

IN PARLIAMENT

HOUSE OF COMMONS

SESSION 2005–06

CROSSRAIL BILL

PETITION

Against the Bill – on Merits – Praying to be heard by Counsel, &c.

**TO THE HONOURABLE THE COMMONS OF THE UNITED
KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND
IN PARLIAMENT ASSEMBLED**

THE HUMBLE PETITION

of

THE UK COMPETITIVE TELECOMMUNICATIONS ASSOCIATION LIMITED (“UKCTA”)

SHEWETH as follows: -

- 1 A Bill (hereinafter referred to as “the Bill”) has been introduced and is now pending in your honourable House intituled “A bill to make provision for a railway transport system running from Maidenhead, in the County of Berkshire, and Heathrow Airport, in the London Borough of Hillingdon, through central London to Shenfield, in the County of Essex, and Abbey Wood, in the London Borough of Greenwich; and for connected purposes”.
- 2 The Bill is promoted by Mr Secretary Darling in his capacity as Secretary of State for Transport (the “Promoter”) supported by the Prime Minister, Mr Chancellor of the Exchequer, Secretary Margaret Beckett, Mr Secretary Hain, Secretary Alan Johnson, Secretary Tessa Jowell and Derek Twigg.

Relevant Clauses of the Bill

- 3 Clause 1 of the Bill (Construction and maintenance of scheduled works) authorises the nominated undertaker (a term defined in the Bill) to construct and maintain the works necessary for Crossrail as described in Schedule 1 to the Bill and shown on the plans and sections deposited with the Bill. Clause 2 and Schedule 2 to the Bill make further and supplementary provisions in respect of works authorised by the Bill.
- 4 By clause 3 of the Bill (Highways) the Promoter seeks power under paragraphs 1 to 3 inclusive of Schedule 3 to stop up permanently certain specified highways.
- 5 By clause 3 of the Bill (Highways) the Promoter seeks power under paragraph 4 of Schedule 3 to carry out associated works in a way that permanently obstructs the highway, such associated works under Schedule 2 including general power to carry out ancillary works additional to the scheduled works, the provision of highway accesses, the diversion of particular overhead lines and the undertaking and maintaining of landscape or other mitigation works necessary as a result of the Crossrail works.

- 6 By clause 3 of the Bill (Highways) the Promoter seeks power under paragraph 5 of Schedule 3 temporarily to stop up, alter or divert any highway or to break up and interfere with the highway for the purpose of executing the works necessary for Crossrail.
- 7 By clause 6 (Acquisition of land within limits shown on the deposited plans), clause 7 (Acquisition of land not subject to the power under section 6(1)) and clause 8 (Extinguishment of private rights of way) the Promoter seeks power to enter upon, take and use land for the purposes of the proposed works or for any purpose connected with or ancillary to the construction and operation of Crossrail.
- 8 Clauses 10, 11, 12 and 13 of the Bill (Planning) make provision for the deeming of planning permission in respect of development to be authorised by the Bill and for related matters.
- 9 By clause 46 of the Bill (Holder of functions of nominated undertaker) the Promoter seeks power by order to designate the holder of functions of the nominated undertaker.
- 10 Clause 50 of the Bill (Compensation for injurious affection) would require the Promoter to pay compensation to owners, lessees and occupiers of property for any injurious affection.
- 11 Clause 52 of the Bill provides that Schedule 14 has effect for protecting the interests of he bodies and persons specified in that Schedule (being bodies and persons who may be affected by other provisions of the Bill). Your Petitioners fall within the category of bodies and persons intended to be protected by Schedule 14 to the Bill and so are specially and directly affected by the provisions of the Bill.
- 12 By clause 53 of the Bill (Power to devolve functions of Secretary of State) the Promoter seeks power by order to provide that a reference in a qualifying provision of the Act to the Secretary of State will have effect as a reference to the Greater London Authority, to Transport for London or to the Greater London Authority and Transport for London. The Promoter also seeks powers to fetter the exercise of his discretion by agreement with the Mayor of London.
- 13 Clause 56 of the Bill (Arbitration) makes provision for the referral of differences to arbitration.

