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Subject: Application by Norfolk Vanguard Limited for an Order granting development consent for the Norfolk Vanguard Offshore Wind Farm - Submission by Network Rail Infrastructure Limited [ADDGDD-Live.FID2847791]
Date: 28 March 2019 20:36:52
Attachments: [Comparison of Doc 3.1 PART 5 Protection of Network Rail Infrastructure Limited \(D4\) and NR required .PDF](#)

Dear Madam or Sir

We act for Network Rail Infrastructure Limited (**Network Rail**).

Network Rail sends its apologies that it has been unable to attend the hearings, being held today and tomorrow, namely the Issue Specific Hearing into the draft DCO (ISH5) and the Compulsory Acquisition Hearing (CAH).

Network Rail would like provide the following update to the ExA regarding the issues raised by the ExA in its Written Questions, which Network Rail responded to at Deadline 4 [**REP4-066**]:

1. Protective provisions for the benefit of Network Rail, Part 5 of Schedule 16 to the Development Consent Order

Since the submission at Deadline 4 of Network Rail's response to the ExA's Written Questions [REP4-006], negotiations between the Applicant and Network Rail have continued. Network Rail is hopeful that the outstanding points of disagreement can be resolved before Deadline 7.

We attach to this submission a copy of the protective provisions that Network Rail would like to be included in the Order. The attached document shows in tracked changes the amendments that Network Rail is seeking to the DCO submitted by the Applicant at Deadline 4 (Document 3.1) (**Network Rail Protective Provisions**).

With reference to the attached Network Rail Protective Provisions, the key provisions that have been amended or are the subject of ongoing discussion are as follows. We note that there are a number of minor amendments in the attached document and we do not refer to them all in this list as we anticipate that they can be agreed between the parties.

- i) **Paragraph 50** - Regarding the two amendments shown in this Paragraph in the Network Rail Protective Provisions, we understand that these points are agreed with the Applicant. By way of explanation:
 - Approval and consent rather than agreement is obtained from Network Rail when its asset protection department is engaged by the undertaker. We have removed reference to "agreement" here and in other paragraphs in the Network Rail Protective Provisions for the same reason.
 - The wording at Paragraph 50(1) stating that consent "is not to be unreasonably withheld or delayed" has been deleted because, pursuant to Paragraph 51(5) of the Network Rail Protective Provisions and elsewhere, when asked to give its consent such consent must not be unreasonably withheld but may be given subject to reasonable conditions. Therefore this wording is not needed.
- ii) **Paragraph 51(1)** - this provision requires the Applicant to obtain consent from Network Rail before exercising a number of powers under the Order in relation to Network Rail, including the exercise of compulsory purchase powers in respect of Network Rail property.

Network Rail understands that the Applicant agrees with the principle of Paragraph 51 and agrees that the majority of Order powers requested by Network Rail can be included in this list, including articles 18 and 20 (compulsory acquisition).

However, there remain discussions in relation to whether the following powers should be included in this list: article 15 (discharge of water), article 16 (authority to survey and investigate the land), article 29 (statutory undertakers), articles 35 and 36 (felling or lopping of trees etc).

Network Rail requires the full list of Order powers that may affect Network Rail property to be included, however unlikely it may be that these powers will be exercised. Network Rail will continue to discuss this list of Order powers with the Applicant.

- iii) **Paragraphs 53(2) and 56(2)** - We understand that these amendments have been agreed with the Applicant.

However, by way of explanation of the amendments shown, and as explained in our Deadline 4 submissions, in relation to the matters for which Network Rail shall be compensated, Network Rail must be compensated for all losses arising from the construction of the specified works, without qualification.

Where Network Rail is able to control costs, such as Network Rail's own expenses, Network Rail agrees that such costs should be "reasonably" incurred. However, where losses arise from the Applicant's development, Network Rail, as a public body, must recover any losses in full.

- iv) **Paragraph 56** - We understand that this amendment has been agreed with the Applicant.

