

THE INFRASTRUCTURE PLANNING (EXAMINATIONS PROCEDURE) RULES 2010

GATE BURTON ENERGY PARK

**WRITTEN REPRESENTATION ON BEHALF OF EDF ENERGY (THERMAL
GENERATION) LIMITED**

DEADLINE 7

4 JANUARY 2024

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WRITTEN REPRESENTATION ON BEHALF OF EDF ENERGY (THERMAL GENERATION) LIMITED

1. PROTECTIVE PROVISIONS – UPDATE

- 1.1 The Promoter is seeking to acquire new rights over plots 17/5, 17/6, 17/7, 17/8, 17/12 and 17/13 of which EDF Energy (Thermal Generation) Limited (“EDF”) is the freehold owner. The Promoter is also seeking to take temporary possession of plots 17/20, 17/21, 18/1, 18/2, 18/3 and 18/4.
- 1.2 As noted at previous deadlines, EDF considers it necessary for the protection and continued safe operation and future demolition of its assets that protective provisions be included within the DCO.
- 1.3 The Promoter and EDF have substantially agreed protective provisions for EDF’s benefit. These were included on the face of the draft DCO submitted by the Promoter at deadline 5 at Schedule 15, Part 15 and remain in the final deadline 6 version. This is welcomed by EDF.
- 1.4 However, the version included on the face of the draft DCO at deadlines 5 and 6 contains at paragraph 190(1) of Schedule 15, Part 15, the following text [xxx].¹
- 1.5 What this should read is “*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 or entry to any land or apparatus or (b) appropriate, acquire, extinguish, interfere with or override any easement, other interest or right of apparatus of EDF otherwise than by agreement*”.
- 1.6 The Promoter’s position is that they will not agree to include the wording noted at paragraph 1.5 above within the protective provisions until voluntary agreements have been secured with EDF. Discussions to agree a proposed route with the Promoter’s advisor commenced in January 2023. EDF provided the Promoter with draft Heads of Terms for the voluntary agreement in July 2023 and has been actively engaging with the Promoter to agree and sign the terms of a voluntary agreement. Following negotiations with the Promoter, EDF had received confirmation from the Promoter on 16 November 2023 that draft legal documentation would be circulated shortly afterwards in order for the voluntary agreement to conclude before deadline 6; however, this documentation was provided to EDF on 19 December 2023 (two days before the Promoter was required to submit its final form DCO at deadline 6). It was, therefore, not possible for a voluntary agreement to have been finalised between the Promoter and EDF before deadline 6 on 21 December 2023. On that basis, EDF’s view is that it is unfortunate that the Promoter is not including the wording that EDF requires at paragraph 1.5 hereto.
- 1.7 Nonetheless, EDF is committed to continuing to work with the Promoter to secure a mutually acceptable voluntary agreement to afford the Promoter with rights over its land to include cable and associated temporary rights.
- 1.8 However, EDF considers that if the DCO was made in its current form, without the wording specified at paragraph 1.5 above and in the absence of any voluntary agreements being secured, it would cause serious detriment to its undertaking. This is further outlined at section 2 below.

¹ For the purposes of this submission, reference is made to paragraph numbers used in the version of the Draft Development Consent Order submitted at Deadline 6 (REP6-024).

2. SERIOUS DETRIMENT TO EDF'S UNDERTAKING

Background to EDF's landholding and use of the land over which rights are being sought

- 2.1 The land over which rights are sought was originally acquired by the Central Electricity Generating Board for the purposes of its statutory undertaking. It was subsequently sold to EDF (as a statutory undertaker) and continues to be used and held for the purpose of EDF's undertaking.
- 2.2 The land over which rights and temporary possession is being sought includes the former coal fired station and a gas fired power station operated by Uniper. The former power station is undergoing a decommissioning and demolition programme which is expected to continue until 2026. This programme is complex and includes demolition events involving explosives. It is therefore important that EDF has full control over the land holdings, in particular in relation to construction and operational activity thereon to ensure the safe completion of the demolition programme within the prescribed timetable. In the event that this was not the case and the Promoter was authorised to acquire rights over, and take temporary possession, of EDF's land then EDF considers that it would cause serious detriment to its undertaking.
- 2.3 The Uniper power station remains operational with critical infrastructure over the EDF land holding (for example an underground 400 KV export cable feeding into the National Grid substation and a make up and purge line which runs to the south and west of the EDF landholding which the Promoter's proposed cable route would have to cross).
- 2.4 There are agreements in place between EDF and several counterparties that contain (amongst other things) obligations relating to the continued safe operation of these assets. It is important that EDF retain full control of the landholdings and rights granted to third parties to ensure the safety and integrity of these assets. The operational 400 KV substation is leased to National Grid and their infrastructure including overhead 400 KV lines are present in the vicinity of the Promoters proposed cable route. These assets are governed by an existing lease between EDF and National Grid and it is important for continued safety and integrity of these assets that EDF retain control of the land holdings and third party rights over the land. If this were not the case and the Promoter was authorised to acquire rights over, and take temporary possession, of EDF's land then EDF considers that it would cause serious detriment to its undertaking.
- 2.5 In the longer term the Cottam site has been designated a Priority Regeneration Area in the Draft Bassetlaw Local Plan. EDF have been working with the Council to identify future potential land uses including residential, commercial and, potentially, low carbon energy projects. It is important for the delivery of this longer-term objective that the overall site remains in single ownership and control.

