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To: HornseaProjectThree@pins.gsi.gov.uk
Cc: [Elsenaar, Marnix](#)
Subject: Orsted Hornsea Project Three (UK) Ltd application for a DCO: Network Rail's Deadline 9 submission [ADDGDD-LIVE.FID2857043]
Date: 26 March 2019 18:52:24
Attachments: [Network Rail Submission D9.pdf](#)

Dear Madam or Sir

We act for Network Rail.

Please find attached our letter to the Examining Authority, which we send on Network Rail's behalf.

Yours faithfully

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Your reference EN010080/H 3WF-SP054

Our reference ELSEM/43283-2563

26 March 2019

BY EMAIL HornseaProjectThree@pins.gsi.gov.uk

The Planning Inspectorate
National Infrastructure Planning
Temple Quay House
2 The Square
Bristol
BS1 6PN

Dear Sir or Madam

**Application by Orsted Project Three (UK) Limited for an Order Granting Development Consent for the Hornsea Project Three Offshore Wind Farm (Order)
Deadline 9 Submission on behalf of Network Rail (PINS Reference No. H 3WF-SP054)
Protective provisions for the benefit of Network Rail, Part 5 of Schedule 9 to the Order**

Introduction

- 1 This letter sets out the submission of Network Rail Infrastructure Limited (**Network Rail**) to the Examining Authority (**ExA**) at deadline 9.
- 2 Further to Network Rail's representation submitted to the ExA in advance of the Compulsory Acquisition Hearing held on 31 January 2019 [REP6-065] and Network Rail's written representations [REP1-251], negotiations between the applicant and Network Rail have been continuing.
- 3 However, there remain points of disagreement in relation to the protective provisions for the benefit of Network Rail (Schedule 9, Part 5 of the Order), which the parties had hoped to resolve before Deadline 9. The protective provisions for its benefit that Network Rail requests to be included in the Order are attached to this email (**Network Rail Protective Provisions**). The Network Rail Protective Provisions show, in tracked changes, Network Rail's proposed amendments to the protective provisions for Network Rail's benefit included in the Order, which was submitted at Deadline 7 [REP7-003].
- 4 Network Rail is awaiting a response from the applicant in relation to the points of disagreement referred to in this letter. However, to the extent that the draft Order submitted by the applicant

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at Deadline 9 includes changes to the Network Rail Protective Provisions, on which Network Rail has not already had an opportunity to comment, Network Rail asks that is it given an opportunity to comment on such changes, to the ExA or the Secretary of State for Business, Energy and Industrial Strategy, as appropriate.

5 The amendments requested by Network Rail to the protective provisions for the benefit of Network Rail included in the draft DCO submitted at Deadline 7 relate to the following paragraphs:

- (a) paragraph 4 ("the no compulsory powers" paragraph) and, as a related point, the definition of "specified works";
- (b) paragraph 15 (indemnity);
- (c) paragraph 20 (transfer of benefit of the Order); and
- (d) paragraph 21 (arbitration).

6 We refer to each of these protective provisions in turn below.

Paragraph 4 and definition of "specified works" – the grant of consent by Network Rail to the applicant's exercise of powers in the Order that affect Network Rail property

7 First, we understand that the amendments to paragraph 4 and the definition of "specified works", and which are shown in the attached Network Rail Protective Provisions, have been agreed with the applicant.

8 The amendments proposed ensure that the powers that may affect Network Rail property are included in the definition of "specified works" to the extent that they are not included in the list of powers requiring Network Rail consent at paragraph 4(1).

9 The reason for the inclusion of the powers at paragraph 4 and in the definition of "specified works" is to ensure that the applicant cannot exercise any Order powers in respect of Network Rail property without Network Rail's express consent.

10 Paragraph 4 is a crucial protective provision for Network Rail because of Network Rail's statutory duties to operate, maintain and renew a safe national rail network and to enable it to comply with its Network Licence.

Protective Provisions, paragraph 15 – indemnity provision

11 Paragraph 15 provides an indemnity by the applicant in favour of Network Rail. The version shown in the Network Rail Protective Provisions is the standard indemnity which has been included in many statutory orders and which has recently been agreed between Network Rail and an applicant of another major offshore wind farm, which has been accepted for examination by the Planning Inspectorate.

