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Yorkshire Green Energy Enablement (GREEN) Project

Volume 8

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1. Position Statement - Protective Provisions Not Yet Agreed with Network Rail

1.1 Summary of position

- 1.1.1 At Deadline 5 National Grid submitted an application under sections 127 and 138 of the Planning Act 2008 (the Act) (**Document 8.27.1**) [REP5-086] which demonstrates that there is a compelling case in the public interest for inclusion within the DCO of powers of compulsory acquisition over Network Rail's land. For the reasons set out therein, the Secretary of State can be satisfied that the tests in sections 127 and 138 of the Act have been met.
- 1.1.2 The main outstanding differences between the two forms of protective provisions relate to similar matters which were outstanding at the close of examination which considered The National Grid (Richborough Connection Project) Development Consent Order 2017 (**Richborough Connection Project**) and The National Grid (**Hinkley Point C Connection Project**) Order 2016 (Hinkley Point C Connection Project). National Grid has made further progress with Network Rail to narrow the fundamental issues between the parties since those previous DCOs were made but some points of difference remain.
- 1.1.3 National Grid has included protective provisions for the benefit of Network Rail in Part 4 of Schedule 15 to the **draft DCO (Document 3.1(F))**.
- 1.1.4 The protective provisions proposed by National Grid in the **draft DCO (Document 3.1(F))** generally reflect the precedented position in the Richborough Connection Project, save that National Grid have included additional concessions to Network Rail in respect of provision for an Asset Protection Agreement, indemnity wording and notices for any future transfers of benefit.
- 1.1.5 Following submission of the Joint Position Statement at Deadline 6 (**Document 8.30.1**) [REP6-063], negotiations have continued to considerably narrow the issues between the parties. As is demonstrated within the **Statement of Common Ground between National Grid and Network Rail (Document 8.5.11(D))** submitted at Deadline 7. However, the following outstanding differences remain between the parties with respect to the protective provisions:
- Network Rail's request for prior consent for the exercise of DCO powers under Articles 3, 4, 25, 26, 29, 34, 36-40, 46 and 55, and equivalent statutory powers under Section 172 (rights to enter and survey) and Section 203 (powers to overwrite easements) of the Housing and Planning Act 2016; Temporary Possession under the Neighbourhood Planning Act 2017; and rights to prevent operation, access and maintenance to railway property. This is not agreed by National Grid and not included in the protective provisions in the **draft DCO (Document 3.1(F))**.
 - The need to stop operation of the line where EMI is found to be present and the process for EMI testing.

- 1.1.6 National Grid and Network Rail have also reached an impasse regarding Heads of Terms negotiations for relevant land agreements associated with the Project. The fundamental point of difference in this respect relates to the 'Termination' and 'Lift and Shift' provisions. This is tied to the disagreement regarding protective provision drafting because whilst disagreement remains on these points, National Grid cannot agree to prior consent of compulsory acquisition powers.
- 1.1.7 Network Rail's proposed wording to require consent over compulsory acquisition powers is disproportionate for the works required in connection with the Project and could result in unnecessary costs to the electricity consumer through no fault of National Grid or as a result of the Project. As a promoter of a nationally significant infrastructure project (NSIP), National Grid 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. However, as a statutory undertaker in their own right and with a regulated obligation to act in the best interests of the electricity consumer, National Grid must ensure that the protective provisions entered into within Schedule 15 of the **draft DCO (Document 3.1(F))** are reasonable, proportionate and would not lead to unnecessary or unjustified cost burdens which would ultimately be borne by the consumer.
- 1.1.8 This Position Statement has been prepared to provide the Examining Authority with National Grid's position regarding the remaining matters not agreed and to request that the Examining Authority recommends to the Secretary of State that the form of protective provisions included for Network Rail's benefit should remain as currently proposed by National Grid within the **draft DCO (Document 3.1(F))**.
- 1.1.9 National Grid's position in respect of each matter of disagreement is explained in turn below.

1.2 Consent Provisions

- 1.2.1 National Grid fully recognises that it must, and continues to, use reasonable endeavours to seek voluntary agreements with all third parties affected by the Project before seeking to acquire land and interests in land compulsorily. It is on that basis that National Grid developed its Land Rights Strategy and has sought to enter into voluntary agreements with all persons with interests in land, including statutory undertakers, such as Network Rail. Progress is continuing positively regarding the voluntary terms. Unfortunately, despite National Grid's ongoing attempts to negotiate voluntary agreements this is unlikely to prove possible with all affected parties. It is on this basis that National Grid is seeking powers to ensure that it is able to compulsorily acquire land and interests in land where it has not been possible to reach such a voluntary agreement.
- 1.2.2 The provisions of paragraph (3) of Network Rail's preferred form of protective provisions would require National Grid to secure Network Rail's consent before exercising certain DCO powers which might affect Network Rail's undertaking. As explained within the Statement of Common Ground entered into between the parties (**Document 8.5.11(D)**), the Project would interface with the operational railway in a number of locations. As such, the effect of paragraph (3) would be that National Grid would not be able to acquire the interests it needs to implement the Project without first seeking Network Rail's consent.

