

**Application by Highways England for an Order granting Development Consent for the
A1 Birtley to Coal House Improvement Scheme**

Planning Inspectorate Reference Number: TR010031

Registration Identification Number: 20023039

Written Representation submitted on behalf of Network Rail Infrastructure Limited

1 Introduction

- 1.1 This written representation (**Written Representation**) is submitted on behalf of Network Rail Infrastructure Limited (**Network Rail**) in response to the application by Highways England (**Applicant**) for the A1 Birtley to Coal House Improvement Scheme Development Consent Order (**DCO**). The Applicant seeks development consent for the authorised development described in Schedule 1 to the DCO (**Proposed Development**).
- 1.2 The Proposed Development will comprise significant engineering works to operational railway land and land adjacent to and crossing over operational railway, which is owned, operated and maintained by Network Rail pursuant to its network licence granted under section 8 of the Railways Act 1993 (as amended) (**Network Licence**). The Applicant is seeking permanent and temporary acquisition of and rights over land owned by Network Rail.
- 1.3 The railway affected by the Proposed Development is the East Coast Main Line, a line that runs from London to Edinburgh via Peterborough, Doncaster, York, Darlington, Durham and Newcastle. The East Coast Main Line is a key transport artery on the eastern side of Great Britain running broadly parallel to the A1 road and is used extensively by both passenger (including commuter and inter city services) and freight transport.
- 1.4 It is imperative that the Proposed Development proceeds in consultation and agreement with Network Rail and with the appropriate protections in place, as set out in this Written Representation.
- 1.5 Network Rail submitted a section 56 representation [**RR-003**] on 8 November 2019.
- 1.6 Network Rail objects to any temporary and permanent compulsory powers being granted or executed or the extinguishment of the rights held by Network Rail over operational railway land and third party land on which it relies for the carrying out of its statutory undertaking. Network Rail also objects to the seeking of other powers to carry out works over and/or to operational and non-operational railway land belonging to Network Rail without first securing appropriate protective provisions for Network Rail's statutory undertaking.
- 1.7 Network Rail welcomes the Applicant's inclusion at paragraph 21(1) of Part 3 of Schedule 3 to the draft DCO [**APP-013**], of a provision which, if included in the DCO that is granted consent by the Secretary of State, would ensure that compulsory acquisition and other DCO powers could not be undertaken in respect of Network Rail property without Network Rail's consent.
- 1.8 Network Rail is willing to enter into the agreements referred to in this Written Representation to enable the Proposed Development to be carried out while safeguarding Network Rail's undertaking.
- 1.9 While negotiations with the Applicant are in progress and Network Rail is hopeful that agreement can be reached during the course of the Examination, in the absence of an agreement that safeguards its interests, Network Rail requests that the Examining Authority (**ExA**) recommend that the attached Protective Provisions are included as Part 3 of Schedule 11 to the draft DCO.
- 1.10 Network Rail has also been asked by the ExA to agree a Statement of Common Ground with the Applicant (**SoCG**). The first SoCG is being submitted at Deadline 2.

2 Network Rail's duties and the Clearance approval process

Network Rail's statutory duties

- 2.1 Network Rail owns, operates and maintains the railway infrastructure of Great Britain pursuant to the Network Licence. Network Rail must comply with regulatory consents or approvals required under the Railways Act 1993 and the Network Licence, by either the Office of Rail and road or the Secretary of State for Transport.
- 2.2 Network Rail considers that there is no compelling case in the public interest for the compulsory acquisition of land and rights over its land as the Applicant and Network Rail should instead negotiate matters by private agreement to grant the Applicant the necessary rights.
- 2.3 Network Rail also 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.
- 2.4 Network Rail welcomes the inclusion of paragraph 21(1) of Part 3 of Schedule 3 to the draft DCO, which dis-applies the compulsory acquisition powers granted by the DCO in respect of Network Rail property.

Network Rail Clearance required for the Proposed Development

- 2.5 Clearance is a two-stage process by which Network Rail's technical and asset protection engineers review a proposal before "clearance" can be granted for a proposal to proceed subject to engineering and other conditions.
- 2.6 On the basis of information supplied to Network Rail by the Applicant regarding the Proposed Development, Network Rail is in the process of applying for Technical and Business Clearance.
- 2.7 The Clearances being applied for are based not on the scheme described by the Works identified in the Book of Reference but on details supplied by the Applicant during the course of discussions between the Applicant and Network Rail.
- 2.8 Subject to the design of the Proposed Development submitted by the Applicant being acceptable to Network Rail's asset protection team and its engineers, Network Rail hopes to obtain Clearance before the closure of the Examination.
- 2.9 Network Rail can confirm that Clearance has not yet been applied for in relation to all of the Works that affect Network Rail infrastructure as Network Rail has not received all the necessary information from the Applicant to enable it to do so. However, Network Rail understands that the Applicant will be submitting the necessary information soon and Network Rail will keep the ExA informed regarding the Clearance process at the relevant Examination deadlines.

