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BY EMAIL ONLY

FAO: Edwin Mawdsley
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The Planning Inspectorate
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Our ref: KJES/RYP/115040.00407

21 June 2022

Dear Mr Mawdsley

Response submitted by: Network Rail Infrastructure Limited
Registration identification number: 20027909
In relation to: Application by Network Rail Infrastructure Limited for an award of costs against London Resort Company Holdings Limited for an application for an Order Granting Development Consent for the London Resort
Your ref: BC080001/ CAPP-006E (Comb)

We act for Network Rail Infrastructure Limited (**Network Rail**). We write in response to The Planning Inspectorate's letter of 7 June 2022.

Matter 1: the 'successful objector' claim for costs, and specifically whether there are any arguments that, if successful, a part award should be made that would be different to or lesser in extent than any award that could possibly be made under Matter 3

LRCH's position

LRCH does not dispute that Network Rail's claim as a successful objector is valid in principle, but suggests that a partial award (and not a full award) of costs should be made. In particular, LRCH suggest that any costs award should only relate to costs incurred by Network Rail in objecting to the impacts of the proposed acquisition, as a person with an interest in land. They state:

1. Only the costs incurred in the period between the service of the section 56 notice until the date of withdrawal of the application by LRCH are payable.

2. That costs incurred in negotiating the private treaty acquisition of any land belonging to Network Rail should be excluded.

3. That the quantum of any costs incurred should be assessed upon the standard basis rather than the indemnity basis.

Network Rail's response

Network Rail considers that a full award of costs should be made, and anything less than this would be inconsistent with the Guidance[1], and dissuade full participation in the process by parties whose interests are subject to compulsory acquisition.

There is a presumption in paragraph 2, Part D of the Guidance that an award of costs will normally be made against the applicant in favour of a successful objector. In the context where an application has been withdrawn, a person will be treated as a successful objector where:

a) that person has interests which were subject to a compulsory acquisition (making them an 'objector' for the purposes of paragraph 1 of Part D);

b) that person has participated in (or has been represented during) the examination by the submission of a relevant and/or written representation (first bullet of paragraph 5 of Part D); and

c) maintained their objection until the compulsory acquisition request in respect of their property or the application for development consent was withdrawn (second bullet of paragraph 5 of Part D).

That wording does not limit an objector's participation in the examination to matters related to compulsory purchase. An objector, particularly an objector who has other land interests and operations in the vicinity of the site (as in the case of Network Rail), is likely to have concerns about the impact of the proposals as a whole and the impact of them on any retained land. The extent of a person's representations does not alter their status as a successful objector. For this reason it is not reasonable or equitable for the recovery of costs of a successful objector to be limited to costs incurred by Network Rail in objecting to the impacts of the proposed acquisition.

Specifically in response to the numbered points raise by LRCH above:

1. Network Rail was aware of, and formally engaged with the applicant ahead of the submission of the application. Being a statutory undertaker, with duties to protect its network, Network Rail is in a different position to most other interested persons as it is compelled to engage in the process where there is an interface with its assets, with specific provisions relating to statutory undertaker land under the Planning Act 2008. In light of that early engagement Network Rail was monitoring and aware of the submission of the application at any early stage (and notably ahead of the section 56 notice). Network Rail reasonably undertook work in the knowledge that the application had been accepted and under the legitimate expectation that it would therefore progress. For this reason the costs application specifically sought to claim all Dentons' invoiced costs from the date of acceptance of the application (i.e. 28 January 2021). We consider that all costs should be recoverable from that date.

2. Negotiations relating to a private treaty acquisition would not have taken place absent the threat of compulsory purchase. As a result, these incurred costs were directly attributable to the application, and specifically to the threat of compulsory acquisition. Therefore all costs relating to private treaty acquisitions (including in Network Rail's case the costs of seeking 'clearance' for any potential disposal through its internal processes) should be recoverable.

