

Summary Submission at Deadline 7 by Network Rail Infrastructure Limited in relation to The Cambridge Waste Water Treatment Plant Relocation Project 202[*] (DCO)

Planning Inspectorate Reference Number: WW010003

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Introduction

Further to Network Rail Infrastructure Limited's (**Network Rail/NR**) Written Representations (submitted on 21 November 2023) which confirmed that Network Rail requires its standard protective provisions to be included in the draft DCO, the parties have agreed a substantial proportion of the form of Protective Provisions for the Protection of Railway Interests (**Protective Provisions**) and the parties are hopeful that the few outstanding matters will be able to be agreed within the next one or two weeks.

The key outstanding matter relates to the longstanding principle that any exercise of compulsory acquisition powers pursuant to the DCO in respect of railway property must be subject to NR's prior consent and a restriction to this effect must be included in the Protective Provisions. Network Rail's position is that an absence of such protection in the Protective Provisions will have a detrimental effect on Network Rail's ability to carry out its statutory undertaking, comply with its Network Licence and safely operate the railway network.

At this stage, NR and the Applicant (together the **Parties**) have been unable to agree the inclusion of the necessary provision in the Protective Provisions for this purpose and so NR must maintain its objection to the making of the DCO.

As detailed below, Network Rail has not issued technical or business clearance for proposed Works and has therefore not established that the proposed development and the proposed use of compulsory acquisition powers on railway is acceptable in the context of ensuring a safe and efficient railway.

We set out the reasons for Network Rail's position and a request for the inclusion of the necessary provision in the Protective Provisions in this submission.

Protective Provisions

The Application includes provisions which would, if granted, authorise the Applicant to carry out works on and in close proximity to operational railway land belonging to Network Rail, to use such land temporarily and to acquire permanent rights over such land. Network Rail must accordingly ensure that the Application is granted subject to protective provisions which provide appropriate protection for the safe and efficient operation of the railway.

The Parties have agreed the substantial proportion of the Protective Provisions which are to be included in the DCO (if made). However, the Parties have not been able to agree the compulsory acquisition powers within the Protective Provisions (concerning the restriction on the use of compulsory powers without NR's prior consent (not to be unreasonably withheld)). The Applicant seeks the deletion of the

parts of NR's required form of provision (as set out below), whereas NR requires the retention of these provisions:

(1) *The undertaker must not exercise the powers conferred by—*

- (a) article 3 (*Development consent etc. granted by the Order*);
- (b) article 5 (*Maintenance of authorised development*);
- (c) article 19 (*Discharge of water*);
- (d) article 21 (*Authority to survey and investigate the land*);
- (e) article 26 (*Compulsory acquisition of land*);
- (f) article 28 (*Compulsory acquisition of rights and imposition of restrictive covenants*);
- (g) article 31 (*Private rights*);
- (h) article 29 (*Acquisition of subsoil only*);
- (i) article 32 (*Power to override easements and other rights*);
- (j) article 35 (*Temporary use of land for carrying out the authorised development*);
- (k) article 36 (*Temporary use of land for maintaining the authorised development*);
- (l) article 41 (*Statutory undertakers*);
- (m) article 8 (*Transfer of benefit of the Order*);
- (n) article 23 (*Felling or lopping of trees and removal of hedgerows*);
- (o) article 24 (*Trees subject to tree preservation orders*);
- (p) the powers conferred by section 11(3) (power of entry) of the 1965 Act;
- (q) the powers conferred by section 203 (power to override easements and rights) of the Housing and Planning Act 2016;
- (r) the powers conferred by section 172 (right to enter and survey land) of the Housing and Planning Act 2016;
- (s) any powers under in respect of the temporary possession of land under the Neighbourhood Planning Act 2017;

in respect of any railway property unless the exercise of such powers is with the consent of Network Rail.

(2) The undertaker must not in the exercise of the powers conferred by this Order prevent pedestrian or vehicular access to any railway property, unless preventing such access is with the consent of Network Rail.