Your Petitioners

- 14 Your Petitioners are an association of companies engaged in the provision and operation of electronic communications networks and electronic communications services. The members of UKCTA include AOL, Abovenet, ntl, AT&T, Opal Telecom, Centrica, Opera Telecom, Cauldwell Communications, Redstone, Cable & Wireless, Telefonica, Colt Telecom Group, THUS, Easynet, Tiscali, Energis, Your Communications, Fibernet Group, Viatel, Gamma Telecoms, Wanadoo, Global Crossing, Kingston Communications and MCI. Your Petitioners are routinely involved in the carrying out of street works and have electronic communications apparatus in locations that will be specially and directly affected by the works to be authorised by the Bill. In particular, Your Petitioners will be affected by the acquisition of land and rights, the permanent or temporary stopping up of highways, by the carrying out of the works authorised by the Bill and by powers conferred upon the nominated undertaker to require the removal and relocation of apparatus and equipment in order to facilitate the construction and operation of Crossrail.
- 15 Your Petitioners support the principle of improved transport links across London in view of the strategic benefits to be gained and the opportunities it will afford for the regeneration and improvement of substantial areas of London. That in principle support is dependent, however, upon satisfactory resolution of the issues set out hereinafter.

- 16 Your Petitioners are concerned at the current uncertainties regarding the funding (both immediate and long term) of the Crossrail project and consider that the Bill may have been introduced prematurely. Your Petitioners are further concerned that if the Bill is passed into law without issues relating to the funding and construction timetable being resolved then difficulties with business planning may result. This could adversely affect the availability of suitable rights for new or replacement apparatus required to meet the service obligations (whether statutory or contractual) and regulatory duties of Your Petitioners.
- 17 Your Petitioners are concerned that the Bill makes no reference to development for the London Olympics in 2012 or to other major infrastructure projects in the vicinity of the Crossrail route that may be promoted or pursued during the planning and/or construction phase of the Crossrail project. Your Petitioners consider that any other major infrastructure projects must be co-ordinated with the Crossrail scheme so far as practicable in order to minimise both disruption to Your Petitioners service and the possibility of Your Petitioners not having sufficient appropriately qualified personnel available to deal with the necessary works. Your Petitioners submit that a new clause be added to the Bill requiring the nominated undertaker adopt an Electronic Communications Forward Plan setting out a rolling timetable for its proposed works affecting electronic communications apparatus; to take account of other such projects and the timescale within which Your Petitioners would be able to carry out necessary works; and to consult with your Petitioner and others affected in order to co-ordinate appropriate phases of such projects and minimise disruption to services.
- 18 Your Petitioners consider if passed into law as they now stand clauses and provisions of the Bill will prejudicially affect your Petitioners, their rights, interests, property and ability to provide services and that inadequate provision is made to protect your Petitioners and their customers, the general public.
- 19 Your Petitioners seek to ensure that the following principles are applied to its members' interests as affected by the Bill:
- (i) avoidance – that effects are avoided wherever possible;
 - (ii) notice – that adequate notice is given before Your Petitioner's apparatus is affected or it is required to take steps;
 - (iii) compensation – that full compensation is made for any costs incurred or loss suffered as a result of the Crossrail scheme.

Your Petitioners' concerns

- 20 Your Petitioners are concerned at the provisions contained in clause 56 for the referral of differences to arbitration. By clause 56(5) the Promoter seeks power (jointly with the other Secretaries of State referred to in that clause) to make provision by statutory instrument to specify procedures in relation to arbitration under this Bill. Your Petitioners respectfully request assurance that any rules made in exercise of this power would ensure the impartiality of the arbitrator and would provide a procedure in line with the Arbitration Act 1996.
- 21 Your Petitioners are also concerned at the provisions contained in Schedule 14 Part 4 (Protection of electronic communications code networks) regarding the resolution of disputes between the nominated undertaker and electronic communications code operators. The Bill provides for the Promoter to appoint a person to act as arbitrator, and for that person to have regard to such matters as may be specified by the Promoter in making the appointment. Your Petitioners consider that the appointment of an arbitrator should be a matter for agreement between the parties or (if agreement cannot be reached) for appointment by an independent person such as the President of the Law

Society or the President of the Royal Institution of Chartered Surveyors. A person appointed by the Promoter may not be regarded as independent of the Promoter. Your Petitioners therefore request that the Bill be amended so that the Promoter has no part in any dispute resolution process relating to Crossrail.

