

**CEC / Scottish Water ("SW") Interface
Meeting of Legal Teams**

In attendance:

Brandon Nolan, Pinsent Masons on behalf of CEC.
David Cunningham, Pinsent Masons on behalf of CEC
Dr Jan Connerton, Scottish Water
Keith Campbell, Dundas & Wilson on behalf of Scottish Water

1 Purpose of Meeting

1.1 This meeting was convened at the request of CEC and SW's respective commercial teams involved in the final settlement discussions between the parties.

1.2 The attendees agreed that the purpose of the meeting was:

- (i) to distil the key issues which divide the parties;
- (ii) to exchange further information and views;
- (iii) to ascertain, where appropriate, what further information is required from each party; and
- (iv) to provide a basis upon which each legal team may provide an update to their respective clients.

1.3 As it is SW which has advanced the concepts of Cost Neutrality and limited liability, the meeting primarily focussed on gaining greater clarity on these issues.

1.4 Reference is made to the Schedule attached to this note which sets out the difference in parties' respective positions.

2 Cost Neutrality

2.1 The issue of Cost Neutrality was discussed, and in particular, what SW meant by Cost Neutrality.

2.2 Parties raised their respective concerns in respect of this issue, before a broad agreement was reached as to what SW's position was in respect of Cost Neutrality.

3 SW Position on Cost Neutrality

3.1 Following detailed discussions, it was noted that SW's position on Cost Neutrality was broadly as follows:

- (i) SW has to date advanced a broad catch all concept of Cost Neutrality, which is a position it still seeks to advance.
- (ii) SW's primary concern is in respect of its apparatus which remains within the Zone ("the Zone") which is now more difficult and more expensive to gain access to by virtue of the ETN. In addition SW has complaints concerning work which is incomplete, "unauthorised" work scope changes and work which has not been finished to industry standards;
- (iii) SW is preparing a Schedule of the specific apparatus and issues to which it refers;

- (iv) SW assert that incremental agreements had been reached with tie/CEC in respect of such apparatus;
- (v) such incremental agreements may be evidenced by correspondence, e-mails or meeting minutes;
- (vi) these incremental agreements were to the effect that SW would remain cost neutral in respect of the affected apparatus.

4 SW Concerns in Respect of Cost Neutrality

- 4.1 The initial agreement between tie and SW was that all apparatus would be moved outwith the Zone.
- 4.2 SW is concerned that it is not afforded sufficient protection in respect of apparatus which remains within the Zone where:
 - (i) work in relation to the apparatus is not complete;
 - (ii) the work scope in relation to the apparatus has been altered;
 - (iii) the work in relation to the apparatus has not been finished in accordance with industry standards.
- 4.3 In respect of these situations, SW considers that it has made significant movement to accommodate CEC and facilitate the tram works, and accordingly, does not consider that it should be exposed to further liability in respect of these situations.
- 4.4 Furthermore, SW is of the view that arrangements were made to deal with those works which had not been completed to SW's satisfaction.
- 4.5 These items were known as "derogations".
- 4.6 A schedule was prepared detailing these derogations and the agreement which parties attempted to reach was at an advanced stage.
- 4.7 Under the New Roads and Street Works Act 1991 ("NRSWA 1991") and the Tripartite Agreement, parties are required to agree "necessary measures" in respect of the removal of apparatus.
- 4.8 CEC have failed to properly implement the "necessary measures".
- 4.9 Under section 143 of NRSWA 1991 there is an obligation for an undertaker to pay compensation.
- 4.10 Where all necessary measures have not been delivered, SW should be entitled to rely on section 143 of NRSWA 1991 to be compensated.
- 4.11 All necessary measures have not been delivered. In these situations, SW should not be left at a disadvantage.
- 4.12 SW is concerned about exposure to significant cost liability in a situation where it requires access to its apparatus and it has to deal with another tram operator which has taken over the operation of the ETN.
- 4.13 The draft Derogations Agreement which was prepared identified the particular apparatus in question. "Derogations" was a defined term.