3 DCO Powers sought by the Applicant and the impact on Network Rail property

Network Rail land required and Works proposed

- 3.1 Network Rail has freehold and other property interests in 37 plots of land (**Plots**) that are identified in the Book of Reference and shown in the Land Plans submitted with the application for the DCO.

- 3.2 The Applicant is seeking DCO powers in relation to the Plots to carry out the following works, which are described fully in Schedule 1 to the DCO:
- (a) Work Nos. 4a, 4b - the construction of a new offline section of the A1 southbound carriageway;
 - (b) Work No. 5b - the demolition of the exiting Allerdene Railway bridge and associated embankments;
 - (c) Work No. 6b - the widening, alteration and realignment of the A1 northbound carriageway;
 - (d) Work Nos. 9, 14, 15 and 16 - the diversion of existing Northern Gas Networks Gas Pipelines; and
 - (e) Work No. 11 - the construction of a private maintenance access road (together the **Works**).
- 3.3 In order to undertake the Works the Applicant is seeking permanent acquisition of land and rights over land or temporary possession and use of the Plots.
- 3.4 As we state below, the Plots identified in the Book of Reference may include land that is not required for the construction of the Works. Network Rail is investigating the Proposed Development and the land that will be required to undertake the Works and will confirm its findings to the ExA and the Applicant as soon as possible and at an appropriate Examination deadline.

The property agreements required to enable the construction of the Proposed Development

- 3.5 Network Rail is still considering the property agreements required to enable the Proposed Development to be constructed. Network Rail is in discussions with the Applicant in this regard but can confirm that there will be numerous property agreements, which are likely to include:
- (a) **Property agreements required to remove existing land and rights of Network Rail (for the existing bridge and access route):** Deed of Surrender of access rights, Deed of Variation terminating an easement, Transfer to Network Rail of land that is not required for the new bridge and Deed of Surrender in respect of the freight lease;
 - (b) **Property agreements required for the demolition of the old bridge and the construction of the new bridge:** Bridge Agreement and Licences to Occupy;
 - (c) **Property agreements required to grant the Applicant with the necessary land and rights in respect of the new bridge:** Deeds of Easement and Transfer; and
 - (d) **Property agreements may be required to grant the Applicant with necessary rights in respect of diverting gas pipelines;** and
 - (e) **Property agreements in respect of relocation of any utilities/telephone mast.**
- 3.6 The Works also affect land that is leased to a freight operating company (**FOC**), as we refer further below, and therefore some property agreements will require the consent of the relevant FOC.

Possible impact of construction traffic on level crossings

- 3.7 Network Rail is assessing the level crossings in the vicinity of the Proposed Development to check whether there will be an impact on their operation during the construction phase of the Works. If any affected level crossing is privately owned, the landowner's consent would need to be obtained before the Works could proceed.

Network Rail's objection to the Works identified in the Book of Reference

- 3.8 As we state above, Network Rail's asset protection team and its engineers are still considering the design of the Proposed Development and, further to ongoing discussions between the Applicant and Network Rail's asset protection team, Network Rail will provide the ExA with further explanation of any matters on which they cannot agree during the course of the Examination.
- 3.9 As the Works set out in the Book of Reference cannot be agreed to by Network Rail, in so far as they relate to Network Rail property, the DCO should not, if submitted, be granted without the exercise of compulsory acquisition and other compulsory powers, being excluded in respect of Network Rail property unless they are exercised with Network Rail's consent. The design of the scheme and other engineering matters that will have a direct impact on the safe operation of the railway can be dealt with by agreement between the Applicant and Network Rail's asset protection team and its engineers.

How the Applicant can address Network Rail's concerns

- 3.10 Network Rail and the Applicant have begun discussions to seek to ensure that the necessary property agreements (or the form of the documents) are agreed before the close of the Examination. The discussions relate to the following documents:
- (a) Protective Provisions that provide sufficient protection for Network Rail, its infrastructure and the safe operation of the railway, as referred to below;
 - (b) A framework agreement that describes or attaches the property agreements to be entered into, the protective provisions and any necessary Basic Asset Protection Agreement (**BAPA**) or Asset Protection Agreement (**APA**) for the benefit of Network Rail;
 - (c) The property agreements identified above regarding the relevant Plots (or part thereof) enabling the Applicant to install, operate and maintain the Works. Negotiations with the Applicant and the relevant FOC regarding the terms of the relevant property agreements are ongoing; and
 - (d) A BAPA and/or APA or agreements that regulate how Network Rail's assets will be protected during the construction and operation of the Proposed Development and ensure that Network Rail has full access rights during the construction and operation phases of the Proposed Development.

