

PLANNING ACT 2008

**THE INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE) RULES 2010
("2010 RULES")**

**APPLICATION FOR THE PROPOSED ABLE ENERGY MARINE PARK DEVELOPMENT
CONSENT ORDER**

**WRITTEN REPRESENTATION SUBMITTED ON BEHALF OF
NETWORK RAIL INFRASTRUCTURE LIMITED AND ANSWERS TO
QUESTIONS 62 TO 66 IN THE LETTER UNDER RULE 8 OF THE 2010 RULES DATED
31ST MAY 2012**

Planning Inspectorate Reference Number: TR030001

Unique Objector Reference: 10015512

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Answers to questions raised by the Examining authority

1. *Qu 62: Would Network Rail explain further why it contests the validity or applicability of s.47(1) of the draft DCO to the effect that the proposed modification would constitute a minor modification for the purposes of Part 4 of the Railways Act (RA2005), given that :-*
 - (a) *S.34(2) of the RA2005 gives the power to determine that a closure is a minor modification to the Secretary of State for Transport who would make the Order; and (or alternatively)*
 - (b) *S. 35 of the RA2005 relates to the impacts on passengers and stations?*

NR response:

- 1.2 Network Rail does not dispute that s.34(3) provides that the Secretary of State may make a determination that a closure is a minor modification nor that section 35 relates to the provision of passenger services. However, as mentioned in paragraph 14 of the Relevant Representation, the closure of the Killingholme Branch Line should not be treated as a minor modification because it does not come within the definition of section 35. The clear intention of the minor modification process as set out in RA2005, is that it relates to passenger services where a closure of that part of the network does not cause disruption to the travelling public.
- 1.3 The section of the network that is proposed to be subject to article 47(1) of the draft DCO is part of the Killingholme Branch Line ("KIL2"). KIL2 is operational railway, used for the transport of freight and in respect of which there are existing connection agreements with C.Gen Killingholme Limited ("CPK") and Associated British Ports ("ABP"). As referred to in paragraph 14 of the Relevant Representation, Network Rail is required to obtain Network Change authorisation in order to effect the closure of the line. Network Change is a requirement of the Network Code. The Network Code is a common set of contractually binding rules and industry procedures that apply to all parties who have a contractual right of access to the track owned and operated by Network Rail. Appeals from decisions made under the Network Code can be made through the industry's "Access Disputes" procedure which can ultimately can lead to determination by the Office of Rail Regulation ("the ORR"). The purpose of Network Change is to protect the

access beneficiaries (i.e. the Network Rail customers using the network, in this case CPK and ABP) from the closure of part of the network without being given an opportunity to put forward their case regarding the use of that part of the Network. A detailed explanation of the Network Change procedure is set out in paragraphs 3.3 and 3.4 of the Written Representation. For the purpose of this response, it is significant to note that, in the event of a dispute as to whether a Network Change should be made, the matter can be referred to the ORR for determination.

- 1.4 Network Rail contests the validity and applicability of s.47(1) of the draft DCO on the basis that sections 34 and 35 of RA2005 are not intended to apply to the closure of parts of the network bearing the characteristics of KIL2; i.e. network that is subject to existing contractual obligations for the provision of access to the network and for the running of freight operations. The proposed effect of s.47 is to undermine the regulatory framework applicable to the closure of KIL2, in applying an inappropriate closure process to that part of the network. Network Rail is extremely concerned about the wider implications that might arise from setting a precedent of this nature.
2. *Qu 63: With specific reference to section 12.3 of its Relevant Representation, what Protective Provisions would Network Rail consider appropriate if the proposed development were to be approved, with or without the acquisition of Network Rail Land through the development site?*

NR response:

- 2.1 We refer to section 4 of the Written Representation and Annex 1 to the Written Representation (draft protective provisions).
3. *Qu 64: With specific reference to Sections 7 and 8 of its Relevant Representation, would Network Rail clarify whether it would still now object to the acquisition of its land even if C.RO (formerly Humber Sea Terminal) were to give consent?*