- 4.14 SW needs to see more willingness from CEC to address the critical issues.
- 4.15 SW wishes CEC's view in respect of instances where work in relation to apparatus was not carried out properly, as agreed, or in accordance with industry standards.
- 4.16 SW should not be exposed to liability where apparatus has not been laid or moved in accordance with industry standards.
- 4.17 There is no legal definition of Cost Neutrality. This is a principle which has been on the table for some time.
- 4.18 SW has incurred substantial costs in respect of the non removal of SW apparatus, where CEC has enjoyed the saving. CEC should indemnify SW for future costs. Otherwise, CEC win every time.
- 4.19 Where apparatus remains in the Zone, SW should be kept cost neutral.
- 4.20 SW co-operated throughout the duration of the works.
- 4.21 SW is preparing a dossier of the apparatus which is affected.
- 4.22 SW will not propose or accept a situation which prevents it from carrying out its statutory duties.
- 4.23 SW wishes to avoid placing itself in a situation of strict liability, which could arise as a result of the assistance it has given to CEC with the ETN.

5 CEC Concerns in respect of SW Position on Cost Neutrality

- 5.1 It was noted that it would be necessary to ascertain:
 - (i) exactly what SW's position was; and
 - (ii) what is yielded by contract and legislation.
- 5.2 There is a concern that SW seeks to be kept Cost Neutral forever more in respect of all SW apparatus related to the tram works.
- 5.3 There was no formal agreement which support the position that all SW apparatus was to be moved outwith the Zone.
- 5.4 In addition to this, there was no agreement which stated that SW should be kept cost neutral.
- 5.5 In particular, the TEL Agreement was never executed.
- 5.6 There was no broad proposition that all apparatus had to be removed. In reality, this was looked at on an apparatus by apparatus basis. It is noted that SW says this was agreed on an apparatus by apparatus basis.
- 5.7 Where SW has placed reliance on incremental agreements relevant to each asset in question, it will be necessary to identify these individual agreements to support the position advanced by SW.
- 5.8 The statutory framework does not provide that SW should be kept Cost Neutral.
- 5.9 It is clear what the legislation says. What divides the parties is its application to the specifics of the situation which exists.

- 5.10 The relevant sections of NRSWA 1991 and the 2003 Regulations which SW has referred to apply to Major Works. Future (non diversionary) work on SW apparatus within the Zone are not Major Works and are not covered by the Act and the Regulations.
- 5.11 The Tripartite Agreement relates to Diversionary Works. There is no specific basis upon which this should be applicable to apparatus left within the Zone.
- 5.12 Where SW say all necessary measures have not been delivered, it will be necessary to ascertain:
 - (i) the specific details in respect of the apparatus which is still in the Zone and with which SW is primarily concerned.
 - (ii) what these necessary measures were;
 - (iii) how they were agreed
 - (iv) why they have not been delivered.
- 5.13 The draft Derogations Agreement was never entered into.
- 5.14 Further granularity is required in respect of SW's claims for Cost Neutrality.
- 5.15 Where Health and Safety is a primary concern in respect of apparatus requesting that this should be flagged and that specific information should be provided as a top priority.
- 5.16 At paragraph 9.1 of SW's Position Paper on Cost Neutrality, SW has very broadly defined Cost Neutrality. This broad definition is not supported by the position in contract or in statute.

6 **Actions on Cost Neutrality**

- 6.1 **SW:** To provide details of key apparatus with which it is primarily concerned.
- 6.2 **SW:** To provide details of agreements entered into in respect of that apparatus, regarding:
 - (i) removal from the Zone;
 - (ii) necessary measures agreed; and
 - (iii) agreement in respect of Cost Neutrality
- 6.3 **CEC:** To provide its views on the apparatus to which SW refers, in particular the position where works or necessary measures were not carried out in accordance with alleged agreements.

7 **Build Over Agreements**

- 7.1 The issue of Build Over Agreements was discussed and in particular, why SW seeks to have its liability limited going forward.

8 **SW Position on Build Over Agreements and Future Liability**

- 8.1 Following detailed discussions, it was noted that SW's position on Build Over Agreements and SW liability was broadly, as follows:
 - (i) Where SW apparatus remains within the Zone, it is inevitable that SW will require to work on the asset at some stage.

- (ii) Because the potential liability consequences are so large, it is reasonable that SW should have some protection.
- (iii) SW should be protected against indirect losses.
- (iv) SW has conceded that it does not require to be protected against direct losses.

9 **SW Concerns on Build Over Agreements and Future Liability**

9.1 Build Over requires SW consent. This is expressly provided for in s.21 of the Sewerage (Scotland) Act 1968 which refers to any "building" which is erected over a sewer or which interferes or obstructs access to any sewer. The definition of "building" expressly excludes a public road and any railway line but no reference is made to a tram line. SW therefore contends that this Act applies to the ETN.

