

**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")**

**WRITTEN SUMMARY ORAL CASE PRESENTED BY NETWORK RAIL  
INFRASTRUCTURE LIMITED ("NETWORK RAIL") AT THE SPECIFIC ISSUE  
HEARINGS ON  
16, 17, 18 OCTOBER 2012**

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(Our ref: ClarkJZ)

## 1. **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 1). 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 it withdrawing the Relevant Representation and the Written Representation submitted by it to the Order application (“the Application”).

## 2. **Summary of oral case**

### *Statutory protection against compulsory acquisition of operational land*

- 2.1 Network Rail has presented submissions in the Written Representation (Annex 3) and the Position Statement submitted to the Examining Authority on 16<sup>th</sup> October 2012 (Annex 2) as to why the statutory protection against the compulsory acquisition of statutory undertaker’s land should not be lifted in these circumstances. The Killingholme branch Line (“KIL2”) is operational railway, which, to remove from the network would be seriously detrimental to Network Rail’s undertaking. There is no land belonging to, or available for acquisition by, Network Rail which may replace KIL2.

### *Network Rail’s operational requirement.*

## 2.2 The Killingholme Loop proposals

- 2.2.1 Network Rail has explained in detailed written, as well as oral, evidence the proposals to construct the Killingholme Loop for the purposes of alleviating the growing freight demand on KIL2. We refer in particular to the Written Representation and the answers to the Examining Authority’s first round of Written Questions (Annex 3), and the answers to the second round of Written Questions (Annex 4).

- 2.2.2 We refer the Applicant’s ‘Comments on Answers to the Second Set of Examiner’s Questions’ (October 2012). We object to the following statements which have been made in respect of the Killingholme Loop proposals:

- (a) Paragraph 6.6 – the Applicant states that alternative alignments for the Killingholme Loop are feasible that do not pass through the AMEP site. As detailed in the Written Representation, Network Rail’s Route Utilisation Strategy 2007 which is researched and published in accordance with the Network Code, discounts two other means of alleviating the pressure on KIL2. Network Rail accepts the

Applicant's point that the Killingholme Loop proposals could be altered in terms of alignment. However, this has not been part of the studies carried out by Network Rail and it has not been proved that any alternative route is practicable. The reason why an alternative alignment has not been part of the studies is that the land which would be required for any such alignment is not within Network Rail's ownership. The infrastructure in KIL2 that is within the AMEP site is already in place and hence is the current optimum route to use for the Killingholme Loop.

- (b) Paragraph 6.7 – Provided that it is proven that any alternative alignment is feasible and powers to acquire the relevant land available, at such time as the Killingholme Loop proposals are implemented, it will be considered. Alternative options to the Killingholme Loop proposals have been discounted by Network Rail (explained in section 3.3 of the Corus Report, Annex 6 to the Written Representation) in favour of the Killingholme Loop which presents the optimum way forward.

2.2.3 The Applicant has called the case for the Killingholme Loop proposals into question, as set out at paragraph 6.8 of its Comments on Answers to the Second Set of Examiner's Questions.

2.2.4 Network Rail strongly objects to the assertion that the case for the Killingholme Loop relies on "*an unproven premise*" that the proposals to increase rail capacity would increase the Port of Immingham's ability to import biomass. Network Rail, in accordance with the requirements of the Network Code and Licence Conditions, has consulted widely on the demand for rail capacity in this area and its view of the potential for biomass is formed by direct contact with all of the industry's major users of rail.

2.2.5 Network Rail's consultation process in this matter has shown that the increase in demand on the network as a consequence of biomass growth, will arise from conversion to biomass (as opposed to coal plant, see paragraph 2.8 of the Written Representation) and not construction of new power stations at new sites. Studies have shown that biomass deliveries will grow to existing sites with rail and electricity infrastructure in place (thus requiring minimal new consents to convert to the new fuel). For reasons of commercial confidentiality, Network Rail cannot reveal specific plans of any generator. However, it can be stated that such consultation studies are on-going with the

following major generators (as opposed to solely the Port of Immingham, as is the Applicant's contention):

- Drax Power
- EDF Energy
- Eggborough Power
- EON
- International Power
- Scottish & Southern
- Scottish Power
- RT Alcan
- RWE

2.2.6 These generators comprise the bulk of the UK electricity industry. Network Rail's knowledge of this market, and the future requirement for rail to service it, is therefore very firmly founded.