Requests of the ExA: the Protective Provisions

- 3.11 Notwithstanding the ongoing discussions with the Applicant, Network Rail invites the ExA to request that the Applicant includes Protective Provisions that provide sufficient protection for Network Rail, its infrastructure and the safe operation of the railway in Part 3 of Schedule 9 to the DCO (and as attached at **Appendix 1 - NR Protective Provisions**).

- 3.12 Appendix 2 shows Network Rail's proposed amendments to the Protective Provisions submitted by the Applicant **[AP-013] (Appendix 2)**.
- 3.13 A key concern with regard to the Protective Provisions is the inclusion by the Applicant of Paragraph 32(4), which states:
- "32(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, except that the sums payable by the undertaker under that sub-paragraph 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."*
- 3.14 Paragraph 32 of the Protective Provisions provides for an indemnity by the Applicant in favour of Network Rail. The version shown in the Network Rail Protective Provisions is the standard indemnity which has been included in many statutory orders.
- 3.15 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. In its version of the Protective Provisions, the Applicant is seeking to ensure that:
- (i) the indemnity does not apply to indirect or consequential loss or loss of profits,
 - (ii) relevant costs may only be recovered by Network Rail if it has provided details of its agreement with the train operator, and of its liability to pay costs to the train operator under that agreement, to the undertaker.
- 3.16 Network Rail should not be obliged to provide advance details of agreements with train operators to the Applicant; this creates an unnecessary administrative burden on Network Rail and any failure to provide the relevant details would invalidate the indemnity. Further, such agreements are commercially sensitive; the Office of Rail and Road only provides redacted copies of such train operator contracts for that reason. The standard Network Rail indemnity will be particularly necessary in this case because of the nature of the Works that are proposed over operational railway; therefore a full indemnity covering Network Rail's potential costs, including those of train and freight operating companies, for which Network Rail is liable, is required.
- 3.17 Network Rail notes that under paragraph 32(2) it is already under an obligation to provide the Applicant with reasonable notice of any claim and not compromise a claim without the prior consent of the undertaker.
- 3.18 A further protection provision is required at paragraph 21(6) to ensure that railway property can always be used or maintained. In this case the access route that is currently used and relied upon by Network Rail cannot be surrendered by Network Rail until the new access route has been constructed (pursuant to Work No. 11), is made available for use by Network Rail and the access rights formally documented.

Consultation with and consent of the freight operating company

- 3.19 In addition to the asset protection requirements of Network Rail, where the Works affect land that is leased by Network Rail to a FOC, Network Rail is under a duty to notify and consult the FOC before allowing the Works to be commenced. Network Rail is liaising with the relevant FOC and will confirm to the ExA and the Applicant the impact that the Works will have on the operation of trains.
- 3.20 The ExA and the Applicant should note that, as a result of the Works, the lease between Network Rail and the FOC may need to be amended prior to the construction of the relevant Works.

Network Rail's objection to the DCO

- 3.21 While Network Rail does not object to the principle of the DCO, for the reasons set out in this Written Representation Network Rail objects to the Proposed Development.
- 3.22 In relation to the above-mentioned Works Network Rail is liaising closely with the Applicant and is willing to enter into private agreements to agree the extent and scope of the rights to be granted to the Applicant and the method of the construction of the Works (subject to the outcome of Network Rail's internal land clearance process, a process which is imposed on Network Rail by its Network Licence, and the requirements of any regulatory consents).
- 3.23 Without these agreements and satisfactory protective provisions being in place, Network Rail considers that the Proposed Development, if carried out in relation to the Plots, will have a serious detrimental impact on the operation of the railway and will prevent Network Rail from operating the railway safely and efficiently and in accordance with its Network Licence. Until such agreements are in place Network Rail is unable to withdraw its objection to the DCO.