NR response

- 3.1 Network Rail would continue to object to the acquisition of its land if C.RO (or, as defined above CPK) were to consent to that acquisition for the following reasons:
- 3.1.1 The compulsory acquisition of plots numbers: 02008, 03013, 03014, 03015, 04004, 04013, 04014, 04024, 04025, 05023 to 05028 and 07001 ("the Land") would prevent Network Rail from developing the network as identified in The Route Utilisation Strategy for Freight (March 2007) ("RUS 2007"). RUS 2007 refers to a gap in capacity on the west side of the Port of Immingham and identifies the Killingholme Loop Project as a means to deal with this deficiency. This began as a scheme to build a new section

of railway from the Killingholme Branch to the Lindsey Oil Refinery (Scheme 1 under Killingholme Loop) and has since developed to include two additional schemes that are related to improving capacity for train paths on the west side of the Port of Immingham to all new developments on land at this location and also to the Humber International Terminal 2 (HIT2).

- 3.1.2 The "HIT2 Head Shunt Extension" is the third of the schemes identified under the Killingholme Loop proposals, and is described in detail by reference to Annex 2, parts 1, 2 and 3 to the Written Representation. It is proposed that HIT2 Head Shunt Extension is taken forward in Control Period 4 2009 to 2014 ("CP4"). As demonstrated by the area shown edged red on Plan No. 27122 (Annex 2 to the Written Representation), the HIT2 Head Shunt Extension involves development on the Land, and the proposed compulsory purchase therefore jeopardizes the scheme.
- 3.1.3 ABP and Network Rail are in advanced discussions concerning the HIT2 Head Shunt Extension. The scheme includes proposals to slue the Killingholme Branch and provide new sidings on the Land for increasing rail capacity for servicing the Port of Immingham. The requirement for increased capacity is connected with the development of renewable energy plant at the Port of Immingham, which will increase the demand on the railway in that area. Network Rail is duty bound by the conditions of the Network Licence **1** to take into account the future requirements of ABP. If HIT2 Head Shunt Extension cannot go forward then the new £70m biomass handling facility it is proposed to serve will not be able to proceed as the Killingholme branch, in its current form, has insufficient capacity for the trains required to serve it.
- 3.1.4 Based on Licence conditions 1.4 and 1.5, as operator of the Railway Infrastructure, Network Rail considers it important for the confidence of other potential users of the railway line that the railway through the AMEP site is in the overall control of Network Rail. This is because Network Rail is aware of development planning of renewable energy plant in the area and considers an increase in demand on the network, likely.
4. *Qu 65: The Route Utilisation Strategy for Freight, published in March 2007, identifies the Killingholme Loop as a project for Control Period 4 (2009 to 2014). Is this still Network Rail's intention, or has the place of the Killingholme Loop project in the overall programme changed or slipped?*

Network Rail response

¹ Licence condition 1.4 "The Licence holder shall plan the means by which it will comply with the general duty in condition 1.2 over the short, medium and long term to meet reasonably foreseeable demand for rail services"; and Licence condition 1.5 "In complying with condition 1.4 the Licence holder shall consult, and take into account the views of, persons providing services relating to railways and funders so as to facilitate industry wide planning".

