

ANNEX 2

**PLANNING ACT 2008
("THE 2008 ACT")**

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

**THE PROPOSED ABLE MARINE ENERGY PARK DEVELOPMENT CONSENT ORDER
("THE PROPOSED ORDER")**

**COMPULSORY ACQUISITION HEARING ON
16, 17, 18 OCTOBER 2012**

**POSITION STATEMENT OF NETWORK RAIL INFRASTRUCTURE LIMITED
("NETWORK RAIL")**

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(Our ref: ClarkJZ)

1. Network Rail's position

Paper of Amendments

- 1.1 Network Rail has submitted a paper of amendments to the Proposed Order dated 11 July 2012 ("the Paper of Amendments") (Annex 2). The Paper of Amendments set out the amendments to the Proposed Order which Network Rail consider appropriate for the protection of its undertaking, and which are required prior to NR withdrawing the Relevant Representation and the Written Representation.

2. Compulsory acquisition issues

Operational Land

- 2.1 Network Rail notes that Able no longer propose to compulsorily acquire plots numbers 02008 and 03015, in recognition of the requirement for that land by Network Rail for the HIT2 Head Shunt Extension. The HIT2 Head Shunt Extension is described in detail by reference to Annex 2, parts 1, 2 and 3 to the Written Representation.
- 2.2 Network Rail continues to object strongly to the compulsory acquisition of the land identified on the Land Plans submitted with the Application as plots numbers: 03013, 03014, 04004, 04013, 04014, 04024, 04025, 05023 to 05028 and 07001 ("the Land"). The grounds for this objection are:
- 2.2.1 based on statutory protection;
- 2.2.2 based on the operational requirement for the Land.

Statutory Protection

- 2.3 Article 29 of the proposed Order if made in its current form, would 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.
- 2.4 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 development consent order 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compulsory acquisition of a statutory undertakers' operational land in respect of which a representation has not been withdrawn, except in relation to land which the Secretary of State has certified (i) can be purchased and not replaced without serious detriment to the carrying on of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.

- 2.5 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:
- 2.5.1 the track and track bed which is the subject of the proposed compulsory acquisition powers is a dead end at the north end;
 - 2.5.2 the line is not used by passenger trains and has "more or less" fallen out of use for freight trains;
 - 2.5.3 the effect of the Promoter's proposals in the Proposed Order 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 (C.RO)] southwards to the southern point of the Order land."
- 2.6 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 (set out in the Written Representation and paragraph 1.11 below for ease of reference), and the extensive future use proposals (set out in the Written Representation and paragraphs 1.12 to 1.16 below). In addition, we refer to paragraph 12 of the Relevant Representation and would expand as follows:
- 2.6.1 The track is a dead end at the north end but as has been shown in the Written Representation the mothballed railway track-bed running west could be utilised in order to increase rail capacity from the Port of Immingham (the Killingholme Loop proposals).
 - 2.6.2 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.
 - 2.6.3 Network Rail consider it a breach of its duties under the Network Licence (as to which see Annex 4 of the Written Representation) 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 below 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.
 - 2.6.4 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.

- 2.7 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 section 2 of the Written Representation and in addition would refer to the Relevant Representations submitted on behalf of C.RO, C.GEN and ABP to the Application, all of which object to the proposed compulsory acquisition of the existing connection. This demonstrates the demand for demand for this section of the Network to be operational and remain in Network Rail's control. Network Rail is under a statutory duty to meet this demand, and the compulsory acquisition of this Land would place it in breach of that duty.
- 2.8 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.
- 2.9 The Statement of Reasons submitted with the Application fails to recognise that the Proposed Order includes the compulsory acquisition of operational railway land. Network Rail strongly disagrees that to compulsorily acquire the Land, which would remove operational land (and thus network) from Network Rail's undertaking, satisfies the test set out in paragraph 1.5 above.

Operational requirement for the Land

- 2.10 The existing use of KIL2 is referred to in paragraph 2.1 of the Written Representation submitted by Network Rail to the Application. 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 1.12 to 1.16 set out a detailed explanation of this future development.
- 2.11 C.RO is an existing user of KIL2, and has a connection agreement with Network Rail dated 11.08.1958. Our understanding is that this agreement has been disclosed to the Examining Authority. This Agreement is not in a modern format, but follows the same principles as any new Connection Agreement whereby C.RO pays Network Rail an annual sum to maintain the points that form the physical connection between the sidings on C.RO's site and their junction with the Killingholme Branch. C.RO 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. The Network Licence is at Annex 4 to the Written Representation. Network Rail's actions in enforcing such termination provisions are governed by the Network Code.

