

Our reference ELSEM/JOHNMD/43283-2630

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BY EMAIL

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The Planning Inspectorate
Temple Quay House
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Dear Sir/Madam

Application by Esso Petroleum Company Limited (Applicant) for an Order granting development consent for the Southampton to London Pipeline Project (Order)
PINS Reference: EN070005
Deadline 7 Submission – Final Examination Update from Network Rail

Introduction

1. We write to update the Examining Authority (**ExA**) regarding the following:
 - a) the Protective Provisions that Network Rail requires for the benefit of the railway for inclusion at Part 3 of Schedule 9 to the Order;
 - b) the property agreements and framework agreement to be entered into with the Applicant;
 - c) Network Rail's submissions regarding section 127 of the Planning Act 2008; and
 - d) Network Rail's proposed amendment to the Outline Construction Traffic Management Plan (**CTMP**).
2. Further to Network Rail's Deadline 6 submission [**REP-099**], we can confirm that while discussions between the Applicant and our client continue to progress, the private property agreements to be entered into between the parties have not been completed and the Protective Provisions are yet to be agreed with the Applicant.
3. Nevertheless, negotiations are continuing between the parties and we hope to be able to agree all matters in the course of the coming weeks. We will update the ExA and, as appropriate, the Secretary of State, when agreement has been reached in relation to all matters.

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The Protective Provisions for the benefit of the railway for inclusion at Part 3 of Schedule 9 to the Order

4. We attach to this letter the Protective Provisions that Network Rail wishes to be included as Part 3 of Schedule 9 to the Order (**Network Rail Protective Provisions**).
5. We also attach a comparison document showing how the Network Rail Protective Provisions vary from those in the draft Development Consent Order submitted by the Applicant at Deadline 6 [REP6-003] (**draft Order**). There have been ongoing discussions with the Applicant since its submission of the draft Order and so some of the amendments in the attached comparison document have since been agreed with the Applicant. The amendments to the draft Order requested by Network Rail that are still to be agreed with the Applicant are as follows:

Paragraph 19: amendment to the definition of "specified work" to include maintenance of the Authorised Development

6. Network Rail asks that the definition of "specified work" is amended to refer to the maintenance of the authorised development. The Network Rail Protective Provisions require that "specified work", as defined in the Protective Provisions, must be authorised by Network Rail engineers and that Network Rail can supervise and monitor the impact of the specified work and request that any protective work, which Network Rail, acting reasonably, considers to be necessary, shall be undertaken in respect of such work. Specified work is defined in the Protective Provisions as "so much of any of the authorised development that ... may in any way adversely affect railway property". "Authorised development" is defined in accordance with the draft Order definition, as the works listed in Schedule 1 to the draft Order and any ancillary works but does not refer to maintenance.
7. Network Rail requests that the *maintenance* of the authorised development (further to the power granted by Article 4 of the draft Order) is included in the definition of "specified work". Network Rail requests this amendment to ensure that the maintenance of the scheme requires the approval of the Network Rail engineers and that Network Rail is afforded the same protection in respect of maintenance work undertaken by the Applicant as it does with regard to the undertaking by the Applicant of the "authorised development".

Paragraph 21: inclusion of requirement for Network Rail to give its consent to the exercise of compulsory powers in respect of railway property

8. Network Rail asks that paragraph 21 is included in the protective provisions. It lists the articles in the Order that may only be exercised with Network Rail's consent and provides that rights over railway property may not be extinguished without Network Rail's consent. Consent by Network Rail must not be unreasonably withheld but may be given subject to reasonable conditions. The inclusion

of paragraph 21 is essential to the application of section 127 of the Planning Act 2008 which we address under the heading 'Submissions relating to section 127 of the Planning Act 2008' below.

