

BT-NG-020621-545-0312

Bramford to Twinstead Reinforcement

Volume 8: Examination Submissions

Document 8.12.4: Final Position on Protective Provisions for the Benefit of Network Rail Infrastructure Limited

Final Issue A
March 2024

Planning Inspectorate Reference: EN020002

The Infrastructure Planning (Examination Procedure) Rules 2010
Regulation 8(1)(k)

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1. Introduction

1.1 Summary of Position

- 1.1.1 National Grid Electricity Transmission plc (the Applicant) submitted, on 27 April 2023, an application for development consent to the Secretary of State for the Bramford to Twinstead Reinforcement (the project) (application reference EN020002). The application was accepted by the Planning Inspectorate on 23 May 2023.
- 1.1.2 The Applicant has included protective provisions for the benefit of Network Rail Infrastructure Limited (Network Rail) in Part 4 of Schedule 14 to its draft Development Consent Order (draft DCO) [REP9-006].
- 1.1.3 Whilst the protective provisions included in Part 4 of Schedule 14 are substantially in Network Rail's preferred form, certain amendments to those protective provisions were made by the Applicant at Deadline 8 as a result of an impasse having been reached as to the commercial terms offered by Network Rail in respect of voluntary land agreements required by the Applicant for the purposes of the project.
- 1.1.4 The Applicant's Deadline 8 submissions are further documented in:
 - The Applicant's Schedule of Changes to the Draft Development Consent Order [REP8-022];
 - The Applicant's Protective Provisions and Commercial Side Agreements Tracking List [REP8-026] (and [REP9-060]); and
 - The Application under Section 127 Planning Act 2008 – Network Rail Infrastructure Limited [REP8-037].
- 1.1.5 Network Rail disagrees with the amendments proposed by the Applicant and made submissions to this effect at Deadline 8 [REP8-052].
- 1.1.6 The Applicant commented on those submissions at Deadline 9 [REP9-065].
- 1.1.7 As is already documented in the Applicant's Protective Provisions and Commercial Side Agreements Tracking List [REP9-060], the Applicant does not expect that it will be possible to reach agreement with Network Rail on the form of protective provisions before the close of the Examination.

1.2 Purpose of this document

- 1.2.1 This document is submitted at Deadline 10 in response to the Examining Authority's Rule 17 Letter dated 27 February 2024 [PD-017].
- 1.2.2 It highlights only those elements of the protective provisions for the benefit of Network Rail which are not agreed between the parties, and provides justification for the drafting currently included by the Applicant in Part 4 of Schedule 14 to its draft DCO [REP9-006].

1.2.3 Table 2.1 is structured as follows:

- **Column 1** establishes the relevant paragraph number and title;
- **Column 2** shows an extract of the clean protective provisions which have been included on the face of the draft DCO [REP9-006] at Deadline 9 and which therefore reflects the Applicant's position;
- **Column 3** provides the Applicant's justification for its approach to drafting;
- **Column 4** shows the change(s) in drafting desired by Network Rail in track changes in the instances required;
- **Column 5** sets out Network Rail's justification for its proposed updated drafting (extracted from [REP8-052]); and
- **Column 6** sets out the Applicant's further comments, where applicable, on Network Rail's Deadline 8 submissions (extracted from [REP9-065]).

2. Protective Provisions to benefit Network Rail

Table 2.1 – Summary of points of disagreement in respect of the protective provisions to benefit Network Rail

