RE: THE LIABILITY OF ENERGIEKONTOR LIMITED FOR DISRUPTION TO TELEVISION RECEPTION CAUSED BY WIND FARM DEVELOPMENT

ADVICE

1. I am asked to advise Hyndburn Borough Council ("the Council") as to the liability of a wind farm operator in respect of the disruption to television reception caused by wind farm development.

2. In advising, I have seen the following documents:

    a. A copy section 106 agreement dated 11th March 2010 and a deed of novation dated 11th August 2011;

    b. A list of people claiming to suffer interference to television reception as a result of the wind farm development;

    c. Sample letter sent by EnergieKontor UK Construction Limited to complainants;

    d. Report prepared by EnergieKontor in respect of the alleged interference;

    e. Email exchange between the Council and EnergieKontor dated 3rd and 5th December 2012;

f. Report to Councillors prepared by the Council's Chief Planning and Transportation Officer, dated December 2012; and

g. Copy press report dated 10th December 2012.

3. In December 2009 an application was made to the Council for planning permission to erect 12 wind turbines on land at Oswaldtwistle Moor. Permission was granted in March 2010 subject to the planning obligation I have seen. The obligation was made between the Council, the landowner and EnergieKontor (UK) Limited ("EK1"). In August 2011, a deed of novation was executed by which the obligation was novated by EK1 to EnergieKontor UK HY GmbH & Co WP Hyndburn KG (UK Branch) ("EK2").

4. The wind farm was erected in late 2012 and has recently become operational. Since then, the Council and EK1 have received over 340 complaints of interference with television reception from residents at Baxenden whose receiving equipment was aligned to the TV transmitter at Winter Hill. EK1 has agreed to pay for the realignment of equipment at those properties to the Haslingden TV transmitter, which appears to be an appropriate solution in terms of the quality of reception. Haslingden provides, however, up to 75% fewer channels for viewing than does Winter Hill.

5. EK1 has offered to make what it calls a "goodwill" offer of £100 to each affected property towards the purchase of a Freesat system. Residents are unhappy that that such a sum does not cover the full cost of the equipment (£160) and that the

equipment would only allow for one television set to receive the full range of channels per dwelling.

6. The Council wishes to assist local residents wishing to press EK1 or EK2 for a more favourable offer of compensation.

7. The planning obligation was validly made as such and complies with the statutory formalities contained in the Town and Country Planning Act 1990. The development of the wind farm has taken place and so the planning obligation has taken effect, pursuant to its clause 8.2.

8. By paragraph 2 of the First Schedule to the obligation, EK1 was to provide to the Council, for its approval, a list of proposed consultants who were to undertake surveys or investigations relating to TV reception.

9. Paragraph 3 of the First Schedule contains the substance of the obligations on TV reception. In plain language, the provisions required:

    a. The developer to carry out a desk top study to identify the area within which the wind farm might affect TV reception ("the shadow area"). That study had to be carried out prior to the development being commenced;

    b. The developer had to commission and complete a "baseline study" prior to the erection of the turbines and no later than three months after

the commencement of the development. The study had to be sent to the Council. The purpose of the baseline study was to ascertain the existing quality of TV reception within the shadow area;

c. Within seven months of the wind farm starting to generate and sell electricity, the developer had to provide an "operational survey" to the Council. The point of that survey was to ascertain the quality of TV reception in the shadow area with the operational wind farm in place;

d. Within a period ending 12 months from the wind farm first generating and selling electricity to the National Grid, if the Council or any person holding a current TV licence and who lived within 5km of the wind farm site (not just those within the shadow area) made a complaint about TV reception, the developer has to investigate the claim through a person appointed for the purpose, to ascertain whether the complainant's TV reception had been materially adversely affected by the wind farm. However, there is no obligation on the developer to appoint such a person if the developer can attend to the problem at its own expense by realigning aerials or by other means;

e. If an investigation is made, then the developer has to provide a copy of the report of that investigation to the complainant and to the Council, setting out whether the complaint is well founded and what remedial works are to be carried out. However, the developer is under no obligation to carry out works if the cost of them means that the

aggregate cost of the performance of the obligations under the obligation exceeds £10,000.

10. The effect of the deed of novation was to place EK2 into the shoes of EK1 for the purposes of the performance of the planning obligation. Clause 4 of the deed of novation left unaffected any claims which existed between the former parties prior to the novation taking effect, which would occur when EK1's interest in the site was transferred to EK2. I do not know what that date was.

11. When complaints were made, a report on the interference was produced, dated 4th December 2012. It describes the baseline study as concluding that the wind farm would have a "neutral effect" which I interpret to mean no effect. It describes interference being caused by the wind farm to such a degree that equipment delivering a digital terrestrial television service ceases to lock onto the channel, causing the channel to drop out. The problem only affected residents whose receiver equipment was aligned to receive a signal from Winter Hill and arose because the signal was only just strong enough to provide a reliable picture and sound to those residents. The remedial work recommended was the realignment of the aerials from Winter Hill to the Haslingden transmitter. The report describes the offer of a Freesat box as a goodwill offer, not an obligation.

12. EnergieKontor wrote to complainants and I have seen a sample letter. It describes the offer of a Freesat box which I have set out above, describing the offer in terms which suggest that the offer is over and above their planning obligations. The offer is said to be a:

"goodwill offer [which] is only available for complaints lodged by Friday 18th January 2013."

13. It is against that background that I answer the questions put to me.

Q1: The legal basis (if any) of EnergieKontor's liability to the residents of affected properties for disruption to television reception caused by the operation of the wind farm.

