

ABLE MARINE ENERGY PARK

**RESPONSE TO SUBMISSIONS BY ABLE UK ON THE DEPARTMENT FOR
TRANSPORT'S "*MINDED TO*" LETTER IN RESPECT OF RAIL MATTERS**

NETWORK RAIL INFRASTRUCTURE LIMITED ("NETWORK RAIL")

NOVEMBER 2013

1. Introduction

1.1 The purpose of these submissions is to set out Network Rail's position in respect of the submissions received by Able UK in the form of its response to the DfT's "minded to approve" letter.

1.2 Network Rail confirm that since DfT issued the "minded to" letter on 28 August 2013, it has worked with Able UK in an effort to establish a means by which the Able Marine Energy Park development ("the Project") might proceed, whilst at the same time achieving the objectives set out in the "minded to" letter. Those objectives are:

1.2.1 Recognising the importance of the current policies of Network Rail and the ORR not to create new level crossings other than in exceptional circumstances.

1.2.2 Not prejudicing the future operation of the Killingholme Branch railway.

1.3 Network Rail are pleased to have reached the position recorded in the Statement of Common Ground between Able UK and Network Rail at Appendix 1 to the Able UK submissions of October 2013. In the spirit of that document, Network Rail wish to stress that they have no intention of inhibiting development of the nature proposed by Able UK. That being said, Network Rail are duty bound to continue to object to any development proposal that impacts on its statutory undertaking.

1.4 Network Rail agree with the ORR in their letter dated 24 September 2013 to Able UK which concludes in the penultimate paragraph that:

"it is abundantly clear that there is no prospect of agreeing detailed proposals in the timescale imposed by the Secretary of State..... [and] the most we can do is state that [Able UK has] engaged with ORR and Network Rail to find a solution...."

1.5 Network Rail also agrees with the ORR's paragraph 6 of its letter of 14th October 2013 to Able UK that:

"One of the main issues to be determined in the coming months is the preferred design solution for safely crossing the Killingholme branch line. We will seek to develop the safest reasonably practicable solutions that will not prejudice the future operation of the Killingholme branch line."

1.6 As is alluded to in Able UK's submissions, that solution will require ratification through the network change process (see section 2 of these submissions). In addition, Network Rail continue to negotiate the outstanding issues in an Asset Protection Agreement as part of a the suite of agreements for the protection of Network Rail assets in the context of third party development. Paragraph 7 of the Statement of Common Ground serves as an update on the progress of these negotiations. Finally, Network Rail reiterate their requirement for the

comprehensive protection of its undertaking on the face of the development consent order, in the common form of protective provisions.

2. Industry Process

- 2.1 As recognised in paragraph 3.1.4 of Able UK's submissions, the Network Code incorporates conditions approved by the ORR which, amongst other things, provide procedures for dealing with changes to the network, including the construction of any new level crossings, any new connection into or diversion of the network work, and third party construction works affecting the network. The Network Code seeks to ensure that all users of railway infrastructure are properly consulted and in agreement prior to any physical or operation change to the Network. This is achieved by the Network Change process, prescribed in Part G of the Network Code (Annex 3 to the Written Representations submitted by Network Rail to the Application).
- 2.2 As Able UK knows, and in recognition of the points made by the ORR (and repeated in paragraphs 1.4 and 1.5 above), the meetings held between Able UK and Network Rail to date and referred to in paragraph 3.1.1 of Able UK's submissions, have not involved any solutioneering or optioneering as to what that proposal might be.
- 2.3 Network Rail have offered, through these meetings, to assist Able UK to establish Network Change in respect of the proposal they seek to put in place to cross the Killingholme Branch Line as part of the Project.
- 2.4 In so doing, Network Rail will put forward Able UK's preferred proposal for Network Change. Able will be required to engage with the Access Beneficiaries in consultation as part of this process, and Network Rail will assist this process where appropriate.

3. Protection of Network Rail's statutory undertaking

- 3.1 As referred in Network Rail's Written Representation to the Application, it requires its common form of protective provisions on the face of the development consent order as assurance that its statutory undertaking is appropriately protected in the context of the third party development. Network Rail note Part 4 of Schedule 9 to the DCO which the Secretary of State is minded to make, subject to consideration of responses to the Department's letter of 28th August 2013, omits to include a vital element of that protection.
- 3.2 The common form of protective provision includes an indemnity where the third party development causes loss of damage to Network Rail's statutory undertaking. During the examination process relating to this Application, it was argued by Able UK that the parties can resolve any such matters through the courts and that in an indemnity, there is a danger that the indemnified body

might reach an unreasonable settlement with a third party, which would be then passed on. Network Rail has presented arguments which counter this theory, listed at paragraph 19.99 of the Panel's Findings and Recommendations. Network Rail do not agree with the Panel that consultation negates the requirement for an indemnity. The indemnity underpins the principle of the protective provisions to protect a statutory undertaking in the context of a third party development. It is appropriate that any such development should be undertaken at the risk of the developer and at no risk to Network Rail. Without the indemnity, Network Rail would be exposed to third party costs (for example the train operating companies) as a consequence of that third party development. To leave the indemnity out of the protective provisions where third party works impact on the network (such as is the case of the Application), is to effectively treat Network Rail as a participant in those works. It is incorrect to assert that the risk to Network Rail could be mitigated through consultation and in any event can be pursued in the courts. That assertion strikes at the heart of the intention of protective provisions, to allow third party development to proceed without compromising the ability of a statutory undertaker to deliver on its statutory duties. It is not reasonable that a statutory undertaker charged with the responsibility to deliver a service should be required to take any risk of a third party development. Network Rail strongly believes that the indemnity provision should be reinstated in the protective provisions.

3.3 Network Rail notes that Part 4 of Schedule 9 includes the requirement for Network Rail consent prior to exercise by the Applicant of powers under section 11(3) of the Compulsory Purchase Act 1965 and endorses this position.

4. **Conclusion**

4.1 Network Rail will continue to work with Able UK and will assist Able UK in the assessment of their proposal to cross the Killingholme Branch Line in accordance with industry processes. In this way, Network Rail is confident that a way forward will be established which will achieve the objectives of the Secretary of State set out in his letter of 28th August 2013.

4.2 Notwithstanding the conclusion in paragraph 4.1, Network Rail feels strongly that the protection afforded by the indemnity provision in the common form of protective provisions must be included on the face of the development consent order authorising the development of the Able Marine Energy Park. Only with this provision can Network Rail be confident that adequate protection for its undertaking is in place.