

**IN THE MATTER OF:**

**THE BOURNEMOUTH-SWANAGE MOTOR ROAD  
AND FERRY COMPANY'S APPLICATION  
TO ALTER TOLLS - JANUARY 2021**

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**THE FERRY COMPANY'S CLOSING SUBMISSIONS**

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**References to the bundles are in the format [Volume No./Page No.].**

1. By an original application dated February 2020, and revised application dated December 2020, the Company seeks to vary its tolls. The objectives of the application are: (i) to ensure that the income from the tolls rises with inflation, meeting the increasing costs faced by the Company; (ii) to ensure that sufficient reserves are built up to replace the current ferry at the end of its serviceable life in 2032-4, (iii) to ensure that regular users are protected from significant rises in tolls, with projected less than inflationary increases (iv) to seek to allow a reasonable return on investment to the ferry owners.
2. In light of the proposals advanced by BCP Council, Dorset Council and Swanage Town Council ('the Consortium') the Company has submitted the revised proposal in order to seek to also promote environmentally-friendly travel by maintaining current pedestrian and cycle tolls. The Company's revised proposal broadly includes more gradual price rises, and higher discounts for regular users.

### The legislative framework for the inquiry

3. The legislative framework to the Company and the Inquiry is well known to the Inspector. The central provision Section 6(3) of the 1954 Act, as amended by the 1986 Act provides materially:

*“(3) In making any order on an application under this section, the Minister shall have regard to the financial position and future prospects of the undertaking and shall not make any revision of charges which in his opinion would be likely to result in the undertaking receiving an annual revenue either substantially less or substantially more than adequate to meet such expenditure on the working, management and maintenance of the undertaking and such other costs, charges and expenses of the undertaking as are properly chargeable to revenue, including reasonable contributions to any reserve, contingency or other fund and, where appropriate, a reasonable return upon [the investment of the Company in the motor road and the ferry as defined in section 2 of the Bournemouth-Swanage Motor Road and Ferry Act 1986]”*

4. There are therefore three primary matters which the Minister must consider when determining the toll application: (i) the expenditure required on the working, management, maintenance (etc) of the Company; (ii) reasonable contributions to any reserve, contingency or other fund; and (iii) where appropriate, a reasonable return on investment.
5. It should be noted that contrary to the submissions of Mr Dubin there is no order of precedence expressed in the statute. Nor is it implicit (somehow) that because the return on investment is listed last it is to be taken as being less considered important by Parliament. Mr Dubin cited no authority for this surprising proposition. This is despite the fact that Bennion on Statutory Interpretation, a practitioner’s text contains and would identify such basic principles of statutory interpretation, but has not been cited. Respectfully, there is no such principle. Were it otherwise, Parliament could never list two or more factors to which a Minister should have regard without either choosing between their priority or stating expressly that they are to be considered

equally. Rather than assuming factors are to be ranked in terms of priority by the order in which they happen to appear instead the proper inference is that, unless stated otherwise, relevant statutory factors listed are to be considered equally.

6. The three factors fall to be considered in turn. However, before considering them it must first be recognised that the overarching considerations to which the Act requires the Minister and Inspector to have regard are the '*financial position and future prospects of the undertaking*'. The language is of the present and the future. The Minister is not instructed to scrutinise the historic management of the company but to look to its future prospects.
7. Read together the three factors listed above, and the focus on the present and the future rather than the past, set out the proper scope of this Inquiry.

*'Expenditure required on the working, management, maintenance (etc) of the Company'*

8. The Inspector has heard detailed evidence from, in particular, Mr Tim Hope, Naval Architect and Mr Kevin Thomas, Accountant relating to the costs involved in the running and maintenance of the Company. In short, they are significant. Among the most significant costs is the maintenance of the ferry and the addressing of mechanical faults as they occur.
9. Mr Hope explained that the Company takes the maintenance of the Bramble Bush Bay seriously. Though not required by statute the Company chooses to keep the ferry 'in class' with Lloyd's Register [1/148]. This imposes independent scrutiny and safeguards which the company would not otherwise be bound by; including detailed requirements as to maintenance and inspection that, as per Mr Hope, '*provides a third party assessment that helps ensure the ferry is kept in sound condition and is being operated safely*'.
10. This high level of inspection and maintenance brings with it significant costs; for example it can be seen that the costs arising out of the 2018/19 major refit

as well as additional ferry maintenance costs during that year came to £1,087,367 in that year alone<sup>1</sup>: see 2019 accounts at [1/51]. Minor refit years are less expensive but still very considerable; based on historic costs Mr Thomas states they are in the region of one-third of the cost of a major refit, i.e. around £315k [1/13 para 1.2.3].

