SCOTTISHPOWER

Corporate Office

Attention:
Lucy Galloway
Project Manager
Scottish Law Commission
140 Causewayside
Edinburgh
EH9 1PR

Sent by email: info@scotlawcom.gsi.gov.uk

Friday 19 June 2015

Dear Ms Galloway

Discussion Paper on Compulsory Purchase

We thank you for the opportunity to help shape a review of the law on compulsory purchase by inviting stakeholders to respond to questions about the Discussion Paper on Compulsory Purchase (DPCP).

ScottishPower is a major UK energy company with networks, retail and conventional and renewable generation interests. It is part of the Iberdrola group, a major international utility and the world's leading wind energy developer. In the UK, our renewable business, ScottishPower Renewables has over 1.6 GW installed capacity to date and a substantial development portfolio including onshore and offshore wind as well as emerging wave and tidal technologies. ScottishPower Energy Networks is the licensed electricity distribution operator in Merseyside Cheshire and North Wales with around 1.5 million customers as well as in the area of central and southern Scotland. ScottishPower Generation owns and operates 5 GW of electricity generation in England and Scotland.

As you are aware Scottish Power is broadly divided into liberalised and regulated businesses, and for business separation reasons, Scottish Power Energy Network will respond separately to the DPCP. This response is made on behalf of the ScottishPower's liberalised businesses (ScottishPower Generation and ScottishPower Renewables) which hold generation licences as well as gas transportation licences.

Overall we welcome efforts to clarify and simplify the compulsory purchase process because we believe that this should deliver a more effective exercise of compulsory purchase powers along with expediency of the whole process.

The DPCP is a substantial paper which raises complex and interrelated topics, and we have therefore chosen to focus on those issues of particular relevance to the liberalised

businesses. I attach for your consideration Appendix 1 which sets out our response to specific questions included in Chapters 11 to 15 that are pertinent to our Corporate Estates function. In addition the undernoted comments highlight our position in relation to the following topics: the definition of statutory undertakers; rights; Crichel Down Rules; objections; staged process; timescales; advertisement; and implementation by GVD.

Statutory Undertakers

You may be aware that Ofgem consulted recently on expanding the powers, available to electricity generation licence holders, under Standard Licence Conditions 14 and 15 of each generation licence. In response to this consultation, we made reference to the implicit support in these conditions and express support for the use of the statutory powers of compulsory acquisition by electricity generators. However we have reservations that, as we are not regarded as a public body, government and the public might be resistant to generators using these powers. We would therefore suggest that the definition, set out in paragraph 2.44 (DPCP), is expanded in any amended legislation to make it explicitly clear that companies which hold generation licences[1] are classed as statutory undertakers. Ofgem have a critical role to play in regulating the electricity industry, and determining which licence holders have CPO powers, and accordingly, it is important that this is recognised in any legislative changes.

Rights

We support the ability to acquire "*rights*" separate to ownership on the basis that this provides enhanced flexibility in relation to the scale and type of development proposed. However, we believe that it would not be proportional to acquire "*rights*" in all circumstances, for example the laying of cables or provision of access or even time limited rights for construction or operational life of an asset. We would therefore welcome clarity of the nature and terms of "*rights*" which could be granted.

It may be advantageous for the types or terms of "*rights*" to be prescribed by statue in order to avoid a situation where "*lease*" type rights could be debated at an inquiry in terms of appropriateness which would be unnecessary, if "ownership" were to be requested. This would also simplify and focus the inquiry process. It would then be for parties to argue for a variation from any prescribed form of statutory "*rights*". While it would be preferable for any "*rights*" to neatly reflect the known, and understood, "*property rights*", we do not consider that this is required in the case where "*rights*" are properly constituted, and authorised, by the enabling statute. It should also be possible for acquiring authorities to be granted "*rights*" to carry out activities such as mitigation on land.

Crichel Down Rules

We support enhanced flexibility by granting an acquiring authority temporary access for works such as pre-construction survey for a limited period. However we question the

[1] Generation and renewables businesses [as well as gas transportation licences]

appropriateness of the approach, set out in paragraphs 2.71 to 2.73. We consider that an alternative would be to expand the Crichel Down Rules to strengthen the obligation on the acquiring authority to return the land to the affected landowner. This would bring an increase in protection which could allow additional land, granted as part of any CPO, to be afforded additional/temporary rights or acquisition of a more expansive area of land to facilitate the construction process. Under the current process there is a risk that, in seeking to minimise the amount of land acquired, the acquiring authority does not acquire enough land or rights because of a lack of detailed information available at the point when the CPO is sought or the proposed technology or planned implementation changes during project development and implementation. We also highlight that, under the Electricity Act 1989 (as amended), there are various powers of access available to generation licence holders relative to surveys and other activities. We would not support any variation to those existing rights.

