

PLANNING ACT 2008

INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE) RULES 2010

APPLICATION FOR THE M4 MOTORWAY (JUNCTIONS 3 TO 12) (SMART MOTORWAY)
DEVELOPMENT CONSENT ORDER (Reference TR010019)

DEADLINE VIII SUBMISSION OF NETWORK RAIL INFRASTRUCTURE LIMITED

(1) COMMENTS ON THE EXAMINING AUTHORITIES DRAFT DCO; AND

(2) RESPONSE TO HIGHWAYS ENGLAND'S SECTION 127 AND 138 SUBMISSION RELATING TO
NETWORK RAIL

(3) RESPONSE TO HIGHWAYS ENGLAND'S REVISED LAND PLANS

1. COMMENTS ON THE EXAMINING AUTHORITY'S DRAFT DCO

1.1 Introduction

- 1.1.1 Network Rail's comments on the Examining Authority's DCO (ExA DCO) are limited to the proposed protective provisions in favour of Network Rail, which are contained in Part 3 of Schedule 9 (for the protection of railway interests).
- 1.1.2 A comparison of Network Rail's protective provisions, as against those proposed by Highways England and contained in the ExA's DCO, is contained in the Annex below (the Annex).
- 1.1.3 As a preliminary point the Protective Provisions in the Annex consistently renumber sub-paragraph (2) as (1), (3) and (2) *et cetera*. This is a function of the software used to compare the ExA DCO against Network Rail's wording and for the avoidance of Network Rail is not proposing to amend sub-paragraph numbers.
- 1.1.4 Network Rail has been in discussions with Highways England about the form of the proposed protective provisions and Highways England is therefore aware of the amendments that Network Rail requires to be made to the protective provisions.

1.2 Substantive Comments

1.2.1 Restriction on Powers: Paragraph 23(1)

- (a) Article 23(1) provides that Highways England will not exercise certain powers under the DCO unless Network Rail consents. Article 23(5) provides the protection that such consent must not be unreasonably withheld.
- (b) Network Rail is a statutory undertaker which operates under a network licence granted under Section 8 of the Railways Act 1993 (Network Licence). This licence contains a set of conditions under which Network Rail must operate. As the operator and owner of the national rail infrastructure, it has a key role to play in railway safety and improving railway performance and efficiency. The network licence is the mechanism by which the Office for Rail and Road holds Network Rail to account.

- (c) Part III of the Network Licence sets of the conditions of the licence. Paragraph 1.1 states:

Purpose

1.1 The purpose is to secure:

- (a) the operation and maintenance of the network;
- (b) the renewal and replacement of the network; and
- (c) the improvement, enhancement and development of the network,

in each case in accordance with best practice and in a timely, efficient and economical manner so as to satisfy the reasonable requirements of persons providing services relating to railways and funders, including potential providers or potential funders, in respect of:

- (i) the quality and capability of the network; and
- (ii) the facilitation of railway service performance in respect of services for the carriage of passengers and goods by railway operating on the network.

- (d) Network Rail's **General Duty** is set out in paragraph 1.2 as follows:

General duty

1.2 The licence holder shall achieve the purpose in condition 1.1 to the greatest extent reasonably practicable having regard to all relevant circumstances including the ability of the licence holder to finance its licensed activities.

- (e) The General Duty can be broken down into two essential elements:

- (i) Securing the current operation and maintenance of the network. Operating a railway is a highly complex operation involving many technical fields of expertise. Any changes which potentially affect the network must therefore be subjected to a high degree of consideration and technical scrutiny in order that the operation of the network is not compromised.
- (ii) Securing the future improvement, development and enhancement of the network. Network Rail is essentially the custodian of the network and its land and facilities for future generations and must manage those resources so as not to prejudice its future development.

- (f) The granting of unfettered powers in the DCO is incompatible with the General Duty and may place Network Rail in a position where it is breach of that duty.

- (g) Accordingly, Network Rail considers that additional powers should be referred to in paragraph 23 as being subject to the requirement for consent and these are set out in the Annex of this submission.

