

## **C.RO PORTS KILLINGHOLME LIMITED ("C.RO")**

## **EXAMINATION OF ABLE MARINE ENERGY PARK ("AMEP")**

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### **NOTE FOR COMPULSORY AQUISITION HEARING CONCERNING KILLINGHOLME BRANCH LINE**

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## **1 INTRODUCTION**

- 1.1 This Note has been prepared to assist the Panel - and other parties - for the purposes of the compulsory acquisition hearing on 16 - 18 October. It seeks to draw together the material before the Panel and to place that material firmly within the legal and policy framework which must inform the Panel's decision concerning Able Humber Ports Limited's ("Able") application to seek powers of compulsory acquisition over the Killingholme Branch Line ("the Railway").
- 1.2 It will be noted by the Panel that a similar Note has been prepared on behalf of C.GEN Killingholme Limited ("C.GEN") to summarise its case concerning the compulsory acquisition of the Railway. It must be emphasised that, whilst they are represented by the same advisors, solicitors and Counsel, C.RO and C.GEN are separate companies with separate interests and separate cases to advance to the Panel.

## **2 LEGAL AND POLICY FRAMEWORK**

- 2.1 Section 122 of the Planning Act 2008 provides, so far as material:

*“An order granting development consent may include provision authorising the compulsory acquisition of land only if the decision-maker is satisfied that the conditions in sub-sections (2) and (3) are met.*

*(2) The condition is that the land –*

*(a) is required for the development to which the development consent relates*

*...*

*(3) The condition is that there is a compelling case in the public interest for the land to be acquired compulsorily.”*

2.2 The relevant Guidance Note, “*Guidance related to procedures for compulsory acquisition*” issued by DCLG in February 2010 provides, so far as material, as follows:

*“19. Promoters must ... be prepared to justify their proposals for the compulsory acquisition of any land (or rights over land) to the satisfaction of the decision maker and will need to be ready to defend such proposals throughout the examination of the application. The following guidance indicates certain factors to which the decision maker must have regard it deciding whether or not to include provision authorising the compulsory acquisition of land in an order granting development consent...*

*...*

*[Concerning the section 122(2) condition]*

*24. The first criterion is the land is required for the development of which the development consent relates. For this to be met, the promoter should be able to demonstrate to the satisfaction of the decision maker that the land in question is needed for the development for which consent is sought. The decision maker should be satisfied, in this regard, the land be acquired is no more than is reasonably required for the purposes of the development.”*

*...*

*[Concerning the section 122(3) condition]*

*27. Compliance with one of the criteria in subsection (2) of section 122 is not, however, enough on its own. Under subsection (3), the decision maker must be satisfied that there is a compelling case in the public interest for the land to be acquired compulsorily.*

28. *For this condition to be met, the decision maker will need to be persuaded that there is compelling evidence that the public benefits that would be derived from the compulsory acquisition will outweigh the private loss that would be suffered by those whose land is to be acquired. Parliament has always taken the view that land should only be taken compulsorily where there is clear evidence that the public benefit will outweigh the private loss. This is reinforced by the condition in section 122(3).*

*[Concerning the balance of public interest against private loss]*

...

32. *There may be circumstances where the decision maker could reasonably justify granting development consent for a project while at the same time refusing to include in an order the provisions authorising the compulsory acquisition of the land or modifying these to reduce the area of land so affected. This could arise, for example, where the decision-maker is satisfied of the case for granting development consent but is not persuaded that all of the land which the promoter seeks to acquire compulsorily has been shown to be necessary for the purposes of the scheme. Or the decision maker may consider that the scheme itself should be modified in a way that affects the requirement for the land which would otherwise be subject to compulsory acquisition. Such scenarios could lead to a decision to remove all or some of the proposed compulsory purchase provisions from a development consent order.*

*[Concerning resource implications of the proposed scheme]*

33. *As stated above, any application for a consent order authorising compulsory acquisition must be accompanied by a statement explaining how it will be funded. This statement should provide as much information as possible about the resource indications of both acquiring the land and implementing the project for which the land is required. It may be that the project is not intended to be independently financially viable, or that the details cannot be finalised until there is certainty about the assembly of the necessary land. In such instances, the promoter should provide an indication of how any potential shortfalls are intended to be met. This should include the degree to which other bodies (public or private sector) have agreed to make financial contributions or to underwrite the scheme, and on what basis such contributions or underwriting is to be made."*

- 2.3 The following observations can be made about the legal and policy framework:
- 2.3.1 It is for the promoter of the scheme to justify in detail why the land sought to be compulsorily acquired is *necessary* for the scheme. Desirability or convenience are insufficient; the test is that the land is needed.
- 2.3.2 The amount of land to be acquired must be no more than is reasonably required for the purposes of the development.
- 2.3.3 Unless and until the test of necessity is met, the issue of a compelling case in the public interest does not even arise.
- 2.3.4 If it does arise, it arises as a separate condition. The necessity of acquiring the land is not, of itself, sufficient.
- 2.3.5 In the event that either of the statutory conditions are not met, the Panel has power to refuse the compulsory acquisition of land even if it is satisfied that the scheme overall should be granted development consent.

