

**Application by Orsted Hornsea Project Three (UK) Limited for an Order granting
Development Consent for the Hornsea Project Three Offshore Wind Farm**

Written Representation submitted on behalf of Network Rail Infrastructure Limited

Planning Inspectorate Reference No: EN010080

Reference No. H 3WF-SP054

1 Introduction

- 1.1 This written representation (**Written Representation**) is submitted on behalf of Network Rail Infrastructure Limited (**Network Rail**) in response to the application by Orsted Hornsea Project Three (UK) Limited (**Applicant**) for Hornsea Project Three Offshore Wind Farm (**DCO**). The DCO seeks development consent for the authorised development described in Schedule 1 (**Proposed Development**).
- 1.2 Network Rail submitted a section 56 representation [**AS-010**] on 15 September 2018.
- 1.3 Network Rail owns, operates and maintains the railway infrastructure of Great Britain. It does so pursuant to a network licence granted under section 8 of the Railways Act 1993.
- 1.4 Network Rail does not object in principle to the DCO. However, Network Rail objects to the compulsory acquisition and extinguishment of rights in operational or third party land on which it relies for the carrying out of its statutory undertaking as these matters can be dealt with by private agreement and by the appropriate protective provisions being in place, as described in this Written Representation.
- 1.5 In order for Network Rail to be in a position to withdraw its objection to the DCO Network Rail requires:
- (a) agreement from the Applicant that the acquisition of land and rights over operational and third party land (including the extinguishment of any rights and restrictions on such land) is on terms agreed with Network Rail for the protection of its statutory undertaking, and that compulsory powers will not be exercised in relation to such land; and
 - (b) sufficient protection for Network Rail's statutory undertaking is put in place for the carrying out of works over and/or in the vicinity of the operational railway network.
- 1.6 Network Rail and the Applicant are engaging in negotiations and Network Rail is hopeful that any concerns can be resolved during the course of the Examination. In the absence of reaching agreement to safeguard its interests, Network Rail, as an interested party, may seek to be heard at the Issue Specific Hearing [**ISH3**] into the draft DCO and at any further issue specific hearings on the DCO.
- 1.7 Network Rail and the Applicant have agreed that a Statement of Common Ground is not necessary at this stage but if matters of disagreement remain between the parties at the next appropriate deadline [**Deadline 4**], a Statement dealing with these matters shall be submitted to the ExA.

2 Impacts on the Railway

- 2.1 Network Rail has interests in parcels of land (**Land Parcels**) identified in the Book of Reference and the associated Land Plans submitted with the application for the DCO. The Land Parcels include 2 sites where Network Rail benefits from rights or owns and

occupies the land referred to as being land inside the boundary of the DCO, namely Land Parcels 3-018 and 30-028.

- 2.2 The Applicant proposes to undertake Works No. 8, as defined in the DCO, in relation to the Land Parcels.
- 2.3 Land Parcel 3-018 relates to a heritage railway which is not operational railway owned by Network Rail but is owned and operated by North Norfolk Railway. In relation to this Land Parcel, Network Rail wishes to transfer its rights and release the restrictive covenants by private agreement with the Applicant.
- 2.4 The works proposed to Land Parcel 30-028 affect the Breckland line; an operational railway line that links Cambridge in the west to Norwich in the east.
- 2.5 Work No. 8 (as described in the DCO) would permit the Applicant to install, retain, maintain and alter underground electricity cables (up to six cable circuits), and other ancillary apparatus and any other works deemed necessary, underneath the Breckland line. To undertake these works the Applicant is seeking powers to use land temporarily and to acquire rights permanently.
- 2.6 In relation to the proposed works to the Breckland line, unless the private agreements referred to in this Written Representation are agreed with the applicant and completed, Network Rail confirms that the Proposed Development will have a detrimental impact on the operation of the railway and will prevent it operating the railway safely and efficiently and in accordance with its Network Licence.
- 2.7 Network Rail's engineers are considering the possible impact of electro-magnetic interference (**EMI**) that may be emitted from the Proposed Development and will update the ExA once the results of the assessment are known.