The amendment concerns the period of time within which alterations and additions to specified works may be carried out by Network Rail at the undertaker's cost. We understand that the period of 24 months, which gives engineers sufficient time to identify, plan and undertake any such alterations, has been agreed.

- v) **Paragraph 58(3)** - This amendment is yet to be agreed with the Applicant. It concerns the strength of the measures to be taken by the undertaker in the design and construction of the authorities development to prevent electromagnetic interference (**EMI**) with Network Rail's apparatus. Network Rail requires "all measures" to be taken to prevent EMI with rail apparatus.

- vi) **Paragraph 58(9)** - We understand that this new sub-paragraph has been agreed. It ensures that the indemnity in paragraph 62 also applies to the costs and expenses reasonably incurred or losses suffered by Network Rail pursuant to paragraph 58 in relation to EMI.

- vii) **Paragraph 62** - We understand that Network Rail's indemnity wording in this paragraph is agreed between the parties.

This provision is necessary to ensure that Network Rail, as a public body, is indemnified against all losses arising from the authorised development. It also ensures that Network Rail is not bound to divulge commercially sensitive contracts with train operators or mitigate losses that it cannot control.

- viii) **Paragraph 67** - We understand that this amendment has been agreed with the Applicant.

This provision ensures that Network Rail is given sufficient opportunity to consider, risk assess and, if necessary, comment on a transfer of the benefit of the Order before an application is made to the Secretary of State for such a transfer.

- ix) **Arbitration Paragraphs 58(11) and 69** - This provision is being discussed with the Applicant.

As we explained in our Deadline 4 submissions, Network Rail cannot be bound to an arbitration timetable, set by an arbitrator who is not specifically required to take into account, when setting the timetable, the time that may be needed by Network Rail to undertake clearance procedures and other regulatory and stakeholder negotiations and address matters of concern with regards to the safe operation of the railway.

We have therefore inserted our standard wording in the attached as this ensures that Network Rail is not bound to such an arbitration timetable as set out in the Arbitration Rules in the Order.

However, Network Rail appreciates that the Applicant would like to agree certain arbitration rules and Network Rail has proposed to the Applicant new wording to be included in the protective provisions, regarding an arbitration timetable, to ensure that in the event of a dispute being referred to arbitration, any timetable agreed between the parties or set by the arbitrator will take into account Network Rail's clearance conditions procedures, and other engineering, regulatory and stakeholder consents, including NR governance procedures, which may be required during the course of the arbitration.

The Applicant is considering Network Rail's proposed wording.

2. Property and asset protection agreements

Negotiations with the Applicant are ongoing with regards to these agreements.

Yours faithfully

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PART

Part 5 Protection of Network Rail Infrastructure Limited ~~48.~~48

48. The following provisions of this Schedule have effect, unless otherwise agreed in writing between the undertaker and Network Rail and, in the case of paragraph ~~62.~~[62] any other person on whom rights or obligations are conferred by that paragraph. ~~49.~~

49. In this part of this Schedule—“

“construction” includes execution, placing, alteration and reconstruction and “construct” and “constructed” have corresponding meanings; “

“the engineer” means an engineer appointed by Network Rail for the purposes of this Order; “

“network licence” means the network licence, as is amended from time to time, granted to Network Rail Infrastructure Limited by the Secretary of State in exercise of powers under section 8 of the Railways Act 1993~~(a)~~; “

“Network Rail” means Network Rail Infrastructure Limited ~~(Company registration number 02904587) whose registered office is at Kings Place, 90 York Way, London, N1 9AG and any (a) 1993 c.43. 244~~and any associated company of Network Rail Infrastructure Limited which holds property for railway purposes, and for the purpose of this definition “associated company” means any company which is (within the meaning of section 1159 of the Companies Act 2006~~(a)~~) the holding company of Network Rail Infrastructure Limited, a subsidiary of Network Rail Infrastructure Limited or another subsidiary of the holding company of Network Rail Infrastructure Limited; “

“plans” includes sections, designs, design data, software, drawings, specifications, soil reports, calculations, descriptions (including descriptions of methods of construction), staging proposals, programmes and details of the extent, timing and duration of any proposed occupation of railway property; “