4 Conclusions

- 4.1 Network Rail does not object in principle to the Proposed Development subject to the outcome of Network Rail's internal clearance process and the requirements of any regulatory consents.
- 4.2 Network Rail requests that the Protective Provisions appended to this document be included in the DCO at Part 3 of Schedule 3.
- 4.3 Network Rail welcomes the exclusion of compulsory acquisition of its land and rights over its land and other DCO powers in respect of its land without its consent, as provided by Paragraph 21 of the Protective Provisions submitted by the Applicant.
- 4.4 Given the potential risk of major accidents during the installation and operation phases of the Proposed Development, Network Rail considers it to be of utmost importance that full protections are first put in place and that the Proposed Development should proceed by way of agreement rather than compulsory acquisition.
- 4.5 Further, the Secretary of State cannot allow the DCO to be granted without protection for Network Rail from compulsory acquisition as the test in section 127 of the Planning Act 2008 cannot be satisfied. The granting of compulsory acquisition powers to the Applicant would result in serious detriment to Network Rail's undertaking; would raise significant health and safety concerns for the general public; and Network Rail does not have any other land available to it which could be used to avoid such detriment.
- 4.6 Network Rail is in ongoing discussions with the Applicant regarding the DCO, the extent of land and rights required in order to undertake the Works and the property agreements and Protective Provisions that will be required to enable its delivery.

- 4.7 Should sufficient progress regarding the Protective Provisions and private agreements to be entered into not be made between the parties in the coming weeks, Network Rail will request to be heard at an appropriate hearing to explain in detail the impacts of the Proposed Development. Network Rail will of course respond to any Written Questions that the Panel wishes to ask.

Addleshaw Goddard LLP
4 February 2020

Appendix 1

Network Rail Protective Provisions

PART 3

For the protection of railway interests

18. 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 32, any other person on whom rights or obligations are conferred by that paragraph.

19. 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 Secretary of State in exercise of powers under section 8 (licences) of the Railways Act 1993(a) ; “Network Rail” means Network Rail Infrastructure Limited (company number 02904587, whose registered office is at 1 Eversholt Street, London NW1 2DN) 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 (meaning of “subsidiary” etc.) of the Companies Act 2006) the holding company of Network Rail Infrastructure Limited, a subsidiary of Network Rail (a) 1993 c.46 (b) 2006 c.46 75 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 22; “railway operational procedures” means procedures specified under any access agreement (as defined in the Railways Act 1993) or station lease; “railway property” means any railway belonging to Network Rail and— (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.

20.—(1) Where under this Part of this Schedule Network Rail is required to give its consent or approval in respect of any matter, that consent or approval is subject to the condition that Network Rail complies with any relevant railway operational procedures and any obligations under its network licence or under statute and, if applicable, shall be subject to first obtaining the consent and/or surrender of any leaseholder of the railway property.

(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.

21.—(1) The undertaker must not exercise the powers conferred by articles 21 (discharge of water), 22 (authority to survey and investigate land), 23 (compulsory acquisition of land), 26 (compulsory acquisition of rights), 27 (private rights over land), 30 (acquisition of subsoil or air-space only), 31 (rights under or over streets), 32 (temporary use of land for carrying out the authorised development), 33 (temporary use of land for maintaining the authorised development), 34 (statutory undertakers), 37

(felling or lopping of trees), 38 (trees subject to tree preservation orders) or the powers conferred by section 11(3) (powers of entry) of the 1965 Act or by section 203 (power to override easements and rights) of the Housing and Planning Act 2016(a) 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 (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 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 under this paragraph, such consent must not be unreasonably withheld but may be given subject to reasonable conditions.

(6) The undertaker shall not place railway property in a position where it cannot be used, or maintained, or is placed at risk of not being capable of use, to run trains safely.

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 by arbitration under article 46 (arbitration).

(2) The approval of the engineer under sub-paragraph (1) must not be unreasonably withheld, and if by the end of the period of 28 days beginning with the date on which such plans have been supplied to Network Rail the engineer has not intimated 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.

(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 without unnecessary delay 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 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 without unnecessary delay 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.

23.—(1) Any specified work and any protective works to be constructed by virtue of paragraph 22(4) must, when commenced, be constructed— (a) without unnecessary delay 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 on it and the use by passengers of railway property.

(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.

(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.

24. 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.

25. 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.

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 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.

(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 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 or protective work.

(3) 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.

(4) 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.

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 the provisions of 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 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.

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; “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 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 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).

(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 22(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.

(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.

(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 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 paragraph. (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.

29. 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.

30. The undertaker must not provide any illumination or illuminated sign or signal on or in connection with a specified work or a 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.

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 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.

32.—(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) by reason of the construction or maintenance of a specified work or a protective work or the failure of it; 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 the engineer's 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 subparagraph.

(2) 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.

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

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

(5) The obligation under subparagraph (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 subparagraph (5).

