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Yorkshire Green Energy Enablement (GREEN) Project

Volume 8

Document 8.34.5 Applicant's Position Statement - Protective Provisions Not Yet Agreed with National Highways

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Version History

Document	Version	Status	Description / Changes
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1. Position Statement - Protective Provisions Not Yet Agreed with National Highways

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 8.27.2**) [**REP5-087**] which demonstrates that there is a compelling case in the public interest for inclusion within the DCO of powers of compulsory acquisition over National Highways' 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.
- 1.1.2 National Grid has included protective provisions for the benefit of National Highways in Part 6 of Schedule 15 to the **draft DCO (Document 3.1(F))**. Within the protective provisions included at Part 6 of Schedule 15 to the **draft DCO (Document 3.1(F))**, National Grid proposes two tiers of protection for National Highways:
- A streamlined approvals process without the need for a bond for scaffolding and reconductoring works (these being works outside the 5.5 metre envelope measured from the surface of the highway); and
 - A full set of protection which closely aligns with the National Highways template protective provisions for any works which would be made directly on or fall within a height of 5.5 metres vertically above the strategic road network. This wider protection ensures that National Highways' undertaking is adequately protected in the event that unforeseen works are required to be undertaken pursuant to the powers of associated development contained within Schedule 1 of the **draft DCO (Document 3.1(F))**.
- 1.1.3 Following the Joint Position Statement submitted at Deadline 6 (**Document 8.30.2**) [**REP6-064**], negotiations have continued in order to narrow considerably the issues between the parties. As is demonstrated within the final **Statement of Common Ground between National Grid and National Highways (Document 8.5.14(C))** submitted at Deadline 7, only two main differences remain not agreed between the parties (all other matters having been agreed) as follows:
- The level of the indemnity to be provided to National Highways and, principally, whether this should be limited or uncapped. Given the scale and nature of the works and National Grid's statutory duties to be economic and efficient, National Grid has included an indemnity limited to £30million in the protective provisions contained in the **draft DCO (Document 3.1(F))**.
 - Whether the protective provisions should extend to all land held by National Highways within the Order limits, even though this is not part of the strategic road network or held for the purposes of National Highways' undertaking. The land in question currently forms part of the local road network. National Grid's firm position is that the protective provisions should not be extended for land which does not form part of National Highway's undertaking, especially where the local highway authority

has confirmed that they are content with the powers in Part 3 of the draft DCO relating to streets and the related controls on these in the **draft DCO (Document 3.1(F))**.

- 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 electricity consumer.
- 1.1.5 This Position Statement has been prepared to provide the Examining Authority with National Grid's position regarding the above two not agreed matters and to request that the Examining Authority recommends to the Secretary of State that the form of Protective Provisions for the protection of National Highways should remain as proposed by National Grid within Part 6 of Schedule 15 of the **draft DCO (Document 3.1(F))**.
- 1.1.6 National Grid's position in respect of each matter of disagreement is explained in turn below.

1.2 Indemnity

- 1.2.1 National Grid has taken a reasonable and proportionate approach to limiting the indemnity given in the protective provisions so that it is reflective of the limited scale and nature of the works to be undertaken as part of the Project which would affect the strategic road network. National Grid is required to take this approach as a result of its statutory duty to be economic and efficient and to protect the electricity consumer who would otherwise ultimately bear the cost of an uncapped indemnity.
- 1.2.2 The two specific matters which are subject to disagreement are as follows:
- Limiting the indemnity to direct losses; and
 - Limiting the indemnity to £30million.
- 1.2.3 Whether or not the indemnity provided for within the protective provisions is capped or uncapped or the extent to which it covers indirect losses does not contribute to a test of 'serious detriment' because, fundamentally, should there be any damage to the strategic road network above the capped amount, National Highways 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 National Highways with respect to recovering their costs. Additionally, the remainder of the bespoke protective provisions for the benefit of National Highways (for which the majority of elements are agreed) provide protections which would prevent any such damage being incurred.
- 1.2.4 National Grid has limited the indemnity to a sum of £30million based on the upper end of what would be expected for works considered to fall within standard and usual business practices. In the absence of a figure being proposed by National Highways and, considering that no works are anticipated to take place to the strategic road

network, and those that are over the strategic road network must be approved by National Highways, National Grid believes that this is reasonable, proportionate and will adequately protect National Highways throughout the construction period for the Project. As a regulated undertaker, National Grid need to ensure that it is not exposed to risks which are disproportionate to the works it undertakes. For this reason, National Grid cannot accept an uncapped indemnity or an indemnity which covers indirect losses where this would not be appropriate on the specific facts of this particular Project.