- (h) The most important of these powers is article 23 (power to override easements and other rights). The operation of Network Rail's network relies on its easements and other rights, and the overriding of an easement or other right right to lay a signalling cable or to access land, for example, could have

very far reaching consequences indeed and put Network Rail in breach of its General Duty.

- (i) The same principle applies to the other powers referred to. For example in respect of the stopping up and prohibition of traffic on streets, street is a broad term which includes not only highways, but also roads which are not highways. In either case, Network Rail may require use of those streets to gain access to the network for repairs and maintenance in accordance with its General Duty.
- (j) This approach has previously been accepted by Highways England's predecessor (see the protective provisions in the A160-A180 (Port of Immingham Improvement) Development Consent Order 2015) and has not been an issue of contention between Network Rail and Highways England in the recent A14 Cambridge to Huntingdon Improvement Scheme DCO Examination. It has also been included in orders such as the Norfolk County Council (Norwich Northern Distributor Road (A1067 to A47(T))) Order 2015.

1.2.2 Costs for construction and failure of protective works (Paragraph 29(e))

- (a) Network Rail considers that the costs of temporary lighting should be payable by Highways England where there is a failure of a protective work as work as when there is a failure of a specified work.
- (b) Specified works and protective works are both referred to consistently in subparagraphs (a) to (d) and it would appear that this is an accidental omission.
- (c) We understand that Highways England accepts this amendment.

1.2.3 Indemnity (Paragraph 34)

- (a) Highways England has omitted Network Rail's standard indemnity from Article 34(1), but have not justified its omission.
- (b) An indemnity is a promise from one person to be responsible for a second person's losses where those losses are brought about by the acts or omissions of the first person. Highways England therefore appear to be seeking to step away from being responsible for the adverse consequences of their actions where those consequences are suffered by Network Rail.
- (c) The indemnity wording in question has been included in previous development consent orders including, *inter alia*:
 - (i) the Rookery South (Resource Recovery Facility) Order 2011;
 - (ii) the Willington C Gas Pipeline Order 2014; and
 - (iii) the Norfolk County Council (Norwich Northern Distributor Road (A1067 to A47(T))) Order 2015.
- (d) The provision of this indemnity was not an issue of contention between Network Rail and Highways England in the recent A14 Cambridge to Huntingdon Improvement Scheme DCO Examination.
- (e) Unusually the indemnity was not included in the A160-A180 (Port of Immingham Improvement) Development Consent Order. That case can be distinguished on the basis that in that case powers were being granted to the

Secretary of State (ie central government) rather than to Highways England, a private limited company.

2. RESPONSE TO HIGHWAYS ENGLAND'S SECTION 127 AND 138 SUBMISSION RELATING TO NETWORK RAIL

- 2.1 In Network Rail's detailed Written Representation it set out why powers of compulsory acquisition should not be granted in relation to its land and cited Sections 127 and 138 of the Planning Act 2008 (**Sections 127 and 138**).
- 2.2 Highways England has now submitted a document entitled: "Submission under Section 127 and 138 of the Planning Act 2008: Statutory Undertaker – Network Rail Infrastructure Limited" (**HE Submission**).
- 2.3 Sections 127 and 138 are rehearsed at length in both of those submissions are not reproduced here.
- 2.4 Before addressing the HE Submission it is important that Network Rail's position is properly understood:
 - 2.4.1 Network Rail does not object in principle to the proposed DCO;
 - 2.4.2 Network Rail is content that the Order should be granted provided that Protective provisions are included in the form set out in the Annex.
 - 2.4.3 Only if Protective Provisions are **not** included in the form set out in the Annex does Network Rail object to the making of the DCO. It is only in these circumstances that Sections 127 and 138 are engaged.
- 2.5 There are two main amendments which need to be made to the Protective Provisions and these are set out in Sections 1.2.1 and 1.2.3 above. In summary:
 - 2.5.1 Network Rail must ensure that it can retain its rights and interests and access to its land in order that it can continue to operate its undertaking and comply with its General Duty (as described in paragraph 1.2.2(e) above). The suspension extinguishment or overriding of those rights and interests is likely to render Network Rail unable to properly and effectively operate its network.
 - 2.5.2 Network Rail must ensure that it is protected against losses which might arise out of the scheme and in particular the acts and omissions of Highways England. Again, failure to secure such protection may put Network Rail in breach of its General Duty.
- 2.6 Provided that these amendments are made Network Rail does not object to the making of the DCO and all arguments in relation to Section 127 and 138 fall away.
- 2.7 The HE Submission is flawed in a number of respects:
 - 2.7.1 It does not engage with the nuanced objection Network Rail as set out above, and implicitly and incorrectly represents Network Rail's objection as an out-and-out objection to the scheme under Sections 127 and 138.
 - 2.7.2 At paragraph 6.3 it appears to suggest that the question to be addressed by the Secretary of State when considering whether the tests in Sections 127 and 138 have been met is whether it is "necessary to seek the proposed powers to ensure that all the land that is required to deliver the Scheme is assembled within an

