

C.GEN Killingholme Limited

The Planning Act 2008

The Infrastructure Planning (Examination Procedure) Rules 2010

The Able Marine Energy Park Development Consent Order

Planning Inspectorate Reference: TR030001

Written summary of the oral representations of C.GEN Killingholme Limited at the Issue Specific Hearing on the draft Development Consent Order including Deemed Marine Licence, 21 and 22 November 2012

Interested Party reference: 10015531

INTRODUCTION

1. This written summary ("WS3") has been prepared on behalf of C.GEN Killingholme Limited ("C.GEN"). It relates to the oral submissions made by C.GEN at the Issue Specific Hearing ("ISH") on the draft Able Marine Energy Park ("AMEP") Development Consent Order ("DCO") including Deemed Marine Licence held on Wednesday 21 and Thursday 22 November 2012.
2. This document summarises the submissions made by C.GEN at the ISH, using the agenda of the ISH as a framework.

MAIN ORDER

3. Article 2 Interpretation

- 3.1 The terms defined in the DCO need revision.

Authorised development

- 3.2 The phrase "any authorised development" was justified by Able on the basis that it covers dredging and other activities. This is not satisfactory. The authorised development should only be that described in Schedule 1. If it is not in there, it is not authorised.

Order limits

- 3.3 This definition refers to the limits "within which the authorised development and works may be carried out" as shown on the works plans. There is no need to refer to works. Reference to authorised development is sufficient.
- 3.4 Further, it was noted that pursuant to Article 11(2) Able is authorised to carry out and maintain works within the order limits. The order limits shown on the works plans are a dotted blue line that includes the turning area and approaches. Put together, the definition and the works plans, and Article 11(2) would allow Able to carry out works outside its area of jurisdiction.
- 3.5 Able agreed to amend the reference to order limits in Article 11(2) to the area of jurisdiction. The definition of order limits still needs to be amended. The amendment to Article 11(2) is accepted.

Additional definitions

3.6 There remains a need to define terms "limits of deviation" and "sections" given that they are used more than once throughout the DCO.

4. Article 11 Provision of works

4.1 Article 11(1) empowers Able to construct railway lines. C.GEN has sought that this be deleted, on the basis that Able has not provided any detail as to the works proposed to the railway. There remains considerable uncertainty about what Able proposes in relation to the Railway and as a result powers should be constrained, if granted at all.

4.2 Able has a specific power in Schedule 1 to construct the passing loop (now recognised by Able at the ISH to be a siding for Able's own use).

4.3 There is no need for a general power to construct railways. It is not appropriate to include a wide range of powers in the hope that they might be relevant.

4.4 At the ISH C.GEN submitted that in any event, the principle concern is that Able is prevented from acquiring interests in the Railway, whether those be the freehold or easements, or connecting to the Railway without the consent (and control) of Network Rail. In that respect, the power to construct a railway on its land is not the principal issue: it is that it should not be allowed to connect without the approval of Network Rail.

5. Articles 15 Street works and 16 Temporary stopping up

5.1 The DCO must provide protection for C.GEN in the event that Able blocks its access to Rosper Road.

5.2 C.GEN recognises the Panel's comment that this is a matter for protective provisions. There are specific provisions in the draft Protective Provisions appended to this WS4.

6. Articles 30 Compulsory acquisition of land, 31 Power to override easements and other rights, 34 Compulsory acquisition of rights

General

6.1 Discussion of these provisions included a discussion of the revised proposals for acquisition of easements that Able only submitted to the Panel on 20 November.

6.2 At the ISH, C.GEN explained that Able's proposals for the Railway were - as a result of those new proposals for easements - unclear.

