House of Lords
House of Commons

Chairman of Committees, House of Lords and Chairman of Ways and Means, House of Commons

The Rookery South (Resource Recovery Facility) Order 2011: Report on petitions against the Order

First Special Report of Session 2010–12

Ordered by the House of Lords
to be printed 30 April 2012
Ordered by the House of Commons
to be printed 30 April 2012

HL Paper 294
HC 1956
Published on 1 May 2012
by authority of the House of Lords and the House of Commons
London: The Stationery Office Limited
£0.00

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Publications

The Report is published by The Stationery Office by Order of the two Houses. All Parliamentary publications relating to the Rookery South (Resource Recovery Facility) Order 2011 (including the hearing transcript) are on the internet at http://www.parliament.uk/business/bills-and-legislation/secondary-legislation/special-procedure-orders/rookery-south/

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1 Introduction

1. The Rookery South (Resource Recovery Facility) Order 2011 is an item of secondary legislation produced under the provisions of an Act of Parliament. Rather than being subject to the standard procedures of negative annulment or affirmative approval by Parliament, the parent Act specifies that it is subject to the Special Parliamentary Procedure which is set out in the Statutory Orders (Special Procedure) Act 1945 and the Private Business Standing Orders of both Houses. Unlike other forms of Parliamentary approval, this procedure enables parties who are directly and specially affected by the Order to petition against it. The purpose of this Report is to announce and explain our decisions about which petitions are certified as proper to be received, as it is only such petitions which go forward to a joint committee of both Houses.

The Rookery South (Resource Recovery Facility) Order 2011

2. The application to build a 65 megawatt "energy from waste generating station" on the site of former brick works at Stewartby in Bedfordshire was lodged by Covanta Rookery South Limited with the Infrastructure Planning Commission (IPC) on 4 August 2010. The proposal is classed as a "nationally significant infrastructure project" under the Planning Act 2008 because of the size of the proposed plant and, as such, is subject to the provisions of that Act with respect to the grant of development consent.

3. The IPC granted development consent to the scheme under two National Policy Statements on Energy.[1] These National Policy Statements were approved by the House of Commons on 18 July 2011.[2] In addition to planning consent, the Development Consent Order contains provisions for the compulsory purchase of types of land which under section 128(2) of the 2008 Act trigger Special Parliamentary Procedure. The Order would not have been subject to Special Parliamentary Procedure if either (a) none of the land to be compulsorily purchased had been "special land" (see paragraph 9 below), or (b) the Local Authority or Statutory Undertaker had been in agreement with the Order or they had withdrawn their opposition before the Order was laid, or (c) the applicant (Covanta) had itself been registered as a Statutory Undertaker.

4. The Rookery South (Resource Recovery Facility) Order 2011 was laid before Parliament by the Secretary of State for Energy and Climate Change on 29 November 2011. In accordance with the 1945 Act, a 21 day joint petitioning process in both Houses commenced on that same day. 39 petitions were deposited by the closing date on 19 December (see Table 1).[3] During the subsequent memorial period (a memorial is an objection from the Applicant or the Secretary of State that a petitioner does not have the right to be heard), which closed on 10 January, the Secretary of State and Covanta Rookery

1 Details of the Infrastructure Planning Commission process of inquiry can be found on the website of the former IPC (abolished on 1 April 2012) http://infrastructure.independent.gov.uk/application-process/the-process/ The pages are currently hosted by the Planning inspectorate.

2 (1) Department of Energy and Climate Change: *Overarching National Policy Statement for Energy (EN-1),* July 2011, and (2) Department of Energy and Climate Change: *National Policy Statement for Renewable Energy Infrastructure (EN-3),* July 2011.

3 25 are "Petitions of General Objection" to the Order, and 14 are "Petitions of Amendment". Four are from the relevant Borough and County Councils, 34 are from Parish and Town Councils, and one is from waste and recycling companies.

