

From: [Johnson, Melissa](#)
To: [A1 Birtley to Coal House](#)
Subject: A1 Birtley To Coal House Improvement Scheme - Written Submissions: Network Rail Infrastructure Limited [ADDGDD-Live.FID3194990]
Date: 08 July 2020 20:58:22
Attachments: [A1 Birtley - Network Rail_s DCO Post Hearing Submissions 08_07_20.DOCX](#)

Dear Madam or Sir

Please refer to the attached Post-Hearing Submissions and response to the Action List following ISH5, which is submitted on behalf of Network Rail.

Yours faithfully

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**APPLICATION BY HIGHWAYS ENGLAND FOR AN ORDER GRANTING
DEVELOPMENT CONSENT FOR THE A1 BIRTLEY TO COAL HOUSE
DEVELOPMENT CONSENT ORDER**

PLANNING INSPECTORATE REFERENCE NUMBER: TR010031

REGISTRATION IDENTIFICATION NUMBER: 20023039

**POST-HEARING SUBMISSIONS AND RESPONSE
TO FURTHER WRITTEN QUESTIONS
submitted on behalf of Network Rail
Infrastructure Limited following Issue Specific
Hearing 5 regarding the Development Consent
Order Hearing held on 25 June 2020**

Introduction

- 1 This document summarises the case put forward by Network Rail Infrastructure Limited (**Network Rail**) at the Development Consent Order Hearing [**ISH5**], which was held on 25 June 2020.
- 2 The agenda for ISH5 was published on the Planning Inspectorate's website. The summary below deals with those agenda items in order.
- 3 Network Rail was represented at the hearing by the following:
 - Roger Brighouse, Senior Surveyor Property (North West and Central), Network Rail; and
 - Melissa Johnson of Addleshaw Goddard LLP.
- 4 Network Rail has also been asked by the Examining Authority, in its Action Points arising from ISH5, to provide alternative wording where there remain points of disagreement regarding the Protective Provisions for the benefit of Network Rail, to be included at Schedule 11 to the Order and this document also responds to the Examining Authority's request (Action Point 17).

Post-hearing submissions

ISH5 Agenda Item 6(j) – Post-hearing submissions

- 5 Network Rail confirmed to the Panel that while negotiations continued to progress with the Applicant regarding the acquisition by the Applicant of Network Rail's freehold interest by private treaty, in relation to the acquisition by the Applicant of Network Rail's leaseholder's estate (with the leaseholder being DB Cargo UK Limited (**DB Cargo**)), Network Rail's understanding is that the Applicant intends to acquire the interest compulsorily, by General Vesting Declaration, pursuant to the Order.
- 6 Network Rail confirmed that in relation to the acquisition of this leasehold estate there may be the need for a new Requirement, the detail of which could be addressed by the parties at a later point, to address Network Rail's concern that the related property documents are completed by the Applicant in the correct chronological order.
- 7 Network Rail confirmed that it understood that there have been no negotiations between the Applicant and DB Cargo during the course of the Examination.
- 8 Network Rail asked the Panel whether it wished to be provided with a brief explanation of how this land is used and the Panel said that this would be helpful.
- 9 Highways England's lawyer, Mr Bassford, argued that Network Rail's oral submissions at the hearing referred to 'without prejudice' discussions and asked that Network Rail make no further submissions on these issues. Consequently, the Panel suggested that discussions occur between the parties following the hearing rather than during it and the parties agreed to do this.

ISH5 Agenda Item 9(j) – Post-hearing submissions

- 10 There was a discussion regarding the outstanding matters of disagreement in relation to Network Rail's protective provisions. The parties agreed to make post-hearing submissions in relation to these, which follow in this document under the next heading (ISH5 Action Point 17).

ISH5 Action Point 17 – Network Rail response

11 Action Point 17 states:

Schedule 11 (Protective Provisions) - Where there is disagreement with the Protective Provisions within the current draft DCO, provide suggested alternative drafting along with reasoning and justification

12 Network Rail confirms that there remain the following points of disagreement with regard to the Protective Provisions for inclusion at Part 3 of Schedule 11 to the Order and, where appropriate, proposes suggested alternative drafting.