### **3 SUMMARY OF C.RO'S CASE IN OPPOSITION TO COMPULSORY ACQUISITION.**

3.1 Within the legal and policy framework set out above, C.RO's case may be summarised as follows:

3.1.1 On the basis of the materials currently before the Panel, Able have failed to demonstrate that there is any necessity whatsoever for them to acquire the Railway. That failure is sufficient to cause the refusal of its compulsory acquisition.

3.1.2 In the event the Panel is satisfied that the compulsory acquisition of the Railway is necessary, the Panel will need to consider whether or not the value of that acquisition to the public interest outweighs the harm which would be done by the acquisition of the Railway by Able. That harm extends not merely to the loss of private rights suffered by Network Rail but also includes the consequences for the operation of C.RO's land caused by the removal of a direct connection to the national railway network. The consequences for the operation of C.RO's port (which would, if consent was now being sought for it, qualify as a nationally significant infrastructure project ("NSIP")) are a matter of the public interest which must be firmly weighed in the balance. When that is done, it is plain that Able cannot meet the high threshold needed to establish a compelling case in the public interest.

#### 4 SECTION 122(2): THE NEED FOR THE ACQUISITION OF THE RAILWAY

##### **Able's purported justification in the documents before the Panel**

4.1 At paragraph 5.12 in the Statement of Reasons (December 2011) submitted with its application for AMEP, Able states that the Railway is to be acquired “*in order to allow the site to be operated as a whole*” . The Statement of Reasons then goes on to assert that the remainder of the track (i.e. that extending beyond the north-western boundary of its site) is also required “*so that the railway can be treated as a single unit*”. These assertions are the full extent of the justification in the Statement of Reasons.

4.2 In Response to the Panel’s first set of questions (June 2012), Able asserted in answer to question 46 that:

*“Network Rail has stated that if the line remains within the network and on its current alignment, grade separated crossings will be required to cross it. This is not reasonably practicable for the intended purpose of the site and is not essential for the site specific conditions, viz a freight only line where speed restrictions can be imposed without detriment to operations.”*

4.3 In Response to the Relevant Representations (June 2012), Able asserted, so far as material, that:

*“30.8 The Applicant considers that the alternative of retaining Network Rail infrastructure through the site would be a significant encumbrance to the efficient and cost-effective operation of the development; Network Rail has advised the applicant that in this event, there would need to be "a solution that bridges the existing Rail Network line". This is not a reasonably practicable solution for the end use of the site as a port.*

...

*30.15 The AMEP proposals have been broadly consulted upon in accordance with the statutory requirements... And the applicant intends that the public interest is best served by the development of AMEP as a coherent single port site with a private rail siding.*

30.16 *Whilst therefore, Network Rail has confirmed the applicant that it is no longer prepared to sell its land and infrastructure to the applicant, the case for retaining it is part of their operational network, as currently expressed, does not seem either compelling or to be in the public interest."*

4.4 In Comments on the Written Representations (August 2012), Able stated, so far as material, as follows:

*"29.5 AMEP will, if consented, provide a diverse manufacturing cluster for the burgeoning offshore wind turbine sector and as such the development will see the relatively frequent movement of large products and components around the site and therefore access across the existing railway line that the sector. These rail crossings are needed to move out going products and incoming raw materials to and from the new quay(s). For example, the site will require significant quantities of steel plate that could be supplied by TATA Steelworks at Scunthorpe and be transported by rail.*

...

*29.7 The rationale [for the acquisition] is to ensure the effective and safe management of the railway line that enables AMEP tenants to operate effectively, retaining the benefit of the line was being able to cross it at regular intervals. In this regard it is crucial to understand the nature of the manufacturing site proposed means that it produces very large and heavy units that need to be moved using specialist equipment that operate on flat ground. Private ownership of the line would unable proportionate arrangements regarding crossing points that reflect rail use and the (effective if not actual) speed limit. Thus, in private ownership level crossings can be used instead of the grade separated crossings necessary on Network Rail track that they say are necessary should the line remain under their direct management."*

4.5 In their Second Set of Questions, the Panel enquired:

*"... If the Killingholme Branch remains within the National Rail network is the development of the Marine Energy Park on the scale and extent proposed a viable proposition?"*

4.6 In Response (September 2012), Able indicated that they had a strong preference for at-grade crossings (level crossings) and that they would suffer operational and financial

disadvantages in the event that grade separated crossings (bridges) were required to be provided. Nevertheless, Able stated, so far as material, that:

“6.3 *The Applicant has never asserted that the development of AMEP is only viable if the Killingholme Branch is removed from the public rail network. Rather the applicant has made clear that "retaining Network Rail infrastructure through the site would be a significant encumbrance to the efficient and cost-effective operation of the development... The Applicant has further stated that bridge crossings of the railway are "not reasonably practicable for the end use of the site as a port".*

6.4 *In determining what alternatives are reason be practical, the applicant has considered what is possible and then made an assessment of what should be considered reasonable on a cost/benefit basis....*

...

6.10 *In conclusion therefore, **AMEP remains viable with whatever crossings are required**, but the construction of bridge crossings would give rise to: –*

- a. *Significant abnormal costs that are, given the evidence available to the Applicant, not reasonable. This, in turn, would be reflected in less competitive offers to prospective tenants.*
- b. *The footprint occupied by the bridge approaches would be significant, provide a constraint to traffic movement across the site and reduce the external storage areas available. Again this would result in a less attractive site to prospective tenants."*

(emphasis added)

#### **C.RO's response on need**

4.7 As to the Statement of Reasons, this is entirely deficient as a justification for the acquisition. It is wholly unclear what is meant by either of the assertions set out in paragraph 4.1 above. No explanation is provided as to why the site cannot be operated as a whole without the acquisition of the Railway. The Railway is already a single unit.