South Limited each deposited memorials against all the petitions, arguing that they were not proper to be received. A total of 78 memorials were received.[4]

Table1: Petitioners against the order and their Agents

Petitioners	Agent
1. Ampthill Town Council [*General Objection*]	Sue Clark
2. Aspley Guise Parish Council [*General Objection*]	Sue Clark
3. Aspley Guise Parish Council [*Amendment*]	Sue Clark
4. Aspley Heath Parish Council [*General Objection*]	Sue Clark
5. Brogborough Parish Council [*General Objection*]	Sue Clark
6. Brogborough Parish Council [*Amendment*]	Sue Clark
7. Cranfield Parish Council [*General Objection*]	Sue Clark
8. Cranfield Parish Council [*Amendment*]	Sue Clark
9. Flitwick Town Council [*General Objection*]	Sue Clark
10. Harlington Parish Council [*General Objection*]	Sue Clark
11. Hockcliffe Parish Council [*General Objection*]	Sue Clark
12. Houghton Conquest Parish Council [*General Objection*]	Sue Clark
13. Houghton Regis Town Council [*General Objection*]	Sue Clark
14. Hulcote and Salford Parish Council [*General Objection*]	Sue Clark
15. Hulcote and Salford Parish Council [*Amendment*]	Sue Clark
16. Husborne Crawley Parish Council [*General Objection*]	Sue Clark
17. Husborne Crawley Parish Council [*Amendment*]	Sue Clark
18. Kempston Town Council [*General Objection*]	Sue Clark
19. Leighton-Linslade Town Council [*General Objection*]	Sue Clark
20. Lidlington Parish Council [*General Objection*]	Sue Clark
21. Lidlington Parish Council [*Amendment*]	Sue Clark
22. Marston Moreteyne Parish Council [*General Objection*]	Sue Clark
23. Marston Moreteyne Parish Council [*Amendment*]	Sue Clark
24. Millbrook Parish Meeting [*General Objection*]	Sue Clark
25. Millbrook Parish Meeting [*Amendment*]	Sue Clark
26. Ridgmont Parish Council [*General Objection*]	Sue Clark
27. Ridgmont Parish Council [*Amendment*]	Sue Clark
28. Stewartby Parish Council [*General Objection*]	Sue Clark
29. Stewartby Parish Council [*Amendment*]	Sue Clark
30. Toddington Parish Council [*General Objection*]	Sue Clark
31. Woburn Parish Council [*General Objection*]	Sue Clark
32. Woburn Sands Town Council [*General Objection*]	Sue Clark
33. Wootton Parish Council [*General Objection*]	Sue Clark
34. Wootton Parish Council [*Amendment*]	Sue Clark
35. Waste Recycling Group Limited, WRG Waste Services Limited and Anti Waste Limited [*Amendment*]	Alison Ogley of Walker Morris Solicitors
36. Central Bedfordshire Council [*General Objection*]	Alastair Lewis of Sharpe Pritchard
37. Central Bedfordshire Council [*Amendment*]	Alastair Lewis of Sharpe Pritchard
38. Bedford Borough Council [*General Objection*]	Alastair Lewis of Sharpe Pritchard
39. Bedford Borough Council [*Amendment*]	Alastair Lewis of Sharpe Pritchard

5. Section 3 of the 1945 Act requires the Chairman of Ways and Means in the House of Commons and the Chairman of Committees in the House of Lords to determine whether a petition is *proper to be received.* A petition will not be proper to be received if the petitioner does not have *locus standi*. Powers are conferred on the two Chairmen under the Private Business Standing Orders of both Houses to decide questions of *locus standi* where, as in this case, an objection to *locus standi* has been made in a memorial. To this end, a hearing where petitioners and memorialists put their cases must be held. Petitioners who are deemed to have *locus standi,* and whose petitions are deemed to be *proper to be received,* will then be able to appear before a joint committee of the two Houses.

4 The petitions and memorials can be viewed on the Parliament web-site at: http://www.parliament.uk/business/bills-and-legislation/secondary-legislation/special-procedure-orders/rookery-south/petitions/

6. On 8 March 2012, we held a hearing on petitions against the Rookery South (Resource Recovery Facility) Order 2011. Agents presented the case of each petitioner and of the two memorialists. The transcript of the hearing is available on the Parliament website,[5] and subsequent correspondence with the Department of Energy and Climate Change is at Appendix A. The purpose of this Report is to announce our decisions on each individual petition along with an explanation for our reasoning. We also wish to draw attention to anomalies in the current statutory framework which are unsatisfactory. We hope our Report will be helpful not only for petitioners and memorialists in this specific case, but also to the parties in future cases. Above all, we hope the Government will act on our call for the current statutory framework to be amended.