[1] "Awards of costs: examinations of applications for development consent orders" (the Guidance)

3. LRCH suggest that the standard basis is the 'normal basis' for a costs award in a compulsory purchase context and so should be applied in this case. We disagree with that assertion for a number of reasons:

    a. Network Rail is not claiming costs in "a compulsory purchase context". The costs claimed here relate to the abortive costs incurred as a result of the applicant's withdrawal of the application. They are not costs associated with the compensation for the compulsory acquisition of land or interests in land, and so the Upper Tribunal (Lands Chamber) Practice Directions (**the Practice Direction**) cited is of no relevance.

    b. In the Upper Tribunal (Lands Chamber) the costs invariably follow final settlement of a legal case. The Guidance is clear that "*an award of costs does not necessarily follow the outcome of the determination of the consent application, as in litigation in the courts*" so in light of that it is appropriate for different costs considerations to apply.

    c. The Practice Direction indicates the Tribunal will "*normally award costs on a standard basis*". Even if the Examining Authority is minded to have regard to the Practice Direction it needs to consider whether the application has proceeded "normally" having regard to other applications of this type. Neither the applicant's conduct nor the timing of the withdrawal of the application can be characterised as "normal". Network Rail had no notice of the applicant's intention to withdraw the application, and so was not in a position to manage its costs expenditure in anticipation of that. That is a very different position to the determination of costs at the end of legal proceedings in which both parties have actively participated, which is the scenario usually considered by the Tribunal.

For these reasons the standard basis is neither the 'normal basis' in current circumstances, nor the basis which should apply. Costs should be awarded on the indemnity basis with Network Rail receiving all their costs, except for those which have been unreasonably incurred or which are unreasonable in amount. Any doubt as to whether the costs were reasonably incurred or are reasonable in amount should be resolved in favour of Network Rail.

Matter 2: the jurisdiction to award costs for unreasonable behaviour in these circumstances

The power to award costs under section 250(5) of the Local Government Act 1972 is applied to an examination of an application for a development consent order by s95(4) of the Planning Act 2008. The effect of that wording is that the Examining Authority may make orders as to costs of the parties in relation to the Examining authority's examination of the application and as to the parties by whom the costs are paid.

The award of costs is ultimately a matter of discretion; the Guidance offers merely an indication as to the way in which the examining Authority should exercise that discretion. The Guidance is not binding or determinative.

The applicant relies on paragraph 12 of the Guidance which refers to the examination being treated, for costs purposes, as starting at the beginning of the Preliminary Meeting but acknowledges that paragraph 12 does not preclude a claim for unreasonable behaviour. We note:

(a) In the Atlantic Array case the Examining Authority took the view that "*the process for the examination of a DCO for an NSIP is therefore wider than the statutory period of the examination starting with the PM. To take too narrow a reading of the guidance on costs would place affected persons at a financial risk with no guarantee of recompense whilst*

simultaneously encouraging them to engage formally and potentially risk their own costs. That would be inconsistent with other areas of the planning process and incompatible with [Human Rights Act 1998]." If the Examining Authority in this case were to adopt a narrow reading of the Guidance which did not allow a claim for unreasonable behaviour this would be incompatible with the encouragement that is given to statutory undertakers and, affected persons more generally, to actively participate in the process.

(b) The trajectory of the Application has been unprecedented. The Planning Inspectorate's stated expectation is that the pre-examination period takes approximately three months to complete. We assume that the suggestion in the Guidance that the examination be treated started at the beginning of the Preliminary Meeting had that timeframe in mind. However, in this case the pre-examination period was 14 months. In light of the extended nature of the pre-examination period, the process of examination of the application needs to be seen as starting from the point that the application was accepted for examination.

(c) Part D of the Guidance sets out some specific considerations in relation to compulsory acquisition requests – namely, that if the circumstances in paragraph 3 of Part D are satisfied costs will be awarded to a successor objector. The applicant is wrong to suggest that is a limitation or a fetter on any other heads of claim.

(d) The applicant's reasons for withdrawal were flimsy and cited as part of the reasoning the designation of the site as a SSSI. The confirmation of the designation was in November 2021. The Examining Authority cannot give any weight to the applicant's suggestion that the application was withdrawn as a clear result of consultation and discussions between the applicant and interested parties. Even if that were the case (which we dispute) the application should have been withdrawn at least 4 months earlier.

In exercising its discretion the Examining Authority should also have regard to the objectives underpinning the costs award regime, and the stated aims of the guidance. Paragraph 4 of the Guidance states that the Guidance is aimed at ensuring, as far possible, that "*all parties involved in an examination behave in an acceptable way and follow good practice. This can be in terms of timeliness, the preparation of their representations or other written material, or their conduct in any hearing*". The applicant's behaviour – including, the failure to respond to requests from the Examining Authority and the late withdrawal of the application – does not follow good practice. Failure to award costs in light of such clearly unreasonable behaviour risks encouraging other applicants to act in a similar fashion.

