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Secretary of State for Transport
c/o Martin Woods
Head of the TWA Orders Unit
General Counsel's Office
Department for Transport
Zone 1/18
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33 Horseferry Road
London SW1P 4DR

Your reference: TWA 8/1/4

Our reference:

MEF/MEF/328740
UKM/54143405.1

15 November 2013

Dear Sir

**PLANNING ACT 2008: APPLICATIONS FOR THE ABLE MARINE ENERGY
PARK DEVELOPMENT CONSENT ORDER AND FOR CERTIFICATES
UNDER SECTION 127**

DLA Piper acts on behalf of C.RO Ports Killingholme Limited ("C.RO").

Please find enclosed C.RO's response to the Secretary of State's "minded to grant" decision letter dated 28 August 2013 and the comments of Able Humber Ports Limited dated 15 October 2013.

Yours faithfully

DLA PIPER UK LLP

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INVESTOR IN PEOPLE

The Planning Act 2008 ("2008 Act")

Applications for the Able Marine Energy Park Development Consent Order and for Certificates under Section 127

Department for Transport Reference: TWA 8/1/4

Representation of C.RO Ports Killingholme Limited (Interested Party reference: 10015532)

15 November 2013

INTRODUCTION

1. This submission is made on behalf of C.RO Ports Killingholme Limited ("C.RO"). It relates to the 'minded to grant' decision of the Secretary of State dated 28 August 2013 (the "Decision") on the Application by Able Humber Ports Limited ("Able") for the Able Marine Energy Park ("AMEP") Development Consent Order (the "AMEP Application") and Able's response to the Decision on 15 October 2013 ("Able's Response").
2. This representation addresses matters of specific concern to C.RO relating to the Killingholme Branch Railway, arising from the various documents issued by the Secretary of State and Able's Response in turn.

C.RO

3. C.RO are the owners and operators of, and statutory harbour authority for, C.RO Ports Killingholme ("CPK"). CPK is a six-berth ro-ro facility located to the west, and up-estuary of AMEP. CPK has an annual throughput of 400,000 units. C.RO has two existing rail heads and the benefit of an existing connection to Network Rail's network. If it were promoted today, it would be a Nationally Significant Infrastructure Project ("NSIP").
4. As a Statutory Harbour Authority C.RO is responsible for the operation of its undertaking, the safe navigation within the area of its jurisdiction and for liaison with the Harbour Master Humber in relation to vessel movements outside its area of jurisdiction and serving it.
5. C.RO was an interested party (reference number: 10015532) in the Examination into the AMEP Application. During the course of the Examination C.RO made several written representations and made representations at both the issue specific hearings and the compulsory acquisition hearings.

EXECUTIVE SUMMARY

6. As part of any decision the Secretary of State must require that the Killingholme Branch Railway remains within the operational network of Network Rail.
7. Similarly, in the protective provisions benefitting C.RO directly it should be confirmed that the Railway will remain within the operational network of Network Rail.
8. C.RO considers that the proposed acquisition of four easements for level crossings should not be permitted. The Order should be amended to provide (at most) for modernisation of the existing level crossing to a single, signalised, protected heavy-duty crossing alone. All other crossings of the Railway line should be by bridge.
9. It is clear from the Statement of Common Ground that Network Rail and Able have agreed certain matters in more detail than reflected in this Statement. It would be entirely appropriate and indeed necessary for the Secretary of State to inform himself further as to what the full extent of these parties' understanding and obligations towards each other are before deciding the application.
10. The Rosper Road Loop is a material change to the AMEP project and the mitigation that it proposes. It is in itself capable of being an NSIP and requires site assembly (probably including powers of compulsory acquisition) and EIA and as such cannot be guaranteed to be acceptable. If the Secretary of State were to rely upon this, he would have to conclude there was a reasonable prospect of its delivery, which he cannot currently do.
11. C.RO's position is that this solution may be acceptable, but only subject to the existing Railway being afforded the protection that it seeks. Regardless of whether Able promotes this in order to reduce the likelihood of the Killingholme Loop being promoted by Network Rail, as an existing beneficiary of the Railway C.GEN must be properly protected, and it must be assured that rail access to CPK will not be interfered with by the unnecessary construction of level crossings. If any weight is to be afforded to this proposal it must be accompanied by full and proper protection for C.RO in the form of protective provisions and an indemnity.

