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Yorkshire Green Energy Enablement (GREEN) Project

Volume 8

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Version History

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1. Position Statement - Protective Provisions Not Yet Agreed with National Gas Transmission

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 8.27.3**) [**REP5-088**] which demonstrates that there is a compelling case in the public interest for inclusion within the DCO of powers of compulsory acquisition over National Gas Transmission Plc's (NGT's) land. For the reasons set out therein, the Secretary of State can be satisfied that the tests in section 127 and 138 of the Act have been met and that rights of access over NGT's land may be compulsorily acquired under the DCO without any serious detriment to NGT's statutory undertaking.
- 1.1.2 National Grid has included protective provisions for the benefit of NGT in Part 7 of Schedule 15 of the **draft DCO (Document 3.1(F))**. At Deadline 6, National Grid and NGT submitted a Joint Position Statement that provided the precise differences between National Grid's proposed protective provisions and NGT's preferred drafting (**Document 8.30.3**) [**REP6-065**]. The Joint Position Statement (**Document 8.30.3**) [**REP6-065**] also contains an overview of both National Grid's and NGT's position and should be read in conjunction with this Position Statement.
- 1.1.3 The main differences which remain unresolved between the parties are as follows:
- **Acceptable Insurance:** National Grid can only commit to insurance limits and indemnities which are proportionate to the interference from the Project and the potential risks to NGT's apparatus resulting from that interference.
 - **Protection for Retained Apparatus:** National Grid propose the inclusion of deemed consent and timescales for the approval of works which are consistent with the remainder of the **draft DCO (Document 3.1(F))**.
 - **Indemnity:** National Grid require a proportionate and reasonable indemnity provision of a scale and nature comparable to the works to be undertaken as a result of the Project and reflective of the level of risk to which this will give rise, relative to the sensitivity and proximity of NGT's apparatus.
 - **Dispute Resolution:** National Grid require a consistent dispute resolution mechanism across all protective provisions and to ensure that provisions which require agreement between the parties are not at the absolute discretion of NGT.
- 1.1.4 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.

- 1.1.5 The importance of the national, high-pressure gas transmission network and NGT's responsibility for this are fully acknowledged by National Grid. National Grid have included bespoke protective provisions for the benefit of NGT in the **draft DCO (Document 3.1(F))** at Schedule 15, Part 7. These protective provisions ensure that any works that may affect NGT's apparatus would be subject to their advance approval. They also enable NGT to inspect the works and request protective works where necessary. Further, National Grid must undertake the works in full compliance with NGT's policies for safe working in proximity to NGT's apparatus.
- 1.1.6 National Grid's position in respect of each matter of disagreement is explained in turn below.

1.2 "Acceptable Insurance" definition

1.2.1 As noted above National Grid can only commit to insurance limits that are proportionate to the Project's interference with NGT's apparatus. National Grid have a statutory duty to operate the transmission network economically and efficiently, because the costs of doing so will ultimately be borne by the electricity consumer.

1.2.2 The works that are to be undertaken by National Grid on or near NGT's buried apparatus are all non-intrusive works and occur only at three sites along the entirety of the Project's linear route. The works are as follows:

- Work at pylon XD003 (Tadcaster Tee): this work involves reconductoring from XD003 to XC481 to enable diversion works. NGT has buried apparatus under the foundations of pylon XD003, but the works do not involve any intrusive works to the foundation of XD003. Although, to enable these works a temporary access road will need to be built, this road will not cross NGT assets, only abut them. Where National Grid cross any NGT access, extra protective precautions will still be adhered to, for example, track matting, subject to ground conditions and agreed between National Grid and NGT.
- Work at tower XC483 (Tadcaster Tee): this work involves reconductoring of the XC route, and oversailing the NGT asset in span XC483 to XC484. The reconductoring at pylonXC483 involves crossing NGT buried apparatus at two locations (1) the first location is an established unnamed road off the A659 slip road, which already has the provisions to accommodate vehicle movements, including heavy farm traffic vehicles; (2) the second access road will involve the construction of a temporary access road; however, this works is non-intrusive work where NGT's apparatus is buried. Where National Grid cross any NGT access, extra protective precautions will still be adhered to, for example, track matting, subject to ground conditions and agreed between the National Grid and NGT.
- Work at pylon XC500 located off Coldhill Lane, south of Saxton: this work involves reconductoring of the XC route, and oversailing the NGT asset in span XC500 to XC501. The reconductoring at pylon XC500 involves crossing NGT buried apparatus at two locations. Both locations will involve the construction of a temporary access road, however this is non-intrusive works where NGT's apparatus is buried. Where National Grid cross any NGT access, extra protective precautions will still be adhered to, for example, track matting, subject to ground conditions and agreed between the National Grid and NGT.