*Resumption of freight services*

2.2.7 The Killingholme Loop proposals are a practical solution to the predicted increase in demand on rail capacity in the area. The Applicant has made much of the relatively low usage of KIL2 in recent years. This is not relevant to the current route utilisation planning.

2.2.8 Resumption of rail freight services after a gap of a number of years is a proven characteristic of the rail freight sector. Network Rail can cite a number of examples of railway lines which have been dormant for a number of years can come back into use as a result of new business initiatives from key industries.

2.2.9 The following table sets out examples. It should be noted that this is not an exhaustive list:

<b>Railway line</b>	<b>Approximate period of dormancy</b>	<b>Key party served by resumed rail services</b>
Ipswich Docks branch	2001 – 2006	Port of Ipswich
Bristol – Portishead	1970s – 2001	Port of Bristol
Pantyffynnon – Gwaun Cae Gurwen	c. 2000 – 2009	Celtic Energy
Methyl Branch	1990s – 2012	Scottish Coal
Rossington Branch	2006 – c. 2013	New waste terminal

East Usk Branch	c. 1990 – 2002	Scottish and Southern Power
Newton Abbot – Heathfield	c. 2005 – 2012	Colas timber
Colnbrook Branch	c. 1970s – 1990s	

2.2.10 The Examiner has questioned the requirement for an environmental assessment of the Killingholme Loop proposals, and Network Rail's progress in that assessment. This question is also raised by the Applicant in its Comments on Answers to the Second Round of Examiner's Questions (paragraph 6.7). In answer to these questions, we refer to the Paper on the Killingholme Loop and Environmental Process submitted to the Examining Authority on 20<sup>th</sup> September 2012.

## 2.3 Negotiations with the Applicant

### *Lease*

2.3.1 As set out in detail in Network Rail's Position Statement submitted to the Examiner on 16<sup>th</sup> October 2012 (Annex 2), Network Rail have cooperated with the Applicant in an effort to reach an agreement in order that the compulsory acquisition of the railway is avoided. Following a meeting on 10<sup>th</sup> October 2012, Network Rail offered a set of heads of term for agreement to the Applicant based on those discussions. The heads of terms are at Annex 6. In the meeting of 10<sup>th</sup> October, Network Rail had understood the Applicant to accept principle of those heads of terms, including the need for certain preconditions to the grant of a lease of the section of KIL2. These preconditions protect the existing users of that section of the network, put an obligation on the Applicant to show existing users how they could get trains to and from their site using what would be a private siding through the AMEP site (a pre-condition the Applicant has been aware of throughout all discussions with Network Rail since 2010 and one that it has never offered a solution to), and safeguard the proposals for the Killingholme Loop. As detailed in the Position Statement, in a complete volte face on 16<sup>th</sup> October 2012, the Applicant rejected the proposed heads of terms.

### *Level crossings*

2.3.2 At the meeting on 10<sup>th</sup> October 2012, Network Rail offered Able an easement for a new level crossing over KIL2 to enable the AMEP site to operate by permitting the passage of heavy pieces of plant over the railway line by use of a crossing. This offer was made in accordance with Network Rail and ORR policy on level crossings whereby new crossings will only be allowed on the Network in exceptional circumstances (e.g. closure of a number of crossings and replacement

by a new crossing) (copy attached at Annex 7). In accordance with the policy the offer was made conditional upon the closure of 4 existing level crossings.

