

**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 OF ORAL CASE PRESENTED BY NETWORK RAIL
INFRASTRUCTURE LIMITED ("NETWORK RAIL") AT THE SPECIFIC ISSUE
HEARINGS ON
21 and 22 NOVEMBER 2012**

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(Our ref: ClarkJZ)

1. **Amendments proposed by the Applicant on 20th November 2012**

1.1 The Applicant has requested the Panel, in an email dated 20th November 2012, to consider amendments to the Application. These amendments have the effect of reducing the proposed compulsory acquisition to remove land parcels 03013, 03014, 04004, 04024, 04014, 04025, 05023, 05025, 05026, 05027, and 05028 ("the Railway Land"). It is proposed that the draft DCO is amended to confer power on the Applicant to compulsorily acquire four easements over operational railway for the construction and operation of four level crossings ("the proposed amendments").

1.2 The Applicant's change in position concedes Network Rail's argument that the compulsory acquisition of the Railway Land is not justified in terms of section 122 of the Planning Act as it is clearly not required for the development (as set out in Network Rail's Note on section 122 submitted to the Panel on 24 October 2012). It also recognises the case of Network Rail, ABP, C.RO and C.GEN that the branch line over the Railway Land is operational and is required to meet growing demand for freight in the vicinity of Killingholme.

1.3 Whilst the acknowledgement of these points are welcomed, Network Rail objects to the proposed amendments. Since first discussing the scheme with the Applicant in 2010, Network Rail has opposed the creation of four new level crossings over a Network line. The reasons for this opposition are:

1.3.1 Policy grounds – both Network Rail and ORR level crossings policies (Annex 1 to this paper, and annex 7 to the Summary of Oral Submissions submitted to the Examining Authority on 26 October 2012, respectively) oppose the creation of new level crossings and promote the closure of them. The ORR is Network Rail's health and safety regulator and Network Rail is required to operate in accordance with the ORR's requirement. In this note, references to 'ORR Policy' include references to Network Rail policy.

1.3.2 Protection of operational railway - an easement for even one new level crossing and any bridges has to be by agreement. To grant unfettered rights of access over operational railway would be both unsafe and detrimental to the operation of the railway undertaking.

1.4 Network Rail submit that if the DCO was amended to include the proposed protective provisions attached to the Paper of Amendments submitted by Network Rail ("the proposed protective provisions"), it would be in a position to withdraw its representation. This is because:

- 1.4.1 the proposed protective provision ensure that any acquisition of Network Rail's land, or rights over by it, would be subject to Network Rail's consent, and conditional on any reasonable terms imposed by Network Rail. This type of protection from compulsory acquisition of operational land applies to all statutory undertakers. In the context of other infrastructure schemes (for example new highways) compulsory powers for easements across the railway are sought by acquiring authorities. In these cases the acquiring authority accepts Network Rail's case to deal with the acquisition by agreement; and
- 1.4.2 an appropriate protection to Network Rail's financial exposure in the event of claims arising as a consequence of the proposed scheme is included in the proposed protective provisions.
- 1.5 Network Rail refers to its Written Answers on the protective provisions submitted to the Panel on 22 November.
- 1.6 The remainder of this note summarises issues of principle relevant to the draft DCO whether or not the proposed amendments are accepted by the Panel.
2. **Agenda Item 1/Main Order – article 47**
- 2.1 Following an email exchange with Angus Walker on 19th November 2012, Network Rail understand that article 48 of the draft DCO (dated 26 October 2012) is for examination by the Panel in the Specific Issues Hearing on the draft DCO.
- 2.2 Article 48(1) seeks to undermine the Railways Act 1993. Section 6 of the Railways Act 1993 makes it a criminal offence for any person to act as the operator of a railway asset unless he is authorised to be the operator of that railway asset by a licence or he is exempt, by virtue of section 7, from the requirement to be so authorised.
- 2.3 Network Rail submit that article 48 (1) should be removed from the draft DCO. In the event that the proposed amendments are accepted, should the Applicant attempt to operate the railway not only would this seek to undermine rail regulation for the reasons mentioned in paragraph 2.2, it would also be trespass. Trespass on the railway is a criminal offence by virtue of section 55 of the British Transport Commission Act 1949.
- 2.4 Article 48(2) seeks to deem a function of the ORR and Network Rail. This seeks to impute to the ORR a discretion to reach an agreement in order to circumvent the normal regulatory procedures. As it has previously, Network Rail submits that the draft DCO has no legislative basis for such a provision. As such, Network Rail submits that the provision should be removed from the draft DCO.