“railway operational procedures” means procedures specified under any access agreement (as defined in the Railways Act 1993) or station lease; “

"railway property" means any railway belonging to Network Rail and—

- (a) any station, land, works, apparatus and equipment belonging to Network Rail or connected with any such railway; and
- (b) any easement or other property interest held or used by Network Rail for the purposes of such railway or works, apparatus or equipment; and "

"specified work" means so much of any of the authorised development as is situated upon, across, under, over or within 15 metres of, or may in any way adversely affect, railway property. ~~50.—~~

50. (1) Where under this part of this Schedule Network Rail is required to give its consent, ~~agreement~~ or approval in respect of any matter, that consent, ~~agreement~~ or approval ~~is not to be unreasonably withheld or delayed but~~ is subject to the condition that Network Rail complies with any relevant railway operational procedures and any obligations under its network licence or under statute.

(2) In so far as any specified work or the acquisition or use of railway property is or may be subject to railway operational procedures, Network Rail must—

- (a) co-operate with the undertaker with a view to avoiding undue delay and securing conformity as between any plans approved by the engineer and requirements emanating from those procedures; and
- (b) use ~~all~~their reasonable endeavours to avoid any conflict arising between the application of those procedures and the proper implementation of the authorised development under this Order. ~~51.—~~

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

- (a) article ~~16~~15 (*discharge of water*);
- (b) article 16 (*authority to survey and investigate the land* ~~onshore~~);
- (c) article 18 (*compulsory acquisition of land*);
- (d) article 20 (*compulsory acquisition of rights*);
- (e) article 21 (*private rights*);
- (f) article 24 (*acquisition of subsoil only*);

- (g) [article 26 \(temporary use of land for carrying out the authorised development\);](#)
- (h) [article 27 \(temporary use of land for maintaining the authorised development\);](#)
- (i) [article 28 \(extinguishment of private rights\);](#)
- (j) [article 29 \(statutory undertakers\);](#)
- (k) [article 35 \(felling or lopping of trees and removal of hedgerows\);](#)
- (l) [article 36 \(trees subject to tree preservation orders\);](#)
- (m) or the powers conferred by section 11(3) of the 1965 Act (powers of entry) .

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 or article 29 (~~extinguishment of rights of statutory undertakers and electronic code communications operators: preliminary notices~~), 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 conferred by 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. ~~(a) 2006 c.46. 245-~~

(5) Where Network Rail is asked to give its consent ~~or agreement~~ pursuant to this paragraph, such consent ~~or agreement must~~ must not be unreasonably withheld but may be given subject to reasonable conditions. ~~52.—~~

52. (1) The undertaker must before commencing construction of any specified work supply to Network Rail proper and sufficient plans of that work for the reasonable approval of the engineer and the specified work ~~shall~~ must not be commenced except in accordance with such plans as have been approved in writing by the engineer or settled by arbitration ~~under article 38 (arbitration).~~

(2) The approval of the engineer under sub-paragraph (1) ~~shall~~must not be unreasonably withheld~~-or delayed~~, and if by the end of the period of 28 days beginning with the date on which such plans have been supplied to Network Rail the engineer has not intimated disapproval of those plans and the grounds of disapproval the undertaker may serve upon the engineer written notice requiring the engineer to intimate approval or disapproval within a further period of 28 days beginning with the date upon which the engineer receives written notice from the undertaker. If by the expiry of the further 28 days the engineer has not intimated approval or disapproval, the engineer is deemed to have approved the plans as submitted.

(3) If by the end of the period of 28 days beginning with the date on which written notice was served upon the engineer under sub-paragraph (2), Network Rail gives notice to the undertaker that Network Rail desires itself to construct any part of a specified work which in the opinion of the engineer will or may affect the stability of railway property or the safe operation of traffic on the railways of Network Rail then, if the undertaker desires such part of the specified work to be constructed, Network Rail must construct it ~~with all reasonable dispatch~~without unnecessary delay on behalf of and to the reasonable satisfaction of the undertaker in accordance with the plans approved or deemed to be approved or settled under this paragraph, and under the supervision (where appropriate and if given) of the undertaker.