REPRESENTATIONS ON RAILWAY MATTERS

12. The Killingholme Branch Railway (the "Railway")

- 12.1 C.RO notes from the Secretary of State's "minded to grant" Decision, that the Secretary of State, before making the Order sought by the Able Application, requires satisfactory evidence

from Able that "*the project will not jeopardise any future operations of the Killingholme Branch railway*" having sought the views of Network Rail and the Office of Rail Regulation (the "ORR"). C.RO welcomes the approach of seeking an absolute assurance from Able.

- 12.2 The Amended Order and the further submissions made by Able do not provide sufficient assurance for the Secretary of State to be able to decide the matter.
- 12.3 C.RO fully agrees with the Secretary of State and the Panel that to meet the concerns of potential users (C.RO and C.GEN) the Railway which currently runs through the site of the Able Marine Energy Park should remain within the operational network of Network Rail.
- 12.4 It is indeed necessary, as a first principle, to reassure all users, current and future, of the Railway (including C.RO) that Network Rail will continue to manage the Railway. Network Rail is best placed to do this as it is independent from any private parties' interests, thereby being capable of deciding questions of access to the Railway, maintenance of the Railway and safety matters, including the operation of any level crossings that would exist on the Railway.
- 12.5 Therefore, the Secretary of State must confirm, in his decision, that the Railway must remain within the operational network of Network Rail. C.RO also requires that in the protective provisions benefitting C.RO it is confirmed that the Railway will remain within the operational network of Network Rail.
- 12.6 At paragraph 40, the Decision specifically repeats the need for assurances in relation to the Railway, given the proposed modification of powers to allow compulsory acquisition of four easements for the purpose of creating level crossings. It is notable that the means by which this would be achieved in terms of drafting has not been set out, and C.RO would need to be consulted on this before a decision is made.
- 12.7 It is clear that the onus is on Able to show any future operations will not be jeopardised. This includes any future use of the Railway by C.RO. CPK is a nationally significant port, comprising a six berth ro-ro facility, already handling more than 400,000 ro-ro units annually. The importance of the port is not only due to its capacity to handle such a significant quantity of ro-ro units, but also because of its potential to handle freight via the Railway which connects CPK with the wider Network. C.RO is entitled to access the Railway through a connection agreement with Network Rail. This has always been a key attraction of this port for C.RO as a port operator, even if it is not currently used on a regular basis. Companies related to C.RO commonly use rail operations for hinterland transport in continental Europe and C.RO considers it important to maintain such a capability here.

- 12.8 The Able Application no longer proposes the acquisition of the Railway, although the exact status of the various plans and wordings of the Order is not clear. This is welcomed, as C.RO has consistently maintained that Able cannot show that it meets the tests in s.122 of the 2008 Act in respect of the railway. It cannot show that acquisition of the Railway in its entirety is needed for the development for which consent is sought, nor that there is a compelling case in the public interest for the land comprising the Railway to be acquired.
- 12.9 As C.RO submitted during the course of the Examination, it has considerable concerns about the operational impacts on its future use of the Railway by the proposed privatisation of the Railway and/or any restriction upon its future use or the manner of its future operation. Such a restriction would increase with an increased number of level crossings. Further, the acquisition of level crossings can cause similar mischief to outright acquisition.
- 12.10 C.RO is an existing port with a connection to the wider network, and is today capable of rail operations. AMEP is not at that stage. As the Panel noted at paragraph 19.116 of its Report, C.RO keeps the possibility of rail freight access under active consideration. The NPS for Ports recognises the value of rail connections for ports, including ro-ro facilities. Network Rail is aware of the increasing amount of freight handled by rail, and that it is only expected to increase. That is why it has a programme of capacity enhancements. It is contrary to the general direction of Government policy to remove - or make very uncertain - the ability of existing port facilities to connect to the Railway to transport freight. Consequently, it is crucial that C.RO's future operation is not jeopardised by Able's proposals in connection with the Railway.
- 12.11 Whilst the Able Application no longer proposes acquisition of the Railway, the proposed compulsory acquisition to provide four level crossings would restrict the use of the Railway in such a way as to prejudice the future operation of the Railway in relation to its future use by C.RO. In this sense, acquisition of level crossings, each of which can impede C.RO's enjoyment of service by the Railway, may as well be the acquisition of the Railway between the two outer crossings. The Panel's view, at paragraph 18.195 of its Report, is that C.RO's interests are fully protected if the line remains in the operational network, as it assumes is now proposed by Able (albeit without full or proper protection for Network Rail). However, the Panel failed to address the consequences of the erection of level crossings, far less level crossings with a passing loop. It also failed to take account of the wording of the draft Order and particularly the protective provisions required for C.RO.