3. APPLICABLE LEGISLATIVE PROVISIONS

- 3.1 Section 127(5) of the Planning Act 2008 (the "PA08") provides that an order granting a development consent may include provision authorising the compulsory acquisition of a right over statutory undertaker's land by the creation of a new right over land only to the extent that the Secretary of State is satisfied of the matters set out in section 127(6) PA08.
- 3.2 Section 127(6) PA08 provides that the matters are that the nature and situation of the land are such that -
 - (a) the right can be purchased without serious detriment to the carrying out of the undertaking, or

- (b) any detriment to the carrying out of the undertaking in consequence of the acquisition of the right, can be made good by the undertakers by the use of other land belonging to or available for acquisition by them.

3.3 For the reasons noted at paragraph 2.2 – 2.5 above, if the DCO authorised the compulsory acquisition of rights over ENGL’s land then this would cause serious detriment to ENGL’s undertaking. Given the required use of this land, there is no alternative land that can be used. The land is required for the safe decommissioning and demolition of the former coal fired station, safe continued operation of the existing Uniper and National Grid assets, and long term regeneration of the Cottam site.

3.4 It is therefore EDF’s submission that, in the absence of the inclusion of the wording at Schedule 15, Part 15, paragraph 190(1) of the DCO, the Secretary of State is unable to satisfy itself that the tests set out at section 127(6) PA08 are met and on that basis should not authorise the compulsory acquisition of rights over EDF’s land. EDF’s submission is that the Secretary of State should make the DCO with the wording noted at paragraph 1.5 above included at Schedule 15, Part 15, paragraph 190(1) in order to avoid serious detriment to EDF’s undertaking.

4. EDF’S PREFERRED FORM PROTECTIVE PROVISIONS

Appendix 1: EDF’s preferred form protective provisions

4.1 To assist the Secretary of State, EDF appends hereto at Appendix 1 the form of protective provisions that it proposes to avoid serious detriment to its undertaking. It highlights in red the text that differs from that submitted by the Promoter at deadline 6.

4.2 In the absence of the wording in red at paragraph 190(1) of Appendix 1, it is unclear how the Promoter intends the DCO to be made. EDF has not seen any alternative wording or explanation put forward by the Promoter. As a statutory instrument, it would be inappropriate for the DCO to be made with square brackets included. It would also mean that references to paragraph 190(1) (within the remaining subparagraphs of paragraph 190 and paragraph 198) would exist, where only square brackets are included. Again this is inappropriate for a statutory instrument.

4.3 As such, EDF’s primary submission is that the protective provisions for EDF’s benefit should include the wording which is appended hereto in red at Appendix 1. This would also resolve the issues with the Promoter’s current unsatisfactory drafting noted above.

Appendix 2: EDF’s alternative form protective provisions

4.4 In the event that the Secretary of State considers otherwise, EDF respectfully requests that the Secretary of State (in the alternative) includes the wording proposed in green at Appendix 2 hereto. This would not resolve the issues around the unsatisfactory drafting caused by the inclusion of square brackets in a statutory instrument. However, in the absence of a voluntary agreement having been reached (which remains EDF’s preference and which EDF will continue to work with the Promoter beyond close of examination to try and achieve) and the absence of the protection that EDF is seeking at Schedule 15, Part 15, paragraph 190(1) of the DCO, EDF considers that the Appendix 2 wording would move towards taking account of additional control measures required by EDF to ensure the safe demolition and continued operation of the remaining assets.

