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Dyddiad / Date: 8th September 2016

Giles Scott
Head of Energy Infrastructure Planning and Coal Liabilities
Department for Business, Energy and Industrial Strategy

(BY E-MAIL)

Dear Mr. Scott

Planning Act 2008 and The Infrastructure Planning (Examination Procedure) Rules 2010

Application by Western Power Distribution (South Wales) plc ("the Applicant") for an Order granting Development Consent for the Brechfa Forest Connection project

REQUEST FOR COMMENTS FROM THE APPLICANT AND CARMARTHENSHIRE COUNTY COUNCIL ON THE APPLICATION FOR THE PROPOSED BRECHFA FOREST CONNECTION PROJECT

I refer to your letter dated 18th August 2016 regarding the above and your subsequent correspondence dated 25th August allowing an extension of time for the submission of information.

The Council notes your request for further clarification and information in relation to permitted development rights. Before providing you with the Council's position, it is important to reiterate the joint opinion held by WPD and ourselves that in the circumstances of the present case the undergrounding is physically, functionally and in our view legally part of the project and thus part of the NSIP for the purposes of the Planning Act 2008. You will already have a copy of our joint opinion with WPD on this matter but for completeness it is appended to this letter.

Turning now to the information you have requested and the Council's response:

The Secretary of State requests that Carmarthenshire County Council clarifies whether it considers that the installation and maintenance of the underground section would be within the Applicant's permitted development rights if the Applicant acquired the land in question (for example, if a decision was taken by the

Secretary of State not to include consent for the underground section in any DCO that may be granted, but any compulsory acquisition powers required in relation to the underground section were included in the DCO).

It is the Council's view that the installation and maintenance of the underground section of the electricity line would be within the Applicant's permitted development rights¹ providing they acquired the land in question. Notwithstanding this there may be other necessary infrastructure associated with the underground line e.g. cable sealing end compounds, pole stays and foundation blocks which would not be permitted development, as the works permitted by Part 17, Class G(a) are limited to "shafts, tunnels, feeder or service pillars, transforming or switching stations and chambers".

The definition of 'electric line' in s.64(1) Electricity Act 1989, which is applied for the purposes of Class G by paragraph G3, is very wide. The definition includes 'any apparatus connected to any such line for the purpose of carrying electricity...' and 'any wire, cable, tube, pipe or other similar thing (including its casing or coating) which surrounds or supports...or is installed in close proximity to or supported, carried or suspended in association with such line...' Whether or not objects (to use a neutral term) are PD or not will depend on what, precisely, they are and whether they fall within that broad definition. The Order does not distinguish between overhead and underground lines or other apparatus.

The Council would point out that there is no reason in law why works which are permitted development should not be included expressly within a DCO (i.e. included in the description of development in the Order as opposed to the general grant of planning permission by way of the GDPO), since they remain 'development' in accordance with s. 31 of the Planning Act 2008 and s. 55 of the Town and Country Planning Act 1990.

The Secretary of State will be aware that there is precedent for the inclusion of underground cabling within a DCO at Hinkley Point C in England and more relevant to Wales the Port Talbot Power DCO.

The Secretary of State also requests that Carmarthenshire County Council clarifies what it considers its role would be in relation to the exercise of any such permitted development rights.

The Council's role would be limited to dealing with any CLOPUD application that might be made in this regard and/or otherwise determining whether particular items fell within Class G(a) [i.e. within s.64 of the 1989 Act definition]. Since development falling within Class G(a) may be carried out without any prior notification process, it is true to say that the Council's consent would not be required to implementation of Class G rights. Furthermore it would have no control over the exact location of the underground line and no control over construction management and timing.

¹ Schedule 2, Part 17, Class G(a) of the Town and Country Planning (General Permitted Development) Order 1995 refers

If Work 2 is to be excluded from the draft DCO, the Council would wish to be consulted on an appropriate form of re-wording of Works 1 and 3 in Schedule 1.

I hope the above clarifies the Council's position.

Yours sincerely



Llinos Quelch
Head of Planning

Application by Western Power Distribution (South Wales) Plc

Brechfa Forest Development Consent Order

Joint Opinion

1. We are asked to advise on an issue that arises out of the operation of the Planning Act's requirements for Nationally Significant Infrastructure Projects (NSIPs) in Wales.
2. We are asked, in the context of an electricity transmission project to transfer electricity from Brechfa Forest West to Llandyfaelog in North Carmarthen to identify the development, which is or forms part of an NSIP.
3. In particular, we are asked to advise whether a short section of the overhead line project which has been placed underground to mitigate its visual impact properly forms part of the project for the purposes of the Planning Act 2008.
4. We are both of the view that in the circumstances of the present case, the undergrounding of part of the project does properly form "part of the NSIP" for the purposes of the Planning Act 2008.
5. Our reasons are set out below.
6. In both England and Wales, consent (by way of a Development Consent Order (DCO)) is necessary for a development, which is or forms part of a Nationally Significant Infrastructure Project (NSIP). The exact words of the statute are important. They provide:

"31. Consent under this Act...is required for development which is or forms part of a nationally significant infrastructure project." (emphasis added)
4. Development which is not part of the project cannot be consented under the Act in Wales. This is because for all practical purposes "associated development" cannot form part of a DCO in Wales but falls to be

considered by the local planning authority.