Para. No.	Extract from Part 4 of Schedule 14 to the draft DCO [REP9-006] at Deadline 9 (Clean)	Applicant's Justification for Existing Drafting	Network Rail's Proposed Changes (Tracked)	Network Rail's Justification for Proposed Changes [REP8-052]	Applicant's Response to Network Rail's Justification for Proposed Changes [REP9-060]
30(1)	<p><i>The undertaker must not exercise the powers conferred by—</i></p> <ul style="list-style-type: none"> (a) <i>article 19 (discharge of water);</i> (b) <i>article 21 (authority to survey and investigate the land);</i> (c) <i>article 48 (felling or lopping); and</i> (d) <i>article 49 (trees subject to Tree Preservation Orders);</i> <p><i>in respect of any railway property unless the exercise of such powers is with the consent of Network Rail.</i></p>	<p>Paragraph 30(1) requires the undertaker (as defined) to seek Network Rail's consent prior to exercising certain powers under the draft DCO in respect of any railway property (again, as defined).</p> <p>The powers previously controlled by Paragraph 30(1) included those related to the carrying out and maintenance of the authorised development (Articles 3 and 4), as well as those related to compulsory acquisition of land and rights (Articles 23, 24 and 25) and temporary possession (Articles 26, 27 and 28).</p> <p>Although Network Rail could not unreasonably withhold consent in such circumstances (see Paragraph 30(6)), the Protective Provisions do not otherwise ensure that consent (or otherwise a refusal to grant consent) would be provided expeditiously.</p> <p>Indeed, based on recent engagement, the Applicant has</p>	<p><i>The undertaker must not exercise the powers conferred by—</i></p> <ul style="list-style-type: none"> (a) <u>article 3 (development consent granted by the Order);</u> (b) <u>article 4 (maintenance of authorised development);</u> (c) (a) <u>article 19 (discharge of water);</u> (d) (b) <u>article 21 (authority to survey and investigate the land);</u> (e) <u>article 23 (compulsory acquisition of land);</u> (f) <u>article 24 (compulsory acquisition of rights);</u> (g) <u>article 25 (acquisition of subsoil or airspace only);</u> (h) <u>article 26 (temporary use of land by National Grid);</u> (i) <u>article 27 (temporary use of land by UKPN);</u> 	<p>Under the Order, the Applicant seeks powers to compulsorily acquire rights over railway property (plots 20-28, 20-33, 20-34, 20-36, 20-38, 20-39 and 20-42 (Plots)) for the purposes of carrying out works involving installing and maintaining underground cables beneath the railway and for access required in connection with the carrying out and maintenance of those works.</p> <p>If the Applicant's proposed deletions in the Revised Protective Provisions were to be accepted, it would give rise to a significant and unacceptable risk that the Applicant could compulsorily acquire rights over railway land which would not be subject to the conditions, limitations and restrictions typically required by NR (including as required through NR's business and technical clearance process) to facilitate the safe and efficient operation of the railway. This risk could lead to a failure by</p>	<p>Table 1.2 of the Application under Section 127 Planning Act 2008 – Network Rail Infrastructure Limited [REP8-037] makes clear that only Class 3 (underground cable) and Class 4 (access) permanent rights are sought in respect of Network Rail's land, alongside temporary possession powers for, inter alia, the dismantling and removal of redundant infrastructure.</p> <p>The Class 3 (underground cable) rights which the Applicant is seeking to acquire are at depth beneath Network Rail's land and will be exercised in accordance with the guidance and other measures set out in Paragraphs 1.3.2 and 1.3.3 of [REP8-037]. The exercise of these rights is, therefore, highly unlikely to impact upon Network Rail's duties to maintain the safe and efficient</p>

