
Joint Statement with Network Rail

The Yorkshire and Humber (CCS Cross Country Pipeline) Development Consent Order

Yorkshire and Humber CCS Cross Country Pipeline Project
Position Statement in relation to progress on Framework Agreement

By

- 1. National Grid Carbon Limited**
- 2. Network Rail Infrastructure Limited**

Dated: 18 May 2015

Joint Position Statement by National Grid Carbon and Network Rail

- 1 There has been a high level of engagement between National Grid Carbon Limited (National Grid) and Network Rail Infrastructure Limited (Network Rail). Good progress has been made to resolve issues and concerns and reach agreement on the proposed approach to ensure that the project is delivered effectively within a framework that is acceptable to Network Rail and National Grid.
- 2 Negotiations have been undertaken between National Grid and Network Rail to develop a framework agreement (the "Framework Agreement") which will include a form of basic asset protection agreement, a set of protective provisions to be incorporated into the draft DCO and included in the agreement between the parties. National Grid and Network Rail have agreed a target date of 1 July 2015 for its completion.
- 3 In addition to negotiations on the Framework Agreement, National Grid and Network Rail are in on-going negotiations to conclude an option to acquire an easement (the "Option Agreement") and an easement in respect of Land forming part of the Railway to the West of Brind Crossing, Brind and at Northfield, Hutton Cranswick (the "Easement"). The Framework Agreement and the protective provisions in particular rely on the Option Agreement being completed, and so both must be completed together to ensure that there is no gap between the powers and rights set out in the draft DCO and the contractual obligations between National Grid and Network Rail.

Outstanding issues

- 4 As regards the Framework Agreement, there are a few points outstanding between the parties. They are as follows:

- (a) Form of basic asset protection agreement

National Grid and Network Rail are still considering the form of basic asset protection agreement ("BAPA"). Network Rail would like the BAPA appended to the Framework Agreement to be considered as an example only, with the form of BAPA entered into in due course being Network Rail's standard form of BAPA at the relevant time which, Network Rail notes, would be the form of BAPA approved by the Office of Rail and Road.

National Grid, on the other hand, would like some certainty as to the form of BAPA and requires it to be in substantially the same form as the BAPA provided by Network Rail appended to the Framework Agreement (with scope for amendments reasonably required by Network Rail to protect the safe operation of the railway).

- (b) Reversion to National Grid on transferee insolvency

Network Rail propose that where a person to whom the Framework Agreement has been transferred ("transferee") is subject to an insolvency event (which is very broadly defined in the Framework Agreement), then liability will revert back to National Grid. This position is not acceptable to National Grid as the acceptance of such a position would mean that National Grid would retain liability under the agreement indefinitely and not be able to transfer its liabilities with certainty.

Easement

- 5 There remain a small number of outstanding points in the Easement which the parties are working to resolve.

Protective Provisions

- 6 Network Rail and National Grid have discussed the protective provisions for Network Rail's benefit which they ask are included in the Order. While the majority of the provisions are agreed there remains a small number of differences between the parties and, accordingly, each party sets out its position on the protective provisions in the following sections. Three sets of protective provisions are attached to this document as follows:

Appendix 1 – Network Rail's preferred protective provisions

Appendix 2 – National Grid's preferred protective provisions

Appendix 3 – A comparison document showing the differences between the documents at Appendices 1 and 2.

Network Rail's position in relation to the protective provisions

- 7 The protective provisions which Network Rail asks are included in the Order are at Appendix 1 of this joint statement. Those provisions are the standard protective provisions, subject to minor amendments agreed with National Grid, which have been included in many development consent and Transport and Works Act orders to ensure the safety and integrity of the railway and railway property.
- 8 Paragraph 4 provides that National Grid shall not exercise powers of compulsory acquisition, contained in a number of articles in the draft Order, in relation to railway property without the consent of Network Rail.
- 9 National Grid have asked that paragraph 4 of the protective provisions is not included unless the Framework Agreement and Option Agreement have been completed by the date on which the decision whether or not to confirm the Order is made. Network Rail understands that the basis for this request is that, in their view, the Humber CCS Pipeline Project will not be able to be delivered if the paragraph is included without the Framework Agreement and Option Agreement having been completed.
- 10 Network Rail does not agree with this view. Network Rail has no wish to prevent or delay the construction of the Humber CCS Pipeline Project and it is committed to finalising and completing the Framework Agreement, Option Agreement and Easement as quickly as possible and in any event in accordance with the timetable set out in this joint statement.
- 11 However, both if the Agreements are completed, and in the unlikely event that they are not, Network Rail requests the inclusion of paragraph 4 in the protective provisions. Paragraph 4 is included in protective provisions in TWA Orders and DCOs for schemes across the United Kingdom. In many instances, agreements with the promoter or undertaker, along the lines of the Agreements, are in place. However, this is not always the case.
- 12 It is incorrect to state that the Humber CCS Pipeline Project could not proceed if paragraph 4 were included. The paragraph does not prevent the project proceeding, it simply states that the specified powers, to the extent that they affect railway property, cannot be exercised without Network Rail's consent. Network Rail would work with any promoter to provide such consent which would be provided once all necessary measures and procedures to ensure the safety of the railway and railway property at all times had been put in place.
- 13 Network Rail considers that it would be inconceivable that National Grid, or any other promoter of a project that affects railway property, would exercise compulsory powers in respect of, and carry out works affecting, railway property, without Network Rail's express consent and co-operation.
- 14 In particular, the interfaces between the Humber CCS Pipeline Project and railway property consist of operational railway lines and paramount at all times must be ensuring the safety and integrity of the operational railway. Accordingly, Network Rail requests that paragraph 4 is included in the protective provisions in any event.
- 15 National Grid also propose amendments to paragraph 15 of the protective provisions which provide that Network Rail:

- (a) shall not admit liability in respect of any claim;
- (b) shall take reasonable steps to mitigate any liabilities
- (c) shall Keep the promoter informed in relation to the progress of any claims and pay due regard to the promoter's reasonable representations in relation to any claims.

Network Rail considers that these amendments are unnecessary. Network Rail must behave reasonably in respect of any claims but there may be occasions where it considers that it should, for example, admit liability. It considers that paragraph 15 as set out in its set of preferred protective provisions is satisfactory and notes that it has been included in many statutory orders. Network Rail also notes that its preferred paragraph 15 already requires it to provide the promoter with reasonable notice of any claim and not to settle or compromise any claim without the promoter's prior consent.

National Grid's position in relation to the protective provisions

- 16 The set of protective provisions appended by National Grid to this Position Statement are identical to the agreed set with Network Rail with two exceptions:
- (a) The restriction on National Grid exercising its compulsory purchase powers at paragraph 4 has been deleted. National Grid considers that until the Easement with Network Rail is completed there cannot be appropriate certainty that the necessary land rights will be drawn down without the right to exercise compulsory purchase powers (and other access related powers) in order to enable the project to proceed, which is particularly important for a linear scheme.
 - (b) A minor amendment to the agreed indemnity wording at paragraph 15 (now paragraph 14) to ensure that Network Rail takes all reasonable steps to mitigate any liability and does not admit liability or agree any settlement or claim without National Grid consent. The amendment also ensures that there is no double recovery. All of these amendments are reasonable, common and do not limit National Grid's liability but rather ensure that both parties act reasonably.

Accordingly we attach at appendix one the protective provisions in a form that is agreeable to National Grid. At appendix two is the form agreeable to Network Rail. At appendix three is a comparison showing the changes.

Summary

- 17 As noted above, the parties have made considerable progress on all matters and will continue to seek to resolve the differences outstanding in the Framework Agreement and for the Framework Agreement (with the agreed protective provisions at Schedule 1) and the Easement to be completed by 1 July 2015. After that date National Grid and Network Rail shall make further submissions to the Secretary of State, the content of which will be dependent on the stage reached, and will hopefully confirm that matters have been satisfactorily concluded.

On behalf of Network Rail Infrastructure Limited and National Grid Carbon Limited

18 May 2015

APPENDIX 1

Network Rail preferred protective provisions

PROTECTIVE PROVISIONS

PART 3

FOR THE PROTECTION OF RAILWAY INTERESTS

1. The following provisions of this Part have effect, unless otherwise agreed in writing between the promoter and Network Rail and, in the case of paragraph 15, any other person on whom rights or obligations are conferred by that paragraph.