- 6.3 C.GEN's position remains that Able should not be authorised to compulsorily acquire the Railway, or any interest therein. C.GEN submits that the Secretary of State ("SoS") cannot be satisfied that the conditions in Section 122 of the Planning Act 2008 ("PA 2008") have been met, or that the requirements of the SoS' Guidance on procedures for compulsory acquisition under the PA 2008 have been satisfied.
- 6.4 This position is fully set out in C.GEN's written representations. In particular, the Panel is referred to the notes that C.GEN submitted on 12 October 2012 in advance of the compulsory acquisition hearing and the summary of its representations made at that hearing (submitted on 26 October 2012).
- 6.5 There was some confusion at the ISH as to what Able was in fact proposing. It appeared that the proposal was a modification to Able's application. However, Counsel for Able sought to explain that it was in fact a suggestion put to the interested parties, that it might only be granted easements. Given the apparent rejection of this proposal by Network Rail, C.GEN, and others, Able had decided that it would instead seek to rely on powers of compulsory acquisition of the freehold. Counsel for Able sought to explain that Able was demonstrating that if the Secretary of State was minded not to grant powers to acquire the freehold of the Railway, Able was demonstrating it could rely on easements.
- 6.6 There are a number of comments made by C.GEN. First, aside from apparent confusion about the nature of these proposals, the easements proposal would still require powers of compulsory acquisition. Second, as identified by a number of parties, the recognition that easements would be workable meant that the freehold was not required, and therefore the tests in Section 122 PA 2008 were not met. Third, as noted by C.GEN, the proposal was billed as a concession. However, given the extremely large width of the easements (which are not explained or justified anywhere), the fact that five are proposed, and there is no restraint or control on how the easements are to be constructed or used i.e. how they would interface with the operational railway, this proposal is not a less worse case, or indeed a real concession. The effects of this proposal would be the same as an acquisition of the whole Railway. The Panel is respectfully reminded of the operational concerns that C.GEN raised in relation to Able controlling the Railway, that are set out in particular in paragraph 11 of the note that C.GEN submitted on 12 October 2012 in advance of the compulsory acquisition hearing.
- 6.7 Finally, C.GEN also reminded the Panel that the option of easements has been available to Able for a long time, including in Able's own proposals to Network Rail, and their revised proposals in response to Able. C.GEN does not object to a reasonable number of easements.

No party does. Able has sought to dress up its revised proposals as a concession. They are clearly not. The Panel (and the Secretary of State) should therefore give them limited weight.

- 6.8 C.GEN also noted (on 22 November) that even if Able is granted powers of compulsory acquisition, it must be remembered that the section of Railway within AMEP would be sandwiched between portions of Network Rail network. This raises operational concerns. AMEP cannot be operated so as to prevent the efficient and effective operation of Network Rail's network. Given that there is no guarantee as to how this would be achieved, it remains C.GEN's case that compulsory acquisition of the Railway (whether the freehold or easements) is not acceptable. Notwithstanding the failure to meet the Section 122 tests, Able's reasons for acquiring the Railway (effective operation of AMEP as a whole, etc. - see C.GEN's Final Note from the compulsory acquisition hearings where these assertions are addressed) do not outweigh the interest of other parties, and the public as regards the availability and use of the national railway network.
- 6.9 C.GEN's position - as explained at the ISH - remains that article 30 must exclude Network Rail's land, or appropriate protective provisions should be given to Network Rail in the standard and long-established form, namely that no interest of Network Rail is acquired without its consent - see paragraph 35(3) of Network Rail's own draft of protective provisions. As C.GEN submitted, this is a standard provision that is included wherever Network Rail's land is proposed to be acquired. The SoS would have to have good reason not to include such a provision. It is submitted that no such reasons exist here, particularly given the consequences of unrestricted powers and the resulting prejudice and detriment to C.GEN.
- 6.10 C.GEN is also seeking protective provisions in respect of the Railway. These are addressed below in relation to Schedule 9.

Provisions to protect C.GEN

- 6.11 As submitted by C.GEN, the Railway including any section acquired by Able must operate as a coherent whole. For this reason, C.GEN maintains that wording is required to protect C.GEN so that acquisition of any portion of the Railway by Able does not affect the status of C.GEN's connection agreements. The following wording is therefore still proposed as Article 31(6)(a) - this was formerly the Article 36(6)(b) in C.GEN's amendments:

"Nothing in this Article shall override any agreement between Network Rail and either C.RO Ports Limited or C.GEN Limited relating to the right to connect to and use Network Rail's railway".

7. Article 48

- 7.1 The Panel is referred to C.GEN's comments at the ISH, rehearsed above. If Able is not to be granted powers of compulsory acquisition over the freehold of the Railway, this Article can be deleted. The same would apply if Able is to be granted the power to acquire easements.
- 7.2 Able stated at the hearing that if its alternative proposal for the compulsory acquisition of easements is accepted then this Article will no longer be required. However regardless of whether compulsory acquisition is authorised in relation to the railway land or easements, Article 48 is not appropriate or necessary and should be deleted.
- 7.3 It was C.GEN's understanding at the close of the ISH that Able were continuing to pursue the compulsory acquisition of the railway land.