11. While consistently expensive, the maintenance costs and periods of time when the service cannot run are otherwise not very predictable. Mr Hope gave oral evidence that this follows from the nature of the ferry as a complex mechanical craft. However, when there are outages of service caused by mechanical problems as well as carrying unpredictable high costs, it also causes a complete loss of income: see Mr Thomas' evidence of downturn caused in 2018/19/20 owing to major refit, then drive shaft failure then Covid-19 at [I/160].
12. In his written [1/62], and oral evidence Mr Hope stated that there is really only one suitable dry-docking facility on the South Coast, being that at Falmouth. The ship-repair industry has contracted and this reduction in competition has led to those remaining repairers '*increasing their prices slightly above the rate of inflation*'. In his oral evidence Mr Hope stated that this lack of competition is not likely to change in the future.
13. In addition, the Ferry company does not benefit from any grants or other sources of external public funding.
14. The relevance of all of this is that when the Minister is having regard to the day to day expenditure on the ferry's running and its maintenance, it is respectfully suggested he should have regard to the fact that:
  - a. the Company has gone beyond the standard of maintenance required of it;
  - b. that this carries significant costs;

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<sup>1</sup> The major refit itself was in the region of £945,000: evidence of Mr Kevin Thomas at [1/13 para 1.2.3]

- c. that the maintenance costs of the ferry are very significant; and that
  - d. those maintenance costs (beyond being consistently high) are unpredictable in their timing and their magnitude;
  - e. ship repair costs are increasing above the rate of inflation.
15. It is submitted that all of this calls for the Minister to seek to err on the side of caution, ensuring that tolls remain adequate to meet the significant and unpredictable demands on the ferry company's resources without compromising the other two relevant considerations, i.e., the ability to build up a reserve and, where appropriate, a reasonable return.
16. The Company's revised application makes sensible and realistic allowance for ferry maintenance, and in particular major refits, based upon the historic experience of these costs. In particular it also takes account of the absence of any income during both major and minor refits.
17. It is notable in this regard that, in relation to the other proposals, the Consortium's proposal does not take into account the income reductions during refit years (See Mr Thomas [1/168/para 5.1.2]) and the National Trust's proposal made no allowance for ferry refits at all.

### **The reserve fund**

18. The Inspector has heard from Mr Hope that the end of the Bramble Bush Bay's viable life as a working craft will be by 2034 at latest. Beyond that it is likely to be uneconomic to run and will become increasingly unpredictable in its performance. Given its age and environmental concerns there is also the increasing spectre of regulatory change by the Maritime and Coastguard Agency [1/59, third and fourth paras] which Mr Hope elaborated upon orally.
19. While there has been some consternation expressed at the proposed date of replacement being by 2034 (with a new ferry being ordered in 2032), as this was different to that proposed at the previous Inquiry (being replacement ordered

in 2026), the proposed date of 2034 is the product of Mr Hope's expert opinion in his report produced for this Inquiry. It was the only expert or informed evidence the Inspector heard on this matter.

20. In oral evidence Mr Hope explained that the revised estimate followed in part from the extended works carried out during 2018/2019 during the major refit, the replacement of the drive shafts (and ordering of spares) and from the non-destructive testing (which Mr Hope likened to an x-ray) being carried out quarterly and demonstrating no developing faults. It is respectfully submitted that the only determination the Minister could reach on this point in light of the evidence is that the ferry will require replacement by 2034.
21. Similarly, the cost of replacement of the Ferry is the subject of Mr Hope's expert evidence, with like for like replacement being £8.44m + professional fees of £273,000 at 2019 prices [I/58] and [I/63]. Over the 13 years between 2019 and 2032 (the anticipated purchase date) it is projected by Mr Kevin Thomas that the replacement ferry cost will be £12.795m [I/14].
22. It is notable that the 1954 legislation expressly contemplates the building up of a reserve fund. It is also significant that by section 11 of the 1986 Act [Supp/93] Parliament chose to limit the Company's borrowing powers to £5,000,000. It is submitted that these matters taken in combination are a strong indication that the Company's future expenditure was contemplated by Parliament to be met in at least significant part by the building up of a fund over time. This follows most clearly from the fact of the statutory limit on borrowing. This makes it inevitable that a replacement ferry can only be bought by building up a replacement fund.
23. The Inspector heard submissions from Studland Parish Council in particular (and most notably Mr Stobart) who argued that the ferry replacement should be financed by other means, notably by taking on more debt, beyond the statutory limitation. However, recommending or achieving a change of

legislation is plainly beyond the remit of this Inquiry, a point that was accepted by Mr Stobart.