The process after our Report

7. On the date of our Report to the two Houses, a 21 day Resolution period will commence. If, during this period, either House were to resolve that the Order be annulled, the Order would become void, and no further proceedings on it could be taken in either House.

8. If no annulment motion is agreed by either House within 21 days, the petitions that we have certified as proper to be received will stand referred to a joint committee of both Houses for consideration. The committee has the power to report the Order with or without amendment, or to report that the Order be not approved.

5 http://www.parliament.uk/documents/special-procedure-orders/rookery-south/ChairmensHearing/Correctd-Trnscrpt-Chairmens-Hearing-RookeryS-08032012.pdf

2 Petitions against the Order

9. In order to determine which of the 39 petitions are proper to be received, including whether a petitioner has *locus standi*, it is necessary to consider the Planning Act 2008 and the nature of the Special Procedure Order. Section 128(2) of the 2008 Act states that an order granting development consent is subject to Special Parliamentary Procedure to the extent that the order authorises the compulsory acquisition of land which is the property of a local authority, where that local authority has made representations about the application for the order and those representations have not been withdrawn. Such land is commonly referred to as "special land".

10. The principal purpose of the Order is to grant development consent for the construction and operation of the facility. The provisions which relate to the compulsory acquisition of rights over the special land are ancillary to that main purpose. The natural interpretation of section 128(2) is that those ancillary provisions of the order are subject to Special Parliamentary Procedure but those provisions granting development consent are not. The 1945 Act, however, does not provide for only part of an order to be subject to Special Parliamentary Procedure: it treats the order as a single entity and allows for petitions of general objection.

11. The petitioners argued before us that the phrase "to the extent that" in section 128(2) means no more than "if", with the result that if a local authority's representations trigger the operation of that subsection then the entire order, including the grant of development consent, is open to parliamentary scrutiny and a joint committee has the power to consider all aspects of the Order contained in the petitions, effectively re-opening issues already considered at the public inquiry carried out by the Infrastructure Planning Commission.[6]

12. We find this argument unattractive. Not only does it conflict with the clear wording of the 2008 Act, but it would mean that the Act had replaced a system whereby the only challenge to development consent granted following a public inquiry was in the courts on a point of law with one where Parliament could be required to act as a fresh opportunity to hear the same issues heard by the public inquiry—effectively a parallel route of appeal, but only if special land is involved. We cannot accept that that can be what was intended by an Act whose purpose was to speed up and simplify the development consent process. The purpose of applying Special Parliamentary Procedure is to provide protection to the rights of those whose special land is subject to compulsory acquisition and no more. If it is possible to construe the 1945 Act as applying to the Order only to the extent that it authorises the compulsory acquisition of special land (in line with the wording of the 2008 Act) we consider that it should be so construed. Although the wording of the 1945 Act is difficult to reconcile with such an approach we are satisfied that it is not impossible to do so. Although we have been referred by the petitioners to various precedents relating to decisions of our predecessors and joint committees in relation to compulsory purchase orders and Courts of Referees in relation to Private Bills we do not consider any of them to be directly applicable to this case, the circumstances of which differ considerably.

6 See transcript of Chairmen's Hearing on 8 March 2012, for example para 40 (Alastair Lewis).

13. We therefore conclude that, although the entire Order is subject to Special Parliamentary Procedure, it is only the provisions of the Order which relate to the compulsory acquisition of the special land which should be treated as relevant for the purposes of deciding which petitions are proper to be received.

The parish and town councils

14. The petitions of the parish and town councils (petitions 1 to 34) raise objections to the construction and operation of the facility. The councils do not claim that their areas are in any way injuriously affected by the acquisition of the special land, and they acknowledged before us that if we take the view that the only subject that petitioners can raise is the effect on them of the compulsory acquisition of the special land then they have no case. We do take that view and accordingly have decided that the parish and town councils should not be given *locus standi* and that therefore the petitions are not proper to be received.

The unitary councils

15. Bedford Borough Council and Central Bedfordshire Council are each owners of special land the compulsory acquisition of which the Order permits. Their ownership of this land is somewhat limited: it arises solely in their capacity as highway authorities, which means that there is vested in them just the surface and "top two spits"[7] of the land below the surface. They have no private rights in the land. Their limited ownership is nevertheless sufficient to grant a landowner *locus standi* to be heard. Section 128 of the Planning Act 2008 allows the two councils to trigger the Special Parliamentary Procedure by virtue of their ownership of the special land. It would be strange indeed if that ownership was not then sufficient to give them *locus standi*.