8. Schedule 1 Authorised Development

- 8.1 This Schedule does not contain the level of specificity required. It is entirely standard in orders of this nature to specify certain construction activities as works and delineate them in the works plans. It is entirely standard to adopt this procedure. Able's statement that nothing to be gained from specifying the activities listed in in paragraph 4 as works is not agreed. That is unorthodox, and brings into doubt the coherence of the proposed development, the efficacy of the DCO, and the ability to control environmental effects to those assessed.
- 8.2 There was discussion about the scope and purpose of Work No. 3. This also related to Able's revised proposals for compulsory acquisition. The position remains unclear, and confused. Clearly, if Able is granted powers to acquire easements only, there is no need for a passing loop. If Able is granted powers to acquire the freehold of the Railway, the passing loop is relevant.
- 8.3 C.GEN has made submissions previously on the inadequacy of the loop (length, operation) to which the Panel is referred - see in particular in paragraph 11.13 - 11.23 of the note that C.GEN submitted on 12 October 2012 in advance of the compulsory acquisition hearing. If Able is to be granted powers to acquire the Railway, Able must be required to install a loop of adequate before it can use the Railway. This position is without prejudice to C.GEN's objections to the proposed acquisition.

Highway improvements

8.4 In relation to the road improvement works listed in paragraph 4(c), insufficient detail has been provided. The same applies to Work No. 2 - improvement works to the junction of Humber Road and Rosper Road. This issue was raised by C.GEN in the first ISH regarding the DCO. Able's agreement at the hearing to delete the references in 4(c) to Eastfield Road and the A180 is noted, however C.GEN still does not have enough information regarding the remainder of the road improvements being put forward as part of the application. C.GEN supports the request made by ABP at the ISH - which accords with its previous submissions - that plans illustrating the road improvement works be included in the plans listed in the DCO. It is not acceptable that Able be empowered to carry out works that are so broadly described without an accompanying plan, referenced in the DCO, to illustrate the nature of those works.

Level crossings

8.5 In reviewing the position following the ISH, C.GEN has observed that Able has sought no powers to construct level crossings. C.GEN has made this point previously. It is, however, material to consideration by the Panel or the SoS of the scope/acceptability of any powers for Able to acquire easements.

8.6 If Able were granted such powers, it would in any event not have the ability to construct level crossings. These are not covered by any wording within Article 11(2). Railway lines are not level crossings. There is no specific Works provision. Given this anomaly, a power to acquire easements would not be effective or capable of implementation because there would be no power to construct the works for which the easements are required.

8.7 In any event, it is entirely unacceptable to proceed without Works plans, or design drawings for level crossings, including details of how they would operate.

8.8 The Panel and the SoS should give limited, if any weight, to such a proposal. It is ill-considered, ineffective, and not assessed. It is not possible to grant such powers.

9. Schedule 9 - Protective Provisions

Railway

9.1 As noted above - and at the ISH - C.GEN continues to object to Able's proposed compulsory acquisition of the Railway, whether of the freehold or easements. Without prejudice to this position, C.GEN has proposed PPs in relation to the Railway. In order that the Panel - and the Secretary of State - is fully aware of C.GEN's position, the following explanation is given:

- 9.1.1 C.GEN continues to object to the acquisition of any interests in the Railway (freehold or otherwise). C.GEN objects to any proposal to increase the number of level crossings. Able has failed to meet the tests in the PA 2008 or related guidance, in particular that the Railway is required for AMEP under section 122(2)(a); and that there is a compelling case in the public interest for the land to be acquired compulsorily under section 122(3);
- 9.1.2 Notwithstanding its preference for no acquisition and without prejudice to that position, C.GEN proposed protective provisions in relation to the Railway. It discussed these - only at the very latest stage of the ISH on 22 November - with Able. Any protection is considered by C.GEN to be a minimum acceptable protection, should the SoS decide in the circumstances to grant powers to Able. There is no basis for doing so but C.GEN has sought to ensure it is protected whatever the outcome; and
- 9.1.3 C.GEN has also proposed an indemnity in the protective provisions.
- 9.2 C.GEN wishes to make clear to the Panel that the version of protective provisions that was discussed with Able on 22 November was first submitted on 23 July. The Panel is aware of the disclosure to it of C.GEN's voluminous correspondence with Able about those provisions, and its efforts to agree a form of protection. The Panel is therefore asked to give due weight to Able's failure to engage with C.GEN.