9. Network Rail submits that it is inconceivable for the construction and maintenance of the pipeline under the heavily used Wessex-route railway lines to be carried out without Network Rail's express consent given the significant risks to the safe operation of the railway and the passengers and train operating companies that use the lines.
10. Network Rail has been working hard to finalise property agreements with the Applicant that will provide the Applicant with all the rights it needs for its project insofar as it interfaces with railways property. Network Rail understands that the Applicant's position is that, until the property agreements have been finalised, the Applicant is unwilling to include paragraph 21 in the draft Order. However, Network Rail only received draft property documents from the Applicant recently (despite Network Rail having repeatedly offered to produce the first draft of the documents, having engaged with the Applicant about the necessary property documents from the start of the Examination and having provided a draft property document to the Applicant in October 2019) so it is unrealistic for the Applicant to have expected the documents to have been completed by the close of the Examination. Network Rail will respond to the Applicant in relation to the proposed property documents as quickly as possible and does not envisage that significant work is required to agree them. Network Rail anticipates that agreement can be reached during the period of the ExA's consideration of the draft Order.
11. The Applicant has also submitted that the provisions contained in the Protective Provisions of the draft Order provide sufficient safeguards for the protection of Network Rail's interests so that paragraph 21 is not required to protect Network Rail's interests. However, Network Rail strongly contests that submission.
12. Network Rail considers that, as a general principle, it is essential that Network Rail's consent is obtained before an undertaker exercises any Order powers affecting railway property.
13. Further, "specified work", as defined in the Protective Provisions, in relation to which the Applicant must seek Network Rail's consent before undertaking such work, only includes the undertaking of the authorised development, as defined in Schedule 1 to the draft Order, and does not include all of the powers to be granted to the undertaker by the draft Order (as we explain at paragraph 6 above in relation to the article 4 - maintenance rights).
14. Schedule 1 works do not include, for example, the following Order powers: article 4 (Maintenance of the authorised development), article 5 (Maintenance of the drainage works) and article 18 (Discharge of water).

15. Therefore, the only way to ensure that Network Rail must be able to oversee all aspects of the Order powers to be granted to the Applicant, is to list all of the powers that require its consent and the rights that cannot be extinguished, as we propose in paragraph 21.

Paragraph 26: the period of time in which Network Rail can monitor the impact of any alterations or additions to railway property that are reasonably necessary in consequence of the construction of a specified work

16. The Applicant considers that a 12-month (rather than the standard 24-months) 'snagging period' for the monitoring of any impact is sufficient, whereas Network Rail requires the full 24 months to ensure that the safety of the railway is not compromised by the construction of any works. Given the importance of monitoring the impact of works for the safety of the railway, Network Rail is unwilling to agree to the shortening of this time period.

Paragraph 32: the indemnity for the benefit of Network Rail

17. Paragraph 32 provides an indemnity by the applicant in favour of Network Rail. The version included in the Network Rail Protective Provisions is the standard indemnity which has been included in many statutory orders.

18. It indemnifies Network Rail in respect of losses it suffers and claims by train operators because of delays caused by reason of the construction or maintenance of a specified work or failure thereof or by reason of any act or omission of the undertaker or any of its employees or contractors while engaged on a specified work. It enables Network Rail to recover what are described as "relevant costs"; namely costs incurred by train operators for which Network Rail is liable under an agreement with the train operator as well as other consequential losses. We understand that the Applicant has agreed to these aspects of the indemnity as a general principle.

19. However the applicant is seeking to provide that:

- a) Network Rail shall take reasonable steps to mitigate any liabilities relating to such a claim or demand; and
- b) the indemnity does not apply to indirect or consequential loss or loss of profits.

20. Network Rail is anxious to ensure that the indemnity included in the Network Rail Protective Provisions is included in the Order and that the scope of the indemnity is not diluted. As a public body and operator of the national rail network it is essential that a private sector developer undertaking works that affect the railway provides Network Rail with a full indemnity so that any losses suffered do not fall on the public purse; that should include consequential loss which, in any event, would need to be properly justified and meet the relevant common law tests.

21. Network Rail's standard indemnity provisions are included in almost all confirmed Orders. In relation to those very few Orders that deviate from Network Rail's standard, the Secretary of State has been clear to identify the special situation that requires this deviation (and we note that the applicant, in each case, was another statutory undertaker).
22. In particular, given the inherent risks of digging under (rather than oversailing) the railway, Network Rail considers that full indemnity provisions are essential in this case.
23. Further, as noted in its Written Representations, Network Rail is continuing to liaise with the affected train operating company regarding the works that will directly affect its interest. Therefore, a full indemnity covering Network Rail's potential costs in the event of a major incident, including those of rain and freight operating companies for which Network Rail is liable, is required.

An update regarding the property agreements and framework agreement to be entered into with the Applicant

24. Network Rail has recently received property documentation from the Applicant's solicitors and will respond to the Applicant's comments as soon as possible.

