

Tritax Symmetry (Hinckley) Limited

HINCKLEY NATIONAL RAIL FREIGHT INTERCHANGE

The Hinckley National Rail Freight Interchange Development Consent Order

Project reference TR050007

Applicant's Response to EXA's Further Written Questions [Appendix B - Protective Provisions position table]

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9 February 2024

Planning Act 2008

The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations
2009 Regulation 5(2)(q)

1. **Introduction and Update**

- 1.1 This document is submitted in response to the Examining Authority’s Further Written Questions ExQ2.5.8 to provide the Applicant’s position on the current status of the protective provisions with all parties, as at Deadline 5.
- 1.2 The table below provides a summary of the current status of discussions and outstanding issues.

Protective provisions for the benefit of	Status of discussion between the parties
Part 1: Protection of Railway Interests (Network Rail)	<p>Positive discussions are ongoing between the parties to deal with the overarching framework agreement which will govern the protective provisions as well as the asset protection arrangements. The Applicant envisages that the version of the provisions in the dDCO will be updated once that framework agreement has been finalised during the course of the Examination. It is intended that this will be reflected in the final draft dDCO to be submitted at Deadline 7.</p> <p>This is also reflected in the Statement of Common Ground with NR submitted at Deadline 5 (Document Reference 19.8).</p>
Part 2: Protection of National Highways	<p>The position with National Highways (NH) is that, as the ExA will recall, since the Application was submitted for Examination, NH have prepared ‘template’ protective provisions that they have sought to include in the dDCO for HNRFI, we understand that this was the first DCO application the template protective provisions have been applied to, and NH accept that they had already been negotiating the Applicant’s draft protective provisions (which had been based on those from other recently consented SRFI DCOs, namely Northampton Gateway and West Midlands Interchange) for a number of months before they requested this change.</p> <p>Notwithstanding the above, the Applicant agreed to review NH’s template protective provisions and has made significant concessions (including the position relating to indemnities and bond provision) against the draft protective provisions submitted with the original dDCO. The Applicant has accepted the majority of the departures, now included in the template NH protective provisions but, it has not been possible to finalise protective provisions with NH at this stage.</p> <p>The majority of the protective provisions included in the dDCO have been agreed between NH and the Applicant but, the following points remain outstanding:</p>

Protective provisions for the benefit of	Status of discussion between the parties
	<ul style="list-style-type: none"> Paragraph 4 - there is a difference of opinion in respect of the appropriate drafting. The provision is set out below, with NH's suggested drafting shown in red and the Applicant's suggested drafting shown in bold. <p><i>"Notwithstanding the limits of deviation permitted pursuant to article 4 of this Order, no works in carrying out, maintaining or diverting the authorised development may be carried out under the strategic road unless such works are agreed in writing with National Highways at the absolute reasonable discretion of National Highways."</i></p> <p>The Applicant's position is that in the context of delivery of a nationally significant infrastructure project, drafting such as 'absolute discretion' is not appropriate and could have significant consequences for a project. The Applicant is aware that NH is under a duty to act reasonably in any event and does not accept that the inclusion of this wording compromises its duty to protect the SRN.</p> <ul style="list-style-type: none"> Paragraph 7(2) – NH has sought to include the following provision: <p><i>"(2) The undertaker must not exercise—</i></p> <p><i>article 6 (maintenance of authorised development);</i> <i>article 9 (street works);</i> <i>article 10 (power to alter layout etc. of streets)</i> <i>article 12 (temporary closure of streets);</i> <i>article 14 (accesses)</i> <i>article 15 (maintenance of highway works)</i> <i>article 18 (traffic regulation);</i> <i>article 21 (discharge of water);</i> <i>article 22 (authority to survey and investigate the land);</i> <i>article 23 (compulsory acquisition of land);</i> <i>article 25 (compulsory acquisition of rights);</i> <i>article 28 (private rights)</i> <i>article 29 (rights under or over streets)</i> <i>article 32 (temporary use of land for carrying out the authorised development);</i> <i>article 33 (temporary use of land for maintaining the authorised development); or</i></p>