24. Given the need for a replacement ferry to be ordered by 2032 (for delivery by 2034) and the inability of the Company borrowing in excess of £5million, and the absence of any grants (oral evidence of Mr Hope and Mr Kean) the only means through which the Company can permissibly finance the loan is through building up a reserve fund.
25. At the centre of the Company's application is the desire to build up the Ferry Replacement Reserve (FRR) in order to be able to afford to replace the ferry at a point in time when the current craft will have reached the end of its economic life. The expert evidence is that this will be 2034.
26. A concern raised by the Inspector on the previous application was that, while the application was intended to fund a ferry replacement, payment into that fund was not properly prioritised.
27. The evidence of Mr Michael Kean, Director of the Company [I/191] is that the Company has learned from this, and changed its formal policies relating to the ferry reserve. As Mr Kean states, in any given year, profits will be paid into the ferry replacement reserve first, up to the instalment required that year, as set out in the Company's projections (at [I/174]). Only after that will there be consideration of paying out any residual profit as dividends. Mr Kevin Thomas, Accountant, notes that this change in policy has been set out in the accounting policy note in the published audited accounts [I/163].
28. In addition to this prioritisation by the policy that is now followed the directors will only consider the payment of a dividend to the investors once the FRR has reached the level required so that, in that year, it is at least equal to the then current cost of the ferry plus the £5million maximum loan: see [1/163/para 2.2.3]. This seeks to meet the concerns of IPs that the fund would be depleted

over time; instead dividends will only be considered provided the FRR is in a strong position.

29. The prioritisation into the FRR has been dismissed by some as an arcane accountancy tool. The implication has been it is not worth much. However, such a view does not hold up to scrutiny. The effect of the prioritisation can be seen to be real by looking at the current and previous two financial years, going back to its introduction at the beginning of the financial year 2019.
30. The year 2018/19 was impacted by an extended major refit with complications, costing £945,000. The year 2019/20 was impacted by the drive shaft failure The year 2020/21 has been impacted by Covid-19.
31. These issues have had a significant impact on passenger volumes (see Mr Thomas' statement at [I/159]) and, consequently, income. Income was therefore below projected levels in those years. The result has been that all of the profit after tax has been placed into the ferry replacement reserve in each of these years. Nothing at all has been paid out by way of dividends to the shareholders for those three years. Far from being an arcane accounting tool it has meant that rather than money being in the pockets of investors as dividends, it is being held for the ferry replacement.
32. The ferry company has committed publicly to this policy in this Inquiry, which shall become a matter of public record. It is written into the parent company's accounting policy [1/163/para 2.2.2] and [1/95]. Moreover, it is the subject of an undertaking from the directors of the Fairacres Group to the Secretary of State for Transport [1/67]. The Company has an obligation to provide its annual accounts to the SOS for Transport: [s35 1923 Ac: [Supplementary bundle/13].
33. It is important to recognise that this change of policy (and the fact it can be shown to have resulted in real difference in non-payment of dividends) is a



major change in approach since the 2018 application. The company now has a very different way of doing things.

34. A question has arisen in this Inquiry as to what the Company can do, if anything, to guarantee that the reserve will be used for the purchase of a replacement ferry. However, this is not, in fact, a question which features as a matter to which the Minister is to have regard by section 6(3) of the 1954 Act, as amended.
35. That states materially that *'the Minister shall have regard to the financial position and future prospects of the undertaking and shall not make any revision of charges which in his opinion would be likely to result in the undertaking receiving an annual revenue either substantially less or substantially more than adequate to meet such expenditure [etc] including reasonable contributions to any reserve, contingency or other fund'*
36. Nowhere is it stated that the Minister shall have regard to any means by which the Company has sought to ring-fence or prioritise the fund in order to ensure or seek to promote its use only for one purpose. Instead, the minister is to have regard to the need for the company to build up a reserve or contingency. Those words are not qualified save that it is implicit that any such fund must be at least intended to be to further the *'future prospects of the undertaking'*. This is a broad objective. There is no mention of segregation or ring-fencing in the Act, nor can it be implied into the statutory language.
37. It is respectfully submitted that, in changing its basic principles regarding the priority as between the FRR and dividend payments; the Company has done all that is possible, and likely has done more than could be said to be required of it by the Act.
38. In this respect it is noted that the Consortium agrees that *'it seems to the [Consortium] that there is no way to make ring-fencing the FRR legally enforceable'* page 4, paragraph 5(b) of Consortium's opening submissions.

