

Rampion 2 Wind Farm

Category 8: Examination Documents

8.91 Applicant's Response to Action Points Arising from ISH2 and CAH 1 for Deadline 5

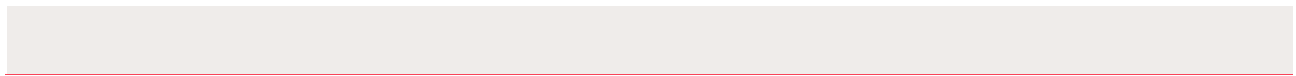
Date: July 2024
Revision A

Application Reference: 8.91
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Document revisions

Revision	Date	Status/reason for issue	Author	Checked by	Approved by
A	09/07/2024	Deadline 5	GoBe WSP	RED	RED



1. Introduction

1.1 Purpose of this Document

- 1.1.1 This document has been provided by the Applicant in response to the **Action points arising from Issue Specific Hearing 2 [EV5-018]** and the **Action points from Compulsory Acquisition Hearing 1 [EV6-012]** documents issued by the Examining Authority.
- 1.1.2 Whilst the large majority of these action points were responded to at Deadline 4 (see Applicant's Response to Actions Points Arising from Issue Specific Hearing 2 and Compulsory Acquisition Hearing 1 **[REP4-074]**), there are some that require a response by Deadline 5, as set out in Table 2-1 below.

Table 1-1 Action Points Requiring a Response by Deadline 5

Action Point	Requirement	Response Provided
Issue Specific Hearing 2		
19	Applicant to consider the submission of outline Cable Specification and Installation Plan document and an outline Cable Burial Risk Assessment.	This information is included as part of 8.85 Outline Cable Burial Risk Assessment and the 8.88 Outline Cable Specification and Installation Plan submitted at Deadline 5.
20	Applicant to consider the submission of a document to compare the equipment and methodology for cable burial, including any lessons learnt from Rampion 1.	<p>The Applicant has considered, but will not be submitting a cable installation method appraisal for Deadline 5. The reasons for not submitting such an appraisal are related to:</p> <ol style="list-style-type: none"> 1) The requirements for the cable installation will be determined further following offshore site investigation campaigns and the detailed cable burial risk assessment, which will outline the cable protection requirements as per the assessed risk to cables in the offshore environment. 2) The potential environmental performance of each installation method (such as footprint or sediment plume) will vary significantly across the variable seabed conditions. Multiple methods may be applied during cable installation in different seabed conditions in the export cable corridor or the array area to ensure the cable installation design and method objectives are achieved. Following the necessary site investigation and study phases detailed construction designs will be completed and the potential environmental impact of cable installation in areas of the array could be estimated. During the detailed construction design stage, the environmental performance would be considered. 3) The specific environmental performance is expected to vary even for each type of installation method between installation service providers in the

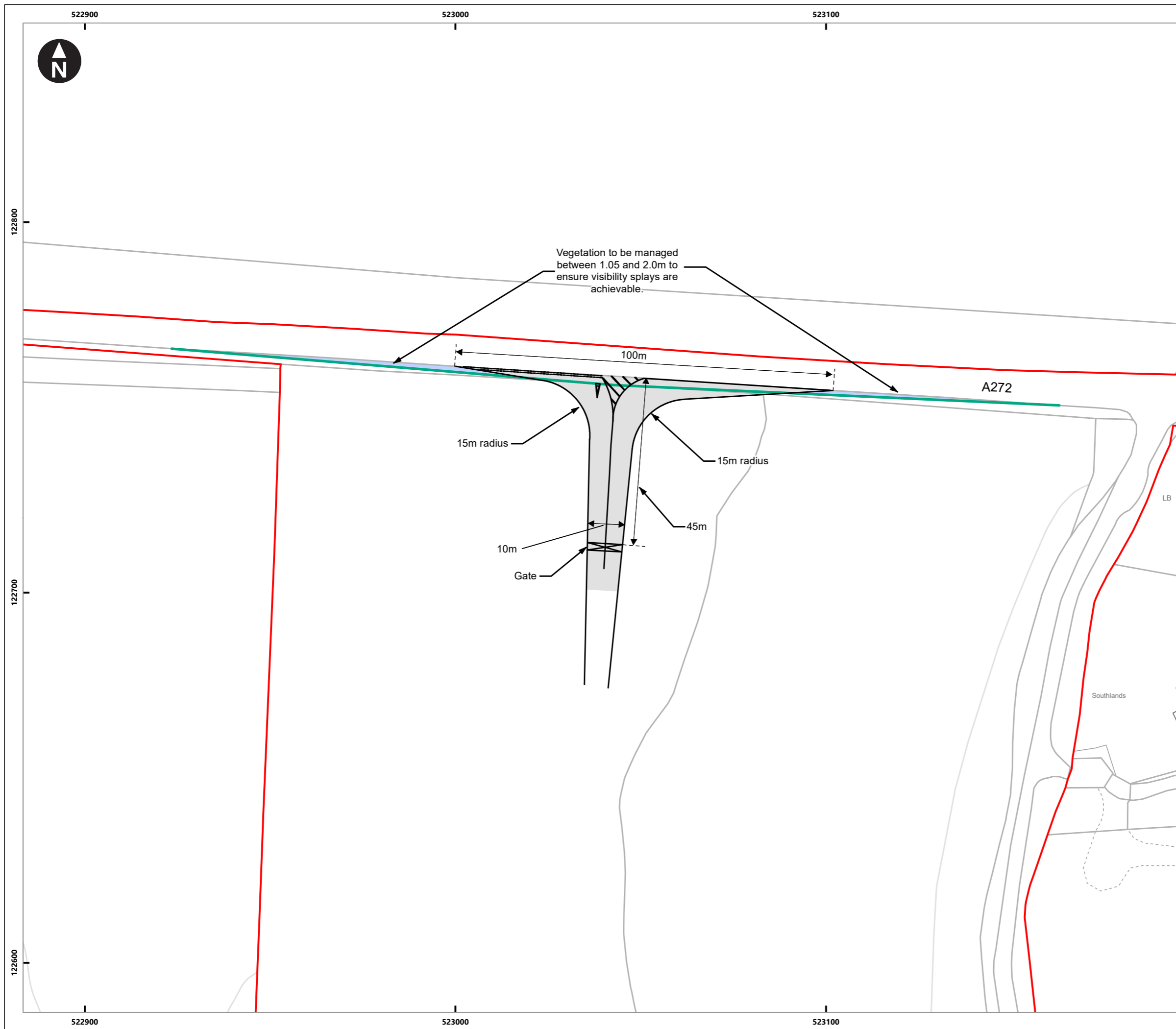
Action Point	Requirement	Response Provided
		industry, who may be operating different models or sizes of equipment. This makes the estimation around potential environmental performance impractical, until the Applicant has had more detailed engagement with installation service providers on the basis of detailed site investigation data as part of the tendering process for the delivery of this project.
22	The Applicant to submit the population modelling that Natural England suggest for the bottlenose dolphin.	Please see Applicant's Response to Action Point 22 – Bottlenose Dolphin Population Modelling (Document Reference 8.90) submitted at Deadline 5.
23	Applicant to present plan at D4 to Natural England and update on progress on discussions with Natural England for offshore in principle monitoring plan.	A meeting has been held with Natural England on Friday 28 June 2024 regarding this point. Progress is recorded in the Statement of Common Ground between the Applicant and Natural England (Document Reference 8.8) which has been updated since Deadline 4 and which is submitted at this deadline.
33	ExA requested a plan consolidating all tree and hedgerow information.	This information is to be provided in the Outline Vegetation Retention and Removal Plan (Document Reference 8.87) submitted at Deadline 5.
43	The Applicant to complete and submit a design for access A63 (the proposed substation site).	An access from the A63 to the substation has been provided to West Sussex County Council (as the Highway Authority), a copy of which is included as Appendix A of this document. Details will be confirmed following completion of the Road Safety Audit, and final detail signed off in accordance with Requirement 15 of the draft DCO.
56	The Applicant to update all traffic and access related documents in the Environmental Statement using the latest traffic data and modelling assumptions.	This information is be provided in the updates to the Outline Construction Traffic Management Plan, Environmental Statement - Volume 4 Appendix 23.2: Traffic Generation Technical Note (Document Reference 6.4.23.2) submitted at Deadline 5.