4.8 It is also to be noted that there is no suggestion that Able need to acquire the Railway in order to operate it as such.



- 4.9 This is the full extent of the justification provided in the Statement of Reasons.
- 4.10 As to the written representations provided by Able and set out as appropriate above, they make plain that the acquisition of the Railway is a matter of desirability and convenience, *not a matter of necessity*. The highlighted passage in the Response to the Panel's Second Set of Questions - “**AMEP remains viable with whatever crossings are required**” indicates clearly that there is no necessity to acquire the Railway. The fundamental statutory requirement that the acquisition be necessary cannot, even on Able's own representations, be made out.
- 4.11 Furthermore, insofar as Able's representations provide any justification for the acquisition, the relevant justification appears to be the need to move very large and heavy units across the Railway using specialist equipment that operates on flat ground. However, no details of the operations have been provided; this is perhaps unsurprising as no layout for the final form of AMEP has been provided. No detail of the location of units which might generate such transits of the Railway is available and there is no basis, from the wholly inchoate materials available, on which it could possibly be concluded that it is necessary for the development for the Railway to be compulsorily acquired.

## **Alternatives**

- 4.12 In the context of the conditions in Section 122 of the Planning Act 2008, as well as the criteria in the Guidance, Able is required to look at alternatives to compulsory acquisition. This includes examining how its proposals could (or could not) be modified, for example by building bridges or underpasses, or rearranging the layout of its development to have one bridge crossing accessed by gentle gradients, and/or diverting the Railway. Able has rejected the incorporation of bridges. The cost of these

(£5-10 million) seems small in the context of the overall cost of AMEP. Its justification for not considering bridges is that they might inhibit the layout of the site in future.

4.13 There is no evidence that Able has looked at alternatives. This would appear to be a result of it failing to consult properly. As a consequence, C.RO is being asked to give up its existing right to connect directly to the national railway network on the basis of a complete lack of any proper proposals. It is acknowledged that Able has offered skeleton heads of terms. However, these are inchoate. They lack the necessary detail, bearing in mind the practical concerns which will be considered in detail below. This is not an acceptable position. Until Able can explain why there is no feasible alternative, including whether its development can be redesigned, C.RO cannot agree to the proposed acquisition. There is no evidence that C.RO's use of the Railway would be properly protected.

4.14 The absence of any proper consultation - through which alternatives could have been properly explored, based on detailed proposals - has put both companies in a position where they are now being pressured to accept a solution that is detrimentally worse, and uncertain. This is not reasonable.

## **5 COMPELLING CASE IN THE PUBLIC INTEREST**

### **Absence of justification for acquisition of the Railway**

5.1 C.RO's primary case is that at no point has it been clear why Able needs to acquire the Railway at all. Indeed, as suggested above, materials submitted by Able itself make plain that there is no necessity to acquire. In the event, however, that the Panel takes a

different view, Able will still need to establish that there is a compelling case in the public interest for the acquisition.

5.2 Should it become necessary to consider that issue, the nature of the justification for the acquisition must be considered and weighed up against the harm that would be done by the acquisition. C.RO operates a ferry port which serves the national economic interest (and which would be an NSIP if it came forward for consent today). As such, the practical effect of the acquisition on C.RO's operations is a matter of the public interest which must be weighed in the balance.

5.3 C.RO could not agree to the removal of the Railway from the national network - or a grant of lease to Able - without understanding how this would be achieved in a way that is not detrimental to their rights. That in turn demands a rationale for the acquisition.

5.4 Accordingly, C.RO now turns to a consideration of various operational matters which suggest that Able are wholly unable to meet the threshold of a compelling case in the public interest.

## **6 OPERATIONAL MATTERS**

### **Summary**

6.1 C.RO needs to ensure that it retains a rail connection to its port. The need for rail transport to and from a port can arise at any time as a result of changes in the market (including fuel prices), or the legislative/policy regime. It should be remembered that

C.RO would constitute an NSIP under the Planning Act 2008 if it were being promoted today, and as such relevant National Policy Statement ("NPS") policy can apply to it.

- 6.2 C.RO has connection agreements in place which allow it to connect to Network Rail's network. It is concerned that the rights it currently enjoys under these agreements will not be guaranteed if compulsory acquisition proceeds. Even if Network Rail remains liable under the connection agreements, if practical issues arise, C.RO may be prejudiced.
- 6.3 C.RO is concerned that the acquisition of the Railway by Able would prevent, or at least seriously restrict, its ability to connect to and use the Railway. Able has proposed draft Heads of Terms to C.RO. However, these do not address C.RO's concerns about the impact of any compulsory acquisition.
- 6.4 It should be noted that these concerns are equally relevant to consideration of any proposal for Network Rail to lease the Railway to Able. C.RO would want to be satisfied that its ability to connect to and use the Railway would not be impaired. C.RO has set out these concerns in a number of places to date, including in correspondence to Able and in its written representations. It has also made these concerns clear to Network Rail.
- 6.5 C.RO considers that the best way to manage potentially competing interests is for the Railway to remain in the ownership and control of Network Rail. C.RO has explained to Able that it is prepared to consider whether the Railway could be controlled by a joint venture company with Able so that both entities' interests are equal. C.RO considers that it may be possible to be comfortable with Able having interests in the Railway if C.RO had equal control. The fact that Able is not willing to consider such an approach indicates that it is not willing to compromise its use/interference with the

Railway. In any case, its preferred position remains that the Railway should be left with Network Rail, as it is best placed to control the Railway and allow access in the interests of all parties.