14. I deal first with the obligations under the planning obligation. Although that obligation does not allow a resident to take action directly against EnergieKontor, it allows them to obtain some redress via action taken by the Council to enforce the terms of the obligation.

15. There can be no doubt that the obligation imposes a duty on EnergieKontor to take remedial works to "restore the quality of the television reception to the level recorded in the baseline study" (paragraph 3.9.2 in Schedule 1 of the planning obligation). Such wording plainly covers a situation where the viewing quality of a signal becomes worse. The more difficult point is whether the obligation obliges EnergieKontor to ensure that the same number of channels can be viewed by a local resident. EnergieKontor plainly believe, or at least publicly state, that such a situation is not within the scope of the planning obligation, because they describe the Freesat offer as a goodwill gesture over and above their obligations.

16. I do not believe that EnergieKontor are correct if that truly is their view. I am told that the realignment of equipment to the Haslingden receiver can result in the range of obtainable channels falling by as much as 75%. In my view, if a resident was formerly able to watch, say, 100 channels and after re-alignment is only able to receive 25, then there is a powerful argument to say that the quality of their television reception has not been restored to the level recorded in the baseline study. Were it otherwise, a person who suffers reduced picture quality of a channel would be in a better position than a person who, as a result of re-alignment, loses that channel altogether. There is, however, a contrary argument, that the provision in the obligation is related solely to the signal quality, and not the range of channels, because the obligation is to restore the quality of signal to that recorded in the baseline study, and the definition of that term in the obligation relates to the quality of television reception and not to the number of viewable channels. Whilst the matter is not altogether clear, I prefer the view that the provision covers the range of channels and not just picture quality, for the reasons I have given above.

17. However, it may not be very advantageous to take this point, because if it is right, then the expense of the Freesat offer would count towards the £10,000 limit on expenditure to discharge the obligations in the agreement. If it is a goodwill offer, then it would not, possibly leaving some of the £10,000 to be spent if other problems with reception emerge within the relevant period for complaints to be made. The Freesat offer will cost EnergieKontor over £10,000 given that more than 100 complaints have been made.

18. If I am wrong about the planning obligation requiring the restoration of the number of viewable channels and not just signal quality, then the obligation provides no means of enforcing a restoration of the number of channels.

19. There is no other means of the Council being able to take action to tackle the number of viewable channels. I have not seen the decision notice granting consent, but I assume that if there had been a relevant planning condition, I would have been told about it.

20. Nothing that happens through the operation of the planning system affects the private legal rights of residents. However, it has been decided by the Courts that interference with television reception caused by the erection of a building (and I see no reason why the erection of a turbine would be any different) cannot form the basis of a legal action in nuisance. That was decided by the House of Lords in the case of *Hunter v Canary Wharf Limited* [1997] AC 655. That was because the law of nuisance is concerned with cases where something is emitted from a person's land and received on another's land, so as unreasonably to interfere with the latter person's use or enjoyment of the land, such as noise, smell, dust and the like. Although I am not advising the local residents directly and should not be thought to be assuming any duty direct to them, my view would be that they would not be able to bring a private law action for nuisance.

Q2: Whether liability rests with EK1 or EK2.

21. As I consider that the planning obligation provides the only possible means of redress, I only consider this question in the context of the obligation. I cannot answer this question directly, because it depends upon the date when the novation in the deed of novation took effect. As set out above, that date is the date on which the land comprising the wind farm was transferred from EK1 to EK2. Once that date is known, the deed of novation operates so as to mean that any claims which were made prior to that date remained the responsibility of EK1. Claims made after that date would be the responsibility of EK2: see clause 4 of the deed of novation.

22. If all of the claims made here post-date the date that the novation took effect, then the responsible party under the planning obligation is EK2.

Q3: The extent of EnergieKontor's liability (if any) to compensate affected residents in particular:
Do residents have grounds to claim the full cost of a Freesat system and how likely is such a claim to be successful; and
Do residents have grounds to claim compensation over and above the cost of a single Freesat system in respect of the loss of channels they may have and how likely is such a claim to be successful?

23. I have dealt with this question, in large measure, in answer to question 1.

24. Further, there is no contractual relationship with the developer which the residents can take advantage of. Nor, on the basis of the material which I have seen, is there any non-contractual remedy in the law of tort. I have dealt with the law of nuisance above. There is no evidence that the developer has practised any fraud, deceit or actionable conspiracy against anyone. Nor is there any reason to think that the developer owes any duty of care in negligence to the residents.

25. Based on the material which I have seen, I do not think that the residents have any private law cause of action against either EK1 or EK2.

Conclusion.

26. My conclusion is that the local residents have no direct claim against either EK1 or EK2 and that the only remedy which exists to help them is that which exists through enforcing the terms of the planning obligation.

27. It is therefore vital that the Council continues the process of publicising the "goodwill" offer in order to ensure that claims are made by Friday 18th January 2013. I note that officers of the Council have informed the Council's Elected Members that complaints need to be made to take up the "goodwill" offer. If not already done, that publicity ought to include reference to the 18th January deadline.

General.

28. I have dealt with all of the matters which occur to me above. I trust that I have dealt with all of the matters upon which my view was sought. If I can be of any further assistance, then my Instructing Solicitor must not hesitate to contact me in Chambers.

MARTIN CARTER
10th January 2013.

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RE: THE LIABILITY OF

ENERGIEKONTOR LIMITED FOR

DISRUPTION TO TELEVISION

RECEPTION CAUSED BY WIND

FARM DEVELOPMENT

ADVICE

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