Compulsory Acquisition Hearing 1

- 3** If there is no agreement on Protective Provisions with all statutory undertakers prior to Deadline 5, the Applicant and Statutory Undertakers to submit, preferably jointly, Protective Provisions with tracked changes on the differences, together with an explanation for additions/omissions.
- Protective provisions have been agreed with Southern Gas Networks (SGN) and Scottish and Southern Electricity (SSE) and the agreed position is reflected in the draft DCO submitted at Deadline 5 (Application Document Ref. 3.1E). The Applicant is in the process of agreeing side agreements with both SSE and SGN, with only the indemnity wording to be agreed in respect of each agreement. It is anticipated that this will be agreed shortly.
- The Applicant is engaged in ongoing discussions with National Grid Electricity Transmission (NGET) in respect of suitable protective provisions. **Appendix B** sets out the provisions which remain to be agreed.
- The Applicant is engaged in ongoing discussions with Network Rail in respect of suitable protective provisions. **Appendix C** sets out the provisions which remain to be agreed.
- The Applicant is engaged in ongoing discussions and negotiations with National Highways in respect of suitable protective provisions. **The Applicant's Comments on Deadline 4 Submissions** (Document 8.84) sets out the provisions which remain to be agreed and the Applicant's detailed commentary on this.

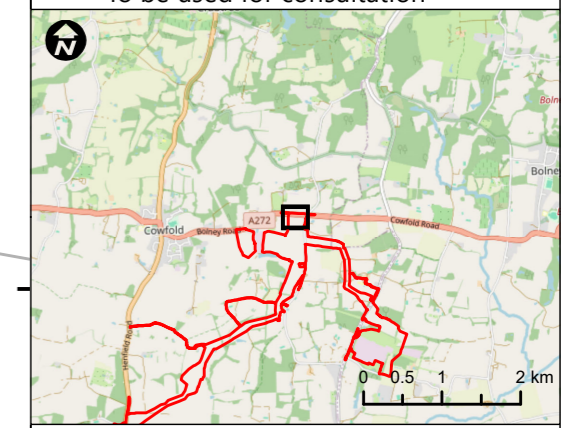
Appendix A

Action Point 43 – Details of A63 Access



- Key**
- Proposed DCO Order Limits
 - Proposed Access
 - Visibility Splay (2.4m by 120m based upon DMRB Sight Distance for 40mph)
 - Overrun Area
 - Vegetation Management

- Access Notes:**
1. All dimension shown in metres unless otherwise stated.
 2. Indicative only. Subject to future detailed design.
 3. Preliminary design covered in 42285-WOOD-ES-ON-RP-MD-0020.
 4. Existing utilities omitted for clarity.
 5. Final design to be agreed with stakeholders.
 6. Access design should be read in conjunction with the Outline Construction Traffic Management Plan.
 7. Visibility splays in both directions fully achieved.
- To be used for consultation**



NOTES:

i. Due to scaling, some narrow areas (i.e. existing tracks) within the red line boundary may appear as a single/solid red line on the map.

Metres
 0 8 16 24 32
 1:1,000
 British National Grid Transverse Mercator



Rampion 2 Offshore Wind Farm

Preliminary Access Design - Substation (A-63)

System Identifier: 42285-WOOD-EX-ON-PN-MD-0006					Version: 3.0
Company: WOOD	Drawn: IM	Chckd: CW	Aprvd: SN	Drawn Date: 05/06/2024	Status: FOR USE

Appendix B

Commentary on the outstanding issues between the Applicant and National Grid Electricity Transmission Limited (“NGET”) in relation to the Protective Provisions

**Commentary on the outstanding issues between the Applicant and National Grid Electricity Transmission Limited (“NGET”) in relation to the Protective Provisions
9 July 2024**

A mark up the version of the protective provisions submitted at Deadline 5 is appended to this submission, showing the amendments sought by NGET in tracked changes. A commentary of these changes is set out in the table below:

Provision	Applicant’s comment	NGET’s comment
<p>Inclusion of definitions of “Incentive Deduction” and “STC Claim” and inclusion of these heads of loss in an indemnity</p>	<p>The Applicant is awaiting clarification as to the scope of the liability which these heads of loss are intended to cover.</p> <p>[The Applicant welcomes the clarification provided by NGET after this submission was finalised and will be considering this further after Deadline 5.]</p>	<p>Incentive Deduction</p> <p>The “Incentive Deduction” refers to an incentive in NGET’s Electricity Transmission Licence concerning maintaining a continuous supply to demand customers (those parties that take load from the system) by ensuring that its system is functioning fully and efficiently. If there are system issues that prevent supply from reaching demand customers then these customers will be restricted and the incentive is reduced based on the restriction window. Essentially, it is a financial incentive for NGET to ensure its system works efficiently and without faults. The Protective Provisions seek to address the scenario where the works that the counterparty is carrying out over or near NGET’s system damages that system or otherwise causes it to not function correctly and therefore restrict this supply. In this scenario the counterparty would cover any related deductions to this incentive.</p> <p>STC Claims</p> <p>The STC Claims relate to “Interruption Payments” under the electricity codes – the System Operator Transmission Owner Code (STC) and Connection and User of Systems Code (CUSC). These codes were agreed and are updated by Stakeholders (including the energy regulator Ofgem). These payments cover situations when an event on NGET’s transmission system causes generation or interconnectors to be unable to export their load to the system. If a successful claim is made by a generator or interconnector for interruption, NGET pays the Interruption Payment to NGESO (as system operator) who in turn pays the generator or interconnector. Again, the purpose of including this in the Protective Provisions is to</p>