- 12.12 Able has not had regard to the matters on which the Secretary of State has sought assurance. The Amended Order and further submissions by Able are entirely opaque as to how any level crossing acquired by Able would be laid out, equipped and operated. None of C.RO nor Network Rail and the ORR or the Secretary of State should be satisfied in respect of compulsory acquisition of an easement for any level crossing without a clear number of detailed conditions and undertakings attached to it to provide all parties with the required certainty and assurance on operational ability and safety of the Railway.
- 12.13 The provision of four level crossings on the Railway would close the entire section of the line just as effectively as the compulsory acquisition of the Railway by Able between the two outer crossings. Further, each level crossing represents a weak link in the line where any interference or malfunction can affect services. It is for this very reason that the ORR restricts the erection of new level crossings except in 'exceptional circumstances'¹. Each crossing would be at least partially controlled by a third party - Able. C.RO welcomes the Secretary of State's recognition of this concern at paragraph 40 of the Decision and considers that the justification for any additional crossings has not been shown, far less that the circumstances are 'exceptional'.
- 12.14 It should be noted that the ORR's safety concerns regarding level crossings which result in the requirement to show 'exceptional circumstances' do not simply relate to the safety of the public, but also include the safety of rail traffic, something which the Panel, at paragraph 18.187 of their Report, did not appear to appreciate. Even with the erection of level crossings, vehicle-train conflicts remain an enhanced possibility as a result of the Able proposals. Consequently, C.RO has considerable concerns about the operational impacts on its future use of the Railway were compulsory acquisition to proceed. Lengthy, slow-moving traffic, such as that which Able predicts, either increases the risk of such conflicts or the amount of barrier down-time.
- 12.15 As noted above, one of the key attractions of CPK for C.RO as a port operator is the potential to handle freight via the Railway. With the level crossings currently proposed, that future rail access cannot now be guaranteed.
- 12.16 The Panel concludes, at paragraph 18.198 of its Report, that there is a compelling case in the public interest. That conclusion is based on their assessment of the nature of the land to be acquired as "*four easements which will not reduce or restrict the use of the railway line or*

¹ Office of Rail Regulation, *Level Crossings: A guide for managers, designers and operators*, Railway Safety Publication 7, p81

otherwise significantly diminish [Network Rail's] assets." C.RO is not aware of any evidence before the Panel that it has seen or been able to test that demonstrates that four (or any) easements would not reduce or restrict, etc. the use of the railway line. Further, nowhere is it provided or required that the easements and their use would not (or, more appropriately, a presumption that they should not) affect the Railway and its use. Nor is there any remedy, absent the provision of indemnities (for C.RO or any other person) in the Order, for any effect that did occur.

12.17 At paragraph 40 of the Decision, the Secretary of State invites Able to reconsider its proposal for access across the railway in consultation with Network Rail and the ORR. The Decision notes that, should this require a reduction in the number of level crossings, Able is asked to propose consequential amendments to the Order.

12.18 For the reasons set out above, C.RO is of the view that the level crossings proposed would jeopardise the future operation of the Railway. Able has not been able to show a need for the proposed development, in the absence of an identified customer for the Able project, or a specific reason for the arrangement of its project so that the existing railway line cannot be accommodated. As such, Able cannot establish a need to cross the Railway: any purported justification for a multiplicity of crossing points is wholly speculative. Nor has Able put forward any alternative to acquiring the Railway in its entirety or acquiring four easements for the provisions of level crossings, such as providing bridges over the Railway alongside a single, heavy-duty signalised crossing. By failing to address these points (which remain unaddressed save by bald assertion) Able risks leaving the Secretary of State in a position where a decision founded upon the matters before him would be irrational.

