambitions set out in the Paris Agreement. In May 2019 the Committee on Climate Change produced a report entitled "Net Zero- the UK's contribution to stopping global warming recommending a net-zero GHG target for 2050". On 18 December 2019 the committee on Climate Change wrote to the Prime Minister. In his letter of response to the Committee on Climate Change dated 28 January 2020, the Prime Minister affirmed that "2020 is a crucial year for action on climate change" and that "*The Government has been elected with an unambiguous commitment to net zero, which we will deliver... this requires action across the economy*".
- (e) On 1 May 2019 the UK Parliament declared a climate emergency. On 28 November 2019 the European Parliament declared a climate emergency.
- (f) On 2 November 2019, HM Treasury published the terms of reference of its review into funding the transition to a net zero greenhouse gas economy. That review is due to conclude in autumn 2020.
- (g) In the Conservative Party Manifesto, a vision was set out to ensure that Britain has the world's most ambitious environmental programme and the Queen's Speech 2019 reaffirmed the UK's statutory commitment to Netzero by 2050.
- (h) On 31 January 2020 the UK left the European Union. Consequently the UK will, among many other changes: (i) be revisiting its relationship to the EU emissions trading scheme and the EU ETS Directive (described in EN-1 para 2.2.13 as "the

cornerstone of UK action to reduce greenhouse gas emissions”) at the end of the transition period; and (ii) will be able to revisit the role of and targets set by the Industrial Emissions Directive.

Section 6(1)(b) Planning Act 2008: Changes not anticipated at the time of the Energy NPSs

It is self-evident that the Paris Agreement and the other matters outlined above leading up to the recent change to net UK carbon account for the year 2050 to at least 100% below the 1990 baseline were not anticipated when the UK adopted the Energy NPSs in 2011. The Energy NPSs are expressly premised upon the former 80% statutory target. For example, EN-1 at 2.2.8; 3.3.1, fn17; 3.3.14; 3.4.1 rely on the July 2010 Pathways Analysis² that also sets a route to an 80% reduction by 2050.

Neither was it anticipated in 2011 that the UK would leave the European Union on 31 January 2020, requiring it to reorganise its participation in the EU emissions trading scheme and its relationship to EU law concerning climate change.

Section 6(1)(c): Whether the Energy NPSs would have been materially different if these changes had been anticipated in 2011

The Energy NPSs make express reference throughout to the premise of an 80% target. For example, EN-1 states at paragraph 2.2.1 “*We are committed to meeting our legally binding target to cut greenhouse gas emissions by at least 80% by 2050 compared to 1990 levels*”. It follows that, when designating the Energy NPSs, the Secretary of State regarded that target as material to the framework for policy related to energy infrastructure. The position now is that, nine years into the planned window for achieving the cut, the target has been set at a materially more ambitious level. It is obvious that if it had been anticipated in 2011 that the 80% target would be increased to a 100% target in 2019, then the Energy NPSs would not have been premised upon the 80% target throughout the lifespan of the plan.

If the Energy NPSs had been drafted in anticipation of the more ambitious target being set in 2019; in anticipation of the Paris Agreement; in anticipation of the declarations of climate emergency (and other significant changes as set out above), then the following examples illustrate that the Energy NPSs would have been materially different:

- (a) there would not now be a continuing applicable emphasis on the “*significant role*” of fossil fuels “*for some time to come*” (EN-1 at § 2.25);

²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/42562/216-2050-pathways-analysis-report.pdf

- (b) there would not now be a continuing need for fossil fuels during the transition to a low carbon economy (EN-1 at 2.2.23);
- (c) the premise at EN-1 3.1.1 that the Infrastructure Planning Commission must assume that there is a need for all types of energy infrastructure would not apply with the same emphasis. Similarly, the presumption in favour of all types of energy supply at 4.1.1 would no longer apply;
- (d) there would be a markedly different emphasis to the “*vital role*” of fossil fuel power stations and the “*important role [of fossil fuel power] in our energy mix as the UK makes the transition*” (EN-1 para 3.6.1); and
- (e) paragraph 5.2.2 of EN-1 would not provide that “*Government has determined that CO2 emissions are not reasons to prohibit the consenting of projects...*” because prohibiting the consent of projects on the grounds of CO2 emissions is precisely what the Netzero target, and fundamentally, the mitigation of the climate emergency now demands.

The Energy NPSs were set with a planning horizon of 2025 (EN-1 at para 3.3.16), but it is clear that the government now needs to make good its commitment at EN-1 §3.3.17 to keeping the relevance of this horizon under review.

Drax Decision

The Secretary of State’s decision on the Drax Power (Generating Stations) Order illustrates the contradictions that are now inherent between the statutory Netzero target and the Paris Agreement on the one hand, and the Energy NPSs on the other. The Inspector recommended that the order be not confirmed, but the Secretary of State, applying the Energy NPSs, overruled that recommendation. At Paragraph 5.7 of the Secretary of State’s decision, he accepted the importance and relevance of the Netzero target:

“5.7 The Secretary of State considers that the amendment to the CCA, which sets a new legally binding target of an at least 100% reduction in GHG emissions against the 1990 benchmark (“Net Zero”), is a matter which is both important and relevant to the decision on whether to grant consent for the Development and that regard should be had to it when determining the Application.”