39. Representatives on behalf of Studland Parish Council have made a number of suggestions as to how, in their opinion and (respectfully) without the benefit of legal opinion, they consider the FRR could be ring-fenced. To be clear by this they appear to suggest it could be put into some legal mechanism such that the Company could not use it save for the ferry replacement and, perhaps, it could even be withheld from the liquidators should the Company ever fail.
40. No such legal mechanism exists. The Ferry Company refers to the content of its legal note on this point. Basic principles of trust law, escrow accounts, company law and bankruptcy law all render their suggestions legal impossibilities.
41. In short, a trust would fail because here the Ferry Company would be both the settlor and sole beneficiary of the trust fund. As the sole contributor to the trust fund would also be its sole beneficiary the trust would be deemed to be a sham trust, i.e. a legal creation that is more form than substance, since the Ferry Company would be wanting the benefits of a trust without divesting itself of the ultimate benefits of the fund. It would be void.
42. A trust cannot be limited by purpose, save where this purpose is charitable. As such there cannot be a trust the purpose of which is to build the ferry. Third, the trust fund could not be for the benefit of all passengers of the ferry, as suggested by Mr Stobart. Trusts must be defined in a manner that allows their constituent elements to be certain upon formation of the trust: such a class of beneficiaries would not provide this certainty.
43. An escrow account only operates to keep monies from the sponsor of the fund or from any liquidator where backed by a trust. The above problems apply.
44. Divestment of the fund to another company would be contrary to fundamental duties of the directors as described in the Note. They could be unwound by the High Court.

45. In doing what it has done to date by way of its prioritisation of payments, its change in accountancy policies, its undertaking to the Secretary of State for Transport and its public commitment in this inquiry the Ferry Company has done all that can be legally done to see that the money is applied towards the replacement of the existing ferry as intended.

*'Where appropriate, a reasonable return upon the Investment of the Company'*

46. There are two elements to this consideration: 'where appropriate' and 'a reasonable return'. Neither of these are defined in statute. It follows that they fall to be defined by the normal meanings of those words bearing in mind both the purpose of the Company and the mechanism which Parliament has chosen to deliver the ferry service.

47. Parliament's objective behind the 1923 and 1986 Acts was undoubtedly to first (by the 1923 Act) create the ferry service and then (by the 1986 Act) support the existing service for the benefit of its passengers.

48. However, it is significant that Parliament chose to have the motor road and ferry be provided by way of the establishment of a private company, rather than by a public, or non-profit body. This was a choice reaffirmed by Parliament in the Bournemouth-Swanage Motor Road and Ferry Act, 1986, when Parliament confirmed that the Company would continue to hold its existing assets and provide the motor road and ferry service.

49. The choice was significant because the provision of the motor road and ferry service by a private company carries with it significant benefits. The significant outlay and over the years many millions of pounds of ongoing maintenance costs for the road, the slipways, the causeway, and the ferry does not come at an expense to the public purse, and so does not come at the expense of local

and national taxpayers. Instead, it comes at the private expense of the ferry company.

50. However, inherent in any private company is the objective of achieving at least a reasonable return. A company would not be a company if that was not amongst its objectives. Section 172 of the Companies Act 2006 imposes on directors the duty to promote the success and viability of the company. A company will only be successful and will only be viable to the extent it is able to enjoy a reasonable return.
51. The directors duty set out in section 172 of the Companies Act is nothing more than the statutory crystallisation of the pre-existing common law principle of a director's duty to promote the company that has existed since at least the Victorian era. This is relevant because, in 1923, Parliament must be taken to have understood that in legislating for the provision of the motor road and ferry service by a private company, comes the inherent objective of achieving a reasonable return on investment. This is of course expressly referred to in the 1954 act as amended by the 1986 Act.
52. Parliament will have understood that the provision of the ferry service for the benefit of passengers and the pursuit of a reasonable long-term return were not in any way opposed, but in fact were complimentary if properly judged. The ferry company's financial health is to the benefit of its passengers. A company that is financially sound with reasonable returns will be in a position to meet unexpected high costs that may and do occur as detailed above.
53. Moreover, a company that is enjoying sound financial returns will find it easier to attract investment and to acquire loans, which are a necessary part of the life of any company. Most fundamentally, a company will only have long-term viability to the extent its investors receive a reasonable return. A company that does not enjoy a reasonable return will not be a viable company. The future

security of any company and the reasonableness of a return its investors receive go hand in hand.

