

Statement of Case

on behalf of Western Power Distribution (South Wales) PLC

The London to Fishguard Trunk Road (A40) Compulsory Purchase Orders

Highways Act 1980

The Highways (Inquiries Procedure) Rules 1994

Acquisition of Land Act 1981

The Compulsory Purchase (Inquiries Procedure) (Wales) Rules 2010

Dated 16th March 2020

Osborne Clarke LLP
2 Temple Back East
Temple Quay
Bristol
BS1 6EG

1. Introduction

- 1.1 This statement is submitted on behalf of Western Power Distribution (South Wales) PLC (WPD).
- 1.2 WPD is the licensed distribution network operator (DNO) under Section 6 Electricity Act 1989 (EA1989) for the area in which the Orders are proposed to have effect. Section 9 of the EA1989 places a duty on the electricity distributor to develop and maintain an efficient, co-ordinated and economical system of electricity distribution.
- 1.3 This Statement is submitted pursuant to the Compulsory Purchase (Inquiries Procedure) (Wales) Rules 2010.
- 1.4 WPD submitted an objection to the Orders. WPD does not object to the development in principle. The proposed development will however interfere with its apparatus and will require the diversion of its electricity lines at voltages of 33kv and below.
- 1.5 WPD has submitted a representation to the Secretary of State for Business, Energy and Industrial Strategy under Section 16 of the Acquisition of Land Act 1981. This provides that the Orders are not to be confirmed unless the Secretary of State for Business, Energy and Industrial Strategy is satisfied that WPD's interests can be acquired and not replaced without serious detriment to the carrying on of WPD's undertaking, or that if acquired its interests can be replaced by other land belonging to, or available for acquisition without serious detriment to the carrying of its operation. A copy of that objection and the response from DBEIS is at **Annex 1**.
- 1.6 WPD considers that its objections to the Orders can be overcome provided that a satisfactory asset protection agreement can be reached with the Welsh Ministers before the close of the Inquiry. A proposed form of agreement was sent to the Welsh Ministers on 26 November 2019 and a response in the form of a marked-up version of this Agreement was received on 5 February 2020. To date no agreement has been concluded.

1.7 Should an agreement not be reached this statement sets out the grounds of WPD's position and details of its concerns. WPD seeks the right to appear at the inquiry and submit further evidence should it be necessary. However in order to limit incurring time and resources in providing detailed evidence where it is hoped to reach a settlement, WPD have submitted this statement as a holding response but on the basis it will seek time to submit further evidence should that be necessary (pursuant to Regulations 8 & 19 of the Compulsory Purchase (Inquiries Procedure) (Wales) Rules 2010).

2. **Chronology**

2.1 WPD submitted its holding objection to the Orders on 19 September 2019. On the same day it submitted its representation to DBEIS as noted above and in Annex 1.

2.2 An initial response to the objection was received from Welsh Ministers on 8th November 2019. That response did not adequately address WPD's concerns and a further letter was sent to Welsh Ministers on 26 November 2019 setting out the reasons for WPD not being able to withdraw its objections and enclosing a proposed Asset Protection Agreement (APA). The letter recommended that the Welsh Ministers engage their solicitors to review the agreement and respond directly to WPD's solicitors.

2.3 Whilst discussions between Welsh Ministers and WPD continued on the technical aspects of the diversions, no further response on the APA was received until 5th February 2020 some 10 weeks later, five weeks before the start of the inquiry and after the deadline for submission of a Statement of Case. The response from Welsh Ministers on the APA sought substantial and material changes which are not acceptable to WPD. WPD responded to Welsh Ministers on this basis on 17 February.

2.4 Since the 17th February WPD and the Welsh Ministers legal representatives have been in regular dialogue on the APA. As of Friday 13th March, whilst significant progress has been made, the parties have not been able to agree on a number of principles that are material to WPD in seeking to protect its network.

3. Other WPD/Welsh Minister engagement

3.1 Welsh Ministers have engaged with WPD on the proposed impact of the Orders on its assets and WPD has provided estimates for diversions. A meeting was held on the 27th January 2020 in which the technical details of the diversions was discussed and revised plans were agreed in principle.

3.2 WPD made clear to Welsh Ministers that the details agreed at the meeting were subject to them agreeing the terms of the APA.

4. Basis on which technical details are agreed

4.1 It is necessary at this stage to explain the basis upon which WPD has engaged with Welsh Ministers on agreeing the technical details of the diversions of its apparatus.