Protective provisions for the benefit of	Status of discussion between the parties
	<p><i>article 44 (felling or lopping trees or removal of hedgerows) of this Order,</i></p> <p><i>over any part of the strategic road network or land in which National Highways has an interest without the consent of National Highways, and National Highways may in connection with any such exercise require the undertaker to provide details of any proposed road space bookings and submit a scheme of traffic management as required for National Highways' approval."</i></p> <p>[note that these articles are not the correct references for the current article numbering in the dDCO but should any of these be agreed, the Applicant will ensure cross-referencing is checked].</p> <p>The Applicant's position is that the provision is wholly inappropriate in the context of a DCO. The Applicant notes that a number of the articles referred to include drafting restricting the use of the relevant powers without first obtaining the approval of the relevant highway authority, or which ensure that the provision in the article is subject to the protective provisions. This demonstrates, in the Applicant's view, a clear lack of engagement in the DCO drafting by NH as it is simply taking the position that 'template' provision must be included without fully considering the effect and drafting within the DCO.</p> <p>The Applicant must insist that articles relating to compulsory acquisition powers are included and can be relied on by the Applicant but, it is important to note that the powers relating to compulsory acquisition do not relate to the Strategic Road Network. The Applicant's position in respect of NH plots subject to compulsory acquisition and temporary possession is set out in the Applicant's Responses to the ExA's Further Written Questions (ExQ2.3 series) (Document Reference 18.16).</p> <ul style="list-style-type: none"> • Paragraph 7(4)(c) - deemed approvals in the event that NH fails to respond to a request for approval within 2 months. The Applicant's position is that deemed approval is critical to providing certainty in terms of delivery of the project. Any delays will have significant impacts on the delivery programme. The Applicant has reiterated throughout the Examination to all third parties with whom deemed approval is contested that the provision only deems approval if the third party has not engaged with the request for consent. It is critical that requests for consent and approval of details for the delivery of a nationally significant infrastructure project are not held up by the failure of a third party to engage. This is not an unreasonable position and it is approved in many DCO as the Applicant has highlighted several times, including NH's own DCOs where deemed approvals are imposed on others.

Protective provisions for the benefit of	Status of discussion between the parties
	<p>The Applicant considers the drafting to allow NH sufficient and reasonable time to respond and approve relevant details;</p> <ul style="list-style-type: none"> • Paragraph 9(4) – there is a difference of opinion in respect of the appropriate drafting. The Applicant’s drafting only seeks to ensure that any ‘excess costs’ payable are stated to be ‘reasonable and proper’. • Paragraph 20(3) – NH has sought to include the following provision: <i>“(3) The undertaker must not under the powers of this Order:</i> <ul style="list-style-type: none"> <i>(a) acquire or use land forming part of;</i> <i>(b) acquire new or existing rights over; or</i> <i>(c) seek to impose or extinguish any restrictive covenants over;</i> <i>any of the strategic road network or land owned by National Highways, or extinguish any existing rights or interfere with apparatus of National Highways in respect of any third party property, except with the consent of National Highways by written request to legalservicesinbox@nationalhighways.co.uk.”</i> <p>The Applicant’s position is that the provision is wholly inappropriate in the context of a DCO.</p> <p>The Applicant must insist that compulsory acquisition powers are included and can be relied on by the Applicant but, it is important to note that the powers relating to compulsory acquisition do not relate to the Strategic Road Network. The Applicant’s position in respect of NH plots subject to compulsory acquisition and temporary possession is set out in the Applicant’s Responses to the ExA’s Further Written Questions (ExQ2.3 series) (Document Reference 18.16).</p> <p>The Applicant’s intention is to carry out all relevant works in accordance with the NH protective provisions and NH’s approval but, if that is not possible during construction, the Applicant must have certainty that the development can be delivered.</p>

Protective provisions for the benefit of	Status of discussion between the parties
<p>Part 3: Protection of Leicestershire County Council as The local highway authority</p>	<p>The Applicant has been engaging with and has attempted to negotiate suitable protective provisions with Leicestershire County Council (LCC) during the Examination period.</p> <p>The ExA will recall that LCC requested the Applicant to consider changing its originally proposed protective provisions to LCC’s standard s278 provision one week before the Examination commenced. The Applicant confirmed it would do so and following further discussions, at the request of LCC, the Applicant has considered (i) the protective provisions included in The East Midlands Gateway Rail Freight Interchange and Highway Order 2016/17 and (ii) LCC’s standard form Section 278 Agreement. The provisions in the dDCO are now based on those included in the EMG DCO.</p> <p>The Applicant has conceded on a significant number of drafting points at LCC’s request, and in an attempt to agree protective provisions, but it has not been possible to finalise protective provisions with LCC during the Examination period.</p> <p>The majority of the protective provisions included in the dDCO have been agreed between LCC and the Applicant but, the following points remain outstanding:</p> <ul style="list-style-type: none"> • phasing of the highway works – LCC has agreed the principle of phasing but its position is that it does not agree to the drafting in Requirement 5 and on that basis LCC will not agree to phasing in the protective provisions. The Applicant does not accept that LCC’s discontent with the drafting of Requirement 5 (for which it has not, to the Applicant’s knowledge, provided any alternative drafting for the Applicant to consider) should affect the approach to the drafting of phasing in the protective provisions. The Applicant understands this is a point of principle based on LCC’s position that the proposed highway mitigation is not agreed and so the phasing of its delivery in requirement 5 cannot be agreed. <p>The design and phasing of the highway works is governed by Requirement 5 in the dDCO and it is the Applicant’s position that the drafting in the Requirement is clear and consistent. The relevant highway works are clearly set out and the trigger for delivery of the works is set out in column three ‘stage of development’.</p> <p>The highway works will need to be delivered in accordance with Requirement 5 but, for the purposes of the protective provisions and managing delivery and certification of highway works, it is the</p>