3. **Compulsory Acquisition of Network Rail operational land, or rights over that land**

3.1 Section 159 of the Planning Act 2008 provides that for the purposes of Part 7 of that Act, "land" includes and interest or right in land. The tests in section 122 of the 2008 Act therefore apply to the Applicant's proposal to compulsorily acquire a new easement over Network Rail operational railway.

3.2 The Applicant has stated that it seeks agreement with Network Rail for access across the Railway Land on reasonable terms ¹. Network Rail has consistently been co-operative regarding negotiations, for example proposing the Heads of Terms dated 15th October which are at Annex 3 to the Applicant's Case Summary ("the HOTs").

3.3 For the reasons explained in paragraph 1.3 above, Network Rail is not able to accept the Applicant's offer to reach agreement in terms of four easements across the railway. Further, it is not satisfied that the proposed compulsory acquisition of rights of way for the creation of four level crossings is justified, for the reasons set out in paragraph 4 below.

4. **Heavy Duty Level Crossing**

4.1 Network Rail has offered the Applicant an easement to construct and operate a single heavy duty level crossing (in the HOTs). This has been rejected on the two grounds (paragraph 47 of the Applicant's Case Summary) set out below, and in each case followed by Network Rail's reasons why it does not agree that there is a coherent argument for that rejection:

4.2 *Network Rail have not demonstrated that the construction and operation of further crossings would be materially unsafe.*

4.2.1 Network Rail does not agree that it is required to prove or disprove the safety case for the construction of four level crossings for use in connection with the proposed development. As has been previously stated, ORR policy applies to the regulation of the operation railway. ORR policy is clear that rail companies should take all reasonable steps to remove or replace level crossings, and that no new level crossing should be constructed except in exceptional circumstances. The fact that level crossings are considered dangerous is a point of policy, and the policy to reduce the number of crossings on the network is a point of fact.

¹ The Summary of the Applicant's Case made at the Compulsory Acquisition Hearings on 16 and 17 October 2012 ("the Applicant's Case Summary") and the Applicant's Commentary on 19 November Proposed Amendments to 26 October Book of Reference and Land Plans

- 4.2.2 It is noted that paragraphs 43 and 44 of the Case Summary make much of an inferred 'inconsistency' in Network Rail's position. Network Rail is surprised by these remarks. In meetings with Able, Network Rail explained that the number of crossings to be closed relates to best practice. The number of crossings required to be closed in this case changed when Network Rail became aware of two additional private crossings across this section of track of which it was not previously aware. These crossings comprise legal rights for farm traffic to cross the railway, the physical existence of these crossings are no longer on site. At all times, Network Rail has been consistent in its adherence to the ORR Guidance on Level Crossings.
- 4.2.3 Network Rail understand that if the proposed amendments are not included in the DCO, Able intend to progress with the application for compulsory acquisition of the Railway Land. Should this be the case, Able will become owner of operational railway. The prevailing regulations applicable to operational railway will be relevant to Able, in the event of any such acquisition.
- 4.2.4 ORR policy will apply in respect of the proposed level crossings if the proposed amendments are included. This is not withstanding the fact that should the DCO include the proposed amendments, Network Rail submit that it would not include the relevant power to construct any level crossings.
- 4.2.5 The Applicant refers to its masterplan for the construction of four level crossings over the railway. The Applicant asserts that the circumstances of the proposed scheme are "exceptional". Presumably the intention in this assertion is to attempt to justify the construction of four level crossings in the context of ORR Policy. This assertion is not backed up by fact. Nor has the Applicant demonstrated any consultation with the ORR or attempted to present the ORR with a case that the development should be considered "extraordinary circumstances" in terms of ORR Policy, such that the construction of more level crossings would be justified. It has therefore not been demonstrated that there is any operational case for the compulsory acquisition of the land to construct and operate four level crossings over the railway.
- 4.3 *One level crossing would not allow AMEP to operate to its full capability and would not fully realise the nationally-recognised benefits that the project would bring.*
- 4.3.1 The Applicant has not provided any justification to the argument that a single heavy duty crossing would not enable the development to

operate to its full capacity nor fully realise the nationally-recognised benefits that the project would bring. The claim appears to be based on the premise that to structure the development in this way would prevent the delivery of the project (i) in its current form, (ii) within proposed timescales, and (iii) retain its appeal to potential clients (paragraph 16 of the Case Summary) and that the *“project needs to retain as much flexibility as possible to respond to emerging market demands, and so scope should be left for responding to any current “known unknowns”* (paragraph 20).