4.5 In summary, the Appendix 2 additional drafting (in the absence of the paragraph 190(1) wording) provides that:

- 4.5.1 The Promoter will need to obtain all necessary consents for crossing of third party infrastructure;
- 4.5.2 The Promoter will consult and have regard to the landowner's requirements so as to minimise disruption to the ongoing and future operations, demolition works, and development works on the landowner's estate and will comply with the requirements of the landowner;
- 4.5.3 The Promoter will cease all work and vacate the site during planned explosive events and at any time as notified by the landowner if, in the landowner's opinion, the promoter's activity constitutes a risk to demolition works; and
- 4.5.4 The Promoter will provide a copy of their risk assessment for all constructions work arising on the landowner's estate and shall not proceed without prior approval from the landowner.

CMS Cameron McKenna Nabarro Olswang LLP

For and on behalf of EDF Energy (Thermal Generation) Limited

4 January 2024

Appendix 1
EDF's preferred form Protective Provisions

PART 15

FOR THE PROTECTION OF EDF ENERGY (THERMAL GENERATION) LIMITED

Application

185.(1) For the protection of EDF as referred to in this Part of this Schedule the following provisions have effect, unless otherwise agreed in writing between the undertaker and EDF. (2) Subject to subparagraph (3) or to the extent otherwise agreed in writing between the undertaker and EDF, where the benefit of this Order is transferred or granted to another person under article 35 (consent to transfer the benefit of the Order) –

(a) any agreement of the type mentioned in subparagraph (1) has effect as if it had been made between EDF and the transferee or grantee (as the case may be); and

(b) written notice of the transfer or grant must be given to EDF 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 EDF (but without prejudice to 195(3)(b)).

Interpretation

186. 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 development; and (b) after the construction period of the authorised development 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):

(i) a waiver of subrogation and an indemnity to principal clause in favour of EDF; and

(ii) 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 EDF to cover the undertaker’s liability to EDF to a total liability cap of £50,000,000.00 (fifty million pounds) (granted by an entity and in a form reasonably satisfactory to EDF and where required by EDF, 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 EDF to cover the undertaker's liability to EDF for an amount of not less than £10,000,000.00 (ten 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 EDF);

“alternative apparatus” means appropriate alternative apparatus to the satisfaction of EDF to enable EDF 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, or other apparatus as defined in article 2 of this Order, belonging to or maintained by EDF together with any replacement apparatus and such other apparatus constructed pursuant to the Order that becomes operational apparatus of EDF and includes any structure in which apparatus is or will be lodged or which gives or will give access to apparatus;

“authorised development” has the same meaning 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, maintenance and decommissioning of the authorised development and construction of any works authorised by this Schedule;

“commence” and “commencement” has the same meaning as in article 2 of this Order, except in this Part of this Schedule it includes 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;

“EDF” means EDF Energy (Thermal Generation) Limited (Company Number 04267569) whose registered office is at 90 Whitfield Street, London, England, W1T 4EZ or any successor as a licence holder within the meaning of Part 1 of the Electricity Act 1989;

“functions” includes powers and duties;

“ground mitigation scheme” means a scheme approved by EDF (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, is to require the undertaker to submit for EDF'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;

“maintain” and “maintenance” include the ability and right to do any of the following in relation to any apparatus or alternative apparatus of EDF: construct, use, repair, alter, inspect, renew or remove (including decommission) the apparatus;

“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 EDF acting reasonably;

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

- a) will or may be situated over, or within 20 metres measured in any direction of any apparatus the removal of which has not been required by the undertaker under paragraph 178(2) or otherwise; or
- b) may in any way adversely affect any apparatus the removal of which has not been required by the undertaker under paragraph 191(2) or otherwise;

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

On Street Apparatus

187. Except for paragraphs 188 (apparatus of EDF in stopped up streets), 193 (retained apparatus: protection), 194 (expenses) and 195 (indemnity) of this Schedule which will apply in respect of the exercise of all or any powers under the Order affecting the rights and apparatus of EDF, the other provisions of this Schedule do not apply to apparatus in respect of which the relations between the undertaker and EDF are regulated by the provisions of Part 3 of the 1991 Act. Apparatus of EDF in stopped up streets

188.—(1) Where any street or public right of way is stopped up under article 11 (temporary stopping up of streets and public rights of way), if EDF has any apparatus in the street or public right of way or accessed via that street or public right of way EDF has the same rights in respect of that apparatus as it enjoyed immediately before the stopping up and the undertaker must grant to EDF, or procure the granting to EDF of, legal easements reasonably satisfactory to EDF in respect of such apparatus and access to it prior to the stopping up of any such street or public right of way but nothing in this paragraph affects any right of the undertaker or EDF to require the removal of that apparatus under paragraph 191 or the power of the undertaker, subject to compliance with this sub-paragraph, to carry out works under paragraph 193.