Protective provisions for the benefit of	Status of discussion between the parties
	<p>Applicant’s position that building the principle of phasing into the protective provisions is important to ensure delivery of the works in accordance with Requirement 5.</p> <p>‘Phase’ is defined as follows in the protective provisions:</p> <p><i>“phase” means those parts of the highway works to be carried out as separate packages of works in the areas identified as Works Nos. 7 to 17 (inclusive) on the highway plans or such other arrangement as must be agreed in writing by the highway authority in advance of commencement of that package of works;</i></p> <p>It is not unusual for ‘packages of works’ within a phase of development to be delivered and certified separately and is regularly the case within section 278 highway agreement, which LCC have insisted on being consistent with. It is important to note that the ‘phasing’ in this context only applies to the protective provisions.</p> <p>The Applicant’s position is that ‘phasing’ ensures that works can be delivered and certified separately to ensure that works can be managed and delivered in accordance with Requirement 5. The protective provisions in the dDCO therefore includes the Applicant’s preferred forms of drafting.</p> <ul style="list-style-type: none"> • defined term ‘works fees’ – the Applicant’s preferred drafting reads: <p>““works fees” means the actual costs of the carrying out of the highway works in relation to—</p> <ol style="list-style-type: none"> (a) considering and approving the detailed design information; (b) the work carried out by the development inspector including travel expenses to and from the highway works and all other expenses properly incurred by the development inspector in connection with his duties; (c) administration in relation to paragraphs (a) and (b) above; and (d) highway related structures fees. <p>The drafting in bold above has not been agreed by LCC.</p>

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	<p>It has not been possible to agree the form of drafting with LCC as LCC is insisting that the definition should read "<i>the sum equal to 10% of all the costs of the works</i>", rather than 'actual costs of the works.</p> <p>The Applicant has confirmed to LCC on a number of occasions that the total sum associated with the highway works will be in the tens of millions and that 10% of the sum will result in a sum payable far in excess of LCC's actual costs and would result in a significant, unreasonable and unjustified profit to LCC.</p> <p>The Applicant's position is that it is not reasonable to secure and LCC cannot justify 10% of the cost of the highway works as this is clearly excessive when the purpose of the fee is as listed in sub-paragraphs (a)-(d). It is reasonable and appropriate for LCC's <i>actual</i> costs in approving and inspecting the works to be paid pursuant to the protective provisions.</p> <p>In respect of sub-paragraph (d) above and reference to 'highway related structures fees', this is purely a drafting point. LCC has sought to include a separate paragraph dealing with payment of the related fee but, the Applicant's position is that the fee is stated to relate to "technical approval design checking and inspection" and the fee is considered to fall within 'works fees'. The Applicant's proposed drafting avoids the potential for 'double-counting'.</p> <ul style="list-style-type: none"> Paragraph 3(2) – there is a difference of opinion in respect of the appropriate drafting. The provision is set out below, with LCC's suggested drafting shown in red. <p><i>"(2) The undertaker must carry out and complete the highway works and shall not occupy any building to be constructed on the site until the highway works (including all works ancillary or incidental thereto) are completed in accordance with the stipulations requirements and conditions laid down in this Schedule."</i></p> <p>The Applicant's position is that, from a drafting perspective, LCC's suggested drafting is not necessary or appropriate as requirement 5 is the appropriate mechanism for securing delivery of the relevant highway works and the highway works will be delivered in line with the triggers in requirement 5.</p>