appropriate timeframe and interfaces with Network Rail's apparatus are managed appropriately". This is plainly wrong in law.

- 2.7.3 Unless protective provisions are included in the DCO in line with the Annex serious detriment is likely to result to Network Rail's land.
- 2.8 Highways England sets out a Schedule of Correspondence with Network Rail at Appendix 5 of the HE Submission and states at paragraph 6.2 that it is seeking to negotiate acquisition by private treaty and has been in negotiations with Network Rail since 11 March 2013. Appendix 5 somewhat overstates the nature and timing of engagement with Network Rail:
- 2.8.1 The engagement set out at Appendix 5 between 11 March 2013 and 8 June 2015 (ie for approximately 2 years and 3 months) was in the nature of standard (general) consultation in respect of the proposed DCO and the gathering of information about ownership.
- 2.8.2 The engagement set out at Appendix 5 between 8 June 2015 and 29 July 2015 related to relevant representations.
- 2.8.3 It was only on 29 July 2015 that Highways England (via the District Valuer) asked for confirmation that Network Rail for confirmation that Network Rail was willing to enter into voluntary arrangements with Highways England.
- 2.8.4 It was only on 16 December 2015 that Network Rail received a costs undertaking in respect of its legal costs for negotiating the a framework agreement in respect of voluntary arrangements.
- 2.9 In conclusion, Sections 127 and 138 are not engaged in respect of Network Rail's land and rights, provided that the Order as made includes protective provisions in the form set out in with the Annex.

3. RESPONSE TO HIGHWAYS ENGLAND'S REVISED LAND PLANS

- 3.1 As a general point in respect of Land Plans 2, 4 and 10, the decks of the M4 Bridges generally appear to be subject to easements to construct and maintain a bridge (rather than freehold transfer of a stratum of the land to the Secretary of State for Transport or dedication of highway) with a freehold transfer of only land required for the bridge abutments. This suggests that reference to Highways England as reputed owners of the bridge level in the Book of Reference may be in error.
- 3.2 Plots 22-24a and 22-24b in the Book of reference are subject to an easement to the Minister of Transport dated 22 December 1965 (including the Bridge abutments) rather than a freehold transfer. The Book of Reference would appear to be in error in this regard.
- 3.3 In terms of consistency with other Land Plans, Network Rail strongly submits that Plots 22-22a, 22-22b, 22-23a, 22-23b, 22-24a and 22-24b should be shaded grey (temporary possession of railway land and unrestricted rights in relation to motorway deck).
- 3.4 It is unclear why the railway bridges on Land Plan 27 are all shown stippled as "Crown Land". Rights were granted to the Secretary of State, presumably as highway authority, for the construction of highway.

Bond Dickinson LLP

26 February 2016

ANNEX
NETWORK RAIL'S PROTECTIVE PROVISIONS

PART 3

FOR THE PROTECTION OF RAILWAY INTERESTS

For the protection of Railway Interests

~~20.20.~~ The following provisions of this Part of this Schedule have effect, unless otherwise agreed in writing between the undertaker and Network Rail and, in the case of paragraph 34, any other person on whom rights or obligations are conferred by that paragraph.

