Phillips 66 Limited
Deadline 5 Submission
VPI Immingham OCGT DCO
EN010097

1 INTRODUCTION

1.1 This is the written submission of the oral case made to the Examining Authority ("**ExA**") on behalf of Phillips 66 Limited ("**P66**") in respect of VPI Immingham B's application for the VPI Immingham OCGT DCO, reference EN010097, at the compulsory acquisition hearing held on Wednesday 4 December 2019.

1.2 All terms used within this document are as defined in the Applicant's Application Documents, and P66's previous submissions, unless otherwise stated.

2 APPLICANT'S PROPOSAL

2.1 What the Applicant is proposing is the acquisition of rights over land owned by P66.

2.2 That land is already the subject of leasehold agreements between P66 and the Applicant.

2.3 Compulsory purchase is something of a blunt tool. It does not allow for the creation and acquisition of leasehold interests; not as an estate in land for a fixed period of time. But absent the term of years absolute, that is what is being proposed here by the Applicant.

2.4 What the Applicant seeks to do is to take all of the benefit of the existing rights its sister company has been granted under the Existing Arrangements, but without any of the controls which are habitually provided for in leasehold arrangements. It seeks to do so over land on which existing and substantial infrastructure is in place.

2.5 Instead of the usual leasehold protections, the Applicant is now seeking to replicate those protections through the use of protective provisions [see Appendix 1 of REP4-007 – the Applicant's Deadline 4 submissions].

2.6 There are two areas of concern with that approach, one is of principle, and the other the details of the provisions being offered.

3 PRINCIPLE OF USING PROTECTIVE PROVISIONS

3.1 On the principle, what the Applicant offers is novel and without precedent[1].

3.2 Protective provisions are usually offered as safeguards during the construction of DCO projects. That is for example the manner in which the original protective provisions were offered by the Applicant – in respect of the hydrocarbon pipeline crossings[2]. In that context the use of protective provisions is standard practice in DCOs. The important point is that the protective provisions regulate the carrying out of construction works. They do not purport to mimic the protections of a leasehold agreement. And they are not generally used to regulate the use of existing infrastructure in DCOs.

3.3 Instead, what the Applicant now offers [Appendix 1 of REP4-007], is protective provisions which would purport to regulate (in perpetuity) the rights it is seeking to acquire over P66's freehold land.

3.4 The principle of using protective provisions for this purpose is fraught with problems.

3.5 The first is enforcement. A lease is a private law arrangement between two parties which the Court will enforce at the request of either party. A DCO is a public law arrangement,

[1] Something which was accepted by the Applicant in its submissions in reply at the CAH.

[2] Those protective provisions are the ones inserted into its dDCO by the Applicant at Deadline 3 – see Part 4 of Schedule 9 to the dDCO at REP3-004.

so looks to the planning authority and the criminal courts to enforce breaches, both of which substantially weaken the enforcing party's position. The relevant provisions of the Planning Act 2008 are s.161 (which makes it a criminal offence to breach the terms of a DCO) and s.171 (under which injunctions are available to local planning authorities). Whilst prosecution or enforcement by the relevant public authority may be expected where a statutory undertaker's apparatus is being protected by the conventional use of protective provisions, the position is much less straightforward in the circumstances proposed by the Applicant. There is no certainty that P66 would be able to secure the enforcement of the latest protective provisions offered. The local planning authority is unlikely to be willing or sufficiently resourced to assist P66 in the protection of its interests under the DCO.

3.6 There are other fundamental aspects of a landlord's armoury which cannot be re-created by protective provisions. Chief amongst those is the remedy of forfeiture; but the criticism also potentially extends to cover the absence of specific performance, damages, even repudiation.

3.7 The ExA raised the question as to whether the protective provisions offered by the Applicant ought to replicate the Existing Arrangements, or otherwise provide necessary safeguards for the protection of P66's existing operations.

3.8 On behalf of P66 the submission was that the appropriate test is that of providing necessary safeguards. However, the Existing Arrangements provide a useful indication of what those safeguards ought to entail, having previously been negotiated by two independent parties as part of a commercial transaction. The Applicant refers[3] to the Existing Arrangements as a level of protection which ought to satisfy P66's concerns. That would appear to indicate it considers they amount to the minimum necessary safeguards required in this instance.

