

SP MANWEB



Reinforcement to the North Shropshire Electricity Distribution Network

Deadline 6 Submission

Application Reference: EN020021

Note in Relation to Statutory Undertakers

SP MANWEB

**Reinforcement to the North Shropshire Electricity
Distribution Network**

Note in Relation to Statutory Undertakers

July 2019

PINS Reference EN020021

QA Box

Author		SP Manweb	
Planning Inspectorate Application Reference		EN020021	
Date			
Version	Status	Description/Changes	
19/07/2019	1	Final	Submitted to PINS (Deadline 6)

SP Manweb plc, Registered Office: 3 Prenton Way Prenton CH43 3ET. Registered in England No. 02366937

CONTENTS

1. Introduction.....1
2. Definitions in the dDCO.....1
3. Relevant Articles in the DCO and their Interrelationship.....13

1. INTRODUCTION

- 1.1. This is SP Manweb's note on statutory undertakers ("SU") and the relationship between Articles 8, 18, 21, 29 and 30 in the draft Development Consent Order ("dDCO") which all address (at least in part) statutory undertakers.
- 1.2. Where it comes to statutory undertakers, the provisions of a development consent order (and, in particular, any protective provisions) are designed to strike a balance in the overall public interest between the competing needs of public authorities and similar organisations that have an interest in the same land or infrastructure.

2. DEFINITIONS IN THE dDCO

- 2.1. Article 2 of the dDCO defines SUs to mean *"any person falling within section 127(8) of the 2008 Act (statutory undertakers' land) and a public communications provider as defined in section 151 of the 2003 Act [the Communications Act 2003] (interpretation of Chapter 1)."*
- 2.2. Section 127(8) provides:

"In this section— "statutory undertakers" has the meaning given by section 8 of the Acquisition of Land Act 1981 (c. 67) and also includes the undertakers—

(a) which are deemed to be statutory undertakers for the purposes of that Act, by virtue of another enactment; (b) which are statutory undertakers for the purposes of section 16(1) and (2) of that Act (see section 16(3) of that Act)."
- 2.3. Section 8 of the ALA 1981 is entitled "Statutory undertakers" and provides in so far as relevant to this scheme:

"(1) In this Act, unless the context otherwise requires, "statutory undertakers" means—

(a) any person authorised by any enactment to construct, work or carry on—

(i) any railway, light railway, tramway, road transport, water transport, canal or inland navigation undertaking...

- 2.4. An example of the operation of section 127(8)(a) is a holder of a licence under the Electricity Act 1989. Paragraph 2(2) of Schedule 16 to the Electricity Act 1989 provides:

*“(2) A licence holder who is entitled to exercise any power [powers of compulsory purchase] conferred by Schedule 3 to this Act shall be deemed to be a statutory undertaker and his undertaking a statutory undertaking for the purposes of the following enactments, namely—...
(g) the Acquisition of Land Act 1981...”*

- 2.5. Section 16 of the Acquisition of Land Act 1981 (“the ALA 1981”) is not relevant to this scheme.

Public communications provider

- 2.6. Section 151 of the Communications Act 2003 (“the 2003 Act”) provides:

“public communications provider” means—

(a) a provider of a public electronic communications network;

(b) a provider of a public electronic communications service; or

(c) a person who makes available facilities that are associated facilities by reference to a public electronic communications network or a public electronic communications service”

- 2.7. A “public electronic communications network” means “*an electronic communications network provided wholly or mainly for the purpose of making electronic communications services available to members of the public*” and “*public electronic communications service*” means “*any electronic communications service that is provided so as to be available for use by members of the public.*”
-

- 2.8. By virtue of section 32 of the 2003 Act “electronic communications network” means:

“(1) (a) a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description; and

(b) such of the following as are used, by the person providing the system and in association with it, for the conveyance of the signals—

(i) apparatus comprised in the system;

(ii) apparatus used for the switching or routing of the signals;

(iii) software and stored data; and

(iv) (except for the purposes of sections 125 to 127) other resources, including network elements which are not active.