(4) When signifying approval of the plans the engineer may specify any ~~necessary~~ protective works (whether temporary or permanent) which in the engineer's opinion should be carried out before the commencement of the construction of a specified work to ensure the safety or stability of railway property or the continuation of safe and efficient operation of the railways of Network Rail or the services of operators using the same (including any relocation de-commissioning and removal of works, apparatus and equipment necessitated by a specified work and the comfort and safety of passengers who may be affected by the specified works), and such protective works as may be reasonably necessary for those purposes ~~are to~~shall be constructed by Network Rail or by the undertaker, if Network Rail so desires, and such protective works ~~shall~~must be carried out at the expense of the undertaker in either case ~~with all reasonable dispatch~~without unnecessary delay and the undertaker shall not commence the construction of the specified works until the engineer has notified the undertaker that the protective works have been completed to the engineer's reasonable satisfaction. ~~53.—~~

53. (1) Any specified work and any protective works to be constructed by virtue of paragraph 52(4) shall, when commenced, be constructed—

(a) ~~with all reasonable dispatch~~without unnecessary delay in accordance with the plans approved or deemed to have been approved or settled under paragraph 52;

(b) under the supervision (where appropriate and if given) and to the reasonable satisfaction of the engineer;

(c) in such manner as to cause as little damage as is possible to railway property; and

(d) so far as is reasonably practicable, so as not to interfere with or obstruct the free, uninterrupted and safe use of any railway of Network Rail or the traffic thereon and the use by passengers of railway property.

(2) If any damage to railway property or any such interference or obstruction is caused by the carrying out of, or in consequence of the construction of, a specified work, the undertaker must, regardless of any approval ~~described in paragraph 53(1)(a)~~, make good such damage and shall pay to Network Rail all reasonable expenses to which Network Rail may be put and compensation for ~~reasonable~~any loss which it may sustain by reason of any such damage, interference or obstruction. ~~246-~~

(3) Nothing in this ~~Part~~Schedule imposes any liability on the undertaker with respect to any damage, costs, expenses or loss attributable to the negligence of Network Rail or its servants, contractors or agents or any liability on Network Rail with respect of any damage, costs, expenses or loss attributable to the negligence of the undertaker or its servants, contractors or agents. ~~54-~~

54. The undertaker must—

(a) at all times afford reasonable facilities to the engineer for access to a specified work during its construction; and

(b) supply the engineer with all such information as the engineer may reasonably require with regard to a specified work or the method of constructing it. ~~55-~~

55. Network Rail must at all times afford reasonable facilities to the undertaker and its agents for access to any works carried out by Network Rail under this ~~part~~Part of this Schedule during

their construction and must supply the undertaker with such information as it may reasonably require with regard to such works or the method of constructing them. ~~56.—~~

56. (1) If any permanent or temporary alterations or additions to railway property are reasonably necessary in consequence of the construction of a specified work, or during a period of ~~12~~24 months after the completion of that work in order to ensure the safety of railway property or the continued safe operation of the railway of Network Rail or the services of operators using the same, such alterations and additions may be carried out by Network Rail and if Network Rail gives to the undertaker reasonable notice of its intention to carry out such alterations or additions (which must be specified in the notice), the undertaker must pay to Network Rail the reasonable cost of those alterations or additions including, in respect of any such alterations and additions as are to be permanent, a capitalised sum representing the increase of the costs which may be expected to be reasonably incurred by Network Rail in maintaining, working and, when necessary, renewing any such alterations or additions.

(2) If during the construction of a specified work by the undertaker, Network Rail gives notice to the undertaker that Network Rail desires itself to construct that part of the specified work which in the opinion of the engineer is endangering the stability of railway property or the safe operation of traffic on the railways of Network Rail then, if the undertaker decides that part of the specified work is to be constructed, Network Rail must assume construction of that part of the specified work and the undertaker must, notwithstanding any such approval of a specified work under paragraph ~~52~~[3], pay to Network Rail all reasonable expenses to which Network Rail may be put and compensation for ~~reasonable~~any loss which it may suffer by reason of the execution by Network Rail of that specified work.