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	<p>The Applicant appreciates however that this is a drafting point but, preference is not to have two separate provisions (in the protective provisions and requirement 5) relating to delivery triggers and timeframes. The Applicant also considers that the inclusion of ancillary or incidental works is not sufficiently clear.</p> <ul style="list-style-type: none"> Paragraph 3(4) – there is a difference of opinion in respect of the appropriate drafting. The provision is set out below, with LCC’s suggested drafting shown in red. <p><i>"(4) The undertaker shall once having commenced the highway works proceed with them conscientiously and expeditiously and with all due diligence and shall complete the same not later than eighteen months from the date of commencement of the highway works (completion of the works shall be taken as the issuing of the provisional certificate)."</i></p> <p>The Applicant’s position is that, from a drafting perspective, LCC’s suggested drafting is not necessary or appropriate as requirement 5 is the appropriate mechanism for securing delivery of the relevant highway works and the highway works will be delivered in line with the triggers in requirement 5 and the key point is that the works must be delivered before any occupation.</p> <ul style="list-style-type: none"> Provision seeking to apply ‘Leicestershire County Council’s Standard Conditions Applying to Highway Works for New Developments’ to the protective provisions’. <p>LCC has sought to include a provision requiring the Applicant to comply with the conditions referred to above in respect of the highway works. The Applicant has reviewed the conditions and consider the conditions ‘cut-across’ the protective provisions and as such, it is not appropriate to refer to them here.</p> <ul style="list-style-type: none"> Paragraph 20(2) – there is a difference of opinion on what should be included. The provision is set out below, with LCC’s suggested drafting shown in red and the Applicant’s suggested drafting in bold. <p><i>"(2) The undertaker must provide the following for the development inspector—</i> <i>(a) workplace on the site of the highway works including welfare facilities;</i> <i>(b) wifi</i> <i>(c) safe route for transportation around the site highway works; and</i></p>

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	<p><i>(d) parking provisions"</i></p> <p>LCC have requested that the Applicant provides a LCC inspector with 'wifi' and 'safe transportation around the site', which LCC have confirmed should include 4x4 vehicle to access parts of the site during phases of constructions.</p> <p>The Applicant has confirmed that 'wifi' will not be provided and that contractors will utilise cellular networks for internet service.</p> <p>In respect of safe transportation, the Applicant's position is that it will provide a safe transportation route around the <i>highway works</i> but, the Applicant cannot be responsible for actually transporting inspectors around the 'site'. It is considered that the provision should relate to highway works only, not the site generally.</p> <ul style="list-style-type: none"> • Paragraph 22(2) (commuted sum) – the Applicant has suggested the following provision: <i>"(2) Upon completion of works relating to a public right of way within the Order limits as part of a phase of the authorised development delivered pursuant to requirement 3 (part 1 of Schedule 2) the undertaker must pay to the highway authority a commuted sum (if necessary) towards the maintenance of such public right of way (including the surfacing of the new footbridge at the Outwoods railway crossing) calculated as provided for in sub-paragraph (3)."</i> <p>The Applicant has included the provision to give certainty and confidence to LCC that commuted sums will be paid in respect of the surfacing of public rights of way in the Order limits, including the surfacing of the new footbridge at the Outwoods railway crossing.</p> <ul style="list-style-type: none"> • Paragraph 10 (notices) - deemed approvals in the event that LCC fails to respond to a request for approval within 42 days. The Applicant's position on deemed approval is set out above in relation to the NH protective provisions. It is critical to providing certainty in terms of delivery of the project. Any delays will have significant impacts on the delivery programme. The Applicant considers the drafting to allow LCC sufficient and reasonable time to respond and approve relevant details; • 'bridge' adoption and maintenance – the Applicant has included provisions securing the adoption and ongoing maintenance of the bridge to form part of the A47, over Network Rail infrastructure.

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	<p>The Applicant's position is that the bridge will form part of the A47, which is adopted highway, and it is therefore appropriate and correct for the bridge to become highway maintainable in the normal way.</p> <p>LCC has confirmed that it does not wish to adopt the bridge on the basis that LCC have no powers to take possession of a live railway for purposes of inspection, maintenance, and in an emergency situation. The Applicant has confirmed to LCC that it will be the case that a Tri-Partite Agreement will be entered into with Network Rail in respect of the bridge. That agreement will grant all the relevant rights etc.</p> <p>It is the Applicant's position that this suggested approach is well established and the Applicant is aware that LCC has recently and continues to adopt structures over the railway.</p> <p>The final dDCO will include the Applicant's preferred and proposed set of protective provisions.</p> <p><u>Works No. 16</u></p> <p>In addition to the above, the Applicant and LCC have discussed the 'Cross in Hand' highway works and the Applicant considered a proposal from LCC proposals in respect of Works No.16, which currently requires the Applicant to obtain the technical approval of three highway authorities in respect of the highway works.</p> <p>As LCC only has limited adopted highway within Works No.16, LCC has asked the Applicant to consider whether it is possible to 'rationalise' the highway boundary via the DCO or to include a mechanism in the DCO or protective provisions to secure that the Applicant only needs to seek the approval of one highway authority. The Applicant did propose to the highway authorities early in the Examination that this could be dealt with through agreements under the Highways Act 1980 between the authorities but that proposal was rejected at that time.</p> <p>Having considered the more recent request, the Applicant's view is that the 'rationalising the highway boundary' option is not possible under the DCO. However, it might still be possible to amend the Protective Provisions so that the Applicant would only require the approval of one highway authority, either Warwickshire County Council, Leicestershire County Council or National Highways, in respect of the relevant works, or at the very least, to remove LCC approvals from this set of works.</p>