16. Their petitions (numbers 36 to 39) raise objections which are almost all concerned with the construction and operation of the facility. They do also object to the compulsory acquisition of their land, however, even if the only prejudice that they identify arising from the acquisition is that "it is unclear whether the compulsory acquisition of [their] rights over highway land will affect [their] highway powers and responsibilities".

17. The petitions for amendment each request two types of amendments to the Order. One set of amendments relates to the nature of the waste that may be processed at the facility. For the reasons given above we do not consider that a joint committee should concern itself with these amendments, which do not relate in any way to the acquisition of the special land. The other set of amendments relate to a proposed Bedford to Milton Keynes Waterway Park, which would involve the construction of a waterway passing under part of the highway which is special land. The amendments proposed would, it is said, safeguard this project. They are therefore related to the acquisition of the special land.

18. We accordingly certify the petitions of general objection of Bedford Borough Council and Central Bedfordshire Council as proper to be received as petitions of general objection and their petitions for amendment as proper to be received as petitions for amendment.

7 This concept originates from *Tithe Redemption Commissioners v Runcorn UDC (1954).* See also transcript of the Chairmen's Hearing 8 March 2012, paragraphs 99–102.

The companies

19. The petition of Waste Recycling Group Limited, WRG Waste Services Limited and Anti Waste Limited is one for amendment (petition 35). The amendments sought would prevent the Order from applying to the land owned by the companies. Although this land is not special land, some of it is directly below part of the special land, as the companies own the freehold of land fronting the highway. The installation of electricity cables in or under the highway land would therefore be likely to affect their land also, and we therefore conclude that they have demonstrated that they may be directly affected by the acquisition of some of the special land.

20. The Secretary of State for Energy and Climate Change urged us, were we to allow this petition, to certify it as one of general objection. We do not consider that to be appropriate. The amendments sought relate only to the companies' land and are only liable to affect a part of the special land.

21. We accordingly certify the companies' petition as proper to be received as a petition for amendment.

3 Procedural issues and implications

22. Our consideration of this first Development Consent Order under Special Parliamentary Procedure has thrown up several procedural problems which arise from anomalies in the statutory framework within which we work. We urge the Government to rectify these anomalies as a matter of priority, and in doing so, they should consult the relevant authorities in the two Houses. We will draw our Report to the attention of the Leaders of the two Houses and to the two Procedure Committees.

Incompatibility of the Planning Act 2008 and the Statutory Orders (Special Procedure) Act 1945

23. The Statutory Orders (Special Procedure) Act 1945 sets out the powers and procedures of Parliament in relation to Special Procedure Orders. It provides for the receipt of petitions, the certification of petitions as proper to be received and the period during which either House can resolve to annul the Order as well as the remit and powers of joint committees to consider petitions against the Order. Crucially, the Act makes provision for Parliament to consider *the whole Order*, and neither House has procedures in place which would allow them to annul only some elements of the Order.

24. By contrast, the natural interpretation of section 128(2) of the Planning Act 2008 is that it limits the Special Parliamentary Procedure to the provisions of the Development Consent Order authorising the compulsory acquisition of special land. After all, it would seem rather inconsistent if Parliament were to conduct a full re-hearing of the issues in respect of *some* Development Consent Orders, given that *all* DCOs, including those subject to Special Parliamentary Procedure, are subject to appeal by judicial review. However, as explained above, the provisions of the 1945 Act apply to the Order as a whole, and since the 2008 Act did not amend the 1945 Act, we now have a statutory framework which is internally contradictory.

25. This incompatibility between the 1945 and the 2008 Acts is particularly critical for the two remaining stages in the Special Parliamentary Procedure process. Firstly, the 1945 Act provides only for consideration and decision of the whole Order, and the Standing Orders of both Houses simply mirror the framework provided by the Act. Neither House has any procedural instrument by which debate on a resolution to annul the Order, tabled within the 21 day resolution period, could be limited to certain elements of the Order only, nor does either House have any means of annulling only some elements of the Order. It must therefore be the incontrovertible right of each House to debate any aspect of a Development Consent Order subject to Special Parliamentary Procedure and, if it so chooses, to reject the Order in its entirety on the basis of opposition to elements which, according to the intention of the 2008 Act, ought not to be subject to any part of Special Parliamentary Procedure.