### **Connection Agreements**

6.6 As has been stated previously, C.RO has connection agreements that entitle it to connect sidings on the C.RO port estate to the Railway. As a result, it can accept and despatch freight trains to/from C.RO. Copies of those agreements have been provided to Able. In order to ensure that the Panel is fully aware of the position, copies are also provided with this note at Appendix 1. The connection point ("C.RO Connection") is shown as "A" on Plan 1 in Appendix 2 and in Picture 2 in Appendix 3. It will be remembered from the Issue Specific Hearing on rail transport that Network Rail considers that C.RO is contractually entitled to be connected to the Railway, and is able to accept/despatch trains onto the Railway and the wider network under those agreements. If C.RO wanted to accept/despatch a train, Network Rail would have to ensure that C.RO could do so, subject to the availability of freight paths .

### **Existing rail infrastructure at C.RO**

6.7 The Railway is illustrated on Plan 3. The section passing through the C.RO estate is also shown in Pictures 1, 2, 5 and 6, which shows the condition of the Railway. C.RO does not consider that works would be required to allow a freight train to pass along the Railway, subject to the need for inspection and rectification of any matters that need attention, including vegetation clearance. Network Rail (through its contractors) would be responsible for carrying out any works required to the Railway. It would also bear the costs of such works.

- 6.8 Usable rail exists along the Railway up to a buffer ("Buffer") to the north-west of the Connection Point. The location of the Buffer is shown as "B" on Plan 1. The section of the Railway leading to it is shown in Picture 1. There is approximately 590 metres of rail between the C.RO Connection and the Buffer.
- 6.9 The two sidings at C.RO ("C.RO Sidings") are shown as "C" and "D" on Plan 1. The C.RO sidings run north-east from the Connection Point onto C.RO's land (see Pictures 2, 9, 10 and 12). There are two sidings. The outer siding (see "C" on Plan 1) is approximately 300 metres in length. The inner siding (see "D" on Plan 1) is approximately 420 metres in length and continues through a gate into the freight compound (see Picture 11). The C.RO sidings are in appropriate condition and of sufficient length to accommodate freight trains. A summary of recent rail freight movements at C.RO is at paragraph 6.14 below.
- 6.10 In terms of the management of train movements, trains arriving at C.RO would have a locomotive at the front end. A train would move beyond the C.RO Connection towards the Buffer. The train would then reverse into the C.RO Sidings. If necessary wagons would be decoupled to allow the full length of the train to be accommodated.
- 6.11 Once a train is in the sidings, container freight would be unloaded by reach stacker cranes. C.RO also retains the ability to load/unload car trains. These trains are loaded/unloaded using ramps, allowing cars to drive on/off the wagons. C.RO has maintained the ramps required for this operation and they are in usable condition.
- 6.12 Once a train is unloaded/loaded, the train then reverses out of the C.RO Sidings towards the Buffer. When the full length of the train is on the Railway, it can then proceed eastwards towards Immingham.

6.13 It will therefore be clear that the existing rail infrastructure at C.RO is capable of accepting/despatching trains.

### **Previous Use of the Railway**

6.14 As stated above, there is a history of recent use of the Railway and C.RO Sidings (notwithstanding historic use by the port in this location) by C.RO for handling freight trains, as follows:

6.14.1 In the period 1994-1998, C.RO handled one train per week carrying 500-600 tonnes of steel. The steel was unloaded at the wharf in Killingholme Haven and loaded onto wagons at the C.RO sidings for onward transport to Burnt Oak in the Midlands;

6.14.2 In 2000-2001 C.RO handled one container train per week, carrying whisky for onward transport on a scheduled sailing to Hamburg. Once the containers carrying whisky were unloaded, and then returned to Scotland; and

6.14.3 During 2004-2005, C.RO handled ad hoc car trains to provide alternative routeing into the UK for onward despatch. This was during a period of industrial action at Ellesmere Port. C.RO was approached by the customer. Although the service was not continued after the dispute ended it demonstrated the feasibility of transporting automobiles by rail.

### **Proposals to modify the C.RO Sidings**

6.15 In 2007 C.RO (when it was the Simon Group/Humber Sea Terminal) developed proposals to modify the C.RO Sidings as part of a project to meet increased demand in container trade at the port. This involved modifying the layout and location of the container yard - and expanding it - to serve demand and maximise efficiencies in

productivity and cost as part of its container handling business. This would also have security advantages. The project involved moving the existing container compound closer to the berths. This would allow the rail siding to be incorporated into the container compound, given that containers could also be transported by rail.

6.16 Plan 2 shows these proposals. It was intended to modify the C.RO Sidings by moving the existing outer rails to the west of the inner rails to allow a rubber tyred gantry crane to operate along the sidings to load/unload.