C.GEN's position

- 9.3 Accordingly, C.GEN's position is as follows and to which it submits that the Panel and the SoS should give considerable weight:
- 9.3.1 C.GEN maintains its objection to the proposed compulsory acquisition of any interest in the Railway. It has sought to discuss the Railway with Able for a long period - and throughout the examination;
- 9.3.2 Without prejudice to that objection, should the SoS determine that Able should be granted powers of compulsory purchase over the Railway, Able should not be entitled to exercise those powers unless and until it has entered into an agreement with C.GEN and C.GEN for joint control and operation of the Railway, and at the absolute discretion of C.GEN and C.GEN;

- 9.3.3 Without prejudice to the above, should the Secretary of State consider to grant Able powers without such restrictions, he must include the PPs proposed by C.GEN (as appended) to ensure that Able does not prevent C.GEN from accessing the railway crossing the Order Land, or prevent C.GEN from having free, uninterrupted, and safe use of the Railway;
- 9.3.4 Further, C.GEN has discussed with Able whether such protection be limited by insertion of a "reasonableness" provision. Without prejudice to the above, should the Secretary of State determine that he agrees with Able's provision, he will nonetheless include PPs for C.GEN but include the words "not unreasonably" in respect of Able not preventing access to or use of the railway crossing the order land; and
- 9.3.5 Finally, whatever the Secretary of State's decision, he must include an indemnity in the form proposed by C.GEN. Further submissions on the need for an indemnity are made below.

Paragraphs 61A and 61B (Rosper Road)

- 9.4 The insertion of paragraphs 61A and 61B have been agreed by Able.

Indemnity

- 9.5 The indemnity sought by C.GEN should be included in any protective provisions because the consequences of Able blocking the Railway are significant for C.GEN, in addition to the need for general protection from damage or loss. In particular, if the Railway were to be blocked, or fail, so that C.GEN could not obtain fuel deliveries by rail, it would not be able to operate its proposed power plant. The potential loss would be substantial, in terms of lost revenue from electricity generation, shut-down and start-up costs, and also penalties for failing to meet contractual obligations for certain electricity generation levels. C.GEN's operational concerns in relation to Able control over the Railway have been set out extensively in C.GEN's written representations, and in the note that C.GEN supplied to the Panel in advance of the compulsory acquisition hearing on 12 October 2012, and the written summary of the representations made at that hearing, submitted to the Panel on 26 October 2012.
- 9.6 Given these concerns an indemnity is the only appropriate and acceptable protection. It is not appropriate to expect C.GEN to rely on bringing an action in the courts, whether to obtain an injunction or to pursue Able for damages.

- 9.7 PPs in statutory orders follow a very standard form. Indemnities are always included because the very existence of PPs acknowledges that the powers contained in the order have the potential to interfere with the interests of the party being protected. The potential for interference is only made acceptable by including PPs. Those PPs are only adequate if they include an indemnity. This is a standard approach across many decades of making such orders. It is applied because where an order authorises such an interference it is not appropriate to expect the party that will suffer the interference to have to rely on seeking redress through the courts. Indemnities in PPs recognise that the party does not need to rely on injunctive proceedings to protect their interest.
- 9.8 The corollary of this is that compensation for any loss caused by the development is secured through the indemnity. This recognises that because of the nature of interests being protected the party should not have to seek financial redress through the Courts. Statutory instruments of this nature should cover all these eventualities.
- 9.9 The SoS must have a very good reason to depart from practice and precedent. Able have made no case as to why an indemnity should not be included other than a general statement that it wants to avoid providing indemnities to any party. It has not explained why an entirely standard approach is not appropriate here. There is accordingly no basis to not include an indemnity. It is submitted that such an approach would be open to challenge in the Courts.
- 9.10 Furthermore an indemnity makes the relationship between parties very clear. It should also be emphasised that the form of the indemnity being sought by C.GEN is such that is not an absolute indemnity as Able stated it is seeking to avoid. Able expressed concern at the ISH that if parties were indemnified by Able they would not be incentivised to seek to reduce the settlement figure. This would not be possible under the indemnity arrangement being sought by C.GEN. Under the provision Able indemnifies C.GEN against all claims brought against it. C.GEN must give Able reasonable notice of any such claim or demand. It cannot reach settlement or compromise without Able's consent. If Able withholds that consent, Able shall have sole conduct of the settlement (or the continuation of the proceedings necessary to resist the claim). C.GEN will provide assistance as reasonably necessary.
- 9.11 The consequences for Able of indemnifying C.GEN are not, therefore, uncontrolled or unknown. An indemnity is the only basis on which Able's compulsory acquisition of the Railway, without a condition precedent requiring joint control, could be acceptable to C.GEN. Notwithstanding this, C.GEN maintains its objection to the compulsory acquisition. Able has failed to make a case under section 122 of the PA 2008. There is no basis on which the