2. In this Schedule—

"construction" includes execution, placing, alteration and reconstruction and "construct" and "constructed" have corresponding meanings;

"the engineer" means an engineer appointed by Network Rail for the purposes of this Order;

"network licence" means the network licence, as the same is amended from time to time, granted to Network Rail Infrastructure Limited by the Secretary of State in exercise of his powers under section 8 of the Railways Act 1993;

"Network Rail" means Network Rail Infrastructure Limited and any associated company of Network Rail Infrastructure Limited which holds property for railway purposes, and for the purpose of this definition "associated company" means any company which is (within the meaning of section 1159 of the Companies Act 2006¹ the holding company of Network Rail Infrastructure Limited, a subsidiary of Network Rail Infrastructure Limited or another subsidiary of the holding company of Network Rail Infrastructure Limited;

"plans" includes sections, designs, design data, software, drawings, specifications, soil reports, calculations, descriptions (including descriptions of methods of construction), staging proposals, programmes and details of the extent, timing and duration of any proposed occupation of railway property;

"promoter" means the undertaker as defined in article 2(interpretation) of this Order;

"railway operational procedures" means procedures specified under any access agreement (as defined in the Railways Act 1993) or station lease;

"railway property" means any railway belonging to Network Rail Infrastructure Limited and-

- (a) any station, land, works, apparatus and equipment belonging to Network Rail Infrastructure Limited or connected with any such railway; and
- (b) any easement or other property interest held or used by Network Rail Infrastructure Limited for the purposes of such railway or works, apparatus or equipment; and

"specified work" means so much of any 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.

- 3. (1) Where under this Schedule Network Rail is required to give its consent or approval in respect of any matter, that consent or approval is subject to the condition that Network Rail complies with any relevant railway operational procedures and any obligations under its network licence or under statute.
- (2) In so far as any specified work or the acquisition or use of railway property is or may be subject to railway operational procedures, Network Rail must—
 - (a) co-operate with the promoter with a view to avoiding undue delay and securing conformity as between any plans approved by the engineer and requirements emanating from those procedures; and
 - (b) use their reasonable endeavours to avoid any conflict arising between the application of those procedures and the proper implementation of the authorised development pursuant to this Order.
- 4. (1) The promoter must not exercise the powers conferred by—
 - (a) article 19 (*discharge of water*);
 - (b) article 21 (*authority to survey and investigate the land*);
 - (c) article 23 (*compulsory acquisition of land*);
 - (d) article 24 (*compulsory acquisition of rights*);
 - (e) article 25 (*acquisition of subsoil only*);

- (f) article 26 (*power to override easements and other rights*);
- (g) article 28 (*temporary use of land for carrying out the authorised development*);
- (h) article 29 (*temporary use of land for maintaining the authorised development*);
- (i) article 37 (*private rights of way*);
- (j) article 44 (*felling or lopping of trees or shrubs*);
- (k) article 45 (*trees subject to tree preservation orders*);
- (l) or the powers conferred by section 11(3) of the 1965 Act,
in respect of any railway property unless the exercise of such powers is with the consent of Network Rail.

(2) The promoter must not in the exercise of the powers conferred by this Order prevent pedestrian or vehicular access to any railway property, unless preventing such access is with the consent of Network Rail.

(3) The promoter must not exercise the powers conferred by sections 271 or 272 of the 1990 Act, or article 34 (*statutory undertakers*), in relation to any right of access of Network Rail to railway property, but such right of access may be diverted with the consent of Network Rail.

(4) The promoter must not under the powers of this Order acquire or use or acquire new rights over any railway property except with the consent of Network Rail.

(5) Where Network Rail is asked to give its consent pursuant to this paragraph, such consent must not be unreasonably withheld but may be given subject to reasonable conditions.

5. (1) The promoter must before commencing construction of any specified work supply to Network Rail proper and sufficient plans of that work for the reasonable approval of the engineer and the specified work must not be commenced except in accordance with such plans as have been approved in writing by the engineer or settled by arbitration.

(2) The approval of the engineer under sub-paragraph (1) must not be unreasonably withheld, and if by the end of the period of 28 days beginning with the date on which such plans have been supplied to Network Rail the engineer has not intimated his disapproval of those plans and the grounds of his disapproval the promoter may serve upon the engineer written notice requiring the engineer to intimate his approval or disapproval within a further period of 28 days beginning with the date upon which the engineer receives written notice from the

promoter. If by the expiry of the further 28 days the engineer has not intimated his approval or disapproval, he shall be deemed to have approved the plans as submitted.

(3) If by the end of the period of 28 days beginning with the date on which written notice was served upon the engineer under sub-paragraph (2), Network Rail gives notice to the promoter that Network Rail desires itself to construct any part of a specified work which in the opinion of the engineer will or may affect the stability of railway property or the safe operation of traffic on the railways of Network Rail then, if the promoter desires such part of the specified work to be constructed, Network Rail must construct it with all reasonable dispatch on behalf of and to the reasonable satisfaction of the promoter in accordance with the plans approved or deemed to be approved or settled under this paragraph, and under the supervision (where appropriate and if given) of the promoter.

(4) When signifying his approval of the plans the engineer may specify any protective works (whether temporary or permanent) which in his opinion should be carried out before the commencement of the construction of a specified work to ensure the safety or stability of railway property or the continuation of safe and efficient operation of the railways of Network Rail or the services of operators using the same (including any relocation de-commissioning and removal of works, apparatus and equipment necessitated by a specified work and the comfort and safety of passengers who may be affected by the specified works), and such protective works as may be reasonably necessary for those purposes must be constructed by Network Rail or by the promoter, if Network Rail so desires, and such protective works must be carried out at the expense of the promoter in either case with all reasonable dispatch and the promoter must not commence the construction of the specified works until the engineer has notified the promoter that the protective works have been completed to his reasonable satisfaction.

6. (1) Any specified work and any protective works to be constructed by virtue of paragraph 5(4) must, when commenced, be constructed—

(a) with all reasonable dispatch in accordance with the plans approved or deemed to have been approved or settled under paragraph 5;

(b) under the supervision (where appropriate and if given) and to the reasonable satisfaction of the engineer;

(c) in such manner as to cause as little damage as is possible to railway property; and

(d) so far as is reasonably practicable, so as not to interfere with or obstruct the free, uninterrupted and safe use of any railway of Network Rail or the traffic thereon and the use by passengers of railway property.

(2) If any damage to railway property or any such interference or obstruction shall be caused by the carrying out of, or in consequence of the construction of a specified work, the promoter must, notwithstanding any such approval, make good such damage and must pay to Network Rail all reasonable expenses to which Network Rail may be put and compensation for any loss which it may sustain by reason of any such damage, interference or obstruction.

(3) Nothing in this Part of this Schedule imposes any liability on the promoter with respect to any damage, costs, expenses or loss attributable to the negligence of Network Rail or its servants, contractors or agents or any liability on Network Rail with respect of any damage, costs, expenses or loss attributable to the negligence of the promoter or its servants, contractors or agents.

7. The promoter must-
 - (a) at all times afford reasonable facilities to the engineer for access to a specified work during its construction; and
 - (b) supply the engineer with all such information as he may reasonably require with regard to a specified work or the method of constructing it.
8. Network Rail must at all times afford reasonable facilities to the promoter and its agents for access to any works carried out by Network Rail under this Part of this Schedule during their construction and must supply the promoter with such information as it may reasonably require with regard to such works or the method of constructing them.
9. (1) If any permanent or temporary alterations or additions to railway property are reasonably necessary in consequence of the construction of a specified work, or during a period of 24 months after the completion of that work in order to ensure the safety of railway property or the continued safe operation of the railway of Network Rail, such alterations and additions may be carried out by Network Rail and if Network Rail gives to the promoter reasonable notice of its intention to carry out such alterations or additions (which must be specified in the notice), the promoter must pay to Network Rail the reasonable cost of those alterations or additions including, in respect of any such alterations and additions as are to be permanent, a capitalised sum representing the increase of the costs which may be expected to be reasonably

incurred by Network Rail in maintaining, working and, when necessary, renewing any such alterations or additions.

(2) If during the construction of a specified work by the promoter, Network Rail gives notice to the promoter that Network Rail desires itself to construct that part of the specified work which in the opinion of the engineer is endangering the stability of railway property or the safe operation of traffic on the railways of Network Rail then, if the promoter decides that part of the specified work is to be constructed, Network Rail must assume construction of that part of the specified work and the promoter must, notwithstanding any such approval of a specified work under paragraph 5(3), pay to Network Rail all reasonable expenses to which Network Rail may be put and compensation for any loss which it may suffer by reason of the execution by Network Rail of that specified work.

(3) The engineer must, in respect of the capitalised sums referred to in this paragraph and paragraph 10(a) provide such details of the formula by which those sums have been calculated as the promoter may reasonably require.