- 22 If the amendment requested in paragraph 21 above is not made then Your Petitioners seek details of the criteria that would be employed by the Promoter in selecting and appointing an appropriate and impartial person to act as arbitrator. Your Petitioners also request an indication of the nature of the matters to which that person would be required by the Promoter to have regard. Your Petitioners also seek assurances that those criteria would be similarly applied by any person to whom powers of the Promoter might be devolved or by any person who is party to an agreement fettering the powers of the Promoter.
- 23 Your Petitioners seek clarification as to the application of clause 8 to the Bill (extinguishment of private rights of way). Specifically, would rights falling within the electronic communications code (such as wayleaves conferred by an agreement made under paragraph 2 of that code) be treated as private rights for the purposes of this clause?
- 24 Your Petitioners note that the protective provisions at Schedule 14 Part 4 paragraphs 3 and 4 of the Bill seek to protect operators' rights of access to apparatus in streets. Your Petitioners submit that these provisions should be amended and strengthened to provide a positive obligation on the part of the Promoter and the nominated undertaker to ensure that operators have access to their apparatus at all times.
- 25 Your Petitioners are concerned that the protective provisions contained in Schedule 14 Part 4 to the Bill disapply paragraph 23 of the electronic communications code in the circumstances set out at sub-paragraph 2(2) of that Part and thereafter contemplate only the relocation of apparatus in direct consequence of the nominated undertaker's exercise of powers relating to highways. Your Petitioners respectfully point out that the works to be authorised by the Bill may in addition affect electronic communications code networks and electronic communications services served by apparatus located within or on buildings or on other sites and land affected by Crossrail (whether within or outside the limits of deviation). Your Petitioners seek assurances that the protections to be afforded by Schedule 14 would extend to such apparatus and that full compensation (including the costs of securing rights required for any relocation of apparatus) would be made in any case where alteration or relocation of apparatus is required for the purposes of Crossrail. If no such assurances can be given then Your Petitioners request that the Bill should be amended to provide adequate protection in all relevant circumstances.
- 26 Your Petitioners are concerned that the provisions relating to the payment of costs incurred in respect of the relocation of apparatus required to facilitate the Crossrail project do not provide sufficient protection. The costs that can be recovered are limited to those directly relating to the relocation of apparatus. It is not clear that the costs of securing rights to suitable alternative sites and land would be recoverable pursuant to Schedule 14. Nor is it clear that any costs incurred under the Traffic Management Act 2004 (for example, permit costs) once that Act is in force would be recoverable. Your Petitioners respectfully seek assurances that such costs would be fully recoverable. If no such assurances can be given on the current provisions of the Bill then Your Petitioners ask that the Bill be amended to provide for such recovery from the Promoter and/or from the nominated undertaker.
- 27 Your Petitioners respectfully request that where a highway is stopped up under paragraph 1 or 2 of Schedule 3 or is otherwise permanently stopped up for the purposes of Crossrail then the operator of an electronic communications code network will continue to enjoy rights under paragraph 9 of the electronic communications code as though that land were still highway maintainable at public expense. This would require an amendment to

Schedule 14 Part 4 sub-paragraph 4(1). Your Petitioners acknowledge that this would be subject always to the right of the nominated undertaker to require removal of that apparatus under Part 4 of Schedule 14 to the Bill or to require alteration in accordance with paragraph 23 of the electronic communications code.