Submissions relating to section 127 of the Planning Act 2008: serious detriment to Network Rail

25. At CAH2, the Panel requested that the Applicant submit its section 127 justification at this Deadline 7 (Action 12 of the Hearing Action Points).
26. Network Rail would also like to address the serious detriment that would occur should the Applicant be granted unfettered compulsory acquisition powers.
27. As stated in its Written Representations, Network Rail considers that the Secretary of State, in applying section 127 of the Planning Act 2008, cannot conclude that new rights and restrictions over the railway land can be created without serious detriment to Network Rail's undertaking; and no other land is available to Network Rail which means that the detriment can be made good by them.
28. We have already confirmed that the compulsory acquisition of Network Rail's property is unnecessary given Network Rail's willingness to agree the relevant property and other documents privately, which Network Rail considers can be achieved during the ExA's consideration of the draft Order.
29. Regarding the serious detriment to Network Rail of the compulsory acquisition of railway property, as we refer above, should the protective provisions not be amended to include Network Rail's paragraph 21, a number of Order powers that are not included within the definition of "specified

work" could be undertaken by the Applicant without the knowledge, consent or supervision of Network Rail.

30. Any one of such unsupervised construction works could lead to severe problems for the railway and its users, for example: the collapse of the railway, the derailment of trains, the closure of the railway lines, compensation claims by train and freight operating companies due to train delays and damage to the railway and commercial and reputational risk to Network Rail. In addition, any unchecked works could prevent Network Rail from proceeding with its own future plans for the railway network.
31. In addition, Network Rail notes that the Class Rights identified in the Book of Reference have not been approved by Network Rail as Network Rail engineers have been liaising closely with the Applicant and approving works based on their own private negotiations. Indeed, clearance certificates have been obtained by Network Rail for those works as progressed privately between the Applicant and Network Rail's asset protection engineers.
32. Therefore, if the works were to be constructed, following compulsory acquisition, in accordance with the Class Rights granted by the draft Order, those works would fall outside of the works that have been granted technical and business clearance by Network Rail. In the (albeit unlikely) event of a transfer of its Order powers, the private negotiations that the Applicant has pursued would fall away, and the Class Rights would remain. It is submitted that the Secretary of State should not grant powers to the Applicant to undertake works, in such circumstances, without Network Rail's consent.
33. Finally, with respect to the compulsory acquisition of Network Rail's property, Network Rail is unclear why the Applicant is unwilling to include paragraph 21 in the draft Order when it has clearly allowed an exclusion of compulsory acquisition in relation to other statutory undertakers' interests. We refer to Part 1 of Schedule 9 to the draft Order for the benefit of electricity, gas, water and sewerage undertakers, which has confirmed, in recent drafts of the Order submitted by the Applicant, that property must not be acquired "other than by agreement" and that their rights "shall not be extinguished".

Amendment to the Outline Construction Traffic Management Plan (CTMP)

34. We have recently asked the Applicant to include the text set out below to Section 5.3 of the Outline CTMP [REP6-026], which the Applicant has submitted to the ExA.
35. The proposed amendment ensures that Network Rail receives sufficient information to ensure the safe operation of the railway over any level crossings affected by construction traffic. While the Applicant is considering this amendment, we request that the ExA recommends its inclusion at section 5.3 of the Outline CTMP. The requested wording is as follows:

"The Applicant shall ensure that all construction traffic associated with the construction of the Works that uses any level crossing over the railway, whether or not that crossing is within the Order limits, shall provide to Network Rail's Level Crossing Route Manager

the following information in advance of using the crossing as well as any specific requirements relating to that crossing:

- a) *construction vehicle routing plans;*
- b) *site access plans;*
- c) *measures ensuring the protection of users of any footpath over the level crossing, which may be affected by the construction of the authorised development;*
- d) *proposals for temporary warning signs and banksman and escort details;*
- e) *details of any temporary or permanent improvements to highways affecting the level crossing;*
- f) *proposals for traffic management controls (such as temporary signals), diversion routes and signage required during any of the activities, operations or works associated with the creation or upgrading of any permanent or temporary means of access affecting the level crossing pursuant to this Order;*

In addition to the above, in relation to its use of the Farnborough North Level Crossing the Applicant confirms that:

- a) *plant and HGV traffic will be using the crossing only when there is T3 possession or a line block in place during night hours to lessen the impact on rail service;*
- b) *during daylight hours only transit vans will use the crossing;*
- c) *the crossing can only be used by construction traffic at times to be agreed with Network Rail; and*
- d) *there will be a Network Rail representative on site when the Plant and HGV movements take place over the crossing."*

Should the Panel have any questions regarding any of the issues raised in this letter please let us know.