Matter 3: the unreasonable behaviour alleged in the costs application and whether it meets the test for an award set out in the Costs Guidance

Section 4 of our letter of 22 April 2022 sets out the details of the applicant's unreasonable behaviour. The impact of that behaviour on Network Rail is detailed in section 5 of that letter. We ask that the Examining Authority review and have regard to those sections of our letter (which is annexed for ease of reference).

Conclusion

For the reasons given we consider that a full award of costs should be made in Network Rail's favour. We respectfully request therefore that the Examining Authority makes a costs award on that basis.

Yours faithfully

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Our ref: KJES/EB.SHARED

22 April 2022

Dear Mr Smith

Costs Application on behalf of Network Rail Infrastructure Limited
Application for an Order granting Development Consent for the London Resort (the Application)

1 Application for costs

1.1 We act for Network Rail Infrastructure Limited (**Network Rail**). Network Rail requests that an award of costs be made against the London Resort Company Holdings (**the Applicant**) in connection with the withdrawn Application.

1.2 Network Rail's status in relation to the Application, and entitlement to make a costs application, is explained in section 2.

1.3 The basis for the costs application is set out in section 3. Section 4 explains the Applicant's unreasonable behaviour, and section 5 details the impact of this on Network Rail. The costs claimed by Network Rail are set out in section 6.

2 Network Rail's status in respect of the Application

2.1 Network Rail was:

(a) an "interested party", as defined in section 102 of the Planning Act 2008 (**the Act**), by virtue of submitting a relevant representation; and

(b) an "affected person" as defined in section 59 of the Act as the Application sought the compulsory acquisition of land and rights belonging to Network Rail.

2.2 Network Rail is also a statutory undertaker for the purposes of the Act.

2.3 In line with Part A, paragraph 2 of the 'Award of costs: examination of applications for development consent orders' Guidance (**the Guidance**) Network Rail is a party who can apply for an award of costs.

3 Basis for the costs application

3.1 Network Rail applies for an award of costs pursuant to section 95(4) of the Act. Network Rail seeks costs in respect of:

(a) its successful objection to the compulsory acquisition request; and

(b) its costs incurred as a result of the applicant's unreasonable behaviour in its management of the Application.

3.2 The Application was received by the Planning Inspectorate on 4 January 2021. Following acceptance of the Application there have been unprecedented delays to the start of the examination hearings. The Preliminary Meeting was scheduled for 29 March 2022 and Dentons UK and Middle East LLP (**Dentons**) registered to speak at that meeting on behalf of Network Rail. In the Arrangements Conference on 29 March 2022 at 9:00 am we were notified that the Applicant had withdrawn the application, outside working hours, approximately 12 hours previously.

3.3 Paragraph 2 of the Guidance states that where an objector "[*has] been successful in objecting to the compulsory acquisition request, an award of costs will normally be made against the applicant for development consent and in favour of the objecto*r". The Guidance states that, provided that a party has:

(a) objected to the compulsory acquisition request;

(b) participated in (or been represented during) the examination by the submission of a relevant and/or written representation; and

(c) maintained their objection at all times before the compulsory acquisition request was withdrawn,

they will be treated as a successful objector and be treated as if their success was due to their representations. For the reasons given in paragraphs 5.1 and 5.2 of this letter, these conditions are met.

3.4 Separately, the Guidance explains at paragraph 11 that costs will normally be awarded where the following conditions are met:

(a) the aggrieved party has made a timely application for an award;

(b) the party against whom the award is sought has acted unreasonably; and

(c) the unreasonable behaviour has caused the party applying for the award of costs to incur unnecessary or wasted expense during the examination.

3.5 In line with paragraph 32 of the Guidance, this cost application is timely as it is submitted within 28 days of the notification of the withdrawal of the Application. Section 4 explains how the applicant has acted unreasonably.

3.6 Network Rail has incurred costs in reviewing the Application, engaging with the Applicant, and participating in the examination process. Network Rail received no notice or indication that the Applicant was contemplating the withdrawal of the Application. Now that the Application has been withdrawn the work undertaken by Network Rail, and the costs associated with it, are wasted.