(2) In this Act “electronic communications service” means a service consisting in, or having as its principal feature, the conveyance by means of an electronic communications network of signals, except in so far as it is a content service.”

- 2.9. It is clear, therefore, that the term public communications provider may cover a wide range of bodies including private companies. This merely reflects how important public infrastructure is generally provided, through private companies. This applies across the communications and utilities sector generally.
- 2.10. Statutory undertakers and public communications providers are often treated in a like manner under the Planning Act 2008. For example, under section 138 a development consent order may include provision for the extinguishment of a statutory undertaker’s or public communications provider’s 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.
- 2.11. These groups of bodies are often treated together because of the nature of their activities: the provision of important infrastructure in the public interest.

SP Manweb submit that there is no difference between a public communications provider and a 'traditional' statutory undertaker in this respect.

3. RELEVANT ARTICLES IN THE DCO AND THEIR INTERRELATIONSHIP

Article 8

- 3.1. This Article provides for exceptions to Article 7 (which grants the benefit of the Order to the Undertaker alone) and allows any or all of the benefit of the provisions of the Order and related statutory rights to be transferred to another person, with the consent of the Secretary of State, subject to exceptions.
- 3.2. Under Article 8(4) consent is not required where: (a) the transferee or lessee is a statutory undertaker; or (b) the transferee or lessee is a person who holds a licence issued under section 6(1) of the Electricity Act 1989; or (c) where the compensation provisions for the acquisition of rights or interests in land or for effects on land have been discharged or are no longer relevant. Strictly speaking it is not necessary to include (b) as (b) falls within (a) as defined.
- 3.3. The justification for these provisions is that in such cases, the transferee or lessee will either be of a similar financial and regulatory standing to the undertaker so as to protect the provision for compensation for rights or interests in land that are compulsorily acquired pursuant to the Order, or there are no outstanding actual or potential compulsory purchase claims.
- 3.4. In other words the justification relates to the ability to pay compensation as opposed to any particular experience in the development of infrastructure the like of which permitted by the development consent order. On this basis there is no need to distinguish between statutory undertakers and a public communications provider.

Article 18

- 3.5. This Article gives the undertaker power to create and acquire new rights and impose restrictions for the purposes of the authorised development.

- 3.6. Paragraph (1) provides that SP Manweb may create and acquire new rights and impose the restrictions described in the book of reference with the extent of this power being exercised over the land shown on the land plans.
- 3.7. Paragraph (2) provides that where the undertaker needs only to acquire rights over the land or impose a restriction, it shall not be obliged to acquire any greater interest in that land.
- 3.8. The ability to imposition of restrictions is necessary to ensure that it is not possible for anything to be done which would interfere with the authorised development. This approach has been adopted in orders made under the Transport and Works Act 1992 and is considered reasonable and appropriate in the context of the authorised development to restrict the use of land or airspace above or beneath the overhead electric line or underground cable.
- 3.9. Paragraphs (4) and (5) allow the undertaker to transfer to a statutory undertaker its power to create and acquire rights and to impose restrictions where required for purposes of diverting, replacing or protecting the apparatus of a statutory undertaker, subject to obtaining the consent of the Secretary of State.
- 3.10. The benefit of these sub-paragraphs is that they avoid possible delay and uncertainty by statutory undertakers being required to exercise their own powers of compulsory acquisition. For them to do so would be unnecessary given that the action taken would be no different than if the powers were created within this Order. There are many precedents for this approach. These include: The North Wales Wind Farms Connection Order; The National Grid (Hinkley Point C Connection Project) Order; and The Network Rail (Norton Bridge Area Improvements) Order 2014.

Article 21

- 3.11. This Article is based on a model provision and has the effect of suspending private rights and restrictive covenants over land in which the undertaker creates and acquires a right or imposes a restriction, whether compulsorily or by agreement.