4.2 WPD received requests for estimates to divert its apparatus to accommodate the Road. WPD undertake a technical review and issue an estimate. That estimate is based on the cost of the works and indicates locations for diversions. Those estimates are open for acceptance by the Welsh Ministers for a period of time on the terms of WPD's standard customer requested diversions. If not accepted those estimates expire and new estimates need to be requested before diversions are undertaken. The initial estimates provided to Welsh Ministers expired and new estimates have been issued. However, those estimates and the technical details are subject to review if they are not accepted within 90 days of the offer letter (dated 4th March 2020).

4.3 It is also necessary to highlight that in certain cases, the provisions of the New Roads and Street Works Act 1981 (NRSWA) may apply to diversions. These provisions apply when WPD's existing assets are placed in the public highway and the diversions are undertaken and replaced wholly within the existing (not new) public highway. Where this principle does not apply then the provisions of NRSWA do not apply. However, WPD often provide estimates based on C3 and C4 estimating provisions of NRSWA even where NRSWA does not apply as it is a common and well understood form for

reporting costs. Estimating in this form is not determinative of whether NRSWA actually applies to the diversions. There is often confusion on this point. The APA deals with the statutory application of NRSWA.

4.4 In summary, whilst the technical details of diversions have been agreed there is no agreement between WPD and Welsh Ministers in place for WPD to undertake the diversions.

5. **Need for the Asset Protection Agreement**

5.1 The APA deals with two principles:

- (a) Protection of WPD's network from damage as a result of the construction of the new road; and
- (b) The terms of WPD's engagement with Welsh Ministers on necessary diversions.

5.2 The Orders, if made, authorise Welsh Ministers to compulsorily acquire interests in land. WPD is required to maintain an efficient, co-ordinated and economical system of electricity distribution per its statutory duty.

5.3 But for the powers and effect of the Orders, WPD would be able to meet these statutory duties.

5.4 The powers in the Orders give rights to interfere with WPD's network. The effect of the Orders if made, could therefore potentially have a serious detrimental impact of WPD's network. For that reason it is incumbent on WPD to secure sufficient protection of the network. It is also imperative that the proposed works do not place any development risk on to WPD.

5.5 The basis for that protection is for Welsh Ministers to fully cover the costs to WPD consequent of the Order and fully bear all risks to damage to WPD's network and /or losses consequent on the development on an indemnity basis. Not to require

otherwise would place WPD in the position that is being expected to accept developer risk, which offends the principles of equivalence pursuant to the Compulsory Purchase Code.

6. **Asset Protection Agreement**

- 6.1 The provisions included in the APA proposed by WPD are similar to the provisions that have been accepted on other recent infrastructure projects that have been promoted by Highways England and Network Rail.
- 6.2 WPD considers that the Welsh Ministers should be able to accept similar terms to these national Government bodies and further considers that it is reasonable and fair for it to require that all such scheme promoters are subject to such terms and a consistent approach is adopted where a compulsory purchase scheme is being proposed pursuant to the Compulsory Purchase Code.
- 6.3 The APA covers the following principal issues which WPD considers need to be dealt with before it is able to withdraw its objection. Should these matters not be settled, the powers granted by the Orders have the possibility of causing serious detriment to WPD's network.

(a) **Land Rights**

The Orders provide for the acquisition of land for the development over which WPD benefits from rights under which WPD has placed electricity lines, associated equipment and structures (assets) in the land.

Should those interests be acquired or rights extinguished without appropriate replacement rights for new or diverted assets, the loss of those rights have the potential to have a serious detriment on WPD's network.

The Welsh Ministers have not sought to acquire replacement interests in land for the diversion of WPD's assets that are required outside of the Order Land. WPD has powers under Schedule 3 and Schedule 4 of the Electricity Act 1989 to acquire

interests in land and necessary wayleaves if they cannot be acquired by agreement. These procedures are themselves subject to public inquiry/hearings.

Without certainty as to the acquisition of land rights, WPD has no security that its assets are able to be diverted in accordance with the requirements of the development. Confirmation of the Order therefore has the potential to seriously impact or disrupt WPD's operation.

(b) Timescale and delay

The need to obtain alternative land rights has a potential on the time needed for WPD to divert or modify its existing assets to accommodate the project. The Welsh Ministers have not demonstrated a clear timescale for delivery of land rights leaving WPD to secure such rights. The project is not deliverable if WPD's assets cannot be diverted to nearby suitable land within a reasonable timescale. Further, WPD is not prepared to accept any risk of delay to the delivery of the road through its inability to secure land rights in a timescale set down by Welsh Ministers because they are at the behest of third parties giving consents/granting rights.