3.7 We ask that the Examining Authority find that the Applicant has acted unreasonably in their conduct and handling of the Application which, as a consequence of that unreasonable behaviour, has caused Network Rail to incur necessary and wasted costs.

3.8 In preparing this costs application we have had regard to the Guidance. The Guidance notes that for costs purpose, the examination is treated as starting at the beginning of the Preliminary Meeting. However, we note that:

(a) The Guidance is merely guidance, and the Examining Authority has a wide discretion under section 250(5) Local Government Act 1972, as applied by section 95(4) of the Act to award costs.

(b) In the Atlantic Array case the Examining Authority took the view that "*the process for the examination of a DCO for an NSIP is therefore wider than the statutory period of the examination starting with the PM. To take too narrow a reading of the guidance on costs would place affected persons at a financial risk with no guarantee of recompense whilst simultaneously encouraging them to engage formally and potentially risk their own costs. That would be inconsistent with other areas of the planning process and incompatible with [Human Rights Act 1998]*." If the Examining Authority in this case were to adopt a narrow reading of the Guidance this would be incompatible with the encouragement that is given to statutory undertakers and, affected persons more generally, to participate in the process.

(c) The trajectory of the Application has been unprecedented. We are not aware of any other application for development consent where there has been such a protracted pre-examination hearing period. Network Rail have participated in the examination by the submission of a relevant representation, corresponding with the Examining Authority regarding the examination procedure (notably in letters dated 10 January and 15 March 2022), registering and logging in to participate in the Preliminary Meeting. At all stages Network Rail has actively participated in the examination process. In light of the extended nature of the pre-examination period, the process of examination of the Application needs to be seen as starting from the point that the application was accepted for examination.

4 The Applicant's unreasonable behaviour

4.1 The applicant acted unreasonably by:

(a) **Submitting an application which was not supported by sufficient or robust evidence**. The Applicant has sought to rely on the designation of the Swanscombe Peninsula as a Site of Special Scientific Interest (**SSSI**) as the reason for the delay and the need to update documentation. However, the proposed updates to the document were much broader than solely ecology impacts. This is evidenced in the summary of updated and new documents which the Applicant was required to submit (see, for example the Applicant's update in June 2021). This demonstrates that the majority of the submission documents required updating. Those "updates" included a new Transport Assessment Addendum, which was plainly not linked to the designation of the site as a SSSI. The Applicant has sought to use the SSSI designation as an opportunity to carry out work which ought to have been carried out prior to submission.

(b) **Failing to adhere to timetables regarding updates to document**. Even if the Examining Authority consider that the Application was supported by sufficient evidence, the Applicant acted unreasonably in failing to update the documents in the timeframes they initially indicated. They repeatedly extended these timeframes. The Applicant also failed to provide the required updates to the Examining Authority. As part of its relevant representation, and repeated in subsequent engagement, Network Rail identified further rail-specific assessment work that was required. Despite seeking multiple extensions to the timetable, the necessary rail work was not carried out carried out. As explained in paragraph 5.7 below, in light of the Applicant's continued failure to progress the necessary technical work, it became necessary for Network Rail, in order to protect its position, to incur the costs of carrying out some of that work itself.

(c) **Failing to meaningfully cooperate with Network Rail and other rail bodies.** Network Rail representatives attended several meetings with the Applicant. At those meetings Network Rail, and other rail industry bodies, raised their concerns about the need for further rail assessment to assess the implications of the proposals on the rail network and inform a cohesive rail strategy. However, the Applicant failed to meaningfully progress the points coming out of those meetings. Network Rail has led to believe that matters would be progressed but repeatedly they were not.

(d) **Changing its position in respect of the impacts on the HS1 network.** HS1 and the Applicant jointly commissioned independent experts Steer to assess the submitted rail strategy in relation to the HS1 impacts and mitigations. That study proposed a dedicated shuttle service between St Pancras and Ebbsfleet. The Applicant, whilst initially agreeing with the findings of that report, then subsequently sought to challenge the findings. This had an impact on Network Rail because if additional services are not provided on the HS1 network this will increase the passenger numbers on its own network. The Applicant's change of position therefore created the need for additional work by Network Rail to understand the basis for that changed viewpoint and created uncertainty about the impacts.