54. It is respectfully submitted that the Inspector and the Minister therefore ought to bear in mind Parliament's election to have the ferry and motor road service provided by a private company. This must inform the question of what is meant by '*if appropriate, a reasonable return*'.

55. '*If appropriate*': it is submitted that ordinarily, where a company is able to generate a profit then at least some return on investment would generally be appropriate as a basic rule. The company's accounting policies since 2018 go beyond this. As detailed above, they will only permit the consideration of payment of dividends to investors where the FRR has been topped up to the required level that year to enable the cost of the ferry to be met (less the maximum loan). In other words, only once the full projected payment into the FRR has been made for that year will there be consideration of payment of a dividend. This can mean that even where there is a fairly significant profit generated in any given year, but not sufficient to fully top up the FRR, no dividend will be paid. Instead, the investors will only see a return on their investment where the company has a successful year in line with projections. In this manner, the prioritisation of payments in effect ensures that the investors will only receive any return at all, let alone a reasonable one, when appropriate. For they can only possibly receive any return once the FRR is where it needs to be that year.

*'Reasonable return on investment'*

56. There has been some debate over how this should be measured. There are several components to this:

- a. Should one measure 'return' by reference to 'profit' even when that is not paid out to the investors but is instead paid into the FRR, or should one measure it by reference to dividends paid to the investors?

- b. Should one measure the 'return on investment' by reference to the net asset value of the Company or by reference to some other metric, such as turnover of the company that year?
- c. If one should measure it by reference to 'net asset value' should this include the value of the Ferry Road?

57. These same questions have been dealt with by previous Inspectors. Those representing the Ferry Company have reviewed the last three reports from 2008, 2014 and 2018 and all three Inspectors dealt with these questions in the same way.

58. In the 2018 report, the Inspector's conclusions addressed the question of whether there was a reasonable return all by reference to the dividends paid to investors: see para 148 to 154, and in particular 152. He also measured the 'reasonable return on investment' as being the value of the dividend payments against the value of the net assets. At para 152 he stated '*Whilst the objectors are right that the net asset value is not directly investment, it is the result of the investment of the Company and not an unreasonable measure to use*'. Finally in the 2018 report the Inspector stated, at para 149, '*the road is an integral part of the business and it is not unreasonable to include its value as part of the overall net asset value of the Company*'.

59. In the 2014 report that Inspector also measured 'return on investment' by reference to the dividends paid out as against the net value of the Company's assets: see para 71. That Inspector also thought the value of the land should be included in the net asset valuation: see para 76.

60. Finally, in the 2008 report that Inspector also measure 'return on investment' by reference to the dividends paid out as against the net value of the Company's

assets: see para 5.7 and 5.8. The issue of the road being included in the net assets appears not to have arisen on that occasion.

61. While the factual evidence before this Inquiry will have been different to that before previous Inspectors, the statutory framework is the same. It is respectfully submitted that all three previous Inspectors were correct in their interpretation of the statutory wording 'return on investment' as meaning dividends received measured against the Company's net asset value. Similarly the 2018 and 2014 Inspectors were correct to conclude that the rights the Company has over the road is a valuable asset of the Company which ought to be included in its valuation. It is respectfully submitted that there is no good reason to depart from the interpretation of the statutory language used by the previous Inspectors. It is submitted the Inspectors' interpretation of the legislation is not binding, but is highly persuasive and as such should only be separated from where there is good reason to do so.

62. However, considering each briefly in turn:

Return as dividends paid or profit before tax (even where not paid to investors but held in the FRR)

63. The Inspector heard from Mr Thomas, Accountant and Financial Adviser, whose written evidence plainly contemplates that only dividends paid out could be considered to be a 'return on investment': see [1/166]. He confirmed in evidence that, speaking generally, investors are not interested in whether they can simply build up the assets held within the company, but rather on receiving the benefit of those assets as dividends. He used the analogy of a shareholder holding shares in a public company. That investor is not interested in knowing that company has lots of assets, but rather is interested in knowing what how what they will receive in their pockets.