13 Network Rail is seeking the following amendments to the Protective Provisions submitted by the Applicant at Deadline 4 [REP4-074], as follows:

Amendment 1 an amendment required to deal with the acquisition by the Applicant of DB Cargo's estate (**new paragraph 21(6) of the Protective Provisions**);

Amendment 2 an amendment relating to article 20 of the DCO (discharge of water) to ensure that Network Rail will consent to the drainage water in the vicinity of the railway by the Applicant (**amendment to paragraph 21 of the Protective Provisions**);

Amendment 3 an amendment to ensure that the Applicant will indemnify Network Rail in respect of indirect and other consequential losses and ensure that Network Rail does not have to disclose the terms of commercially sensitive documents to the Applicant (**deletion of paragraph 32(4) of the Protective Provisions**); and

Amendment 4 an amendment to the definition of 'specified works'; Network Rail will update the Panel regarding this proposal at the next Examination deadline after it has concluded discussions with the Applicant (**amendment to paragraph 19 of the Protective Provisions**).

Amendment 1 - New Protective Provision 21(6) relating to the compulsory acquisition of the leasehold estate

14 Amendment 1 relates to the acquisition of the DB Cargo leasehold estate by the Applicant.

15 Network Rail continues to co-operate with the Applicant to ensure that the necessary land and rights are provided to the Applicant to enable it to carry out the Scheme.

16 As the Panel is aware, DB Cargo has a leasehold interest over some of Network Rail's estate within the Order limits.

17 The acquisition of the DB Cargo leasehold estate by the Applicant can either happen by way of compulsory acquisition or by private treaty. Network Rail is happy for the Applicant to proceed by either acquisition method.

18 The following amendment is requested to ensure that, in the event of the Applicant proceeding to acquire the DB Cargo estate compulsorily, the acquisition of the DB Cargo estate occurs prior to or simultaneously with the acquisition of Network Rail's related freehold estate.

- 19 Network Rail seeks the inclusion of a new Protective Provision, at new paragraph 21(6), which has been provided to the Applicant for comments and which we hope will be agreed before the next Examination deadline:

"The undertaker may not compulsorily acquire any leasehold estate over the land in respect of which a freehold estate is held by Network Rail or any easement over such leasehold estate unless provision has been made for the prior or simultaneous acquisition of any such freehold estate belonging to Network Rail or of any such easement over such freehold estate, as applicable, by the undertaker".

- 20 This new Protective Provision ensures that, in the event of the Applicant proceeding to acquire DB Cargo's estate by compulsory acquisition, that this will occur *prior to or simultaneously with* the acquisition of Network Rail's freehold estate, which the parties are negotiating by private treaty.
- 21 If the Applicant was to acquire the DB Cargo leasehold estate *before* acquiring Network Rail's freehold estate, the Applicant would effectively become Network Rail's tenant (of a freight lease) and the parties would have the complexity of dealing with the powers in the Order potentially conflicting with the covenants in the lease, which we understand the Applicant as well as Network Rail wishes to avoid. Therefore Network Rail asks for this protective provision to ensure the correct sequence of events, so that the compulsory acquisition will proceed smoothly for both Network Rail and the Applicant.

Protective Provision 20(1) - Amendment submitted by the Applicant and welcomed by Network Rail

- 22 If the DB Cargo leasehold estate is to be acquired by the Applicant by private treaty (rather than by compulsory acquisition), unless the lease has been acquired / surrendered *prior to or simultaneously with* the acquisition of Network Rail's freehold interest, Network Rail would need to obtain the consent of its leaseholder to the transfer of its freehold interest otherwise Network Rail would be in breach of the lease.
- 23 Should the consent of its leaseholder be required in those circumstances, Network Rail naturally seeks to avoid being held to account for any delay to the transfer of its freehold estate to the Applicant occurring as a result of the Applicant or Network Rail first seeking consent from DB Cargo. Further, Network Rail notes that DB Cargo has its own land disposal procedures to follow.
- 24 The Applicant has therefore inserted the following words to paragraph 20(1) (shown underlined) in the Protective Provisions included in the Development Consent Order submitted at Deadline 4 [REP4-074] to account for this eventuality and Network Rail welcomes this amendment:

"Where under this Part of this Schedule Network Rail is required to give its consent or approval in respect of any matter, that consent or approval is subject to the condition that NR complies with any relevant railway operational procedures and any obligations under its network licence or under statute and, if applicable, shall be subject to first obtaining the consent and/or surrender of any leaseholder of the railway property"

Amendment 2 - Protective Provision 21(1): Article 20 relating to the discharge of water

- 25 As the Panel is aware, Network Rail wishes to include "article 20 (discharge of water)" in the list of Order powers to which Network Rail must give its consent at paragraph 21(1) of the Protective Provisions. Network Rail must be able to consent to the drainage of water into any watercourse or public sewer or drain and/or the taking up and altering of pipes in the vicinity of the railway.