~~21.21.~~ In this Part of this Schedule—

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

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

“network licence” means the network licence, as the same is amended from time to time, granted to Network Rail Infrastructure Limited by the undertaker in exercise of powers under section 8 (licences) of the Railways Act 1993 ~~(b)~~ ^(ba);

“Network Rail” means Network Rail Infrastructure Limited (company number 02904587, whose registered office is at 1 Eversholt Street, London NW1 2DN) and any associated

- (a) ~~1984 c. 12. Paragraph 23 was amended by section 190 of, and paragraph 68 of Schedule 25 and Part 1 of Schedule 27 to, the Water Act 1989 (c. 15), section 112(4) of, and Schedule 18 to, the Electricity Act 1989 (c. 29) and section 106(2) of, and paragraphs 1, 5(d) and 8 of Schedule 3 to, the Communications Act 2003.~~
- (b) ~~1993 c. 43.~~

~~8.3.~~ 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 (meaning of “subsidiary” etc.) of the Companies Act 2006 ~~(ab)~~ ^(ab)) 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;

~~—protective works~~” means any works specified by the engineer under paragraph 24 ~~;~~

“railway operational procedures” means procedures specified under any access agreement (as defined in the Railways Act 1993 ~~(bc)~~ ^(bc)) or station lease;

“railway property” means any railway belonging to Network Rail and—

^(a) [1993 c. 43.](#)

^(b) [2006 c. 46.](#)

^(c) [1993 c. 43.](#)

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

“specified work” means so much of any of the authorised development as is, or is to be, situated upon, across, under, over or within 15 metres of, or may in any way adversely affect, railway property.

~~22.22.~~—(1) Where under this Part of this Schedule Network Rail is required to give its consent, agreement or approval in respect of any matter, that consent, agreement or approval is subject to the condition that Network Rail complies with any relevant railway operational procedures and any obligations under its network licence or under statute.

~~(1) (2)~~ In so far as any specified work or the acquisition or use of railway property or rights over 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 under this Order.

~~23.23.~~—(1) The undertaker must not exercise the powers conferred by articles [13 \(permanent stopping up of streets\)](#), [14 \(temporary stopping up of streets\)](#), [15 \(access to works\)](#), [17 \(discharge of water\)](#), [18 \(protective works to buildings\)](#), 19 (authority to survey and investigate land), 20 (compulsory acquisition of land), 22 (compulsory acquisition of rights), [23 \(power to override easements and other rights\)](#), 24 (private rights over land), 26 (acquisition of subsoil or air-space only), 28 (rights under or over streets), 29 (temporary use of land for carrying out the authorised development), 30 (temporary use of land for maintaining the authorised development), 31 (statutory undertakers), [38 \(felling or lopping trees\)](#), [39 \(trees subject to tree preservation orders\)](#), [43 \(temporary prohibition of traffic\)](#) or the powers conferred by section 11(3) (powers of entry) of the 1965 Act in respect of any railway property unless the exercise of such powers is with the consent of Network Rail.

~~(1) (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.

~~(2) (3)~~ The undertaker must not exercise the powers conferred by sections 271 (extinguishment of rights of statutory undertakers: preliminary notices) or 272 (extinguishment of rights of telecommunications code system operators: preliminary notices) of the 1990 Act, or article 31 (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.

- (a) 2006 e.-46.
- (b) 1993 e.-43.

~~(3) (4)~~ The undertaker must not under the powers of this Order acquire or use, or acquire new rights over, any railway property except with the consent of Network Rail.

~~(4) (5)~~ Where Network Rail is asked to give its consent or agreement under this paragraph, such consent or agreement must not be unreasonably withheld but may be given subject to reasonable ~~8-5~~ conditions.

~~24.24.~~—(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 by arbitration under article 46 (arbitration).