- 12 It indemnifies Network Rail in respect of losses it suffers and claims by train operators because of delays caused by reason of the construction or maintenance of a specified work or failure thereof or by reason of any act or omission of the undertaker or any of its employees or contractors while engaged on a specified work. It enables Network Rail to recover what are described as "relevant costs"; namely costs incurred by train operators for which Network Rail is liable under an agreement with the train operator as well as other consequential losses.
- 13 The applicant is seeking to provide that:
- (a) the indemnity does not apply to indirect or consequential loss or loss of profits,
 - (b) relevant costs may only be recovered by Network Rail if it has provided details of its agreement with the train operator, and of its liability to pay costs to the train operator under that agreement, to the undertaker.
 - (c) Network Rail must explain to the undertaker how it has minimised any claim for relevant costs.
- 14 Network Rail is anxious to ensure that the indemnity included in the Network Rail Protective Provisions is included in the Order and that the scope of the indemnity is not diluted. As a public body and operator of the national rail network it is essential that a private sector developer undertaking works that affect the railway provides Network Rail with a full indemnity so that any losses suffered do not fall on the public purse; that should include consequential loss which, in any event, would need to be properly justified and meet the relevant common law tests.
- 15 Network Rail should not be obliged to provide advance details of agreements with train operators to the undertaker; this creates an unnecessary administrative burden on Network Rail and any failure to provide the relevant details would invalidate the indemnity. Further, such agreements are commercially sensitive; the Office of Rail and Road only provides redacted copies of such train operator contracts for that reason.
- 16 Network Rail notes that under paragraph 15(3) it is already under an obligation to provide the undertaker with notice of any claim and not compromise a claim without the prior consent of the undertaker; it should not have to demonstrate to the undertaker how it has minimised the claim. As a public body, Network Rail must act reasonably in any event.
- 17 If the ExA is minded to dilute Network Rail's indemnity as proposed by the applicant, Network Rail considers that the ExA should seek the opinion of Network Rail's sponsoring department and the Department for Transport, before doing so.
- 18 Network Rail notes that a further minor amendment that is required as a result of the changes that Network Rail wishes to make to the indemnity protective provisions, is a non-consequential amendment at paragraph 11(9) to "paragraphs 15(2) to 15(7)".

Protective Provisions, paragraph 20 – written notice to Network Rail of proposed transfer of benefit of the Order

- 19 Paragraph 20 requires the applicant to give written notice to Network Rail if it proposes to ask for the Secretary of State's consent to transfer the benefit of the Order. The applicant would like to reduce the period of time given to Network Rail for its consideration of any proposed transfer from 28 days (which is the standard period required by Network Rail in its protective provisions) to 14 days.
- 20 Network Rail considers that it is appropriate for the Order to include the standard 28 day period to enable it to consider any such application, make an assessment as to risk, which will require consideration of the contracts currently in place and whether the transferee will need to provide any further surety, and to make representations to the Secretary of State on the suitability of any proposed transferee.
- 21 Network Rail notes that this provision relates to transfers of land within 15 metres of Network Rail's operational railway and therefore the likelihood of any such notice being required is minimal.

Protective Provisions, paragraph 21 – arbitration provision

- 22 Network Rail requests that this provision be amended to ensure that both the undertaker *and* the arbitrator will have to take into consideration the matters listed at paragraph 21 (namely, obtaining the relevant clearance conditions and other consents) when considering an extension of time in relation to the arbitration timetable following a request by Network Rail on those grounds.
- 23 Further, on the basis that paragraph 21 includes a provision for Network Rail to act reasonably when complying with the time limits in Schedule 13, it does not agree that any extension of time should, in itself, be subject to the test of reasonableness.

In summary, Network Rail requests that the network Rail Protective Provisions attached to this letter are included in the Order.

Network Rail will respond to any written questions that the ExA has about this letter and will continue to work with the applicant to try and agree these outstanding matters before the close of the Examination.

Yours faithfully



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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;

“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 1 Eversholt Street, London, NW1 2DN 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) 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 project as is situated upon, across, under, over or within 15 metres of, or may in any way adversely affect, railway property and for the avoidance of doubt includes the exercise of the powers conferred by article 4 (powers to maintain authorised project), article 12 (access to works), article 15 (discharge of water), article 17 (authority to survey and investigate the land onshore); article 34 (felling or lopping of trees and removal of hedgerows) and article 35 (trees subject to tree preservation orders) in respect of any railway property.

3.—(1) Where under this Part Network Rail is required to give its consent or approval in respect of any matter, that consent 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 18 (compulsory acquisition of land), article 20 (compulsory acquisition of rights), article 21 (private rights), article 23 (acquisition of subsoil only), article 26 (temporary use of land for carrying out the authorised project), article 27 (temporary use for land for maintaining the authorised project) 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 28 (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.

(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 pursuant to this paragraph, such consent 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 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 37 (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 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 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 must be carried out at the expense of the undertaker in either case without unnecessary delay and the undertaker must not commence the construction of the specified 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) 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.