64. Mr Tice argued to the contrary. He said what mattered was the Company's profit before tax, regardless of how that was spent, and regardless of whether it was ever paid out to investors. However in response to questioning he agreed that, logically, this would mean that he would still consider the investors to be having a 'return on investment' even in a scenario where the Ferry Company paid out no dividend to its investors in any of the next 12 years, instead put its profits into an FRR, and spent all of that on a new ferry. This is despite the fact that this would mean that the investors would receive no dividend payment at all; i.e. they would receive zero personal enrichment. It is respectfully submitted that this cannot have been what Parliament meant by 'return on investment'. The view of the three previous inspectors is to be preferred.

#### Net asset value or some other measure

65. The statutory test is 'reasonable return on investment' but as set out above none of those words are defined. As observed by the Inspector in 2018 the Company's net assets are the product of its investment over the years. As has been made clear, but for the Company the Ferry Road, slipways, causeway, buildings, and ferry (etc) would not exist. They exist only because of the investment of the Company.

66. Just as a personal saver measures his or her return on savings against the sum of their principal sum in the bank so too does any company measure its return against its assets. Mr Thomas confirmed this was standard financial practice for companies.

67. The only other suggestion that has been raised as to how return should be measured is by reference to turnover; this has been raised by Studland Parish Council. However the statutory test is '*reasonable return on investment*'. While there is no perfect proxy for investment in an absolute sense, turnover of a company, i.e. income received before deductions for expenses, is simply



unrelated to investment. It cannot be the correct barometer against which reasonable return is measured.

68. In his submissions Mr Dubin noted that a measure of return 'might fall out of favour with member of the financial professions'. This is perhaps true as a theoretical possibility, but the Inquiry has heard no evidence to this effect at all.

#### Inclusion of the road

69. As found by the 2018 Inspector '*the road is an integral part of the business*'. The road allows customers to access the ferry, and without its control of the road the company could not exist. The extent of the company's legal rights over the road are detailed in the legal note on that topic.

70. In short the Company enjoys the statutory right to freehold over sections of the road as set out by the 1923 and 1986 Acts, in respect of the remainder of the road the Company it enjoys rights of user in perpetuity. By the 1986 Act the Company has been granted extensive powers over control over the road; to make a wide variety of improvements (including without reference to certain planning permission requirement) and even to advance and enforce byelaws in relation to the road.

71. As such by operation of statute, the Company is the freehold owner of the slipways, ferry office sites, and either is, or is entitled to be freehold owner of the wide section of the road on the Studland site (containing various road improvements). In respect of the remainder of the road the Company enjoys full rights of user in perpetuity along with rights to build on and improve the road with additional facilities to further the Ferry Company's interests, and various powers to control the use of the Ferry Road.

72. The Ferry Company may not have the same power to dispose of the land separately from its other assets. Yet, through sale of the Company, the owners

have the power to transfer their rights and powers over the motor road and other land to the new owners. Moreover, all the rights which the Company enjoys over the road are rights designed to promote the effective and smooth running of the ferry operation. As such the land supports the Company's commercial purpose.

73. Having been appraised of the detailed position in relation to the Ferry Road during the course of the Inquiry, Mr Glenwright, valuer, made clear that this did not change his position on the value of the land or its inclusion in the valuation of the Company's assets. In answering questions raised by Mr Reynolds, he stated that a valuation of the company's assets would be incomplete without inclusion of the land.

74. In this regard it has been suggested that the Company received the road 'for free'. This is not correct and is based on an overly simplistic notion of the statutory arrangements. While no money changed hands in return for the transfer of rights in the road, the Company took on new and significant legal obligations to construct and upkeep the road and to run the ferry service. On any view this would constitute good consideration and is undoubtedly the giving of something valuable by the company in return for the road.

75. In this connection Mr Glenwright also confirmed that the DRC methodology used was the only appropriate valuation methodology for infrastructural assets. He was guided by the RICS guidance in selecting that method: [I/155] While Mr Street for the NT on the one hand appeared to criticise the choice of valuation method, on the other hand he confirmed that he himself had used that method to value infrastructural assets.

76. In his evidence Mr Kean confirmed that the Company has been able to make improvement to the road over the years, in exercise of its statutory powers. The Company has been able to do all a reasonable company could wish to do in relation to the road to promote the furtherance of the ferry service. It is

undoubtedly an integral part of the Company's assets; the company's rights over the road are valuable, and any valuation of the Company would be incomplete should it exclude the road.