Yours faithfully

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Network Rail Protective Provisions

SCHEDULE 9 Articles 33 and 34

PROTECTIVE PROVISIONS

PART 3

PROTECTION FOR RAILWAY INTERESTS

18. The provisions of this Part have effect unless otherwise agreed in writing between the undertaker and Network Rail and, in the case of paragraph 32 any other person on whom rights or obligations are conferred by that paragraph.

19. In this Part —

"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 amended from time to time, granted to Network Rail by the Secretary of State in exercise of the powers in section 8 of the Railways Act 1993;

"Network Rail" means Network Rail Infrastructure Limited (registered company number 2904587) 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;

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

"railway property" means –

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

"specified work" means so much of any of the authorised development or the maintenance 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.

20. (1) Where under this Part 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 undertaker 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 its 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.

21. (1) The undertaker must not exercise the powers conferred by—

- (a) article 4 (*Maintenance of the authorized development*);
- (b) article 5 (*Maintenance of the drainage works*);
- (c) article 15 (*Access to works*);
- (d) article 18 (*Discharge of water*);
- (e) article 19 (*Protective work to buildings*);
- (f) article 20 (*Authority to survey and investigate the land*);

- (g) article 21 (*Compulsory acquisition of land*);
- (h) article 23 (*Compulsory acquisition of rights and restrictive covenants*);
- (i) article 25 (*Private rights over land*);
- (j) article 28 (*Acquisition of subsoil only*);
- (k) article 29 (*Rights under or over streets*);
- (l) article 30 (*Temporary use of land for carrying out the authorised development*);
- (m) article 31 (*Temporary use of land for maintaining the authorised development*);
- (n) article 34 (*Statutory undertakers*);
- (o) article 42 (*Felling or lopping*);
- (p) article 43 (*Trees subject to tree preservation orders*);

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 undertaker 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 undertaker 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 undertaker must not under the powers of this Order acquire or use or acquire new rights over, or seek to impose any restrictive covenants over, any railway property, or extinguish any existing rights of Network Rail in respect of any third party 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 and, if applicable, shall be subject to first obtaining the consent and/or surrender of any leaseholder of the railway property.

22. (1) The undertaker 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 in accordance with paragraph 39 of this Part.

(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 their disapproval of those plans and the grounds of such disapproval the undertaker may serve upon the engineer written notice requiring the engineer to intimate approval or disapproval within a further period of 28 days beginning with the date upon which the engineer receives written notice from the undertaker and if, by the expiry of the further 28 days' period specified in the written notice, the engineer has not intimated approval or disapproval, the engineer is 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 undertaker 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 undertaker 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 undertaker 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 undertaker.

(4) When signifying approval of the plans, the engineer may specify any protective works (whether temporary or permanent) which in the opinion of the engineer must 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 them (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 undertaker, if Network Rail so desires, and such protective works must be carried out at the expense of the undertaker in either case with all reasonable dispatch and the undertaker must not commence the construction of the specified work until the engineer has notified the undertaker that the protective works have been completed to the engineer's reasonable satisfaction.

23. (1) Any specified work and any protective works to be constructed by virtue of paragraph 22(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 22;
 - (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 undertaker 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 imposes any liability on the undertaker 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 undertaker or its servants, contractors or agents.
24. The undertaker 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 the engineer may reasonably require with regard to a specified work or the method of constructing it.
25. Network Rail must at all times afford reasonable facilities to the undertaker and its agents for access to any works carried out by Network Rail under this Part during their construction and must supply the undertaker with such information as it may reasonably require with regard to such works or the method of constructing them.

26. (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 undertaker reasonable notice of its intention to carry out such alterations or additions (which must be specified in the notice), the undertaker 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 undertaker, Network Rail gives notice to the undertaker 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 undertaker 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 undertaker must, notwithstanding any such approval of a specified work under paragraph 22(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 27(a) provide such details of the formula by which those sums have been calculated as the undertaker 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 the saving must be set off against any sum payable by the undertaker to Network Rail under this paragraph.
27. The undertaker 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 undertaker as provided by paragraph 22(3) or in constructing any protective works under paragraph 22(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 undertaker and the supervision by the engineer of the construction of a specified work;

(c) in respect of the employment or procurement of the services of any inspectors, signallers, guards 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.

