

Hornsea Project Three
Offshore Wind Farm



Hornsea Project Three Offshore Wind Farm

Applicant's Position Statement relating to Network Rail

Date: 1st April 2019

Document Control			
Document Properties			
Organisation	Ørsted Hornsea Project Three		
Author	Pinsent Masons		
Checked by	Richard Grist		
Approved by	Andrew Guyton		
Title	Applicant's Position Statement relating to Network Rail at Deadline 10		
PINS Document Number	n/a		
Version History			
Date	Version	Status	Description / Changes
01/04/2019	A	Final	Submitted at Deadline 10 (1 st April 2019)

Ørsted

5 Howick Place,

London, SW1P 1WG

© Orsted Power (UK) Ltd, 2019. All rights reserved

Front cover picture: Kite surfer near a UK offshore wind farm © Ørsted Hornsea Project Three (UK) Ltd., 2019.

- 1.1 This Position Statement sets out the Applicant's response to Network Rail's submission at Deadline 9 (REP9-084). For the reasons set out in this Position Statement, the Applicant considers that the new rights being sought can be compulsorily acquired without causing serious detriment to Network Rail's undertaking and therefore the test set out in s127 of the Planning Act 2008 (PA 2008) is satisfied.
- 1.2 The Applicant notes that Network Rail has not objected to Hornsea Three in principle and there are no technical reasons why the onshore cables cannot be located beneath the railway. As referred to in the Compulsory Acquisition Hearing on 31 January 2019 (and set out in the Written Summary of the Applicant's Oral Case (REP6-012)), the only outstanding matters relate to compulsory acquisition, the indemnity, transfer of benefit and arbitration.
- 1.3 Network Rail's position is that the Applicant should only be able to exercise its compulsory acquisition powers over railway property with the consent of Network Rail. As at the date of this submission, the Applicant cannot agree to this requirement because the Applicant is not confident that a voluntary agreement can be reached with Network Rail.
- 1.4 In order to ensure the deliverability of Hornsea Three, the Applicant therefore requires compulsory acquisition powers for new rights over Network Rail's land. The Applicant's position is that this will not cause serious detriment to Network Rail's undertaking as all physical works must be approved by Network Rail pursuant to the terms of the protective provisions. The Applicant therefore considers that the test set out in s127(6)(a) of the PA 2008 is satisfied.

	Summary of Network Rail's Position	Applicant's Position
1.	Compulsory acquisition of new rights for the onshore cables beneath the railway	
1.1	<p>Network Rail's position is that paragraph 4 of the version of the protective provisions submitted by Network Rail at Deadline 9 (REP-084) is required to ensure that the Applicant cannot exercise any Order powers in respect of Network Rail's property without Network Rail's express consent.</p> <p>Network Rail argues that this requirement is necessary due to Network Rail's statutory duties to operate, maintain and renew a safe national rail network and to enable it to comply with its Network Licence.</p>	<p>In order to ensure the deliverability of Hornsea Project Three Offshore Wind Farm, the Applicant can only agree to restrict the use of compulsory acquisition powers if a voluntary agreement has been entered into in respect of the property rights for crossing beneath the railway.</p> <p>The Applicant has been discussing the terms of a voluntary property agreement with Network Rail for the necessary rights to install and use the onshore cables beneath the railway and heads of terms are substantially agreed. However, in order to ensure the deliverability of Hornsea Three the Applicant is not able to remove or restrict its compulsory acquisition powers over this land until such a voluntary agreement is in place.</p> <p>As referred to at the Compulsory Acquisition Hearing on 31 January 2019, the Applicant notes that this point was considered by the Examining Authority and the Secretary of State</p>

	Summary of Network Rail's Position	Applicant's Position
		<p>in the application for the Hinkley Point C Connection Development Consent Order (Hinkley Connection) where the Secretary of State agreed with the Examining Authority that compulsory acquisition powers should be exercisable for new rights beneath the railway without requiring consent and the test set out in section 127 of the PA 2008 was satisfied:</p> <p>Paragraph 8.5.224 of Examining Authority's Report for the Hinkley Connection set out that:</p> <p><i>"The rights would co-exist alongside those of NRIL. Apart from the construction phase, the only possible interference would be on those occasions when maintenance or emergency works were being carried out to the Applicant's equipment. The Panel is satisfied that rights required by the Applicant over the operational land in question could be taken without serious detriment to the carrying on of the undertaking, but only if protective provisions safeguarding NRIL's assets are included in the DCO."</i></p> <p>Paragraph 8.5.230 of Examining Authority's Report for the Hinkley Connection set out that:</p> <p><i>"The Panel considers that it is not necessary, nor would it be reasonable, to include paragraph 4 of NRIL's preferred form of the protective provisions and that it could compromise the Applicant's ability to deliver the proposed development."</i></p> <p>Paragraph 5 of the protective provisions for the benefit of Network Rail contained in Part 5 of Schedule 9 to the dDCO submitted at Deadline 10 (REP9-003) includes Network Rail's standard wording which requires the Applicant to submit plans to Network Rail for approval prior to carrying out any construction or maintenance works, or exercising certain Order powers, on or in proximity to railway property. The Applicant therefore considers that the protection afforded by the protective provisions ensures that there will be no serious detriment to the carrying out of Network Rail's undertaking.</p> <p>The Applicant considers that the inclusion of paragraph 4 of Network Rail's preferred form of protective provisions cannot be agreed as it would compromise the Applicant's ability to deliver the project. The Applicant needs to ensure that it has the requisite property rights to deliver the project. In the absence of a voluntary agreement, the Applicant cannot agree to only exercise compulsory acquisition powers with Network Rail's consent as this would constitute an impediment to the delivery of the project.</p>