12.19 In these circumstances, C.RO is of the view that the proposed acquisition of easements for level crossings should not be permitted. The Order should be amended to provide (at most) for modernisation of the existing level crossing to a single, signalised, protected heavy-duty crossing alone. All other crossings of the Railway line should be by bridge.

13. The Killingholme Loop

13.1 C.RO welcomes the finding of the Secretary of State, and the Panel's finding, that, while there remains uncertainty about the need for and route of the possible Killingholme Loop railway scheme, the line which currently runs through the site of the Able Application should remain within the operational network of Network Rail.

- 13.2 As the Panel and the Secretary of State note, this is necessary to address C.RO's concerns as a potential user of the Killingholme Loop.
- 13.3 C.RO disagrees with the statement made by the ORR in a letter to Able dated 24 September 2013 (appendix 2 to the Able response to DfT 'minded to approve' letter in respect of rail matters) that 'whilst the branch is mothballed' the ORR is satisfied with Able's proposal for protection of a haul road during construction. C.RO understands the Railway has operational status within Network Rail's network. It is entirely incorrect for either Able or the ORR to characterise the Railway as "mothballed".

14. The Draft Order

- 14.1 C.RO notes from paragraph 51 of the Decision that the Secretary of State agrees with the Panel's conclusions on the text of the draft Order.
- 14.2 During the course of the Examination, C.RO sought additional text to be included in the Order to ensure that its connection agreement with Network Rail could not be overridden by Able. At paragraph 51(f) of the Decision, the Secretary of State accepts the Panel's conclusion that that text is not necessary and that use of the Railway would be safeguarded by the protective provisions in Parts 5 and 6 of Schedule 9 to the Order.
- 14.3 Those protective provisions state that Able must not cause unreasonable interference with or unreasonably prevent the free, uninterrupted and safe use by C.RO of the railway in connection with the use of CPK.
- 14.4 C.RO is of the view that those protective provisions will not be effective in providing the protection C.RO requires to guarantee its future use of the Railway in connection with CPK. A test of 'reasonableness' is not objectively capable of being employed in these circumstances. In particular, it is not appropriate to apply a test of reasonableness to interference given there are no details of how the interaction of the construction and operation of the Able project with the Railway will be managed. Further, the benefit of the presumption of reasonableness is not made clear in the provisions. For instance, an extended interference with the railway may be a reasonable consequence of Able's activities, but have a highly deleterious effect on any future transportation of freight by railway from CPK. This would be akin to permitting reasonable interference with a highway at the behest of a private party, something that would not be acceptable.

- 14.5 Based on the C.RO protective provisions 67 and 68 contained in Part 6 of Schedule 9 of the proposed Amended Order, C.RO understands it maintains its full right to use the Railway in connection with the use of CPK. However, C.RO is concerned that protective provisions 49 and 50 contained in Part 6 of Schedule 9 of the Amended Order for the benefit of C.GEN Killingholme Limited that the same rights apply to C.GEN but with an apparent limitation of the protection to ‘up to five trains per day’.
- 14.6 C.RO asserts that the Order should not work to transfer any power to decide the use of the Railway from Network Rail to Able, nor to imply any specific limitation on use of the Railway as a result of a constraint on the protection afforded to any party.
- 14.7 C.RO finds this makes the Amended Order inconsistent, creates potential uncertainty about future increases in C.RO’s use of the Railway and is inconsistent with the matter on which the Secretary of State sought assurance: that any use of the Railway would be assured.
- 14.8 Moreover, if the Railway is to remain within the operational network of Network Rail, it should be for Network Rail to have operational control and determine the use of the Railway by C.RO and any other current and future users in the manner customary for all use generally of Network Rail’s network, not for an implicit limitation to be created by the Order. C.RO requires this to be confirmed as part of the Order.
- 14.9 The Decision is clear that the Secretary of State requires assurances from Able that it will not jeopardise any future operations of the Railway. In this regard, C.RO notes that there are a number of provisions in the draft Order that do not enable that assurance to be given:
- 14.9.1 Article 11 provides that Able may, from time to time within the area of jurisdiction, construct and maintain roads, railway lines, buildings, sheds, offices, workshops, depots, walls, foundations, fences, gates, tanks, pumps, conduits pipes...etc. The Railway lies within the area of jurisdiction and, as such, it is clear that any number of the activities listed in Article 11 have the potential to jeopardise future operation of the Railway - these must be restricted;
- 14.9.2 Pursuant to Article 42, Able has the power to extinguish the rights of, remove or reposition the apparatus belonging to statutory undertakers, if such extinguishment, removal or repositioning is necessary for carrying out the authorised development. Quite plainly, this could include apparatus belonging to Network Rail, including the railway itself; and