Our clients agree. Furthermore, if, as the Secretary of State accepts, the target is important and relevant to an individual decision on a Nationally Significant Infrastructure Project, it is obviously important and relevant to the policy framework that governs the individual decisions. It is not to be treated as an ad hoc addition to that framework. Yet the Secretary of State’s decision shows how the existing framework subverts the purpose and intention of the Netzero target. He held in relation to the Drax decision that:

"5.9 The move to Net Zero is not in itself incompatible with the existing policy in that there are a range of potential pathways that will bring about a minimum 100% reduction in the UK's emissions."

However, for present purposes, the unlawfulness is not that the policy does not preclude Netzero; it is that it allows for pathways to 2050 which fail to achieve Netzero.

Thwarting and Contradiction of the Policy and Objects of the Statutes

Maintaining the policy within the existing NPSs and failing to take a decision on whether it is now appropriate to review the Energy NPSs is an exercise of the discretion which runs contrary to the policy and objects of the Planning Act 2008 and is unlawful by reason of it conflicting with and subverting the purpose and intention of section 1 of the Climate Change Act 2008 establishing the Netzero target: *R v Social Security Secretary, ex parte JCWI* [1997] 1 WLR 27; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1030 B – D and *R (UNISON v Lord Chancellor)* [2017] UKSC 51 at §87 and *The Northern Ireland Human Rights Commission case* [2019] 1 All ER 173 at §82.

R (on the Application of Plan B Earth) [2020] EWCA Civ 214

The Court of Appeal held in its judgment in *R (Friends of the Earth) -v- Secretary of State for Transport and others* [2020] EWCA Civ 213 on the Airports National Policy Statement that it had been designated without regard to the Government's commitment to the Paris Climate Agreement which, the Court held, comprised part of government policy [§228]. The Court of Appeal, in essence, accepted [at §234] that (i) failing to take account of the Paris Agreement was an error of law in the approach taken by the Secretary of State; and (ii) if he had asked himself whether he should have done so, the only answer that would reasonably have been open to him is that the Paris Agreement was "*so obviously material*" to the decision he had to make in deciding whether to designate the Airports National Policy Statement that it was irrational not to take it into account.

Aside from the Paris Agreement and the matters raised in the Court of Appeal's decision, the entire policy on climate change including: (i) the amendment of the 80% target to 100% in section 1 of the Climate Change Act 2008; (ii) Parliament's declaration of a climate emergency; (iii) post-2050 Co2 targets; (iv) non-CO₂ emissions targets; and (v) the departure of the UK from the EU (and associated effects) are so obviously material to national energy policy (c.f. §237 of the CoA decision) that:

- (a) the only rational view open to the Secretary of State is that now is an appropriate time to review all or parts of the Energy NPSs pursuant to section 6(1) of the Climate Change Act 2008; and

- (b) in deciding pursuant to section 6(3) of the Climate Change Act 2008 whether to review the Energy NPSs the only rational conclusion is that (i) there has been at least one significant change of circumstance since 2011 related to the basis on which the policy was decided; (ii) the change(s) were not anticipated at that time; and (iii) if the change(s) had been anticipated then the Energy NPSs would be materially different.

The failure to take account of the Paris Agreement alone was a sufficient failure to have regard to a material consideration in relation to the Airports National Policy Statement. The amendment by Parliament of the target in section 1 of the Climate Change Act 2008 is a far more obvious and straightforward change to the policy context and it is now inescapable that the change to the policy framework demands that the Energy NPSs be reviewed.

The fact that the government has accepted that it will in any event be reviewing the Airport National Policy Statements presents a suitable opportunity for the review to be undertaken.

Section 13 of the Planning Act 2008

The proposed claim is not ousted by section 13 of the Planning Act 2008. Section 13 relates to matters in the course of preparing a policy statement; a decision by the Secretary of State not to carry out a review (section 13(2)); a decision to carry out a review (s.13(3)), or to matters in the course of or after a review (s.13(3)-(5)).

Disclosure

The Secretary of State is asked to make full and frank disclosure, as he is required to do, of matters relevant to the decision under challenge in this letter.

Funding

We shall write separately concerning proposed funding arrangements pursuant to the Aarhus Convention.

Alternative dispute resolution

Our clients are willing to engage in alternative dispute resolution. Please notify us of your position.

Period for response

Paragraph 6(b) of the Practice Direction on Pre-action Conduct and Protocols states that the Defendant should respond within “*a reasonable time – 14 days in a straight forward case and no more than 3 months in a very complex one*”. We anticipate that the government

is already considering the matters raised in this pre-action letter. Our clients are willing to allow 21 days for a response in this case, failing which our clients shall issue proceedings in the High Court seeking the remedies set out above.

Please respond by both email and post using the details set out below.

Our Details

Solicitors: Baker McKenzie LLP (Joanna Ludlam (joanna.ludlam@bakermckenzie.com), Luke Richardson (luke.richardson@bakermckenzie.com) and Lereesa Easterbrook (lereesa.easterbrook@bakermckenzie.com)).

Counsel: Alex Goodman, Landmark Chambers

We look forward to hearing from you.

Yours faithfully

A handwritten signature in black ink that reads "Baker & McKenzie LLP". The signature is written in a cursive, flowing style. The "LLP" is enclosed in a large, circular flourish.

Baker & McKenzie LLP
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