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Dear Mr Hudson

The Planning Act 2008 and the Infrastructure Planning (Examination Procedure) Rules 2010 - Rules 17 and 13

Application by SP Manweb for an Order Granting Development Consent for the Reinforcement to the North Shropshire Electricity Distribution Network

Update on negotiations to date with SP Manweb (“the Applicant”) ahead of Deadline 7

We wrote to you on 26th June 2019 setting out Network Rail Infrastructure Limited’s (“Network Rail”) concerns regarding the proposed closure of the Examination period by 31st July 2019. As the closing date for the Examination period has not at the date of this letter been confirmed, Network Rail are proceeding on the basis that the Examination period will end at Deadline 7 on Wednesday 31st July 2019.

I am writing now, on behalf of Network Rail, in advance of Deadline 7 to provide comments on the Applicant’s proposed final preferred Order and to set out Network Rail’s concerns with negotiations to date with the Applicant.

Network Rail detailed in its section 56 Representation in January 2019 the protections Network Rail require in order to be in a position to withdraw its objection to this application. These protections are the inclusion of full and proper protective provisions for Network Rail in the draft Order together with the settlement of a framework agreement, the required asset protection agreement and necessary property agreement so to properly and fully protect Network Rail’s statutory undertaking. Network Rail reiterated these requirements in the Statement of Common Ground with the Applicant dated 31st May 2019 which was submitted for the Deadline 4 submission. As stated in this Statement of Common Ground the protections required by Network Rail had yet to be agreed by the Applicant. These protections remain to be agreed to Network Rail’s satisfaction as of the date of this letter.

I set out below the current status of discussions regarding the required Protective Provisions and related agreements in order to illustrate the disappointing progress made with the Applicant.

The Protective Provisions

Network Rail’s standard, and well precedented in DCO Protective Provisions, were sent to the Applicant on 28th January 2019 for review and comment. Despite chasing, Network Rail only received the Applicant’s substantive comments on the Protective Provisions on 5th July 2019.

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Compulsory Acquisition

Network Rail's overriding objection with the marked up Protective Provisions received from the Applicant is the deletion of the protective provisions from the compulsory acquisition powers proposed to be included in the Order over Network Rail operational railway. As statutory undertaker with statutory obligations to ensure the safe operation of the railway, Network Rail cannot agree to the Applicant being granted the unfettered ability to exercise compulsory acquisition powers over the operational railway. Such a position is not acceptable to Network Rail as it would create a serious detriment to the continued safe, economic and efficient operation of the operational railway. As such the protection from compulsory acquisition of Network Rail's land and interests must be included in the Protective Provisions.

The terms of Network Rail's standard Protective Provisions including protections against the compulsory acquisition of Network Rail's operational railway land, have been widely accepted and incorporated in multiple DCOs so it is not clear why the Applicant has taken six months to provide comments and is unwilling to agree to the provisions provided.

As stated in Network Rail's section 56 Representation, any temporary possession of, or acquisition of permanent rights over, Network Rail operational land can only be granted with Network Rail's consent. Any such use of the operational railway must only be permitted in accordance with the statutory requirements imposed on Network Rail as the operator of the railway network and subject to all necessary requirements to ensure the safe, economic and efficient operation of the railway. In addition, any acquisition of rights over the operational railway must be subject to Network Rail's land clearance process, which is imposed on Network Rail by its Network Licence. This process includes internal consultation with railway stakeholders and the ORR (Network Rail's regulator).

The Applicant asserts that restrictions on their compulsory purchase powers would prevent the development going ahead. However, Network Rail has proposed suitable alternatives to facilitate the Applicant's erection of over ground cables, supporting wooden poles and undergrounding cables by provision of a wayleave agreement which grants the necessary rights of access and management required by the Applicant.

Indemnity for Costs

The Applicant stated in its Deadline 6 submission that Network Rail require an indemnity that extends to consequential loss. To clarify, the Applicant has inserted provision in the Protective Provisions that excludes consequential loss and excludes liability as a result of any negligence of Network Rail. Network Rail does not agree to deviation from its well precedented Protective Provisions unless required by exceptional circumstances. The Applicant has not provided justification for these additions. The specific protections required by Network Rail are included in numerous Orders, including The Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014.

Planning Act 2008

In relation to the acquisition of rights only, section 127 (5) and (6) of the Planning Act 2008 apply. As you are aware compulsory acquisition of rights over statutory undertaker's land can only be acquired if the Secretary of State is satisfied there will not be any serious detriment to the undertaker's carrying on of its undertaking. Network Rail strongly maintains that the works proposed to erect wooden poles on either side of the operational railway, the over sailing of the operational railway by overhead electricity cables and the undergrounding of electricity cables directly adjacent and parallel to the operational railway will impede Network Rail's ability to ensure the continued safe, efficient and economical operation of the operational railway. As such Network Rail requires robust Protective Provisions and protections in additional agreements as discussed further below.

Framework Agreement

The first draft of the Framework Agreement was sent to the Applicant on 15th March 2019. The Applicant's first substantive response to the Framework Agreement was on 5th July where the Applicant asserted that the Framework Agreement was not required and there would be no benefit to the Applicant in discussing or entering a Framework Agreement.