- 1.2.3 Overall, these works are really limited to the delivery of steel and fixtures and fittings for the pylons, and the scaffold delivery, typically with a roll on roll off scaffold wagon, and a tractor with a winch attached. In a very worse case situation National Grid would need to cross with a crane. However, any vehicle that is used would be limited to the same axle weight as a vehicle that can travel on the public highway, which is 11.5 tonnes. This would be the same as an agricultural vehicle.
- 1.2.4 Where National Grid would install temporary construction accesses, suitable due diligence in accordance with NGT specifications for safe systems of work and codes of practice when working near high pressure gas mains will be adhered to at all times. This is secured by the protective provisions included in the **draft DCO (Document 3.1(F))** and will ensure that no serious detriment occurs to NGT's undertaking as a result of the Project.
- 1.2.5 Although the risk of damage to NGT's apparatus is considered very low, National Grid accepts that an appropriate level of insurance cover should be maintained whilst the works are undertaken and be proportionate to the scale and nature of the works to be undertaken in proximity to NGT's apparatus. For this reason, National Grid has included a provision which requires insurance cover of £25 million (per occurrence) to be maintained. National Grid have on numerous occasions, requested from NGT specific justification for their request for insurance cover of £50 million (per occurrence) and to date have not been provided with any justification as to why this level of insurance cover is required by NGT for this particular Project. NGT have pointed to other DCOs which include this level of insurance cover, but this does not set any precedent; the other DCOs relate to protection for both electricity and gas apparatus and for projects where the scale of works is not necessarily comparable with this Project. Given National Grid's statutory duty of economy and efficiency, National Grid simply cannot accept NGT's request for insurance cover which is not proportionate to the scale and nature of the works without specific justification.

1.3 "Network Code Claims" definition

- 1.3.1 The potential interpretation of liability within the definition of "Network Code Claims" is considered too wide and will potentially expose National Grid to liability and costs that do not result from the Project. National Grid propose the inclusion of the word "direct" so that liability is directly related to the works undertaken for the Project. National Grid believes this is entirely reasonable.

1.4 Protection of retained apparatus protection – inclusion of deemed consent and amendment to time scales

- 1.4.1 The protective provisions included in the **draft DCO (Document 3.1(F))** require National Grid to give NGT 28-days' prior notice before undertaking works on or near NGT's apparatus. This is entirely reasonable given the scale and nature of the works which would affect NGT's apparatus. No works to NGT's pipeline are required as part of the Project. The only works being undertaken on or near to NGT's apparatus relate to the laying of track matting (if required) to facilitate access over NGT's underground gas pipeline. No intrusive works would be undertaken in the laying of the track matting.
- 1.4.2 This Project has significant programme constraints to meet the earliest in-service date in 2027. As a result, it is essential that any approvals required under the DCO are given promptly and without any unnecessary delays. As with other stakeholders, National Grid

fully intend to work collaboratively with NGT. As much notice as possible of an intended submission will be provided to NGT to ensure that NGT are aware of its expected date of submission and can allocate resource to respond to it in the timescales required. It would not be in National Grid's interest to do otherwise, as this could risk refusal of the plan submitted.

- 1.4.3 As with other approval processes under the draft DCO, deemed consent has been included to ensure that there are no unnecessary delays associated with the approvals process. Under the protective provisions in the **draft DCO (Document 3.1(F))** NGT has the ability to request the modification of any plan within 21 days of its receipt. This provides a reasonable and adequate period for NGT to review and form a view on the works proposed given their minor nature and scale.

1.5 Indemnity

- 1.5.1 National Grid have included an indemnity for NGT in the protective provisions contained in the **draft DCO (Document 3.1(F))** which is entirely proportionate to the scale and nature of the works to be undertaken in proximity to NGT's apparatus on this particular Project.
- 1.5.2 The absence of an uncapped indemnity does not contribute to a test of 'serious detriment' because, fundamentally, should there be any damage to NGT's apparatus above the capped amount, they would still have recourse through the usual contractual channels to seek costs from National Grid for damage attributable to it under the provisions (such losses would simply need to be proven as opposed to being outright indemnified). The indemnity merely provides a more beneficial starting point for NGT with respect to recovering their costs. Additionally, the remainder of the bespoke protective provisions for the benefit of NGT (for which the majority of elements are agreed) provide protections which would prevent any such damage being incurred.
- 1.5.3 As explained above, National Grid has a statutory duty to be economic and efficient. For this reason, National Grid cannot accept an uncapped indemnity where this would not be appropriate on the specific facts of this particular Project. Justification has been sought from NGT on multiple occasions to date and no justification in consideration of the specifics of this Project has been provided.
- 1.5.4 NGT have made reference to a number of made DCOs where uncapped indemnities have been provided. As explained above, these DCOs should not be taken as providing any precedent for this Project. None of the DCOs referred to were promoted by National Grid. Indeed, the majority of the examples presented were included for the benefit of National Grid's gas and electricity undertaking (the two being combined at that time). In each case, the parties reached an agreement as a result of that project's impact on National Grid's apparatus. As noted above, no such equivalent circumstances apply here. Equally, National Grid can point to examples of DCOs where no indemnity has been provided for gas undertakers. For example, the Thurrock Flexible Generation Plant Development Consent Order 2022¹ (see Part 5 of Schedule 8, 'For the protection of National Grid as electricity and gas undertaker'). Notwithstanding this, National Grid accepts that an indemnity should be provided in this case but, for the reasons given above, is firmly of the view that it must reflect the scale and nature of the works affecting NGT's apparatus for this particular Project. It is simply not appropriate to compare or rely on previous DCOs which are not like for like as setting any form of precedent.