		<p>cover where the counterparty's actions damage or alter NGET's transmission system and this causes generation to be constrained and interruption payments to be made. The counterparty would cover these payments.</p> <p>In both cases the indemnity already covers the scenario envisaged for an incentive deduction or an STC claim but this wording is included for clarification.</p>
<p>Inclusion of paragraph 4 (Acquisition of land) and associated definition of "deed of consent".</p>	<p>The Applicant cannot accept restrictions on its ability to exercise its powers under the Order in the absence of a voluntary agreement being in place in order since this would prevent the Applicant from being able to build out the Development. The parties are currently in discussions to agree a property agreement, and are seeking to agree suitable wording to address NGET's concerns in relation to rights sought over its land.</p>	<p>NGET is a statutory undertaker within the meaning of section 127(8) of the Planning Act 2008. In these circumstances, section 127(2) and (5) provide that any order granting development consent for the Project may only include provision authorising the compulsory acquisition of NGET's land or rights therein if this can be done without serious detriment to the carrying on of NGET's undertaking (whether by the provision of replacement land or otherwise) or any detriment in consequence of the acquisition of a right can be made good.</p> <p>As matters stand, serious detriment to NGET's undertaking would result from the Project, for the reasons explained by NGET at CAH 1. In summary, this is because NGET needs to retain ownership and control of its land in order to facilitate customer connections at Bolney substation. The Applicant's proposal to compulsorily acquire rights and impose restrictions over this land would make it more difficult to site other customers' cables in this area and may have the effect of sterilising the land entirely for that purpose. NGET's consent should be required to exercise powers of compulsory acquisition, so that NGET can control the extent of such rights and restrictions.</p> <p>Connections to the National Electricity Transmission System ("NETS") are a highly</p>

		<p>valuable resource which NGET, as the relevant statutory undertaker, plays a vital role in coordinating. NGET is able, and is in fact obliged, to take a whole system view rather than considering this issue only in terms of the needs of individual applicants. Permitting the Applicant to compulsorily acquire the rights and restrictions it seeks would interfere with NGET's ability to carry out that co-ordinating role, and may prevent others from connecting to the transmission system or make such connections unnecessarily complex. Further, OFGEM would likely be concerned if NGET undertook any steps which would prevent it from managing future connections to the electricity generation system for the benefit of a single customer. It would, therefore, cause serious detriment to NGET's ability to carry on its undertaking. Requiring NGET's consent before such compulsory acquisition can take place would prevent serious detriment from arising.</p>
<p>Removal of "reasonable" in paragraph 5(2) (Removal of apparatus) so that facilities and rights for alternative apparatus are to be provided to National Grid's 'satisfaction' (rather than 'reasonable satisfaction')</p>	<p>The inclusion of "reasonable" here was accepted in The A66 Northern Trans-Pennine Development Consent Order 2024/564 and The Keadby 3 (Carbon Capture Equipped Gas Fired Generating Station) Order 2022/1396. It may not be possible to obtain all rights which National Grid specifies and the obligation should be to secure what is reasonable to meet its needs.</p>	<p>NGET does not accept the Applicant's approach of citing other DCOs in which Protective Provisions contain different wording to that sought in this case. There are, equally, DCOs containing NGET's preferred wording. Cherry-picking examples in this way is unlikely to assist the Examining Authority in relation to this DCO. There are likely to be reasons specific to the DCOs referred to by the Applicant that justify the approach taken in those cases and which may not apply in this case.</p> <p>NGET's position reflects its standard Protective Provisions, which have been drafted so as to provide, when taken as a whole, the level of protection needed for the NETS. The NETS is nationally significant infrastructure in its own right and NGET submits that it should receive the</p>

		<p>highest degree of protection where a third party's development could place it at risk.</p> <p>NGET submits that if the Applicant requires the removal of National Grid apparatus, NGET needs complete discretion to be able to specify the facilities and rights it requires in respect of alternative apparatus. NGET, not the Applicant, is in the best position to specify the facilities and rights it needs and it therefore should not be required to justify that these are reasonable.</p>
<p>Replacement of "must" with "may in its sole discretion" in paragraph 5(2) (Removal of apparatus) so that National Grid's has discretion as to whether to assist the undertaker with obtaining the necessary facilities and rights in the land in which the alternative apparatus is to be constructed (rather than must assist)</p>	<p>The Applicant will not have compulsory powers of acquisition outside of the Order limits and therefore requires an absolute obligation on NGET to do what is reasonable in the circumstances to assist it in obtaining these rights. Any costs incurred by NGET will be reimbursed.</p> <p>The requested drafting was included in the recent The Sheringham Shoal and Dudgeon Extensions Offshore Wind Farm Order 2024/564 and The A66 Northern Trans-Pennine Development Consent Order 2024/360. The remainder of the paragraph makes clear that NGET is not obliged to use its compulsory powers of acquisition to satisfy this obligation.</p>	<p>Please see NGET's comments above as to the Applicant's of precedent.</p> <p>NGET's position again reflects its standard Protective Provisions. This paragraph of the Protective Provisions deals with the removal and relocation of NGET's infrastructure for the Applicant's benefit. The Protective Provisions should not place an obligation on NGET to assist with this, although its position is that in practice it may do so.</p>
<p>Removal of paragraph 7(12) (retained apparatus: protection) so that deemed approval does not occur where National Grid fails to respond to a request for approval after 56 days</p>	<p>The Applicant requires deemed approvals in order to ensure that there are no unreasonable delays to the Proposed Development in the event that NGET fails to respond in a timely way in response to approval requests. The wording does not require NGET to have taken a decision in the 56 day time frame, it must only respond to avoid approval being deemed to be given.</p>	<p>As already noted, the NETS is nationally significant infrastructure in its own right. NGET does not envisage that it would ever fail to respond to such a request. However, given the consequences if damage occurred to the NETS, NGET's position is that its express approval must be given to specified works. If NGET were to fail to respond, this could be resolved as a dispute via the arbitration provisions in the order, so the Applicant's concerns about "unreasonable delays" are unfounded.</p>
<p>Inclusion of paragraph 9 (Indemnity) and associated definitions of "acceptable credit provider"; and "acceptable insurance".</p>	<p>The Applicant is agreeable in principle to providing insurance / security but considers that all commercial provisions should be contained in</p>	<p>Please see NGET's comments above as to the Applicant's use of precedent.</p>

	<p>a side agreement rather than being included on the face of the dDCO.</p> <p>This reflects what is understand to have been agreed as part of the Hornsea 4, East Anglia One North and the Sheringham and Dudgeon Examinations as the relevant Orders do not contain these provisions. The Applicant considers that this approach should be followed in respect of the dDCO.</p>	<p>The Applicant agrees in principle that these should be provided and has not advanced any substantive justification as to why they should not be included on the face of the order, as they are in relation to almost all DCOs.</p> <p>In any event, NGET does not accept that these are “commercial” provisions that should be treated differently from the other elements of the Protective Provisions. The Protective Provisions as a whole represent the level of protection that NGET considers is required in respect of the NETS. These should be on the face of the order in their entirety so that this is clear to the wider market.</p>
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NATIONAL GRID ELECTRICITY TRANSMISSION PLC

SCHEDULE 1

PROTECTIVE PROVISIONS

PART 3

FOR THE PROTECTION OF NATIONAL GRID ELECTRICITY TRANSMISSION PLC AS ELECTRICITY UNDERTAKER

Application

1.(1) For the protection of National Grid as referred to in this Part of this Schedule the following provisions have effect, unless otherwise agreed in writing between the undertaker and National Grid.

(2) Subject to sub-paragraph (3) or to the extent otherwise agreed in writing between the undertaker and National Grid, where the benefit of this Order is transferred or granted to another person under article 5 (*benefit of Order*) –

- (a) any agreement of the type mentioned in subparagraph (1) has effect as if it had been made between National Grid and the transferee or grantee (as the case may be); and
- (b) written notice of the transfer or grant must be given to National Grid on or before the date of that transfer or grant.
- (3) Sub-paragraph (2) does not apply where the benefit of the Order is transferred or granted to National Grid (but without prejudice to 11(3)b).