(3) The engineer must, in respect of the capitalised sums referred to in this paragraph and paragraph [57(a)] provide such details of the formula by which those sums have been calculated as the undertaker may reasonably require.

(4) If the cost of maintaining, working or renewing railway property is reduced in consequence of any such alterations or additions a capitalised sum representing such saving must be set off against any sum payable by the undertaker to Network Rail under this paragraph. ~~57.—~~

57. The undertaker must repay to Network Rail all reasonable fees, costs, charges and expenses reasonably incurred by Network Rail—

(a) in constructing any part of a specified work on behalf of the undertaker as provided by paragraph 52(3) or in constructing any protective works under the provisions of paragraph 52(4) including, in respect of any permanent protective works, a capitalised sum representing the cost of maintaining and renewing those works;

(b) in respect of the approval by the engineer of plans submitted by the undertaker and the supervision by the engineer of the construction of a specified work;

(c) in respect of the employment or procurement of the services of any inspectors, ~~signalmen, watchmen~~signallers, watch-persons and other persons whom it shall be reasonably necessary to appoint for inspecting, signalling, watching and lighting railway property and for preventing, so far as may be reasonably practicable, interference, obstruction, danger or accident arising from the construction or failure of a specified work; ~~247-~~

(d) in respect of any special traffic working resulting from any speed restrictions which may in the opinion of the engineer, require to be imposed by reason or in consequence of the construction or failure of a specified work or from the substitution or diversion of services which may be reasonably necessary for the same reason; and

(e) in respect of any additional temporary lighting of railway property in the vicinity of the specified works, being lighting made reasonably necessary by reason or in consequence of the construction or failure of a specified work. ~~58.—~~

58. (1) In this paragraph ~~—~~=

“EMI” means, subject to sub-paragraph (2), electromagnetic interference with Network Rail’s ~~s~~ apparatus generated by the operation of the authorised development where such interference is of a level which adversely affects the safe operation of Network Rail’s apparatus; and

“Network Rail’s apparatus” means any lines, circuits, wires, apparatus or equipment (whether or not modified or installed as part of the authorised development) which are owned or used by Network Rail for the purpose of transmitting or receiving electrical energy or of radio, telegraphic, telephonic, electric, electronic or other like means of signalling or other communications.

(2) This paragraph applies to EMI only to the extent that such EMI is not attributable to any change to Network Rail’s apparatus carried out after approval of plans under paragraph 52(1) for the relevant part of the authorised development giving rise to EMI (unless the undertaker

has been given notice in writing before the approval of those plans of the intention to make such change).

(3) Subject to sub-paragraph (5), the undertaker must in the design and construction of the authorised development take all measures ~~reasonably~~ necessary to prevent EMI and must establish with Network Rail (both parties acting reasonably) appropriate arrangements to verify their effectiveness.

(4) In order to facilitate the undertaker's compliance with sub-paragraph (3) ~~—~~ =

(a) the undertaker must consult with Network Rail as early as reasonably practicable to identify all Network Rail's apparatus which may be at risk of EMI, and thereafter must continue to consult with Network Rail (both before and after formal submission of plans under paragraph 52(1)) in order to identify all potential causes of EMI and the measures required to eliminate them;

(b) Network Rail must make available to the undertaker all information in the possession of Network Rail reasonably requested by the undertaker in respect of Network Rail's apparatus identified pursuant to sub-paragraph (a); and

(c) Network Rail must allow the undertaker reasonable facilities for the inspection of Network Rail's apparatus identified pursuant to sub-paragraph (a).

(5) In any case where it is established that EMI can only reasonably be prevented by modifications to Network Rail's apparatus, Network Rail must not withhold ~~or delay~~ its consent unreasonably to modifications of Network Rail's apparatus, but the means of prevention and the method of their execution must be selected in the reasonable discretion of Network Rail, and in relation to such modifications paragraph 52(1) ~~shall~~ have effect subject to this sub-paragraph.