4.1 The Killingholme Loop project, as identified in RUS 2007, covers 3 different schemes all of which are related to improving capacity for train paths on the west side of the Port of Immingham and in particular to the Humber International Terminal 2 (HIT2) coal and proposed biomass handling facilities, as referred to in the response to Qu 64 above. The requirement to increase capacity is due to lack of capacity for trains on the section of the Killingholme Branch known as KIL1. The RUS 2007 recommended scheme was to provide access between the Lindsey Oil refinery and the Killingholme Branch (Gap 10.7 in the Freight RUS Mar 2007) ("Scheme 1"). This Scheme 1 is shown for identification purposes by the dotted red line on Plan No 27122 (Annex 2 to the Written Representation). Scheme 1 has been evaluated and discounted. However, the RUS 2007 also states that further options have been developed since consultation on that document and as a development of the work on Scheme 1, two further options have been identified as Killingholme Loop schemes. These are: :

4.1.1 Scheme 2. The provision of a new railway line which would run west from the Port of Immingham via the existing Killingholme Branch and then over a combination of the mothballed track-bed between the points marked B and C, and a new section of railway shown by blue line on Plan No 27122 (Annex 2 to the Written Representation). This would join into the Network Rail line known as the Barton on Humber branch.

4.1.2 Scheme 3. The HIT2 Head Shunt Extension, which is described in Network Rail's response to 'Question 64', and shown in detail in the Functional Specification and Plan at Annex 1 to this Written Representation.

4.2 The proposals in paragraph 4.1.1 have been discounted for the current time on the basis that the rail capacity requirements of the Port of Immingham can be met through less costly developments such as those described in paragraph 4.1.2. However, it is important to note that Network Rail considers it strategically important to retain the capability to be able to implement these proposals in the long term. This is due to the potential for further substantial changes in demand for train services in this South Humber Location, following the development of sites used for port related activities and that may require the distribution of imported goods by rail. These sites are on the South Bank of the Humber, and include the continued expansion of biomass traffic to the Port of Immingham, the Able Humber Port Logistics park and also the CPK and C.Gen sites. In addition, Network Rail understand the Able AMEP Scheme itself to potentially require rail service to the site. The initial forecast of the increase in

rail traffic consequential on the construction of a biomass facility in the area is an additional 24 trains per day, onto the south end of the Killingholme Branch².

- 4.3 The limited capacity of KIL1³ could not cope with the intensification if all of the sites referred to in paragraph 4.2 sought to increase traffic via the existing route to the rest of the rail network. Any such intensification of demand will require another route, such as the Scheme 2 identified in the Killingholme Loop Scheme (and described in paragraph 4.1.1 above). Such future planning is in accordance with Network Rail's duties under the Network Licence.
- 4.4 As set out in Network Rail's response to 'Question 64', the HIT2 Head Shunt Extension (or Scheme 3) is planned development for CP4 in accordance with the programme identified in RUS 2007.
5. *Qu 66: Has Network Rail undertaken preliminary or detailed planning for the Killingholme Loop project? Is Network Rail in a position to say whether this scheme would require all or primarily the existing alignment towards Goxhill, or a partial new alignment that might affect the proposed development?*

NR response:

- 5.1 A preliminary study was undertaken which evaluated various options in the period June to November 2007. As set out in the response to question 65, the results of that preliminary study are that the preferred option for progressing in CP4 is the HIT2 Head Shunt Extension. In addition, it is considered strategically important to protect the option to use the mothballed track towards Goxhill (Scheme 2). A copy of the study entitled "Killingholme/Goxhill/HIT Track Enhancements" is attached at Annex 6. This followed on from the work that discounted the original Scheme 1 for the Killingholme Loop specified in the RUS 2007.
- 5.2 Plan No 22174 (Annex 1, Part 2) shows the HIT2 Head Shunt Extension, on which the boundary of the Land has been superimposed by green hatch. Scheme 3 is the subject of detailed planning and requires the land identified on the Plans submitted with the Proposed DCO as Plot Nos. 02008 and 03015. It can be seen from Plan No 22174 and the associated signalling diagram that the scheme includes what is called a "facing connection" onto the Killingholme Branch. This will enable trains from HIT2 to be able to run westwards from the terminal and hence through the Land. The inclusion of the "facing connection" indicates that ABP realistically anticipate running trains westwards from HIT2, and are at this stage prepared to invest in the infrastructure that would facilitate this.