	Summary of Network Rail's Position	Applicant's Position
2.	Indemnity	
2.1	<p>Network Rail's position is that the indemnity should apply to all indirect and consequential loss or loss of profits and that all relevant costs should be recoverable.</p> <p>Network Rail submits that as Network Rail is a public body and operator of the national rail network it should be provided with a full indemnity so that any losses suffered do not fall on the public purse.</p> <p>Network Rail states that it should not be obliged to provide details of any agreements with train operators as this creates an administrative burden and the agreements are commercial sensitive.</p> <p>Network Rail states that it should not have to demonstrate how it has minimised any claim and argues that as a public body, Network Rail must act reasonably in any event.</p>	<p>The Applicant has accepted the requirement to provide an uncapped indemnity and to compensate for certain known economic losses but has sought to understand its potential liability for economic losses of train operators by requiring Network Rail to confirm the existence and potential extent of the liability in advance. Wording has been included in paragraph 14 of the draft protective provisions in the dDCO to inform the Applicant of that potential liability. This will enable the Applicant to procure insurance to cover such losses. The Applicant is not proposing that full copies of the agreements with train operators are provided, just details of the relevant terms.</p> <p>The Applicant notes that the Examining Authority and the Secretary of State in the application for the Hinkley Connection considered the wording of the indemnity proposed by Network Rail and agreed that Network Rail's drafting was "<i>unduly onerous</i>" (paragraph 8.5.233 of the Examining Authority's Report) and approved the form of drafting which the Applicant is proposing. A similar approach was also adopted by the Secretary of State in the Keuper Gas Storage Order in relation to protective provisions for the benefit of Holford Gas Storage Limited.</p> <p>In respect of the obligation on Network Rail to mitigate its losses, the Applicant considers that this is an entirely reasonable provision and notes that similar obligations have been agreed with other statutory undertakers in the protective provisions in the dDCO (for example paragraph 11(5) of Part 3 in respect of Cadent Gas and paragraph 14 of Part 6 in respect of Anglian Water). The Applicant does not accept that there is any public interest argument that supports Network Rail's position that it should not be obliged to mitigate its losses.</p> <p>The Applicant's considers that the Applicant's proposed wording is reasonable and proportionate and provides Network Rail with sufficient protection.</p>

	Summary of Network Rail's Position	Applicant's Position
3.	Transfer of benefit	
3.1	<p>Network Rail requires 28 days notices of any proposed application to the Secretary of State to transfer the benefit of the Order so that Network Rail can consider any such application, make an assessment of risk and make representations to the Secretary of State on the suitability of any proposed transferee. Network Rail suggests that the likelihood of any notice being required is minimal.</p>	<p>The Applicant considers that 14 days is a sufficient period of time for Network Rail to be notified of any proposed transfer of benefit of the Order. It is for the Secretary of State to decide whether the proposed transferee is suitable, not Network Rail. The Applicant notes that any transferee would need to be licensed under the Electricity Act 1989 in order to operate the onshore cables and the suitability of the proposed transferee would have been assessed as part of the licence application procedure.</p> <p>The Applicant does not agree that this provision is unlikely to occur as the Applicant has a statutory obligation to transfer the ownership and operation of the transmission assets to an OFTO. The Applicant does not consider it necessary or appropriate for Network Rail to delay this statutory process any longer than 14 days.</p>
4.	Arbitration	
4.1	<p>Network Rail has requested that the paragraph 20 of Part 5 is amended to remove the requirement for any extension of time to be reasonable. Network Rail has also requested that the arbitrator be bound to agree any extension of time.</p>	<p>The Applicant understands that Network Rail is comfortable with the arbitration drafting in principle and that paragraph 20 of Part 5 is substantially agreed. The Applicant notes that Network Rail has amended paragraph 20 to remove the requirement for any extensions of time to be reasonable. The Applicant considers that it is only appropriate for the Applicant to be compelled to agree to an extension of time if that extension of time is reasonable. This is to ensure that there are no unreasonable or unnecessary delays to the delivery of Hornsea Three.</p> <p>The Applicant does not consider that it is necessary to include a provision for the arbitrator to be obliged to agree any extension of time. Paragraph 5(3) of Schedule 13 already requires the arbitrator to approve any extensions of time agreed by the parties provided that they are acceptable.</p>