Interpretation

2. In this Part of this Schedule—

“1991 Act” means the New Roads and Street Works Act 1991;

“acceptable credit provider” means a bank or financial institution with a credit rating that is not lower than: (i) “A-” if the rating is assigned by Standard & Poor’s Ratings Group or Fitch Ratings; and “A3” if the rating is assigned by Moody’s Investors Services Inc.;

“acceptable insurance” means general third party liability insurance effected and maintained by the undertaker with a combined property damage and bodily injury limit of indemnity of not less than £50,000,000.00 (fifty million pounds) per occurrence or series of occurrences arising out of one event. Such insurance shall be maintained (a) during the construction period of the authorised works; and (b) after the construction period of the authorised works in respect of any use and maintenance of the authorised development by or on behalf of the undertaker which constitute specified works and arranged with an insurer whose security/credit rating meets the same requirements as an “acceptable credit provider”, such insurance shall include (without limitation):

(a) a waiver of subrogation and an indemnity to principal clause in favour of National Grid

(b) pollution liability for third party property damage and third party bodily damage arising from any pollution/contamination event with a (sub)limit of indemnity of not less than £10,000,000.00 (ten million pounds) per occurrence or series of occurrences arising out of one event or £20,000,000.00 (twenty million pounds) in aggregate;

“acceptable security” means either:

(a) a parent company guarantee from a parent company in favour of National Grid to cover the undertaker’s liability to National Grid to a total liability cap of £50,000,000.00 (fifty million pounds) (in a form reasonably satisfactory to National Grid and where required by National Grid, accompanied with a legal opinion confirming the due capacity and authorisation of the parent company to enter into and be bound by the terms of such guarantee); or

(b) a bank bond or letter of credit from an acceptable credit provider in favour of National Grid to cover the undertaker’s liability to National Grid for an amount of not less than £25,000,000.00 (twenty-five million pounds) per asset per event up to a total liability cap of £50,000,000.00 (fifty million pounds) (in a form reasonably satisfactory to National Grid);

“alternative apparatus” means appropriate alternative apparatus to the satisfaction of National Grid to enable National Grid to fulfil its statutory functions in a manner no less efficient than previously;

“apparatus” means any electric lines or electrical plant as defined in the Electricity Act 1989, belonging to or maintained by National Grid together with any replacement apparatus and such other apparatus constructed pursuant to the Order that becomes operational apparatus of National Grid for the purposes of transmission, distribution and/or supply and includes any structure in which apparatus is or will be lodged or which gives or will give access to apparatus;

“authorised works” has the same meaning as is given to the term “authorised development” in article 2(1) of this Order and includes any associated development authorised by the Order and for the purposes of this Part of this Schedule includes the use and maintenance of the authorised works and construction of any works authorised by this Schedule;

“commence” and “commencement” in this Part of this Schedule shall include any below ground surveys, monitoring, ground work operations or the receipt and erection of construction plant and equipment;

“deed of consent” means a deed of consent, crossing agreement, deed of variation or new deed of grant agreed between the parties acting reasonably in order to vary or replace existing easements, agreements, enactments and other such interests so as to secure land rights and interests as are necessary to carry out, maintain, operate and use the apparatus in a manner consistent with the terms of this Part of this Schedule;

“functions” includes powers and duties;

“ground mitigation scheme” means a scheme approved by National Grid (such approval not to be unreasonably withheld or delayed) setting out the necessary measures (if any) for a ground subsidence event;

“ground monitoring scheme” means a scheme for monitoring ground subsidence which sets out the apparatus which is to be subject to such monitoring, the extent of land to be monitored, the manner in which ground levels are to be monitored, the timescales of any monitoring activities and the extent of ground subsidence which, if exceeded, shall require the undertaker to submit for National Grid's approval a ground mitigation scheme;

“ground subsidence event” means any ground subsidence identified by the monitoring activities set out in the ground monitoring scheme that has exceeded the level described in the ground monitoring scheme as requiring a ground mitigation scheme;

“in” in a context referring to apparatus or alternative apparatus in land includes a reference to apparatus or alternative apparatus under, over, across, along or upon such land;

“Incentive Deduction” means any incentive deduction National Grid Electricity Transmission plc receives under its electricity transmission licence which is caused by an event on its transmission system that causes electricity not to be supplied to a demand customer and which arises as a result of the authorised works;]

“maintain” and “maintenance” shall include the ability and right to do any of the following in relation to any apparatus or alternative apparatus of National Grid: construct, use, repair, alter, inspect, renew or remove the apparatus;

“National Grid” means National Grid Electricity Transmission Plc (Company Number 2366977) whose registered office is at 1-3 Strand, London, WC2N 5EH or any successor as a licence holder within the meaning of Part 1 of the Electricity Act 1989;

“NGESO” means as defined in the STC;

“plan” or “plans” include all designs, drawings, specifications, method statements, soil reports, programmes, calculations, risk assessments and other documents that are reasonably necessary properly and sufficiently to describe and assess the works to be executed;

“parent company” means a parent company of the undertaker acceptable to and which shall have been approved by National Grid acting reasonably;

“specified works” means any of the authorised works or activities undertaken in association with the authorised works which:

(a) will or may be situated over, or within 15 metres measured in any direction of any apparatus the removal of which has not been required by the undertaker under paragraph 4(2) or otherwise; and/or

(b) may in any way adversely affect any apparatus the removal of which has not been required by the undertaker under paragraph 4(2) or otherwise; and/or

(c) includes any of the activities that are referred to in development near overhead lines EN43-8 and HSE’s guidance note 6 “Avoidance of Danger from Overhead Lines”.

“STC” means the System Operator Transmission Owner Code prepared by the electricity Transmission Owners and NGENSO as modified from time to time;

[“STC Claims” means any claim made under the STC against National Grid Electricity Transmission plc arising out of or in connection with the de-energisation (whereby no electricity can flow to or from the relevant system through the generator or interconnector’s equipment) of a generator or interconnector party solely as a result of the de-energisation of plant and apparatus forming part of National Grid Electricity Transmission plc’s transmission system which arises as a result of the authorised works;]

“Transmission Owner” means as defined in the STC;

“undertaker” means the undertaker as defined in article 2(1) of this Order;

Apparatus of National Grid in stopped up streets

—(1) Notwithstanding the temporary stopping up or diversion of any highway under the powers of article 11 [*temporary closure of streets*], National Grid is at liberty at all times to take all necessary access across any such stopped up highway and to execute and do all such works and things in, upon or under any such highway as may be reasonably necessary or desirable to enable it to maintain any apparatus which at the time of the stopping up or diversion was in that highway.

Protective works to buildings

3. The undertaker, in the case of the powers conferred by article 17 (protective work to buildings), must exercise those powers so as not to obstruct or render less convenient the access to any apparatus without the written consent of National Grid.

4. Acquisition of land

(1) Regardless of any provision in this Order or anything shown on the land plans or contained in the book of reference to the Order, the undertaker may not (a) appropriate or acquire or take temporary possession of any land or apparatus or ((b) appropriate, acquire, extinguish, interfere with or override any easement, other interest or right and/or apparatus of National Grid otherwise than by agreement.