What is reasonable?

77. The forecast dividends (as % of net assets) are set out in Appendix 4.2 to Mr Thomas' updating report [I/178]. These show 0% return for the years ending 31 March 2019-2021. Thereafter they show a range from 0.6% to 5.6%, such that the average from the year ending 2019 to 2032 is 2.96%, or purely prospectively from 2021 onwards, is 3.46%. However, Mr Thomas explain that these figures were calculated before the most recent lockdown. It appears likely (insofar as it can be known) that the lockdown will endure for most of this financial year. We all know that there is very likely to be at least some residual impact of Covid into the next financial year. Mr Thomas stated that the predictions for 2021 will very likely be less than stated as a result. Therefore the average return of 3.46% is likely to be greater than what is actually realised.
78. As noted by Mr Thomas, the reasonableness of a return must consider the risks and difficulties involved in the investment [I/166-7]. The last three financial years demonstrate that investment in the company carries considerable risks, given the nil return. It demonstrates that the risks include mechanical problems (despite the Company maintaining the vessel to the standard set out independently by Lloyd's Register) and changes in passenger demand outside of the Company's control. Similarly, the unpredictability of the cost (and down-time) of major refits constitutes a significant risk.
79. In connection with this, by its nature (as determined by statute) the Ferry Company's sole income stream is the ferry. This is inherently risky. If the ferry's operation is suspended (e.g. by mechanical problems) then so too is the company's sole income stream.

80. It is moreover incorrect to conclude from the fact that because the ferry is the only company with rights to operate the ferry service that it is free from competition. Passengers have a choice whether to use the ferry or the road: they are not a captive audience.
81. The Company also faces significant external controls. The various Acts of Parliament, while giving the Ferry Company important rights, also impose considerable restrictions. Self-evidently, in order to alter tolls the Company must obtain approval following an inquiry.
82. Mr Thomas, Accountant, contrasts the position of two sets of investors, one, investors in the Company and two, shareholders in a publicly-traded company. He noted that global stock markets have delivered a real return of 7.6% over the past decade. [I/166]. He noted that investors in global stock markets can easily sell some or all of their shares if they are unhappy with their return. By contrast, in his evidence, Mr Kean stated that there is no market for shares in the Ferry Company. If the investors in the Company are unhappy with their return they either have to simply tolerate it, or sell the entire company (which assumes a buyer can be found, which would not be a guarantee if the company were underperforming), with all of the expense and complexity that would involve.
83. In light of the foregoing, it is respectfully submitted that the proposed return, being significantly less than that advanced in previous inquiries is a reasonable one. It is all the more reasonable given the prioritisation arrangement now put in place, such that any return will only be received once it is certain that the FRR is in the position it needs to be in any given financial year.

#### **The toll scheme - revised proposal**

84. Strictly speaking affordability and compliance with national policies relating to environmentally sounder modes of transport are not amongst the statutory criteria that the Inspector must consider but it is respectfully submitted that the

Inspector may have regard to these both these factors. It is submitted in particular that by requiring the Minister seeks to ensure that the relevant tolls are neither 'substantially less nor substantially more' than required, the desire for affordability is implicit. However, it is not express, unlike the three relevant considerations detailed at length above. This would generally indicate that less weight should be given to it.

85. In any event, affordability is at the heart of the Company's revised proposal. By freezing pedestrian and cycle costs the Company is guaranteeing their affordability. Moreover, by the books of multi-purchase tickets for cars (in addition to all other modes of transport) the Company is offering discounts that are far greater than it has offered before.

86. In particular the pricing of the multi-ticket books are kept below Mr Thomas long term estimate of inflation of 3% throughout the 12 years, sometimes significantly below this rate of inflation (as demonstrated at [1/187]). In this manner the Company seeks to preserve the affordability of the company to its users, and in particular, its frequent users who rely on it most.

87. In addition it should be noted that the Company's proposed increments and the proposed prices for all classes of ticket, both individual and books, are lower than and less than that of the Consortium save for the very final increment in 2032. That the Consortium felt able to put its proposed pricing slightly higher than that of the Company for all increments save the final one, surely demonstrates the Consortium's view that those levels are reasonable and affordable. It is important to note that the constituents of the three large councils of the Consortium constitutes the large majority of the Company's passengers.

