



**APPLICATION BY NATIONAL HIGHWAYS FOR AN ORDER GRANTING  
DEVELOPMENT CONSENT FOR THE A12 CHELMSFORD TO A120  
WIDENING SCHEME**

**PLANNING INSPECTORATE REFERENCE NUMBER: TR010060**

**REGISTRATION IDENTIFICATION NUMBER: 20033115**

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**DEADLINE 7 SUBMISSION**  
**submitted on behalf of Network Rail**  
**Infrastructure Limited**

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## 1 Introduction

- 1.1 This document provides an update to the Examining Authority about the protective provisions for the benefit of Network Rail Infrastructure Limited (**Network Rail**) that have been included at Part 6 of Schedule 11 in the most recent version of the draft development consent order (**Order**) submitted by National Highways (the **Applicant**) at Deadline 6 (**REP6-037**) (**Protective Provisions**).
- 1.2 The protective provisions requested by Network Rail to be included at Part 6 of Schedule 11 to the Order are at Appendix 1 of this document (**Network Rail Protective Provisions**).
- 1.3 Please note that the Network Rail Protective Provisions differ from the protective provisions submitted by Addleshaw Goddard LLP on behalf of Network Rail to the Examining Authority at Deadline 6 [**REP6-108**] in that they no longer refer to the concept of "protective works". This was a concept that was introduced by the Applicant as part of the negotiation of the protective provisions which Network Rail agreed to but have not been included in the Protective Provisions. As such, they have been removed from the Network Rail Protective Provisions as the concept is no longer being sought by the Applicant for inclusion in the Protective Provisions.
- 1.4 The Network Rail Protective Provisions are agreed with the Applicant, save in relation to the provisions relating to the use or operation of the authorised development following the occurrence of electromagnetic interference at paragraph 76 and in relation to the indemnity for Network Rail's benefit at paragraph 80.
- 1.5 We set out Network Rail's position in relation to paragraphs 76 and 80 in the following paragraphs.

## 2 Provisions relating to electromagnetic interference

- 2.1 Network Rail requests that paragraph 76(7)(d) of the Network Rail Protective Provisions be included in the Order when made. Network Rail's paragraph 76(7)(d) states:

*(7)(d) the undertaker shall not allow the use or operation of the authorised development in a manner that has caused or will cause EMI<sup>1</sup> until measures have been taken in accordance with this paragraph to prevent EMI occurring.*

- 2.2 In an email dated 29 June 2023, the Applicant have provided the following explanation as to why they have not agreed or accepted this wording:

*The Applicant does not agree to this wording being inserted. This drafting may be appropriate for other infrastructure schemes such as electricity cables or gas mains where the undertaker causes use and operation by causing electricity to flow, and has the power to turn the power off.*

*However, because the authorised development is a highway, National Highways does not in the same sense "allow the use or operation" of the highway and is constrained in its actions by the ambit of its statutory powers and duties. A highway carries a public right and if the Applicant attempts to*

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<sup>1</sup> "EMI" is defined in the Network Rail Protective Provisions as 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.

*interfere with that right without lawful authority a criminal offence will be committed.*

*National Highways may only therefore restrict the "use or operation" of the highway in circumstances where it has a statutory power to do so. In particular in exercising its powers under the Road Traffic Regulation Act 1984 it must have regard to its duties under Section 122 of the Act and balance the factors specifically set out in that Act: it cannot fetter its statutory discretion in that regard, as that would be unlawful and open any action it took to judicial or statutory review. Equally there is no power to permanently stop up the strategic road network on the basis of EMI being caused.*

*In these circumstances the Applicant considers that Network Rail's proposed wording does not work in the context of a highway scheme Network Rail may instead rely on paragraphs 70 and 74 of the protective provisions which allow Network Rail to require protective works to be carried out at the Applicant's expense.*