The Applicant's response at this late stage is frustrating and disappointing. Network Rail strongly disagree that a Framework Agreement is not required to manage the direct interface this proposal will have with the operational railway. The Framework Agreement is fundamental to collate and govern the following into one document:

- 1. Protective Provisions -** Network Rail's required Protective Provisions (as discussed above) are to be appended to the Framework Agreement and provision is made in the Framework Agreement that these Protective Provisions will be incorporated in the Order or deemed to apply.
- 2. Existing Rights-** Network Rail must retain its existing rights in land and any unknown existing rights in operational railway land. Provision is made in the Framework Agreement for this retention which is well precedented in such agreements.
- 3. Wayleave Agreement-** The form of a wayleave agreement (to be entered into pursuant to an existing master wayleave agreement between the parties) is currently being negotiated between the parties to regulate the grant of required rights from Network Rail to the Applicant. Network Rail proposes to append this to the Framework Agreement and set out how changes may be made, if necessary, to the wayleave agreement once the Order is made. The inclusion in the Framework Agreement of the requirement to enter into this wayleave agreement more than adequately addresses the Applicant's concerns regarding securing the rights it requires.
- 4. Costs and Indemnity-** As the Applicant has not provided an agreed costs undertaking for costs Network Rail has incurred as a direct result of this DCO application, Network Rail has deemed it necessary to include provision for costs and indemnity. But for the DCO application, costs would not have been incurred by Network Rail. In addition, as a publicly funded body Network Rail is not funded to cover such costs, whilst it is also under a duty to minimise any costs which ultimately fall to the taxpayer.
- 5. Relationship of the Parties-** The Framework Agreement also contains various clauses to govern the relationship between Network Rail and the Applicant, namely co-operation, confidentiality, dispute resolution, notices to be served, rights of third parties, variation, negligence and termination. All of these provisions are necessary in order to ensure both parties are protected during the construction of the proposed works. It is unclear to Network Rail why the Applicant would not agree that such provisions are beneficial.
- 6. Asset Protection Agreement-** As the proposed project will have a direct interface and impact with the operational railway it is imperative for the Applicant to enter an asset protection agreement to regulate the construction of works, which in the absence of

such regulation would have a detrimental effect on the safe, economic and efficient of the railway. The requirement to enter into such an asset protection agreement is therefore provided for in the Framework Agreement. Further information is provided in the section below.

Asset Protection Agreement

The Applicant also confirmed to Network Rail only on the 5th July 2019 that they did not consider an asset protection agreement necessary due to their assertion that there will be limited interaction between the project and Network Rail's operational railway. Network Rail however, strongly disagrees with this comment.

The proposed project includes works to construct overhead electricity cables over the operational railway (Shewsbury to Chester Line), erect wooden poles either side of the operational railway and to underground electricity cables directly adjacent and parallel to this operational rail. Network Rail is firmly of the view that these proposed works are significantly close in location and disruptive nature to the operational railway so to require an asset protection agreement. It is not logical to assert that the construction of a third party electricity works over and adjacent to an operational railway represent a 'limited interaction'.

Asset protection agreements are always required by Network Rail in such circumstances and are well precedented to ensure the appropriate and necessary technical, engineering and safety requirements for working on, over or near Network Rail's operational railway. Due to the location of the Applicant's proposed works, Network Rail requires an asset protection agreement in order to carry out its statutory duty.

In addition, Network Rail is aware from the Applicant's Deadline 6 submission, that they are entering into asset protection agreements with other statutory undertakers. It is therefore unclear why the Applicant is unwilling to discuss the terms of an asset protection agreement with Network Rail when the proposed works would directly impact the operation of the railway (and provision of passenger services) and therefore prevent Network Rail fulfilling its statutory obligations.

Network Rail's Requirements

Whilst Network Rail was pleased to note the Applicant included Protective Provisions for the protection of Network Rail in the draft Order submitted with the application, Network Rail requires the inclusion of standard and well precedented Protective Provisions. Due to the nature and proximity of the proposed works to the operational railway it is not credible for the Applicant to assume there would be no "*serious detriment*" to Network Rail's undertaking. Network Rail therefore requires its full Protective Provisions to be included in any made Order.

For the reasons set out above, Network Rail considers a Framework Agreement to be the most effective way of; agreeing the inclusion of Protective Provisions required by Network Rail, asset protection agreement, providing for the grant of rights through a wayleave agreement, providing Network Rail with the comfort of retaining its existing rights, providing for the recovery of Network Rail costs and governing the relationship between the parties.

As previously stated in the section 56 representation, Network Rail does not object to the project in principle. However Network Rail is under a statutory duty to protect the operational railway and associated railway infrastructure. Discussions to date with the Applicant have been slow and disappointing. Network Rail, accordingly, remains unsatisfied that the Applicant's proposals adequately provide the protections Network Rail requires for such projects with a direct impact on operational railway. Network Rail therefore must maintain its objection to the project.

Issue Specific Hearing

In light of the points raised above and recent communications with the Applicant, Network Rail respectfully suggests that an Issue Specific Hearing would be the most appropriate method of presenting Network Rail's concerns and requirements to the Examining Authority. As the closing date for the Examination period has not been confirmed, Network Rail therefore requests an Issue Specific Hearing to be scheduled before the Examining Authority officially closes the Examination period.

Yours sincerely

Jessica Craven
Senior Associate for
Eversheds Sutherland (International) LLP