4.3.2 Network Rail accepts that to construct one, as opposed to four, level crossings would alter the form of the project. However, it does not accept that this is material justification for the compulsory acquisition of its land.

4.3.3 As regards the need to “retain appeal to potential clients” and “retain as much flexibility as possible”, Network Rail strongly object to these subjective criteria being persuasive justification for the compulsory acquisition of its land, or rights over it.

4.4 The points of principle made in Network Rail’s Note on s122 apply to the compulsory acquisition proposed by the Applicant, whether it relates to the Railway Land, or rights over the Railway Land. Network Rail maintains its position that both limbs of the test in section 122 are not satisfied. That Able’s justification for requiring four crossings over the railway is to “maintain flexibility” and “maintain attractiveness to potential clients” is completely subjective, and cannot possibly leave a decision maker in “no doubt” as to the purpose.

4.5 Network Rail does not accept that the compulsory acquisition of its land is necessary in these circumstances. In fact, on the basis that the purported justification for the proposed acquisition is to maintain flexibility and the project appeal to a (as yet unidentified) client, it seems that Network Rail’s land is more desirable and convenient for the purposes of the project, than necessary in the circumstances.

5. **Heavy Duty Bridges**

5.1 The Applicant has rejected Network Rail’s offer of an easement to construct and operate a bridge, or bridges, over the railway for the purposes of the proposed development. The Applicant has accepted that heavy duty bridges over the railway are “feasible” (paragraph 39 of the Case Summary). However, they dismiss Network Rail’s offer of an easement to construct and operate a bridge over the railway on the basis that the bridges will be large structures *“thus reducing the availability of land for the urgently-needed development of marine*

energy infrastructure". Referring back to the Applicant's arguments for the compulsory acquisition of land which are set out above, the limits of land subject to proposed compulsory acquisition as part of the project allow for *flexibility*, and *attractiveness to a potential client*, all of which are at this stage not defined. An argument that land is *urgently required* cannot be given weight when the requirement for that land is not defined.

5.2 On this basis, Network Rail do not accept that Able have a coherent argument as to why Able cannot gain access over the railway by the construction and use of bridges over it. It is, by the Applicant's admission, a "feasible" way to cross the railway for the purposes of the project.

6. Agreement for Lease

6.1 Network Rail has offered the Applicant an agreement for a lease of the Land. Again, this offer has been rejected. The Applicant's reasons are:

- (a) Network Rail seeks a pre-condition to the grant of a lease that the relevant powers to construct and operate the Killingholme Loop are secured; and
- (b) Network Rail seeks a pre-condition that Network Change is in place to secure the removal of KIL2 from the Network.

6.2 The Applicant has sought to undermine Network Rail's case for the Killingholme Loop proposals. As has been demonstrated to the Panel in evidence, the Killingholme Loop is the considered option of the rail industry to alleviate the forecast increase in demand in rail services in the vicinity of Killingholme. There is a definite and strong case for need for the scheme.

6.3 Network Rail considers that the precondition set out in paragraph 6.1(a) above is a sensible and constructive protective measure which enables it to offer Able the lease it desires. In rejecting the offer on this basis, the Applicant has failed to note:

- (a) The Applicant will not be required to secure the powers if Network Rail has already done so.
- (b) Clause 2.4.2 of the Agreement for Lease only requires the Applicant to contribute financially to the cost of the Killingholme Loop in so far as those costs exceed the amount should the lease not be in place. The Applicant has asserted in evidence that there are cheaper alternatives to the existing Killingholme Loop proposals. If this the case, Network Rail struggles to see the basis for the Applicant's objections to this condition precedent.