² A detailed explanation of the proposal is at paragraph 2.9 of Network Rail's Written Representation. The project is proposed to open in 2013.

³ KIL1 is shown on the Plan No27122 at Annex 1

Written Representation

1. Introduction

- 1.1 Network Rail does not object in principle to the development proposed by the Able Marine Energy Park draft Development Consent Order ("the proposed DCO").
- 1.2 Network Rail does, however, object to the compulsory acquisition of operational railway land, and to the effect of section 47 of the proposed DCO which would force the closure of operation railway and circumvent the regulatory procedure required for such a closure.
- 1.3 Network Rail also objects to the design element in the scheme which requires new level crossings to provide access from the proposed manufacturing sites, to the proposed wharf. Network Rail considers these level crossings should either be replaced by bridge crossings or the scheme should be re-designed. As a matter of policy, Network Rail will not permit the introduction of new level crossings on the rail network.
- 1.4 Network Rail owns the rail infrastructure of Great Britain; it operates that rail infrastructure pursuant to a network licence ("the Network Licence") granted under section 8 of the Railways Act 1993 ("the 1993 Act"). A copy of the Network Licence is at Annex 3 to this Written Representation. Its duties under the Network Licence are enforceable by the Office of Rail Regulation ("the ORR"), and are described in paragraphs 3 and 4 of the Relevant Representation. In sum, Network Rail is responsible for the maintenance and repair of rail infrastructure, as well as the renewal of track, stations, signalling and electrical control equipment for the enhancement of the network. Train services, and freight operators on the network are operated by companies to which Network Rail grants rights to use the railway in the form of contracts approved by the ORR.
- 1.5 In addition, an over-arching contractual framework applies to Network Rail and all users of the network in the form of the "Network Code". The Network Code incorporates conditions approved by the ORR which, amongst other things, provide procedures for dealing with changes to the network including closures. The Network Code seeks to ensure that all users of railway infrastructure are properly consulted and protected prior to any change, including closure, of the Network. A copy of Part G (Network Change) of the Network Code is at Annex 4 to this Written Representation.

- 1.6 The activities of Network Rail as network operator are regulated by the ORR under the Network Licence. The ORR itself is under a general duty imposed by section 4(1) of the 1993 Act to exercise those regulatory functions in a manner which it considers best calculated to, amongst other things:
- 1.6.1 to promote improvements in railway service performance;
 - 1.6.2 to protect the interests of users of railway services;
 - 1.6.3 to promote the use of the rail network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that it considers economically practicable;
 - 1.6.4 to contribute to the development of an integrated system of transport of passengers and goods;
 - 1.6.5 to contribute to the achievement of sustainable development;
 - 1.6.6 to promote efficiency and economy on the part of persons providing railway services;
 - 1.6.7 to promote competition in the provision of railway services for the benefit of users of railway services;
 - 1.6.8 to promote measures designed to facilitate the making by passengers of journeys which involve use of the services of more than one passenger service operator;
 - 1.6.9 to impose on the operators of railway services the minimum restrictions which are consistent with the performance of its functions that are not safety functions;
 - 1.6.10 to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance.
 - 1.6.11 By virtue of section 4(3) of the 1993 Act, the ORR is also required to take into account the need to protect all persons from dangers arising from the operation of the railways.
- 1.7 Network Rail considers as absolutely necessary, that the Secretary of State confers protection on Network Rail to safeguard the continued safe, economic and efficient operation of its railway undertaking and to ensure that any works to be carried out in the vicinity of the network are carried out in accordance with Railway Group Standards and are of the required specification so as not to jeopardize the safety of the operational network.