3.9 That position is reinforced by paragraph 8 of the DCO CPO Guidance[4], which indicates that any interference to be authorised by CPO with private rights must be necessary and proportionate. The Applicant appears to accept that the unfettered acquisition of rights over P66's interests would not be necessary and proportionate. In order to fetter its acquisition, the Applicant's proposal is to recreate the Existing Arrangements as protective provisions.

3.10 P66 disagrees that the protective provisions as proposed secure those necessary safeguards. But the standard the Applicant is aiming at in drafting the suggested measures is clearly the recreation of the Existing Arrangements. It can be inferred, on the Applicant's proposal, that the *minimum* necessary safeguards to be imposed on the CPO powers within the DCO are those which effectively replicate the Existing Arrangements.

3.11 P66's position is that the protections of the Existing Arrangements must be recreated within the proposed DCO. To do otherwise is disproportionate and unnecessary, and therefore contrary to guidance on this issue.

4 DETAIL OF PROTECTIVE PROVISIONS

4.1 Turning to examples of the details of the protective provisions being offered by the Applicant.

4.2 One critical issue in those protective provisions is the scope of the indemnity. This is used as an illustrative example of the approach being taken by the Applicant.

[3] See its answer to Q2.2.17 at page 15 of REP4-007.

[4] "Planning Act 2008: guidance related to procedures for the compulsory acquisition of land" published by the Department for Communities and Local Government in September 2013.

4.3 Paragraph 64 of the protective provisions offered by the Applicant is an indemnity limited to direct losses. That compares to liability for consequential loss under the Existing Arrangements[5].

4.4 This one point illustrates that the Applicant is not seeking to replicate the Existing Arrangements. Even on its solution it is proposing a different commercial settlement, compared to those Existing Arrangements.

4.5 This is an excellent illustrative example because it is a commercial point which is also in issue between the parties in their negotiations over new lease arrangements – the Proposed Arrangements as they have been called.

4.6 The Applicant's proposed protective provisions would limit its liability. P66 seeks unlimited liability. That is a perfectly reasonable commercial term, which underpins the Existing Arrangements. This serves as a good example of why CPO should not be used to circumvent private treaty in a leasehold situation.

4.7 Other examples of detail which emerge from the suggested drafting include the following:

Terms and conditions

4.8 There is an absence of many of the detailed controls which are contained within the Existing Arrangements. Another example being the terms and conditions which apply under the lease of the Existing Pipeline Site[6]. Those terms and conditions control many important issues such as access to and egress from the site, as well as the control of sources of ignition.

Lift and shift provisions

4.9 The drafting of the lift and shift provisions has been amended to apparently avoid any obligation to pay compensation. The key operative drafting omits the notification obligation on the Applicant to elect to pay compensation.

4.10 It was suggested during the hearing that the effect was to limit the Applicant's ability to elect to retain its pipeline. But if that is the effect of the omission, then it would appear an alternative problem has been created, which is that there would be no obligation to pay compensation where planning permission is refused to P66 by virtue of the presence of the pipeline.

4.11 The Applicant appeared to indicate that regardless of the effect of the lift and shift drafting, P66 would be entitled to compensation on the grant of the DCO powers if exercised by the Applicant. The intimation being this is simply a matter of compensation. However, that misses entirely the impacts that the proposed DCO and its powers of CPO may have on P66's business. This to a large extent is the same issue as that addressed above on the standard the protections of the DCO must secure; whether it must replicate the Existing Arrangements, or simply provide a necessary safeguard. P66 contends that the current drafting of these lift and shift provisions would have a disproportionate impact on its business operation. They should not therefore be approved on these terms.

Other detailed drafting points

4.12 There are a number of further drafting issues with the protective provisions offered by the Applicant. The ExA directed during the hearing that the appropriate time for those detailed submissions could be Deadline 6, by which time P66 will have been able to review and

[5] See clause 4.12 of the Lease of the Existing Gas Pipeline, as contained at Appendix 2 to P66's Written Representation REP2-024.

[6] See Schedule 3 of the Lease of the Existing Gas Pipeline, as contained at Appendix 2 to P66's Written Representation REP2-024

assess the detailed drafting offered by the Applicant at Deadline 5. These points of detail, and others, will therefore be set out at that time.