Negotiations

In relation to paragraph 4.16, we question the statement that the CPO process is a sequential process. It is erroneous to suggest that compulsory acquisition cannot commence until voluntary discussions have also commenced (and been exhausted). In our experience, the steps and time taken to confirm an Order are lengthy and often protracted. We therefore support efforts to expedite the process by limiting the time available to an acquiring body to negotiate removal of an objection and thereby avoid the need to convene a hearing or inquiry. We have experienced situations where landowners have not engaged in negotiations unless a CPO process has commenced with a view to inflating commercial land values payable by a third party. We would welcome improved clarity and recognition on the need for, and ability to, commence compulsory processes at an early stage. This would be beneficial by allowing increased flexibility for an acquiring authority in relation to what can be acquired.

We support the provision of timescales for securing CPO's to be set out in subordinate legislation and the alignment of associated processes (e.g. challenges to CPO on the basis it is incompatible with the property owner's right, under the Convention, being required to be made within the general 6 week period for general challenges to the CPO.)

We support the decision maker having discretion, similar to exists under the planning process, as to the method for resolving an objection to a CPO i.e. hearing, inquiry or even written submissions. This discretion should redress opportunities for objectors to deliberately delay or frustrate project implementation where delivery is time critical. This could also be used for the purposes of disregarding objections which are considered be frivolous. However it is important that a balance is struck by not undermining existing statutory provisions. For example, the existing determination processes in relation to licence holders seeking to compulsory acquire rights held by another licence. We would not support any changes which could undermine or circumvent these existing provisions.

Pre-condition

We have reservations about the proposed imposition of a pre-condition that a CPO would only be confirmed where there is clear evidence that the project is reasonably likely to proceed. This would bring considerable uncertainty into the development process and undermine investor confidence. Under the Contract for Difference regime, for example, a generator is awarded a contract following a successful bid in an auction process. Generators are unable to predict whether a bid(s) will be successful, and consequently they cannot provide a guarantee that a project will proceed. This raises an inherent tension in developing and delivering energy projects: generators cannot make a bid without certainty about land costs and a project delivery timeframe which cannot be assessed without a CPO being in place.

Staged Process

Compulsory acquisitions by a statutory undertaker involve two stages: (1) making a CPO; and (2) confirming a CPO by Ministers. In straightforward cases, we would suggest that a reporter confirms the making of a CPO, dispensing with the need for Ministerial involvement. In more complex cases, we agree that the two stage process should be retained with the caveat that Scottish Ministers can deviate from a Reporter's recommendation and confirm the Order where it can be demonstrated that a project is in national interests.

Timescales

An acquiring authority has three years from the confirmation of a CPO to implement the CPO. Consent under the Electricity Act/Town and Country Planning Act can be extended to five years, with agreement of the determining authority. We believe that the CPO timeframe should now align with the other regimes. We would like to see the CPO implementation period extended to five years in order to support delivery of complex infrastructure projects, especially in light of the Contract for Difference regime.

Advertisement

We welcome improvements to the advertisement of CPOs but suggest this forms part of the land register process. We believe that this offers an effective and efficient way to consolidate this information.

Implementation by GVD

We support the GVD process but recognise that further improvements can be made. In this respect, we highlight an opportunity to introduce a single statutory process for transferring the land to the acquiring authority.

If you would like to discuss our representation or arrange a meeting to consider our comments in more detail, please do not hesitate to contact me

[redacted] or my colleague [redacted]

Yours sincerely

[redacted]

Brian Galloway
Energy Policy Director

Appendix 1

PART 3: COMPENSATION

Chapter 11 Valuation of land to be acquired – basic position

74. The concept of "value to the seller" should continue to reflect any factors which might limit the price which the seller might expect to receive on a voluntary sale.

(Paragraph 11.30)

Comments on Proposal 74

We consider that the current six Rules of Valuation should be retained as the core valuation principles

78. Should a test along the lines of the "devoted to a purpose" test be retained?

(Paragraph 11.55)

Comments on Proposal 78

We believe that the 'Devoted to Purpose' test should be retained.

Chapter 12 Valuation of land to be acquired – rule 3 and the "no-scheme" world

81. How should the "scheme" be defined?

(Paragraph 12.78)

Comments on Proposal 81

We consider that the Scheme should be defined along the lines of "*the purpose for which the land is being compulsory acquired*".

82. Should an increase in the value of the land being acquired as a result of the scheme be taken into account for the purpose of assessing compensation?