28. (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 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 22(1) for the relevant part of the authorised development giving rise to EMI (unless the undertaker 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 undertaker 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 undertaker's compliance with sub-paragraph (3)-

(a) the undertaker 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 22(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 undertaker all information in the possession of Network Rail reasonably requested by the undertaker in respect of Network Rail's apparatus identified pursuant to sub-paragraph (a); and

(c) Network Rail must allow the undertaker 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 reasonably be prevented only 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 22(1) has effect subject to this 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 undertaker must immediately upon receipt of notification by Network Rail of the 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 undertaker's apparatus causing the EMI until all measures necessary have been taken to remedy the EMI by way of modification to the source of the 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 undertaker must afford reasonable facilities to Network Rail for access to the undertaker's apparatus in the investigation of the EMI;

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

(c) Network Rail must make available to the undertaker any additional material information in its possession reasonably requested by the undertaker in respect of Network Rail's apparatus or the 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 undertaker 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 undertaker in accordance with paragraph 23.

(9) To the extent that it would not otherwise do so, the indemnity in paragraph 32(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 27(a) any modifications to Network Rail's apparatus under this paragraph are deemed to be protective works referred to in that sub-paragraph.

(11) In relation to any dispute arising under this paragraph the reference in article 48 (Arbitration) to the Secretary of State must be read as a reference to the President of the Institution of Engineering and Technology.

29. 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 undertaker 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 undertaker 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.

30. The undertaker 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.

31. 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 at least 56 days' prior notice of the commencement of such alteration, reconstruction or maintenance has been given to the undertaker, be paid by the undertaker to Network Rail.

32. (1) The undertaker must pay to Network Rail all reasonable costs, charges, damages and expenses not otherwise provided for in this Part (subject to article 47 (*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 undertaker or of any person in its employ or of its contractors or others whilst engaged upon a specified work;

and the undertaker 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 undertaker or in accordance with plans approved by the engineer or in accordance with any requirement of the engineer or under the supervision of the engineer 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 undertaker from any liability under the provisions of this sub-paragraph.

(2) Network Rail must give the undertaker 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 undertaker.

(3) The sums payable by the undertaker 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 sub-paragraph (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.

33. Network Rail must, on receipt of a request from the undertaker, from time to time provide the undertaker free of charge with written estimates of the costs, charges, expenses and other liabilities for which the undertaker is or will become liable under this Part (including the amount of the relevant costs mentioned in paragraph 32) and with such information as may reasonably enable the undertaker to assess the reasonableness of any such estimate or claim made or to be made pursuant to this Part (including any claim relating to those relevant costs).
34. In the assessment of any sums payable to Network Rail under this Part, no account must be taken of 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 undertaker under this Part or increasing the sums so payable.
35. The undertaker 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 undertaker of—
 - (a) any railway property shown on the Works Plans 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.

36. Nothing in this Order, or in any enactment incorporated with or applied by this Order, prejudices or affects the operation of Part 1 of the Railways Act 1993.

37. The undertaker must give written notice to Network Rail if any application is proposed to be made by the undertaker for the Secretary of State's consent, under article 8 (Consent to transfer 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.

38. The undertaker 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 45 (Certification of documents, etc.) are certified by the Secretary of State, provide a set of those plans to Network Rail in a format to be agreed between the parties.

39. In relation to any dispute arising under this part of this Schedule (except for those disputes referred to in paragraph 28(11) of this Part), unless otherwise provided for, must be referred to and settled by a single arbitrator to be agreed between the parties or, failing agreement, to be appointed on the application of either party (after giving notice in writing to the other) to the President of the Institution of Civil Engineers.

SCHEDULE 9 Articles 33 and 34

PROTECTIVE PROVISIONS

PART 3

PROTECTION FOR RAILWAY INTERESTS

~~18.~~ The provisions of this Part have effect unless otherwise agreed in writing between the

18. undertaker and Network Rail and, in the case of paragraph 32 any other person on whom rights or obligations are conferred by that paragraph.

19. ~~19.~~ In this Part—

~~“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;

~~127~~

~~“network licence”~~ means the network licence, as amended from time to time, granted to

Network Rail by the Secretary of State in exercise of the powers in section 8 of the Railways

Act ~~1993(a);1993;~~

~~“Network Rail”~~ means Network Rail Infrastructure Limited (registered company number

2904587) 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(b))~~ 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;

“railway operational procedures” means procedures specified under any access agreement (as

defined in the Railways Act 1993) or station lease;

“railway property” means—

(a) any railway belonging to Network Rail;

(b) any station, land, works, apparatus and equipment belonging to Network Rail ~~and~~

or connected with any such railway; and

(c) any easement or other property interest held or used by Network Rail for the purposes of

such railway or works, apparatus or equipment;

“specified work” means so much of any of the authorised development or the maintenance 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.