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		<p>serious concerns as to Network Rail's continued ability to respond to requests for information or approval in a timely manner.</p> <p>The Applicant had anticipated that both the exercise of powers pursuant to the draft DCO in respect of railway property and the acquisition of land interests from Network Rail and other third parties would be addressed through a voluntary agreement.</p> <p>However, and as is detailed further in Applicant's Application under Section 127 Planning Act 2008 – Network Rail Infrastructure Limited [REP8-037] and the Compulsory Acquisition and Temporary Possession Objections Schedule [REP9-056], the parties have been unable to reach agreement due to fundamental concerns with the position taken by Network Rail in respect of 'lift and shift' and 'termination' provisions in those documents.</p> <p>Notwithstanding the absence of a provision within the Planning Act 2008 which would otherwise require the Applicant to secure Network Rail's consent to the exercise of powers pursuant to the draft</p>	<p>(j) <u>article 28 (temporary use of land for maintaining the authorised development):</u></p> <p>(k) <u>article 29 (power to override easements and other rights):</u></p> <p>(l) <u>article 43 (statutory undertakers):</u></p> <p>(m) (e)-<u>article 48 (felling or lopping);</u> and</p> <p>(n) (d)-<u>article 49 (trees subject to Tree Preservation Orders);</u></p> <p>(o) <u>the powers conferred by section 11(3) (power of entry) of the 1965 Act;</u></p> <p>(p) <u>the powers conferred by section 203 (power to override easements and rights) of the Housing and Planning Act 2016;</u></p> <p>(q) <u>the powers conferred by section 172 (right to enter and survey land) of the Housing and Planning Act 2016;</u> and</p> <p>(r) <u>any powers under in respect of the temporary possession of land under the</u></p>	<p>NR in its capacity as a statutory undertaker to comply with its Network Licence (further details of which are set out below).</p> <p>NR operates under a Network Licence granted by the Office of Rail and Road (ORR) (a copy of which is appended to this representation). Under the Network Licence, NR is obliged to ensure compliance with a wide number of standards imposed by the Rail Safety and Standards Board that pertain to maintaining the safe and efficient running of trains on the railway. In order to regulate its ability to comply with such standards, NR must retain stringent restrictions, controls and procedures over any interferences with the railway by third parties, including by reason of persons exercising rights on or over railway land.</p> <p>Accordingly, where a right is compulsorily acquired over railway land, such right is created outside of NR's control and may not be subject to the necessary restrictions and conditions that NR would reasonably regard as sufficient so as to enable it to comply with its Network Licence. For example, NR may require that</p>	<p>running of the Sudbury Branch railway line.</p> <p>Exercise of Class 4 (access) rights and temporary possession powers would constitute a 'specified work' for the purposes of Network Rail's Protective Provisions and, therefore, any such exercise would be subject to the controls and other measures stipulated by Network Rail in the manner contemplated by those Protective Provisions (including the requirement to enter into an Asset Protection Agreement). The Applicant understands that those controls and measures are a practical manifestation of the 'restrictions, controls and procedures over interferences with the railway' which Network Rail refers to in its Deadline 8 submission.</p> <p>Taking account of the above, the Applicant does not agree that the amendment sought to Paragraph 30(1) of the Protective Provisions would inhibit the safe and efficient operation of the railway or, in turn, lead to non-compliance with the terms of Network Rail's Network Licence.</p> <p>Notwithstanding the precedent cited by Network Rail, there is also very clear and very</p>

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		<p>DCO (in contrast with for instance, the position of the Crown where such a provision has been made in section 135 of the Act), the Applicant has serious concerns that the inclusion of Paragraph 30(1) in its previous guise would have enabled Network Rail to dictate not only the nature of the interest(s) in railway property granted for the project but also the commercial terms (including those related to compensation) on which such an interest may be granted and statutory powers exercised.</p> <p>As a consequence, Paragraph 30(1) as previously drafted would have the potential to hinder the progress of a nationally significant infrastructure project, since it would fetter the exercise of the Applicant's rights and powers under the draft DCO and would compromise the Applicant's ability to secure the necessary rights over land required for construction and operation of the project in a manner which is in accordance with the Applicant's statutory duties.</p> <p>The Applicant has, therefore, taken the decision to reduce the extent of powers to which Paragraph 30(1) would apply,</p>	<p><u>Neighbourhood Planning Act 2017</u>;</p>	<p>rights granted to the Applicant are subject to reservations allowing NR to interrupt the exercise of such right in certain circumstances (such as enabling NR to deal with emergencies on the railway or carry out necessary works). There is a risk of reservations such as this not being imposed where a right over railway land is compulsorily acquired and as a result NR's control over its ability to appropriately manage the safety of the railway could be compromised. The consequences of which could be catastrophic and crucially, this could lead to a failure by NR to comply with its Network Licence which is not a position which can be accepted by NR, nor would it be acceptable to the ORR as NR's regulator.</p> <p>A restriction on the compulsory acquisition of rights over railway land is a widely accepted and longstanding principle and has been accepted by the Examining Authority and Secretary of State on numerous DCOs, including but not limited to: the A47/A11 Thickthorn Junction DCO, Thurrock Flexible Generation Plant DCO, Yorkshire and Humber CCS</p>	<p>relevant precedent to support the specific amendment to Paragraph 30(1) of the Protective Provisions which the Applicant is seeking.</p> <p>Reference is made in this context to the Protective Provisions for the benefit of Network Rail as they appear in each of The National Grid (Hinkley Point C Connection Project) Order 2016 and The National Grid (Richborough Connection Project) Development Consent Order 2017.</p> <p>So far as the Applicant is aware, the form of Protective Provisions as included in the Hinkley and Richborough Orders has not inhibited the safe and efficient operation of the railway network nor has Network Rail been placed in a position of conflict with the terms of its Network Licence.</p> <p>The Applicant welcomes Network Rail's willingness to agree the terms of the rights required in order to deliver the project. Indeed, the Applicant intends that private treaty negotiations with Network Rail will continue in parallel with the compulsory acquisition process with a view to concluding an</p>

