

<b>CABINET</b>	<b>AGENDA ITEM No. 6</b>
<b>21 JUNE 2021</b>	<b>PUBLIC REPORT</b>

Report of:	Peter Carpenter – Corporate Director Resources	
Cabinet Member(s) responsible:	Councillor Coles – Cabinet Member for Finance	
Contact Officer(s):	Carole Coe – Commercial Finance Manager	Tel. 384562

## **AMENDMENT TO ARRANGEMENTS WITH EMPOWER**

RECOMMENDATIONS	
<b>FROM:</b> Director Corporate Resources – Peter Carpenter	<b>Deadline date:</b> N/A
<p>It is recommended that Cabinet:</p> <ol style="list-style-type: none"> <li>1. Approve the recommendation from the Insolvency Advisor, Teneo Restructuring Ltd to take control of the assets of ECSP1.</li> <li>2. Delegate authority to the Corporate Director Resources and Director of Law and Governance to agree the financial and legal arrangements necessary to give effect to item 1 above.</li> <li>3. Approve the write off of the outstanding invoices raised on ECSP1 using the additional provision set aside for this purpose.</li> </ol>	

### **1. ORIGIN OF REPORT**

1.1 This report is submitted to Cabinet following a referral from CMT on 19 May 2021.

### **2. PURPOSE AND REASON FOR REPORT**

2.1 The purpose of this report is to:

- Consider the report from Teneo Restructuring Ltd advising on the options available to the Council following the Notice of Repayment sent to ECSP1 on 30 March 2021.
- To approve the recommendation in that report to take control of the assets of ECSP1.

2.2 This report is for Cabinet to consider under its Terms of Reference No. 3.2.1, *‘To take collective responsibility for the delivery of all strategic Executive functions within the Council’s Major Policy and Budget Framework and lead the Council’s overall improvement programmes to deliver excellent services.’*

2.3 In line with executive procedure rules, and with the agreement of the Chairman of Growth, Environment, and Resources Committee, this decision was not advertised on the Forward Plan for 28 days, due to the exempt nature of the information under paragraph 3 of Schedule 12A of Part 1 of the Local Government Act 1972.

2.4 Notice of Repayment was sent on Empower on the 30 March 2021 giving them six weeks to repay the loan in full. This was highly confidential because if such notice was in the public domain, it may have jeopardised their ability to refinance the loan with an alternative lender. Similarly, the appointment of an Insolvency Advisor is also a commercially confidential matter and the

disclosure of such needs to be properly managed once the options available have been fully explored.

- 2.5 For this reason, it was considered that if an item was placed on the Forward Plan regarding Empower it would be immediately apparent that the long-term loan refinance of the loan by the Council which was agreed in September 2020 had failed and an alternative action was about to be taken by the Council.

### 3. **TIMESCALES**

Is this a Major Policy Item/Statutory Plan?	<b>NO</b>	If yes, date for Cabinet meeting	<b>N/A</b>
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### 4. **BACKGROUND AND KEY ISSUES**

#### 4.1 **Background**

In December 2014 the Council entered into a strategic partnership agreement with Empower Community Management LLP to deliver solar panels on residential properties. As part of this arrangement and subsequent additions to the original scheme, the Council invested capital funds totalling £23m which resulted in over 7,700 rooftop installations which have been providing free electricity for the householder. The Empower Loan is fully secured over the solar rooftop assets of ECS Peterborough 1 and was returning a commercial rate of return to the Council. This return contributed towards the Budget position of the Council and helped to support the delivery of services.

#### **Extensions to the PCC Funding Facility**

The original loan facility was contracted to terminate in October 2017 but within the original agreement the Council was given the opportunity to extend to March 2019 to continue to fund the existing and new projects.

All new projects were completed by March 2018 and from that date the facility has been extended by a series of Cabinet Member Decisions which are listed in paragraph 10.1, the last of which was in September 2020 giving authority for the construction loan facility to be amended to a long-term loan facility.

#### **Progress since September 2020**

Following the decision in SEP20/CAB/31, which gave authority for the loan to be placed on a long-term basis, extensive work was undertaken by the Council, its advisors Deloitte and Pinsent Mason and Empower. Heads of Terms for the new loan facility were signed in October 2020. The loan repayment profile within the Heads of Terms, agreed by both parties, was underpinned by an aggressive financial model, this was discussed by the Council its advisors and Empower, and assurances were given by Empower that this was achievable and realistic despite its aggressiveness in comparison to other market solar portfolios. The Empower team also provided outline information on future projects to enhance the value of the portfolio, including Peer to Peer Electricity trading.

On 11 March 2021 the Empower team informed the Council they were unable to make the full repayment of the last quarter's loan instalment (as per the terms of the unsigned long term loan agreement) and requested the loan be reprofiled to accommodate this shortfall.