~~20.~~ (1) Where under this Part 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

20. 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 undertaker 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 its 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.

21. (1) The undertaker must not exercise the powers conferred by—

(a) article 4 (Maintenance of the authorized development);

(b) article 5 (Maintenance of the drainage works);

(c) article 15 (Access to works);

(d) article 18 (Discharge of water);

(e) article 19 (Protective work to buildings);

(f) article 20 (Authority to survey and investigate the land);

(g) article 21.—(Compulsory acquisition of land);

(h) article 23 (Compulsory acquisition of rights and restrictive covenants);

(i) article 25 (Private rights over land);

(j) article 28 (Acquisition of subsoil only);

(k) article 29 (Rights under or over streets);

(l) article 30 (Temporary use of land for carrying out the authorised development);

(m) article 31 (Temporary use of land for maintaining the authorised development);

(n) article 34 (Statutory undertakers);

(o) article 42 (Felling or lopping);

(p) article 43 (Trees subject to tree preservation orders);

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 undertaker 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 undertaker 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 undertaker must not under the powers of this Order acquire or use or acquire new rights over, or seek to impose any restrictive covenants over, any railway property, or extinguish any existing rights of Network Rail in respect of any third party 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 and, if applicable, shall be subject to first obtaining the consent and/or surrender of any leaseholder of the railway property.

(1) The undertaker 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 ~~21-22.~~ approved in writing by the engineer or settled ~~by arbitration under article 4847 (arbitration)~~ in accordance with paragraph 39 of this Part.

(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 ~~the~~ such plans have been supplied to Network Rail the engineer has not intimated ~~their~~ disapproval of those plans and the grounds of ~~such~~ disapproval, the undertaker may serve upon the engineer written notice requiring the engineer to intimate approval or disapproval within a further period of ~~1428~~ days beginning with the date upon which the engineer receives written notice from the undertaker and if, by the expiry of

~~(a) 1993 C. 43.~~

~~(b) 2006 e. 40.~~

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the further ~~14 days~~28 days' period specified in the written notice, the engineer has not intimated approval

or disapproval, the engineer is deemed to have approved the plans as submitted.

(3) If by the end of the period of ~~14~~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 undertaker

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 undertaker 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 undertaker 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 undertaker.

~~the railways of Network Rail then, if the undertaker desires such part of the specified work to be constructed, Network Rail must construct it (together with any adjoining part of the specified work which the undertaker reasonably requires to be constructed with that work) with all reasonable dispatch on behalf of and to the reasonable satisfaction of the undertaker 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 undertaker.~~

(4) When signifying approval of the plans, the engineer may specify any protective works

(whether temporary or permanent) which in the opinion of the engineer must 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 them (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 ~~work~~works), and such protective works as
may be reasonably necessary for those purposes ~~are to~~must be constructed by Network Rail or by the
undertaker, if Network Rail so desires, and such protective works must be carried out at the
expense of the undertaker in either case with all reasonable dispatch; and the undertaker must not
commence the construction of the specified work until the engineer has notified the undertaker
that the protective works have been completed to the ~~engineer's~~engineer's reasonable
satisfaction.

~~22.~~(1) Any specified work and any protective works to be constructed by virtue of paragraph
~~22.~~23. ~~21~~ 22(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 ~~21;~~22;

(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 ~~reasonably~~possible to railway property;
and

~~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 ~~is~~shall be caused by the
carrying out of, or in consequence of the construction of a specified work, the undertaker must,
notwithstanding any such approval, make good such damage and ~~is~~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 imposes any liability on the undertaker 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 undertaker or its servants, contractors or agents.~~

~~agents or any liability on Network Rail with respect of any damage, costs, expenses or loss attributable to the negligence of the undertaker or its servants, contractors or agents.~~

~~23-24.~~ 23. The undertaker 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 the engineer may reasonably require with regard to a specified work or the method of constructing it.

~~24.~~ Network Rail must at all times afford reasonable facilities to the undertaker and its agents for access to any works carried out by Network Rail under this Part during their construction and ~~129~~

must supply the undertaker with such information as it may reasonably require with regard to such ~~24-25.~~ works or the method of constructing them.