3 Compulsory acquisition of rights over operational and third party land

- 3.1 Network Rail considers that there is no compelling case in the public interest for the compulsory acquisition of, or the use by the Applicant of, the Land Parcels as the Applicant and Network Rail should instead negotiate these matters by private agreement. As referred to above, unless matters are resolved by private agreement the Proposed Development will prevent Network Rail operating the operational railway safely and in accordance with its Network Licence.
- 3.2 Network Rail also considers that the Secretary of State, in applying section 127 of the Planning Act 2008, cannot conclude that new rights and restrictions over the railway land can be created without serious detriment to Network Rail's undertaking; and no other land is available to Network Rail which means that the detriment can be made good by them.
- 3.3 Network Rail and the Applicant have begun discussions to ensure that appropriate arrangements are agreed, as follows:
 - i) options to grant easements and a form of easement to provide the Applicant with the necessary rights in relation to Land Parcel 30-028; and

ii) a deed of release, in Network Rail's standard form, in relation to Land Parcel 3-018.

4 Protective Provisions

- 4.1 In the Panel's Written Questions and Requests for Information issued on 9 October, the Panel asked [Q1.14.31] whether NR is satisfied that its interests and those of the train operators who use Network Rail's infrastructure are adequately protected. In answer to that question, the protective provisions included within Part 5 of Schedule 9 to the DCO for the benefit of Network Rail (**DCO Protective Provisions**) are not sufficient.
- 4.2 The Applicant and Network Rail are in ongoing discussions regarding these provisions and Network Rail is hopeful that the outstanding matters can be resolved soon. Network Rail will update the ExA at the next appropriate deadline regarding any outstanding matters of disagreement and, if necessary, in advance of ISH3 into the draft DCO.
- 4.3 The changes proposed by Network Rail to the protective provisions are shown in Annex 1 to this written representation (**NR Protective Provisions**).
- 4.4 Network Rail will also require (by private agreement with the Applicant) that, notwithstanding the wording in the DCO Protective Provisions that may be confirmed by the Secretary of State, the NR Protective Provisions that are agreed between the parties during the course of the Examination will be complied with in any event.

5 Asset protection

- 5.1 Network Rail will not be in a position to withdraw its objection to the DCO unless sufficient protections are put in place for the carrying out of work over, under and/or in the vicinity of the operational railway, namely Land Parcel 30/028. These works comprise both temporary use of Network Rail's land during the construction phase as well as works of a permanent nature.
- 5.2 In respect of all of these works, Network Rail requires asset protection agreements to be put in place to secure:
- (a) that no works shall be carried out without Network Rail's prior approval of the plans, specification, method statement and programme of works;
 - (b) full access rights, during both the construction and operation phases, are retained for the benefit of Network Rail to enable the carrying out of all necessary maintenance, repair, renewal, inspection and enhancement works;
 - (c) recovery of Network Rail's legal and professional fees, costs and disbursements incurred in connection with the proposals to carry out the works and any other costs incurred by Network Rail arising out of the construction, operation and maintenance of the works; and
 - (d) no work will be carried out unless and until all consents, licences, registrations and authorisations (including any statutory or regulatory consents) are in place.

5.3 Network Rail requires these protections to be secured prior to any third party works being undertaken on, or in, proximity to operational land and its objection to the DCO shall remain in place until such an agreement has been entered into.

6 Conclusions

6.1 Network Rail does not object in principle to the Proposed Development. However it strongly objects to the proposed compulsory and permanent acquisition of rights over operational land and the inadequate protective provisions in the DCO. Network Rail considers that these matters should be dealt with by private agreement.

6.2 The Protective Provisions that NR wishes to be included in the DCO are appended to this Written Representation.

6.3 Network Rail considers that the Secretary of State cannot allow the DCO to be granted without amendment, as the test in section 127 of the Planning Act 2008, cannot be satisfied. The Proposed Development would result in serious detriment to Network Rail's undertaking and Network Rail does not have any other land available to it which could be used to avoid such detriment.

6.4 Network Rail is considering the possible impact of EMI that may be emitted by the operation of the Proposed Development and will update the ExA at the next appropriate deadline.

6.5 Network Rail is in ongoing discussions with the Applicant but until such time as Network Rail is given the protection and assurances requested as detailed in this Written Representation, Network Rail's objection to the DCO will not be withdrawn.