(2) As a condition of an agreement between the parties in sub-paragraph (1), prior to the carrying out of any part of the authorised works (or in such other timeframe as may be agreed between National Grid and the undertaker) that is subject to the requirements of this Part of this Schedule that will cause any conflict with or breach the terms of any easement or other legal or land interest of National Grid or affect the provisions of any enactment or agreement regulating the relations between National Grid and the undertaker in respect of any apparatus laid or erected in land belonging to or secured by the undertaker, the undertaker must as National Grid reasonably requires enter into such deeds of consent upon such terms and conditions as may be agreed between National Grid and the undertaker acting reasonably and which must be no less favourable on the whole to National Grid unless otherwise agreed by National Grid, and it will be the responsibility of the undertaker to procure and/or secure the consent and entering into of such deeds and variations by all other third parties with an interest in the land at that time who are affected by such authorised works.

(3) Save where otherwise agreed in writing between National Grid and the undertaker the undertaker and National Grid agree that where there is any inconsistency or duplication between the provisions set out in this Part of this Schedule relating to the relocation and/or removal of apparatus/including but not limited to the payment of costs and expenses relating to such relocation and/or removal of apparatus) and the provisions of any existing easement, rights, agreements and licences granted, used, enjoyed or exercised by National Grid and/or other enactments relied upon by National Grid as of right or other use in relation to the apparatus, then the provisions in this Schedule shall prevail.

(4) Any agreement or consent granted by National Grid under paragraph 9 or any other paragraph of this Part of this Schedule, shall not be taken to constitute agreement under sub-paragraph (1).

Removal of apparatus

4.5.—(1) If, in the exercise of the powers conferred by this Order, the undertaker acquires any interest in or possesses temporarily any land in which any apparatus is placed, that apparatus must not be removed under this Part of this Schedule and any right of National Grid to maintain that apparatus in that land must not be extinguished until alternative apparatus has been constructed, and is in operation to the reasonable satisfaction of National Grid in accordance with sub-paragraph (2) to (5).

(2) If, for the purpose of executing any works in, on, under or over any land purchased, held, appropriated or used under this Order, the undertaker requires the removal of any apparatus placed in that land, it must give to National Grid advance written notice of that requirement, together with a plan of the work proposed, and of the proposed position of the alternative apparatus to be provided or constructed and in that case (or if in consequence of the exercise of any of the powers conferred by this Order National Grid reasonably needs to remove any of its apparatus) the undertaker must, subject to sub-paragraph (3), secure any necessary consents for the alternative apparatus and afford to National Grid to its ~~reasonable~~ satisfaction (taking into account paragraph 5(1) below) the necessary facilities and rights

(a) for the construction of alternative apparatus in other land of or land secured by the undertaker; and

(b) subsequently for the maintenance of that apparatus.

(3) If alternative apparatus or any part of such apparatus is to be constructed elsewhere than in other land of or land secured by the undertaker, or the undertaker is unable to afford such facilities and rights as are mentioned in sub-paragraph (2) in the land in which the alternative apparatus or part of such apparatus is to be constructed, National Grid ~~may in its sole discretion~~ **must**, on receipt of a written notice to that effect from the undertaker, take such steps as are reasonable in the circumstances to assist the undertaker to obtain the necessary facilities and rights in the land in which the alternative apparatus is to be constructed save that this obligation shall not extend to the requirement for National Grid to use its compulsory purchase powers to this end unless it elects to do so.

(4) Any alternative apparatus to be constructed in land of or land secured by the undertaker under this Part of this Schedule must be constructed in such manner and in such line or situation as may be agreed between National Grid and the undertaker.

(5) National Grid must, after the alternative apparatus to be provided or constructed has been agreed, and subject to a written diversion agreement having been entered into between the parties and the grant to National Grid of any such facilities and rights as are referred to in sub-paragraph (2) or (3), proceed without unnecessary delay to construct and bring into operation the alternative apparatus and subsequently to remove any apparatus required by the undertaker to be removed under the provisions of this Part of this Schedule.

Facilities and rights for alternative apparatus

~~5.6.~~—(1) Where, in accordance with the provisions of this Part of this Schedule, the undertaker affords to or secures for National Grid facilities and rights in land for the construction, use, maintenance and protection of alternative apparatus in substitution for apparatus to be removed, those facilities and rights must be granted upon such terms and conditions as may be agreed between the undertaker and National Grid and must be no less favourable on the whole to National Grid than the facilities and rights enjoyed by it in respect of the apparatus to be removed unless otherwise agreed by National Grid.

(2) If the facilities and rights to be afforded by the undertaker in respect of any alternative apparatus, and the terms and conditions subject to which those facilities and rights are to be granted, are less favourable on the whole to National Grid than the facilities and rights enjoyed by it in respect of the apparatus to be removed and the terms and conditions to which those facilities and rights are subject the matter may be referred to arbitration in accordance with paragraph 12 (*Arbitration*) of this Part of this Schedule and the arbitrator must make such provision for the payment of compensation by the undertaker to National Grid as appears to the arbitrator to be reasonable having regard to all the circumstances of the particular case.

Retained apparatus: protection

~~6.7.~~—(1) Not less than 56 days before the commencement of any specified works the undertaker must submit to National Grid a plan of the works to be executed and seek from National Grid details of the underground extent of their electricity assets.

(2) In relation to specified works the plan to be submitted to National Grid under sub-paragraph (1) must include a method statement and describe—

- (a) the exact position of the works;
- (b) the level at which these are proposed to be constructed or renewed;
- (c) the manner of their construction or renewal including details of excavation, positioning of plant;
- (d) the position of all apparatus;
- (e) by way of detailed drawings, every alteration proposed to be made to or close to any such apparatus;
- (f) any intended maintenance regimes; and
- (g) an assessment of risks of rise of earth issues.
- (h) a ground monitoring scheme, where required.

(3) In relation to any works which will or may be situated on, over, under or within 10 metres of any part of the foundations of an electricity tower or between any two or more electricity towers, the plan to be submitted under sub-paragraph (1) must, in addition to the matters set out in sub-paragraph (2), include a method statement describing; -

- (a) details of any cable trench design including route, dimensions, clearance to pylon foundations;
- (b) demonstration that pylon foundations will not be affected prior to, during and post construction;
- (c) details of load bearing capacities of trenches;
- (d) details of any cable installation methodology including access arrangements, jointing bays and backfill methodology;
- (e) a written management plan for high voltage hazard during construction and ongoing maintenance of any cable route;