The Empower team negotiated a bank overdraft, however the proposed overdraft facility would have given the bank first security in precedence over the Council's existing security which was considered unacceptable by the Council.

The Council sought advice from its advisors Deloitte and Pinsent Mason and concluded, in order to protect its interests, it was left in no option but to serve notice of repayment for the loan. The loan agreement with ECPS1 provided for this action in the event of default on the loan.

Advice was also taken on the repayment notice period for the loan. The Council decided that as this was at its own discretion, a period of six weeks was appropriate. This was proposed:

- to give recognition to the existing relationship with Empower
- to give a reasonable period of time for Empower to secure an alternative long-term funder.

The six-week period expired, and the Council's loan was not repaid. Insolvency advisors, Teneo Restructuring Ltd (previously Deloitte LLP restructuring team), were jointly appointed by the Council and ECSP1 to:

- Assess the options available to the Council and ECSP1 to maximise value for creditors, including consideration of key risks, uncertainties and issues which would need to be addressed.
- Identify the option which is likely to result in the maximum recoveries for creditors.

### **Insolvency Advice**

Teneo Restructuring Ltd have provided their advice, and a summary of the options considered, and the impact of those options is set out in the report attached as Appendix 1.

Having considered the options, it is recommended that Cabinet approve the option to take control of the assets of ECSP1. This will give the Council a higher degree of control of the portfolio both to preserve the value of its investment and to be able to take advantage of future benefits that may arise as technologies and the electricity distribution network evolve over the next 15 years.

The Council will appoint an interim asset manager in the short term which will allow time to carry out a competitive tender exercise for a permanent asset manager. The Empower management team will be able to submit a tender in that process if they wish.

### **Financial Statements for 2019/20**

The Council's External Auditors EY, as part of their review of the 2019/20 Financial Statements, requested further audit evidence on the loan and the Council's security over the underlying assets. This work was finalised in March 2021 and EY informed the Council they were not minded to challenge the accounting treatment in the 2019/20 Financial Statements, although note was to be made of the aggressive nature of the proposed model. This was received on 10 March 2021.

Empower advised the Council they were unable to pay the first-year loan instalment in full on 11 March 2021 and this, together with their request to re-schedule the agreed loan repayment schedule, was considered by the Council's advisors and auditors. The auditors EY requested a revaluation of the loan considering the new information in order that a post balance event is noted in the 2019/20 Financial Statements. This revaluation has resulted in an impairment of the loan in the accounts to £20.4m. This revaluation has been calculated on the net present value of the cash flow forecasts and is not necessarily a reflection of the value of the assets once the period of Administration has concluded.

The Financial Statements for 2019/20 are to be recommended for approval at the Audit Committee on 21 June 2021.

### **Invoices Outstanding**

During the period in which Empower were trying to refinance the loan the Council, according to standard procedure in such circumstances, were charging their financial and legal advisor costs to ECSP1. During this period the Council were also charging ECSP1 an administration fee of £10k per month. The recharged costs and administration fee were to be paid from the proceeds of the newly refinanced loan. As the loan was never refinanced this repayment was not made and the invoices have remained outstanding.

The Council, being aware of the risk of default if the loan was not refinanced in full, had made additional payments to the bad debt provision over the last two years, funded from the interest income received from ECSP1. The outstanding invoices of £429,995.80 have been fully provided against and the Council is recommending that the provision is applied against the invoices to fully write them off.

## **5. CONSULTATION**

- 5.1 Consultation on recommendation from Teneo Restructuring Ltd has been undertaken with the Council's advisors, Pinsent Masons LLP and Deloitte LLP and the Council's auditors EY have been fully informed. The Cabinet Member for Finance had been kept fully informed of the process undertaken to secure the Council's interests.

## **6. ANTICIPATED OUTCOMES OR IMPACT**

- 6.1 The Council will take control of the assets of ECSP1 as this is the most economically beneficial option for the Council. An estimated value of £15.4m has been provided by Deloitte LLP if the Council were to sell the loan in the financial markets to a non-specialist buyer.

The Council will run a competitive tender process for an asset manager once the portfolio is under its control.

## **7. REASON FOR THE RECOMMENDATION**

- 7.1 ECSP1 notified the Council on 11 March that they were unable to make the full repayment of the last quarter's loan instalment and requested the loan to be reprofiled to accommodate this shortfall. Following advice, a letter was sent to ECSP1 giving six weeks' Notice of Repayment on 30 March 2021. The Council's loan was not repaid at the end of this period therefore a joint insolvency advisor appointment was made by the Council and ECSP1 to safeguard the Council's position.

The report attached outlines the options available and recommends one of those options as the one which will secure the best outcome for the Council.