5. What is meant by the term NSIP is explained by s 14 of the Act. An NSIP means a “project which consists of any of the following:”. There are then identified a series of types of project.
6. One of the types of project identified is “the installation of an electric line above ground.” It is to be noted that s 14 seeks to define “projects” and not categories of “development”.
7. When s 14 and s 31 are read together, the Parliamentary intent becomes clear: a nationally significant “project” which consists of the installation of an electric line above ground **and/or** development which in reality forms **part** of that project requires consent under the Act.
8. The use of the term “project” in s 14 as opposed to simply nationally significant infrastructure “development” is deliberate and instructive. The Act uses the term “development” where that term is appropriate and gives it the same meaning as the Town and Country Planning Act.
9. Use of the term “project” clearly brings with it a meaning which is deliberately different to the term “development”.
10. The word project, an ordinary English word to be given its ordinary English meaning (even in Wales) brings with it the meaning of an holistic “enterprise which is carefully planned to achieve a particular aim.” (See OED).
11. In deciding whether “development” constitutes part of a project, it is thus first necessary accurately to identify the relevant project.
12. Once the project is properly identified, the questions to be asked are:
 - a. does the project constitute an NSIP?
 - b. is any identified development in reality part of that project?
13. The identification of the relevant project and its extent is primarily a matter of judgment for the decision-maker having regard to

ss14 and 31- subject to the usual principles of public law rationality and reasonableness. (see R (Redcar and Cleveland Borough Council v Secretary of State for Business Enterprise and Regulatory Reform and EDF Energy Limited) [2008] EWHC 1847 (Admin)).

14. This means that in each case, the identification of the project and its extent falls to be determined on its own particular facts. A case by case assessment is necessary.
15. In the particular circumstances of the present case however, at all material times there has been a unanimity of judgment as to the, nature and extent of the "Project"¹.
16. All relevant parties which have expressed a view have judged that the relevant project as a matter of fact and degree consists of the installation of an electricity line above ground between Brechfa West and the EE line at Llandyfaelog. The mitigation of that project's impact by the placing of a small part of the project underground has been seen to form an integral and necessary part of that overall project or planned enterprise. Particular weight should be given to the local planning authority's position on this matter because it otherwise would be the body with the authority to determine any undergrounding application.
17. We agree with the judgments referred to above and the reasoning behind those judgments.
18. Certainly those judgments are not unlawful. Indeed, in the particular circumstances of this project, it is difficult to comprehend a different judgment being made.
19. We would go so far as to say that an assertion that the undergrounding section did not in reality form part of the project in this case would result in an artificial and illogical splitting up of this project. This would in fact risk offending the very public law principles set out above.

¹ S55 PINS Checklist position on acceptance of application
CCC consistent position, agreed by NRW in topic based sessions
WG clear and reasoned response annexed to explanatory memorandum.

20. We are of this view for the following reasons.
21. The new enterprise here is the transmission of electricity from Brechfa West to Llandyfaelog. The project has been carefully planned, designed and assessed as a project, to achieve the purposes of that enterprise.
22. Originally this enterprise or project consisted of an entirely overhead electricity line but as a result of the pre-application consultation required by the Planning Act 2008 for NSIPs, a small proportion of the of the project was placed underground to mitigate the visual impact of the overhead line.
23. The enterprise or project did not of course alter as a result of this mitigation decision.
24. Rather, the Planning Act process had the effect of shaping the overhead line project in a way wholly consistent with the aims and objectives of the legislation and its associated Guidance Notes (to which decision-makers are required to have regard).
25. The electric lines which transmit the electricity from Brechfa West substation to Llantyfaelog will continue do so without interference or break. The short underground section is functionally and in engineering terms just as necessary to the transmission of electricity above ground as other physical elements of the project.
26. The project thus consists of the installation of an overhead line and its necessary mitigation which includes the placing of the overhead line underground for a short section of the project.
27. As such the project (as a whole) is an NSIP. The short underground section is physically, functionally and in our view legally part of that project.
28. No error of law would be disclosed by this conclusion.
29. This approach in the particular circumstances of the case has the additional factors to commend it.