~~(1) (2)~~ The approval of the engineer under sub-paragraph (1) must not be unreasonably withheld, and if by the end of the period of 28 days beginning with the date on which such plans have been supplied to Network Rail the engineer has not intimated disapproval of those plans and the grounds of 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. If by the expiry of the further 28 days the engineer has not intimated approval or disapproval, the engineer is deemed to have approved the plans as submitted.

~~(2) (3)~~ If by the end of the period of 28 days beginning with the date on which written notice was served upon the engineer under sub-paragraph (2), Network Rail gives notice to the 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.

~~(3) (4)~~ When signifying approval of the plans the engineer may specify any protective works (whether temporary or permanent) which in the engineer's opinion should be carried out before the commencement of the construction of a specified work to ensure the safety or stability of railway property or the continuation of safe and efficient operation of the railways of Network Rail or the services of operators using the same (including any relocation de-commissioning and removal of works, apparatus and equipment necessitated by a specified work and the comfort and safety of passengers who may be affected by the specified works), and such protective works as may be reasonably necessary for those purposes must be constructed by Network Rail or by the 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 works until the engineer has notified the undertaker that the protective works have been completed to the engineer's reasonable satisfaction.

~~25.25.~~—(1) Any specified work and any protective works to be constructed by virtue of paragraph 24(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 24;
- (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 on it and the use by passengers of railway property.

~~(2)~~ If any damage to railway property or any such interference or obstruction is

~~(2)~~ If any damage to railway property or any such interference or obstruction is caused by the carrying out of, or in consequence of the construction of a specified work or a protective work, the undertaker must, regardless of 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.

~~(1)~~ ~~(3)~~ Nothing in this Part of this Schedule 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 the undertaker's employees, contractors or agents.

~~26.26.~~—(1) The undertaker must—

- (a) at all times afford reasonable facilities to the engineer for access to a specified work or protective 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 protective work or the method of constructing it.

~~27.27.~~ Network Rail must at all reasonable times afford reasonable facilities to the undertaker and the undertaker's agents for access to any works carried out by Network Rail under this Part of this Schedule during their construction and must supply the undertaker with such information as the undertaker may reasonably require with regard to such works or the method of constructing them.

~~28.28.~~—(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 a protective 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.

~~(1)~~ ~~(2)~~ If during the construction of a specified work or a protective work by the undertaker, Network Rail gives notice to the undertaker that Network Rail desires itself to construct that part of the specified work or protective 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 or protective work is to be constructed, Network Rail must assume construction of that part of the specified work or protective work and the undertaker must, regardless of any such approval of a specified work or protective work under paragraph 24(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 or protective work.

~~(2)~~ (3) The engineer must, in respect of the capitalised sums referred to in this paragraph and paragraph 29(a) provide such details of the formula by which those sums have been calculated as the undertaker may reasonably require.

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

~~29.29.~~ 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 24(3) or in constructing any protective works under the provisions of paragraph 24(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 or a protective work;
- (c) in respect of the employment or procurement of the services of any inspectors, signallers, watchkeepers and other persons whom it is 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 or a protective 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 a protective 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 or a protective work.

~~30.30.~~—(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;

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

~~(1)~~ (2) This paragraph applies to EMI only to the extent that such EMI is not attributable to any change to Network Rail’s apparatus carried out after approval of plans under paragraph 24(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).

~~(2)~~ (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 ~~8.7~~ their effectiveness.

~~(3)~~ ~~(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 must continue to consult with Network Rail (both before and after formal submission of plans under paragraph 24(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 under sub-paragraph (a); and
- (c) Network Rail must allow the undertaker reasonable facilities for the inspection of Network Rail's apparatus identified under sub-paragraph (a).

~~(4)~~ ~~(5)~~ In any case where it is established that EMI can only reasonably be prevented by modifications to Network Rail's apparatus, Network Rail must not withhold its consent unreasonably to modifications of Network Rail's apparatus, but the means of prevention and the method of their execution may be selected at the reasonable discretion of Network Rail, and in relation to such modifications paragraph 24(1) has effect subject to this sub-paragraph.