9.2 It is not unreasonable for SW to secure no liability for indirect losses.

9.3 CEC has a duty to obtain best value, however it has already achieved this by not moving the apparatus.

10 **CEC Concerns on Build Over Agreements and Future Liability**

10.1 Not accepted that the 1968 Act is applicable because the tram works are part of or ancillary to a road or are a railway line.

10.2 Clearly, if SW is seeking to insert the draft clause limiting its liability, it is doing so because this not already provided under existing contracts and statutes.

10.3 Whilst some form of agreement on the conduct of parties is useful there is no requirement to accept the clause which SW is seeking to introduce.

10.4 A fair allocation of risk should be achieved and the purported draft clause does not achieve this.

CEC / SW Interface - Cost Neutrality and Future Liability

Schedule of Parties Positions and Concerns

Scottish Water	CEC
Cost Neutrality	
There was an overarching agreement between tie and SW that all apparatus would be moved outwith the Zone.	There was no formal agreement or broad propositions that all SW assets would be moved outwith the Zone.
SW has advanced a broad catch all concept of Cost Neutrality.	CEC is opposed to a broad catch all concept of Cost Neutrality. This broad definition is not supported by contract or statute. Further granularity is required in respect of SW's claims for Cost Neutrality.
SW's primary concern is in respect of those assets which: <ul style="list-style-type: none"> • remain within the Zone; • necessary measures were agreed in respect of the necessary works; • the necessary measures were altered, not completed, or not completed to industry standard. 	It is necessary to ascertain: <ul style="list-style-type: none"> • the specific details of the apparatus which is still in the Zone and with which SW is primarily concerned. • what these necessary measures were. • how they were agreed; and • why they have not been delivered.
Incremental and individual agreements were reached in respect of the apparatus with which SW is primarily concerned. These agreements were breached.	These individual and incremental agreements have to be identified and evidenced.
Draft TEL Agreement and draft Derogation Agreements were taken to an advanced stage and these proceeded on the basis of Cost Neutrality.	These agreements were not executed and therefore have no contractual relevance.
Under the NRSWA 1991, parties are required to agree "necessary measures". The necessary measures have not been implemented.	No issues with agreeing "necessary measures". The issue is what are necessary measures.
Under NRSWA 1991, there is a duty for an undertaker to pay compensation, where the necessary measures have not been implemented.	Which undertaker? SW has borne no cost in relation to diversionary works. Will SW now contribute?
Under the Tripartite Agreement, parties are	There is no contractual framework which entitles

Scottish Water	CEC
required to agree necessary measures.	<p>SW to Cost Neutrality.</p> <p>The Tripartite Agreement essentially relates to Diversionary Works. There is no specific basis upon which this should be applicable to assets left within the Zone and in any event cost neutrality is not provided for.</p>
All necessary measures have not been delivered. SW should not be exposed to liability as a result of this.	CEC to provide substantive response on this point once more specific information is provided.
SW may be exposed to significant cost liability if another tram operator takes over the operation of the trams.	CEC to provide substantive response to this point.
SW needs to see more willingness from CEC to address the critical issues, in particular where necessary measures were not carried out at all or not carried out in accordance with industry standards.	<p>CEC requires information on the specifics of these 'critical issues' and the agreements relating thereto.</p> <p>Any issues concerning Health and Safety should be flagged as a matter of priority.</p>
SW has co-operated throughout the lifespan of the works in respect of assets being removed.	CEC appreciates co-operation from SW.
SW will not propose or accept a situation which prevents it from carrying out its statutory duties.	CEC are not stopping SW from carrying out its statutory duties.
Build Over Agreement and Future Liability	
The obligation to have a Build Over Agreement is excluded in respect of roads and railways but not tramways	CEC disagrees with this interpretation.
It is not unreasonable for SW to secure no liability for indirect losses.	<p>A fair allocation of risk should be achieved and the purported draft clause does not achieve this.</p> <p>Specifically why should SW not be fully liable for the consequences of its negligence?</p>
CEC has already achieved its duty to obtain best value by not incurring the cost of moving the apparatus.	CEC maintains it has an obligation to obtain best value and excluding SW's liability in respect of indirect loss does not achieve this.