(6) If at any time prior to the commencement of ~~commercial operation of regular~~ revenue-earning operations comprised in the authorised development and regardless of any measures adopted under sub-paragraph (3), the testing or commissioning of the authorised development causes EMI then the undertaker shall immediately upon receipt of notification by Network Rail of such EMI either in writing or communicated orally (such oral communication to be confirmed in writing as soon as reasonably practicable after it has been issued) forthwith cease to use (or procure the cessation of use of) the undertaker's apparatus causing such EMI until necessary measures have been taken to remedy such EMI by way of

modification to the source of such EMI or (in the circumstances, and subject to the consent, specified in sub-paragraph (5)) to Network Rail's apparatus.

(7) In the event of EMI having occurred ~~—248 =~~

(a) the undertaker must afford reasonable facilities to Network Rail for access to the undertaker's apparatus in the investigation of such EMI;

(b) Network Rail must afford reasonable facilities to the undertaker for access to Network Rail's apparatus in the investigation of such EMI; and

(c) Network Rail must make available to the undertaker any additional material information in its possession reasonably requested by the undertaker in respect of Network Rail's apparatus or such EMI.

(8) Where Network Rail approves modifications to Network Rail's apparatus pursuant to ~~subparagraphs~~sub-paragraphs (5) or (6) ~~— =~~

(a) Network Rail must allow the undertaker reasonable facilities for the inspection of the relevant part of Network Rail's apparatus;

(b) any modifications to Network Rail's apparatus approved pursuant to those ~~subparagraphs~~sub-paragraphs must be carried out and completed by the undertaker in accordance with paragraph 53.

(9) To the extent that it would not otherwise do so, the indemnity in paragraph [(1)] applies to the costs and expenses reasonably incurred or losses suffered by network Rail through the implementation of the provisions of this paragraph (including costs incurred in connection with the consideration of proposals, approval of plans, supervision and inspection of works and facilitating access to Network Rail's apparatus) or in consequence of any EMI to which sub-paragraph (6) applies.

(10) For the purpose of paragraph ~~57~~[(a)] any modifications to Network Rail's apparatus under this paragraph ~~is~~shall be deemed to be protective works referred to in that paragraph.
~~59.~~

(11) In relation to any dispute arising under this sub-paragraph the provisions of Article 38 (Arbitration) shall not apply and any such dispute, unless otherwise provided for, must be referred to and settled by a single arbitrator to be agreed between the parties or, failing

agreement, to be appointed on the application of either party (after giving notice in writing to the other) to the President of the Institution of Engineering and Technology.

59. If at any time after the completion of a specified work, not being a work vested in Network Rail, Network Rail gives notice to the undertaker informing it that the state of maintenance of any part of the specified work appears to be such as adversely affects the operation of railway property, the undertaker must, on receipt of such notice, take such steps as may be reasonably necessary to put that specified work in such state of maintenance as not adversely to affect railway property. ~~60.-~~

60. The undertaker must not provide any illumination or illuminated sign or signal on or in connection with a specified work in the vicinity of any railway belonging to Network Rail unless it has first consulted Network Rail and it must comply with Network Rail's reasonable requirements for preventing confusion between such illumination or illuminated sign or signal and any railway signal or other light used for controlling, directing or securing the safety of traffic on the railway. ~~61.-~~

61. Any additional expenses which Network Rail may reasonably incur in altering, reconstructing or maintaining railway property under any powers existing at the making of this Order by reason of the existence of a specified work must, provided that 56 days' previous notice of the commencement of such alteration, reconstruction or maintenance has been given to the undertaker, ~~are to be repaid by the undertaker to Network Rail.~~ ~~62.-~~

62. (1) The undertaker must ~~(a)~~ pay to Network Rail all reasonable costs, charges, damages and expenses not otherwise provided for in this Schedule which may be occasioned to or reasonably incurred by Network Rail —

(a) by reason of ~~(i)~~ the construction or maintenance of a specified work or the failure thereof; or