Secretary of State should grant compulsory purchase powers to Able in respect of the Railway, whether that be of Network Rail's land or Able's alternative proposal of the acquisition of easements. This position has been maintained by C.GEN throughout the examination, but C.GEN notes in particular the note it submitted to the Panel in advance of the compulsory acquisition hearing on 12 October 2012, and the written summary of the representations made at that hearing, submitted to the Panel on 26 October 2012.

10. Schedule 11 - Requirements

Requirement 3A - cargo restriction

- 10.1 C.GEN endorsed the submissions of ABP (which C.GEN has also made separately) that the restriction on use of the authorised development should not apply to the quay only, but to the whole development.
- 10.2 C.GEN submitted that any other restriction opened the possibility of the use of the landside works for unspecified purposes not connected with activities at the quay, the environmental effects of which might be different, significant, and in any case have not been assessed. The SoS is required to impose restrictions to limit the environmental effects of a proposal to those that have been assessed. In particular, other uses could have different effects on *inter alia* road and rail. There is no basis for not including a restriction on the use of the whole development, and the fact that Able has not proposed such a restriction must be given weight accordingly.
- 10.3 Able also suggested that if it agreed to insert a restriction into Paragraph 3A(1) it would delete the related provision in paragraph 4(b) of Schedule 1. This is not appropriate. The Schedules have a different purpose to the Requirements. Schedule 1 operates to describe the development authorised by the DCO and Schedule 11 restricts how that development may be carried out. References to the restriction on the purposes for which AMEP can be used are required in both schedules to ensure that the development carried out is limited to that which has been environmentally assessed. Any other approach is unorthodox.
- 10.4 C.GEN (and ABP) also made extensive submissions about Requirement 3A(2), which C.GEN has made previously. Able sought to explain that this provision would not prejudice anyone because an application for planning permission to handle different cargoes would be consulted upon, and would also be subject to the Secretary of State's powers of call-in under the Town and Country Planning Act 1990 ("1990 Act").

10.5 C.GEN responded (these submissions made previously) that the proper route for amending a requirement is the PA 2008, and Schedule 6 of that Act. As the Panel observed, if this provision is an attempt to circumvent those procedures, the DCO should not contain it, and if it is not, the purpose of the provision is unclear.

10.6 C.GEN also submitted that in any event an addendum to a requirement does not achieve what Able purports to achieve. If it seeks to amend the provisions of the PA 2008, an operative provision is required in the main body of the DCO. Such an amendment cannot be achieved in this way in a requirement. It simply does not have that effect. It is also entirely unlawful. It would be improper and contrary to the wishes of Parliament, given the correct procedures are set out in the PA 2008.

Requirement 4 - Detailed design approval

10.7 C.GEN heard the submissions made by Able and ABP about this requirement, and the concerns of the Panel. In particular, it was apparently unclear how this requirement was intended to operate to enable approval of detailed design in future.

10.8 To assist the Panel, C.GEN highlighted the approach taken in the Rookery South Resource Recovery Facility DCO. Whilst design of that project was more advanced than AMEP at this stage, the same principles can be applied here. They are standard. It is entirely acceptable for a DCO to permit development in outline form with subsequent approval of detailed design. However, in order to do that, the Requirements must be clear about what Works (or elements of the design) are subject to further approval, and in relation to what, e.g. scale, massing, layout, external appearance.

10.9 C.GEN read out the drafting in the Rookery DCO, explaining how the development was to be carried out in accordance with drawings listed in the Requirement, but that no development was to be commenced until (in that case) the LPA had approved details of external appearance, and layout. C.GEN submits that the same approach can and should be applied here. Currently, reference to external appearance in Requirement 5 - landscaping - is confused.

11. C.GEN submitted that as currently drafted, Requirement 4 does not achieve what it apparently seeks to achieve. It is in fact meaningless. The Rookery approach simply follows an established approach for outline planning permissions under the 1990 Act.

DLA Piper UK LLP on behalf of C.GEN Killingholme Limited

C.GEN Killingholme Limited

23 November 2012