(4) If the cost of maintaining, working or renewing railway property is reduced in consequence of any such alterations or additions a capitalised sum representing such saving must be set off against any sum payable by the promoter to Network Rail under this paragraph.

10. The promoter must repay to Network Rail all reasonable fees, costs, charges and expenses reasonably incurred by Network Rail—

(a) in constructing any part of a specified work on behalf of the promoter as provided by paragraph 5(3) or in constructing any protective works under the provisions of paragraph 5(4) including, in respect of any permanent protective works, a capitalised sum representing the cost of maintaining and renewing those works;

(b) in respect of the approval by the engineer of plans submitted by the promoter and the supervision by him of the construction of a specified work;

(c) in respect of the employment or procurement of the services of any inspectors, signalmen, watchmen and other persons whom it shall be reasonably necessary to appoint for inspecting, signalling, watching and lighting railway property and for preventing, so far as may be reasonably practicable, interference, obstruction, danger or accident arising from the construction or failure of a specified work;

(d) in respect of any special traffic working resulting from any speed restrictions which may in the opinion of the engineer, require to be imposed by reason or in consequence of the construction or failure of a specified work or from the substitution or diversion of services which may be reasonably necessary for the same reason; and

(e) in respect of any additional temporary lighting of railway property in the vicinity of the specified works, being lighting made reasonably necessary by reason or in consequence of the construction or failure of a specified work.

11. (1) In this paragraph-

“EMI” means, subject to sub-paragraph (2), electromagnetic interference with Network Rail apparatus generated by the operation of the authorised development (including the operation of tramcars using the tramway comprised in the works) where such interference is of a level which adversely affects the safe operation of Network Rail’s apparatus; and

“Network Rail’s apparatus” means any lines, circuits, wires, apparatus or equipment (whether or not modified or installed as part of the authorised development) which are owned or used by Network Rail for the purpose of transmitting or receiving electrical energy or of radio, telegraphic, telephonic, electric, electronic or other like means of signaling or other communications.

(2) This paragraph applies to EMI only to the extent that such EMI is not attributable to any change to Network Rail’s apparatus carried out after approval of plans under paragraph 5(1) for the relevant part of the authorised development giving rise to EMI (unless the promoter has been given notice in writing before the approval of those plans of the intention to make such change).

(3) Subject to sub-paragraph (5), the promoter must in the design and construction of the authorised development take all measures necessary to prevent EMI and must establish with Network Rail (both parties acting reasonably) appropriate arrangements to verify their effectiveness.

(4) In order to facilitate the promoter’s compliance with sub-paragraph (3)-

(a) the promoter must consult with Network Rail as early as reasonably practicable to identify all Network Rail’s apparatus which may be at risk of EMI, and thereafter must continue to consult with Network Rail (both before and after formal submission of plans under paragraph

5(1)) in order to identify all potential causes of EMI and the measures required to eliminate them;

(b) Network Rail must make available to the promoter all information in the possession of Network Rail reasonably requested by the promoter in respect of Network Rail's apparatus identified pursuant to sub-paragraph (a); and

(c) Network Rail must allow the promoter reasonable facilities for the inspection of Network Rail's apparatus identified pursuant to sub-paragraph (a).

(5) In any case where it is established that EMI can only reasonably be prevented by modifications to Network Rail's apparatus, Network Rail must not withhold its consent unreasonably to modifications of Network Rail's apparatus, but the means of prevention and the method of their execution must be selected in the reasonable discretion of Network Rail, and in relation to such modifications paragraph 5(1) have effect subject to the sub-paragraph.

(6) If at any time prior to the commencement of regular revenue-earning operations comprised in the authorised development and notwithstanding any measures adopted pursuant to sub-paragraph (3), the testing or commissioning of the authorised development causes EMI then the promoter must immediately upon receipt of notification by Network Rail of such EMI either in writing or communicated orally (such oral communication to be confirmed in writing as soon as reasonably practicable after it has been issued) forthwith cease to use (or procure the cessation of use of) the promoter's apparatus causing such EMI until all measures necessary have been taken to remedy such EMI by way of modification to the source of such EMI or (in the circumstances, and subject to the consent, specified in sub-paragraph (5)) to Network Rail's apparatus.

(7) In the event of EMI having occurred –

(a) the promoter must afford reasonable facilities to Network Rail for access to the promoter's apparatus in the investigation of such EMI;

(b) Network Rail must afford reasonable facilities to the promoter for access to Network Rail's apparatus in the investigation of such EMI; and

(c) Network Rail must make available to the promoter any additional material information in its possession reasonably requested by the promoter in respect of Network Rail's apparatus or such EMI.

(8) Where Network Rail approves modifications to Network Rail's apparatus pursuant to sub-paragraphs (5) or (6) –

(a) Network Rail must allow the promoter reasonable facilities for the inspection of the relevant part of Network Rail's apparatus;

(b) any modifications to Network Rail's apparatus approved pursuant to those sub-paragraphs must be carried out and completed by the promoter in accordance with paragraph 6.

(9) To the extent that it would not otherwise do so, the indemnity in paragraph 15(1) applies to the costs and expenses reasonably incurred or losses suffered by network Rail through the implementation of the provisions of this paragraph (including costs incurred in connection with the consideration of proposals, approval of plans, supervision and inspection of works and facilitating access to Network Rail's apparatus) or in consequence of any EMI to which sub-paragraph (6) applies.

(10) For the purpose of paragraph 10(a) any modifications to Network Rail's apparatus under this paragraph shall be deemed to be protective works referred to in that paragraph.

(11) In relation to any dispute arising under this paragraph the reference in article 45 (Arbitration) to the Institution of Civil Engineers shall be read as a reference to the Institution of Electrical Engineers.

12. If at any time after the completion of a specified work, not being a work vested in Network Rail, Network Rail gives notice to the promoter informing it that the state of maintenance of any part of the specified work appears to be such as adversely affects the operation of railway property, the promoter must, on receipt of such notice, take such steps as may be reasonably necessary to put that specified work in such state of maintenance as not adversely to affect railway property.
13. The promoter must not provide any illumination or illuminated sign or signal on or in connection with a specified work in the vicinity of any railway belonging to Network Rail unless it has first consulted Network Rail and it must comply with Network Rail's reasonable requirements for preventing confusion between such illumination or illuminated sign or signal and any railway signal or other light used for controlling, directing or securing the safety of traffic on the railway.
14. Any additional expenses which Network Rail may reasonably incur in altering, reconstructing or maintaining railway property under any powers existing at the making of this Order by

reason of the existence of a specified work must, provided that 56 days' previous notice of the commencement of such alteration, reconstruction or maintenance has been given to the promoter, be repaid by the promoter to Network Rail.

15. (1) The promoter must pay to Network Rail all reasonable costs, charges, damages and expenses not otherwise provided for in this Part of this Schedule (subject to article 32 (*no double recovery*)) which may be occasioned to or reasonably incurred by Network Rail—

(a) by reason of the construction or maintenance of a specified work or the failure thereof or

(b) by reason of any act or omission of the promoter or of any person in its employ or of its contractors or others whilst engaged upon a specified work;

and the promoter must indemnify and keep indemnified Network Rail from and against all claims and demands arising out of or in connection with a specified work or any such failure, act or omission: and the fact that any act or thing may have been done by Network Rail on behalf of the promoter or in accordance with plans approved by the engineer or in accordance with any requirement of the engineer or under his supervision shall not (if it was done without negligence on the part of Network Rail or of any person in its employ or of its contractors or agents) excuse the promoter from any liability under the provisions of this sub-paragraph.

(2) Network Rail must give the promoter reasonable written notice of any such claim or demand and no settlement or compromise of such a claim or demand shall be made without the prior consent of the promoter.

(3) The sums payable by the promoter under sub-paragraph (1) shall if relevant include a sum equivalent to the relevant costs.

(4) Subject to the terms of any agreement between Network Rail and a train operator regarding the timing or method of payment of the relevant costs in respect of that train operator, Network Rail must promptly pay to each train operator the amount of any sums which Network Rail receives under sub-paragraph (3) which relates to the relevant costs of that train operator.

(5) The obligation under sub-paragraph (3) to pay Network Rail the relevant costs shall, in the event of default, be enforceable directly by any train operator concerned to the extent that such sums would be payable to that operator pursuant to sub-paragraph (4).

(6) In this paragraph—

"the relevant costs" means the costs, direct losses and expenses (including loss of revenue) reasonably incurred by each train operator as a consequence of any restriction of the use of Network Rail's railway network as a result of the construction, maintenance or failure of a specified work or any such act or omission as mentioned in subparagraph (1); and

"train operator" means any person who is authorised to act as the operator of a train by a licence under section 8 of the Railways Act 1993.