~~(ii)~~ b) by reason of any act or omission of the undertaker or of any person in its employ or of its contractors or others whilst engaged upon a specified work, ~~(b) compensate;~~

and the undertaker must indemnify and keep ~~compensated~~ indemnified Network Rail from and against all claims and demands arising out of or in connection with a specified work or any such failure, act or omission ~~(unless in the case of: and the fact that any act or thing may have been done by Network Rail on behalf of the undertaker or in accordance with plans~~

approved by the engineer or in accordance with any requirement of the engineer or under the engineer's supervision shall not (if it was done without negligence on the part of Network Rail or of any person in its employ or of its contractors or agents) excuse the undertaker from any liability under the provisions of this sub-paragraph.

(2) Network Rail must ~~—(a)~~ give the undertaker reasonable written notice of any such claim or demand ~~as soon as reasonably possible after Network Rail become aware of any such claim or demand; (b) not admit liability or make any offer to settle or compromise any~~ and no settlement or compromise of such a claim or demand shall be made without the prior consent of the undertaker ~~(which, if it withholds such consent has the 249 sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand); (c) take all reasonable steps to mitigate any liabilities relating to such claims or demands; and (d) keep the undertaker informed in relation to the progress of any such claims and demands and pay due regard to the undertaker's reasonable representations in relation to them.~~

(3) ~~In no circumstances is the undertaker liable to Network Rail under sub-paragraph (1) for any indirect or consequential loss or loss of profits, save that the~~ The sums payable by the undertaker under ~~that sub-~~paragraph (1) shall if relevant include a sum equivalent to the relevant costs ~~in circumstances where— (a) Network Rail is liable to make payment of the relevant costs pursuant to the terms of an agreement between Network Rail and a train operator; and (b) the existence of that agreement and the extent of Network Rail's liability to make payment of the relevant costs pursuant to its terms has previously been disclosed in writing to the undertaker, but not otherwise.~~

(4) Subject to the terms of any agreement between Network Rail and a train operator regarding the timing or method of payment of the relevant costs in respect of that train operator, Network Rail must promptly pay to each train operator the amount of any sums which Network Rail receives under sub-paragraph (3) which relates to the relevant costs of that train operator.

(5) The obligation under sub-paragraph (3) to pay Network Rail the relevant costs ~~will~~ shall, in the event of default, be enforceable directly by any train operator concerned to the extent that such sums would be payable to that operator pursuant to sub-paragraph (4).

(6) In this paragraph— “

“the relevant costs” means the costs, direct losses and expenses (including loss of revenue) reasonably incurred by ~~a~~each train operator as a consequence of any restriction of the use of Network Rail’s railway network as a result of the construction, maintenance or failure of a specified work or any such act or omission as mentioned in sub-paragraph (1); and “

“train operator” means any person who is authorised to act as the operator of a train by a licence under section 8 of the Railways Act 1993. ~~63-~~

63. Network Rail must, on receipt of a request from the undertaker, from time to time provide the undertaker free of charge with written estimates of the costs, charges, expenses and other liabilities for which the undertaker is or will become liable under this ~~Part~~Schedule (including the amount of the relevant costs mentioned in paragraph 15) and with such information as may reasonably enable the undertaker to assess the reasonableness of any such estimate or claim made or to be made pursuant to this Part (including any claim relating to those relevant costs). ~~64-~~

64. In the assessment of any sums payable to Network Rail under this Schedule there must not be taken into account any increase in the sums claimed that is attributable to any action taken by or any agreement entered into by Network Rail if that action or agreement was not reasonably necessary and was taken or entered into with a view to obtaining the payment of those sums by the undertaker under this Schedule or increasing the sums so payable. ~~65-~~

65. The undertaker and Network Rail may, subject in the case of Network Rail to compliance with the terms of its network licence, enter into, and carry into effect, agreements for the transfer to the undertaker of—

(a) any railway property shown on the works and land plans and described in the book of reference;

(b) any lands, works or other property held in connection with any such railway property; and

(c) any rights and obligations (whether or not statutory) of Network Rail relating to any railway property or any lands, works or other property referred to in this paragraph. ~~66-~~