(Paragraph 12.78)

Comments on Proposal 82

We believe that the 'no scheme world' valuation environment should be preserved.

83. To what extent should an increase in the value of the land being acquired, as a result of the effect of the scheme on other land being acquired, be disregarded?

(Paragraph 12.78)

Comments on Proposal 83

We consider that this effect should be totally disregarded.

Chapter 13 Valuation of land to be acquired – establishing development value

85. Should the statutory planning assumptions apply to land other than the land which is compulsorily acquired?

(Paragraph 13.14)

Comments on Proposal 86

We are of the view that existing planning consents should be taken into account when valuing land to be acquired.

88. Should there continue to be a statutory assumption that planning permission would have been granted for the acquiring authority's proposals if it were not for the compulsory purchase?

(Paragraph 13.30)

Comments on Proposal 88

We consider that there should continue to be statutory assumption that planning would have been granted for the land being acquired in relation to the acquiring authority's proposals.

Chapter 14 Valuation of land to be acquired - CAADs

98. Should there be a time limit for applying for a CAAD following the making of the CPO and, if so, what should that limit be?

(Paragraph 14.6)

Comments on Proposal 98

We believe that there should be a three month time limit for applying for a CAAD, following the making of a CPO.

107. Should an appeal against a CAAD be made to the LTS rather than to the Scottish Ministers?

(Paragraph 14.53)

Comments on Proposal 107

We consider that there is a case for appeal against a CAAD to be made to the LTS instead of the Scottish Ministers. We consider that this could shorten timescales and put the matter into expert and neutral hands.

Chapter 15 Consequential loss – retained land

112. The statutory definition of retained land should continue to be based on the effect of the acquisition on that land and not merely on the physical proximity of the retained land to the acquired land.

(Paragraph 15.18)

Comments on Proposal 112

We agree with this Proposal.

113. The proposed new statute should provide that the assessment of compensation for severance or injurious affection should be carried out on a "before and after" basis.

(Paragraph 15.25)

Comments on Proposal 113

We agree with this Proposal.

114. Claims for injurious affection should be assessed as at the date of severance.

(Paragraph 15.37)

Comments on Proposal 114

We agree with this Proposal.

115. Compensation for injurious affection, properly so called, should be limited to damage caused to the market value of the retained land.

(Paragraph 15.44)

Comments on Proposal 115

We agree with this Proposal.

117. Is the current rule, that set-off for betterment applies to land which is "contiguous with or adjacent to the relevant land", satisfactory?

(Paragraph 15.59)

Comments on Proposal 117

We believe that this would be satisfactory.

118. The provisions which require any betterment to the retained land to be set off against any compensation paid to the landowner in respect of the acquired land should be repealed and not re-enacted.

(Paragraph 15.70)

Comments on Proposal 118

We do not agree with this Proposal.

Chapter 16 Consequential loss - disturbance

119. The assessment of compensation for disturbance should be carried out separately from the assessment of the market value of the property.

(Paragraph 16.30)

Comments on Proposal 119

We agree with this Proposal.

120. There should be an express statutory provision for disturbance compensation.

(Paragraph 16.34)

Comments on Proposal 120

We agree with this Proposal.

121. Should the principle of causation in relation to disturbance compensation be set out in the proposed new statute?

(Paragraph 16.38)

Comments on Proposal 121

We agree with this Proposal.

122. The proposed new statute should make it clear that compensation for disturbance is payable from the date of publication of notice of the making of the CPO.

(Paragraph 16.44)

Comments on Proposal 122

We agree with this Proposal.

123. The proposed new statute should make it clear that compensation is payable in respect of costs incurred in relation to a compulsory acquisition which does not ultimately proceed.

(Paragraph 16.45)

Comments on Proposal 123

We agree with this Proposal.

124. If compensation for disturbance is to be payable from before the confirmation of the CPO, should it include losses caused as a result of lost development potential?

(Paragraph 16.47)

Comments on Proposal 124

Given that this will only apply in exceptional specialist circumstances, we are unable to offer detailed comment at this time.

128. Should claimants' personal circumstances be taken into account when considering the assessment of disturbance compensation?

(Paragraph 16.77)

Comments on Proposal 128

We agree with this Proposal.

129. Claimants should be under a duty to mitigate loss in terms of compensation for disturbance from the date of publication of notice of the making of the CPO.

(Paragraph 16.78)

Comments on Proposal 129

We agree with this Proposal.

133. Should it be made clear, in the proposed new statute, that a claim for disturbance compensation on the basis of relocation of a business will only be determined when sufficient time has elapsed following the relocation to enable the extent of the loss to be quantified?

(Paragraph 16.99)

Comments on Proposal 133

We agree with this Proposal.