2. **Compulsory acquisition of operational land**

Land belonging to statutory undertakers

- 2.1 Article 29 of the proposed DCO would confer the power on the Applicant to compulsorily acquire the land identified on the Land Plans submitted with the Application as plots numbers: 02008, 03013, 03014, 03015, 04004, 04013, 04014, 04024, 04025, 05023 to 05028 and 07001 ("the Land"). This impacts significantly on the railway network at Killingholme, specifically the Killingholme branch line known as KIL2. KIL2 is operational railway which services the Port of Immingham, and Humber International Terminal 2 (HIT2). Both Associated British Ports ("ABP") and C.RO Ports Killingholme Limited ("CPK") benefit from existing connection agreements to KIL2, and have submitted Relevant Representations to the Application.
- 2.2 The effect of article if the proposed DCO were made in its current form, would be to confer unfettered compulsory purchase powers of acquisition over operational railway and the Promoter would accordingly be able to acquire and take possession of operational railway infrastructure.
- 2.3 Network Rail's position, as a statutory undertaker, is protected by sections 127 and 128 of the Planning Act 2008. Section 127 provides that a DCO is not to be made or confirmed so as to authorise the compulsory acquisition of a statutory undertakers' operational land in respect of which a representation has not been withdrawn, except in relation to land which the Secretary of State has certified (i) can be purchased and not replaced without serious detriment to the carrying on of the undertaking, or (ii) if purchased it can be replaced by other land belonging to, or available for acquisition by, the undertakers without serious detriment to the carrying on of the undertaking.
- 2.4 The Statement of Reasons submitted with the Application fails to recognise that the proposed DCO includes the compulsory acquisition of operational railway land. For the reasons set out in this section 2, Network Rail strongly disagrees that to compulsorily acquire the Land, thus removing operational land (and thus network) from Network Rail's undertaking, satisfies the test set out in paragraph 2.3 above.
- 2.5 The existing use of KIL2 is referred to in paragraph 2.1. Route Utilisation Strategy 2007 ("RUS 2007") identifies significant development of KIL2 in order to accommodate the anticipated increase in demand in this area for freight transportation. The following paragraphs 2.6 to 2.9 set out a detailed explanation of this future development.

Details of proposed future use of KIL2

- 2.6 CPK has an existing connection to KIL2 dated 11.08.1958 that has been inherited from its predecessors in title to the CPK Site. This Agreement is not in a modern format, but follows the same principles as any new Connection

Agreement whereby CPK pays Network Rail an annual sum to maintain the points that form the physical connection between the sidings on CPK's site and their junction with the Killingholme Branch. CPK continue to pay to have the connection maintained as they may want to use this in the future in conjunction with rail services to their port facilities. As such, Network Rail is contractually obliged to maintain this connection. Agreements of this nature may be terminated by either party, but such action is only taken by Network Rail if there is no prospect of any future rail use in connection with this agreement. This is in accordance with Network Rail's duty under the Network Licence (Condition 1) to facilitate rail freight services and access to the rail network. Network Rail's actions in enforcing such termination provisions are governed by the Network Code referred to in paragraph 1.3

- 2.7 We refer to the Relevant Representation submitted by ABP to the proposed DCO. ABP state that the "*proposed compulsory acquisition of part of the railway track within the ownership of Network Rail would restrict the future passage of commercial rail traffic serving the local industrial community*". Network Rail fully supports ABP in this aspect of its Representation. The Port of Immingham is Britain's largest bulk goods port and the largest generator of rail freight traffic onto the British rail network. As such the port and the rail network serving it are of national strategic importance both in terms of their current and future capability. Network Rail asserts that it is essential that the capability of the network around the Port of Immingham is preserved in its entirety under Network Rail's control as operator of the national rail infrastructure.
- 2.8 The volume and nature of the goods transported from the Port by rail have changed significantly in recent years. Within the last decade imported coal traffic has reached unprecedented levels as a result of the decline of the domestic coal industry. Further significant changes are predicted as a result of UK energy policy, in particular the replacement of existing coal volume by biomass⁴. Biomass is a bulkier commodity that will demand greater rail capacity than any coal for which it will be a substitute. Statistics suggest that for the same calorific value of energy production, the transportation of biomass utilises 1.6 trains for 1 train for the transportation of coal⁵. The proposals of the Killingholme Loop Scheme 2 are a vital strategic option to provide a solution to increasing train paths out of the Port, in the event that biomass traffic to power stations increases. To eliminate this option would damage the national interest in being contradictory to national energy policy. It would be directly contradictory to Network Rail's duties under the Network Licence.