6.17 Although these proposals were well advanced in 2007, they were put on hold because of the fall in container freight handling that occurred nationwide as a result of the global economic downturn. This was at its nadir in 2008. As a result, the modifications did not represent an appropriate investment at the time. With current positive trends in freight levels and the upturn in rail freight, these proposals are being looked at again by C.RO. Whilst no decision has been made to proceed with this project, it has been described here to demonstrate how C.RO keeps the feasibility of rail under review.

### **The importance and relevance of rail to C.RO's port business**

6.18 C.RO is currently configured as a ro-ro port. Containers are 25% of total freight movements, and 35% are cars (including vans/other vehicles). Therefore 55% of freight movements at C.RO are suitable for transport to/from C.RO by rail.

6.19 C.RO is well-placed to handle freight delivered/despatched by rail, including containers and cars. It represents a key element of its business. The ability to respond to demand, to offer this facility and to be able to deliver it, is of vital importance to C.RO's port business. The existence of a usable railway connection is highly attractive for the purposes of operating a port and attracting customers. Whilst container freight - and



therefore container rail freight - suffered at the onset of the global economic downturn, it is now back to 2008 levels. Commentators consider that rail freight is on an upward curve. There is therefore every reason to assert that rail freight trains at C.RO are a realistic and marketable prospect.

6.20 The use of rail freight is ultimately driven by the customer. Currently, there are no customers using rail freight. However, C.RO is constantly aware of the attractiveness of rail freight to customers. It is also aware that demand for rail freight could arise at any time, when a potential or existing customer decides that rail would be a viable transport option. The ability to handle freight trains is therefore a key element of its business, and the attractiveness of the port to potential customers. It is not a theoretical possibility.

6.21 Without a reliable rail freight connection, C.RO could not meet customer demand that may arise. C.RO has a number of practical, operational concerns (see paragraph 6.30 to 6.62 where these are discussed in more detail) about the impact of AMEP on its ability to handle freight trains. In summary, if these were not resolved, C.RO would be at risk of not being able realistically to offer rail freight to customers. This would put it at a disadvantage, bearing in mind the highly competitive nature of the port industry.

6.22 There is considerable Government policy support for transporting freight by rail, and also for the availability of rail facilities at ports (National Policy Statement for Ports, paragraph 5.4.14-15). It will also be noted that accommodating rail freight on the railway network is a key objective of Network Rail. There has been considerable recent investment in major schemes to enable this - the relevant freight policy documents are summarised in WR1 (see relevant excerpt at Appendix 4). There is no basis to justify the removal of C.RO's connection to the Railway. There is also no basis on which to allow a third party - that does not need the Railway itself for its project - to control the

Railway without adequate safeguards in place to ensure C.RO's unimpeded future use of the Railway.

### **Easements to cross the Railway**

6.23 As shown marked "E" and "F" on Plan 1 and Photos 7-8 and 3-4 respectively, there are two level crossings within the C.RO port estate, which are used by C.RO to enable the movement of ro-ro units to/from the berths.

6.24 There is a third level crossings shown "G" on Plan 1 on Clough Lane. This is not currently used by port traffic although it would be required if Gate A at the port was open to traffic.

6.25 C.RO's use of the level crossings is protected by easements granted by Network Rail. Copies of these are provided at Appendix 5. Commercially sensitive parts of these documents have been redacted, principally relating to payments. C.RO's use of the level crossings is subject to the use of the Railway by trains. However, Network Rail is a regulated body and is subject to the oversight of the ORR. There is a regulated structure in place that protects C.RO. No such oversight would exist if Able were to own/control the Railway.

6.26 Network Rail contractors carry out six-monthly inspections of the level crossings. When works are required, the crossings are closed during evenings and/or weekends so that works can be carried out. C.RO works with Network Rail to ensure that closure of the crossings to traffic is managed appropriately.

6.27 Should Able acquire the whole of the area of the Railway that it seeks, C.RO is concerned about the effect of Able controlling the Railway on its existing easements to cross the Railway. It needs to understand if and how Able's proposals would affect

these, particularly as regards the use of the level crossings by C.RO in order to operate as a port, and any additional rail traffic that may pass over existing level crossings that C.RO uses. The working assumption is that the land would remain subject to the easements, although Able has sought powers enabling the easements to be extinguished and severing C.RO's land. Able has declined to qualify these powers so as not to sever C.RO's land. Further, if the more northerly portion of the Railway would be used for trains accessing ALP, the effect upon these easements has not been assessed.

6.28 If C.RO's use of the level crossings is not accommodated, C.RO's land would be severed. In effect, C.RO would not be able to operate effectively, if at all. C.RO would not be able to offer customers a reliable service. Units may not be able to board scheduled vessel sailings. A nationally significant ro-ro port would be severely restricted in its operations. This is an entirely inappropriate outcome, and contrary to national policy. It is also unnecessary.

6.29 Paragraph 5.1.2 of the Statement of Reasons deals with the need for Able to acquire the stretch of Railway between the AMEP boundary and the site of the proposed Able Logistics Park ("ALP"). In summary, Able does not need to control this part of the Railway - under a lease or by owning the Railway itself - for the purposes of AMEP. This section of Railway should be removed from the order limits.

### **Operational and Practical concerns**

6.30 Set out below is an analysis of the operational and practical concerns posed by AMEP to the use of the Railway by C.RO. It will be noted that these comprise matters that C.RO has raised on a number of occasions, both in its representations as part of the examination of AMEP, and to Able directly - see paragraph 16.37 to 16.40 of C.RO's WR1 and the letter appended to WR1 at Appendix 3.