- 3.12. This is an automatic suspension that although contingent on is distinct from the powers under Article 18. It is only relevant where the right in question survives the Article 18 compulsory purchase.
- 3.13. The suspension takes effect to the extent that the continuance of the rights would be inconsistent with an activity authorised by the Order.
- 3.14. The drafting departs from the model provision in that it relates to all rights/restrictions over land, not just rights of way, to ensure that any other rights that may exist cannot prevent the implementation or use of the authorised development. The Article generally follows the approach in the Rookery South (Resource Recovery Facility) Order 2011 (Article 17) and the M1 Junction 10a (Grade Separation) Order 2013 (Article 21) and the North Wales Wind Farms Connection Order 2016 (Article 23).
- 3.15. Paragraph (3) provides that there is an entitlement to compensation where loss is suffered as a result of the extinguishment or suspension of any private right or restrictive covenant.
- 3.16. Paragraph (4) disapplies the suspension in so far as it relates to rights of Statutory Undertakers. This recognises the important role of statutory undertakers and the services and infrastructure they provide. Automatic suspension is not warranted where the Statutory Undertaker's right may be important in the public interest. Article 29 addresses statutory undertakers separately. It provides similar (though not automated) powers but in the context of the protections afforded by Schedule 6.

Article 29

- 3.17. Article 29(1) gives effect to the protective provisions. It is appropriate to protect the apparatus of all the undertakings captured in Schedule 6, including public communications providers, given the obvious importance of such equipment to the functioning of the economy and society generally.
- 3.18. The genesis of Article 29(2) is the model provisions which provided:

“The undertaker may—

(a) acquire compulsorily the land belonging to statutory undertakers shown on the land plan within the limits of the land to be acquired and described in the book of reference;

(b) extinguish the rights of, remove or reposition the apparatus belonging to statutory undertakers shown on the [insert name] plan and described in the book of reference; and

(c) acquire compulsorily the new rights over land belonging to statutory undertakers shown on the [insert name] plan and described in the book of reference.”

- 3.19. Article 29(2) reflects the model provision save that it does not include paragraph (a) of the model provision as it is not relevant to this scheme. The model provision has also been amended so as to allow for the suspension of rights of a statutory undertaker (for example where land is being used temporarily under the order) as opposed to just extinguishment and the ability to impose restrictions over land belonging to a statutory undertaker. It is appropriate to include the ability to suspend given the automatic suspension under Article 21 is not applied.
- 3.20. This form of Article 29(2) has been included in a number of other development consent orders including the North Wales Wind Farms Connection Order and the Brechfa Forest Wind Farm Connection Order.
- 3.21. SP Manweb accept that the Article 29 overlaps with the powers granted under Article 18. In oral submissions at ISH2 on the dDCO, SP Manweb said that it would consider deleting Article 29(2)(a) as it overlapped with Article 18.
- 3.22. However, overlap existed in the model provisions and has been the case under numerous other development consent orders (including the above examples). It is understood that this form of article reflects both historic provisions under the Transport and Works Act 1992 and the separate protection afforded to statutory undertakers and public communications providers under section 138 of the Planning Act 2008.
- 3.23. It is submitted that there is, on reflection, no need to change this established practice and that it provides a degree of clarity in relation to the application of
-

powers of compulsory purchase in relation to statutory undertakers (and in the context of the particular protection under section 138 of the Planning Act 2008).

- 3.24. In light of section 138 of the Planning Act 2008, it is further clear that it is appropriate that Article 29(2) also covers electronic communications providers.

Article 30

- 3.25. This Article provides that persons who have to create a new connection following the exercise of powers under Article 29 may recover the costs of new connections from the undertaker. The Article was based on a model provision. It is designed to protect owners of property from interruption to services. It is specifically applied to both public utility undertakers and public communications providers as these are the bodies that provide infrastructure to properties.
- 3.26. It is appropriate to include communications provides in this protection given the importance of such equipment to occupiers of premises.