~~25.~~ (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 ~~12~~ 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 undertaker reasonable notice of its

intention to carry out such alterations or additions (which must be specified in the notice), the
undertaker 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
25-26. additions.

(2) If during the construction of a specified work by the undertaker, Network Rail gives notice
to the undertaker 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 undertaker 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 undertaker must, notwithstanding any such approval of a specified
work under paragraph 22(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.

~~of traffic on the railways of Network Rail, then, if the undertaker 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 undertaker must, notwithstanding any such approval of a specified work under~~
~~paragraph 21(1), 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 2627(a) provide such details of the formula by which those sums have been calculated as
the undertaker 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 the saving must be set off against any sum payable by the undertaker to Network Rail under this paragraph.

~~of any such alterations or additions, a capitalised sum representing the saving must be set off against any sum payable by the undertaker to Network Rail under this paragraph.~~

~~26.~~The undertaker must ~~pay~~repay to Network Rail all reasonable fees, costs, charges and expenses ~~26-27.~~ reasonably incurred by Network Rail—

(a) in constructing any part of a specified work on behalf of the undertaker as provided by paragraph ~~21~~22(3) or in constructing any protective works under paragraph ~~21~~22(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 undertaker and the supervision by the engineer of the construction of a specified work;

(c) in respect of the employment or procurement of the services of any inspectors, signallers, guards and other persons whom it ~~is~~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, ~~need~~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.

~~27-28. 27.~~ (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 where such interference is of a level which adversely affects the safe operation of Network Rail’s apparatus; and

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“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 ~~the~~such EMI is not attributable to any change to Network Rail’s apparatus carried out after approval of plans under paragraph ~~21~~22(1) for the relevant part of the authorised development giving rise to EMI (unless the undertaker 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 undertaker 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.

~~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 undertaker's compliance with sub-paragraph (3) ~~—~~;

(a) the undertaker 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 2122(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 undertaker all information in the possession of

Network Rail reasonably requested by the undertaker in respect of Network Rail's apparatus identified pursuant to sub-paragraph (a); and

~~Network Rail reasonably requested by the undertaker in respect of Network Rail's~~

~~apparatus identified pursuant to paragraph (a); and~~

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

~~Network Rail's apparatus identified pursuant to paragraph (a).~~

(5) In any case where it is established that EMI can reasonably be prevented only by

modifications to Network Rail's apparatus, Network Rail must not withhold ~~or delay~~ its consent

unreasonably to modifications of Network Rail's apparatus, but ~~Network Rail may, in its~~

~~reasonable discretion, select~~ 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 2122(1) has effect subject to this 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 ~~subparagraph~~sub-paragraph (3), the testing or commissioning of the authorised development causes EMI; then the

~~undertaker~~ must immediately upon receipt of notification by Network Rail of the 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 undertaker's apparatus causing the EMI until all measures necessary have been taken to ~~remedy~~ the EMI by way of modification to the source of the 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 undertaker must afford reasonable facilities to Network Rail for access to the

~~undertaker's~~ apparatus in the investigation of the EMI;

(b) Network Rail must afford reasonable facilities to the undertaker for access to Network

~~Rail's~~ apparatus in the investigation of the EMI; and

(c) Network Rail must make available to the undertaker any additional material information

~~in~~ its possession reasonably requested by the undertaker in respect of Network Rail's

~~apparatus~~ or the EMI.

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

(a) Network Rail must allow the undertaker reasonable facilities for the inspection of the

~~relevant part of~~ Network Rail's apparatus;-

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

~~paragraph 22~~paragraph 23.

(9) To the extent that it would not otherwise do so, the indemnity in paragraph 32(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 ~~26~~27(a) any modifications to Network Rail's apparatus under this ~~paragraph~~ are deemed to be protective works referred to in that sub-paragraph.

~~(40)~~11 In relation to any dispute arising under this paragraph, the reference in article ~~48~~47

~~(arbitration)~~48 (Arbitration) to the Secretary of State must be read as a reference to the President of the Institution of Engineering and Technology.

~~of Engineering and Technology.~~

~~28.~~ 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 undertaker 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 undertaker 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 ~~28.~~29. property.

~~29.~~ The undertaker 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~~Rail's reasonable requirements for preventing confusion between such illumination or illuminated sign or signal and

~~29-30.~~ any railway signal or other light used for controlling, directing or securing the safety of traffic on the railway.