### *Regulated framework*

6.31 Currently, access to and use of the Railway is controlled by Network Rail subject to the regulatory framework of the Railways Act 1993 (as amended by the Railways Act 2005). Because C.RO has connection agreements, Network Rail is required to maintain connection to the network and facilitate the arrival/despatch of trains to C.RO. This is subject to other factors, such as capacity of the network.

6.32 If Able acquires all interests in the Railway that it has sought (either as a leasehold sidings operator, or through compulsory acquisition) C.RO's direct connection to the network will be severed. The effect on guarantees and protections that a connection agreement with Network Rail secures will be uncertain. If the connection point remains at C.RO, it is not certain how Network Rail will deal with its obligations to get trains from its network to C.RO. Conversely, if the connection point is at some point further away, it is not clear how C.RO can be assured that services to its former connection point will be as reliable as that provided by Network Rail and protected by statute. In both scenarios C.RO will be dependent on Able making available times/space for train movements.

6.33 C.RO considers that the interests of all parties are best secured by Network Rail retaining ownership and control of the Railway.

### *Restrictions on capacity*

6.34 Currently, there is no restriction (i.e. through the connection agreements) on the number of trains that C.RO can receive/despatch. It is acknowledged that this may be subject to capacity of the network. C.RO is concerned that Able would be able to

impose restrictions on the number/nature of train movements C.RO could operate on the Railway to allow movement of components at AMEP across the Railway.

6.35 If Able wished to block out times for component movements across the Railway, and the blocked times corresponded with wider network capacity, the ability to use the Railway and train numbers would be restricted. Similarly, if a customer of C.RO desired a specified number of trains and that would affect Able's operations, it is not clear how this could be delivered. As things stand, C.RO is not subject to any restriction. Use of the Railway would not be subject to network capacity (bearing in mind Network Rail is required by its licence to respond to capacity demands), but to Able's own priorities at AMEP.

6.36 Any restriction on train movements would mean that increased rail traffic to/from C.RO might not be accommodated, or at least would be severely limited.

6.37 Able has not provided any evidence of how train movements to/from C.RO can be accommodated in conjunction with AMEP. It follows that Able has not shown how any future increase in train movements could be accommodated, if at all.

6.38 C.RO believes that Able would have to impose operational restrictions on trains, such as line speed restrictions, restrictions on the times at which level crossings can be used, protocols applicable before trains could be accepted to cross AMEP, and possibly restrictions such as gates across the Railway at each end of AMEP if relevant TranSec requirements for port security applied. It has not seen any proposals from Able that explain how any restrictions might operate. That is because Able has not carried out any analysis.

6.39 Able has not shown to C.RO's satisfaction why bridges - and/or a limited number of level crossings in specific locations - are unviable, except that it would restrict design flexibility at AMEP. This is an assertion in relation to unknown consequences - Able has not shown that bridges would prevent, or seriously diminish, future flexibility.

*Level crossings/other crossing points*

6.40 Able has not agreed to fix the location of the additional level crossings it wishes to construct. It is not certain how many level crossings Able proposes to construct, where they would be located, what form they would take, and whether they will be sufficiently spaced to allow trains to be stopped between crossings. If there is not sufficient space for trains to wait between crossings, trains will be forced to wait outside the AMEP site until the entire length of track across the AMEP site is clear. How this would be signalled/controlled is likewise unclear. This is likely to cause a backlog of trains and delays. This will be unattractive to potential clients of C.RO who may wish to make use of rail freight transport because rail freight would not be a reliable transport option.

6.41 Able has not carried out any analysis of whether it is possible to operate trains through AMEP with any number of crossings, and certainly not four as proposed (and in unspecified locations).

6.42 An entirely open arrangement i.e. with no level crossings but where track is inset in a level surface and components can cross anywhere, will be unnecessarily complicated and potentially dangerous. Able has not carried out any analysis of whether such an arrangement/interface is feasible. It has not assessed the impacts on the Railway, or on C.RO as environmental receptors. It has not carried out any safety assessment.

### *Loop/siding*

- 6.43 Able now proposes a loop/siding which it proposes to provide if other parties wish to use the Railway. It is referred to as a passing loop. It is not clear whether Able proposes this loop is to operate as a siding for AMEP trains or as a passing loop for other non-AMEP trains to move round AMEP trains standing on the Railway for the purposes of loading/unloading. Regardless of the purpose, it will not solve the problem of interfaces between the Railway and AMEP's component movements.
- 6.44 C.RO considers that if the loop is to operate as a siding for AMEP trains, it will only be a solution if Able does not accept any train that is longer than 250 metres. It seems unlikely that steel trains would be this short. Therefore if Able requires trains that are longer than 250 metres the front or back end of the train will block the Railway. In this sense the loop would not allow other trains to pass.
- 6.45 If Able proposes that the loop is to allow other parties' trains to pass a 250 metre length of track will not be long enough for most trains. Car trains are circa 500 metres long. It is understood that the longest freight trains that are able to operate on the network are circa 700 metres long. It is therefore the case that there is a real risk that an AMEP train standing on the Railway will prevent other rail traffic passing via the loop unless the loop is of sufficient length.
- 6.46 C.RO considers that any siding or loop should conform with good practice in the rail industry to provide for future longer train lengths and increases in rail freight movements.
- 6.47 If the loop is not long enough (for AMEP trains as a siding or other trains as a passing loop) the Railway would only be suitable for use by one train at a time, for its entire

length between the Port of Immingham and the Buffer. This is because if a train was standing on the Railway (and the loop is not long enough) it would not be able to move out of the way to allow a C.RO train to access the C.RO Sidings. It would not be able to move beyond the C.RO Sidings towards the Buffer because this would prevent a C.RO train from reversing into the C.RO Sidings. The practical effect of this would be to make the Railway suitable for use by only one C.RO or AMEP train at a time. Restricted use of the Railway - including as a result of blocking/congestion - would have a knock on effect for all users of the Railway. It may mean that trains miss their slots on the wider network. That is entirely contrary to good practice or the commercial interests of any of the parties, including Able.