- 14.9.3 At paragraph 3 of Schedule 1, Work No. 3 remains that enables construction of a passing loop. It is not clear if this would be Network Rail's work or Able's, how level crossings would interact with it and how it might affect use of the branch line. The Panel has not addressed this and this must be resolved before the Order is made.
- 14.10 Generally, the draft Order must be reviewed to ensure that it does not enable interference with the Railway by other means. Currently, it contains many inconsistencies.
- 14.11 At paragraph 19.100 of its Report, the Panel recommends the removal of the usual requirement that the powers to compulsorily acquire easements over the Railway can only be exercised with the consent of Network Rail, that consent not to be unreasonably withheld. This is an important requirement as it enables Network Rail to prevent an acquisition of land which would adversely affect the safe and efficient operation of the railway. By reasoning that such a power subverts the purpose of the sanction of compulsory acquisition, the Panel has failed to understand the purpose of the requirement to safeguard the safe and efficient operation of the railway. C.RO submits that this requirement should be included in the draft Order. Able is protected by the ability to refer questions of reasonableness to Arbitration under the Order, meaning that this is capable of objective resolution - powers of compulsory acquisition are not subverted if this approach is used.
- 14.12 This point is distinct from the concerns raised above regarding the provision preventing Able from causing unreasonable interference (i.e. allowing reasonable interference) with the use of the Railway by C.GEN (see paras 12.3-12.4). The reasonableness of Network Rail's failure to give consent to the acquisition of land in these circumstances is capable of being resolved by Arbitration under the terms of the Order. This is because the governing principle is the safety and efficiency of the railway, which is a matter that is capable of being objectively assessed. The reasonableness of any interference with use of the Railway, is not, absent any such overarching and objective principle.
- 14.13 At paragraph 19.101 of its Report, the Panel rejects a fundamental aspect of protection for Network Rail, by refusing the request for Able to indemnify Network Rail in respect of claims arising in respect of a specified work. Were the level crossings proposed to cause interference with C.RO's future use of the railway or the use of it by others to access CPK, Network Rail would not be indemnified against a claim by C.RO for loss caused as a result of that interference.

- 14.14 Further, by stating that the parties can avoid having to go through the courts if Network Rail consults Able, the Panel fails to understand that a lengthy and costly court process is only avoided if Able does not benefit from statutory immunity, not by consultation.
- 14.15 C.RO is of the view that the indemnity in favour of Network Rail should be provided. Consequently, in light of the Panel's conclusion at paragraph 19.102, the same protection should be applied to all parties benefitting from protective provisions.