5 JUSTIFICATION

5.1 The ExA was also addressed on the question of justification. The Applicant has referred to paragraphs 3.1.3 and 3.6.8 of EN-1 in so far as they refer to the need for the development proposed; gas fuelled generating capacity. It should be noted that the "urgent" need attributed to that technology type, appears from the language of 3.6.8 to apply only to schemes which are to be Carbon Capture and Storage (CCS) schemes. There is a need recognised for Carbon Capture Ready (CCR) schemes, but 3.6.8 is less clear about what need there is for fossil fuel generated schemes which do not meet either of those criteria (i.e. are neither CCS, nor CCR). That of course is the case for the Applicant's proposal.

5.2 That is referred to as context for P66's primary submission on justification; which is that the question of whether or not there is a need for the development in question is a very different question to whether or not there is a compelling case in the public interest. The latter is the test the Secretary of State must be satisfied of if he or she is to make the DCO with powers of compulsory acquisition. This is best articulated with reference to paragraph 13 of the DCO CPO Guidance:

> *"13. For this condition [the test in s.122] to be met, the Secretary of State will need to be persuaded that there is compelling evidence that the public benefits that would be derived from the compulsory acquisition will outweigh the private loss that would be suffered by those whose land is to be acquired. Parliament has always taken the view that land should only be taken compulsorily where there is clear evidence that the public benefit will outweigh the private loss. "*

5.3 In order to apply this test, the ExA and Secretary of State must weigh the private loss to P66 as a result of the Applicant's proposal. Given the national importance of P66's business, as outlined in previous representations and not contested by the Applicant, the weight to be attributed to private loss to P66's business should be very great indeed.

5.4 The ExA questioned whether the test under s.122 is the same as, or different, to the test which is to be applied at s.104 of the Planning Act and the question of whether or not to grant development consent for a project.

5.5 P66's submission was that the tests are different, but that the findings on CPO may feed into the s.104 test on the grant of DCO. The DCO CPO Guidance reinforces that conclusion in paragraph 16 where it provides:

> *"16. There may be circumstances where the Secretary of State could reasonably justify granting development consent for a project, but decide against including in an order the provisions authorising the compulsory acquisition of the land…"*

5.6 Where the two tests may interrelate is on issues such as deliverability. If for example the Secretary of State were not satisfied that a compelling case in the public interest is made out, he or she may also conclude that the Applicant is unable to show that it can deliver the scheme proposed, for want of the rights it seeks over P66's land. Deliverability is a material consideration in the planning regime, and may amount to a relevant and important consideration when applying the s.104 tests.

6 EXISTING PROTECTIVE PROVISIONS

6.1 The references in the foregoing part of these submissions are to the new protective provisions suggested by the Applicant as Appendix 1 to its Deadline 4 submissions [REP4-007].

6.2 In its submissions to the ExA on the existing protective provisions[7] the Applicant confirmed that it would be amending its DCO to make the drafting changes suggested by P66 in its Deadline 4 submissions. The particular drafting is referred to at paragraphs 2.13 and 2.14 of those D4 submissions [REP4-018].

6.3 Provided those drafting changes are made, the existing protective provisions relating to the crossing of the existing hydrocarbon pipelines are acceptable to P66. With those changes, the provisions would amount to those suggested by P66 in its Written Representation.

7 CONCLUSION

7.1 In summary; P66 objects to the exercise of CPO powers against its land. The protective provisions offered by the Applicant do not comprise appropriate safeguards. The use of protective provisions to offer the type of safeguards intended is entirely novel and without precedent. It conflicts with the accepted legal principle against creating leaseholds via compulsory acquisition.

7.2 P66 does not contest the Applicant's submission that novelty is no reason of itself not to adopt a particular approach.

7.3 However, P66's business is nationally significant. The Applicant appears to have accepted[8] that controls on the exercise of its DCO's powers of compulsory acquisition are necessary to protect that business. Novelty and a lack of precedent are not features that P66 would usually look for in arrangements relating to its highly regulated, nationally significant, business. The potential for private loss is significant.

7.4 The Applicant's proposal fails to meet the test in s.122.

Burges Salmon LLP on behalf of **Phillips 66 Limited**

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[7] i.e. those relating to the works to cross the existing hydrocarbon pipelines (plot 17 of the Land Plans).

[8] In response to P66's representations as part of this examination.