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	The Applicant is considering the drafting amendments that would be required to achieve this and such amendments and approach would need to be agreed by the relevant highway authorities. The protective provisions may therefore be amended further ahead of Deadline 7.
Part 4: Protection of Warwickshire County Council as local highway authority	<p>It has been agreed between the Applicant, Leicestershire County Council and Warwickshire County Council (WCC) that protective provisions should be included for the benefit of Warwickshire County Council. This is of course subject to the position above in relation to the Cross In Hands works.</p> <p>The Applicant is engaged in ongoing discussions and negotiations with WCC in respect of suitable protective provisions. The protective provisions have been included in the DCO and are based on WCC's standard form Section 278 Agreement with amendments, the majority of which have been agreed between the Applicant and WCC. The only point outstanding relates to:</p> <ul style="list-style-type: none"> deemed approvals in the event that WCC fails to respond to a request for approval within 42 days. The Applicant's position on deemed approval is set out above in relation to the NH protective provisions. It is critical to providing certainty in terms of delivery of the project. Any delays will have significant impacts on the delivery programme. The Applicant considers the drafting to allow WCC sufficient and reasonable time to respond and approve relevant details.
Part 5: Cadent Gas Limited (as Gas Undertaker)	The Applicant is engaged in ongoing discussions and negotiations with Cadent in respect of suitable protective provisions. There are only minor drafting points outstanding relating to the indemnity. The Applicant envisages that the protective provisions will be settled shortly and the agreed form protective provisions will be included in the DCO to be submitted at Deadline 7.
Part 6: Severn Trent Limited Water Limited	The Applicant has agreed protective provisions with Severn Trent.
Part 7: General provisions for the protection of Electricity Undertakers	The Applicant has included standard protective provisions in the dDCO, which have been included in many made DCOs. The Applicant has not received any correspondence from electricity undertakers (noting that National Grid Electricity Transmission Plc and National Grid Electricity Distribution (East Midlands) Plc have the benefit of separate protective provisions) that they have any concerns with this drafting.

Protective provisions for the benefit of	Status of discussion between the parties
Part 8: General provisions for the protection of operators of the Electronic Communications Code Networks	<p>The Applicant confirmed these are standard provisions included in most DCO and is aware that they have been accepted by BT Openreach on other schemes. The Applicant has sought to make contact with BT Openreach to confirm that the protective provisions are acceptable but has not received any engagement. Accordingly, the Applicant has concluded that BT Openreach is content with the drafting.</p>
Part 9: National Grid Electricity Distribution (East Midlands) Plc (as electricity provider)	<p>The Applicant is engaged in ongoing discussions and negotiations with National Grid Electricity Distribution in respect of suitable protective provisions and anticipates being in a position to include final and agreed protective provisions in the DCO at Deadline 7.</p> <p>The only points outstanding in the protective provisions relate to the requirement for an expert when making an expert determination to take into account NGED’s standard form rights for the type of alternative apparatus to be constructed in the circumstances similar to the Authorised Development. The Applicant does not object to this in principle but is in the processes of considering the standard form rights.</p>
Part 10: National Grid Electricity Transmission Plc (as Electricity Undertaker)	<p>The Applicant is engaged in ongoing discussions and negotiations with National Grid Electricity Transmission in respect of suitable protective provisions. The only points outstanding relate to:</p> <ul style="list-style-type: none"> • deemed approvals in the event that NGET fails to respond to a request for approval within 56 days. The Applicant has proposed an alternative for consideration by NGET however, requires a mechanism to avoid undue delays. The Applicant’s position on deemed approval is set out above in relation to the NH protective provisions. • the dispute resolution mechanism which is currently being discussed with NGET. <p>The Applicant is hopeful of agreeing protective provisions with NGET to be included in the final form DCO to be submitted at Deadline 7.</p>