6.48 Good practice is demonstrated by ABP at the Port of Immingham which is proposing to have 1000 metre long sidings for trains likely to be at least 500 metres in length (see Plan 4). Overprovision is required to ensure sufficient capacity to meet future need.

6.49 Able states that it will provide a siding as and when it wants to receive/despatch trains. It should therefore be prevented from operating trains until it has built a siding of adequate length for the trains it intends to receive/despatch at AMEP.

6.50 As stated above Able has proposed the loop would be constructed as and when other parties wish to use the Railway. Whilst this could be provided for in the DCO through protective provisions, in a contract or through a section 106 obligation C.RO is concerned that it would have to seek to enforce any obligation. This would mean that their ability to use the Railway would be subject to uncertainty and potential delay. It is extremely important to C.RO that it can, when there is a customer, begin to accept/despatch trains with the minimum delay. C.RO is also concerned as to whether Able would have the necessary finance to deliver any such solution.



- 6.51 C.RO questions whether the proposed loop/siding Able has proposed to install is a meaningful solution, given that components will still presumably need to be transported across the loop as well as the Railway itself. This will merely mean that it is possible for AMEP trains not to be in the way of C.RO trains.
- 6.52 C.RO requires more information regarding how the interface between trains moving to/from C.RO and trains moving to/from proposed loop on the AMEP site (and any other sidings proposed on the AMEP site) would be managed, and in particular, which trains would have priority. C.RO likewise needs to know the loop length and whether the loop would be crossed by level crossings or if such crossings would be either side of turnouts.

*Lack of experience*

- 6.53 Able does not have any experience of operating a mainline railway. Whilst Able does have rail sidings at other facilities, that is not the same as operating a railway accepting through traffic, including to C.RO, C.GEN and potentially the Able Logistics Park ("ALP"). C.RO is concerned that, given its lack of experience in operating railway facilities, Able will not be able to manage the interface between trains running to/from C.RO and the transport of components/machinery associated with wind turbine manufacture across the Railway without compromising safety and efficiency.
- 6.54 Able has relied on appointing a train manager. It is not clear what this means, to whom the manager would report or be liable, or how such a manager would discharge its responsibilities (quite apart from what such responsibilities might be).

### *Able's obligations*

- 6.55 Able has not begun the process to establish a connection agreement. There is no evidence that it is in the process of doing so. It is not clear what is proposed in relation to C.RO's Connection Point, and the status of its Connection Agreement.
- 6.56 C.RO is concerned that if it has to rely on Able performing contractual obligations to provide C.RO with access and to maintain the Railway to an appropriate standard (rather than Network Rail, which has a statutory duty to do so), it will be reliant on a man of straw in place of a regulated statutory body in Network Rail.
- 6.57 If Able fails to maintain the track or allow access to be blocked C.RO will have no immediate recourse absent protective provisions or a suitable contractual arrangement. At present Able has proposed neither and has not suggested any means of producing such arrangement that protects C.RO.
- 6.58 C.RO needs more information as to the charging or other cost-recovery mechanisms Able proposes in respect of maintenance of the Railway, upgrades should further capacity be required and for managing access. Currently access charges are paid by freight operating companies, whereas the Able proposal would impose an additional cost upon C.RO itself. C.RO does not currently pay for the maintenance of the Railway. That is Network Rail's responsibility with costs recovered from freight operating companies who pass said costs to customers as part of their overall charges. If a cost-sharing approach was adopted based on use, it is likely that if C.RO is the only party running trains (i.e. none are required for AMEP) C.RO would be liable for the cost of maintenance. As the actual nature of Railway in this location is unknown (save that it may include turnouts in addition to plain track, which are more expensive to maintain) the extent of such liabilities cannot be understood. In the absence of any

certainty about being able to use the Railway without restrictions, C.RO does not accept that it should pay money to Able. In any case, C.RO would not have to pay money to anyone (other than sums due for the connection itself) if Able were not acquiring the Railway for its own purposes. These are additional costs without benefit to C.RO.

6.59 There is no information on the process that Able would follow to increase train movements associated with AMEP, and what the nature of those train movements would be. Able has stated that in future it may seek to provide tenants with railway sidings. It does not know if AMEP is likely materially to increase movements for AMEP or some future use such as a container port. No assessment has been undertaken and no proposal as to how any effect upon C.RO would be mitigated has been made. For instance, it is not clear how C.RO could use the Railway if it was acquired by Able, allowed to fall into disrepair and neither access for maintenance nor funds to do so were provided by Able. In such circumstances, C.RO would be in a much worse position than with Network Rail since Network Rail may not allow abandonment to take place. It is required to deliver/receive trains to/from a connection point under a connection agreement.