~~(6)~~ If at any time prior to the completion of the authorised development and regardless of any measures adopted under 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 such EMI either in writing or communicated orally (such oral communication to be confirmed in writing as soon as reasonably practicable after it has been issued) cease to use (or procure the cessation of use of) the undertaker's apparatus causing such EMI until all measures necessary have been taken to remedy such EMI by way of modification to the source of such EMI or (in the circumstances, and subject to the consent, specified in sub-paragraph (5)) to Network Rail's apparatus.

~~(5)~~ ~~(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 such EMI;
- (b) Network Rail must afford reasonable facilities to the undertaker for access to Network Rail's apparatus in the investigation of such 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 such EMI.

~~(6)~~ ~~(8)~~ Where Network Rail approves modifications to Network Rail's apparatus under subparagraphs (5) or (6)—

- (a) Network Rail must allow the undertaker reasonable facilities for the inspection of the relevant part of Network Rail's apparatus; and
- (b) any modifications to Network Rail's apparatus approved under those sub-paragraphs must be carried out and completed by the undertaker in accordance with paragraph 25.

~~(7)~~ ~~(9)~~ To the extent that it would ~~§§~~ not otherwise do so, paragraph 34(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 ~~subparagraph~~sub-paragraph (6) applies.

~~(8)~~ ~~(10)~~ For the purpose of paragraph 29(a) any modifications to Network Rail's apparatus under this paragraph are deemed to be protective works referred to in that paragraph.

~~(9)~~ ~~(11)~~ In relation to any dispute arising under this paragraph the reference in article 46 (arbitration) to a single arbitrator to be agreed between the parties is to be read as a reference to an arbitrator being a member of the Institution of Engineering and Technology to be agreed.

31. If at any time after the completion of a specified work or a protective 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 or protective 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 or protective work in such state of maintenance as to not adversely affect railway property.

32. The undertaker must not provide any illumination or illuminated sign or signal on or in connection with a specified work or protective work in the vicinity of any railway belonging to Network Rail unless the undertaker has first consulted Network Rail and the undertaker 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.

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

~~34.34.~~—(1) The undertaker must pay to Network Rail all reasonable costs, charges, damages and expenses not otherwise provided for in this Part of this Schedule which may be occasioned to or reasonably incurred by Network Rail—

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

~~(b)~~ by reason of any act or omission of the undertaker or of any person in the undertaker's employ or of the undertaker's contractors or others whilst engaged upon a specified work or a protective 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 a protective 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 ~~§9~~ his supervision will not (if it was

done without negligence on the part of Network Rail or of any person in its employ or of its contractors or agents) excuse the undertaker from any liability under the provisions of this sub-paragraph.

(1) Network Rail must give the undertaker reasonable notice of any such claim or demand and no settlement or compromise of such a claim or demand is to be made without the prior written consent of the undertaker.

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

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

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

(5) 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 a protective work or any such act or omission as mentioned in subparagraph (1); and

“train operator” means any person who is authorised to act as the operator of a train by a licence under section 8 (licences) of the Railways Act 1993.

35. Network Rail must, on receipt of a request from the undertaker, at a frequency to be agreed between the undertaker and Network Rail, provide the undertaker free of charge with written estimates of the costs, charges, expenses, future cost forecasts and other liabilities for which the undertaker is or will become liable under this Part of this Schedule (including the amount of the relevant costs mentioned in paragraph 34) 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 under this Part of this Schedule (including any claim relating to those relevant costs).

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

37. 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/or 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.

~~38.~~ Nothing in this Order, or in any enactment incorporated with or applied by this Order, prejudices or affects the operation of Part 1 (the provision of railway services) of the Railways Act 1993.

~~38.39.~~ The undertaker must give written notice to Network Rail where any application is required and is proposed to be made for the undertaker's consent under article 8 (consent to transfer benefit of 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 decision-maker to whom the application is to be made.

~~39.40.~~ The undertaker must no later than 28 days from the date that the documents referred to in article 44(1) (certification of plans, etc.) are submitted to and certified by the Secretary of State in accordance with article 44, provide a set of those documents to Network Rail in the form of a computer disc with read only memory.