~~the railway.~~

~~30.~~ 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 at least 56 ~~days'~~days' prior notice of the commencement of such alteration, reconstruction or maintenance has been given to ~~30-31.~~ the undertaker, be paid by the undertaker to Network Rail.

~~31. (1) The undertaker must—~~

~~(a)~~ pay to Network Rail all reasonable ~~and proper~~ costs, charges, damages and expenses not otherwise provided for in this Part (~~but~~ subject to ~~the provisions of this paragraph and~~ article ~~4746 (no 47~~ (*No double recovery*)) which may be occasioned to or reasonably incurred by

~~32. Network Rail—~~

~~(a)~~ by reason of—

~~(i)~~ the construction or maintenance of a specified work or the failure ~~of such a work~~thereof; or

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

~~(b)~~and the undertaker 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.~~

~~(2) The~~ and the fact that any act or thing may have been done by Network Rail on behalf of the undertaker or in accordance with plans approved by the engineer or in accordance with any requirement of the engineer or under the supervision of the engineer ~~doesshall~~ 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 undertaker from any liability under the provisions of this sub-paragraph ~~(1).~~

~~(32)~~ Network Rail must—

~~(a)~~ give the undertaker reasonable written notice of any such ~~claims or demands as soon as reasonably possible after Network Rail become aware of any such claims or demands;~~

~~(b)~~ ~~not admit liability or make any offer to settle or settle or compromise 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 undertaker ~~(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; and

~~(d)~~ keep the undertaker informed in relation to the progress of any such claims and demands and pay due regard to the undertaker's reasonable representations in relation to them.

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~~(4)~~ In no circumstances is the undertaker liable to Network Rail under sub-paragraph (1) for any indirect or consequential loss or loss of profits, save that the ~~(3)~~ The sums payable by the undertaker under

~~that~~ sub-paragraph (1) shall if relevant include a sum equivalent to the relevant costs ~~in circumstances where~~—.

~~(a)~~ Network Rail is liable to make payment of the relevant costs pursuant to the terms of an agreement between Network Rail and a train operator; and

~~(b)~~ the existence of that agreement and the extent of Network Rail's liability to make payment of the relevant costs pursuant to its terms has previously been disclosed in

~~writing to the undertaker,~~

~~but not otherwise.~~

~~(5)(4)~~ Subject to the terms of any agreement between Network Rail and a train operator regarding

~~the amount,~~ 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 (43) which relates to the relevant costs of that train operator.~~

~~(65)~~ The obligation under sub-paragraph (43) to pay Network Rail the relevant costs ~~is 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 (5-4).~~

~~(76)~~ 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 sub-paragraph (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.~~

~~32.~~ Network Rail must, on receipt of a request from the undertaker, from time to time provide

~~the undertaker free of charge with written estimates of the costs, charges, expenses and other~~

~~liabilities for which the undertaker is or will become liable under this Part (including the amount of the relevant costs mentioned in paragraph 32) and~~ with such information

~~as may reasonably enable the undertaker to assess the reasonableness of any such estimate or~~

~~31-33.~~ claim made or to be made pursuant to this Part: (including any claim relating to those relevant costs).

~~33.~~ In the assessment of any sums payable to Network Rail under this Part, no account must be taken of 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 ~~32-34.~~ undertaker under this Part or increasing the sums so payable.

~~34.~~ The undertaker and Network Rail may, subject in the case of Network Rail to compliance ~~33-35.~~ with the terms of its network licence, enter into, and carry into effect, agreements for the transfer to the undertaker of—

~~to the undertaker of—~~

(a) any railway property shown on the Works Plans 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.

~~35.~~ Nothing in this Order, or in any enactment incorporated with or applied by this Order,

~~34-36.~~ prejudices or affects the operation of Part 1 of the Railways Act 1993.

~~37.~~ ~~36.~~ The undertaker must give written notice to Network Rail if any application is proposed to be made by the undertaker for the Secretary of State's consent, under article 8 (Consent to transfer 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.

38. The undertaker 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 ~~4544 (certification)~~ 45 (Certification of documents, etc.)

are certified by the Secretary of State, provide a set of those plans to Network Rail in ~~the form of a~~ format to be agreed between the parties.

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39. In relation to any dispute arising under this part of this Schedule (except for those disputes referred to in paragraph 28(11) of this Part), unless otherwise provided for, must be referred to and settled by a single arbitrator to be agreed between the parties or, failing agreement, to be appointed on the application of either party (after giving notice in writing to the other) to the President of the Institution of Civil Engineers.