- 2.3 Network Rail considers that the purpose of paragraph 76(7)(d) is not to prevent the use or operation of the authorised development once the use or operation has commenced, but rather to prevent the commencement of use or operation until measures have been taken to prevent EMI occurring.
- 2.4 The preceding paragraph 76(6) provides that prior to the commencement of operation of the authorised development, the undertaker shall test the use of the authorised development to determine if EMI is caused. Paragraph 76(7) provides that if EMI is caused during this test (which is carried out prior to the commencement of operation) then use or operation of the authorised development cannot commence until measures are taken to prevent EMI occurring.
- 2.5 The use and operation of the highway by the Applicant would be the point of dedication of the road as a highway and allowing users to use the road as highway. EMI testing should take place before this and, in line with paragraph 76(7)(d), dedication as highway should not take place until the testing has occurred and any measures put in place.
- 2.6 As such, Network Rail considers that the Applicant has misunderstood the operation of paragraph 76(7)(d) and that it is reasonable to require that the authorised development is not brought into use or operation until any measures to deal with EMI are put in place.

### **3 The indemnity for the benefit of Network Rail at paragraph 80 of the Network Rail Protective Provisions**

#### ***Proposed conditionality on liability***

- 3.1 Network Rail requests that the wording underlined in red below be deleted from paragraph 80(1) of the Protective Provisions when the Order is made. The Applicant's paragraph 80(1) states:

*—(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 (but subject always to the remaining provisions of this paragraph and to article 35 (no double recovery)) which may be occasioned to or reasonably incurred by Network Rail...[ ]*

- 3.2 While the wording does not adversely affect Network Rail's interests, Network Rail does not consider that this wording is necessary and introduces a potential for misinterpretation when

the circumstances in which the Applicant is liable are clearly set out in the subsequent subparagraphs.

***The conduct of Network Rail in relation to claims or demands for payment of costs under paragraph 80(1)***

- 3.3 Network Rail requests that paragraph 80(2) of the Protective Provisions be deleted from the Order when made. The Applicant's paragraph 80(2) states:

*(2) Network Rail must –*

*(a) give the undertaker reasonable written notice (and in any event not less than 7 days) of any such claims or demands;*

*(b) not admit any liability or make any offer to settle or any settlement or compromise of such a claim or demand without the prior consent of the undertaker (which, if it withholds such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand);*

*(c) take such steps as are within its control and are reasonable in the circumstances to mitigate any liabilities relating to such claims or demands; and*

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

- 3.4 The proposed timeframe of 7 days for the provision of written notice proposed in the Applicant's paragraph 80(2)(a) is unnecessary and inappropriate. Network Rail is already committed to providing reasonable notice and the circumstances of a particular claim or dispute may mean that such notice is provided earlier or later than 7 days. There is, in Network Rail's view, no need for the protective provisions to prescribe a specific time limit.
- 3.5 The Applicant's proposed paragraph 80(2)(b) requires Network Rail not to admit any liability or make any offer to settle any claims or demands without the consent of the Applicant. Network Rail's Protective Provisions already include this obligation. However, the Applicant's amendment, also requires that where the Applicant withholds its consent to the admission of liability, an offer of settlement or the making of a settlement or a compromise in relation to a claim, it (the Applicant) shall have sole conduct of the settlement, compromise or proceedings to resist the claim.
- 3.6 It is not appropriate for the Applicant, while a member of the "DfT family", to take over the conduct of disputes between bodies in the rail sector in which it has no expertise or experience. Such disputes are properly conducted by Network Rail and the Network Rail Protective Provisions provide for Network Rail to obtain the Applicant's consent before compromising any claim. That text is tried and tested and has appeared in many statutory orders. There is, in Network Rail's view, no need to amend it here.
- 3.7 The Examining Authority will note that there are existing contracts between Network Rail and TOCs which will dictate the process by which claims and demands should be conducted and it would not be appropriate for the Applicant to have conduct of disputes pursuant to those contracts.

- 3.8 The Applicant's proposed paragraph 80(2)(d) would put an additional administrative burden on Network Rail to have regard to the Applicant's representations. Again, Network Rail is best qualified to deal with rail-related disputes and a requirement to consider the Applicant's representations is both ill-defined and would add an unnecessary layer of complexity. Paragraph (a) already requires Network Rail to give the Applicant written notice of any claims and demands. The addition of paragraph (d) is unnecessary.