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		<p>and also to include within Paragraph 30(6) a deemed consent mechanism which broadly mirrors an equivalent mechanism already found within Paragraph 31(2) of the Protective Provisions.</p> <p>As a promoter of a nationally significant infrastructure project (NSIP), the Applicant takes seriously its obligation to ensure that statutory undertakers' apparatus and equipment is protected through the inclusion of adequate protective provisions, as considered necessary and relevant to each statutory undertaker's undertaking.</p> <p>In this context, the Applicant notes that Paragraph 31 already requires Network Rail's approval to be sought before any 'specified work' (as defined) is permitted to be carried out. As a consequence, Network Rail's operational undertaking would not be adversely affected by any works undertaken as part of the project, even if rights were separately compulsorily acquired to construct and operate the project on Network Rail's land.</p> <p>Since Network Rail's undertaking and railway</p>		<p>Cross Country Pipeline DCO, Sunnica Energy Farm DCO, Longfield Solar Farm DCO and South Humber Bank Energy Centre DCO.</p> <p>Network Rail is of course willing to engage with the Applicant through the consent process facilitated by provision 30(1) to agree the terms of the rights sought and is obliged under the Protective Provisions to act reasonably in doing so. Where the parties are unable to agree the terms of the rights, the Protective Provisions include a mechanism for any disputes to be resolved through arbitration at provision 48 in any event and so any risk that the parties will ultimately not agree the terms of the rights (through the process of the Applicant seeking NR's consent under provision 30(1)) is not a justified reason to delete these powers from provision 30(1). The purpose of this restriction is not to impede the implementation of the Applicant's scheme nor hold the Applicant to ransom (NR is required by the Protective Provisions to act reasonably), but to secure the necessary protection to NR as a statutory undertaker over its assets in order that it can</p>	<p>agreement as soon as practicably possible.</p> <p>However, given the current impasse as documented in Paragraphs 1.5.12 to 1.5.19 (inclusive) of the Application under Section 127 Planning Act 2008 – Network Rail Infrastructure Limited [REP8-037], and the absence of substantive engagement to date, the Applicant simply cannot countenance a scenario whereby the delivery of critical national infrastructure is subject to the consent and arbitration process which is referred to in Network Rail's submission.</p> <p>As a related point, and given the great weight which Network Rail affords in its submissions to its Network Licence obligations, the Applicant is surprised that Network Rail is content for matters of this nature to be determined through an arbitration process. Applying Network Rail's own logic, an arbitration award in favour of the Applicant would appear almost certain to place Network Rail in breach of those Licence obligations.</p> <p>In reality, the Applicant anticipates that an arbitration award would favour Network</p>

