

ScottishPower Renewables' response to the Examining Authority's request for further information dated 22 July 2019 in respect of the A30 Chiverton Cross to Carland Cross DCO

1. Introduction

- 1.1 This document provides a response to each of the questions directed to ScottishPower Renewables (SPR) within the Examining Authority's request for further information dated 22 July 2019 in respect of the A30 Chiverton Cross to Carland Cross DCO (the A30 Scheme).

2. Update on position of parties

- 2.1 SPR and the Applicant are continuing to engage in respect of the A30 Scheme in order to find a solution to mitigate the impacts that the Scheme is likely to have on SPR's Carland Cross Wind Farm.
- 2.2 Further to our submission on 4 July at Deadline 6, both parties have continued to make positive progress towards resolving matters however due to the complexities involved the legal agreement between the parties has not yet been finalised and therefore we would request that the draft protective provisions which SPR submitted at Deadline 6 are included in the DCO for the protection of SPR's Carland Cross Wind Farm.

3. Q4.5.5: Please indicate your position in relation to whether or not you are a statutory undertaker.

- 3.1 It is SPR's position that SPR is a statutory undertaker for the reasons set out below.

Definition of "statutory undertaker"

- 3.2 The Planning Act 2008 (the 2008 Act) contains two different definitions of "statutory undertaker".
- 3.3 The first, which appears in a number of provisions including Section 138 (Extinguishment of rights, and removal of apparatus, of statutory undertakers etc.) defines "statutory undertakers" as:

"persons who are, or are deemed to be, statutory undertakers for the purpose of any provision of Part 11 of TCPA 1990."

- 3.4 Paragraphs (6) and (7) of Section 262 in Part 11 of the Town and Country Planning Act 1990 (the TCPA 1990) provide the following definition of "statutory undertakers":

"(6) Any holder of a licence under section 6 of the Electricity Act 1989 shall be deemed to be a statutory undertaker and his undertaking a statutory undertaking—

(a) for the purposes of the provisions mentioned in subsection (7)(a), if he holds a licence under subsection (1) of that section;

(b) for the purposes of the provisions mentioned in subsection (7)(b), if he is entitled to exercise any power conferred by Schedule 3 to that Act; and

(c) for the purposes of the provisions mentioned in subsection (7)(c), if he is entitled to exercise any power conferred by paragraph 1 of Schedule 4 to that Act.

(7) The provisions referred to in subsection (6) are—

(a) sections 55, 108(3), 139 to 141, 143, 148, 236(2)(a), 237, 245, 253, 263(1) and (2), 264, 266 to 283, 288(10)(a), 306, 325(9) and 336(2) and (3), paragraph 18 of Schedule 1 and Schedule 13;

(b) sections 170(12)(b) and 238 to 241; and

(c) sections 247(4) and 257(2) and Schedule 14."

- 3.5 The sections of the TCPA 1990 which fall within Part 11 are sections 262 to 283 and therefore paragraphs (6)(a) and (7)(a) of section 262 are relevant for the purposes of the definition of "statutory undertakers" in Section 138 of the 2008 Act.
- 3.6 For the purpose of various provisions of Part 11 of the TCPA 1990, holders of a licence under section 6 of the Electricity Act 1989 are deemed to be a statutory undertaker.
- 3.7 It therefore follows that any holder of a section 6 licence shall be deemed to be a statutory undertaker under section 138 of the 2008 Act.

- 3.8 The second definition of “statutory undertakers” in the 2008 Act can be found in section 127 (Statutory undertakers' land). This section states that “statutory undertakers” has the meaning given by section 8 of the Acquisition of Land Act 1981 and also includes undertakers which are deemed to be statutory undertakers for the purposes of that Act, by virtue of another enactment.
- 3.9 Paragraph 2 of Schedule 16 of the Electricity Act 1989 states that a licence holder who is entitled to exercise any power conferred by Schedule 3 of the Electricity Act shall be deemed to be a statutory undertaker and his undertaking a statutory undertaking for the purposes of a number of specified enactments, including the Acquisition of Land Act 1981.
- 3.10 Schedule 3 of the Electricity Act 1989 sets out the compulsory acquisition powers of licence holders.