(e) **Repeatedly failing to engage with Network Rail's lawyers regarding the form of protective provisions.** Dentons' first provided Network Rail's standard form of protective provision to the Applicant's lawyers on 26 August 2021. Dentons contacted the Applicant's lawyers on several subsequent occasions regarding the protective provisions. At no point during the process did the Applicant, or their advisers, provide any comments on Network Rail's requested form of protective provisions. We note that the Applicant's update on 15 March 2022 indicated that there has been correspondence between Eversheds and Dentons regarding the protective provisions. That is disingenuous as that correspondence simply indicated that Eversheds were awaiting instructions.

(f) **Repeatedly failing to engage with Network Rail's lawyers regarding a Costs Recovery Agreement.** The Applicant had, during the course of meetings, indicated that they would be willing to enter into an agreement to cover Network Rail's internal and external costs in reviewing the technical material supporting the Application and Network Rail's input into the process. A Costs Recovery Agreement was prepared and issued in good faith on that basis. Dentons first provided a draft of the Costs Recovery to the Applicant on 12 August 2021. The scope of the Costs Recovery Agreement was subsequently narrowed. At no point during the process did the Applicant, or their advisers, provide any comments on either Costs Recovery Agreement. Had they engaged in that process it may have negated the need for this costs application.

(g) **Withdrawing the application approximately 12 hours prior to the commencement of the Preliminary Meeting.** Participants, including Network Rail, were only made aware of the withdrawal of the Application at the point of joining the Arrangements Meeting. At that point Network Rail had incurred costs in registering to attend the Preliminary Meeting and preparing for it. It was open to the Applicant to withdraw the application at any earlier point in the process. The Examining Authority's letter of 1 February 2022 made express reference to withdrawal being an option open to the Application. The Applicant has acted unreasonably in withdrawing the application at the 11th hour on the eve of the Preliminary Meeting.

5 Impact on Network Rail

Compulsory acquisition

5.1 As detailed in paragraph 3.3 above, an objector "*[has] been successful in objecting to the compulsory acquisition request, an award of costs will normally be made against the applicant for development consent and in favour of the objector*". Network Rail is entitled to its costs because:

(a) The Application contained compulsory acquisitions requests in respect of numerous parcels of Network Rail;

(b) Network Rail objected to the compulsory acquisition of any of its land and interests in its relevant representation (see section 4 of that representation which specifically deals with Network Rail's objection to compulsory acquisition request);

(c) Network Rail took an active part in the Examination, including submitting a response on 10 January 2022 to the Examining Authority's consultation on timing, submitting response in relation at Deadline A on 15 March 2022 and registering to speak at the Preliminary Meeting, and

(d) Network Rail maintained their objection in respect of compulsory acquisition and this was still extant at the point the Application was withdrawn.

5.2 The Examining Authority have made interested parties aware of the costs decision in relation to Atlantic Array. Similar consideration to those set out at paragraph 15 of the costs awarded apply in this case. Namely, that it was necessary for Network Rail to participate in the process and incur costs in assessing the compulsory acquisition position ahead of the start of the Preliminary Meeting. Those costs have included (but are not limited to):

(a) reviewing the Book of Reference and land plans to understanding the interface between the proposed acquisition plots and Network Rail owned land (including the preparation of plans);

(b) correspondence with Savills regarding the impact of the compulsory acquisition proposals;

(c) submitting what Network Rail terms 'clearance requests' which are necessary when any land is subject to disposal (compulsory or otherwise); and

(d) internal considerations of potential heads of terms for the three proposed underpasses under the railway.

Wider impacts on Network Rail

5.3 We ask the Examining Authority to consider the wider effect that the Application this has had on Network Rail. The Applicant's own estimate indicates that the 30% of all visitors will arrive by rail. Network Rail considers that the true figure is much higher. However, in any event, it is clear that the rail network is expected to play a significant role in facilitating the movement of visitors and staff to and from the Resort. A theme park also gives rise to a particular pattern of movements with defined peaks of movement. As a result, the proposals would have had a direct and material impact on the rail network.