- 1.2.5 Even in the remote hypothetical possibility that the level of works affecting the strategic road network change, the remainder of the protective provisions would still ensure that those works are undertaken with National Highways' prior approval and protective measures are in place. Moreover, the proposed indemnity of £30million would facilitate any such shift because National Grid consider it is already at the upper end of normal practice.
- 1.2.6 For the same reasons as National Grid cannot provide an uncapped indemnity, an indemnity which covers indirect losses is also not proportionate or reasonable in the present circumstances. Indirect losses attributable to works carried out by National Grid as part of the authorised development would still be attributable to National Grid. These indirect losses would need to be proven by National Highways. This is a reasonable approach in light of National Grid's regulatory duty to act in the best interests of the electricity consumer and not expose itself to indemnities for highly remote risks.
- 1.2.7 In summary, all indemnities provided by National Grid need to be justified because National Grid has a statutory duty to be economic and efficient. National Grid cannot agree to an uncapped indemnity, especially in circumstances that clearly show that any works on or over the strategic road network will be limited. The absence of an uncapped indemnity covering indirect losses does not contribute to a test of 'serious detriment' because, fundamentally, should there be any damage to National Highways' 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 protective provisions. Therefore, a reasonable and proportionate cap to the indemnity within the Protective Provisions for National Highways should be acceptable.

1.3 Land rights

- 1.3.1 National Grid's firm position is that the protective provisions included in the **draft DCO (Document 3.1(F))** for National Highways should apply only in respect of National Highways' statutory undertaking and not land which is not held for that purpose.
- 1.3.2 National Grid has reviewed and updated the **Statement of Reasons (Document 4.1(C))** submitted at deadline 7 to differentiate between the plots owned by National Highways for its statutory undertaking and plots owned by National Highways for purposes unconnected to its statutory undertaking (because the land forms part of the subsoil of the local highway network, maintained by North Yorkshire Council).
- 1.3.3 The purpose of the protective provisions is to protect National Highways' specific undertaking, not their rights generally as a landowner outside of their statutory undertaking. Therefore, the provisions should not extend beyond the protection of National Highways' undertaking.
- 1.3.4 Freehold acquisition is being sought over land held by National Highways which is within the local road network. As this is land within the local road network, it does not form part of National Highways undertaking, and therefore no serious detriment can

arise to National Highways' undertaking as a result of its freehold acquisition. National Highways has no maintenance obligation or statutory duties in connection with the local road network. As such, National Highways' objection to compulsory acquisition over the local road network is not relevant to the test under sections 127 or 138 of the Act.

- 1.3.5 Notwithstanding this, controls are in place to ensure that no serious detriment would be caused to the local road network. The local highway authority (North Yorkshire Council) have approval rights for the use of powers within relevant articles related to street works and within relevant requirements of the **draft DCO (Document 3.1(F))**. There is no disagreement with the local highway authority in respect of the powers sought in Part 3 Streets of the **draft DCO (Document 3.1(F))**.

1.4 Conclusion

- 1.4.1 For the above reasons, the Examining Authority and Secretary of State are invited to retain the wording within Part 6 of Schedule 15 to the **draft DCO (Document 3.1(F))** as currently drafted. National Grid's position is reasonable and in line with its statutory obligation. The majority of matters within the protective provisions are now agreed with National Highways, as is shown within the **Statement of Common Ground (Document 8.5.14(C))**. In the absence of evidence to substantiate National Highways' position, it is not possible for National Grid to meet National Highways' requests and still comply with its statutory duty.

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