(6) In this paragraph— “the relevant costs” means the costs, direct losses and expenses (including loss of revenue) reasonably incurred by each train operator as a consequence of any restriction of the use of Network Rail's railway network as a result of the construction, maintenance or failure of a specified work or 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. 33. 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 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 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 under this Part of this Schedule (including any claim relating to those relevant costs).

34. 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.

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 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; (c) and 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 (the provision of railway services) of the Railways Act 1993.

37. The undertaker must give written notice to Network Rail where any application is required and is proposed to be made for the Secretary of State's consent under article 9 (consent to transfer benefit of the 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.

38. 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 a format to be agreed between the undertaker and Network Rail's engineers.

Appendix 2

Amendments to the Protective Provisions in the DCO requested by Network Rail

PART 3 For the protection of railway interests 18. 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 32, any other person on whom rights or obligations are conferred by that paragraph.

19. 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~~[Secretary of State](#) in exercise of powers under section 8 (licences) of the Railways Act 1993(a) ; “Network Rail” means Network Rail Infrastructure Limited (company number 02904587, whose registered office is at 1 Eversholt Street, London NW1 2DN) 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 (meaning of ~~“subsidiary”~~ etc.) of the Companies Act 2006~~(b)~~) the holding company of Network Rail Infrastructure Limited, a subsidiary of Network Rail (a) 1993 c.46 (b) 2006 c.46 75 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 22; “railway operational procedures” means procedures specified under any access agreement (as defined in the Railways Act 1993) or station lease; “railway property” means any railway belonging to Network Rail and— (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.

20.—(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 ~~and, if applicable,~~ [shall be subject to first obtaining the consent and/or surrender of any leaseholder of the railway property.](#)

(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) ~~any station, land, works, apparatus and equipment belonging to Network Rail or connected with any such railway~~[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.

21.—(1) The undertaker must not exercise the powers conferred by articles [21 \(discharge of water\)](#), 22 (authority to survey and investigate land), 23 (compulsory acquisition of land), 26 (compulsory acquisition of rights), 27 (private rights over land), 30 (acquisition of subsoil or air-space only), 31 (rights under or over streets), 32 (temporary use of land for carrying out the authorised development), 33 (temporary use of land for maintaining the authorised development), 34 (statutory undertakers), 37 (felling or lopping of trees), [38 \(trees subject to tree preservation orders\)](#) or the powers conferred by section 11(3) (powers of entry) of the 1965 Act or by section 203 (power to override easements and rights) of the Housing and Planning Act 2016(a) 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

(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 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 ~~or agreement~~ under this paragraph, such consent ~~or agreement~~ must not be unreasonably withheld but may be given subject to reasonable conditions. ~~(a) 2016 c.22 76 22.—~~

(6) The undertaker shall not place railway property in a position where it cannot be used, or maintained, or is placed at risk of not being capable of use, to run trains safely.

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 by arbitration under article 46 (arbitration). (2) The approval of the engineer under sub-paragraph (1) must not be unreasonably withheld, and if by the end of the period of 28 days beginning with the date on which such plans have been supplied to Network Rail the engineer has not intimated 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. (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~~without unnecessary delay 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 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 decommissioning 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~~without unnecessary delay 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.

23.—(1) Any specified work and any protective works to be constructed by virtue of paragraph 22(4) must, when commenced, be constructed— (a) without unnecessary delay 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 on it and the use by passengers of railway property. (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. (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. ~~77~~24. 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. 25. 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. 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 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. (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 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 or protective work. (3) 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. (4) 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. 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 the provisions of 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 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 ~~78~~ construction or failure of a specified work or a protective work or from the substitution of 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. 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; “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 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 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). (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 22(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. (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 79 (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. (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 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 paragraph. (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. 29. 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. 30. The undertaker must not provide any illumination or illuminated sign or signal on or in connection with a specified work or a 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. 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 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. 32.—(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) by reason of the construction or maintenance of a specified work or a protective work or the failure of it; 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 the engineer's 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 subparagraph. ~~80~~(2) 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. (3) The sums payable by the undertaker under sub-paragraph (1) may include a sum equivalent to the relevant costs. (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, except that the sums payable by the undertaker under that sub-paragraph 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) 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. ~~6~~

(5) 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 (5). ~~(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 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. 33. 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 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 under this Part of this Schedule (including any claim relating to those relevant costs). 34. 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. 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 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; (c) and 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 (the provision of railway services) of the Railways Act 1993. ~~84~~37. The undertaker must give written notice to Network Rail where any application is required and is proposed to be made for the Secretary of State's consent under article 9 (consent to transfer benefit of the 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. 38. The undertaker must no later than 28 days from the date that the documents referred to in article ~~40~~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 a format to be agreed between the undertaker and Network Rail's engineers.