(2) Notwithstanding the temporary stopping up or diversion of any street or public right of way under the powers of article 11 (temporary stopping up of streets and public rights of way), EDF is at liberty at all times to take all necessary access across any such street or public right of way 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 street or public right of way.

Protective works to buildings

189. The undertaker, in the case of the powers conferred by article 18 (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 EDF.

Acquisition of land

190.(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 or entry to any land or apparatus or (b) appropriate, acquire, extinguish, interfere with or override any easement, other interest or right of apparatus of EDF 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 development (or in such other timeframe as may be agreed between EDF 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 EDF or affect the provisions of any enactment or agreement regulating the relations between EDF and the undertaker in respect of any apparatus laid or erected in land belonging to or secured by the undertaker, the undertaker must as EDF reasonably requires enter into such deeds of consent upon such terms and conditions as may be agreed between EDF and the undertaker acting reasonably and which must be no less favourable on the whole to EDF unless otherwise agreed by EDF, and it will be the responsibility of the undertaker to procure or secure (or both) 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 development.

(3) Save where otherwise agreed in writing between EDF and the undertaker, the undertaker and EDF agree that where there is any inconsistency or duplication between the provisions set out in this Part of this Schedule relating to the relocation 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 EDF or other enactments relied upon by EDF as of right or other use in relation to the apparatus, then the provisions in this Schedule will prevail.

(4) As a condition of an agreement between the parties in sub-paragraph (1) which relates to taking temporary access rights during construction over EDF's land, EDF may ensure that it retains flexibility to alter any construction routes (within the Order limits) or to limit access for certain time periods, and may require the undertaker to pay any security and maintenance costs involved in the grant of any such rights.

(5) Any agreement or consent granted by EDF under paragraph 193 or any other paragraph of this Part of this Schedule, are not be taken to constitute agreement under sub-paragraph (1).

Removal of apparatus

191.—(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 EDF 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 EDF in accordance with sub-paragraphs (2) to (5) inclusive.

(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 EDF 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 EDF 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 EDF to its satisfaction (taking into account paragraph 192(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, operation and decommissioning 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, EDF may in its sole discretion, 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 does not extend to the requirement for EDF to use its compulsory purchase powers to this end unless it elects to so do.

(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 EDF and the undertaker.

(5) EDF 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 EDF 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

192.—(1) Where, in accordance with the provisions of this Part of this Schedule, the undertaker affords to or secures for EDF 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 EDF and must be no less favourable on the whole to EDF than the facilities and rights enjoyed by it in respect of the apparatus to be removed unless otherwise agreed by EDF.

(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 EDF 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 199 (Arbitration) of this Part of this Schedule and the arbitrator must make such provision for the payment of compensation by the undertaker to EDF as appears to the arbitrator to be reasonable having regard to all the circumstances of the particular case.

Retained apparatus: protection

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

(2) In relation to specified works the plan to be submitted to EDF 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) a ground monitoring scheme, where required.

(3) The undertaker must not commence any works to which sub-paragraph (2) applies until EDF has given written approval of the plan so submitted.

(4) Any approval of EDF required under sub-paragraph (3)—

- a) may be given subject to reasonable conditions for any purpose mentioned in sub-paragraphs (5) or (7); and,
- b) must not be unreasonably withheld.

(5) In relation to any work to which sub-paragraph (2) applies, EDF 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.

(6) Works executed under sub-paragraph (2) must be executed in accordance with the plan, submitted under sub-paragraph (1) or as relevant sub-paragraph (5), as approved or as amended from time to time by agreement between the undertaker and EDF and in accordance with such reasonable requirements as may be made in accordance with sub-paragraphs (5) or (7) by EDF for the alteration or otherwise for the protection of the apparatus, or for securing access to it, and EDF will be entitled to watch and inspect the execution of those works.

(7) Where EDF 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 EDF's satisfaction prior to the commencement of any specified works for which protective works are required and EDF must give notice of its requirement for such works within 42 days of the date of submission of a plan pursuant to this paragraph (except in an emergency).

(8) If EDF in accordance with sub-paragraphs (5) or (7) 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 185 to 187 and 190 to 192 apply as if the removal of the apparatus had been required by the undertaker under paragraph 191(2).

(9) 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.

(10) 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 EDF notice as soon as is reasonably practicable and a plan of those works and must comply with sub-paragraphs (5), (6) and (7) 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 EDF's HSEQ Requirement for Contractors (document reference DD_STND_HAS_001 and any document that replaces or supersedes it).