- 1.2.3 National Grid has sought to negotiate voluntary agreement for the grant of the interests in the land it requires from Network Rail and discussions between the parties continue in this respect. However, the parties have been unable to reach agreement to date due to the conflicting positions in respect of 'lift and shift' and 'termination' provisions sought by Network Rail. Further detail on these matters is set out below.
- 1.2.4 In the absence of reaching agreement, this provision has the potential to hinder the progress of the Project, because it would fetter the exercise of National Grid's rights and powers under the DCO and would compromise National Grid's ability to secure the necessary rights over land required for construction and operation of the Project in a way which is in accordance with National Grid's statutory duty, in the best interests of the electricity consumer.
- 1.2.5 Under National Grid's proposed protective provisions (as included in Part 4 of Schedule 15 of the **draft DCO (Document 3.1(F))**), National Grid must secure Network Rail's approval before carrying out any 'specified work' (being so much of the authorised development as is situated upon, across, under, over or within 15 metres, of, or may in any way adversely affect, railway property). For this reason, 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. National Grid is not seeking powers to acquire a freehold interest in Network Rail's land for this Project. Therefore, Network Rail's further approval to exercise powers of the DCO would unnecessarily restrict National Grid's ability to deliver the Project. In addition, Network Rail's land will continue to benefit from the protections contained within the protective provisions.
- 1.2.6 National Grid acknowledges that there is precedent for the inclusion of the type of consent provision proposed by Network Rail. However, there are also DCOs which affect railway land which do not include this form of wording¹. In any event this should not, in National Grid's view, automatically result in the repeated inclusion of wording within a DCO, each case must be considered on its own merits and subject to the relevant facts and land or rights to be acquired in each particular case. The Project is an overhead line DCO required to manage a boundary constraint on the transmission system, with a number of offshore wind farm and interconnectors reliant on its delivery and operation. National Grid would not be able to cease or stall operations to accommodate any future application of the termination and 'lift and shift' provisions requested by Network Rail because this would have far-reaching consequences across the national network and its dependents.
- 1.2.7 There is no provision within the Planning Act 2008 which requires an applicant to secure Network Rail's consent to the exercise of DCO powers (in contrast with for instance, the position of the Crown where such a provision has been made in section 135 of the Act) and National Grid is not aware of any basis on which such consent ought to be required. National Grid have serious concerns that the inclusion of such a provision would enable Network Rail to dictate not only the nature of the interest in land granted for the Project but also the commercial terms on which such an interest may be granted.
- 1.2.8 Through the DCO Application and examination documents, National Grid has demonstrated its case for securing powers to compulsorily acquire the land interests it needs to deliver the Project. Network Rail has not presented any evidence to suggest

¹ See for instance, the National Grid (Kings Lynn B Power Station Connection) Order 2013 (S.I. 2013/3200); The National Grid (Hinkley Point C Connection Project) Order 2016 (S.I. 2016/49); and The National Grid (Richborough Connection Project) Development Consent Order 2017 (S.I. 2017/817).

that the Project is incompatible with the efficient and safe operation of the railway. If the Secretary of State is minded to make the draft DCO in the form applied for, it should not then be necessary for National Grid to once again make the case for the land interests it requires to Network Rail.

1.2.9 Similarly, in so far as the payment of compensation for land interests is concerned, the effect of Network Rail's proposed consent provision would be to enable Network Rail to dictate the payments that must be made. National Grid's position is that the payment of compensation to Network Rail for the acquisition of land interests should not be treated any differently from any other affected party with an interest in land: the payment of compensation should be determined by reference to the statutory compensation code unless the parties agree otherwise. It would remain open to Network Rail to refer any matter of dispute to the Upper Tribunal for determination. However, if National Grid is unable to revert to the exercise of such powers but instead must secure Network Rail's consent, Network Rail could effectively dictate the commercial terms of any disposal.

1.2.10 Given the above, National Grid does not consider the inclusion of paragraph (3) of Network Rail's preferred protective provisions to be necessary, proportionate or appropriate and furthermore, that it could seriously compromise National Grid's ability to deliver the Project.