⁴ National Policy Statements: EN-1, EN-2 and EN-3 in particular identifies the need to increase the production of renewable energy including biomass, and in doing so, increase multi modal transportation of materials such as by rail and water.

⁵ <http://www.biomassenergycentre.org.uk>

- 2.9 The HIT2 Head Shunt Extension is proposed by ABP with a view to improving rail access so as to facilitate increased rail capacity to HIT2 and permit the construction of ABP's proposed £70m biomass handling facility. As shown on Plan No 27122 (annex 2), this scheme includes Network Rail land (currently the subject of lease negotiations) to be used for the head shunt. It is proposed that the adjoining section of the Killingholme Branch will be slued to allow the construction of this head shunt. The compulsory acquisition of the Land, as is sought in the proposed DCO, would cut across the HIT2 Head Shunt Extension. As a direct effect of this, the biomass handling facility could not be built.
- 2.10 Network Rail has been approached by C.GEN Killingholme ("C.GEN") regarding proposals to transport solid fuel to a proposed 470 MWe gas-fired electricity generation station by rail. This requires the construction of new sidings on their land and a connection agreement relating to those sidings with Network Rail, as well as an agreement with Network Rail for the number of train paths they require between their site and the HIT2 facility.
- 2.11 Together with article 47 of the proposed DCO, the effect of article 29 would be to close part of the railway to the exclusion of Network Rail and existing operators. There are severe disruptive and safety implications of such a power being exercised, and such a precedent being set. Network Rail are very concerned that the draft DCO should not be made in this form.
- 2.12 We have sight of a letter of application by the Applicants to the Secretary of State, for a certificate under section 127 of the Planning Act. In that letter, the Applicants make the following argument:
- 2.12.1 the track and track bed which is the subject of the proposed compulsory acquisition powers is a dead end at the north end;
- 2.12.2 the line is not used by passenger trains and has "more or less" fallen out of use for freight trains;
- 2.12.3 the effect of the Promoter's proposals in the proposed DCO would "simply be to move [the connection point which is the subject of the existing connection agreement between Network Rail and C.RO Ports Killingholme Limited (CPK)] southwards to the southern point of the Order land."
- 2.13 Network Rail does not agree with the Promoter that the statutory protection for this part of the railway network should be withheld. We refer to the existing use of KIL2, and the extensive future use proposals set out in this section 2. In addition, we refer to paragraph 12 of the Relevant Representation and would expand as follows:
- 2.13.1 The track is a dead end at the north end but as has been shown elsewhere in this Written Representation the mothballed railway track-bed

running west could be utilised in order to increase rail capacity from the Port of Immingham (Scheme 2 of the Killingholme Loop proposals).