6.4 As noted in paragraph above, the Killingholme Loop proposals are a real prospect for development. To offer an Agreement for Lease without a precondition of the type set out in paragraph 6.1(a) would be for Network Rail to act contrary to its duties as set out in the Network Licence and Network Code.

6.5 The pre-condition referred to in paragraph 6.1(b) is a statutory requirement. If it were not included in the Agreement for lease, to enter into the lease would have the following consequences: -

(a) The Applicant would effectively be illegal owners of operational railway. Section 6 of the Railways Act 1993 makes it a criminal offence for any person to act as the operator of a railway asset unless he is authorised to be the operator of that railway asset by a licence or he is exempt, by virtue of section 7, from the requirement to be so authorised.

(b) The railway is required to remain in the network unless the Network Change procedure is completed (Network Code, Part G). It is a requirement of Network Change for Network Rail to *"either reach agreement with any objecting Access Beneficiaries, refer the matters in dispute in accordance with the ADRR or abandon the proposal"* (Part G, Paragraph H(vi)). The Applicant's objection to this precondition on the basis that it is an opportunity for parties to "veto" the proposals is to call into question a statutory requirement, and the workings and resolution processes within the Network Change process.

7. **Operational Railway**

7.1 Network Rail has submitted detailed evidence of its objections to the compulsory acquisition of operational railway land, which include:

7.1.1 Such compulsory acquisition impedes future development of the railway to service increasing demand;

7.1.2 Safety case;

7.1.3 Statutory protection of operational railway land.

7.2 As noted above, for the purposes of the 2008 Act, "land" includes interests in and rights over land. Network Rail continue to object strongly to the proposals to compulsorily acquire operational land, or rights over it. Further, Network Rail object to the Applicant's application to the Secretary of State for a certificate

under section 127 of the Planning Act 2008, on the basis that the test in section 127(3) or 127(6) (as the case may be) cannot be satisfied.

- 7.3 As has been noted, as a statutory undertaker, Network Rail is protected by sections 127 and 128 of the Planning Act 2008. Network Rail does not intend to withdraw its representations to the proposed DCO until such time as the DCO is amended to incorporate the proposed protective provisions.

8. **Killingholme Loop proposals**

- 8.1 Paragraphs 31 to 34 of the Applicant's Case Summary invite the Examiner to place little or no weight upon the current status of the Killingholme Loop scheme, due to what appears to be an argument that there is a lack of certainty that the scheme will be implemented. NR strongly disagrees that there is any such lack of certainty, and cite (as it has previously done in evidence) the strong case for the need of the proposals. Network Rail would point out that legislation relating to railway undertaking contemplates the protection for future development of operational land for the purposes of that undertaking (section 127 and 128 of the Planning Act 2008, and the Town and Country Planning (General Permitted Development) Order 1995 (section 3, classes 11 and 17)). The Applicant's suggestion in paragraph 32 of the Case Summary, that the planning system requires safeguarding so that rail routes such as the Killingholme Loop do not impede other development proposals, is factually incorrect. Safeguarding is the process by which a proposed route is protected from conflicting development. In the case of a project such as the Killingholme Loop, where the majority of the proposed route is on operational land, the requirement for safeguarding is diminished due to the protection in sections 127 and 128 of the Planning Act 2008 (and section 16 of the Acquisition of Land Act 1981).

9. **Conclusions**

- 9.1 As previously stated, Network Rail will not be in a position to remove the representations to the Application until such time as the draft DCO is amended to reflect the proposed protective provisions.
- 9.2 By its offer to remove the compulsory acquisition of the Land from the DCO, the Applicant appears to have agreed with Network Rail that the Railway Land is not reasonably required for the proposed development. Network Rail therefore requires the DCO to be amended accordingly.
- 9.3 Network Rail maintains opposition to the compulsory acquisition of rights to construct and operate four level crossings over the Land. This number of level crossings has no proven safety case, and the Applicant has not consulted the ORR in order to establish whether the circumstances of the Marine Energy Park might be considered "exceptional" in the context of ORR policy so as to justify

departure from ORR Policy to remove level crossings over the railway and to resist the construction of new level crossings.