(c) Losses and Damages

A principle of the APA is to ensure that Welsh Ministers are liable for any losses incurred by WPD that are caused by Welsh Ministers or its contractors in constructing the road. For example, if the works caused damage to WPD's assets and caused an electricity outage WPD could become liable to its customers for loss of supply. WPD would expect Welsh Ministers to cover those losses if they were directly caused by the works (consequence of the powers granted in the CPO). WPD expect Welsh Ministers to provide sufficient security to WPD to enable WPD to confirm that there will be no serious detriment to its network.

This is not an issue of compensation. Unless an arrangement is in place for the Welsh Ministers to undertake to meet the full costs of diversion in advance is provided, WPD is unable to withdraw its objection.

(d) Risk

As a general comment, the purpose of the APA is to ensure that WPD does not bear or is allocated any development risk. WPD's assets affected by the development are generally passive and its statutory responsibility is to operate and maintain those assets. But for the Orders, WPD's liability is therefore limited to that extent. Any additional allocation of risk brought to bear on WPD as a result of the Orders and/or the Development is therefore unacceptable to WPD.

7. Conclusion

- 7.1 To date the Welsh Ministers have not properly considered the impact of the scheme on the local and/or strategic electricity distribution network, or the need to ensure security of electricity supply in the area. WPD considers that unless security to its assets can be secured by an Asset Protection Agreement there is a potential for the project if confirmed by the Orders to have a serious detriment on WPD's operation.

Osborne Clarke LLP



Secretary of State for Business Energy and Industrial Strategy,
Department for Business, Energy and Industrial Strategy,
1 Victoria Street
Westminster
London
SW1H 0ET

Our reference MILS/1120076/O45881447.2/MILS

19 September 2019

By Email only to: s37-wayleaves@beis.gov.uk

Dear Sir/Madam

THE LONDON TO FISHGUARD TRUNK ROAD (A40) (LLANDDEWI VELFREY TO PENBLEWIN IMPROVEMENT AND DE-TRUNKING) ORDER 201- and THE LONDON TO FISHGUARD TRUNK ROAD (LLANDDEWI VELFREY TO PENBLEWIN) (SIDE ROADS) ORDER 201- and THE WELSH MINISTERS (THE LONDON TO FISHGUARD TRUNK ROAD (A40) (LLANDDEWI VELFREY TO PENBLEWIN IMPROVEMENT)) COMPULSORY PURCHASE ORDER 201- ('The Orders')

We act on behalf of Western Power Distribution (South Wales) PLC (WPD) whose registered office is at Avonbank, Feeder Road, Bristol, BS2 0TB.

WPD has been notified of the Orders and has submitted a holding objection to the Welsh Ministers.

Pursuant to Section 16 of the Acquisition of Land Act 1981 (ALA1981) WPD also wishes to place this representation and objection to the Orders with the Secretary of State for Business Energy and Industrial Strategy as the appropriate Minister. The details of the representation are set out below.

Land and interests in land are comprised in the proposed Orders which are held by WPD for the purposes of its undertaking. However from the information provided WPD is unable to determine the impact of the Orders on its electricity network. In particular it would wish to understand:

- How the proposal will ensure security of electricity supply in the area.
- How the proposal will protect the electricity network during the construction phase of the scheme and following its completion.
- Precise details of the design or construction of the scheme and therefore potential operational implications.

Osborne Clarke LLP
2 Temple Back East, Temple Quay, Bristol, BS1 6EG or DX 7818 Bristol T +44 117 917 3000 F +44 117 917 3005

Osborne Clarke LLP is a limited liability partnership registered in England and Wales with registered number OC397443 whose registered office is at One London Wall, London EC2Y 5EB. It is authorised and regulated in the UK by the Solicitors Regulation Authority (SRA) and is registered as a recognised body with SRA number 619990.

The term 'partner' refers to a member of Osborne Clarke LLP. A list of members of Osborne Clarke LLP and their professional qualifications is available for inspection at the registered office. Any advice given by any individual member, employee, or consultant is the responsibility of Osborne Clarke LLP and not the individual.

Osborne Clarke LLP is part of an international legal practice.

- Precise details of the property rights and interests that will be affected by the implementation of the Orders.

Without further details the effect of confirmation of the Orders has the potential to cause serious detriment to the carrying on of WPD's statutory responsibilities which has the potential to result in a significant negative impact upon the distribution of electricity in the area. The Orders should not be confirmed until these issues have been dealt with to protect the electricity network.

Please therefore accept this letter as WPD's representation to the Orders consisting of a holding objection. The objection is framed as a "holding" objection as WPD would not wish this to be considered as an objection to the project but as an objection to protect its statutory rights and duties pursuant to the EA1989. We would expect the objection to be withdrawn once discussions commence with the Welsh Government regarding solutions to protect WPD's electricity network and formal agreements are concluded.