- (f) written details of the operations and maintenance regime for any cable, including frequency and method of access;
 - (g) assessment of earth rise potential if reasonably required by National Grid's engineers; and
 - (h) evidence that trench bearing capacity is to be designed to support overhead line construction traffic of up to and including 26 tonnes in weight.
- (4) The undertaker must not commence any works to which sub-paragraphs (2) or (3) apply until National Grid has given written approval of the plan so submitted.
- (5) Any approval of National Grid required under sub-paragraphs (4)—
- (a) may be given subject to reasonable conditions for any purpose mentioned in sub-paragraphs (6) or (8); and,
 - (b) must not be unreasonably withheld.
- (6) In relation to any work to which sub-paragraphs (2) or (3) apply, National Grid may require such modifications to be made to the plans as may be reasonably necessary for the purpose of securing its apparatus against interference or risk of damage, for the provision of protective works or for the purpose of providing or securing proper and convenient means of access to any apparatus.
- (7) Works executed under sub-paragraphs (2) or (3) must be executed in accordance with the plan, submitted under sub-paragraph (1) or as relevant sub-paragraph (6), as approved or as amended from time to time by agreement between the undertaker and National Grid and in accordance with such reasonable requirements as may be made in accordance with sub-paragraphs (6) or (8) by National Grid for the alteration or otherwise for the protection of the apparatus, or for securing access to it, and National Grid will be entitled to watch and inspect the execution of those works.
- (8) Where National Grid requires any protective works to be carried out by itself or by the undertaker (whether of a temporary or permanent nature) such protective works, inclusive of any measures or schemes required and approved as part of the plan approved pursuant to this paragraph, must be carried out to National Grid's satisfaction prior to the commencement of any authorised development (or any relevant part thereof) for which protective works are required and National Grid shall give notice its requirement for such works within 42 days of the date of submission of a plan pursuant to this paragraph (except in an emergency).
- (9) If National Grid in accordance with sub-paragraphs (6) or (8) and in consequence of the works proposed by the undertaker, reasonably requires the removal of any apparatus and gives written notice to the undertaker of that requirement, paragraphs 1 to 3 and 3 to 5 apply as if the removal of the apparatus had been required by the undertaker under paragraph 4(2).
- (10) Nothing in this paragraph precludes the undertaker from submitting at any time or from time to time, but in no case less than 56 days before commencing the execution of the authorised development, a new plan, instead of the plan previously submitted, and having done so the provisions of this paragraph shall apply to and in respect of the new plan.
- (11) The undertaker will not be required to comply with sub-paragraph (1) where it needs to carry out emergency works as defined in the 1991 Act but in that case it must give to National Grid notice as soon as is reasonably practicable and a plan of those works and must comply with sub-paragraphs (6), (7) and (8) insofar as is reasonably practicable in the circumstances and comply with sub-paragraph (11) at all times.
- (11) At all times when carrying out any works authorised under the Order, the undertaker must comply with National Grid's policies for development near overhead lines EN43-8 and HSE's guidance note 6 "Avoidance of Danger from Overhead Lines".
- ~~(12) An approval of National Grid required under sub-paragraph (4) or sub-paragraph (8) shall be deemed to be granted 14 days after the expiry of the 56 day period if no response to the request for approval has been provided within that initial 56 day period.~~

Expenses

~~7.8~~(1) Save where otherwise agreed in writing between National Grid and the undertaker and subject to the following provisions of this paragraph, the undertaker must pay to National Grid within 30 days of receipt of an itemised invoice or claim from National Grid all charges, costs and expenses reasonably and properly incurred by National Grid in, or in connection with, the inspection, removal, relaying or replacing, alteration or protection of any apparatus or the construction of any new or alternative apparatus which may be required in consequence of the execution of any authorised works including without limitation—

- (a) any costs reasonably incurred by or compensation properly paid by National Grid in connection with the acquisition of rights or the exercise of statutory powers for such apparatus including without limitation all costs incurred by National Grid as a consequence of National Grid;
 - (i) using its own compulsory purchase powers to acquire any necessary rights under paragraph 4(3); or
 - (ii) exercising any compulsory purchase powers in the Order transferred to or benefitting National Grid;
 - (b) in connection with the cost of the carrying out of any diversion work or the provision of any alternative apparatus, where no written diversion agreement is otherwise in place;
 - (c) the cutting off of any apparatus from any other apparatus or the making safe of redundant apparatus;
 - (d) the approval of plans;
 - (e) the carrying out of protective works, plus a capitalised sum to cover the cost of maintaining and renewing permanent protective works;
 - (f) the survey of any land, apparatus or works, the inspection and monitoring of works or the installation or removal of any temporary works reasonably necessary in consequence of the execution of any such works referred to in this Part of this Schedule.
- (2) There will be deducted from any sum payable under sub-paragraph (1) the value of any apparatus removed under the provisions of this Part of this Schedule and which is not re-used as part of the alternative apparatus, that value being calculated after removal.
- (3) If in accordance with the provisions of this Part of this Schedule—
- (a) apparatus of better type, of greater capacity or of greater dimensions is placed in substitution for existing apparatus of worse type, of smaller capacity or of smaller dimensions; or
 - (b) apparatus (whether existing apparatus or apparatus substituted for existing apparatus) is placed at a depth greater than the depth at which the existing apparatus was situated,

and the placing of apparatus of that type or capacity or of those dimensions or the placing of apparatus at that depth, as the case may be, is not agreed by the undertaker or, in default of agreement, is not determined by arbitration in accordance with paragraph 12 (*arbitration*) to be necessary, then, if such placing involves cost in the construction of works under this Part of this Schedule exceeding that which would have been involved if the apparatus placed had been of the existing type, capacity or dimensions, or at the existing depth, as the case may be, the amount which apart from this sub-paragraph would be payable to National Grid by virtue of sub-paragraph (1) will be reduced by the amount of that excess save to the extent that it is not possible in the circumstances to obtain the existing type of apparatus at the same capacity and dimensions or place at the existing depth in which case full costs will be borne by the undertaker.

(4) For the purposes of sub-paragraph (3)—

- (a) an extension of apparatus to a length greater than the length of existing apparatus will not be treated as a placing of apparatus of greater dimensions than those of the existing apparatus; and
 - (b) where the provision of a joint in a pipe or cable is agreed, or is determined to be necessary, the consequential provision of a jointing chamber or of a manhole will be treated as if it also had been agreed or had been so determined.
- (5) Any amount which apart from this sub-paragraph would be payable to National Grid in respect of works by virtue of sub-paragraph (1) will, if the works include the placing of apparatus provided in substitution for apparatus placed more than 7 years and 6 months earlier so as to confer on National Grid any financial benefit by deferment of the time for renewal of the apparatus in the ordinary course, be reduced by the amount which represents that benefit.

Indemnity

9.—(1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction of any works authorised by this Part of this Schedule or in consequence of the construction, use maintenance or failure of any of the authorised works by or on behalf of the undertaker or in consequence of any act or default of the undertaker (or any person employed or authorised by him) in the course of carrying out such works, including without limitation works carried out by the undertaker under this Part of this Schedule or any subsidence resulting from any of these works, any damage is caused to any apparatus or alternative apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal for the purposes of the authorised works) or property of National Grid, or there is any interruption in any service provided, or in the supply of any goods, by National Grid, or National Grid becomes liable to pay any amount to any third party, the undertaker will—

- (a) bear and pay on demand accompanied by an invoice or claim from National Grid the cost reasonably and properly incurred by National Grid in making good such damage or restoring the supply; and
- (b) indemnify National Grid for any other expenses, loss, demands, proceedings, damages, claims, penalty or costs incurred by or recovered from National Grid, by reason or in consequence of any such damage or interruption or National Grid becoming liable to any third party and including STC Claims or an Incentive Deduction other than arising from any default of National Grid.

(2) The fact that any act or thing may have been done by National Grid on behalf of the undertaker or in accordance with a plan approved by National Grid or in accordance with any requirement of National Grid or under its supervision will not (unless sub-paragraph (3) applies), excuse the undertaker from liability under the provisions of this sub-paragraph (1) unless National Grid fails to carry out and execute the works properly with due care and attention and in a skilful and workman like manner or in a manner that does not accord with the approved plan.

