

**18 DECEMBER 2024**

**THE INFRASTRUCTURE PLANNING (EXAMINATIONS PROCEDURE) RULES 2010**

**THE H2 TEESSIDE PROJECT**

**WRITTEN SUBMISSION AT DEADLINE 5 ON BEHALF OF NATIONAL GAS  
TRANSMISSION PLC**

**&**

**REQUEST TO ATTEND COMPULSORY ACQUISITION HEARING 2 (CAH2)**

**REF: ADEA/TWHI/3011593.11**



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**1 INTRODUCTION**

1.1 National Gas Transmission Plc ("**NGT**") made a Relevant Representation in this matter on 1 July 2024 [**RR-017**], a Written Representation on 3 October 2024 [**REP2-067**] and a further interim submission on 19 November at Deadline 4 [**REP4-029**] (together the "**Existing Representations**").

1.2 As stated in its Existing Representations, NGT does not object in principle to the development proposed by H2 Teesside Limited (the "**Applicant**") and as defined as the "**Authorised Development**" in the draft Development Consent Order (the "**Draft Order**") [**REP4-004**].

1.3 NGT does, however, continue to **object** to:

- (a) the Applicant's intended reliance on powers of temporary possession and compulsory acquisition (as set out in the Draft Order) in order to temporarily use, and to permanently acquire, a significant extent of land in respect of which leasehold interests are currently held for the purposes of NGT's statutory undertaking and, further, to override or otherwise interfere with easements or rights which would adversely affect NGT's right to access and maintain its apparatus; and
- (b) the Authorised Development being carried out in close proximity to NGT's existing apparatus within the Order limits,

unless and until suitable protective provisions and related agreements have been secured to NGT's satisfaction.

1.4 This Written Submission, which is provided at Deadline 5 (18 December 2024), is comprised of the following elements:

- (a) A request made on behalf of NGT to attend Compulsory Acquisition Hearing 2 ("**CAH2**") which is scheduled to take place virtually on 13 January 2025; and
- (b) A written submission which is intended to provide the Examining Authority ("**ExA**") with an update on matters which remain at issue and in respect of which NGT would wish to make oral representations during CAH2.

1.5 NGT would be pleased to provide the ExA with clarification on any of the matters contained within this Written Submission.

**2 REQUEST TO ATTEND CAH2**

2.1 With reference to Annex B of the ExA's "*Notice of variation to the Examination Timetable following acceptance of change request for examination, including*

*notification of Hearings*” issued on 9 December 2024 [PD-017], NGT wishes to **confirm its attendance at CAH2 which is scheduled to take place virtually on 13 January 2025.**

- 2.2 With reference to the Preliminary Agenda for CAH2 included at Annex C of [PD-017], NGT would anticipate making oral submissions on the following agenda items:
- (a) **Item 4(i):** an update in respect of NGT’s objection to the Authorised Development (with reference to matters as set out in this Written Submission);
  - (b) **Item 5(ii):** statutory undertakers’ land; and
  - (c) **Item 6:** any other business (to the extent that NGT is invited to do so by the ExA).
- 2.3 It is anticipated that NGT will be represented at CAH2 by:
- (a) Caroline Daly (Counsel, Francis Taylor Building);
  - (b) A member of NGT’s engineering team;
  - (c) Ellie-May Craddock (Senior Associate, Fisher German); and
  - (d) Abigail Walters (Associate Director, Bryan Cave Leighton Paisner LLP).

### 3 **WRITTEN SUBMISSION AT DEADLINE 5**

#### **Overview**

- 3.1 Further to submissions made in its Existing Representations, NGT remains disappointed at the absence of substantive engagement from the Applicant during the course of the Examination.
- 3.2 Whilst a response to matters raised in [REP4-029] was provided by the Applicant on 21 November 2024, the substance of that response provided NGT with very little reassurance as to how the Draft Order (if made) will secure the usual protections for NGT’s existing assets, rights and other interests that are necessary to allow NGT to properly discharge its statutory obligations.
- 3.3 The following sections of this Written Submission, made with reference to Schedule 20 to the Draft Order [REP4-004], which contains a form of protective provisions put forward by the Applicant and expressed to be for the benefit of NGT (the “**Protective Provisions**”), explain the specific matters which remain at issue:

#### **Acquisition of Land and Rights**

- 3.4 NGT continues to seek, and the Applicant continues to resist, the inclusion of a paragraph (suggested as Paragraph 6 (Acquisition of Land)) in the Protective Provisions that would remove the Applicant’s ability to exercise compulsory acquisition or temporary possession powers in the absence of agreement with NGT.
- 3.5 NGT’s Written Representation of 3 October 2024 [REP2-067] at Paragraph 7 sought the inclusion of this paragraph and very little, if any, substantive explanation has been provided to date by the Applicant to justify its omission. To omit such a paragraph would run contrary to an established line of precedent that supports the position adopted by NGT (and indeed other statutory undertakers) as to the need for

a restriction on the actual exercise of powers of compulsory acquisition or temporary possession.<sup>1</sup>

- 3.6 For the benefit of the Examining Authority, the version of Paragraph 6 of the Protective Provisions which NGT is seeking to include in the Draft Order is included at Appendix 1 to this Written Submission.
- 3.7 NGT require the inclusion of Paragraph 6 in the Protective Provisions to ensure the effective discharge of its statutory obligations and regulatory duties, for the reasons which have already been made clear to the Examining Authority in NGT's Written Representation [REP2-067].
- 3.8 In overall terms, NGT considers that the continued omission of the procedural safeguards under Paragraph 6 would give rise to serious detriment in the context of the application of the statutory test under Section 127(6) of the Planning Act 2008. This assessment is predicated upon two overarching considerations, as follows:
- (a) **Transmission Obligations:** NGT must ensure complete control over its apparatus and associated land rights in order to adequately protect and maintain its apparatus and to allow it to effectively discharge obligations under its transmission licence, namely to ensure a continuous supply of gas across its network. The absence of Paragraph 6 would fundamentally inhibit NGT's ability to do so and NGT cannot, therefore, accept anything which presents a threat to its compliance under its transmission licence and its other statutory and regulatory obligations. The Protective Provisions must be secured in NGT's usual form in order to ensure that the Applicant is unable to carry out activities or works on NGT's land without NGT's express approval and on terms which are satisfactory to NGT.
  - (b) **Risks to Safety:** it is also noted that NGT's apparatus within the Order limits comprises high pressure major accident hazard pipelines ("MAHP"). By definition, MAHP pose a serious health and safety risk if not protected and maintained properly and appropriately. The safe and effective protection and maintenance of MAHPs is a fundamental objective of NGT and is central to both NGT's business operations and statutory obligations. The presence of MAHPs within the Order limits is a further reason why NGT must ensure complete control over its apparatus, which it will be unable to guarantee in the absence of Paragraph 6. The Pipeline Safety Regulations 1996 (the "**Regulations**") further require that pipelines are designed, constructed and operated so that the risks are as low as is reasonably practicable (ALARP). Regulation 15 states that "*No person shall cause such damage to a pipeline as may give rise to a danger to persons.*" NGT operates and maintains its network in line with the Regulations and according to well established standards to ensure the ongoing safety of the network.
- 3.9 More specifically, and in the context of the Authorised Development itself, NGT notes:
- (a) There are six plots of land included within the Order limits (Plots 2/38, 4/10, 4/13, 4/16, 4/8 and 9/10) where the Applicant is seeking to permanently acquire a very widely-drawn class of access-related rights over NGT's operational (leasehold) land. Based on the description of the rights sought by the Applicant, there is seemingly no intention for any newly-created access rights to be capable of co-existing with NGT's existing rights ("*...along with the right to prevent any works on or uses of the land which*

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<sup>1</sup> See, by way of example, [NGT's Response to Action Point 18 in respect of CAH2](#) in the context of the Examination of The National Grid (Yorkshire Green Energy Enablement Project) Development Consent Order 2024.

*may interfere with or damage the [Work No. 6A.1] infrastructure, or interfere with or obstruct access from and to the [Work No. 6A.1] infrastructure....”).*

Several of NGT’s above ground installation (AGI) assets are situated on these parcels of land, each of which are critical components of the national gas transmission network. The absence from the Protective Provisions of Paragraph 6 (Acquisition of Land), when read alongside Article 34 of the Draft Order (which would allow for the complete extinguishment of NGT’s existing land rights), would represent an unacceptable risk to NGT’s statutory duty to take access at such times and in such manner as is necessary to ensure the integrity of the gas transmission network, including in an emergency situation.

