

PLANNING ACT 2008

INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE) RULES 2010

APPLICATION FOR THE TRITON KNOLL ELECTRICAL SYSTEM DRAFT DEVELOPMENT CONSENT ORDER AND DEEMED MARINE LICENCE (Ref. EN020019)

Written representation of Network Rail Infrastructure Limited (Unique reference number 10031830)

Network Rail owns and operates Great Britain's railway network and has statutory and regulatory obligations in respect of it. Network Rail is a statutory undertaker in respect of its railway undertaking. Network Rail lodged a relevant representation (No.136) on 13th July 2015.

Network Rail is also an affected land owner; its land and rights are listed within the Book of Reference with Land references 18/07, 18/08, 22/12, 22/14 and 43/12.

The draft Order includes powers at Article 17 and Schedule 5 to compulsorily acquire rights in Network Rail land, together with other powers that could affect Network Rail land. Network Rail objects to any proposed compulsory acquisition of its land or any rights in, over or under its land. The proposed cable route for the project interfaces with the railway in three separate locations where a cable crosses under the railway.

Subject to the proper protection of Network Rail's statutory undertaking, Network Rail does not object in principle to the making of the DCO. However at the time of submission of this document Network Rail's interests are not adequately protected and its objection is therefore sustained. Network Rail's objection is limited to those parts of the proposed DCO affecting its operational land and described in this representation.

The rights required over Network Rail land will require the grant of easements and there may be other legal agreements required to protect the network. In particular, it may be necessary for the promoter to enter into separate asset protection agreements for the specific works required.

Network Rail has been in discussions with the promoter and provided technical clearance approval in principle on 2 February 2015 for the three proposed underground cable routes.

Network Rail has provided the Promoter with a draft standard form of easement which it is able to grant to the promoter. This incorporates appropriate protections for the network and provides the necessary rights to lay and maintain the cables in the specified locations within the proposed Order Limits. This is put forward in substitution for the rights and the restrictive covenant the promoter seeks to acquire, as set out in Schedule 5 to the draft Order, which are not acceptable and do not provide the necessary protection that Network Rail require.

Protective Provisions

Network Rail has standard protective provisions which it requires to be included in any development consent order which is likely to affect its railway undertaking. Although the precise detail of protective provisions needs to be agreed on each occasion, a useful starting point is the protective provisions contained in the A160/A180 (Port of Immingham Improvement) Development Consent Order 2015.

Network Rail's protective provisions are designed to balance the needs of the Promoter against the operational requirements of Network Rail's undertaking. The protective provisions deal with issues such as the restriction of the powers of the Promoter to exercise powers of compulsory acquisition except with the consent of Network Rail, the approval of plans, the carrying out of protective works and damage and obstruction arising from the works.

The Draft DCO does contain protective provisions in favour of Network Rail but these have not yet been agreed between the parties. As such, unless and until such time as protective provisions are included in the DCO in a form approved by Network Rail, Network Rail must sustain its objection to

the making of the DCO. Network Rail is continuing discussions with the promoter on the provisions and will press, both in representations and in submissions at hearings, the absolute need for appropriate protective provisions to be included in a DCO where Network Rail's operational infrastructure is affected by the proposed Order.

In particular, Network Rail has requested that paragraph 4(1) of the Protective Provisions for Network Rail set out in Part 2 of Schedule 8 of the draft Order should also refer to the following articles in addition to Article 14, 25 and 35, namely Articles 12,13,17,18,19, 21, 26 and 28. It is imperative that Network Rail ensures the operational safety of the network at all times and accordingly the promoter must be required to obtain the consent of Network Rail to exercise any of the powers conferred by the draft Order which would allow the promoter to gain access to or acquire any rights in Network Rail land. It will be noted that the protective provisions contained in the A160/A180 (Port of Immingham Improvement) Development Consent Order 2015 include this drafting.

Compulsory Acquisition of New Rights over Statutory Undertakers' Land

Section 127 contains provisions conveying special protection for statutory undertakers' land by introducing a special test which must be applied by the Secretary of State before powers of compulsory acquisition are granted. Under Section 127(1):

- (1) *This section applies in relation to land ("statutory undertakers' land") if—*
- (a) *the land has been acquired by statutory undertakers for the purposes of their undertaking,*
 - (b) *a representation has been made about an application for an order granting development consent before the completion of the examination of the application, and the representation has not been withdrawn, and*
 - (c) *as a result of the representation the Secretary of State is satisfied that—*
 - (i) *the land is used for the purposes of carrying on the statutory undertakers' undertaking, or*
 - (ii) *an interest in the land is held for those purposes.*

It is clear that Section 127 of the 2008 is engaged in this case. Statutory undertaker is defined in Section 127(8) of the 2008 Act by reference to Section 8 of the Acquisition of Land Act 1981. Section 8(1)(a) of the 1981 Act includes: "*any person authorised by any enactment to construct, work or carry on... any railway... undertaking*". Network Rail is authorised to carry on the railway undertaking. Network Rail has made a representation in respect of the Application. The land in question is part of the London North Eastern route and as such, it is clear that it is being used for the purposes of carrying on Network Rail's undertaking.

Under Sections 127(5) and (6) of the 2008 a development consent order "*may include provision authorising the compulsory acquisition of a right over statutory undertakers' land by the creation of a new right over land only to the extent that the Secretary of State is satisfied*" that one of the following is satisfied:

- (6) *...that the nature and situation of the land are such that—*
- (a) *the right can be purchased without serious detriment to the carrying on of the undertaking, or*
 - (b) *any detriment to the carrying on of the undertaking, in consequence of the acquisition of the right, can be made good by the undertakers by the use of other land belonging to or available for acquisition by them.*

Sections 127(5) and (6) apply to the acquisition of new rights as more specifically set out in Schedule 5 to the draft Order which applies to Network Rail land.

The Draft DCO contains a number of powers to acquire rights which are subject to this test, including Articles 12 (discharge of water), 13 (authority to survey and investigate land), 17 (compulsory acquisition of rights), 28 (statutory undertakers), and 35 (felling and lopping of trees and removal of hedgerows). In view of the fact that Network Rail has not yet agreed protective provisions to control the access to its land, it considers that these powers cannot be taken without the potential for serious detriment to the carrying on of its railway undertaking and it therefore objects to these powers applying to the Network Rail land.

Further, Network Rail cannot accept the imposition of a restrictive covenant on its land (as set out in Schedule 5 to the draft Order) as this would restrict their ability to gain access to its own land to properly ensure the safe operation of the network at all times.

Section 138 of the 2008 Act

Section 138 contains a special test which must be applied by the Secretary of State before powers of compulsory acquisition are granted which would extinguish a right of way, or a right of laying down, erecting, continuing or maintaining apparatus on, under or over land where that right is vested in a statutory undertaker for the purposes of their statutory undertaking. Under Section 138(4):

(4) The order may include provision for the extinguishment of the relevant right, or the removal of the relevant apparatus, only if the Secretary of State is satisfied that the extinguishment or removal is necessary for the purpose of carrying out the development to which the order relates.

The Draft DCO contains a number of powers to extinguish rights, including Articles 18 (private rights over land) and 28 (statutory undertakers).

Although the Statement of Reasons makes reference to Section 138, no justification has been made out for the removal of any of Network Rail's rights in its land. Accordingly no case has been made out that the extinguishment of Network Rail's rights is necessary to allow the development to proceed and the powers which are being sought in relation to Network Rail's interests in its land should not be granted.

Bond Dickinson LLP
5th October 2015