26. The other stage at which the discrepancy between the provisions of the 1945 Act and the intentions of the 2008 Act become critically important is in the scope of consideration of petitions by a joint committee. The Agents for the unitary councils argued forcefully at our hearing that, once a petition has been certified as proper to be received and referred to

a joint committee, all aspects of that petition, whether or not they relate to the compulsory purchase of special land, should be considered by the committee.

27. We do not agree with this 'key to the door' interpretation, but we acknowledge that the lack of legislative consistency muddies the waters very seriously. We do not have the power to direct any committee to opt for one interpretation or another. Only the Houses can do that, should they so choose. Given the inconsistencies of the current statutory framework, it must be the prerogative of any committee to decide for itself how widely or narrowly it wishes to interpret its remit in relation to the petitions before it. We would, however, encourage any joint committee to seek to be consistent with section 128 of the Planning Act 2008 by focusing their work on the issues of compulsory purchase of special land; but it is clear that whilst the statutory inconsistencies remain, joint committees may reach different conclusions about the appropriate breadth of their inquiries, and further inconsistencies of practice are therefore probable. This is unsatisfactory.

In the 2012 Budget, the Government announced that it will—

> "remove duplication in the consenting regime for major infrastructure development by bringing forward legislation to adjust the scope of Special Parliamentary Procedure, and will shortly publish draft revised guidance to make the regime clearer and easier to use".[8]

28. At this stage, it is unclear precisely what duplication the Government intends to remove, and indeed whether it will address the problems we have identified above. **We urge the Government to amend either the Statutory Orders (Special Procedure) Act 1945 or the Planning Act 2008—or both—so as to ensure a consistent statutory framework for the consideration of future Development Consent Orders subject to Special Parliamentary Procedure. In drawing up revised provisions, the Government will need to consult with the relevant authorities of the two Houses. In the meantime, no further orders of this type should be laid before Parliament until the statutory framework has been amended to resolve these inconsistencies.**

Compliance with European Directives

29. A further legal issue was brought to our attention by the Secretary of State for Energy and Climate Change less than a week before our hearing on the Rookery South (Resource Recovery Facility) Order 2011 on 8 March 2012. In a written submission summarising the arguments that would be made on behalf of the Secretary of State at the hearing, it was suggested that, in a case such as this which relates to the approval of new electricity generating capacity, the Special Parliamentary Procedure would be incompatible with Article 7 of EU directive 2009/72/EC (concerning common rules for the internal market in electricity and gas) if it led to the annulment of the order, or a decision by the joint committee that the order be not approved.[9] The Directive provides that Member States are obliged to provide a route of appeal for applicants in cases where an application to construct additional generating capacity is rejected. We were urged to opt for a narrow

8 HM Treasury, *Budget 2012,* HC 1853 (2010–12), para 1.236, p 44

9 Submission from the Secretary of State for Energy and Climate Change, 1 March 2012, paras 45–50

interpretation of *locus standi* in order to minimise the risk that a joint committee would be persuaded to report that the Order be not approved under section 5(2) of the 1945 Act.

30. We sought clarification on these points both at our hearing on 8 March, and subsequently by correspondence (which is published in Appendix A). In his letter, the Minister states that "Both Parliament and the Executive have a duty to secure compliance, in so far as they can, with the UK's international obligations, for example under EU Treaties." The Minister also suggests in his letter that through a series of procedural manoeuvres it would not be "impossible to secure compliance by one means or another", including the possibility that an annulment motion may "not be selected for debate". This view of Parliamentary procedure is mistaken as there are no powers of selection in the Lords and the powers granted to the Speaker in the Commons do not extend to motions of this type. Furthermore, under the 1945 Act, either House has the right to pass a resolution to annul the Order (a decision the Minister concedes would be incompatible) and the joint committee has a statutory right to reject the Order if it sees fit to do so.