16. Network Rail must, on receipt of a request from the promoter, from time to time provide the promoter free of charge with written estimates of the costs, charges, expenses and other liabilities for which the promoter is or will become liable under this Schedule (including the amount of the relevant costs mentioned in paragraph 15) and with such information as may reasonably enable the promoter to assess the reasonableness of any such estimate or claim made or to be made pursuant to this Schedule (including any claim relating to those relevant costs).
17. In the assessment of any sums payable to Network Rail under this Part of this Schedule there must not be taken into account any increase in the sums claimed that is attributable to any action taken by or any agreement entered into by Network Rail if that action or agreement was not reasonably necessary and was taken or entered into with a view to obtaining the payment of those sums by the promoter under this Schedule or increasing the sums so payable.
18. The promoter and Network Rail may, subject in the case of Network Rail to compliance with the terms of its network licence, enter into, and carry into effect, agreements for the transfer to the promoter of—
 - (a) any railway property shown on the works and land plans and described in the book of reference;
 - (b) any lands, works or other property held in connection with any such railway property; and
 - (c) any rights and obligations (whether or not statutory) of Network Rail relating to any railway property or any lands, works or other property referred to in this paragraph.
19. Nothing in this Order, or in any enactment incorporated with or applied by this Order, prejudices or affects the operation of Part I of the Railways Act 1993.

- 19 The promoter must give written notice to Network Rail if any application is proposed to be made by the promoter for the Secretary of State's consent, under article 9 (transfer of benefit of Order) of this Order and any such notice must be given no later than 28 days before any such application is made and must describe or give (as appropriate)—
- (a) the nature of the application to be made;
 - (b) the extent of the geographical area to which the application relates; and
 - (c) the name and address of the person acting for the Secretary of State to whom the application is to be made.
- 20 The promoter must no later than 28 days from the date that the plans submitted to and certified by the Secretary of State in accordance with article 49 (certification of plans etc.) are certified by the Secretary of State, provide a set of those plans to Network Rail in the form of a computer disc with read only memory.

APPENDIX 2

National Grid preferred protective provisions

PROTECTIVE PROVISIONS

PART 3

FOR THE PROTECTION OF RAILWAY INTERESTS

1. The following provisions of this Part have effect, unless otherwise agreed in writing between the promoter and Network Rail and, in the case of paragraph 14, any other person on whom rights or obligations are conferred by that paragraph.

2. In this Schedule—

"construction" includes execution, placing, alteration and reconstruction and "construct" and "constructed" have corresponding meanings;

"the engineer" means an engineer appointed by Network Rail for the purposes of this Order;

"network licence" means the network licence, as the same is amended from time to time, granted to Network Rail Infrastructure Limited by the Secretary of State in exercise of his powers under section 8 of the Railways Act 1993;

"Network Rail" means Network Rail Infrastructure Limited and any associated company of Network Rail Infrastructure Limited which holds property for railway purposes, and for the purpose of this definition "associated company" means any company which is (within the meaning of section 1159 of the Companies Act 2006 the holding company of Network Rail Infrastructure Limited, a subsidiary of Network Rail Infrastructure Limited or another subsidiary of the holding company of Network Rail Infrastructure Limited;

"plans" includes sections, designs, design data, software, drawings, specifications, soil reports, calculations, descriptions (including descriptions of methods of construction), staging proposals, programmes and details of the extent, timing and duration of any proposed occupation of railway property;

"promoter" means the undertaker as defined in article 2(interpretation) of this Order;

"railway operational procedures" means procedures specified under any access agreement (as defined in the Railways Act 1993) or station lease;

"railway property" means any railway belonging to Network Rail Infrastructure Limited and—

(a) any station, land, works, apparatus and equipment belonging to Network Rail Infrastructure Limited or connected with any such railway; and

(b) any easement or other property interest held or used by Network Rail Infrastructure Limited for the purposes of such railway or works, apparatus or equipment;

and

"specified work" means so much of any 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.

3.—(1) Where under this Schedule Network Rail is required to give its consent or approval in respect of any matter, that consent or approval is subject to the condition that Network Rail complies with any relevant railway operational procedures and any obligations under its network licence or under statute.

(2) In so far as any specified work or the acquisition or use of railway property is or may be subject to railway operational procedures, Network Rail must—

- (a) co-operate with the promoter with a view to avoiding undue delay and securing conformity as between any plans approved by the engineer and requirements emanating from those procedures; and
- (b) use their reasonable endeavours to avoid any conflict arising between the application of those procedures and the proper implementation of the authorised development pursuant to this Order.

4.—(1) The promoter must before commencing construction of any specified work supply to Network Rail proper and sufficient plans of that work for the reasonable approval of the engineer and the specified work must not be commenced except in accordance with such plans as have been approved in writing by the engineer or settled by arbitration.

(2) The approval of the engineer under sub-paragraph (1) must not be unreasonably withheld and if by the end of the period of 28 days beginning with the date on which such plans have been supplied to Network Rail the engineer has not intimated his disapproval of those plans and the grounds of his disapproval the promoter may serve upon the engineer written notice requiring the engineer to intimate his approval or disapproval within a further period of 28 days beginning with the date upon which the engineer receives written notice from the promoter. If by the expiry of the further 28 days the engineer has not intimated his approval or disapproval, he shall be deemed to have approved the plans as submitted.

(3) If by the end of the period of 28 days beginning with the date on which written notice was served upon the engineer under sub-paragraph (2), Network Rail gives notice to the promoter that Network Rail desires itself to construct any part of a specified work which in the opinion of the engineer will or may affect the stability of railway property or the safe operation of traffic on the railways of Network Rail then, if the promoter desires such part of the specified work to be constructed, Network Rail must construct it with all reasonable dispatch on behalf of and to the reasonable satisfaction of the promoter in accordance with the plans approved or deemed to be approved or settled under this paragraph, and under the supervision (where appropriate and if given) of the promoter.

(4) When signifying his approval of the plans the engineer may specify any protective works (whether temporary or permanent) which in his opinion should be carried out before the commencement of the construction of a specified work to ensure the safety or stability of railway property or the continuation of safe and efficient operation of the railways of Network Rail or the services of operators using the same (including any relocation de-commissioning and removal of works, apparatus and equipment necessitated by a specified work and the comfort and safety of passengers who may be affected by the specified works), and such protective works as may be reasonably necessary for those purposes must be constructed by Network Rail or by the promoter, if Network Rail so desires, and such protective works must be carried out at the expense of the promoter in either case with all reasonable dispatch and the promoter must not commence the construction of the specified works until the engineer has notified the promoter that the protective works have been completed to his reasonable satisfaction.

5.—(1) Any specified work and any protective works to be constructed by virtue of paragraph 4(4) must, when commenced, be constructed—

- (a) with all reasonable dispatch in accordance with the plans approved or deemed to have been approved or settled under paragraph 4;
- (b) under the supervision (where appropriate and if given) and to the reasonable satisfaction of the engineer;
- (c) in such manner as to cause as little damage as is possible to railway property; and
- (d) so far as is reasonably practicable, so as not to interfere with or obstruct the free, uninterrupted and safe use of any railway of Network Rail or the traffic thereon and the use by passengers of railway property.

(2) If any damage to railway property or any such interference or obstruction shall be caused by the carrying out of, or in consequence of the construction of a specified work,

the promoter must, notwithstanding any such approval, make good such damage and must pay to Network Rail all reasonable expenses to which Network Rail may be put and compensation for any loss which it may sustain by reason of any such damage, interference or obstruction.

(3) Nothing in this Part of this Schedule imposes any liability on the promoter with respect to any damage, costs, expenses or loss attributable to the negligence of Network Rail or its servants, contractors or agents or any liability on Network Rail with respect of any damage, costs, expenses or loss attributable to the negligence of the promoter or its servants, contractors or agents.

6. The promoter must—

- (a) at all times afford reasonable facilities to the engineer for access to a specified work during its construction; and
- (b) supply the engineer with all such information as he may reasonably require with regard to a specified work or the method of constructing it.

7. Network Rail must at all times afford reasonable facilities to the promoter and its agents for access to any works carried out by Network Rail under this Part of this Schedule during their construction and must supply the promoter with such information as it may reasonably require with regard to such works or the method of constructing them.

8.—(1) If any permanent or temporary alterations or additions to railway property are reasonably necessary in consequence of the construction of a specified work, or during a period of 24 months after the completion of that work in order to ensure the safety of railway property or the continued safe operation of the railway of Network Rail, such alterations and additions may be carried out by Network Rail and if Network Rail gives to the promoter reasonable notice of its intention to carry out such alterations or additions (which must be specified in the notice), the promoter must pay to Network Rail the reasonable cost of those alterations or additions including, in respect of any such alterations and additions as are to be permanent, a capitalised sum representing the increase of the costs which may be expected to be reasonably incurred by Network Rail in maintaining, working and, when necessary, renewing any such alterations or additions.