- 2.3.3 In reality, three of the existing level crossings which are suggested for closure as part of the offer referred to in paragraph 2.3.2 have little or no use being former private crossings for the use of farm vehicles only. Network Rail's offer to the Applicant therefore represents a potential increase in level crossing use over KIL2. This fact demonstrates Network Rail's cooperation in this matter. The easement offered would create a new level crossing for the use of very major industrial plant and as such the offer is very generous, taking into account the overall comparison of level crossing safety risk between the *status quo* and the position being offered to Applicant (as is required by ORR Guidance).
- 2.3.4 The Applicant has not offered any explanation to Network Rail as to the reasons for rejecting the offer for the easement for a level crossing. It appears to Network Rail that the Applicant is driven by a requirement to acquire ownership of KIL2 (whether freehold or leasehold), in order that it has a "free hand" over the railway – whether to build on it or construct and operate a greater number of level crossings than Network Rail has felt able to offer through its easement proposal. On the face of the Application, it would appear that access over the railway as presented in Network Rail's offer of an easement over KIL2, should be sufficient for the requirements of the development. The rejection of the offer for an easement without explanation completely undermines the case for compulsory acquisition of KIL2 and the Applicant's proposals to do so are wholly unjustified.
- 2.3.5 Network Rail would note in the context of level crossings, that the Applicant would be required to comply with the statutory duties as regards safety, namely:
- (a) to assess and justify the balance of safety risks between the *status quo* and proposals for any new level crossings; and
  - (b) to obtain the permission of the Office of Rail Regulation for any new level crossing arrangements over what would be a private siding rather than a Network line.
- 2.3.6 As such, if the purpose of the proposed compulsory acquisition is to enable the construction of a number of level crossings, Network Rail is aware that the proposal would still require ORR approval and such

approval has not been demonstrated by the Applicant. In this way, the case for compulsory acquisition is further undermined.

### *Bridge*

2.3.7 The Applicant has not properly discounted the case for constructing a bridge over KIL2 in order to operate the AMEP site. As part of the heads of terms offered to the Applicant, Network Rail offered an easement over the railway for the construction and operation of a bridge or bridges (in addition to the level crossing). Again, this offer has been rejected by the Applicant without explanation.

## 3. **Conclusion**

### *Justification for compulsory purchase*

3.1 Section 122 of the Planning Act 2008 requires that there is a compelling case in the public interest for land to be compulsorily acquired, and that Secretary of State must be satisfied of this prior to granting a development consent order which includes a provision to compulsorily acquire land. Network Rail submits that this requirement has not been met:

3.1.1 As has been put in evidence to the Examiner, Network Rail does not consider that the case for constructing a bridge over KIL2 has been properly considered by the Applicant and justifiably dismissed.

3.1.2 The Applicant has not provided a proper explanation as to why Network Rail's offer for an easement over KIL2 to build and operate a level crossing is not acceptable. Should the Applicant consider that a compulsory acquisition of the land would enable them to construct more than one level crossing, Network Rail would point out that statutory constraints on the building and operating of new level crossings would apply. As such, the Applicant has not proved that it can gain any operational advantage from the compulsory acquisition.

3.1.3 The Applicant has not demonstrated that it has any contact with the ORR to explore the acceptability of its aspirations with regard to level crossings. It has not presented assessment of comparative level crossing safety risk between the *status quo* and their aspirations for the AMEP site. There is no evidence, therefore, that the compulsory acquisition of the railway would facilitate the operation of the AMEP site.

3.1.4 Network Rail believes that its offer to the Applicant for crossing the railway by a combination of bridge or bridges and level crossing should enable the operation of the proposed AMEP site. The Applicant

has not properly demonstrated that the acquisition of the railway is required, except in order to access the AMEP site. As such, the Applicant's case for the compulsory acquisition of the branch line is entirely without merit and is not based on any reasoned justification.

- 3.2 Network Rail maintains that the statutory protection set out in section 127 of the Planning Act 2008 should not be circumvented. In evidence, Network Rail has demonstrated that KIL2 is operational railway land that is used for the purposes of carrying out its undertaking. Compulsory purchase of it would be serious detrimental to Network Rail's undertaking, as has been shown in evidence with regard to the Killingholme Loop proposals as well as obligations to existing users of that section of the Network.
- 3.3 As stated in paragraph 1, Network Rail's position remains that until the Order is modified in accordance with the Paper of Amendments, it will not withdraw its Written Representation.

Eversheds LLP  
Solicitors for Network Rail  
26<sup>th</sup> October 2012