6.60 No safeguards have been proposed to deal with the situation if compulsory acquisition proceeds but AMEP is not built out or is abandoned. It would be unacceptable for C.RO to have to seek powers of compulsory acquisition to be able to maintain and/or use the Railway.

6.61 No guarantees exist that any future requirement of C.RO for easements in relation to existing level crossings and services beneath level crossings (as it enjoys now) would be provided on request and on a reasonable basis.

In light of these concerns C.RO considers that it is not acceptable, or appropriate, for C.RO to be expected to rely on the ability to use a private siding under Able's control in place of a mainline railway operated by Network Rail. C.RO's preference is that the Railway be retained in Network Rail's control. If the Railway is to be acquired by Able, under no circumstances should control be given to Able alone. An equitable solution between Able, C.RO and C.GEN would be the minimum appropriate protection. C.RO has proposed this as a basis for negotiation. C.RO and Able met recently to discuss the scope for a solution.

## **7 THE KILLINGHOLME LOOP**

- 7.1 C.RO is aware of the proposals for the Killingholme Loop and notes that Network Rail has submitted to the Panel that the Killingholme Loop has been identified as the best, if only, means to meet the predicted increase in rail traffic in the vicinity of the Port of Immingham. C.RO does not propose to make submissions on the viability of the Killingholme Loop.

## **8 THE RELEVANCE OF AMEP AS AN NSIP TO GRANT OF POWERS OF COMPULSORY ACQUISITION**

- 8.1 Network Rail has indicated that AMEP's status as an NSIP means that Network Rail may well find it difficult to defend a position to keep the Railway as part of the Network. There is no basis for this proposition, either in law or policy. In fact, it is entirely contrary to the usual method of assessing whether the impacts of a project are acceptable.

- 8.2 As matters stand, it is proposed that the Railway - for which there is a reasonable prospect of use by others - is removed from the network because it is an obstacle to the proposed development. This argument is apparently based on the assumption that AMEP is an NSIP. This is a novel concept in compulsory purchase law. It is also plainly wrong. A project is an NSIP if it meets the capacity thresholds set out in the Planning Act 2008. That does not by itself justify the acquisition of land and rights in land, which the Guidance on procedures for compulsory acquisition makes clear.
- 8.3 The Secretary of State is empowered to confer powers of compulsory acquisition not simply because a project is an NSIP, but only where land is needed/required to facilitate the project, and there is a compelling case in the public interest for the acquisition of that land. It is not sufficient to rely on the fact that the project is an NSIP.
- 8.4 The fact that AMEP may be an NSIP is not enough, and does not override the requirements of other projects.

## **9 THE RELEVANCE OF OTHER NSIP CONSIDERATIONS**

- 9.1 It is not Government policy that there is a hierarchy of projects, with some - such as an NSIP - trumping the needs of other projects or facilities. Where there are differing requirements, a compromise may be possible. It is not the case, however, that one project can justifiably remove access to publicly owned facilities for its own ends. Network Rail has an important role in this respect to ensure that access to its network remains unimpaired.
- 9.2 There is an identified need for port facilities to support the construction of offshore wind generating capacity, but that is not an overriding policy that on its own justifies

removing land and interests from others. That must be judged on a case-by-case basis having regard to the availability of alternatives to the acquisition, or indeed the project as a whole. That is particularly the case where existing or proposed projects that are affected by proposals are supported by NPS, and those NPS also support the requirement for rail access envisaged by C.RO and C.GEN.

9.3 Under Section 104 of the Planning Act 2008, the Secretary of State is required to determine an NSIP with reference to the relevant NPS. That means having regard to policies that may also dictate that he should not allow certain elements of a proposal to go ahead, where they would conflict with a NPS. For each of C.RO and C.GEN, there is NPS support for rail access. In this respect, a decision about AMEP must have regard to the relevant NPS that require rail access to be maintained.

9.4 C.RO is a nationally significant port, handling in excess of 600,000 ro-ro units per year. It is worth noting that if it were to be promoted now, it would be an NSIP in itself. Its requirements for rail access are, therefore, no less significant than the considerations applicable to AMEP. C.RO is an important port not only because of its capacity to handle such a significant quantity of ro-ro units but also because of its potential to handle freight via the Railway. This has always been a key attraction of this port for C.RO as a port operator, even if it is not currently used.

9.5 The fact is that C.RO is an existing port with a connection, and could today (subject to some works) commence rail operations. AMEP is not at that stage. The NPS for Ports recognises the value of rail connections for ports, including ro-ro facilities. Network Rail is aware of the increasing amount of freight handled by rail, and that it is only expected to increase. That is why it has a programme of capacity enhancements. It is contradictory to the general direction of Government policy to remove - or make very

uncertain - the ability of existing port facilities to connect to the railway to transport freight.

- 9.6 In this case, what is proposed by Able is that an NSIP with no identified need to use the Railway - other than, put simply, for it not to be there at all - will deprive a nationally significant port operator of its currently unimpeded connection to the regulated network.

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# **APPENDIX 1**

## Connection Agreements



## **APPENDIX 2**

Plans

## **APPENDIX 3**

Photos

## **APPENDIX 4**

Extract from C.RO's first written representation

## **APPENDIX 5**

Deeds of Easement