(2) If during the construction of a specified work by the promoter, Network Rail gives notice to the promoter that Network Rail desires itself to construct that part of the specified work which in the opinion of the engineer is endangering the stability of railway property or the safe operation of traffic on the railways of Network Rail then, if the promoter decides that part of the specified work is to be constructed, Network Rail must assume construction of that part of the specified work and the promoter must, notwithstanding any such approval of a specified work under paragraph 4(3), pay to Network Rail all reasonable expenses to which Network Rail may be put and compensation for any loss which it may suffer by reason of the execution by Network Rail of that specified work.

(3) The engineer must, in respect of the capitalised sums referred to in this paragraph and paragraph 9(a) provide such details of the formula by which those sums have been calculated as the promoter may reasonably require.

(4) If the cost of maintaining, working or renewing railway property is reduced in consequence of any such alterations or additions a capitalised sum representing such saving must be set off against any sum payable by the promoter to Network Rail under this paragraph.

9. The promoter must repay to Network Rail all reasonable fees, costs, charges and expenses reasonably incurred by Network Rail—

- (a) in constructing any part of a specified work on behalf of the promoter as provided by paragraph 4(3) or in constructing any protective works under the provisions of paragraph 4(4) including, in respect of any permanent protective works, a capitalised sum representing the cost of maintaining and renewing those works;

- (b) in respect of the approval by the engineer of plans submitted by the promoter and the supervision by him of the construction of a specified work;
- (c) in respect of the employment or procurement of the services of any inspectors, signalmen, watchmen and other persons whom it shall be reasonably necessary to appoint for inspecting, signalling, watching and lighting railway property and for preventing, so far as may be reasonably practicable, interference, obstruction, danger or accident arising from the construction or failure of a specified work;
- (d) in respect of any special traffic working resulting from any speed restrictions which may in the opinion of the engineer, require to be imposed by reason or in consequence of the construction or failure of a specified work or from the substitution or diversion of services which may be reasonably necessary for the same reason; and
- (e) in respect of any additional temporary lighting of railway property in the vicinity of the specified works, being lighting made reasonably necessary by reason or in consequence of the construction or failure of a specified work.

10.—(1) In this paragraph—

“EMI” means, subject to sub-paragraph (2), electromagnetic interference with Network Rail apparatus generated by the operation of the authorised development (including the operation of tramcars using the tramway comprised in the works) where such interference is of a level which adversely affects the safe operation of Network Rail’s apparatus; and

“Network Rail’s apparatus” means any lines, circuits, wires, apparatus or equipment (whether or not modified or installed as part of the authorised development) which are owned or used by Network Rail for the purpose of transmitting or receiving electrical energy or of radio, telegraphic, telephonic, electric, electronic or other like means of signalling or other communications.

(2) This paragraph applies to EMI only to the extent that such EMI is not attributable to any change to Network Rail’s apparatus carried out after approval of plans under paragraph 4(1) for the relevant part of the authorised development giving rise to EMI (unless the promoter has been given notice in writing before the approval of those plans of the intention to make such change).

(3) Subject to sub-paragraph (5), the promoter must in the design and construction of the authorised development take all measures necessary to prevent EMI and must establish with Network Rail (both parties acting reasonably) appropriate arrangements to verify their effectiveness.

(4) In order to facilitate the promoter’s compliance with sub-paragraph (3)—

- (a) the promoter must consult with Network Rail as early as reasonably practicable to identify all Network Rail’s apparatus which may be at risk of EMI, and thereafter must continue to consult with Network Rail (both before and after formal submission of plans under paragraph 4(1)) in order to identify all potential causes of EMI and the measures required to eliminate them;
- (b) Network Rail must make available to the promoter all information in the possession of Network Rail reasonably requested by the promoter in respect of Network Rail’s apparatus identified pursuant to sub-paragraph (a); and
- (c) Network Rail must allow the promoter reasonable facilities for the inspection of Network Rail’s apparatus identified pursuant to sub-paragraph (a).

(5) In any case where it is established that EMI can only reasonably be prevented by modifications to Network Rail’s apparatus, Network Rail must not withhold its consent unreasonably to modifications of Network Rail’s apparatus, but the means of prevention and the method of their execution must be selected in the reasonable discretion of Network Rail, and in relation to such modifications paragraph 4(1) have effect subject to the sub-paragraph.

(6) If at any time prior to the commencement of regular revenue-earning operations comprised in the authorised development and notwithstanding any measures adopted

pursuant to sub-paragraph (3), the testing or commissioning of the authorised development causes EMI then the promoter must immediately upon receipt of notification by Network Rail of such EMI either in writing or communicated orally (such oral communication to be confirmed in writing as soon as reasonably practicable after it has been issued) forthwith cease to use (or procure the cessation of use of) the promoter's apparatus causing such EMI until all measures necessary have been taken to remedy such EMI by way of modification to the source of such EMI or (in the circumstances, and subject to the consent, specified in sub-paragraph (5)) to Network Rail's apparatus.

(7) In the event of EMI having occurred—

- (a) the promoter must afford reasonable facilities to Network Rail for access to the promoter's apparatus in the investigation of such EMI;
- (b) Network Rail must afford reasonable facilities to the promoter for access to Network Rail's apparatus in the investigation of such EMI; and
- (c) Network Rail must make available to the promoter any additional material information in its possession reasonably requested by the promoter in respect of Network Rail's apparatus or such EMI.

(8) Where Network Rail approves modifications to Network Rail's apparatus pursuant to sub-paragraphs (5) or (6)—

- (a) Network Rail must allow the promoter reasonable facilities for the inspection of the relevant part of Network Rail's apparatus;
- (b) any modifications to Network Rail's apparatus approved pursuant to those sub-paragraphs must be carried out and completed by the promoter in accordance with paragraph 5.

(9) To the extent that it would not otherwise do so, the indemnity in paragraph 14(1) applies to the costs and expenses reasonably incurred or losses suffered by network Rail through the implementation of the provisions of this paragraph (including costs incurred in connection with the consideration of proposals, approval of plans, supervision and inspection of works and facilitating access to Network Rail's apparatus) or in consequence of any EMI to which sub-paragraph (6) applies.

(10) For the purpose of paragraph 9(a) any modifications to Network Rail's apparatus under this paragraph shall be deemed to be protective works referred to in that paragraph.

(11) In relation to any dispute arising under this paragraph the reference in article 45 (Arbitration) to the Institution of Civil Engineers shall be read as a reference to the Institution of Electrical Engineers.

11. If at any time after the completion of a specified work, not being a work vested in Network Rail, Network Rail gives notice to the promoter informing it that the state of maintenance of any part of the specified work appears to be such as adversely affects the operation of railway property, the promoter must, on receipt of such notice, take such steps as may be reasonably necessary to put that specified work in such state of maintenance as not adversely to affect railway property.

12. The promoter must not provide any illumination or illuminated sign or signal on or in connection with a specified work in the vicinity of any railway belonging to Network Rail unless it has first consulted Network Rail and it must comply with Network Rail's reasonable requirements for preventing confusion between such illumination or illuminated sign or signal and any railway signal or other light used for controlling, directing or securing the safety of traffic on the railway.

13. Any additional expenses which Network Rail may reasonably incur in altering, reconstructing or maintaining railway property under any powers existing at the making of this Order by reason of the existence of a specified work must, provided that 56 days' previous notice of the commencement of such alteration, reconstruction or maintenance has been given to the promoter, be repaid by the promoter to Network Rail.

14.—(1) The promoter must pay to Network Rail all reasonable costs, charges, damages and expenses not otherwise provided for in this Part of this Schedule (but subject to article 32 (*no double recovery*)) which may be occasioned to or reasonably incurred by Network Rail—

- (a) by reason of the construction or maintenance of a specified work or the failure thereof or
- (b) by reason of any act or omission of the promoter or of any person in its employ or of its contractors or others whilst engaged upon a specified work;

and the promoter must indemnify and keep indemnified Network Rail from and against all claims and demands arising out of or in connection with a specified work or any such failure, act or omission: and the fact that any act or thing may have been done by Network Rail on behalf of the promoter or in accordance with plans approved by the engineer or in accordance with any requirement of the engineer or under his supervision will not (if it was done without negligence on the part of Network Rail or of any person in its employ or of its contractors or agents) excuse the promoter from any liability under the provisions of this sub-paragraph.