REPRESENTATIONS ON ABLE'S RESPONSE

15. Able Response on Rail Matters

- 15.1 Able has produced a summary document, which seeks to address the matters in the Secretary of State's Decision. Able admits that it has failed to do so, instead stating that the matter should be addressed by "Network Change" (para 1.1.2). This is not a point accepted by either Network Rail or the ORR in their representations. Both say that Network Change can be used, not that it resolves the issue.
- 15.2 C.RO is very concerned about the Statement of Common Ground that was signed on 14 October between Able and Network Rail (Appendix 1 to the Able Response to the DfT 'minded to approve' letter in respect of rail matters). C.RO is an Access Beneficiary for the purpose of a Part G Network Change. C.RO has not been consulted at all in relation to this matter.
- 15.3 It is clear from the Statement of Common Ground that Network Rail and Able have agreed certain matters in more detail than reflected in the Statement. It would be entirely appropriate and indeed necessary for the Secretary of State to inform himself further before deciding on the application as to what the full extent of these parties' understanding and obligations towards each other are before making any decision on the Able Application.
- 15.4 As things stand, Able has told the Secretary of State that the assurance sought by the Secretary of State will be delivered through Network Change, yet fails to disclose to the Secretary of State and other statutory consultees, such as C.RO, any detail on how this will be done, by whom and including which proposals. There is a risk that the Network change process will be prejudged by the decision currently before the Secretary of State, meaning that proper protection is not afforded to legitimate interests. At the same time, it is obvious from the Statement of Common Ground that much more information must already be available, including a "range of design solutions that can be developed for safely crossing the

Killingholme Branch Line that need not prejudice the future operation of the Killingholme Branch Line" (point 4 of the Statement). Moreover, parties state they have agreed 'the roles, responsibilities and obligations of the Network Change Process'. C.RO finds it quite unacceptable that the information is not shared with the Secretary of State and other statutory consultees such as C.RO as it would clearly provide an insight on the obligations of Network Rail in such a process and would allow the Secretary of State to satisfy himself that the matter has not been prejudged in any way.

- 15.5 Able further reports that Network Rail "will support and promote" a solution (para 3.1.5) that is safe. However, this is not provided in the Statement of Common Ground between Network Rail and the point does not address the Secretary of State's requirement not to interfere with future use. Furthermore, none of the solutions for the branch line is set out and no evidence is given that C.RO can see or understand as to the likely impact on use of the railway. Even if the parties agree that such solutions exist, this process demands that those who may be affected are allowed to understand them, their environmental and practical impacts and to comment, particularly where (as for C.RO) the proposals may interfere with their legal rights.
- 15.6 In addition, the assertion by Able and Network Rail that modification of rail infrastructure can only be achieved by Network Change, obscures the requirement for development consent in respect of such proposals. There is no evidence that such proposals have been designed or can be understood so that C.RO can comment.
- 15.7 The response of the ORR is problematic (section 3.2). The ORR appears to have concluded that the "exceptional circumstances" test has been met, and that "movements on the level are the only practicable means of crossing the Killingholme Branch". It has done both without the benefit of balanced consideration and, apparently unaware that Able itself has stated that the Railway need not be crossed "on the level" in its submissions to the Examining Authority. Able's only concern in constructing a bridge crossing was that it might result in loss of developable land, which is not an "exceptional circumstance" since Able has at no point shown the existence of any customer for AMEP, far less that sufficient customers exist to require multiple crossings of the Railway. The Secretary of State should afford little weight to the views of the ORR and must form his own view on the points raised, allowing the points to be tested orally.

16. Western Diversion Option Study

- 16.1 Able has submitted this document, which presents alternative alignments of the Railway which would maintain its ability to function. C.RO considers that the diversion of the railway

should be possible, but the matter has not been properly examined and it would be risky for the Secretary of State to rely upon this document.

16.2 Before relying upon this study, the Secretary of State should require that it is expanded and updated. The study looks at two options, both of which interfere with Able's arrangement of AMEP. However, no attempt seems to have been made to optimise the alignment to minimise effects. For instance, the areas of overspill storage and ecological mitigation land shown on figure 3.1 are available to Able in order to improve the alignment. Further, the use of the existing arrangement of AMEP as a base plan tends to prejudge the question of the effect on usable space. No attempt appears to have been made to reconfigure AMEP itself to allow a more westerly realignment of the Railway.