Expenses

194.—(1) Save where otherwise agreed in writing between EDF and the undertaker and subject to the following provisions of this paragraph, the undertaker must pay to EDF within 30 days of receipt of an itemised invoice or claim from EDF all charges, costs and expenses reasonably anticipated within the following three months or reasonably and properly incurred by EDF 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 development including without limitation—

(a) any costs reasonably incurred by or compensation properly paid by EDF in connection with the acquisition of rights or the exercise of statutory powers for such apparatus including without limitation all costs incurred by EDF as a consequence of EDF;

(i) using its own compulsory purchase powers to acquire any necessary rights under paragraph 191(3);
or

(ii) exercising any compulsory purchase powers in the Order transferred to or benefitting EDF;

(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 199 (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 EDF 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 EDF 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 EDF 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

195.—(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 development 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 development) or property of EDF, or there is any interruption in any service provided, or in the supply of any goods, by EDF, or EDF 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 EDF the cost reasonably and properly incurred by EDF in making good such damage or restoring the supply; and
- b) indemnify EDF for any other expenses, loss, demands, proceedings, damages, claims, penalty or costs incurred by or recovered from EDF, by reason or in consequence of any such damage or interruption or EDF becoming liable to any third party other than arising from any default of EDF.

(2) The fact that any act or thing may have been done by EDF on behalf of the undertaker or in accordance with a plan approved by EDF or in accordance with any requirement of EDF 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 EDF 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) is to 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 EDF, its officers, servants, contractors or agents; or
- b) any authorised development or any other works authorised by this Part of this Schedule carried out by EDF 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 35 (consent to transfer benefit of Order) subject to the proviso that once such works become apparatus (“new apparatus”), any authorised development yet to be executed and not falling within this sub-paragraph 195(3)(b) will be subject to the full terms of this Part of this Schedule including this paragraph 195; or
- c) any 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) EDF 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) EDF 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) EDF 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 EDF’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 EDF’s control and if reasonably requested to do so by the undertaker EDF 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 development on any land owned by EDF or in respect of which EDF has an easement or wayleave for its apparatus or any other interest or to carry out any works within 20 metres of EDF’s apparatus until the following conditions are satisfied:

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

authorised development from the proposed date of commencement of construction of the authorised development) and EDF has confirmed the same in writing to the undertaker.

(8) In the event that the undertaker fails to comply with paragraph 172(7) of this Part of this Schedule, nothing in this Part of this Schedule shall prevent EDF from seeking injunctive relief (or any other equitable remedy) in any court of competent jurisdiction.

Enactments and agreements

196. Save to the extent provided for to the contrary elsewhere in this Part of this Schedule or by agreement in writing between EDF 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 EDF 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

197.—(1) Where in consequence of the proposed construction of any part of the authorised development, the undertaker or EDF requires the removal of apparatus under paragraph 191(2) or EDF makes requirements for the protection or alteration of apparatus under paragraph 193, 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 development and taking into account the need to ensure the safe and efficient operation of EDF's undertaking and EDF shall use its best endeavours to co-operate with the undertaker for that purpose.

(2) For the avoidance of doubt whenever EDF'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

198. If in consequence of the agreement reached in accordance with paragraph 190(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 EDF to maintain or use the apparatus no less effectively than was possible before such obstruction.

Arbitration

199. Save for differences or disputes arising under paragraph 191(2), 191(4), 192(1) and 193 any difference or dispute arising between the undertaker and EDF under this Part of this Schedule must, unless otherwise agreed in writing between the undertaker and EDF, be determined by arbitration in accordance with article 42 (arbitration).

Notices

200. Notwithstanding article 45 (service of notices), any plans submitted to EDF by the undertaker pursuant to paragraph 193 must be submitted to EDF addressed to the company secretary and copied to the land and estates team and sent to 90 Whitfield Street, London, England, W1T 4EZ or to such other address as EDF may from time to time appoint instead for that purpose and notify to the undertaker in writing.

Appendix 2
EDF's alternative form Protective Provisions

PART 15

FOR THE PROTECTION OF EDF ENERGY (THERMAL GENERATION) LIMITED

Application

185.(1) For the protection of EDF as referred to in this Part of this Schedule the following provisions have effect, unless otherwise agreed in writing between the undertaker and EDF. (2) Subject to subparagraph (3) or to the extent otherwise agreed in writing between the undertaker and EDF, where the benefit of this Order is transferred or granted to another person under article 35 (consent to transfer the benefit of the Order) –

(a) any agreement of the type mentioned in subparagraph (1) has effect as if it had been made between EDF and the transferee or grantee (as the case may be); and

(b) written notice of the transfer or grant must be given to EDF 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 EDF (but without prejudice to 195(3)(b)).