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		<p>property will continue to benefit from the protections contained within the Protective Provisions, the Applicant's position is that the amendments to Paragraph 30(1) and 30(6) are appropriate, proportionate and necessary to avoid what would otherwise be an inappropriate and unnecessary further constraint on the Applicant's ability to successfully deliver the project.</p>		<p>properly regulate the rights to be exercised over its railway network, which is an appropriate function and purpose of protective provisions. It is inconceivable that the Applicant should have powers to acquire rights over operational railway land without NR's consent having been provided as to how those rights can be exercised.</p> <p>It is accepted that there is some protection afforded to Network Rail in the Protective Provisions, as the Applicant must both (i) enter into an asset protection agreement (provision 30(7)) and (ii) seek NR's prior approval of any plans (provision 31(1)), before any works commence. However, whilst these requirements secure some comfort for NR, this is limited to NR having approval as to the design of the works and the procedure to be followed in carrying out the works. These protections do not afford NR any control over how the Applicant can exercise a right to access the railway in carrying out the installation works or in carrying out future maintenance works.</p>	<p>Rail, leaving the Applicant in as equally disadvantageous and unacceptable a position to that which it would find itself in if Paragraph 30(1) were not amended in the manner currently proposed.</p> <p>From the Applicant's perspective, there is no practical distinction to be drawn between the measures and controls already stipulated by Network Rail in the Protective Provisions (i.e. 'the procedure to be followed in carrying out the works' as it is termed in Network Rail's submission) and the manner in which rights sought by the Applicant for the purposes of the project can be exercised.</p> <p>As explained above, the exercise of Class 4 (access) rights would constitute a 'specified work' for the purposes of Network Rail's Protective Provisions and, therefore, any such exercise would be subject to the controls and other measures stipulated by Network Rail in the manner contemplated by those Protective Provisions (including the requirement to enter into an Asset Protection Agreement).</p>

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				For these reasons, NR requires the form of provision 30(1) contained in the Current Protective Provisions to be retained.	
30(6)	<p>Where Network Rail is asked to give its consent pursuant to this paragraph, such consent must not—</p> <p>(a) 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); and</p> <p>(b) be unreasonably delayed and if, by the end of 28 days beginning with the date on which such request for Network Rail's consent was made, Network Rail has not intimated its refusal together with the grounds of any such refusal of such</p>	The Applicant refers to its submissions made above in respect of Paragraph 30(1).	<p>Where Network Rail is asked to give its consent pursuant to this paragraph, such consent must not—</p> <p>(a) 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); and</p> <p>(b) be unreasonably delayed and if, by the end of 28 days beginning with the date on which such request for Network Rail's consent was made, Network Rail has not intimated its refusal together with the grounds of any such refusal of such consent, the undertaker may serve upon Network Rail written notice requiring Network Rail to intimate approval or disapproval within a</p>	<p>The insertion of this wording is not acceptable to Network Rail on the basis that:</p> <p>(a) it cannot agree to a blanket obligation to respond to a request for consent under provision 30 of the Protective Provisions within a maximum of 42 days on the basis that some circumstances may require a longer period of time than this for NR to properly assess the impacts of any such request (for example, NR may need to seek technical clearance from its engineers in order to grant consent (a process which can take up to 3 months)). Equally, some requests may require less than 42 days for NR to respond, but it is not appropriate for NR to be obliged to respond within a fixed time period which does not factor in the specific circumstances or particulars of such request</p>	<p>The Applicant appreciates the fact that certain approvals may – in abstract terms – take longer than others to obtain. However, a period of 42 days is considered entirely reasonable given (a) the critical national need which necessitates the timely delivery of the project, (b) the very limited nature of requests for consent or approval to which Paragraph 30(6) would apply, and (c) the nature of the Network Rail asset(s) which could conceivably form the subject matter of any approvals process. The very limited interactions between the project and Network Rail's asset(s) (the Sudbury Branch railway line) are of a lower order of magnitude and complexity to those on other projects where a 3 month approval period may be justifiable. The Applicant also notes that Paragraph 31(2) of the Protective Provisions includes a deemed consent mechanism,</p>