16.3 In section 3.2 it is suggested that change to the areas shown is not possible. However:

16.3.1 Ecological mitigation area A could be reconfigured or relocated to avoid the disturbance Able alleges would occur (although, C.RO's own evidence suggests little disturbance would occur even if the railway passed through the mitigation area). If Able wished, it could change the shape of the mitigation area, whilst preserving its size and maintaining the railway along one edge;

16.3.2 There is no suggestion that the realignment of the railway would affect the quay;

16.3.3 The heavy component manufacturing area could be configured so as to be properly accommodated to the East of a realigned railway. There is no evidence that this would not be possible;

16.3.4 Able concedes that the supply chain park need not be to the east of the Railway; and

16.3.5 There is no evidence that the use of the Overspill Storage Area for enclosed activities (for instance) would result in the disturbance of the North Killingholme Haven Pits as Able alleges.

Simply put, there are solutions, not investigated by Able, which do allow realignment of the railway, and which might better secure the Secretary of State's desire to avoid any interference with its use.

16.4 Two solutions for a western realignment are provided. However, both are sub-optimal and have not properly tested alternatives within their scope. As such, it is not possible to attach weight to their dismissal until they have been properly considered.

17. The Alternative Rosper Road Loop

17.1 Able has proposed this solution, which has never been properly or previously canvassed, which does not benefit from environmental impact assessment ("EIA") and which does not have the benefit of having been the subject of consultation. As such, it can be afforded only limited weight by the Secretary of State. Furthermore, it does not address the question of securing any use of the Railway.

17.2 The Rosper Road Loop is a material change to the AMEP project and the mitigation that it proposes. It is in itself capable of being an NSIP and requires site assembly and EIA and as such cannot be guaranteed to be acceptable. If the Secretary of State were to rely upon this he would have to conclude there was a reasonable prospect of its delivery, which he cannot currently do.

17.3 C.RO's position is that this solution may be acceptable, but only subject to the existing Railway being afforded the protection that it seeks. Regardless of whether Able promotes this in order to reduce the likelihood of the Killingholme Loop being promoted by Network Rail, as an existing beneficiary of the Railway it must be properly protected and it must be assured that rail access to CPK will not be interfered with by the unnecessary construction of level crossings. If any weight is to be afforded to this proposal it must be accompanied by full and proper protection for C.RO in the form of protective provisions and an indemnity.

18. Procedural matters

18.1 Able is understandably casting around for solutions in relation to the problems presented by its failure properly to consult in relation to AMEP. The proposals it is now advancing are flawed and jeopardise any decision founded upon them. Before proceeding further, the Secretary of State should require Able to resubmit its application and, at the very least, recommence its examination on the basis of clear and fixed application proposals. This is for the following reasons:

18.1.1 Able has not addressed the matter on which the Secretary of State wished to receive assurances. It has sought to show that it cannot adopt a western diversion of the railway and that a Rosper Road Loop could be built. It has not shown how level crossings can operate safely, or the amount of use of such crossings, down-

times, interference with rail use or the like. Able has not met the standard of proof demanded by the questions asked by the Secretary of State;

- 18.1.2 The proposals of Able are unclear. It has not provided alternative drafting for the DCO. Its drawings have not been amended. Drawings used in some of its submissions appear to maintain that it seeks the compulsory acquisition of the Railway. The locations of level crossings and easements have not been shown;
- 18.1.3 The changes in the proposals amount to a major variation of the AMEP project, which goes beyond the changes disallowed by the IPC in relation to the Brig-y-Cwm energy from waste project and envisaged by the letter of Bob Neil dealing with changes to NSIP applications;
- 18.1.4 The assertions of AMEP rest upon interpretations of statements made by Network Rail on the topic of Network Change, which need to be tested by cross-examination, since the interpretation given by Able goes further than the words used by Network Rail;
- 18.1.5 Able seeks to ascribe weight to statements by the ORR that are based upon meetings with AMEP and submissions by AMEP in which the views of other parties have not been sought, given or afforded weight. There is a real risk that the ORR, which must act quasi-judicially, has prejudged important matters upon which it must form an opinion in due course. As such, the prejudice of the ORR would result in the contamination of the Secretary of State's decisions should he afford the ORR's views weight; and
- 18.1.6 The Secretary of State should afford parties like C.RO the right to be heard on these matters. Effectively, the approach of Able is prolonging the hearing process and amending the application by other means and without the ability for those affected to be heard in respect of matters of great importance to their businesses.

DLA Piper UK LLP

15 November 2013