Interpretation

186. 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 development; and (b) after the construction period of the authorised development 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):

(i) a waiver of subrogation and an indemnity to principal clause in favour of EDF; and

(ii) 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 EDF to cover the undertaker’s liability to EDF to a total liability cap of £50,000,000.00 (fifty million pounds) (granted by an entity and in a form reasonably satisfactory to EDF and where required by EDF, 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 EDF to cover the undertaker's liability to EDF for an amount of not less than £10,000,000.00 (ten 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 EDF);

“alternative apparatus” means appropriate alternative apparatus to the satisfaction of EDF to enable EDF 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, or other apparatus as defined in article 2 of this Order, belonging to or maintained by EDF together with any replacement apparatus and such other apparatus constructed pursuant to the Order that becomes operational apparatus of EDF and includes any structure in which apparatus is or will be lodged or which gives or will give access to apparatus;

“authorised development” has the same meaning 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, maintenance and decommissioning of the authorised development and construction of any works authorised by this Schedule;

“commence” and “commencement” has the same meaning as in article 2 of this Order, except in this Part of this Schedule it includes 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;

“EDF” means EDF Energy (Thermal Generation) Limited (Company Number 04267569) whose registered office is at 90 Whitfield Street, London, England, W1T 4EZ or any successor as a licence holder within the meaning of Part 1 of the Electricity Act 1989;

“functions” includes powers and duties;

“ground mitigation scheme” means a scheme approved by EDF (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, is to require the undertaker to submit for EDF'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;

“maintain” and “maintenance” include the ability and right to do any of the following in relation to any apparatus or alternative apparatus of EDF: construct, use, repair, alter, inspect, renew or remove (including decommission) the apparatus;

“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 EDF acting reasonably;

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

- a) will or may be situated over, or within 20 metres measured in any direction of any apparatus the removal of which has not been required by the undertaker under paragraph 178(2) or otherwise; or
- b) may in any way adversely affect any apparatus (including, for the avoidance of doubt, the demolition or future development of any apparatus) the removal of which has not been required by the undertaker under paragraph 191(2) or otherwise;

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

On Street Apparatus

187. Except for paragraphs 188 (apparatus of EDF in stopped up streets), 193 (retained apparatus: protection), 194 (expenses) and 195 (indemnity) of this Schedule which will apply in respect of the exercise of all or any powers under the Order affecting the rights and apparatus of EDF, the other provisions of this Schedule do not apply to apparatus in respect of which the relations between the undertaker and EDF are regulated by the provisions of Part 3 of the 1991 Act. Apparatus of EDF in stopped up streets

188.—(1) Where any street or public right of way is stopped up under article 11 (temporary stopping up of streets and public rights of way), if EDF has any apparatus in the street or public right of way or accessed via that street or public right of way EDF has the same rights in respect of that apparatus as it enjoyed immediately before the stopping up and the undertaker must grant to EDF, or procure the granting to EDF of, legal easements reasonably satisfactory to EDF in respect of such apparatus and access to it prior to the stopping up of any such street or public right of way but nothing in this paragraph affects any right of the undertaker or EDF to require the removal of that apparatus under paragraph 191 or the power of the undertaker, subject to compliance with this sub-paragraph, to carry out works under paragraph 193.

(2) Notwithstanding the temporary stopping up or diversion of any street or public right of way under the powers of article 11 (temporary stopping up of streets and public rights of way), EDF is at liberty at all times to take all necessary access across any such street or public right of way 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 street or public right of way.

Protective works to buildings

189. The undertaker, in the case of the powers conferred by article 18 (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 EDF.

Acquisition of land

~~190.(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 or entry to any land or apparatus or (b) appropriate, acquire, extinguish, interfere with or override any easement, other interest or right of apparatus of EDF otherwise than by agreement. [xxx]~~

[Drafting Note: As per paragraph 4 of our representations, EDF does not consider it appropriate for a statutory instrument to be made with square brackets included or sub-paragraphs referred to which do not exist. EDF has not seen any alternative wording or explanation put forward by the undertaker and so it is unclear how the undertaker intends for the DCO to be made in the absence of paragraph 190(1). EDF's position is that this wording be included (as per Appendix 1). However if the Secretary of State disagrees then this Appendix 2 version of the protective provisions seeks further amendments that EDF would require in the absence of this paragraph 190(1) wording.]