- 28 Your Petitioners observe that the wording of Schedule 14 Part 4 sub-paragraph 4(4)(b) differs from that used in Schedule 14 Part 2 sub-paragraph 11(1)(c). Sub-paragraph 11(1)(c), which relates to electricity, gas, water and sewerage undertakers, provides for the recovery of reasonable expenses incurred in connection with “any other work or thing rendered reasonably necessary in consequence of the exercise by the nominated undertaker” of its powers. By contrast Part 4 sub-paragraph 4(4)(b) refers only to the cost reasonably incurred by the operator in connection with “the doing of any other work or thing rendered necessary by the execution of relocation works”. Your Petitioners respectfully ask for clarification of the costs that may be recovered under the narrower formulation of Schedule 14 Part 4. If the different language employed in these Parts of Schedule 14 is intended to produce a different treatment or level of protection Your Petitioners would respectfully ask for details of the rationale underpinning any such difference. If there is no such intention, or should any rationale offered prove unacceptable to Your Petitioners, then Your Petitioners would respectfully request that the Bill be amended to align the wording used in Part 4 of Schedule 14 with that used in Part 2 of Schedule 14 so that protection equivalent to that currently provided by Part 2 is provided in each case.
- 29 Your Petitioners further observe that Schedule 14 sub-paragraph 4(8) disapplies the provisions relating to the recovery of costs in circumstances where the authorised works constitute major highway works for the purposes of Part 3 of the New Roads and Street Works Act 1991. In those cases the allowable costs of relocation works will be determined in accordance with section 85 of that Act so that in practice recovery would be less than 100% of the costs incurred by an affected operator. Your Petitioners respectfully submit that cost sharing is inappropriate for a project of this scale and that the planning principle of developers paying for the external costs of their development and the environmental principle of the polluter pays, should apply. Accordingly, Your Petitioners submit that an amendment be made to the Bill to require the appropriate compensation to be paid in full.
- 30 Your Petitioners are concerned that where a requirement arises for apparatus to be relocated then the Bill if passed into law as it now stands may create a deadlock which could be resolved only by your petitioners successfully using powers conferred upon them by the electronic communications code. This would arise (for example) in circumstances where continuity of networks and services provided by your Petitioners could be ensured only by relocating apparatus from the highway onto, over or under private land. In those circumstances it would be for Your Petitioners’ members to negotiate agreements or to use statutory procedures to secure the necessary rights. Should private landowners view negotiations as a “ransom” opportunity to exact excessive payment then your Petitioners may reluctantly be compelled to use statutory procedures (for example, seeking an order of the Court under paragraph 5 of the electronic communications code). In those cases your Petitioners’ experiences indicate that the cost in both financial terms and in delay can be significant.
- 31 Your Petitioners have received legal advice that, in view of the factors to be taken into account by the Court, paragraph 5 of the electronic communications code would not be certain to produce an order in favour of the operator so as to secure rights over alternative sites or land. Further, any order that is made might require payment of sums by way of compensation and/or consideration that could properly be regarded as uneconomic by the operator. While the Crossrail project might suffer delay your Petitioners humbly point out that the financial costs and risk would currently appear to fall to be borne by their members alone. Your Petitioners therefore request that the Bill is amended to include an express confirmation that Your Petitioners would not be required to use electronic

communications code powers. Your Petitioners observe that a similar confirmation was given in respect of utilities companies at paragraph 6(5) of Schedule 15 Part II to the Channel Tunnel Rail Link Act 1996. That provision expressly stated that the undertakers' obligation to use "best endeavours" does not extend to the exercise by the undertakers of any power to acquire by way of compulsory purchase order any land or rights in land.

- 32 Your Petitioners respectfully request that the Bill should be amended to oblige the Promoter and the nominated undertaker to assist with the acquisition of any land or rights necessary for the relocation of electronic communications apparatus (whether within or outside the limits of deviation). The Promoter and/or the nominated undertaker should also be required, in line with the principle for full compensation, to bear or to indemnify your Petitioners against the costs reasonably so incurred.
- 33 Your Petitioners respectfully request that the Bill be amended to provide that should any requirement of the Promoter or nominated undertaker made in exercise of the powers to be conferred by the Bill result in apparatus being left in place so as to be regarded (for the purposes of the electronic communications code) as abandoned apparatus, then that apparatus will fall outside the relevant provisions of that code so that no liability would attach to the operator in respect of it.
- 34 Your Petitioners have concerns regarding the potential impact of noise, dust and vibration on their equipment and apparatus, both during construction and once Crossrail is operational. Much of the equipment employed by Your Petitioners is sensitive to dust and vibration. Your petitioners are concerned that the Bill as it stands provides no adequate protection for interruption to services caused by dust and vibration once construction has been completed. Your Petitioners respectfully request that the Bill is amended to address this issue and to ensure full compensation in respect of any adverse impact on Your Petitioners' operation of electronic communications networks and/or provision of electronic communications services.

Conclusion

- 35 Your Petitioners submit that, in the respects mentioned and in other respects, the Bill fails adequately to safeguard and protect the interests of your Petitioners and those who rely upon your Petitioners for the provision of essential utilities and services.

YOUR PETITIONERS therefore humbly pray your Honourable House that the Bill may not be allowed to pass into law as it now stands and that they may be heard by their Counsel, Agents and witnesses in support of the allegations of this Petition against so much of the Bill as affects the property, rights and interests of your Petitioners and in support of such other clauses and provisions as may be necessary or expedient for their protection, or that such other relief may be given to your Petitioner in the premises as your Honourable House shall deem meet.

AND YOUR PETITIONERS WILL EVER PRAY, &C.

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