***The proposed exclusion of the Applicant's liability for indirect losses***

- 3.9 Network Rail requests that paragraph 80(3) of the Protective Provisions be deleted from the Order when made. The Applicant's paragraph 80(3) states:

*(3) The undertaker is not liable 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 previously disclosed in writing to the undertaker, but not otherwise.*

- 3.10 The effect of the Applicant's proposed paragraph 80(3) is to exclude "indirect or consequential loss or loss of profit" from the scope of the indemnity. There is an express exception from that exclusion. That is where Network Rail is liable for costs to a train operator under an agreement with such operator and where the agreement and the extent of Network Rail's liability has previously been disclosed in writing to the Applicant. As described below, neither the exclusion nor the exception make sense in the context of a proper understanding of English common law and the meaning of the relevant terms used in the drafting of paragraph 80(3).
- 3.11 Under common law, there are two types of recoverable losses in a damages claim. First, direct losses which are the natural results of the breach in the usual course of things. Second, indirect loss and consequential loss (which mean the same thing). They are losses which are not the natural result of the breach, but arise from special circumstances of the case. For indirect losses to be recoverable under common law, they must be foreseeable. In other words, the paying party (the Applicant, in this case) must be in a position to know of the special circumstances at the time of the contract - or here, when the Order was made.
- 3.12 By proposing the exclusion, it appears that the Applicant is seeking to protect itself from losses of which it is unaware. This is misleading and an incorrect statement of common law principles. As noted above, common law requires that for losses to be recoverable they must be foreseeable. If they are not foreseeable – i.e. they are too remote – then they are not direct or indirect losses and so are not recoverable under law. There is no need to expressly exclude liability for loss which is unforeseeable; the law does that.
- 3.13 The effect of paragraph 80(3) as proposed by the Applicant is to exclude its liability for losses it might cause to Network Rail which: (a) well established common law says ought to be recoverable as damages in a breach of contract claim; and (b) by definition, the Applicant is in a position to know about. Network Rail contends that it is neither reasonable nor proper that a loss it suffers as a result of the actions of the Applicant which would be recoverable under common law should be excluded from being recoverable under the Protective Provisions.

3.14 Network Rail notes that the proposed paragraph 80(3) is inconsistent with the position in Network Rail's standard asset protection agreements (a copy of which is available on Network Rail's website) where indirect and consequential losses are not excluded from the paying party's loss under an indemnity. Those agreements are regulated by the Office of Rail and Road (ORR), Network Rail's regulator, and are subject to statutory consultation. Network Rail submits that there is no good reason why the level of protection afforded Network Rail under an asset protection agreement ought to be different from that afforded by the Protective Provisions. The ORR in approving the use of the asset protection agreement takes into account a balance between the interests of Network Rail and parties carrying out developments on or near the railway. Network Rail respectfully submits that it would be sensible for the Examining Authority and, ultimately, the Secretary of State, to reach the same conclusion as the ORR in respect of the same issue, and delete paragraph 80(3) from the Protective Provisions.

3.15 If, notwithstanding Network Rail's submissions above, the Examining Authority or Secretary of State is minded to accept the exclusion of indirect and consequential loss as proposed by the Applicant, then Network Rail further submits that such exclusion is limited so that it addresses only the mischief which the Applicant appears to be concerned about, namely the lack of foreseeability. In those circumstances we propose that the words following "consequential loss" in paragraph 80(3) are deleted and replaced with "that was not in the reasonable contemplation of the parties at the time of making the Order". In that case, paragraph 80(3) would be drafted as follows:

*"In no circumstances is the undertaker liable to Network Rail under sub-paragraph (1) for any indirect or consequential loss that was not in the reasonable contemplation of the parties at the time of making the Order"*

However, the Examining Authority and Secretary of State should note that such amendment would leave Network Rail open to an element of risk for which it is not funded.