(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 development (or in such other timeframe as may be agreed between EDF 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 EDF or affect the provisions of any enactment or agreement regulating the relations between EDF and the undertaker in respect of any apparatus laid or erected in land belonging to or secured by the undertaker, the undertaker must as EDF reasonably requires enter into such deeds of consent upon such terms and conditions as may be agreed between EDF and the undertaker acting reasonably and which must be no less favourable on the whole to EDF unless otherwise agreed by EDF, and it will be the responsibility of the undertaker to procure or secure (or both) 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 development.

(3) Save where otherwise agreed in writing between EDF and the undertaker, the undertaker and EDF agree that where there is any inconsistency or duplication between the provisions set out in this Part of this Schedule relating to the relocation 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 EDF or other enactments relied upon by EDF as of right or other use in relation to the apparatus, then the provisions in this Schedule will prevail.

(4) As a condition of an agreement between the parties in sub-paragraph (1) which relates to taking temporary access rights during construction over EDF's land, EDF may ensure that it retains flexibility to alter any construction routes (within the Order limits) or to limit access for certain time periods, and may require the undertaker to pay any security and maintenance costs involved in the grant of any such rights.

(5) Any agreement or consent granted by EDF under paragraph 193 or any other paragraph of this Part of this Schedule, are not be taken to constitute agreement under sub-paragraph (1).

Removal of apparatus

191.—(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 EDF 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 EDF in accordance with sub-paragraphs (2) to (5) inclusive.

(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 EDF 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 EDF 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 EDF to its satisfaction (taking into account paragraph 192(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, operation and decommissioning 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, EDF may in its sole discretion, 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 does not extend to the requirement for EDF to use its compulsory purchase powers to this end unless it elects to so do.

(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 EDF and the undertaker.

(5) EDF 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 EDF 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

192.—(1) Where, in accordance with the provisions of this Part of this Schedule, the undertaker affords to or secures for EDF 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 EDF and must be no less favourable on the whole to EDF than the facilities and rights enjoyed by it in respect of the apparatus to be removed unless otherwise agreed by EDF.

(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 EDF 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 199 (Arbitration) of this Part of this Schedule and the arbitrator must make such provision for the payment of compensation by the undertaker to EDF as appears to the arbitrator to be reasonable having regard to all the circumstances of the particular case.

Retained apparatus: protection

193.—(1) Not less than ~~56~~60 days before the commencement of any specified works the undertaker must submit to EDF a plan of the works to be executed and seek from EDF details of the underground extent of their assets.

(2) In relation to specified works the plan to be submitted to EDF 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) a ground monitoring scheme, where required; and
- h) an assessment of the risks to the demolition and development of EDF's apparatus from the works.

(3) The undertaker must not commence any works to which sub-paragraph (2) applies until EDF has given written approval of the plan so submitted.

(4) Any approval of EDF required under sub-paragraph (3)—

- a) may be given subject to reasonable conditions for any purpose mentioned in sub-paragraphs (5) or (7); and,
- b) must not be unreasonably withheld.

(5) In relation to any work to which sub-paragraph (2) applies, EDF 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, including for the purpose of minimising disruption to wider demolition or development works, for the provision of protective works or for the purpose of providing or securing proper and convenient means of access to any apparatus.

(6) Works executed under sub-paragraph (2) must be executed in accordance with the plan, submitted under sub-paragraph (1) or as relevant sub-paragraph (5), as approved or as amended from time to time by agreement between the undertaker and EDF and in accordance with such reasonable requirements as may be made in accordance with sub-paragraphs (5) or (7) by EDF for the alteration or otherwise for the protection of the apparatus, or for securing access to it, and EDF will be entitled to watch and inspect the execution of those works.

(7) Where EDF 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 EDF's satisfaction prior to the commencement of any specified works for which protective works

are required and EDF must give notice of its requirement for such works within 42 days of the date of submission of a plan pursuant to this paragraph (except in an emergency).

(8) If EDF in accordance with sub-paragraphs (5) or (7) 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 185 to 187 and 190 to 192 apply as if the removal of the apparatus had been required by the undertaker under paragraph 191(2).

(9) 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.

(10) 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 EDF notice as soon as is reasonably practicable and a plan of those works and must comply with sub-paragraphs (5), (6) and (7) 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 EDF's HSEQ Requirement for Contractors (document reference DD_STND_HAS_001 and any document that replaces or supersedes it).