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	<p>consent, the undertaker may serve upon Network Rail written notice requiring Network Rail to intimate approval or disapproval within a further period of 14 days beginning with the date upon which Network Rail receives written notice from the undertaker. If by the expiry of the further 14 days Network Rail has not intimated consent or refusal of consent, Network Rail is deemed to have given consent for the exercise of the respective powers.</p>		<p>further period of 14 days beginning with the date upon which Network Rail receives written notice from the undertaker. If by the expiry of the further 14 days Network Rail has not intimated consent or refusal of consent, Network Rail is deemed to have given consent for the exercise of the respective powers.</p>	<p>which may necessitate a longer period;</p> <p>(b) it is not appropriate for the consent of NR, as a statutory undertaker, to be deemed to have been given where it cannot provide a response within a fixed time period. Any such request for NR's consent must be properly assessed and cannot be deemed to have been given due to the effluxion of time. Any such provision would be contrary to NR's duty to carry on its statutory undertaking and comply with its Network Licence as detailed above;</p> <p>(c) in any event it is not appropriate to draft this obligation in a manner which obliges NR not to unreasonably delay providing its 'consent', but rather it ought to be worded to provide that NR should not unreasonably delay providing its 'response' to such a request. The former approach implies that such consent has been pre-determined to have been given, which is not appropriate or grammatically correct.</p>	<p>and that such a mechanism is not in dispute (indeed it forms part of Network Rail's standard-form Protective Provisions): "...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."</p> <p>The Applicant would therefore query whether Network Rail's submission that "[any] such provision would be contrary to NR's duty to carry on its statutory undertaking and comply with its Network Licence" is indeed factually correct.</p> <p>Absent any further clarification from Network Rail, the Applicant would suggest that limited weight may be placed on this particular aspect of Network Rail's submission.</p> <p>As to the particular drafting of Paragraph 30(6), the Applicant notes the submissions made by Network Rail and would suggest that the final sentence in Paragraph 30(6)(b) is instead amended to read as follows:</p> <p>"If by the expiry of the further 14 days Network Rail has not intimated consent or refusal of consent, Network Rail is</p>

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30(7)	<p><i>Unless otherwise agreed, the undertaker must use reasonable endeavours to enter into an asset protection agreement prior to the carrying out of any specified work.</i></p>	<p>The Applicant has sought to amend what was previously an absolute obligation in Paragraph 30(7) to enter into an Asset Protection Agreement (APA) prior to the carrying out of any 'specified work'.</p> <p>Whilst the Applicant takes seriously its obligation to ensure that statutory undertakers' apparatus and equipment is protected through the inclusion of adequate protective provisions, it is incumbent upon the Applicant to ensure that any protective provisions are reasonable, proportionate and would not lead to unnecessary or unjustified cost burdens which would ultimately be borne by the consumer.</p> <p>As indicated above, the Applicant has serious concerns</p>	<p>Unless otherwise agreed, the<u>The</u> undertaker must use reasonable endeavours to <u>enter into an asset protection agreement prior to the carrying out of any specified work.</u></p>	<p>NR is content to agree not to unreasonably delay providing its response to such a request and would propose the following wording as a new provision 30(6A):</p> <p><i>(6A) Where Network Rail is asked to give its consent pursuant to this paragraph, Network Rail's response to such a request must not be unreasonably delayed.</i></p>	<p><i>deemed to have approved the exercise of the respective powers."</i></p> <p>The effect of this change would be to mirror the form of wording in Paragraph 31(2) and in respect of which Network Rail is, as noted above, already seemingly content.</p>
				<p>The insertion of this wording is not acceptable to Network Rail on the basis that in order to comply with its Network Licence, Network Rail must ensure that any person accessing railway property enters into an asset protection agreement in order to ensure the safe and efficient running of trains on the railway. An asset protection agreement ensures that any person accessing railway property complies with the relevant conditions and procedural requirements deemed by NR to be reasonably necessary to maintain the safety of that person and the safety of users of the railway. NR is under an obligation not to act unreasonably (save for matters which concern safety where NR</p>	<p>The Applicant refers to its existing submissions as set out in Column 3 of this Table.</p>

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		<p>based on its engagement to date, that Network Rail would be inclined to enter into an appropriate form of APA in such circumstances in a timely manner.</p> <p>Any delay to the carrying out of 'specified works' would have significant implications in terms of delivery of the project as a whole, the critical national need for which is already well established (see, for example, the Needs Case [APP-161]).</p> <p>Therefore, the amendments sought to Paragraph 30(7) seek to cater for a potential scenario whereby Network Rail's prompt engagement in respect of an APA is not forthcoming or indeed where the terms sought by Network Rail are unreasonable.</p> <p>In recognition of Network Rail's own statutory duties, the amendments do not, however, seek to remove the requirement to enter into an APA.</p>		<p>shall have absolute discretion) in entering into such an agreement under provision 30(6) which should be sufficient comfort to NGET that NR may not otherwise act unreasonably in imposing requirements in an asset protection agreement. On this basis, NR's position is that such an obligation cannot be subject to the use of reasonable endeavours and that NGET's proposed revisions to provision 30(7) should be rejected.</p>	

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