66. Nothing in this Order, or in any enactment incorporated with or applied by this Order, ~~shall~~prejudice~~prejudices~~ or ~~affect~~affects the operation of Part I of the Railways Act 1993. ~~250-67-~~

67. The undertaker must give written notice to Network Rail if any application is proposed to be made by the undertaker for the Secretary of State's consent, under article 6 (transfer of benefit of Order) of this Order and any such notice must be given no later than 28 days before any such application is made and must describe or give (as appropriate)—

(a) the nature of the application to be made;

(b) the extent of the geographical area to which the application relates; and

(c) the name and address of the person acting for the Secretary of State to whom the application is to be made.

68. The undertaker must no later than 28 days from the date that the plans submitted to and certified by the Secretary of State in accordance with article ~~137~~ (certification of plans etc.) are certified by the Secretary of State, provide a set of those plans to Network Rail in ~~the form of a computer disc with read-only memory~~ a format specified by Network Rail.

69. In relation to any dispute arising under this part of this Schedule (except for those disputes referred to in paragraph 58(11)) the provisions of Article 38 (Arbitration) shall not apply and any such dispute, unless otherwise provided for, must be referred to and settled by a single arbitrator to be agreed between the parties or, failing agreement, to be appointed on the application of either party (after giving notice in writing to the other) to the President of the Institution of Civil Engineers.

Document comparison by Workshare 9 on 28 March 2019 19:30:15

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Rendering set	Standard

Legend:	
<u>Insertion</u>	
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Statistics:	
	Count
Insertions	160
Deletions	130
Moved from	1
Moved to	1
Style change	0
Format changed	0
Total changes	292

From: [Johnson, Melissa](#)
To: norfolkvanguard@pins.gov.uk
Cc: [Elsenaar, Marnix](#)
Subject: Application by Norfolk Vanguard Limited for a DCO for the Norfolk Vanguard Offshore Wind Farm - Deadline 7 Submission by Network Rail Infrastructure Limited [ADDGDD-LIVE.FID2847791]
Date: 02 May 2019 18:08:26
Attachments: [Application by Norfolk Vanguard Limited for an Order granting development consent for the Norfolk Vanguard Offshore Wind Farm - Submission by Network Rail Infrastructure Limited ADDGDD-LIVE.FID2847791.msg](#)

Dear Madam or Sir

We act for Network Rail Infrastructure Limited (**Network Rail**).

We write with an update regarding negotiations between Network Rail and the applicant.

Network Rail's previous submission to the Examining Authority dated 28 March (email attached) was made in order to update the Examining Authority as Network Rail was unable to attend ISH5 and the Compulsory Acquisition Hearing. Our submission was made out-of-deadline and so we attach a further copy for your information now.

1. Protective provisions for the benefit of Network Rail, Part 5 of Schedule 16 to the Development Consent Order

Since Network Rail's previous update to the Examining Authority (attached), negotiations between the parties have been ongoing and the majority of the protective provisions have now been agreed between the parties.

The outstanding protective provision in dispute is **protective provision 69 (arbitration)**.

As we explained in our Deadline 4 submission [REP4-066] and at point 1(ix) in the attached email, the applicant wants Network Rail to be bound by the Arbitration Rules in Schedule 14 of the Order. While Network Rail appreciates the applicant's desire to agree arbitration rules, Network Rail cannot agree to be bound, in particular, by an arbitration timetable, to be set by an arbitrator, without the arbitrator having due regard to Network Rail's consents and other procedures, which may impact on Network Rail's ability to meet any such timetable.

We hope to agree some wording for protective provision 69 that is acceptable to both parties in the next few days and that we will reach agreement before the applicant submits its final DCO on 30 May (Deadline 8).

2. Property and other agreements

Negotiations regarding the property and other related agreements are ongoing between the parties and we hope to agree the form of these documents in the coming weeks.

Yours faithfully

Addleshaw Goddard LLP

Melissa Johnson

Consultant

for Addleshaw Goddard LLP

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