- 9.4 Network Rail submit that the terms of the DCO, and the extent of the limits of land to be compulsorily acquired under the powers of the DCO, appear to not have been considered prior to the Application. The Applicant has altered its proposals at a very late date in the examination proceedings (by reducing the proposal to compulsorily acquire Network Rail's land from full acquisition to the compulsory acquisition of rights over the railway). Further, it has not consulted with the principle regulatory body over what is asserted to be a crucial element of the project.

Eversheds LLP

23 November 2012

Level crossing policy

Our policy for level crossings involves:

Reducing the number and types of level crossings

- We shall set and monitor annual targets for level crossing closures.
- We will rationalise the numbers and types of level crossings.
- If closure is not possible, we will seek to reduce risk and enhance safety - where reasonably practicable - at every opportunity.
- Closure will always be the priority consideration for any project or scheme that includes a level crossing or crossings within the scope.
- Only in exceptional circumstances shall we permit new crossings to be introduced onto the network.

Reducing level crossing risk

- We will consider all business risks when making level crossing enhancement and investment decisions.
- We will set and monitor annual targets for risk reduction.
- We will seek to modernise existing types of level crossings by designing out risk and introducing new technologies.
- Risk management practices will be revised to provide assurance that all risks identified are considered and actions taken are recorded.
- We will not seek to introduce any new Automatic Half Barrier crossings onto the network, where to do so would increase risk. Where a further technological improvement to reduce risk and improve safety is not available, we will rationalise this type of crossing at the point of renewal, or sooner, based on risk, opportunity and business benefit.
- We will continue to request and participate in research to reduce level crossing risk.
- We will continue to investigate, trial, and implement new technology, processes and techniques to improve safety.
- We will use tools such as the All Level Crossing Risk Model to inform and support us in our decision making.
- We will implement lessons learned from accidents and incidents.
- We will seek to present a consistent experience to the crossing user.
- We will prioritise those crossings with the greatest collective risk.
- The opportunity to improve safety and reduce or eliminate risk at level crossings should be included in all initial project remits, plans and development, irrespective of the projects predicted impact on level crossing risk.
- Our level crossing staff will be qualified risk practitioners with regular training and competence testing.

Ensuring level crossings are fit for purpose

- Level crossings will be well maintained in accordance with technical specifications.

Level crossing policy

- Level crossings will be risk assessed and inspected at specified regular intervals based on risk and usage.
- We will seek to reduce the number of multi disciplinary interfaces and create a system approach to management of the asset.
- If closure is not possible, life expired level crossings will be renewed incorporating the latest design and technology to reduce risk.
- At the point of renewal, or sooner, all Automatic Open Crossings locally monitored will be closed or replaced by a modern barrier type crossing.
- We will seek to introduce new technologies and utilise existing technology in alternative configurations to improve safety and create efficiencies based on risk, business benefit, whole life costs and asset condition.
- We will seek to increase automation in the operation of level crossings in order to enhance safety and reduce operating costs, providing high quality, consistent, information and guidance directly to users.
- Targeted renewal of component parts will be the preferred option until such time as the full renewal is required.
- Our technology strategy for level crossings will seek to introduce greater competition for lower cost commercially available products and expedite delivery timescales, approvals processes and standards development.
- We will seek to reduce costs and minimise; power, cables, lineside equipment and intrusive manual lineside maintenance, with the minimal interface with the existing signalling system.
- Our deliverability strategy will seek to standardise design and increase capabilities and competencies of internal and external contractors to install and test equipment.
- Technology solutions will focus on providing information to the crossing user directly.

Working with users and stakeholders

- We will educate users in the safe use of level crossings.
- We shall seek to involve users and stakeholders in risk assessments and developing controls to improve safety.
- We will regularly involve and inform our stakeholders of new technologies and developments in the management of level crossings.
- We will form partnerships and improve relationships with internal and external stakeholders to improve safety at level crossings.
- We will regularly communicate with our Authorised Users.
- We will work with corporate users to improve understanding and awareness of the safe use of level crossings.

Supporting enforcement initiatives

- We will help the BTP to develop strong Policing Plans and targets regarding level crossing risk.
- We will offer risk advice and intelligence to the BTP to help them to efficiently target level crossing misuse.

Level crossing policy

- We will support joint initiatives with BTP and other stakeholders to enforce level crossing and traffic laws and regulations.
- We will work with external agencies to maximise penalties and to introduce new sanctions for dangerous and deliberate acts of misuse at crossings.