Reason why SPR is a statutory undertaker

- 3.11 SPR was granted an electricity generation licence under section 6(1)(a) of the Electricity Act 1989 on 1 March 2005 under its previous name of CRE Energy Limited. This licence remains in force.
- 3.12 SPR's generation licence did not have the compulsory purchase powers within Schedule 3 of the Electricity Act 'activated' when it was first granted in 2005. Standard licence condition 14 is the relevant condition which requires to be 'activated' for the compulsory purchase powers to apply.
- 3.13 In 2007 Ofgem issued a statutory direction under section 11A of the Electricity Act 1989 to modify standard licence conditions 14 and 15 of electricity generation licences. The effect of this modification was to switch these conditions on for all generation licensees.
- 3.14 As a result of this modification, SPR's electricity generation licence includes standard licence condition 14 making SPR a licence holder who is entitled to exercise powers conferred by Schedule 3 of the Electricity Act.
- 3.15 SPR is therefore a statutory undertaker under Part 11 of the TCPA 1990, and therefore under section 138 of the 2008 Act also. SPR is also deemed to be a statutory undertaker for the purposes of the Acquisition of Land Act 1981, and in turn, section 127 of the 2008 Act.

4. Q4.5.6: Please indicate the legal basis for protective provisions to apply if it is not accepted that you are a statutory undertaker in relation to this DCO application.

- 4.1 Whilst it is SPR's position that SPR is a statutory undertaker, in the event that this position is not accepted, the legal basis for protective provisions to apply to SPR can be found in Section 120 of the 2008 Act.
- 4.2 Section 120 prescribes those matters which may be provided for in an order granting development consent. Section 120 of the 2008 Act states at paragraphs (3) and (4):
- “(3) An order granting development consent may make provision relating to, or to matters ancillary to, the development for which consent is granted.*
- (4) The provision that may be made under subsection (3) includes in particular provision for or relating to any of the matters listed in Part 1 of Schedule 5.”*
- 4.3 Part 1 of Schedule 5 includes at paragraph 10:
- “The protection of the property or interests of any person.”*
- 4.4 Provision may therefore be made within a DCO for the protection of the property or interests of any person. This protection is not limited to statutory undertakers.
- 4.5 There are a number of DCOs that have granted protective provisions for private parties, including:
- 4.5.1 The Able Marine Energy Park Development Consent Order 2014 which granted protective provisions to Bethany Jane Ltd.
- 4.5.2 The East Midlands Gateway Rail Freight Interchange and Highway Order 2016 which granted protective provisions to Tarmac Aggregates Limited.

5. Q4.5.7: Please provide any comments on the suggested wording of the protective provisions set out in Appendix A to 8.27 Comments on Interested Party Submissions at Deadline 6 [REP7-012].

- 5.1 It is SPR's preference for the protective provisions proposed by SPR in its submission at Deadline 6 to be included within the DCO in the event that the order is granted.
- 5.2 With respect to the protective provisions set out in Appendix A to 8.27 Comments on Interested Party Submissions at Deadline 6 [REP7-012], SPR would make the following key comments:
- 5.2.1 Paragraph 3(4) only requires the undertaker to attempt to agree a resolution to any concerns SPR may have in respect of the documents provided to SPR in accordance with paragraph 3. This does not go far enough to protect SPR's position as it allows the undertaker to proceed without resolving SPR's concerns.
- 5.2.2 SPR requests that the words "are fit for purpose and" be inserted into paragraph 6(1)(d) after "realigned cables" to ensure that the realigned cables are fit for their required purpose.
- 5.2.3 SPR requests the deletion of "use reasonable endeavours to" from paragraph 8(2) to ensure that the protection provided to SPR under paragraph 8 continues following the adoption of the existing re-aligned A30.
- 5.2.4 The words "or operation" require to be added to paragraph 11(1) after "in consequence of the construction". The current drafting does not provide adequate protection to SPR in the event that SPR suffers loss as a result of the operation of the A30 Scheme. A number of the protections included within the protective provisions apply to the operational period and therefore it is imperative that paragraph 11 enables SPR to recover costs or be compensated for loss incurred during this period.

6. Q4.5.8 – If considered to be a private company, please indicate whether it would be appropriate to benefit from the other protections proposed in the DCO, including the Requirements, any additional measures that are agreed with HE and any right to compensation in the same way as any other party that is affected by the Scheme.

- 6.1 For the reasons set out in its response to Q4.5.6, SPR considers that there is a legal basis for including protective provisions in the DCO for both statutory undertakers and private organisations and SPR considers protective provisions to be the most appropriate way to protect SPR's position in the event that the DCO for the A30 Scheme is granted.
- 6.2 It is SPR's position that the inclusion of protective provisions would not prevent SPR from benefiting from other protection within the DCO (for example, compensation in the event that compulsory acquisition powers are exercised in respect of land in which SPR has an interest) and so it is considered that other protections within the DCO would apply to SPR to the extent that they are relevant, in the same way as they would apply to other parties that are affected by the A30 Scheme.
- 6.3 Our overall conclusion is that the protections within the DCO do not adequately protect SPR's Carland Cross Wind Farm and this is why SPR considers that specific protective provisions for the benefit of SPR are necessary.