Addleshaw Goddard LLP 7 November 2018

Appendix 1

NR Protective Provisions

SCHEDULE 9 Article 41

PROTECTIVE PROVISIONS

PART 5

Protection of Network Rail Infrastructure Limited

~~1.~~The following provisions of this Part of this Schedule have effect, unless otherwise agreed in writing between the undertaker and Network Rail and in the case of paragraph 15 any other person on whom rights or obligations are conferred by that paragraph.

~~2.~~In this part of this Schedule—

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

~~(a)~~ 2003 c.21.

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

“network licence” means the network licence, as amended from time to time, granted to Network Rail 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~~ 1 Eversholt Street, London, N NW1 9AG2DN 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~~(b)~~) 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) ~~(a)~~ any station, land, works, apparatus and equipment belonging to Network Rail or connected with any such railway; and

(b) ~~(b)~~ any easement or other property interest held or used by Network Rail for the purposes of such railway or works, apparatus or equipment;

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

3.—(1) Where under this Part Network Rail is required to give its consent, ~~agreement~~ or approval in respect of any matter, that consent, ~~agreement~~ or approval 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 their reasonable endeavours to avoid any conflict arising between the application of those procedures and the proper implementation of the authorised project pursuant to this Order.

4.—(1) ~~¶~~The undertaker must not exercise the powers conferred by ~~Article 17~~ ~~(compulsory~~

article 4 (Power to maintain authorised project):

article 12 (Access to works):

article 14 (Discharge of water):

article 16 (Authority to survey and investigate the land onshore):

article 17 (Compulsory acquisition of land) ~~or~~:

article 19 (Compulsory acquisition of rights):

article 20 (Private Rights):

article 22 (Acquisition of subsoil only)

article 25 (Temporary use of land for carrying out the authorised project):

article 26 (Temporary use of land for maintaining the authorised project):

article 27 (statutory undertakers):

article 37 (private rights of way):

article 33 (Felling or lopping of trees or shrubs):

article 34 (Trees subject to tree preservation orders); or

the powers conferred by section 11(3) of the 1965 Act (*powers of entry*) of the 1965 Act.

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 27 (statutory undertakers), 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.

(a) 1993 c.43
(b) 2006 c.46.
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(4) The undertaker must not under the powers of this Order acquire or use or acquire new rights over any railway property except with the consent of Network Rail.

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

5.—(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 ~~may~~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 36 (~~arbitration~~Arbitration).

(2) The approval of the engineer under sub-paragraph (1) must not be unreasonably withheld, 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 protective works (whether temporary or permanent) which in the opinion of the engineer ~~must~~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 them (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 work), and such protective works as may be reasonably necessary for those purposes are to be constructed by Network Rail or by the undertaker, if Network Rail so desires, and such protective ~~work~~works must be carried out at the expense of the undertaker in either case ~~with all reasonable dispatch~~without unnecessary delay and the undertaker ~~may~~must not commence the construction of the specified ~~works~~work until the engineer

has notified the undertaker that the protective works have been completed to the engineer's reasonable satisfaction.

6.—(1) Any specified work and any protective works to be constructed by virtue of paragraph 5(4) must, 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 5;

~~(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 6(1)(a), make good such damage and pay to Network Rail all reasonable expenses to which Network Rail may be put and compensation for any loss which it may sustain by reason of any such damage, interference or obstruction.

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(3) Nothing in this Part 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.

7.—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.~~

8.—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 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.

9.—(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, 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 5(3), pay to Network Rail all reasonable expenses to which Network Rail may be put and compensation for 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 10(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.

~~10.~~The undertaker must pay 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 5(3) or in constructing any protective works under paragraph 5(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, signallers, ~~guards~~ watch-persons and other persons whom it is 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;

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~~(d)~~in respect of any special traffic working resulting from any speed restrictions which may in the opinion of the engineer, need 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~~work, being lighting made reasonably necessary by reason or in consequence of the construction or failure of a specified work.