(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 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, 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;
- (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 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 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 project) which are owned or used by Network Rail for the purpose of transmitting or receiving electrical energy or of radio,

~~106~~ 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 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 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 project and regardless of any measures adopted under sub-paragraph (3), the testing or commissioning of the authorised 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 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 subparagraph (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;
- (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 subparagraphs (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 must be carried out and completed by the undertaker in accordance with paragraph 6.

(9) To the extent that it would not otherwise do so, the indemnity in paragraph 15(1) applies, subject to paragraphs 15(2) to 15(8), to the costs and expenses reasonably incurred or losses reasonably suffered by Network Rail through the implementation of the provisions of this

paragraph (including costs reasonably 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 37 (arbitration) to the Secretary of State shall be read as a reference to the Institution of Engineering and Technology for appointment of an arbitrator.

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) 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) the construction or maintenance of a specified work or the failure of such a work; or
 - (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) 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 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 give the undertaker reasonable written notice of any such claim or demand and no settlement or compromise of such a claim or demand shall be made without the prior consent of the undertaker.

~~(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 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 (34) which relates to the relevant costs of that train operator.

(6) The obligation under sub-paragraph (34) 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) Network Rail must use its reasonable endeavours to mitigate in whole or in part and to minimise any costs, expenses, loss, demands, and penalties to which the indemnity under this paragraph 15 applies. If requested to do so by the undertaker, Network Rail shall provide an explanation of how the claim has been minimised. The undertaker shall only be liable under this paragraph 15 for claims reasonably incurred by Network Rail.~~

~~(7)~~ (8) 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.

20. 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 the Order) of this Order in relation to land within 15m of Network Rail’s operational railway and any such notice must be given no later than ~~14~~²⁸ days before any such application is made and must describe or give (as appropriate)—

- (a) whether the application is for consent pursuant to article 5(a) or 5(b);
- (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

21. In relation to any dispute arising under this Part that is referred to arbitration in accordance with article 37 (arbitration) of the Order, the undertaker ~~and the arbitrator~~ will agree to any ~~reasonable~~ extension of time requested by Network Rail pursuant to paragraph 5(3) of Schedule 13 where Network Rail can demonstrate that it is unable (acting reasonably) to comply with the time limit due to 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.

22. 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 36 (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 reasonably specified by Network Rail.

PART 6

FOR THE PROTECTION OF ANGLIAN WATER SERVICES LIMITED

~~1. For the protection of Anglian Water, the following provisions of this Schedule, unless otherwise agreed in writing between the undertaker and Anglian Water shall have effect.~~

~~2. In this part of this Schedule—~~

~~“alternative apparatus” means alternative apparatus adequate to enable Anglian Water to fulfil its statutory functions in not less efficient a manner than previously;~~

~~“Anglian Water” means Anglian Water Services Limited;~~

~~“Apparatus” means any works, mains, pipes or other apparatus belonging to or maintained by Anglian Water for the purposes of water supply and sewerage and—~~

~~(a) any drain or works vested in Anglian Water under the Water Industry Act 1991;~~

~~(b) any sewer which is so vested or is the subject of a notice of intention to adopt given under section 102 (4) of the Water Industry Act 1991 or an agreement to adopt made under section 104 of that Act,~~

~~and includes a sludge main, disposal main or sewer outfall and any manholes, ventilating shafts, pumps or other accessories forming part of any sewer, drain, or works (within the meaning of section 219 of that Act) and any structure in which apparatus is or is to be lodged or which gives or will give access to apparatus;~~

~~“functions” includes powers and duties;~~

~~“in” in a context referring to apparatus or alternative apparatus in land includes a reference to apparatus or alternative apparatus under, over or upon land; and~~

~~“plan” includes sections, drawings, specifications and method statements.~~

~~3. This Part of this Schedule does not apply to apparatus to the extent that the relations between the undertaker and Anglian Water are regulated by the provisions of Part 3 of the 1991 Act.~~

~~4. The undertaker must not interfere with, build over or near to any Apparatus within the Order land or execute the placing, installation, bedding, packing, removal, connection or disconnection of any apparatus, or execute any filling around the apparatus (where the apparatus is laid in a trench) within the standard protection strips which are the strips of land falling, the following distances to either side of the medial line of any Apparatus—~~

~~(a) 2.25 metres where the diameter of the pipe is less than 150 millimetres~~

~~(b) 3 metres where the diameter of the pipe is between 150 and 450 millimetres~~

~~(c) 4.5 metres where the diameter of the pipe is between 450 and 750 millimetres~~

~~(d) 6 metres where the diameter of the pipe exceeds 750 millimetres;~~