30. First, this holistic approach in this case is most consistent with the wording of the Act and the key guidance. We have dealt with the content of the Act in short terms but a little more can and should be said here about this matter and the relevant guidance.
31. Section 31 is clear that a DCO can and must authorise “development which is or forms part of a nationally significant project.” (emphasis added) (see above)
32. The “or” in this sentence is important. It means that development which by itself falls outside of the immediate definition of an NSIP (in this case a project which consists of the “installation of an electric line above ground”) can nonetheless form part of the DCO if it in reality forms part of the relevant nationally significant infrastructure project.
33. Development involving the simple, physical installation of an electric line above ground is clearly caught by the relevant s 14 identification of an NSIP.
34. But one then has to ask the question as to whether in reality other development forms part of that project.
35. The electricity transmission line above ground in this case is physically attached to and forms part of the same transmission line as the short underground section of line. It would be artificial in these circumstances to suggest that the underground "development" which connects seamlessly to the electric line above ground was not part of the project for the purposes of s 31 of the Act. It clearly is.
27. By the same logic other development which was integral to or formed a necessary part of the installation of the electric line above ground and clearly formed part of that project such as sealing end compounds, pole stays, foundation blocks, etc, would form part of the project and also require to be the subject of a DCO.
28. Without such works, the overhead element of line would simply be incapable of carrying electricity at all, the project would not exist.

29. This approach is reflected in the content of the relevant policy statement. National Policy Statement EN-5. Para 1.2.1 of the Guidance provides:

“This National Policy Statement (NPS), taken together with the Overarching National Policy Statement for Energy (EN-1), provides the primary basis for decisions taken by the Infrastructure Planning Commission (IPC) on applications it receives for electricity networks infrastructure.”

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30. The National Policy Statements have a very particular role and status in the determination of Planning Act applications.
31. Footnote 13 of the document is very clear. Under the heading of “Undergrounding”, it provides: **“Proposed underground cables do not require development consent under the Planning Act, but they may form part of a scheme of new infrastructure which is the subject of an application under the Act, and requirements or obligations regarding undergrounding may feature as a means of mitigating some of the adverse impacts of a proposal which does require and is granted development consent.”**
32. This identification of the clear potential for underground cables to “form part of a scheme of new infrastructure” fits clearly with the words of the statute and the facts of this case. If underground cables are capable of forming part of an electricity network project for the purposes of EN-5, then we cannot conceive of a case where this potential more clearly becomes a reality than this.
33. Second, this holistic approach is consistent with the overall aims and objectives of the Act.
34. Thus, (in Wales as well as in England), it is the underlying intention of the Act that the approach to significant infrastructure projects should be streamlined. It would be inconsistent with this aim for elements of a proposal which are so integral to the project and form its essential mitigation to be excluded from the DCO provisions and to require an entirely separate consenting regime.
35. Third, the alternative argument, that it is solely the overhead line development which constitutes the NSIP, involves in the circumstances

of this case, doing violence to the proper meaning of the term "project".

36. It involves the logical conclusion that each element of overhead line would by itself constitute a separate NSIP even though each element of overhead line (and the underground links between them) was clearly part of a wider transmission project or enterprise or project. Further each element of overhead line (each mini "project") would be wholly incapable of transmitting electricity anywhere, much less as part of an overall project or enterprise.
37. In our opinion, this is not what Parliament intended. The better approach would be to identify the true extent of the project as a matter of fact and judgment having regard to s 14 of the Act and then to ask whether there is other development which in reality forms part of that project or its mitigation.
38. If there is such development which is integral to the project and or forms part of it or its mitigation then it can and should be the subject of a DCO application.
39. That is the case here in relation to the underground section of the project.
40. This opinion does not alter if the additional two spans of undergrounding sought by officers of the Council as part of their submissions to the hearings are accepted.
41. Indeed, the ability of the Examining Authority and Secretary of State to consider such suggested alternatives to the project as part of the Planning Act jurisdiction underscores the appropriateness and rationality of considering the nature and extent of the project and its mitigation as part of the Planning Act consideration.
42. This case is distinguishable from the Secretary of State's decision in "Hirwaun" because the project there was the construction of a generating station. The Secretary of State decided as a matter of fact and judgment that a gas feeder pipe and electrical connection did not fall within the statutory term "*generating station*"; she accordingly

deleted these elements from the Order. The reasoning in that case is simply not applicable to this case where a short element of undergrounding is an integral element of mitigation for the overhead line project as a whole.

RUSSELL HARRIS QC Landmark Chambers Counsel for the Applicant

MORAG ELLIS QC Francis Taylor Buildings Counsel for Carmarthenshire County Council.

15 December 2015