(3) The undertaker must not exercise the powers conferred by sections 271 or 272 of the 1990 Act, article 41 (*Statutory undertakers*), article 32 (*power to override easements and other rights*) or article 31 (*Private rights*) in relation to any right of access of Network Rail to railway property, but such right of access may be diverted with the consent of Network Rail.

(4) The undertaker must not under the powers of this Order acquire or use or acquire new rights over, or seek to impose any restrictive covenants over, any railway property, or extinguish any existing rights of Network Rail in respect of any third party property, except with the consent of Network Rail.

(5) The undertaker must not under the powers of this Order do anything which would result in railway property being incapable of being used or maintained or which would affect the safe running of trains on the railway.

(6) Where Network Rail is asked to give its consent pursuant to this paragraph, such consent must not be unreasonably withheld but may be given subject to reasonable conditions but it shall never be unreasonable to withhold consent for reasons of operational or railway safety (such matters to be in Network Rail's absolute discretion).

(7) The undertaker must enter into an asset protection agreement prior to the carrying out of any specified work.

Although the Applicant's proposed draft DCO does include some protection for the railway, it is not sufficient. A failure to include the above provisions would not only be at the detriment of Network Rail, but to safe and efficient running of the railway for members of the public. As later discussed, a failure of NR to have the control over what rights are exercised over the railway could lead to catastrophic consequences.

The Applicant proposes to compulsorily acquire permanent rights over and temporarily use operational railway land in delivering the DCO scheme (plots 008a, 008b, 008c, 008d, 008e, 008f, 008g, 074a, 074b and 074c) (together, the **Plots**). If NR has no ability to require its prior consent to such acquisition of rights over and temporary use of this land, it would give rise to a significant, unacceptable risk that the Applicant could compulsorily acquire a right over or temporarily use (as applicable to the respective Plots) railway land which would not be subject to the conditions, limitations and restrictions necessarily required by NR to facilitate and ensure the safe and efficient operation of the railway. The adverse implications of which are that NR may be compromised in its capacity as a statutory undertaker to (a) comply with its Network Licence and (b) (as a consequence of (a)) ensure the safe and efficient running of trains on the railway. This is particularly critical in circumstances such as this where NR has not issued the Applicant with technical or business clearance for works proposed on railway land. Accordingly, NR must have the ability to require that its prior consent is obtained before the Applicant exercises powers of compulsory acquisition on railway land.

Network Licence

NR operates under a Network Licence granted by the Office of Rail and Road (ORR). Under the Network Licence, NR is obliged to ensure compliance with a wide number of standards imposed by the Rail Safety and Standards Board that pertain to maintaining the safe and efficient running of trains on the railway. In order to regulate its ability to comply with such standards, NR must retain stringent restrictions, controls and procedures over any interferences with the railway by third parties, including by reason of persons exercising rights on or over railway land. NR imposes such restrictions through a requirement to obtain its prior consent before rights are compulsorily acquired or railway land is temporarily used and by requiring third parties to enter into an asset protection agreement.

Accordingly, where a right is compulsorily acquired and may be exercised over railway land which is not subject to NR's prior consent, such a right is created outside of NR's control and would not be subject

to the necessary restrictions and conditions that NR would regard as sufficient so as to enable it to comply with its Network Licence. For example, NR may require that rights granted to the Applicant are subject to reservations allowing NR to interrupt the exercise of such right in certain circumstances (such as enabling NR to deal with emergencies on the railway or carry out necessary works or the exercise of use right or temporary possession may not be safe to be exercised at a specified period of time due to railway operations). Where NR's prior consent is not required before exercising these powers over railway land, there is a risk that any such rights would not be subject to the required restrictions and as a result NR's control over its ability to appropriately manage the safety of the railway would be compromised. The consequences of NR not being able to effectively manage the safety of the railway could be catastrophic. Moreover, this could lead to a failure by NR to comply with its Network Licence which is not position which can be accepted by NR, nor would it be acceptable to the ORR as NR's regulator.