~~11.~~(1) In this paragraph—

~~“EMI”~~ means, subject to sub—paragraph (2), electromagnetic interference with Network Rail’s apparatus generated by the operation of the authorised ~~development~~project 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~~project) 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 the EMI is not attributable to any change to Network Rail's apparatus carried out after approval of plans under paragraph 5(1) for the relevant part of the authorised ~~development~~ project 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~~ project take all measures 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 5(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 reasonably be prevented only by modifications to Network Rail's apparatus, Network Rail must not withhold its consent unreasonably to modifications of Network Rail's apparatus, but Network Rail may, in its reasonable discretion select the means of prevention and the method of their execution, and in relation to such modifications paragraph 5(1) has effect subject to this sub-paragraph.

(6) If at any time prior to the commencement of the commercial operation of the authorised ~~development~~ project and regardless of any measures adopted under sub-paragraph (3), the testing or commissioning of the authorised ~~development~~ project

causes EMI then the undertaker must immediately upon receipt of notification by Network Rail of the 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) cease to use (or procure the cessation of use of) the undertaker's apparatus causing ~~such~~ the EMI until all measures necessary have been taken to remedy the EMI by way of modification to the source of the 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—(a) =

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

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

(8) Where Network Rail approves modifications to Network Rail's apparatus pursuant to 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 sub-paragraphs must be carried out and completed by the undertaker in accordance with paragraph ~~6.6~~.

(9) To the extent that it would not otherwise do so, the indemnity in paragraph 15(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 10(a) any modifications to Network Rail's apparatus under this paragraph is deemed to be protective works referred to in that paragraph.

(11) In relation to any dispute arising under this paragraph the reference in article 36 (Arbitration) to the Secretary of State shall be read as a reference to the Institution of Engineering and Technology.

~~12.~~ 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.

~~13.~~ 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.

~~14.~~ 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, provided that at least 56 days' prior notice of the commencement of such alteration, reconstruction or maintenance has been given to the undertaker, are to be paid by the undertaker to Network Rail.

~~15.~~ (1) The undertaker must—~~(a)~~

a) pay to Network Rail all reasonable costs, charges, damages and expenses not otherwise provided for in this Part (but subject to the provisions of this paragraph) which may be occasioned to or reasonably incurred by Network Rail by reason of—~~(i)~~

i. the construction or maintenance of a specified work or the failure of such a ~~network work~~ work; or

ii. ~~(ii)~~ 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) ~~(b)~~ indemnify and keep 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;

(2) 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 supervision of the engineer ~~does~~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.

(3) Network Rail must—(a) give the undertaker reasonable written notice of any such claims or demands as soon as reasonably

possible after Network Rail become aware of any such claims or demands;
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~~(b) not admit liability or make any offer to settle or compromise any such claim or demand~~claim or demand 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 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~~

~~(4) 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.~~

(5) Subject to the terms of any agreement between Network Rail and a train operator regarding the amount, 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 (4) which relates to the relevant costs of that train operator.

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

(7) In this paragraph—

“the relevant costs” means the costs, direct losses and expenses (including loss of revenue) reasonably incurred by a 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.

~~16.~~ 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 (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).

~~17.~~ In the assessment of any sums payable to Network Rail under this Part no account must be taken of 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 Part or increasing the sums so payable.

~~18.~~ 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 plans 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.

~~19.~~ Nothing in this Order, or in any enactment incorporated with or applied by this Order, prejudices or affects the operation of Part I of the Railways Act 1993.

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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 5 (Benefit of Order) of this Order in relation to land within the onshore Order limits plan.

on or in the vicinity of Network Rail's operational railway 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)—

the nature of the application to be made;

the extent of the geographical area to which the application relates; and

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

In relation to any dispute arising under this Part that is referred to arbitration in accordance with Article 36 of the Order, Network Rail will comply with the Arbitration Rules in Schedule 13 to the Order to the extent possible but taking into account any timing constraints that may arise for Network Rail in obtaining clearance conditions and/or any engineering regulatory or stakeholder (internal or external) consents and/or assessing any matters of concern with regards to the safe operation of the railway.

~~20.~~ 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 35 (certification of plans and documents etc.) are certified by the Secretary of State, provide a set of those plans to Network Rail in a format specified by Network Rail.

~~in the form of a computer disc with read only memory.~~