(2) Network Rail must—

- (a) give the promoter reasonable written notice of any such claim or demand;
- (b) not admit liability or make any offer to settle or settle or compromise any such claim or demand without the prior consent of the promoter (which, if it withholds such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand);
- (c) take all reasonable steps to mitigate any liabilities relating to such claims or demands;
- (d) keep the promoter informed in relation to the progress of any such actions, claims and demands and paying due regard to the promoter's reasonable representations in relation thereto

(3) The sums payable by the promoter under sub-paragraph (1) may include a sum equivalent to the relevant costs.

(4) Subject to the terms of any agreement between Network Rail and a train operator regarding the timing or method of payment of the relevant costs in respect of that train operator, Network Rail must promptly pay to each train operator the amount of any sums which Network Rail receives under sub-paragraph (3) which relates to the relevant costs of that train operator.

(5) The obligation under sub-paragraph (3) to pay Network Rail the relevant costs shall, in the event of default, be enforceable directly by any train operator concerned to the extent that such sums would be payable to that operator pursuant to sub paragraph (4).

(6) In this paragraph—

"the relevant costs" means the costs, direct losses and expenses (including loss of revenue) reasonably incurred by each train operator as a consequence of any restriction of the use of Network Rail's railway network as a result of the construction, maintenance or failure of a specified work or any such act or omission as mentioned in subparagraph (1); and

"train operator" means any person who is authorised to act as the operator of a train by a licence under section 8 of the Railways Act 1993.

15. Network Rail must, on receipt of a request from the promoter, from time to time provide the promoter free of charge with written estimates of the costs, charges, expenses and other liabilities for which the promoter is or will become liable under this Schedule (including the amount of the relevant costs mentioned in paragraph 14) and with such information as may reasonably enable the promoter to assess the reasonableness of any such estimate or claim made or to be made pursuant to this Schedule (including any claim relating to those relevant costs).

16. In the assessment of any sums payable to Network Rail under this Part of this Schedule there must not be taken into account any increase in the sums claimed that is attributable to any action taken by or any agreement entered into by Network Rail if that action or agreement was

not reasonably necessary and was taken or entered into with a view to obtaining the payment of those sums by the promoter under this Schedule or increasing the sums so payable.

17. The promoter and Network Rail may, subject in the case of Network Rail to compliance with the terms of its network licence, enter into, and carry into effect, agreements for the transfer to the promoter of—

- (a) any railway property shown on the lands plans and described in the book of reference;
- (b) any lands, works or other property held in connection with any such railway property; and
- (c) any rights and obligations (whether or not statutory) of Network Rail relating to any railway property or any lands, works or other property referred to in this paragraph.

18. Nothing in this Order, or in any enactment incorporated with or applied by this Order, prejudices or affects the operation of Part I of the Railways Act 1993.

19. The promoter must give written notice to Network Rail if any application is proposed to be made by the promoter for the Secretary of State's consent, under article 9 (transfer of benefit of Order) of this Order and any such notice must be given no later than 28 days before any such application is made and must describe or give (as appropriate)—

- (a) the nature of the application to be made;
- (b) the extent of the geographical area to which the application relates; and
- (c) the name and address of the person acting for the Secretary of State to whom the application is to be made.

20. The promoter must no later than 28 days from the date that the plans submitted to and certified by the Secretary of State in accordance with article 49 (certification of plans etc.) are certified by the Secretary of State, provide a set of those plans to Network Rail in the form of a computer disc with read only memory.

APPENDIX 3

Comparison between Network Rail preferred protective provisions and National Grid preferred protective provisions

(unchanged text remains green; changed text in red)

PROTECTIVE PROVISIONS

PART 3

FOR THE PROTECTION OF RAILWAY INTERESTS

1. The following provisions of this Part have effect, unless otherwise agreed in writing between the promoter and Network Rail and, in the case of paragraph 1~~5~~4, any other person on whom rights or obligations are conferred by that paragraph.

2. In this Schedule—

"construction" includes execution, placing, alteration and reconstruction and "construct" and "constructed" have corresponding meanings;

"the engineer" means an engineer appointed by Network Rail for the purposes of this Order;

"network licence" means the network licence, as the same is amended from time to time, granted to Network Rail Infrastructure Limited by the Secretary of State in exercise of his powers under section 8 of the Railways Act 1993;

"Network Rail" means Network Rail Infrastructure Limited and any associated company of Network Rail Infrastructure Limited which holds property for railway purposes, and for the purpose of this definition "associated company" means any company which is (within the meaning of section 1159 of the Companies Act 2006⁺ the holding company of Network Rail Infrastructure Limited, a subsidiary of Network Rail Infrastructure Limited or another subsidiary of the holding company of Network Rail Infrastructure Limited;

"plans" includes sections, designs, design data, software, drawings, specifications, soil reports, calculations, descriptions (including descriptions of methods of construction), staging proposals, programmes and details of the extent, timing and duration of any proposed occupation of railway property;

"promoter" means the undertaker as defined in article 2(interpretation) of this Order;

"railway operational procedures" means procedures specified under any access agreement (as defined in the Railways Act 1993) or station lease;

"railway property" means any railway belonging to Network Rail Infrastructure Limited and—

(a) ~~(a)~~ any station, land, works, apparatus and equipment belonging to Network Rail Infrastructure Limited or connected with any such railway; and

(b) ~~(b)~~ any easement or other property interest held or used by Network Rail Infrastructure Limited for the purposes of such railway or works, apparatus or equipment; and

"specified work" means so much of any 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.

3. ~~(1)~~ Where under this Schedule Network Rail is required to give its consent or approval in respect of any matter, that consent or approval is subject to the condition that Network Rail complies with any relevant railway operational procedures and any obligations under its network licence or under statute.

~~(1)~~ ~~(2)~~—In so far as any specified work or the acquisition or use of railway property is or may be subject to railway operational procedures, Network Rail must—

- ~~(a)~~ ~~(a)~~ co-operate with the promoter with a view to avoiding undue delay and securing conformity as between any plans approved by the engineer and requirements emanating from those procedures; and
- ~~(b)~~ ~~(b)~~ use their reasonable endeavours to avoid any conflict arising between the application of those procedures and the proper implementation of the authorised development pursuant to this Order.

~~4.~~ ~~(1) The promoter must not exercise the powers conferred by—~~

- ~~(a)~~ ~~article 19 (discharge of water);~~
- ~~(b)~~ ~~article 21 (authority to survey and investigate the land);~~
- ~~(c)~~ ~~article 23 (compulsory acquisition of land);~~
- ~~(d)~~ ~~article 24 (compulsory acquisition of rights);~~
- ~~(e)~~ ~~article 25 (acquisition of subsoil only);~~
- ~~(f)~~ ~~article 26 (power to override easements and other rights);~~
- ~~(g)~~ ~~article 28 (temporary use of land for carrying out the authorised development);~~
- ~~(h)~~ ~~article 29 (temporary use of land for maintaining the authorised development);~~
- ~~(i)~~ ~~article 37 (private rights of way);~~
- ~~(j)~~ ~~article 44 (felling or lopping of trees or shrubs);~~
- ~~(k)~~ ~~article 45 (trees subject to tree preservation orders);~~
- ~~(l)~~ ~~or the powers conferred by section 11(3) of the 1965 Act,~~
~~in respect of any railway property unless the exercise of such powers is with the consent of Network Rail.~~

~~(2) The promoter must not in the exercise of the powers conferred by this Order prevent pedestrian or vehicular access to any railway property, unless preventing such access is with the consent of Network Rail.~~

~~(3) The promoter must not exercise the powers conferred by sections 271 or 272 of the 1990 Act, or article 34 (statutory undertakers), in relation to any right of access of Network Rail to railway property, but such right of access may be diverted with the consent of Network Rail.~~

~~(4) The promoter must not under the powers of this Order acquire or use or acquire new rights over any railway property except with the consent of Network Rail.~~

~~(5) Where Network Rail is asked to give its consent pursuant to this paragraph, such consent must not be unreasonably withheld but may be given subject to reasonable conditions.~~

~~4. 5. (1)~~ The promoter must before commencing construction of any specified work supply to Network Rail proper and sufficient plans of that work for the reasonable approval of the engineer and the specified work must not be commenced except in accordance with such plans as have been approved in writing by the engineer or settled by arbitration.

~~(1) (2)~~ The approval of the engineer under sub-paragraph (1) must not be unreasonably withheld; and if by the end of the period of 28 days beginning with the date on which such plans have been supplied to Network Rail the engineer has not intimated his disapproval of those plans and the grounds of his disapproval the promoter may serve upon the engineer written notice requiring the engineer to intimate his approval or disapproval within a further period of 28 days beginning with the date upon which the engineer receives written notice from the promoter. If by the expiry of the further 28 days the engineer has not intimated his approval or disapproval, he shall be deemed to have approved the plans as submitted.