3.16 Finally, Network Rail notes that costs (losses and expenses) payable by Network Rail to train operators would constitute recoverable direct losses, notwithstanding the inference to the contrary in the drafting of paragraph 80(3) proposed by the Applicant. Paragraph 80(6) of the Network Rail Protective Provisions defines such costs as a "relevant costs". It is clear that if the Applicant caused damage or disruption to the railway, Network Rail will be liable to train operators. It is a widely understood and accepted principle that Network Rail is liable to train operators where the railway is not available for use, and so it would be an entirely obvious – or natural– consequence of breach of the Protective Provisions by the Applicant, and therefore constitute a direct loss.

#### **4 A1 Birtley to Coal House Improvement Scheme**

4.1 With regards to the arguments put forward in paragraphs 3.8 – 3.15, Network Rail would also like to make the Examining Authority (and the Secretary of State) aware that wording proposed in paragraph 80(3) of the Protective Provisions was also sought by Highways England (the Applicant's predecessor) in the protective provisions of the development consent order for the A1 Birtley to Coal House Improvement Scheme (**A1 DCO**).

4.2 Network Rail made the same arguments it has made in the paragraphs above in relation to the inclusion of such wording in the A1 DCO protective provisions and the Secretary of State agreed with Network Rail's position and removed the wording from the final form of protective provisions for the benefit of Network Rail from the Order as made. The potential risk to Network Rail from inclusion of the proposed 80(3) remains the same as was the case for the A1 DCO.

## **5 Impacts on railway property from the A12 Chelmsford to A120 Widening Scheme**

- 5.1 A full explanation as to the interactions between the A12 Chelmsford to A120 Widening Scheme (**A12 Scheme**) were set out in Network Rail's written representation (**AS-062**) submitted as an additional submission to the Deadline 2 submission published on 15 February 2023 (**Written Representation**). In addition, an up-to-date Statement of Common Ground is due to be submitted by the Applicant at Deadline 7 which sets out the issues still to be agreed between Network Rail and the Applicant (**Deadline 7 SoCG**).
- 5.2 Network Rail has previously made submissions in relation to inclusion of its preferred protective provisions in the Order and has explained that these protective provisions are necessary to ensure that its infrastructure is protected and the railway can be operated safely.
- 5.3 Although the protective provisions are largely agreed between the parties, the remaining outstanding issues (as set out in the paragraphs above) present risks to Network Rail, particularly with regards to liability arising as a result of the A12 Scheme works. The Written Representation and the Deadline 7 SoCG acknowledge the significant interactions between railway property and infrastructure and the works proposed by the A12 Scheme (particularly with regards to signal siting and the delivery of the new station at Beaulieu). The inclusion of the Network Rail Protective Provisions in the Order are necessary to ensure that its infrastructure is protected and the railway can be operated safely and Network Rail asks that the Network Rail Protective Provisions are included in the Order made by the Secretary of State.
- 5.4 The Statement of Common Ground agreed between the Applicant and Network Rail, that will be submitted at Deadline 7, refers in a number of places to a Framework Agreement that it is intended will be agreed between the parties to address Network Rail's concerns about the impact of the A12 scheme on its infrastructure. A draft of the agreement has been with the Applicant's solicitors for several weeks and Network Rail awaits a further draft. We propose that we update the Secretary of State on the progress of the agreement following the close of the Examination.

## **6 Conclusions**

- 6.1 Network Rail requests that the Network Rail Protective Provisions are included in the Order.
- 6.2 Should the Examining Authority have any further questions regarding these submissions Network Rail will be happy to answer them.

**Addleshaw Goddard LLP**

**3 July 2023**

## PART 6

### FOR THE PROTECTION OF RAILWAY INTERESTS

66. The 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 80 of this Part of this Schedule any other person on whom rights or obligations are conferred by that paragraph.