5.4 Network Rail is a statutory undertaker and owns, operates and maintains its rail infrastructure pursuant to its network licence. Under the terms of that licence Network Rail is under a duty to secure the operation, maintenance, renewal and enhancement of the network in order to satisfy the reasonable requirements of customers and funders. In light of that licence duty it was not open to Network Rail to simply sit back and await whatever revisions the Applicant chose to submit. Given the direct and highly material impact on the rail network, Network Rail had no option but to engage with the detail of the proposals to understand and assess the impacts. That work was:

(a) led by Network Rail's Strategic Planning team;

(b) supported by internal advice (including property, legal and asset protection advice); and

(c) supported by external legal advice from Dentons, who provided both strategic support and detailed legal advice on specific issues (including, not limited to preparing the relevant representation, drafting the Costs Recovery Agreement, providing comments on the draft DCO and correspondence with the Examining Authority).

5.5 Beyond the formal engagement in the Application process the review and assessment work has involved:

(a) an extensive review of the Application by the Strategic Planning team;

(b) attendance at meetings with the Applicant;

(c) attendance at London Resort specific rail industry stakeholder meetings; and

(d) regular internal calls to coordinate the input on the rail, property, asset protection and other disciplines.

5.6 As a consequence of the Applicant's unreasonable behaviour, Network Rail has had to spend a disproportionate and unreasonable amount of time to establish what rail strategy the Applicant was in fact proposing and the technical evidence that they were relying on to support it. The Applicant indicated at several points they would carry out the rail-specific work and/or fund Network Rail to do so. On the back of this Network Rail procured costings and briefing documents for this work which were provided to the Applicant. However, the Applicant never carried out this work nor formally committed to fund it. Due to persistent delays in doing so, and the delays in updating the Application documents more generally, Network Rail has been left second-guessing how the Applicant intended to revise the Application. This has happened at each stage of the process.

5.7 It reached the point where it became necessary for Network Rail to proactively undertake work to assess the rail impacts to enable Network Rail to protect its statutory undertaking and support its position at the examination hearings. Had the Applicant acted reasonably and undertaken this work

this would not have been necessary. Network Rail had supported delays to the start of the examination to allow this work to be carried out but notwithstanding this, the Applicant failed to do so. This work (which is referenced in section 2.13 of Network Rail's relevant representations) involved the commissioning of a timetable study by WSP to look at:

(a) how long trains would need to wait at Swanscombe to accommodate the loading on / loading off of passengers for the Resort; and

(b) the impact of that on the passenger and freight timetables.

5.8 This is work that Network Rail has maintained, and continues to maintain, ought to be covered by the Applicant. Network Rail asks for its costs in respect of this work.

5.9 It should be noted that if the Applicant were to re-submit the application it would be necessary for:

(a) the timetable modelling to be carried out afresh to reflect the revised proposed date of opening of the development, and resulting changes in the 'baseline assessment';

(b) any revised application to be considered afresh on its own merits.

Any work carried out in respect of this Application is unlikely to be applicable to any future application as that would have an alternative opening date. In any event, for the purposes of determining this application for costs the Examining Authority has no certainty that the Application will be indeed be resubmitted so cannot give that any weight.

6 Network Rail's claim

6.1 Network Rail claims:

(a) All of Dentons' invoiced costs from the date of acceptance of the Application to, and including, 29 March 2022 (including costs connected with advising on the compulsory acquisition request);

(b) All of Dentons' invoiced costs in connection with the preparation of this application for an award of costs;

(c) All of the costs incurred by Network Rail in commissioning WSP to carry out the timetable modelling;

(d) WSP's costs in carrying out the timetable modelling;

(e) All internal Network Rail costs in connection with the proposed compulsory acquisition of Networks (including, but not limited to the costs detailed in paragraph 5.2(a) – (d)).

(f) All internal costs of Network Rail's Strategic Planning Team reviewing and assessing the Application;

(g) All internal Network Rail costs in assessing the asset protection implications (where these costs are not already recovered under another agreement);

(h) All internal costs of attending meetings with the Applicant;

(i) All internal costs of the internal steering group meetings;

(j) All costs of attending London Resort rail industry stakeholder meetings; and

(k) All incurred VAT and disbursements in relation to the above costs.

6.2 For the reasons given above, these costs have been necessarily and reasonably incurred and, as a result of the Applicant's conduct, are wasted. We ask the Examining Authority to make an award of costs in respect of the costs detailed above.

Yours faithfully

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Dentons UK and Middle East LLP