- 2.13.2 In any event, all of the track is still part of the rail network as defined by the Sectional Appendix which is an industry wide document that shows which railway lines are available for use under Network Rail's control.
- 2.13.3 Network Rail consider it a breach of its duties under the Network Licence were they not to safeguard such a secure and economic means of supply of bulk fuel to a significant part of the UK electricity generation industry, such as is the potential in KIL2. The proposed biomass plan described in detail in paragraph 2.9 is anticipated to generate an additional 24 trains per day onto the south end of the Killingholme Branch. This project is planned to be open in 2013. The compulsory acquisition of the Land would mean that network is not available for the increased demand resulting from this development and others like it.
- 2.13.4 In addition, it is inaccurate to call this part of the network "disused". Records show the last commercial traffic was in 2007 with use by Network Rail trains in 2011. It is maintained by Network Rail as part of the Network as, in the absence of Network Change to remove it from the Sectional Appendix, Network Rail is contractually committed to provide access to an operator over the railway line on demand.
- 2.14 In sum, as submitted in paragraph 12.2 of the Relevant Representation, Network Rail does not agree that the test in section 127 of the Planning Act 2008 can be satisfied in respect of the Land. In support of this point, Network Rail relies on the issues stated in this section 2 and in addition would refer to the Relevant Representations submitted on behalf of CPK, C.GEN and ABP to the Application, all of which object to the proposed compulsory acquisition of the existing connection.
- 2.15 Network Rail maintains in any event that, unless agreement is reached with the Applicant regarding the use of the Land, it will not be in a position to withdraw its representation to the Application, and that the matter should be referred to Special Parliamentary Procedure in accordance with section 128 of the Planning Act 2008.

Protective Provisions

- 2.16 We refer to paragraph 12.3 of the Relevant Representation. In all infrastructure projects where work has been required to alter the railway network, agreement has been reached with the applicant in question for works to be carried out, and access has been agreed to the altered rail network, without the need for the compulsory purchase of operational railway land. In respect of such projects, provisions for the protection of Network Rail are included, the effect of which is

generally to authorise the grant of specific rights to the promoters whilst conferring upon Network Rail a suitable degree of operational control and supervision. Network Rail considers such provisions vital for the protection of its ability to deliver on its duties under the Network Licence. Such provisions are typically included within orders granted pursuant to the Transport and Works Act 1992, for example, The Nottingham Express Transit System Order 2009 and The London Underground (Victoria Station Upgrade) Order 2009. Network Rail expects that the proposed the Rookery South (Resource Recovery Facility) Order will include these provisions when it is eventually made.

2.17 Network Rail maintain that without any agreement or qualification on the exercise of unfettered compulsory purchase powers as proposed in the DCO the following consequences would arise:

2.17.1 Network Rail would not be able to operate the severed KIL2 which would result in the loss of protection to both CPK and ABP as existing freight customers and the port and freight train operators in terms of future development of rail freight traffic from Immingham. This would in turn place Network Rail in breach of its obligations under the Network Licence to *"secure the operation and maintenance of the network and the improvement, enhancement and development of the network.... so as to satisfy the reasonable requirements of persons providing services relating to railways and funders...in respect of the quality and capability of the network, and the facilitation of railway service performance in respect of services for the carriage of passengers and goods by railway operating on the network."*⁶

2.17.2 The contractual right of both CPK and ABP to connect into the main railway network via a connection point on the Killingholme branch line would be frustrated through Network Rail's inability to fulfil its part of the agreement to connect CPK with the wider national network.

2.17.3 The future use of KIL2 for the carriage of goods, including potential arrangements with ABP, would be frustrated as referred to in paragraphs 2.8 to 2.10.

2.17.4 The contractual right of ABP to connect into the south end of the Killingholme branch would be frustrated though Network Rails inability to fulfil its part of the agreement to connect ABP with this part of the network.

2.18 The proposed DCO is materially deficient in that it does not contain protective provisions expressed to be for the protection of Network Rail. Draft protective

⁶ Network Licence condition 1

provisions for the protection of Network Rail's undertaking are at Annex 5 to this Written Representation.

3. The effect of Article 47 of the draft DCO

3.1 We refer to paragraphs 13 and 14 of the Relevant Representation.

3.2 As referred to in paragraph 14 of the Relevant Representation, the correct procedure for the closure of the Killingholme branch line is to obtain authorisation pursuant to Network Change.

