

PLANNING ACT 2008

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

**APPLICATION FOR THE PROPOSED ABLE ENERGY MARINE PARK DEVELOPMENT
CONSENT ORDER ("the DCO")**

**NETWORK RAIL'S WRITTEN SUBMISSIONS IN ANSWER TO QUESTIONS RAISED
BY THE PANEL AT THE SPECIFIC ISSUES HEARING ON 21 NOVEMBER 2012**

Planning Inspectorate Reference Number: TR030001

Unique Objector Reference: 10015512

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NOTE: references to the DCO are references to the draft DCO dated 26 October 2012.

1. Section 127 and protective provisions

1.1 Network Rail has submitted in its Written Representation and subsequent evidence in the course of the process of examination of the DCO, that should the DCO be amended to incorporate the protective provisions in the form submitted with Network Rail's Paper of Amendments (11 July 2012) ("the proposed protective provisions") it will be in a position to withdraw its representations against the DCO.

1.2 Schedule 9, Part 4 of the draft DCO (for the protection of Network Rail) omits to include two fundamental aspects of protection, which are typically included in legislation authorising infrastructure projects. These are:

(a) the requirement that the powers to compulsorily acquire land or rights over land can only be exercised with the consent (not to be unreasonably withheld and may be subject to conditions) of Network Rail; and

(b) an indemnity in respect of claims arising in respect of a specified work;

(paragraph 36(3) and 45 respectively of the proposed protective provisions).

1.3 The Panel has asked Network Rail to expand on the relationship between section 127 of the Planning Act 2008, and paragraph 36(3) of the proposed protective provisions. Section 127 provides that where a Written Representation to an application for a development consent order submitted by a statutory undertaker is not withdrawn, the matter is referred to the Secretary of State to decide whether the specific tests set out in that section are satisfied.

1.4 The proposed protective provisions do not impose an absolute restriction on the compulsory acquisition of Network Rail's land. They simply seek to ensure that in the event of compulsory acquisition of that land, or rights over it, Network Rail has the opportunity to impose reasonable conditions for the protection of its operational undertaking. Paragraph 36(3) requires that Network Rail's consent is obtained prior to the exercise of the powers of compulsory acquisition over operational land, however that consent may not be unreasonably withheld or delayed. The only matter in respect of such consent which is in Network Rail's discretion to decide, is safety.

1.5 Statutory undertakers, such as Network Rail, hold land which is required to discharge specific statutory functions. Section 127 is one aspect of statutory

protection that has been put in place to prevent a statutory undertaker's duty being frustrated by the compulsory acquisition of operational land (as defined by the Town and Country Planning Act 1990 (section 263)).

- 1.6 Section 127 serves the same purpose as section 16 of the Acquisition of Land Act 1981, which applies to the compulsory acquisition of land belonging to statutory undertakers in the context of a conventional compulsory purchase order. The purpose is to protect Network Rail (and other statutory undertakers) in the event of a proposed order which does not include protection against the compulsory acquisition of operational land, where that acquisition would frustrate the discharge of a statutory duty. The question of whether the acquisition of the statutory undertakers' land will cause detriment to the undertaking is referred to the Secretary of State. This referral is not necessary should the DCO include the controls in paragraph 36(3), which in any event are subject to reasonableness.
- 1.7 The clear function of paragraph 36(3) is to ensure that the safety and fitness for purpose of the railway is not jeopardised by development on it. As has been explained to the Panel, it is universally accepted that where a third party scheme affects operational railway property, that property is protected in this way. There is no precedent of an order pursuant to the Transport and Works Act 1992, or the Planning Act 2008 being made without this protection.
- 1.8 Just as paragraph 36(3) ensures that the safe operation of the railway is protected, the "reasonableness qualification" in paragraph 35 of the proposed protective provision (which applies to all of those provisions) ensures that Network Rail is not in a position to unreasonably prevent development on or near the railway.

2. **Indemnity**

- 2.1 It is accepted practice that a statutory undertaker should have the benefit of an indemnity to the extent that a third party scheme affects its statutory functions. The indemnity at paragraph 45 of the proposed protective provision is reasonable protection for Network Rail's financial exposure. It includes the following qualifications:

- (a) it relates to costs, charges, damages and expenses ... "reasonably and properly incurred" by Network Rail (paragraph 45(1));
- (b) Network rail is required to give the Company (i.e. the developer) reasonable notice of any claim or demand (paragraph 45(2));
- (c) Network Rail is prohibited from settling any claim or demand, or reaching a compromise in respect of it,

without the prior consent of the Company (paragraph 45(2)).

- 2.2 Paragraph 45(3) includes in the definition of claim, costs incurred by a train operating company. Network Rail are obliged to compensate users of the railway (now or in the future) where there is a disruption to their rail services. As a matter of principle, Network Rail must be able to recover those claims from a developer in the event that they are brought as a consequence of a third party scheme. Paragraph 45(4) ensures that Network Rail is not able to withhold sums from a train operating company that it has received as part of a claim from the Company. The qualifications spelled out in paragraph 2.1 apply.

22 November 2012