26 Network Rail has not been given sufficient information by the Applicant to be satisfied that no such works will need to occur during the construction and maintenance of the Scheme and therefore requests that this reference remains in paragraph 21(1).

27 Network Rail understands that the Applicant is considering this amendment further and we hope to resolve this issue before the next Examination deadline.

28 An alternative, should the Applicant prefer, is to amend the definition of "specified work" as follows:

"specified work" means so much of any of the authorised project as is situated upon, across, under, over or within 15 metres of, or may in any way adversely affect, railway property and for the avoidance of doubt includes the exercise of the powers conferred by article 20 (discharge of water)"

29 This alternative text would mean that the consent to any such works would fall within the remit of a specified work and would therefore be a matter for Network Rail's asset protection team to consent to.

Amendment 3 - Protective Provision 32(4): Indemnity provided by the Applicant to Network Rail

30 Network Rail requests that paragraph 32(4) of the Protective Provisions be deleted from the DCO Protective Provisions. For an explanation of this request, Network Rail refers the Panel to its previous submissions relating to the indemnity [REP4-67 (section 5 (iii))]. Network Rail is continuing its discussions regarding this indemnity with the Applicant.

31 Network Rail is concerned to ensure that the scope of its standard indemnity is not diluted by the inclusion of paragraph 32(4). Network Rail considers it essential that the Applicant provides Network Rail with a full indemnity for any losses arising from the Scheme; that indemnity should include consequential and indirect loss, which, in any event would need to be properly justified and meet the relevant common law tests.

32 As Network Rail referred during its verbal submissions at ISH5, only losses that can be reasonably foreseen by the parties as a result of the direct loss will be covered by the Applicant, if the Applicant is to be accountable for indirect as well as direct loss.

33 Given the complex and extensive works proposed to the land abutting the railway and over sailing the railway in this Scheme, involving the following works:

- the demolition and construction of a road bridge over the East Coast Main Line;
- excavation for new bridge abutments / bridge supports including excavation;
- construction of new abutments / bridge supports;
- installation of bridge deck beams and deck construction over the East Coast Mainline;
- replacement of overhead line equipment,
- the construction of a new access track;
- the installation of fencing adjacent to Network Rail's railway boundary;
- the modification of the existing overhead line equipment surrounding the new bridge and existing bridge; and
- temporary diversion of Network Rail cables and ducts and the protection of Network Rail services;

the Scheme's works can in no way be considered by Network Rail to be minor.

- 34 Business and technical clearance with extensive engineering conditions have been obtained by Network Rail (and continue to be obtained as the Scheme changes) to enable the works to proceed and there will be significant involvement of Network Rail's asset protection team and railway engineers throughout the construction of the works to ensure the safety of the railway.
- 35 Network Rail considers that a full indemnity provision is vital given that the risk of there being a direct loss exists and that it is greater because of the complex nature of the works proposed over a mainline in constant use by high speed trains.
- 36 As the Panel may be aware, Network Rail's standard indemnity provisions are included in almost all confirmed Orders.
- 37 In relation to the very few Orders that deviate from Network Rail's standard, the Secretary of State has been clear to identify the special situation that requires this deviation. In relation to the *Hinkley Point C DCO*, the works proposed involved the over sailing of an electricity cable over the railway; entirely different in nature to the complex and extensive works proposed by the Applicant in this case.
- 38 In relation to the *M42 (Junction 6) DCO*, where the undertaker in question was *Cadent Gas* rather than a railway undertaker, we are not aware of the full facts relating to this DCO and whether those facts are in any way applicable to this Scheme. We know that private agreements were entered into between Cadent Gas and the Applicant but we are of course not aware of the terms of those agreements.
- 39 There are many other DCOs where the proposed works more closely align with the works proposed in relation to the Scheme, and where Network Rail's preferred indemnity has been confirmed by the relevant Secretary of State.

Amendment 4 - Protective Provision 19: Definition of 'specified work'

- 40 Finally, Network Rail and the Applicant are in discussions regarding the definition of 'specified work' in paragraph 19 of the Protective Provisions as Network Rail seeks to ensure that the definition addresses the extent of land to be subject to engineering approvals in this Scheme.
- 41 Network Rail will update the Examining Authority at the next Examination deadline with regard to the amendment that it seeks; and is seeking to agree this with the Applicant before requesting this wording in written submissions.

Conclusion

- 42 Should the Examining Authority have any further questions regarding the contents of this document, Network Rail will be happy to provide further submissions.
- 43 Network Rail will continue to liaise with the Applicant and provide the Panel with a final update at the relevant deadline before the close of the Examination.

Addleshaw Goddard LLP
8 July 2020