Network Rail is of course willing to engage with the Applicant to agree the terms of the rights sought and is under a duty to act reasonably in doing so. However, in order for NR to comply with their statutory duties, they can not relinquish this degree of control over rights being exercised on the railway where the consequences of doing so could be significantly and catastrophically adverse. As discussed in the Introduction section of this submission, the Applicant has unfortunately not been actively engaged in discussions with Network Rail to reasonably come an agreement as to the granting of the necessary rights through private agreement and discussions in respect of the same are yet to commence.

It is also pertinent to mention that Network Rail have not granted technical or business clearance in respect of the Works that are proposed under this DCO. This means that at present Network Rail engineers have not approved that the Works can in principle be carried out without causing serious implications for the safety of the railway.

The restrictions that Network Rail are seeking on the exercise of compulsory powers over railway land is a widely accepted and longstanding principle which has been accepted by the Examining Authority and Secretary of State on numerous DCOs including but not limited to: the A47/A11 Thickthorn Junction DCO, Thurrock Flexible Generation Plant DCO, Yorkshire and Humber CCS Cross Country Pipeline DCO, Sunnica Energy Farm DCO, Longfield Solar Farm DCO and South Humber Bank Energy Centre DCO. The purpose of this restriction is not to impede the implementation of the Applicant's scheme, but to secure the necessary protection to NR as a statutory undertaker in order that it can properly regulate the rights to be exercised over its railway network and which is appropriate function and purpose of protective provisions.

As discussed above, it is accepted that there is some protection for the railway in the currently proposed Protective Provisions, as the Applicant must seek NR's prior approval before exercising any rights under article 20 and 21. However, whilst these requirements secure some comfort for NR in the context of providing some protection for the railway during the carrying out of any works, this protection is limited and is not sufficient to address the issue of the need for the applicant to enter into an asset protection agreement nor does it allow NR to properly regulate the exercising of any rights by the Applicant.

For the reasons set out above, NR must maintain its objection to the application for the DCO and must insist on the inclusion of the form of protective provisions as set out in this submission.

S.127 and S.138 of the Planning Act 2008

In addition to the points set out above, without the inclusion of the restrictions on compulsory acquisition that is contained in Network Rail's standard protective provisions, NR must also maintain its objection to the DCO on the basis that the proposed compulsory acquisition of rights over railway property does not satisfy the test in section 127 Planning Act 2008 in that:

- (a) the right cannot be acquired without serious detriment to the carrying on of the undertaking; and
- (b) such detriment cannot be made good by Network Rail by use of other railway property.

The reason for which is that:

- 1) all of the Plots (over which rights are proposed to be compulsorily acquired and temporary possession is proposed to be taken) comprise of, or is in close proximity of operational railway line;
- 2) unless NR has the ability to require its prior consent and require the Applicant to enter into an asset protection agreement prior to the acquisition of such rights/temporary possession in order to ensure any such rights can be carried out in harmony with the operational railway the proposed rights/temporary use have the capacity to cause serious detriment to the carrying on of NR's undertaking as it could interfere with the operational railway line, in particular potentially compromising the safe running of trains and the safety of users of the railway. It is inconceivable that a third party should have compulsory powers to acquire the rights to use railway land without first seeking NR's consent and without NR's technical and business clearance; and
- 3) as this is an operational railway line such detriment cannot be made good as the line cannot be relocated to other land in the possession of NR (and not least to say requiring NR to relocate its operational railway to facilitate such rights would be entirely disproportionate both in cost and nature).

Accordingly, in order for such proposed compulsory acquisition and temporary possession of the Plot to pass the test in section 127 Planning Act 2008, provision 116 of Network Rail's standard protective provisions (set out above) requiring NR's prior consent to be sought must be imposed before powers authorising the compulsory acquisition of such rights are exercised. Network Rail's position is that in the absence of such a Protective Provision, the test in section 127 is not satisfied.

In addition, to the extent that the proposed compulsory acquisition of rights and temporary possession over the Plots does involve the extinguishment of any rights or the removal of any apparatus belonging to NR, NR submits that the test in section 138 is not satisfied on the same grounds as set out above.