31. It is clear from the Minister's response that the Government considers that it would be incompatible with Directive 2009/72/EC for Parliament to annul an order granting development consent where, as in this case, the order related to a new electricity generating station. The same must apply where a joint committee decided that such an order should not be approved. Given this point of view, we find it very difficult to see any justification for maintaining the legislation in a form that allows these things to happen. In our view, it cannot be right for legislation to confer powers on Parliament in relation to development consent orders for new electricity generating stations if there are no circumstances in which those powers can be exercised compatibly with EU law. **We therefore urge the Government to amend the statutory framework under the Statutory Orders (Special Procedure) Act 1945 to ensure that all outcomes available under the statutory framework, and as a result, the Standing Orders of the two Houses, are compliant with EU legislation. In drawing up revised provisions, the Government will need to consult with the relevant authorities of the two Houses. In the meantime, no further orders of this type engaging Article 7 of Directive 2009/72/EC should be laid before Parliament.**

Appendix A: Correspondence between the Chairmen and the Department

Chairmen's letter to the Secretary of State for Energy and Climate Change

We are writing to you in connection with our consideration of the Rookery South (Resource Recovery Facility) Order 2011, deposited in both Houses of Parliament by your predecessor, Mr Huhne, on 29 November 2012. The Order is subject to Special Parliamentary Procedure under the Statutory Orders (Special Procedure) Act 1945.

On 8 March 2012, we held a Hearing under the provisions of House of Commons Standing Order 242 (House of Lords S.O. 208) to consider whether the petitions received against the Order were proper to be received. In anticipation of the Hearing, on 1 March, we received a letter from the Minister of State, Charles Hendry MP, setting out your approach to the Order and the petitions against it. The letter was accompanied by an extensive note from the Agent acting on your behalf, Mr Paul Thompson of Bircham Dyson Bell, explaining your position in detail and citing the basis in law and parliamentary precedent for your objections to the 39 Petitions against the Order.

In the letter and attached submission from Bircham Dyson Bell, reference is made to the potential incompatibility of the proceedings under the Statutory Orders (Special Procedure) Act 1945 ("the 1945 Act") with article 7(4) of Directive 2009/72/EC concerning common rules for the internal market in electricity. Article 7 regulates Member States' procedures for authorising new generating capacity. Paragraph 4 of that Article requires the applicant for authorisation to be informed of the reasons for refusal where an application is refused. It also requires appeal procedures to be made available to the applicant.

The submission made on your behalf points out that there is a potential incompatibility between Article 7(4) and the domestic legislation which requires an order granting development consent for an electricity generating station to be subject to special parliamentary procedure where it provides for the compulsory acquisition of special land. This is because a potential consequence of the Special Parliamentary Procedure is to prevent the order granting consent from having effect. No appeal would be available to the applicant against such an outcome.

We will of course give careful consideration to this point and the submissions made on it, when reaching our view on the *locus standi* of petitioners and on the other matters raised at the hearing on 8 March, But it seems to us there is a wider point here which is separate from the issues raised at the hearing. We consider it cannot be right to require an order granting development consent to be subject to special parliamentary procedure if the only acceptable outcome from a legal standpoint is that the procedure has no effect on the order. It seems to us that there is a particular difficulty with section 4(1) of the 1945 Act which allows either House, within the period of 21 days from the date on which the Chairmen make their report under section 3(5), to resolve that an order he annulled. It is your view, and that of the other parties, that the special parliamentary procedure applies to the order as a whole which is indivisible. If that is right, then any resolution under section

4(1) would also necessarily relate to the order as a whole. This would accord with Parliamentary practice in both Houses in that there is no procedure to annul part of a special parliamentary order (or any other statutory instrument). Since there can be no appeal against a resolution, it must surely follow that in your view there would be a breach of the Directive if a resolution for annulment of the order were to be passed.

We would be grateful for confirmation that, despite the points raised in this letter, you still consider the legislation can he made to work in a way that is compatible with Article 7(4) of Directive 2009/72/EC. It would also help to have your detailed reasons for this view.

lf, in fact, it is your view that changes to the legislation are required to ensure the compatibility of the current legislative framework with Article 7(4) of Directive 2009/72/EC, we would be grateful for an indication of the Government's plans and anticipated time scale for such action.

It would be helpful to receive your response by noon on Monday 26 March. A copy of this letter is being sent to agents for the petitioners and the other memorialist. If those agents have comments on the points raised in this letter, they should submit them to the same deadline.

It may be helpful for all parties to know that we do not expect to report before the end of March.