(3) Nothing in sub-paragraph (1) shall impose any liability on the undertaker in respect of-

- (a) any damage or interruption to the extent that it is attributable to the neglect or default of National Grid, its officers, servants, contractors or agents;
- (b) any authorised works and/or any other works authorised by this Part of this Schedule carried out by National Grid as an assignee, transferee or lessee of the undertaker with the benefit of the Order pursuant to section 156 of the Planning Act 2008 or article 5 (*benefit of the Order*) subject to the proviso that once such works become apparatus (“new apparatus”), any authorised works yet to be executed and not falling within this sub-section 3(b) will be subject to the full terms of this Part of this Schedule including this paragraph 8; and/or
- (c) any indirect or consequential loss of any third party (including but not limited to loss of use, revenue, profit, contract, production, increased cost of working or business interruption) arising from any such damage or interruption, which is not reasonably foreseeable;

(4) National Grid must give the undertaker reasonable notice of any such third party claim or demand and no settlement, admission of liability or compromise must, unless payment is required in connection with a statutory compensation scheme, be made without first consulting the undertaker and considering their representations.

(5) National Grid must, in respect of any matter covered by the indemnity given by the undertaker in this paragraph, at all times act reasonably and in the same manner as it would as if settling third party claims on its own behalf from its own funds.

(6) National Grid must use its reasonable endeavours to mitigate and to minimise any costs, expenses, loss, demands, and penalties to which the indemnity under this paragraph applies where it is within National Grid's reasonable ability and control to do so and which expressly excludes any obligation to mitigate liability arising from third parties which is outside of National Grid's control and if reasonably requested to do so by the undertaker National Grid must provide an explanation of how the claim has been minimised, where relevant.

(7) Not to commence construction (and not to permit the commencement of such construction) of the authorised works on any land owned by National Grid or in respect of which National Grid has an easement or wayleave for its apparatus or any other interest or to carry out any works within [15] metres of National Grid's apparatus until the following conditions are satisfied:

(a) unless and until National Grid is satisfied acting reasonably (but subject to all necessary regulatory constraints) that the undertaker has first provided the acceptable security (and provided evidence that it shall maintain such acceptable security for the construction period of the authorised works from the proposed date of commencement of construction of the authorised works) and National Grid has confirmed the same to the undertaker in writing; and

(b) unless and until National Grid is satisfied acting reasonably (but subject to all necessary regulatory constraints) that the undertaker has procured acceptable insurance (and provided evidence to National Grid that it shall maintain such acceptable insurance for the construction period of the authorised works from the proposed date of commencement of construction of the authorised works) and National Grid has confirmed the same in writing to the undertaker.

(8) In the event that the undertaker fails to comply with 11(7) of this Part of this Schedule, nothing in this Part of this Schedule shall prevent National Grid from seeking injunctive relief (or any other equitable remedy) in any court of competent jurisdiction.

Enactments and agreements

8.10. Save to the extent provided for to the contrary elsewhere in this Part of this Schedule or by agreement in writing between National Grid and the undertaker, nothing in this Part of this Schedule affects the provisions of any enactment or agreement regulating the relations between the undertaker and National Grid in respect of any apparatus laid or erected in land belonging to the undertaker on the date on which this Order is made.

Co-operation

9.11.(1) Where in consequence of the proposed construction of any part of the authorised works, the undertaker or National Grid requires the removal of apparatus under paragraph 4(2) or National Grid makes requirements for the protection or alteration of apparatus under paragraph 6, the undertaker shall use its best endeavours to co-ordinate the execution of the works in the interests of safety and the efficient and economic execution of the authorised works and taking into account the need to ensure the safe and efficient operation of National Grid's undertaking and National Grid shall use its best endeavours to co-operate with the undertaker for that purpose.

(2) For the avoidance of doubt whenever National Grid's consent, agreement or approval is required in relation to plans, documents or other information submitted by the undertaker or the taking of action by the undertaker, it must not be unreasonably withheld or delayed.

Access

~~10.~~12. If in consequence of the agreement reached in accordance with paragraph 3(1) or the powers granted under this Order the access to any apparatus is materially obstructed, the undertaker must provide such alternative means of access to such apparatus as will enable National Grid to maintain or use the apparatus no less effectively than was possible before such obstruction.

Arbitration

~~11.~~13. Save for differences or disputes arising under paragraph 4(2), 4(4) 5(1) and 6 any difference or dispute arising between the undertaker and National Grid under this Part of this Schedule must, unless otherwise agreed in writing between the undertaker and National Grid, be determined by arbitration in accordance with article 47 (*arbitration*).

Notices

~~12.~~14. Notwithstanding article 56 (service of notices), any plans submitted to National Grid by the undertaker pursuant to paragraph 6 must be submitted using the LSBUD system (<https://lsbud.co.uk/>) or to such other address as National Grid may from time to time appoint instead for that purpose and notify to the undertaker in writing.

Appendix C

Commentary on the outstanding issues between the Applicant and Network Rail Infrastructure Limited (“NR”) in relation to the Protective Provisions

**Commentary on the outstanding issues between the Applicant and Network Rail Infrastructure Limited (“NR”) in relation to the Protective Provisions
9 July 2024**

A mark up the version of the protective provisions submitted at Deadline 5 is appended to this submission, showing the amendments sought by NR in tracked changes. A commentary of these changes is set out in the table below:

Provision	Applicant’s comment	NR’s comment
The insertion of paragraphs 4(1), (3) and (4) to prevent the exercise of Order powers without NR consent	The Applicant cannot accept restrictions on its ability to exercise its powers under the Order in the absence of a voluntary agreement being in place as to land, in order since this would prevent the Applicant from being able to build out the Development. The parties are currently in discussions to agree a property agreement.	Whilst NR understand the Applicant's position, the property agreement, which will be in a form of an easement, is currently being drafted. The agreement has been delayed due to protracted talks about the legal fees for the agreement. Paragraphs 4(1),(3) and (4) are crucial to protect NR's assets and Land and is a red line for NR and must be included in the protective provisions.
The insertion of an indemnity into paragraph 15(1) and a consequential change to paragraph 11(7)	The does not object to the principle of an indemnity however, the Applicant's position is that all commercial arrangements should be kept off the face of the DCO. In respect of the drafting proposed, the Applicant's position is that it not reasonable for the Applicant to be made liable in circumstances where NR has carried out works itself since it will be in control of the way in which these are carried out.	The PPs are NR's standard wording, and it is NR's preference to include an indemnity in the PPs. The text as drafted ensures that the indemnity right will not be triggered by NR's negligent action. NR cannot accept deletion of this paragraph.
The removal of “(but excluding loss of revenue)” from paragraph 15(6) in respect of costs which may be recovered in respect of losses by train operators	The Applicant's position is that only direct costs should be recoverable, as lost revenues of train operators is too wide and remote a category of loss.	NR are happy to accept the removal of “(but excluding loss of revenue)” provided NR's standard PP's are placed on the face of the order and any amendments to the PPs are set out in a separate framework agreement, off the face of the DCO.

FOR THE PROTECTION OF RAILWAY INTERESTS

1. The 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 of this Part of this Schedule any other person on whom rights or obligations are conferred by that paragraph.