3.3 The Network Change procedure is set out in the Network Code (Part G) which Network Rail is obliged to comply with in its operations. A copy of Part G of the Network Code is at Annex 3. The Code is clear that Network Rail must consider whether Network Change will apply before any decision is made regarding changes which are likely to have a material effect on the operation of the Network, and specifically that "*closures of lines which are not covered by the statutory procedures are Network Changes*". It is absolutely clear on the face of the Code that the closure of this part of the Network requires Network Change. All Network Changes are required to be implemented by Network Rail. The procedure is set out in paragraph 3.4 below.

3.4 Under the Network Code (Part G) Network Rail is required to write to all parties who have a contractual right to use the network explaining the nature and purpose of proposals for material changes to the infrastructure and to consult them for their views. Network Rail has to engage with these parties to resolve any questions and objections which they may raise in response to the proposal. Network Rail has to secure the consultees' agreement to the changes and may not impose them whilst any objection is outstanding. If a consultee does not feel that Network Rail has applied the Network Code (Part G) satisfactorily they may use the "Access Dispute" procedure to challenge Network Rail's decisions or actions which may eventually lead to an appeal to the ORR for a final determination.

3.5 The proposal to deem to removal of operational railway a minor modification not only bypasses the rights of CPK and ABP who have the benefit of agreement with respect to this part of the network, under the Network Code to object to the closure of the railway, but also applies an inappropriate procedure to the closure in clear undermining of the regulatory framework applicable to the railway.

4. Safety

4.1 As explained in section 1 of this Written Representation, Network Rail is under a duty to ensure the safety of the Network. This duty is enforceable by the ORR, which is required by statute to ensure the safety of the railway. The Environmental Statement describes the construction of level crossings as part of

the proposed works (paragraph 4.4.48). Network Rail objects strongly to this proposal which is contrary to the ORR's clear message that the rail industry is seeking to close level crossings across the Network. In illustration of this point, we cite the following extract from the ORR's policy on level crossings:

"Level crossings are the single biggest source of railway catastrophic risk....We seek to influence dutyholders and others to reduce risk at Britain's level crossings. We do this through a variety of means ranging from advice to formal enforcement action..... Risk control should, where practicable, be achieved through the elimination of level crossings in favour of bridges, underpasses or diversions. Where elimination is not possible, we aim to ensure that duty holders reduce risk so far as is reasonably practicable and in accordance with the principles of protection.

4.2 The Environmental Statement (paragraph 15.8.23) states that:

"Appropriate safety measures will be in place at the rail crossings to minimise the potential for any collisions between vehicles on the site and trains to as low as reasonably practicable"

4.3 As the company responsible to enforcing the safe operation of railways, Network Rail considers this assessment wholly inadequate and considers it unlikely to satisfy the ORR that the safety plans with respect to the crossing are satisfactory.

4.4 In addition, Network Rail is concerned that should the crossings be constructed, their operation would limit the capacity of the network immediately affected by that part of the track, thus further limiting the capacity of this part of the network. As demonstrated in section 2 in this Written Representation, Network Rail consider it detrimental to itself and to the national interest to limit the capacity of the network around the Port of Immingham.

5. **Environmental Statement and Consultation**

5.1 We note that the Environmental Statement submitted with the Application does not adequately assess the impact of removing KIL2 connection point from the network. Nor does the proposed DCO seek specific powers to lay out track bed at the southern point of the Order land.

5.2 The Application mentions that Able will provide access to all users over what would be a private siding but makes no provision for how this would be operated to ensure open access for all operators both now and in the future.

5.3 Further, Network Rail does not consider that the Environmental Statement adequately assesses alternatives to the proposed Scheme which would not affect the Network, and does not show how Abel propose to operate the site without

affecting the capacity of the network in the near future, in the context of National energy policy.

5.4 Finally, we refer to paragraph 12.4 of the Relevant Representation. Network Rail does not consider that the Applicant consulted adequately on the proposed acquisition of operational railway land and as such, the Application does not comply with the 2008 Act Guidance related to procedures for Compulsory Acquisition.

Dated 29th June 2012

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Eversheds LLP