88. The Ferry Company agrees that the Minister can have regard to the national environmental policies. The Minister should seek to advance those national policies and should not do anything that is directly contrary to those policies.

In any event the revised proposal clearly advances the environmental policies that have been put before the Inspector.

### **Consortium's counter proposal**

89. The Company considers the consortium's objection to the final incremental price rise is misplaced. This price rise in effect balances against the fact that the Company has introduced price rises on a more incremental and heavily discounted basis than the Consortium for all other periods. The Consortium cannot criticise the final increment without also proposing its steeper increments. The Company respectfully submits that its revised proposal, with more gradual increases are likely to be more affordable than that advanced by the Consortium.

90. It is noted that Mr Dubin submitted that the final instalment represented a return that was not reasonable. It is submitted that this is a surprising conclusion when the Consortium's counter proposal would in fact generate slightly income more than revised proposal. While we note the Consortium has some qualms about the final instalment it does not follow that the return on investment is unreasonable.

### **The National Trust's proposal**

91. The National Trust's proposal is premised on an unevidenced basis. It is respectfully submitted that the assertions made within the document [I/134], that over 100,000 additional car journeys could be achieved and also that discounted tickets would be used at certain times of day, and full price tickets at other times of day is without foundation. In fairness, Ms Churcher confirmed in cross-examination that her submissions were not advanced as a worked-out proposal but rather was advanced to 'generate discussion'.

### **The powers of the Inspector and the Minister**

92. The Company respectfully adopts the opening submissions of Mr Dubin on behalf of the Consortium in respect of the Inspector and the Minister's powers to respectively recommend and implemented a staged, incremental, pricing model. This could be achieved by way of setting out MTCs in the body of the Order , and stating that these are subject to the Schedules of the Order which each would then set out the fare regime for the years 2021 to 2032. Should the Inspector be assisted these a draft order could be provided by the Company in due course if she were minded to adopt that approach.
93. The Company notes that, in previous applications (e.g. 2014) it was given the power to raise tolls to a maximum across the full period, but in fact brought in the rises on an incremental basis that was in fact slightly slower than it had indicated it would at the inquiry. As such, given its past form, the incremental approach suggested by Mr Dubin is not necessary. However if it allayed concerns of others, then the Company would support the approach advocated by Mr Dubin.
94. It was suggested by Mr Dubin in his opening submissions that if the Inspector had doubts about the application, she should refused. It is respectfully submitted that this approach is not quite that advanced by the statutory criteria.
95. Section 6(2) of the 1953 Act gives the Minister not merely the power to approve or reject an application, but may '*make an order revising[any application] in such manner as he may think fit' [Supp/61]*. In addition Section 6(3) of the 1953 Act states that '*in making any order on an application under this section, the Minister shall have regard to the financial position and future prospects of the undertaking and shall not make any revision of charges which in his opinion would be likely to result in the undertaking receiving an annual revenue either substantially less or substantially more than adequate*'. Given the extensive powers of the Minister and the duty to make allowance for neither substantially less or substantially more than adequate even if the Minister were not persuaded that the application advanced was properly judged as between the three statutory elements

(working costs of undertaking, any reserve or contingency, and reasonable return on investment), he would still have to consider whether he should exercise his power to vary that application. In having regard to that he would have to consider the financial position and future prospects of the undertaking and satisfy himself as to whether leaving the pricing as it is would be likely to result in the undertaking receiving an annual revenue either substantially less or substantially more than adequate.

### **Conclusions**

96. In conclusion, this application is advanced on a very different basis to the application in 2018. The last application was refused largely because there was concern that the FRR was not properly being prioritised but was instead being used occasionally to pay dividends. It was also felt that dividends were not properly responsive to the financial performance of the company in a given year. The Company has made very significant changes: it now prioritised the FRR. It will only consider paying a dividend when the company has performed well.
97. This is a real and meaningful change as the last three years, in which nil dividends have been paid, demonstrates. Moreover there is now a firm timeline set out for the replacement of the existing vessel and this has been based on expert evidence, which it is submitted, has stood up to scrutiny.
98. The return made by company under the projections is significantly less than can be made in many other, arguably less risky, and certainly more liquid investments. There are undoubtedly significant risks in investment in the Company, as the last three years demonstrate. All taken together, the toll proposal advanced achieves the three key objectives of allowing neither too little nor too much for the maintenance and working of the business, the building of the reserve and, where appropriate, a reasonable return.



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