2. In this Part of this Schedule—

“asset protection agreement” means an agreement to regulate the construction and maintenance of the specified work in a form prescribed from time to time by Network Rail;

"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 the same is amended from time to time, granted to Network Rail Infrastructure Limited by the Secretary of State in exercise of their powers under section 8 (licences) of the Railways Act 1993;

"Network Rail" means Network Rail Infrastructure Limited (company number 02904587, whose registered office is at Waterloo General Office, London, SE1 8SW) 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) 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 and any successor to Network Rail Infrastructure Limited's railway undertaking;

"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 or a tenant or licensee of Network Rail for the purposes of such railway or works, apparatus or equipment;

"regulatory consents" means any consent or approval required under:

- (a) the Railways Act 1993;
- (b) the network licence; and/or
- (c) any other relevant statutory or regulatory provisions;

by either the Office of Rail and Road or the Secretary of State for Transport or any other competent body including change procedures and any other consents, approvals of any access or beneficiary that may be required in relation to the authorised development;

"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 and, for the avoidance of doubt, includes the maintenance of such works under the powers of the Order.

3. (1) Where under this Part of this Schedule 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 development pursuant to this Order.

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

- (a) article 3 (development consent etc. granted by the Order);
- (b) article 4 (power to maintain the authorised project);
- (c) article 13 (access to works)
- (d) article 16 (discharge of water);
- (e) article 18 (authority to survey and investigate the land);
- (f) article 22 (compulsory acquisition of land);
- (g) article 23 (Time limit for exercise of authority to acquire land compulsorily or to take land temporarily)
- (h) article 24 (compulsory acquisition of rights and imposition of restrictive covenants);
- (i) article 30 (acquisition of subsoil or airspace only);
- (j) article 26 (power to override easements and other rights);
- (k) article 32 (temporary use of land for carrying out the authorised project);

- (l) article 33 (temporary use of land for maintaining the authorised project);
 - (m) article 34 (compulsory acquisition of land – incorporation of the mineral code)
 - (n) article 35 (statutory undertakers);
 - (o) article 43 (felling or lopping of trees or shrubs);
 - (p) article 44 (trees subject to tree preservation orders);
 - (q) the powers conferred by section 11(3) (power of entry) of the 1965 Act;
 - (r) the powers conferred by section 203 (power to override easements and rights) of the Housing and Planning Act 2016;
 - (s) the powers conferred by section 172 (right to enter and survey land) of the Housing and Planning Act 2016;
 - (t) any powers under in respect of the temporary possession of land under the Neighbourhood Planning Act 2017;
 - (u) other provisions where the exercise of the powers under that provision would impact on railway property
- in respect of any railway property unless the exercise of such powers is with the consent of Network Rail.

(2) Save for in the case of unforeseen event or emergency, 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, article 35 (statutory undertakers), article 26 (power to override easements and other rights) or article 25 (private rights over land), 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, 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.

(5) The undertaker must not under the powers of this Order do anything which would result in railway property being incapable of being used or maintained or which would affect the safe running of trains on the railway.

(6) 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 but it shall never be unreasonable to withhold consent for reasons of operational or railway safety (such matters to be in Network Rail's absolute discretion).

(7) The undertaker must enter into an asset protection agreement prior to the carrying out of any specified work.

4-5. (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.

(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 their disapproval of those plans and the grounds of such 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 shall be 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 their approval of the plans the engineer may specify any 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 must be constructed by Network Rail or by the undertaker, if Network Rail so desires, and such protective works 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 works until the engineer has notified the undertaker that the protective works have been completed to their reasonable satisfaction.

~~5-6.~~ (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 shall be caused by the carrying out of, or in consequence of the construction of a specified work, the undertaker must, notwithstanding any such approval, make good such damage and must 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 of this 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.

~~6-7.~~ 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 they may reasonably require with regard to a specified work or the method of constructing it.

~~7-8.~~ 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.

~~8-9.~~ (1) If any permanent or temporary alterations or additions to railway property are reasonably necessary in consequence of the construction or completion of a specified 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 56 days' notice (or in the event of an emergency or safety critical issue such notice as is reasonable in the circumstances) 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.

9-10. 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 5(3) or in constructing any protective works under the provisions of 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 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;

(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.

~~40-11.~~ (1) In this paragraph-

“EMI” means, subject to sub-paragraph (2), electromagnetic interference with Network Rail 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 5(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 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 only reasonably be prevented by modifications to Network Rail's apparatus, Network Rail must not withhold 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 5(1) has effect subject to the sub-paragraph.

(6) Prior to the commencement of operation of the authorised development the undertaker shall test the use of the authorised development in a manner that shall first have been agreed with Network Rail and if, notwithstanding any measures adopted pursuant to sub-paragraph (3), the testing of the authorised development causes EMI then the undertaker must 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 all measures necessary 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 –

(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;

(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; and

(d) the undertaker shall not allow the use or operation of the authorised development in a manner that has caused or will cause EMI until measures have been taken in accordance with this paragraph to prevent EMI occurring.

(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.

(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 shall be deemed to be protective works referred to in that paragraph.

(11) In relation to any dispute arising under this paragraph the reference in article 47 (Arbitration) to the Institution of Civil Engineers shall be read as a reference to the Institution of Engineering and Technology.

~~11-12.~~ 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.

~~12-13.~~ 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.

~~13-14.~~ 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 must, provided that 56 days' previous notice of the commencement of such alteration, reconstruction or maintenance has been given to the undertaker, be repaid by the undertaker to Network Rail.

~~14-15.~~ (1) The undertaker must pay to Network Rail all reasonable costs, charges, damages and expenses not otherwise provided for in this Part of this Schedule (subject to article 53 (*no double recovery*)) which may be occasioned to or reasonably incurred by Network Rail—

(a) by reason of the construction, maintenance or operation of a specified work or the failure thereof; or

(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.

(c) by reason of any act or omission of the undertaker or any person in its employ or of its contractors or others whilst accessing to or egressing from the authorised development;

(d) in respect of any damage caused to or additional maintenance required to, railway property or any such interference or obstruction or delay to the operation of the railway as a result of access to or egress from the authorised development by the undertaker or any person in its employ or of its contractors or others;

(e) in respect of costs incurred by Network Rail in complying with any railway operational procedures or obtaining any regulatory consents which procedures are required to be followed or consents obtained to facilitate the carrying out or operation of the authorised development;

and the undertaker must 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 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 claims or demands

(b) not make any settlement or compromise of such a claim or demand without the prior consent of the undertaker; and

(c) take such steps as are within its control and are reasonable in the circumstances to mitigate any liabilities relating to such claims or demands.

(3) The sums payable by the undertaker under sub-paragraph (1) shall if relevant include a sum equivalent to the relevant costs.

(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 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, losses and expenses ~~(but excluding loss of revenue)~~ reasonably incurred by each train operator as a consequence of any specified work including but not limited to 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 subparagraph (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.

~~45-16.~~ 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 of this 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 of this Schedule (including any claim relating to those relevant costs).

~~46-17.~~ In the assessment of any sums payable to Network Rail under this Part of 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 Part of this Schedule or increasing the sums so payable.

~~17-18.~~ 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 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.

~~18-19.~~ 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 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.

21 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 50 (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.

- 22 In relation to any dispute arising under this part of this Part of this Schedule (except for those disputes referred to in paragraph 11 the provisions of article 47 (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.

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