~~(2) (3)~~ If by the end of the period of 28 days beginning with the date on which written notice was served upon the engineer under sub-paragraph (2), Network Rail gives notice to the promoter that Network Rail desires itself to construct any part of a specified work which in the opinion of the engineer will or may affect the stability of railway property or the safe operation of traffic on the railways of Network Rail then, if the promoter desires such part of the specified work to be constructed, Network Rail must construct it with all reasonable dispatch on behalf of and to the reasonable satisfaction of the promoter in accordance with the plans approved or deemed to be approved or settled under this paragraph, and under the supervision (where appropriate and if given) of the promoter.

~~(3) (4)~~ When signifying his approval of the plans the engineer may specify any protective works (whether temporary or permanent) which in his opinion should be carried out before the commencement of the construction of a specified work to ensure the safety or stability of railway property or the continuation of safe and efficient operation of the railways of Network Rail or the services of operators using the same (including any relocation de-commissioning and removal of works, apparatus and equipment necessitated by a specified work and the comfort and safety of passengers who may be affected by the specified works), and such protective works as may be reasonably necessary for those purposes must be constructed by Network Rail or by the promoter, if Network Rail so desires, and such protective works must be carried out at the expense of the promoter in either case with all reasonable dispatch and the promoter must not commence the construction of the specified works until the engineer has notified the promoter that the protective works have been completed to his reasonable satisfaction.

~~5. 6. (1)~~ Any specified work and any protective works to be constructed by virtue of paragraph ~~5~~~~4~~(4) must, when commenced, be constructed—

- ~~(a) (a)~~ with all reasonable dispatch in accordance with the plans approved or deemed to have been approved or settled under paragraph ~~5~~~~4~~;
- ~~(b) (b)~~ under the supervision (where appropriate and if given) and to the reasonable satisfaction of the engineer;
- ~~(c) (c)~~ in such manner as to cause as little damage as is possible to railway property; and
- ~~(d) (d)~~ so far as is reasonably practicable, so as not to interfere with or obstruct the free, uninterrupted and safe use of any railway of Network Rail or the traffic thereon and the use by passengers of railway property.

~~(1) (2)~~ If any damage to railway property or any such interference or obstruction shall be caused by the carrying out of, or in consequence of the construction of a specified

work, the promoter must, notwithstanding any such approval, make good such damage and must pay to Network Rail all reasonable expenses to which Network Rail may be put and compensation for any loss which it may sustain by reason of any such damage, interference or obstruction.

~~(2) (3)~~ Nothing in this Part of this Schedule imposes any liability on the promoter with respect to any damage, costs, expenses or loss attributable to the negligence of Network Rail or its servants, contractors or agents or any liability on Network Rail with respect of any damage, costs, expenses or loss attributable to the negligence of the promoter or its servants, contractors or agents.

~~6. 7.~~ The promoter must—

- ~~(a)~~ at all times afford reasonable facilities to the engineer for access to a specified work during its construction; and
- ~~(b)~~ supply the engineer with all such information as he may reasonably require with regard to a specified work or the method of constructing it.

~~7. 8.~~ Network Rail must at all times afford reasonable facilities to the promoter and its agents for access to any works carried out by Network Rail under this Part of this Schedule during their construction and must supply the promoter with such information as it may reasonably require with regard to such works or the method of constructing them.

~~8. 9. (1)~~ If any permanent or temporary alterations or additions to railway property are reasonably necessary in consequence of the construction of a specified work, or during a period of 24 months after the completion of that work in order to ensure the safety of railway property or the continued safe operation of the railway of Network Rail, such alterations and additions may be carried out by Network Rail and if Network Rail gives to the promoter reasonable notice of its intention to carry out such alterations or additions (which must be specified in the notice), the promoter must pay to Network Rail the reasonable cost of those alterations or additions including, in respect of any such alterations and additions as are to be permanent, a capitalised sum representing the increase of the costs which may be expected to be reasonably incurred by Network Rail in maintaining, working and, when necessary, renewing any such alterations or additions.

~~(1) (2)~~ If during the construction of a specified work by the promoter, Network Rail gives notice to the promoter that Network Rail desires itself to construct that part of the specified work which in the opinion of the engineer is endangering the stability of railway property or the safe operation of traffic on the railways of Network Rail then, if the promoter decides that part of the specified work is to be constructed, Network Rail must assume construction of that part of the specified work and the promoter must, notwithstanding any such approval of a specified work under paragraph ~~54~~(3), pay to Network Rail all reasonable expenses to which Network Rail may be put and compensation for any loss which it may suffer by reason of the execution by Network Rail of that specified work.

~~(2) (3)~~ The engineer must, in respect of the capitalised sums referred to in this paragraph and paragraph ~~109~~(a) provide such details of the formula by which those sums have been calculated as the promoter may reasonably require.

~~(3) (4)~~ If the cost of maintaining, working or renewing railway property is reduced in consequence of any such alterations or additions a capitalised sum representing such saving must be set off against any sum payable by the promoter to Network Rail under this paragraph.

~~9. 10.~~ The promoter must repay to Network Rail all reasonable fees, costs, charges and expenses reasonably incurred by Network Rail—

- ~~(a)~~ in constructing any part of a specified work on behalf of the promoter as provided by paragraph ~~54~~(3) or in constructing any protective works under the provisions of

paragraph ~~54~~(4) including, in respect of any permanent protective works, a capitalised sum representing the cost of maintaining and renewing those works;

- (b) ~~(b)~~ in respect of the approval by the engineer of plans submitted by the promoter and the supervision by him of the construction of a specified work;
- (c) ~~(e)~~ in respect of the employment or procurement of the services of any inspectors, signalmen, watchmen and other persons whom it shall be reasonably necessary to appoint for inspecting, signalling, watching and lighting railway property and for preventing, so far as may be reasonably practicable, interference, obstruction, danger or accident arising from the construction or failure of a specified work;
- (d) ~~(d)~~ in respect of any special traffic working resulting from any speed restrictions which may in the opinion of the engineer, require to be imposed by reason or in consequence of the construction or failure of a specified work or from the substitution or diversion of services which may be reasonably necessary for the same reason; and
- (e) ~~(e)~~ in respect of any additional temporary lighting of railway property in the vicinity of the specified works, being lighting made reasonably necessary by reason or in consequence of the construction or failure of a specified work.

~~10.11. (1)~~ In this paragraph—

“EMI” means, subject to sub-paragraph (2), electromagnetic interference with Network Rail apparatus generated by the operation of the authorised development (including the operation of tramcars using the tramway comprised in the works) where such interference is of a level which adversely affects the safe operation of Network Rail’s apparatus; and

“Network Rail’s apparatus” means any lines, circuits, wires, apparatus or equipment (whether or not modified or installed as part of the authorised development) which are owned or used by Network Rail for the purpose of transmitting or receiving electrical energy or of radio, telegraphic, telephonic, electric, electronic or other like means of signalling or other communications.

(1) ~~(2)~~ This paragraph applies to EMI only to the extent ~~extent~~ that such EMI is not attributable to any change to Network Rail’s apparatus carried out after approval of plans under paragraph ~~54~~(1) for the relevant part of the authorised development giving rise to EMI (unless the promoter has been given notice in writing before the approval of those plans of the intention to make such change).

(2) ~~(3)~~ Subject to sub-paragraph (5), the promoter must in the design and construction of the authorised development take all measures necessary to prevent EMI and must establish with Network Rail (both parties acting reasonably) appropriate arrangements to verify their effectiveness.

(3) ~~(4)~~ In order to facilitate the promoter’s compliance with sub-paragraph (3)—

- (a) ~~(a)~~ the promoter must consult with Network Rail as early as reasonably practicable to identify all Network Rail’s apparatus which may be at risk of EMI, and thereafter must continue to consult with Network Rail (both before and after formal submission of plans under paragraph ~~54~~(1)) in order to identify all potential causes of EMI and the measures required to eliminate them;
- (b) (b) Network Rail must make available to the promoter all information in the possession of Network Rail reasonably requested by the promoter in respect of Network Rail’s apparatus identified pursuant to sub-paragraph (a); and
- (c) (c) Network Rail must allow the promoter reasonable facilities for the inspection of Network Rail’s apparatus identified pursuant to sub-paragraph (a).

(4) ~~(5)~~ In any case where it is established that EMI can only reasonably be prevented by modifications to Network Rail’s apparatus, Network Rail must not withhold its consent unreasonably to modifications of Network Rail’s apparatus, but the means of prevention and the method of their execution must be selected in the reasonable discretion of Network Rail, and in relation to such modifications paragraph ~~54~~(1) have effect subject to the sub-paragraph.