¹ S.I. 2022/157

- 1.5.5 NGT also point to a hypothetical future instance where the potential impacts of work near gas pipelines become 'catastrophic'. Whilst flexibility is allowed for within the **draft DCO (Document 3.1(F))** for the detailed design of the Project, these would not go so far as to allow a deviation to the extent that any works proposed would have a 'catastrophic' or even moderate impact on NGT apparatus. Even in the remotely hypothetical event that the level of works change near NGT apparatus, the remainder of the protective provisions would still ensure that works are undertaken with its prior approval and protective measures are in place. Moreover, National Grid's proposed level of indemnity would facilitate any such shift because the quantum is already set at the upper end of what would be expected for works considered to fall within standard and usual business practices.
- 1.5.6 As has been evidenced by National Grid's approach to the Network Rail protective provisions, where a clear justification is or can be established for an uncapped indemnity in respect to the specific project in question and its interferences with third party apparatus, National Grid is rightly open to discussion with that statutory undertaker on the approach to be taken. However, in its duty to the electricity consumer National Grid cannot blindly rely on other DCO projects (promoted by a different entity and those given jointly for protection for both electricity and gas apparatus and for projects where the scale of works is not necessarily comparable to this Project) as a justification for exposing itself (and therefore the electricity consumer) to an uncapped indemnity.
- 1.5.7 NGT have been unable to quantify the potential risks of damage to their apparatus and want to ensure that every possible scenario is covered (however remote or unlikely to occur). As a regulated undertaker, National Grid need to ensure that it is not exposed to risks which are disproportionate to the works it undertakes. Provision of an uncapped indemnity when the works in question do not break ground over or near NGT apparatus would be disproportionate. National Grid have sought to cap the indemnity at the upper end of normal working practice liability expectations. The works themselves form part of a NSIP due to the thresholds set out in the Act, but are within the normal course of National Grid activities to maintain its network. If National Grid were simply reconducting an overhead line above an NGT pipeline outside of a DCO, no equivalent protective provisions would be required or provided.
- 1.5.8 In summary, all indemnities provided by National Grid need to be justified because National Grid has a statutory duty to be economic and efficient. No clear justification has been provided by NGT for the need of an uncapped indemnity in the circumstances of the proposed works. The absence of an uncapped indemnity does not contribute to a test of 'serious detriment' because, fundamentally, should there be any damage to NGT's apparatus above the capped amount, they would still have recourse through the usual contractual channels to seek costs from National Grid for damage attributable under the protective provisions.

1.6 Paragraph 15 – dispute resolution

- 1.6.1 If there is any potential for a dispute arising, National Grid's position is that a means of resolution needs to be contained in the DCO and, to ensure a consistent approach to dispute resolution, it is appropriate that this is achieved through the DCO's arbitration provision (article 53) which is a standard article across numerous made DCOs.

- 1.6.2 NGT have sought to exclude certain matters under the protective provisions from any form of dispute resolution, with the consequent effect that NGT would have absolute discretion in relation to those matters. NGT considers that:
- the matters excluded relate to absolute requirements on National Grid;
 - National Grid has no discretion not to comply with those requirements;
 - there could be no dispute on which a third party could adjudicate; and
 - dispute resolution would remove the sole discretion of NGT as the owner of the apparatus in question.
- 1.6.3 National Grid disagrees. The relevant provisions (paragraphs 7(2), 7(4), 8(1) and 9) require NGT and National Grid to act reasonably and, in some cases, for NGT and National Grid to reach agreement. For this reason, it must be right that dispute resolution procedures are included, otherwise National Grid would have no recourse should NGT not act reasonably, or the parties fail to reach agreement. The Act dictates that there is criminal liability for non-compliance with a DCO. This makes it all the more fundamental that dispute resolution procedures are in built to the protective provisions.

1.7 Conclusion

- 1.7.1 For the above reasons, the Examining Authority and Secretary of State are invited to retain the wording within Schedule 15, Part 7 to the **draft DCO (Document 3.1(F))** as currently drafted. National Grid's position is reasonable and in line with its statutory obligation. In the absence of evidence to substantiate NGT's position, it is not possible for National Grid to meet NGT's requests and still comply with its statutory duty.

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