14 March 2012

Letter from Charles Hendry MP, Minister of State, Department of Energy and Climate Change to the Chairmen

I write in response to the letter of 14th March 2012 which you wrote to the Secretary of State for Energy and Climate Change, following up on the hearing you held on the Rookery South (Resource Recovery Facility) Order 2011 ("the Order") on 8th March 2012 under the Statutory Orders (Special Procedure) Act 1945 ("the 1945 Act").

I would begin by reiterating that the Government's role in this process is not to take a view one way or another on the merits of the Order or the proposed development to which it relates, but simply to explain how it considers the legislation ought to operate. In providing this opinion and in commenting previously on the petitioners' right to be heard, the Government is not suggesting that any of the petitioners are not genuinely aggrieved by the Infrastructure Planning Commission's ("the IPC") decision and it does not seek to endorse the judgments the now abolished IPC made.

You ask whether, in the light of the submissions made by Mr Thompson on the Secretary of State's behalf at the hearing, we think that certain outcomes which may occur under the 1945 Act would be incompatible with the rules about authorisation of new generating capacity set out in Article 7 of Directive 2009/72/EC concerning common rules for the internal market in electricity. In particular, you raise the question of motions to annul the Order under section 4(1) of the 1945 Act.

We agree that the annulment of the Order in its entirety would not be compatible with Article 7. But no action which you, in your current roles, might take would inevitably lead to that outcome. If, in the future course of the Special Parliamentary Process, it became

apparent that such an outcome was being envisaged, the Government would reiterate its advice that it was incompatible with Article 7. Even so, other parties might not necessarily share the Government's opinion on that matter and so might take actions which they would justify in accordance with alternative interpretations of the legislative position. However, we consider the proceedings on the Order can reach a meaningful conclusion without such an outcome.

For example, a person specially and directly affected by the proposed compulsory acquisition of rights over local authority land could argue against the Order on the grounds that, even allowing for the merits of the proposed Rookery South Resource Recovery Facility as approved by the IPC, the proposed compulsory acquisition was an unjustified intrusion on that person's rights—perhaps because a less intrusive way of achieving the same objective could readily be found. In the Government's view, that petition would be proper to be received, and, depending on the outcome of proceedings before the Joint Committee, it could lead to amendment of the Order without the loss of the Rookery South project as a whole. We do not think that the absence of judicial appeal against the loss of compulsory purchase rights over land for an ancillary part of the development would infringe Article 7 in the same way that special parliamentary procedure as interpreted by the petitioners could.

As far as a motion under section 4(1) is concerned, we would note the following points. Both Parliament and the Executive have a duty to secure compliance, in so far as they can, with the UK's international obligations, for example under the EU Treaties. If there were the prospect of a section 4(1) motion to annul, and it was considered that that motion would, if carried, in and of itself, produce a result that was not compatible with Article 7, there would be a number of options. The motion may not be tabled; if tabled, it may not be selected for debate; if debated, it may not be voted on; if voted on, it may be defeated; if passed, it may, exceptionally but not impossibly given the need to secure compliance with applicable EU law, be treated as a motion for annulment only of that part of the order which has caused it to be subject to special parliamentary procedure.

In short, if the relevant circumstances arise, those concerned will have to decide what to do in order to comply with the Article 7, but the Government does not think that it would in principle be impossible to secure compliance by one means or another.

Accordingly, we do not think that the risk of special parliamentary procedure in the present case having an outcome which would be incompatible with Article 7 is great enough to justify legislative action to avoid all potential incompatibility. In any case, we doubt very much whether it would be proper to introduce amendments to the 1945 Act or the Planning Act 2008 which had any effect on the present proceedings. However, it was announced, alongside the Budget, that the Government would act to remove duplication in the consenting regime for major infrastructure development by bringing forward legislation to adjust the scope of special parliamentary procedure. This proposal is intended to go rather wider than issues of Article 7 compatibility, but clearly Article 7 issues that might otherwise arise in future cases could be addressed as part of any reforming legislation.

I hope this answers your questions. The Order has thrown up novel issues almost at each stage of the special parliamentary procedure and I very much appreciate the care which is

being taken by yourselves and your officials in this matter. I am sorry that it has not proved possible to respond to your letter by 26th March as requested, due to other pressures.

13 April 2012