~~(5) (6)~~ If at any time prior to the commencement of regular revenue-earning operations comprised in the authorised development and notwithstanding any measures adopted pursuant to sub-paragraph (3), the testing or commissioning of the authorised development causes EMI then the promoter must immediately upon receipt of notification by Network Rail of such EMI either in writing or communicated orally (such oral communication to be confirmed in writing as soon as reasonably practicable after it has been issued) forthwith cease to use (or procure the cessation of use of) the promoter's apparatus causing such EMI until all measures necessary have been taken to remedy such EMI by way of modification to the source of such EMI or (in the circumstances, and subject to the consent, specified in sub-paragraph (5)) to Network Rail's apparatus.

~~(6) (7)~~ In the ~~ventevent~~ event of EMI having occurred—

- ~~(a) (a)~~ the promoter must afford reasonable facilities to Network Rail for access to the promoter's apparatus in the investigation of such EMI;
- ~~(b) (b)~~ Network Rail must afford reasonable facilities to the promoter for access to Network Rail's apparatus in the investigation of such EMI; and
- ~~(c) (c)~~ Network Rail must make available to the promoter any additional material information in its possession reasonably requested by the promoter in respect of Network Rail's apparatus or such EMI.

~~(7) (8)~~ Where Network Rail approves modifications to Network Rail's apparatus pursuant to sub-paragraphs (5) or (6)—

- ~~(a) (a)~~ Network Rail must allow the promoter reasonable facilities for the inspection of the relevant part of Network Rail's apparatus;
- ~~(b) (b)~~ any modifications to Network Rail's apparatus approved pursuant to those sub-paragraphs must be carried out and completed by the promoter in accordance with paragraph ~~6~~5.

~~(8) (9)~~ To the extent that it would not otherwise do so, the indemnity in paragraph ~~15~~4(1) applies to the costs and expenses reasonably incurred or losses suffered by network Rail through the implementation of the provisions of this paragraph (including costs incurred in connection with the consideration of proposals, approval of plans, supervision and inspection of works and facilitating access to Network Rail's apparatus) or in consequence of any EMI to which sub-paragraph (6) applies.

~~(9) (10)~~ For the purpose of paragraph ~~10~~9(a) any modifications to Network Rail's apparatus under this paragraph shall be deemed to be protective works referred to in that paragraph.

~~(10) (11)~~ In relation to any dispute arising under this paragraph the reference in article 45 (Arbitration) to the Institution of Civil Engineers shall be read as a reference to the Institution of Electrical Engineers.

~~11.12.~~ If at any time after the completion of a specified work, not being a work vested in Network Rail, Network Rail gives notice to the promoter informing it that the state of maintenance of any part of the specified work appears to be such as adversely affects the operation of railway property, the promoter must, on receipt of such notice, take such steps as may be reasonably necessary to put that specified work in such state of maintenance as not adversely to affect railway property.

~~12.13.~~ The promoter must not provide any illumination or illuminated sign or signal on or in connection with a specified work in the vicinity of any railway belonging to Network Rail unless it has first consulted Network Rail and it must comply with Network Rail's reasonable requirements for preventing confusion between such illumination or illuminated sign or signal and any railway signal or other light used for controlling, directing or securing the safety of traffic on the railway.

~~13.14.~~ Any additional expenses which Network Rail may reasonably incur in altering, reconstructing or maintaining railway property under any powers existing at the making of this

Order by reason of the existence of a specified work must, provided that 56 days' previous notice of the commencement of such alteration, reconstruction or maintenance has been given to the promoter, be repaid by the promoter to Network Rail.

~~14.15.-(1)~~— The promoter must pay to Network Rail all reasonable costs, charges, damages and expenses not otherwise provided for in this Part of this Schedule (but subject to article 32 (*no double recovery*)) which may be occasioned to or reasonably incurred by Network Rail—

- (a) ~~(a)~~ by reason of the construction or maintenance of a specified work or the failure thereof or
- (b) ~~(b)~~ by reason of any act or omission of the promoter or of any person in its employ or of its contractors or others whilst engaged upon a specified work;

and the promoter must indemnify and keep indemnified Network Rail from and against all claims and demands arising out of or in connection with a specified work or any such failure, act or omission: and the fact that any act or thing may have been done by Network Rail on behalf of the promoter or in accordance with plans approved by the engineer or in accordance with any requirement of the engineer or under his supervision ~~shall~~will not (if it was done without negligence on the part of Network Rail or of any person in its employ or of its contractors or agents) excuse the promoter from any liability under the provisions of this sub-paragraph.

(1) Network Rail must—

- (a) ~~(2) Network Rail must~~ give the promoter reasonable written notice of any such claim or demand ~~and no settlement or compromise of such a claim or demand shall be made without the prior consent of the promoter.;~~
- (b) not admit liability or make any offer to settle or settle or compromise any such claim or demand without the prior consent of the promoter (which, if it withholds such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand);
- (c) take all reasonable steps to mitigate any liabilities relating to such claims or demands;
- (d) keep the Undertaker informed in relation to the progress of any such actions, claims and demands and paying due regard to the Undertakers reasonable representations in relation thereto

(2) ~~(3)~~ The sums payable by the promoter under sub-paragraph (1) ~~shall if relevant~~may include a sum equivalent to the relevant costs.

(3) ~~(4)~~ Subject to the terms of any agreement between Network Rail and a train operator regarding the timing or method of payment of the relevant costs in respect of that train operator, Network Rail must promptly pay to each train operator the amount of any sums which Network Rail receives under sub-paragraph (3) which relates to the relevant costs of that train operator.

(4) ~~(5)~~ The obligation under sub-paragraph (3) to pay Network Rail the relevant costs shall, in the event of default, be enforceable directly by any train operator concerned to the extent that such sums would be payable to that operator pursuant to sub-paragraph (4).

(5) ~~(6)~~ In this paragraph—

"the relevant costs" means the costs, direct losses and expenses (including loss of revenue) reasonably incurred by each train operator as a consequence of any restriction of the use of Network Rail's railway network as a result of the construction, maintenance or failure of a specified work or any such act or omission as mentioned in subparagraph (1); and

"train operator" means any person who is authorised to act as the operator of a train by a licence under section 8 of the Railways Act 1993.

~~15.16~~— Network Rail must, on receipt of a request from the promoter, from time to time provide the promoter free of charge with written estimates of the costs, charges, expenses and other liabilities for which the promoter is or will become liable under this Schedule (including the amount of the relevant costs mentioned in paragraph ~~15~~4) and with such information as

may reasonably enable the promoter to assess the reasonableness of any such estimate or claim made or to be made pursuant to this Schedule (including any claim relating to those relevant costs).

~~16.17.~~— In the assessment of any sums payable to Network Rail under this Part of this Schedule there must not be taken into account any increase in the sums claimed that is attributable to any action taken by or any agreement entered into by Network Rail if that action or agreement was not reasonably necessary and was taken or entered into with a view to obtaining the payment of those sums by the promoter under this Schedule or increasing the sums so payable.

~~17.18.~~— The promoter and Network Rail may, subject in the case of Network Rail to compliance with the terms of its network licence, enter into, and carry into effect, agreements for the transfer to the promoter of—

- (a) ~~(a)~~ any railway property shown on the ~~works and land plans~~ [Lands Plans](#) and described in the book of reference;
- (b) ~~(b)~~ any lands, works or other property held in connection with any such railway property; and
- (c) ~~(c)~~ any rights and obligations (whether or not statutory) of Network Rail relating to any railway property or any lands, works or other property referred to in this paragraph.

~~18.19.~~— Nothing in this Order, or in any enactment incorporated with or applied by this Order, prejudices or affects the operation of Part I of the Railways Act 1993.

~~19.19~~ The promoter must give written notice to Network Rail if any application is proposed to be made by the promoter for the Secretary of State's consent, under article 9 (transfer of benefit of Order) of this Order and any such notice must be given no later than 28 days before any such application is made and must describe or give (as appropriate)—

- (a) ~~(a)~~ the nature of the application to be made;
- (b) ~~(b)~~ the extent of the geographical area to which the application relates; and
- (c) ~~(c)~~ the name and address of the person acting for the Secretary of State to whom the application is to be made.

~~20.20~~ The promoter must no later than 28 days from the date that the plans submitted to and certified by the Secretary of State in accordance with article 49 (certification of plans etc.) are certified by the Secretary of State, provide a set of those plans to Network Rail in the form of a computer disc with read only memory.