- (b) There are numerous other plots of land included within the Order limits in respect of which NGT holds rights and interests as an occupier in respect of below ground transmission assets (including Feeder Main pipelines) and other ancillary apparatus. The apparatus in each case either forms part, or is associated with the functioning, of the national gas transmission network. It is therefore vital that the exercise of temporary possession powers and/or the acquisition or creation of rights by the Applicant does not impact upon the rights which NGT already enjoys in respect of its apparatus, including rights: (i) to prevent damage or injury to its apparatus, (ii) to prevent obstruction of access to its apparatus, and (iii) to install, inspect, maintain and repair its apparatus at all times.

In general terms, any uncontrolled interference with these existing rights would give rise to the impacts and risks noted above, including at Paragraph 3.8. NGT anticipates being able to provide the Examining Authority with more specific examples of those likely risks and impacts, in the context of the Authorised Development, during CAH2.

- 3.10 NGT is not opposed to the Authorised Development (and, indeed, there is a commercial relationship between the Applicant and NGT in respect of “Project Union” as described in NGT’s response to ExQ1 Q1.2.7). NGT is therefore amenable to granting the Applicant the necessary land rights which it needs over NGT’s land/easements to enable the safe construction of the Authorised Development, provided that this is done in a way which also protects and is consistent with NGT’s own existing land rights.
- 3.11 Paragraph 12(2) of the Protective Provisions provides that whenever NGT’s consent, agreement or approval is required for the taking of any action by the Applicant, such consent, agreement or approval must not be unreasonably withheld or delayed. To the extent that the Applicant considers a refusal by NGT to agree to the use of powers of compulsory acquisition to be unreasonable, it would be able to use the arbitration procedure in the Order to resolve the dispute by virtue of Paragraph 14 of the Protective Provisions.
- 3.12 The Parties will accordingly be capable of agreeing or otherwise resolving the grant of appropriate overlapping land rights for the benefit of the Applicant if Paragraph 6 (as set out in Appendix 1) is included in the Draft Order. However failing to include these provisions for NGT could result in NGT’s existing land rights being overridden, which is unacceptable given the strategic nature of NGT’s existing assets situated within the Order limits.

## Indemnity

3.13 The Protective Provisions include, at Paragraph 10, the usual form of indemnity which is to be provided by the Applicant and expressed to be for the benefit of NGT. In accordance with established convention, NGT had understood the indemnity to be, in the usual form, uncapped.

3.14 However, in correspondence of 21 November 2024, the Applicant has provided – without justification or explanation – for a cap on the indemnity under Paragraph 10, in the following form:

*"(7) The liability of the undertaker under the indemnity contained in this paragraph 49 is limited to a sum of £25,000,000.00 (Twenty Five Million Pounds) aggregate."*

3.15 As a matter of principle, NGT is opposed to any form of cap on the Applicant's liability under the Protective Provisions for the following reasons:

- (a) Risks associated with a third-party project should not be for NGT to bear or subsidise. It is well-established that, as a matter of principle, DCO promoters must bear the risk in respect of impacts to statutory undertakers' apparatus posed by the proposed development. This is entirely consistent with the Examining Authority's recommendation in the context of the Eggborough Gas Fired Generating Station Order 2018, where the Examining Authority considered (at Paragraph 8.5.30) that to place a cap on the indemnity being given to the statutory undertaker in question would place an unreasonable and unjustified burden on that undertaker who would face the risk of meeting potential costs and losses through no fault of its own.<sup>2</sup> There is also a very well established line of recent DCOs which contain protective provisions for the benefit of NGT, none of which include capped indemnities.<sup>3</sup>
- (b) The scope, nature and extent of the potential liabilities or damages that may arise from the Applicant's actions or omissions are neither clear nor quantifiable. NGT must ensure protection for its undertaking in all possible scenarios or contingencies. An uncapped indemnity is the most efficient and equitable way of addressing any issues or disputes that may arise, without having to specify or limit the types, amounts, or durations of the indemnifiable claims.
- (c) An uncapped indemnity in the Order will not prevent the parties reaching a separate agreement in future which could limit the indemnity if appropriate, and subject to all necessary controls (e.g. risk and method statements and crossing agreements) being put in place to NGT's satisfaction. However, a capped indemnity at this stage would not give any reason or incentive to minimise any impacts or interactions as the Authorised Development develops post consent. Furthermore, should a cap be imposed at this stage and it later becomes apparent that the potential impacts of the Applicant's works near to NGT's assets would be catastrophic, there would be no mechanism for NGT to compel the Applicant to raise the indemnity cap. Again, there would also be no incentive for the Applicant to raise the cap voluntarily.
- (d) The provision of an uncapped indemnity does not, to NGT's understanding, result in any upfront cost to the Applicant.