(12) The undertaker will immediately cease any specified works being carried out within, and vacate, EDF's land during planned explosive and demolition events or if EDF, acting reasonably, considers the specified works constitute a risk to demolition works. EDF must give notice of its requirement for any such explosive and demolition events within 14 days of the date of such event.

(13) The undertaker shall be responsible for procuring or securing (or both) any consents, permissions, licences or otherwise required for crossing or interfering with any apparatus or infrastructure owned or operated by third parties.

Expenses

194.—(1) Save where otherwise agreed in writing between EDF and the undertaker and subject to the following provisions of this paragraph, the undertaker must pay to EDF within 30 days of receipt of an itemised invoice or claim from EDF all charges, costs and expenses reasonably anticipated within the following three months or reasonably and properly incurred by EDF 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 development including without limitation—

(a) any costs reasonably incurred by or compensation properly paid by EDF in connection with the acquisition of rights or the exercise of statutory powers for such apparatus including without limitation all costs incurred by EDF as a consequence of EDF;

(i) using its own compulsory purchase powers to acquire any necessary rights under paragraph 191(3);
or

(ii) exercising any compulsory purchase powers in the Order transferred to or benefitting EDF;

(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 199 (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 EDF 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 EDF 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 EDF 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

195.—(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 development 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 development) or property of EDF, or there is any interruption in any service provided, or in the supply of any goods, by EDF, or EDF 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 EDF the cost reasonably and properly incurred by EDF in making good such damage or restoring the supply; and
- b) indemnify EDF for any other expenses, loss, demands, proceedings, damages, claims, penalty or costs incurred by or recovered from EDF, by reason or in consequence of any such damage or interruption or EDF becoming liable to any third party other than arising from any default of EDF.

(2) The fact that any act or thing may have been done by EDF on behalf of the undertaker or in accordance with a plan approved by EDF or in accordance with any requirement of EDF 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 EDF 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) is to 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 EDF, its officers, servants, contractors or agents; or
- b) any authorised development or any other works authorised by this Part of this Schedule carried out by EDF 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 35 (consent to transfer benefit of Order) subject to the proviso that once such works become apparatus (“new apparatus”), any authorised development yet to be executed and not falling within this sub-paragraph 195(3)(b) will be subject to the full terms of this Part of this Schedule including this paragraph 195; or
- c) any 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) EDF 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) EDF 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) EDF 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 EDF’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 EDF's control and if reasonably requested to do so by the undertaker EDF 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 development on any land owned by EDF or in respect of which EDF has an easement or wayleave for its apparatus or any other interest or to carry out any works within 20 metres of EDF's apparatus until the following conditions are satisfied:

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

(8) In the event that the undertaker fails to comply with paragraph 172(7) of this Part of this Schedule, nothing in this Part of this Schedule shall prevent EDF from seeking injunctive relief (or any other equitable remedy) in any court of competent jurisdiction.

Enactments and agreements

196. Save to the extent provided for to the contrary elsewhere in this Part of this Schedule or by agreement in writing between EDF 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 EDF 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

197.—(1) Where in consequence of the proposed construction of any part of the authorised development, the undertaker or EDF requires the removal of apparatus under paragraph 191(2) or EDF makes requirements for the protection or alteration of apparatus under paragraph 193, 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 development and taking into account the need to ensure the safe and efficient operation of EDF's undertaking and EDF shall use its best endeavours to co-operate with the undertaker for that purpose.

(2) For the avoidance of doubt whenever EDF'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

198. If in consequence of the agreement reached in accordance with paragraph 190(1) or the powers granted under this Order the access (with or without vehicles, plant or machinery) to any apparatus is materially obstructed or severed, the undertaker must provide such alternative means of access to such apparatus as will enable EDF to maintain or use the apparatus no less effectively than was possible before such obstruction.

[Drafting Note: Please see the drafting note above regarding the appropriateness of referring to a subparagraph in a statutory instrument that does not exist].

Arbitration

199. Save for differences or disputes arising under paragraph 191(2), 191(4), 192(1) and 193 any difference or dispute arising between the undertaker and EDF under this Part of this Schedule must, unless otherwise agreed in writing between the undertaker and EDF, be determined by arbitration in accordance with article 42 (arbitration).

Notices

200. Notwithstanding article 45 (service of notices), any plans submitted to EDF by the undertaker pursuant to paragraph 193 must be submitted to EDF addressed to the company secretary and copied to the land and estates team and sent to 90 Whitfield Street, London, England, W1T 4EZ or to such other address as EDF may from time to time appoint instead for that purpose and notify to the undertaker in writing.