- 2.12 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.
- 2.13 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 biomass¹. 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 coal². The proposals of the Killingholme Loop Scheme 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 (Annex 4 to the Written Representation).
- 2.14 The effect of article 29 of the Proposed Order (together with article 47 which was the subject of the Specific Issues Hearing on the Draft Development Consent Order) 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

¹ 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.

² <http://www.biomassenergycentre.org.uk>

power being exercised, and such a precedent being set. Network Rail are very concerned that the Proposed Order should not be made in this form.

- 2.15 Compulsory acquisition of this part of the network 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.
- 2.16 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.
- 2.17 It is important to note that Network Rail considers it strategically important to retain the capability to be able to implement the proposals set out in paragraphs 1.12 to 1.16 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 C.RO 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 Branch³.
- 2.18 The limited capacity of KIL1⁴ could not cope with the intensification if all of the sites referred to in paragraph 2.17 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.
- 2.19 In sum, the operational demand on this section of the network is high, both in the short and long term. If the Proposed Order is made in a form which does not include the Paper of Amendments, not only would it place Network Rail in

³ 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.

⁴ KIL1 is shown on the Plan No27122 at Annex 1 to the Written Representation

direct contravention to its statutory duty, but would also run contrary to government policy to increase the transportation of materials by rail.

3. **Justification for Compulsory Acquisition**

- 3.1 Section 122 of the 2008 Act requires the following conditions to be satisfied if a development consent order is to include a provision for compulsory acquisition:

122(2) The condition is that the land-

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

(b) is required to facilitate or is incidental to the development, or

(c) is replacement land which is to be given in exchange for the order land under section 131 or 132.

122(3) The condition is that there is a compelling case in the public interest for the land to be acquired compulsorily.

- 3.2 Network Rail do not agree that the conditions in section 122 have been satisfied on the following grounds:

- 3.2.1 Able have not properly demonstrated the case for not building further bridges over the operational line;
- 3.2.2 Whilst discussions with Network Rail as to the construction of a single level crossing (in addition to bridges) have been commenced, they have not been concluded and thus this remains as an option which has not been closed out to the compulsory acquisition as an alternative;
- 3.2.3 Able have not demonstrated that the extent of the proposed compulsory acquisition of the Land is justifiable;
- 3.2.4 As against the future proposed uses of KIL2 together with the non-satisfaction of conditions in section 122(2)(a) and (b) of the 2008 Act, Network Rail does not agree that there is a compelling case in the public interest for the compulsory acquisition of the Land.

4. **Heads of Terms**

- 4.1 NR met with Able UK Limited ("Able") on Wednesday 10th October 2012. The purpose of the meeting was to discuss the grounds for an agreement between Able and NR, as regards the Relevant Representation and Written Representation submitted by NR to the proposed Order on 26th March 2012 and 29th June 2012, respectively.

4.2 The parties agreed verbally on some heads of terms for an agreement. NR subsequently instructed Eversheds LLP to formally draw up the heads of terms ("the HOTs") (Annex 1). These were sent as open correspondence to Bircham Dyson Bell at 1400hours on 15th October 2012.

4.3 On the morning of the compulsory acquisition hearing on 16th October 2012, Able rejected the HOTs and reverted to its position prior to the meeting of 10th October. Network Rail are completely surprised and dismayed by this change in position. Given the timing of the volte face, Network Rail's position has been severely compromised.

5. Conclusion

5.1 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:

5.1.1 Network Rail would not be able to operate the severed KIL2 which would result in the loss of protection to both C.RO 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."*⁵

5.1.2 The contractual right of both C.RO 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 C.RO with the wider national network.

5.1.3 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.

5.1.4 The contractual right of ABP to connect into the south end of the Killingholme branch would be frustrated through Network Rail's inability to fulfil its part of the agreement to connect ABP with this part of the network.

⁵ Network Licence condition 1

- 5.2 Network Rail were under the impression following the meeting on Wednesday 10th October, that Able understand Network Rail's statutory obligations and that an agreement can be entered into that include as a condition precedent the amendment of the Proposed Order in accordance with the Paper of Amendments. Following that meeting Network Rail thought its presence at the Specific Issues Hearing on Compulsory Acquisition necessary to update the Panel on these negotiations.
- 5.3 Network Rail now understands that Able have retracted their position of 10th October and as such is prejudiced in its position at the Specific Issues hearing on Compulsory Acquisition. It relies on, and reiterates, the position as set out in the Relevant Representation and the Written Representation, and further in this note.