Please address all correspondence to the undersigned at the address or e-mail given.

Yours faithfully

Millie Smith

Osborne Clarke LLP

T +44 117 917 3868

E millie.smith@osborneclarke.com

Neil Bromwich

From: S37 Wayleaves <s37-Wayleaves@beis.gov.uk>
Sent: 27 September 2019 17:58
To: Millie Smith
Cc: customerhelp@gov.wales; S37 Wayleaves
Subject: THE LONDON TO FISHGUARD TRUNK ROAD ORDERS
Attachments: L to Secretary of State for Business Energy and Industrial Strategy - 19 September 2019.DOCX

** EXTERNAL EMAIL **

Good Afternoon,

**THE LONDON TO FISHGUARD TRUNK ROAD (A40) (LLANDDEWI VELFREY TO PENBLEWIN IMPROVEMENT AND DE-TRUNKING) ORDER 201-
THE LONDON TO FISHGUARD TRUNK ROAD (LLANDDEWI VELFREY TO PENBLEWIN IMPROVEMENT) (SIDE ROADS) ORDER 201-
THE WELSH MINISTERS (THE LONDON TO FISHGUARD TRUNK ROAD (A40) (LLANDDEWI VELFREY TO PENBLEWIN IMPROVEMENT)) COMPULSORY PURCHASE ORDER 201-**

The Secretary of State for Business, Energy and Industrial Strategy has received a representation under Section 16 of the Acquisition of Land Act 1981 from Western Power Distribution (South Wales) Plc in respect of the above Order.

As you may be aware, if a representation under section 16 is maintained the Order cannot be confirmed unless the Secretary of State for Business, Energy and Industrial Strategy certifies that she is satisfied that the compulsory acquisition of the land will not cause serious detriment to the company's operations in accordance with the provisions of either paragraphs 16(2)(a) or 16(2)(b) of the 1981 Act. We are sure that Western Power Distribution (South Wales) Plc and the Acquiring Authority will continue to negotiate with a view to resolving this matter so that the objection can be withdrawn before the Order inquiry proceeds. However, if negotiations fail and Western Power Distribution (South Wales) Plc's objection remains at the close of the Order inquiry, the Department will appoint an Inspector on behalf of the Secretary of State for Business, Energy and Industrial Strategy, to visit both parties in pursuit of determining whether it would be appropriate for a section 16 certificate to be issued.

We understand that an inquiry date for the above Order has not yet been set. In advance of being notified of dates, you should be aware that the appointed Inspector will be looking for the following information from representatives of the Welsh Ministers and Western Power Distribution (South Wales) Plc. **This information will be required within two weeks of the Order inquiry closing:**

From Western Power Distribution (South Wales) Plc:-

1. Schematic of the all appropriate electrical networks with associated LV and HV interconnectivity.
2. Detail of the electrical plant involved, its capacity and appropriate loading profile.
3. Detail on the effect on the network if the equipment is removed and not replaced, including ER P2/6 need case.
4. Detail of the adjacent network electrical plant, the capacity(ies) and loading profile(s).
5. Site plan showing the position of the electrical equipment at present and site plan showing the subsequent site development (a single plan with one plan superimposed on the other would be the preferred format).

From Western Power Distribution (South Wales) Plc **and** the Welsh Ministers:-

6. Mitigation that the parties have in place should Western Power Distribution (South Wales) Plc's assets remain in situ.
7. Details from both parties on the progress of negotiations on relocation/retention of Western Power Distribution (South Wales) Plc's assets.

8. Factors considered as part of the design process to accommodate/relocate Western Power Distribution (South Wales) Plc's assets.

We would ask that parties consult with their technical departments to ensure that the evidence can be produced on time (within two weeks of the Order inquiry closing) if the section 16 objection by Western Power Distribution (South Wales) Plc is maintained. Upon receipt of the evidence the Inspector will make arrangements with parties for a site visit to take place before producing their report and recommendation to the Secretary of State for Business, Energy and Industrial Strategy.

We are copying this email to the National Planning Casework Unit, and to the Welsh Ministers, so that the Acquiring Authority are also aware of the information that will be required from them, should this section 16 objection remain after the Order inquiry has closed. Should you have any questions, please do not hesitate to get in touch.

Regards

Rachel Dominey



Rachel Dominey
Wayleaves Manager
Energy Infrastructure Planning
E-mail: rachel.dominey@beis.gov.uk
T: 0300 068 5675
Level 3, Orchard 2, 1 Victoria St, Westminster, London SW1H 0ET
www.gov.uk/beis | twitter.com/beisgovuk