## **8. ALTERNATIVE OPTIONS CONSIDERED**

- 8.1 The alternative options are listed and considered in Appendix 1.

## **9. IMPLICATIONS**

### **9.1 Financial Implications**

- 9.1.1 The Council will take control of the assets of ECSP1. This will be accomplished either by:
- taking control of the assets directly by Council,
  - the Council taking over the entity ECSP1,
  - transferring the assets or the entity into a wholly owned subsidiary of the Council.

- 9.1.2 Option a: the assets will effectively be purchased by the Council and the loan repaid. The assets will transfer to the Balance Sheet of the Council and become part of the long-term assets of the Council and be depreciated over their remaining useful life, with an equivalent minimum revenue provision (MRP) applied and included as part of the Medium-Term Financial Strategy budget setting.

- 9.1.3 Option b: the Council will take over the entity of ECSP1 and it will become a wholly owned and controlled subsidiary of the Council. The loan will remain, and this will be shown on the Council's balance sheet as a long-term intercompany debtor. The repayment of the loan would form part of the intercompany loan agreement as part of the operating business case.

- 9.1.4 Option c: transfer to a wholly owned and controlled subsidiary of the Council who will purchase the assets using a loan provided by the Council. As with option b above the loan will be shown on the Council's balance sheet as a long-term intercompany debtor. The repayment of the loan would form part of the intercompany loan agreement as part of the operating business case.
- 9.1.5 During the life of the loan the Council has received £5.8m interest from ECSP1 which has cost £1.4m the Council to borrow resulting in a net interest income of £4.4m. The Council has incurred financial and legal advice costs during the refinancing process which has been funded from this net interest income.

During the refinance process the Council and ECSP1 have had to continue to comply with the short-term loan conditions, this means that interest has been charged at a much higher rate of interest and no loan repayments made.

The loan to Empower ECSP1 falls within the definition of capital expenditure for accounting purposes and therefore forms part of the Council's Capital Financing Requirement (CFR). The £2.6m write down of the asset would be matched by an adjustment to the Capital Adjustment Account with no direct revenue impact for 2019/20. Instead as this adjustment was made in the 2020/21 financial year (Post Balance Sheet Event) the Council will implement a phased write down of the potential loss in accordance with its Minimum Revenue Provision policy, as contained in the Medium Term Financial Strategy. This equates to an average yearly MRP charge of £176k to commence in 2021/22.

## 9.2 Legal Implications

- 9.2.1 The Council is being advised on its legal options to take control of the assets of ECSP1 set out in paragraph 9.1.

The Council is able to achieve the various options under consideration with regard to the powers available to it as follows:

The ability of the Council to grant a new loan would be made under the Local Government Act 2003 "power to invest" as well as under the general power of competence. In making any such investment the Council is required to have regard to the Government's commentary to the Guidance on Local Government Investments, as well as the statutory guidance issued by the Secretary of State and specific guidance published by the Chartered Institute of Public Finance and Accountancy. Furthermore, any such investment must be consistent with the Council's Annual Investment Strategy. Any request for funding from the Invest to Save budget is made in accordance with the Council's Constitution and applicable Contract Rules.

All wholly owned subsidiary companies of the Council are subject to appropriate scrutiny in accordance with the terms of its Constitution. In particular, oversight is provided by the Shareholder Cabinet Committee.

- 9.2.2 Whichever option is adopted, the Council intends to appoint a specialist asset manager to manage the portfolio. An interim asset manager will be appointed pending a compliant tendering of these services in accordance with the Public Contracts Regulations.

## 9.3 Equalities Implications

- 9.3.1 There are no equalities implications related to this decision.

## Carbon Impact Assessment

This decision is a recommendation to take control of the assets of ECSP1 and as such has no current carbon impact. However, by taking control of the portfolio on a long-term basis, any new or emerging technologies reducing carbon impacts may be attached to this source of renewable energy and its location on 7,700 domestic rooftops.

## **10. BACKGROUND DOCUMENTS**

Used to prepare this report, in accordance with the Local Government (Access to Information) Act 1985

- 10.1 Cabinet Report JULY17/CAB/16
- Councillor Member Decision Notice MAR18/CMDN/123
- Councillor Member Decision Notice JUL18/CMDN/01
- Councillor Member Decision Notice OCT18/CMDN/40
- Councillor Member Decision Notice NOV18/CMDN/57
- Councillor Member Decision Notice MAR19/CMDN/98
- Cabinet Report SEP19/CAB/43
- Councillor Member Decision Notice NOV19/CMDN/59
- Councillor Member Decision Notice JAN20/CMDN/75
- Cabinet Report SEP20/CAB/31

## **11. APPENDICES**

- 11.1 Appendix 1 – Report from Insolvency Advisor Teneo Restructuring Ltd (previously Deloitte LLP)