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<sup>2</sup> See Paragraph 8.5.30 of the [Examining Authority's Recommendation Report](#) dated 27 June 2018.

<sup>3</sup> See [NGT's Response to Action Point 18 in respect of CAH2](#) in the context of the Examination of The National Grid (Yorkshire Green Energy Enablement Project) Development Consent Order 2024.

- 3.16 NGT is responsible for the national, high pressure gas transmission network. If the Authorised Development was to cause damage to NGT's Apparatus, then there may well be the need to isolate and depressurise assets within the transmission system in order to mitigate further impacts to the network and repair the damage. If these measures were required, then it could result in the loss of gas supply to a significant number of consumers. This would incur financial consequences in restoring those gas connections and present health and safety implications for vulnerable residents left without a gas supply to their property.
- 3.17 Any damage caused to the four Feeder Mains listed in NGT's Written Representation [REP2-067] will likely constrain NGT's ability to transport gas across its network. Those constraints will not only result in detrimental impacts to gas consumers across the network but would also result in significant constraint costs, including "Network Code Claims" (as defined in the Protective Provisions). Whilst such claims are foreseeable, they are virtually impossible to quantify with any certainty. In the context of the Authorised Development, it is estimated that constraint costs would be in the region of £5.7 million per day, with a further increase expected if transmission network constraints were to endure for a significant length of time.
- 3.18 In addition to constraints on the operation of the network, any damage to the feeder mains would also compromise NGT's ability to maintain its network. Damage to one Feeder Main may result in an inability to carry out routine maintenance scheduled for other assets in the area. NGT would lose flexibility in how to operate its network and there may well be associated costs.

#### **Conclusion**

- 3.19 For the reasons set out above and in its Existing Representations, NGT must continue to object to the current proposed drafting of the Protective Provisions.
- 3.20 The failure of those Protective Provisions to adequately safeguard NGT's obligations and rights has the clear potential to give rise to serious detriment in the context of NGT's statutory undertaking.

**Bryan Cave Leighton Paisner LLP**

**For and on behalf of National Gas Transmission Plc**

**18 December 2024**

## Appendix 1

### NGT Protective Provisions: Paragraph 6 (Acquisition of Land)

#### **Acquisition of Land**

6. —(1) *Regardless of any provision in this Order or anything shown on the land plans or contained in the book of reference to the Order, the undertaker may not (a) appropriate or acquire or take temporary possession of any land or apparatus or ((b) appropriate, acquire, extinguish, interfere with or override any easement, other interest or right and/or apparatus of National Gas otherwise than by agreement.*

(2) *As a condition of an agreement between the parties in sub-paragraph (1), prior to the carrying out of any part of the authorised development (or in such other timeframe as may be agreed between National Gas and the undertaker) that is subject to the requirements of this Part of this Schedule that will cause any conflict with or breach the terms of any easement or other legal or land interest of National Gas or affect the provisions of any enactment or agreement regulating the relations between National Gas and the undertaker in respect of any apparatus laid or erected in land belonging to or secured by the undertaker, the undertaker must as National Gas reasonably requires enter into such deeds of consent upon such terms and conditions as may be agreed between National Gas and the undertaker acting reasonably and which must be no less favourable on the whole to National Gas unless otherwise agreed by National Gas, and it will be the responsibility of the undertaker to procure and/or secure the consent and entering into of such deeds and variations by all other third parties with an interest in the land at that time who are affected by such authorised development.*

(3) *Save where otherwise agreed in writing between National Gas and the undertaker, the undertaker and National Gas agree that where there is any inconsistency or duplication between the provisions set out in this Part of this Schedule relating to the relocation and/or removal of apparatus/including but not limited to the payment of costs and expenses relating to such relocation and/or removal of apparatus) and the provisions of any existing easement, rights, agreements and licences granted, used, enjoyed or exercised by National Gas and/or other enactments relied upon by National Gas as of right or other use in relation to the apparatus, then the provisions in this Schedule shall prevail.*

(6) *Any agreement or consent granted by National Gas under paragraph 8 or any other paragraph of this Part of this Schedule, shall not be taken to constitute agreement under sub-paragraph (1).*