1.3 EMI

Operational testing of EMI

1.3.1 Network Rail have requested wording that "*prior to the commencement of operation of the authorised development the undertaker shall test the use of the authorised development in a manner that shall first have been agreed with Network Rail*". National Grid's approach to EMI is to ensure that its equipment complies with appropriate national standards, specifically BS EN 50122-1, which covers steady state and fault condition operation of National Grid's equipment. National Grid has committed to working with Network Rail to establish appropriate arrangements to verify effectiveness in line with normal practice procedures. It is not standard practice for National Grid to undertake operational testing of the line specifically with respect to EMI because the calculations themselves demonstrate this to much more robust parameters. Paragraph 35(3) provides that pre-operational verification procedures will take place. This is the normal practice through which National Grid verify effectiveness of a line with respect EMI and involves calculations covering extreme scenarios, beyond that which could be physically tested at a commissioning stage of an overhead line, and undertaking a detailed design of new infrastructure so that there is no impact from EMI, typically through the installation of additional earthing if required. The requirement to test the equipment prior to energisation is not required as the detailed design will have been undertaken to assess EMI and a solution designed to ensure any impacts have been mitigated. Needing to agree this process again has the potential to add delay to the programme. National Grid has sought clarifications from Network Rail as to the testing Network Rail require, the conditions under which testing is to be carried out, and if there are any agreed standards followed for the testing protocols. National Grid has received further information from Network Rail regarding EMI and the standards that National Grid would need to comply with. National Grid maintain that no tests would be required due to the detailed design work that is undertaken; however, are committed to further discussions and dialogue with Network Rail to come to a resolution on this point.

Stopping of operations as a result of EMI

- 1.3.2 Network Rail have requested wording that "*the undertaker shall not allow the use or operation of the authorised development in a manner that has caused or will cause EMI until measures have been taken in accordance with this paragraph to prevent EMI occurring*". Shutting down the operation of an electric line is a significant undertaking for National Grid and cannot be committed to lightly. In practice, where there is an EMI, National Grid have a regulatory duty, to address this as soon as possible. The existence of EMI would not necessarily require shutting down operation of the line whilst the problem is being fixed. For example, NGET would not shut down operation unnecessarily in instances where Network Rail were still able to use their undertaking whilst the EMI issue was being addressed. Sub-paragraph (3) requires that National Grid must "*take all measures necessary to prevent EMI*", which provides the requisite protection for Network Rail, whilst at the same time maintaining flexibility for National Grid to resolve the issue without shutting down operation of the line, where such outage would not be necessary.

1.4 Land Agreements

- 1.4.1 Related to the serious concerns that National Grid have raised with a prior approval right being given to Network Rail before compulsory acquisition powers can be exercised, there is a fundamental point of difference between National Grid and Network Rail regarding the terms of voluntary land agreements currently under negotiation.
- 1.4.2 Network Rail has required terms which would allow it to terminate National Grid's land rights at Network Rail's election. Tied to this is the term which would allow Network Rail to require National Grid to move its apparatus in the event that Network Rail requests this. These are called 'termination' and 'lift and shift' clauses. Such terms would allow Network Rail to bring the voluntary lands agreement to an end for any purpose in connection to conducting its business as a railway operator by giving National Grid written notice. Prior to serving the notice, Network Rail need to use reasonable endeavours to identify and offer an alternative location for National Grid's apparatus that is required to be moved; however, there is no actual obligation to source and provide such alternative location. Each have the effect of removing National Grid's rights to operate a nationally significant infrastructure project at the future request of Network Rail, and further would require positive action by National Grid to reconfigure the transmission network, at the electricity consumer's expense. These provisions are totally at odds with National Grid's statutory duties to be economic and efficient.
- 1.4.3 It is accepted that Network Rail has a statutory duty to ensure safe operation of the railway and act in the public's best interest, but National Grid is also a regulated body with a duty to the electricity consumer and must not enter into commitments which would put at risk the future transmission of electricity across the nation. Agreeing to Network Rail's request would remove certainty as to the ongoing operation of the Project and commit National Grid to future diversions which may require new consents, including new land rights which would need to be sought, which have not been assessed as part of this Project. This would be entirely unacceptable for the operation of a nationally significant infrastructure project.
- 1.4.4 It would incur significant cost to National Grid, which would be borne by the electricity consumer, through no fault or instigation of National Grid. Outages would be experienced by the consumer, which would be out of the control of National Grid and

potentially take a significant amount of time to restore especially if new statutory consents are required.

- 1.4.5 Whilst it is likely that Section 37 consent under the Electricity Act 1989 would be required to consent a future movement of apparatus requested by Network Rail; dependent on the extent of diversion and length of overhead line affected, such movement may necessitate a potential future DCO. The costs and timescales associated with these consents processes are substantial and would exceed the timescales for termination and 'lift and shift' proposed by Network Rail. Additionally, this could also require land and rights from potentially additional landowners not already affected by the Project.
- 1.4.6 It is National Grid's position that any future need for Network Rail to update its network, which necessitates movement of National Grid apparatus, should be funded and consented, with alternative land rights secured for National Grid, by Network Rail as the promoter of any such future development in the usual way.

1.5 Conclusion

- 1.5.1 For the above reasons, the Examining Authority and Secretary of State are invited to retain the wording within Schedule 15, Part 4 to the **draft DCO (Document 3.1(F))** as currently drafted and proposed by National Grid. National Grid's position is reasonable and in line with its statutory obligation; it is not possible for National Grid to meet Network Rail's requests and still comply with its statutory duty.

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