67. In this Part of this Schedule—

“asset protection agreement” means an agreement to regulate the construction and maintenance of the specified work in a form prescribed from time to time by Network Rail;

“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 their powers under section 8 (licences) of the Railways Act 1993;

“Network Rail” means Network Rail Infrastructure Limited (company number 02904587, whose registered office is at [Waterloo General Office, London SE1 8SW](#)~~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 of the Companies Act 2006) the holding company of Network Rail Infrastructure Limited, a subsidiary of Network Rail Infrastructure Limited or another subsidiary of the holding company of Network Rail Infrastructure Limited and any successor to Network Rail Infrastructure Limited’s railway undertaking;

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

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

“railway property” means 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 or a tenant or licensee of Network Rail for the purposes of such railway or works, apparatus or equipment;

“regulatory consents” means any consent or approval required under:

- (a) the Railways Act 1993;
- (b) the network licence; and/or
- (c) any other relevant statutory or regulatory provisions;

by either the Office of Rail and Road or the Secretary of State for Transport or any other competent body including change procedures and any other consents, approvals of any access or beneficiary that may be required in relation to the authorised development;

“specified work” means so much of any of the authorised development as is situated upon, across, under, over or within 15 metres of, or may in any way adversely affect, railway property and, for the avoidance of doubt, includes the maintenance of such works under the



powers conferred by article 6 (construction and maintenance of authorised development) in respect of such works.

**68.**—(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.

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

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

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

- (a) article 5 (development consent etc. granted by the Order);
- (b) article 6 (maintenance of authorised development);
- (c) article 24 (discharge of water);
- (d) article 26 (authority to survey and investigate the land);
- (e) article 27 (compulsory acquisition of land);
- (f) article 30 (compulsory acquisition of rights and imposition of restrictive covenants);
- (g) article 31 (private rights over land);
- (h) article 38 (acquisition of subsoil or airspace only);
- (i) article 40 (temporary use of land for carrying out the authorised development);
- (j) article 41 (temporary use of land for maintaining the authorised development);
- (k) article 42 (statutory undertakers);
- (l) article 46 (felling or lopping of trees and removal of hedgerows);
- (m) article 47 (trees subject to tree preservation orders);
- (n) the powers conferred by section 11(3) (power of entry) of the 1965 Act;
- (o) the powers conferred by section 203 (power to override easements and rights) of the Housing and Planning Act 2016;
- (p) the powers conferred by section 172 (right to enter and survey land) of the Housing and Planning Act 2016;
- (q) any powers under in respect of the temporary possession of land under the Neighbourhood Planning Act 2017,

in respect of any railway property unless the exercise of such powers is with the consent of Network Rail.

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

(3) The undertaker must not exercise the powers conferred by sections 271 or 272 of the 1990 Act, article 42 (statutory undertakers), or article 31 (private rights over land), 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) The undertaker must not under the powers of this Order do anything which would result in railway property being incapable of being used or maintained or which would affect the safe running of trains on the railway.

(6) Where Network Rail is asked to give its consent pursuant to this paragraph, such consent must not be unreasonably withheld but may be given subject to reasonable conditions, but it is not unreasonable to withhold consent for reasons of operational or railway safety (such matters to be in Network Rail's absolute discretion).

(7) The undertaker must enter into an asset protection agreement prior to the carrying out of any specified work.

**70.**—(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.

(2) The approval of the engineer under sub-paragraph (1) must not be unreasonably withheld, and if by the end of the period of 28 days beginning with the date on which such plans have been supplied to Network Rail the engineer has not intimated their disapproval of those plans and the grounds of such disapproval the undertaker may serve upon the engineer written notice requiring the engineer to intimate approval or disapproval within a further period of 28 days beginning with the date upon which the engineer receives written notice from the undertaker. If by the expiry of the further ~~14~~28 days the engineer has not intimated approval or disapproval, the engineer shall be deemed to have approved the plans as submitted.

(3) If by the end of the period of 28 days beginning with the date on which written notice was served upon the engineer under sub-paragraph (2), Network Rail gives notice to the 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 ~~PROVIDED THAT this paragraph shall not apply to any works that require temporary traffic management on the Strategic Road Network.~~

**71.**—(1) Any specified work to be constructed by virtue of paragraph 70(3) 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 70(1);
- (b) under the supervision (where appropriate and if given) and to the reasonable satisfaction of the engineer;
- (c) in such manner as to cause as little damage as is possible to railway property; and
- (d) so far as is reasonably practicable, so as not to interfere with or obstruct the free, uninterrupted and safe use of any railway of Network Rail or the traffic thereon and the use by passengers of railway property.

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

(3) Nothing in this Part 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 its servants, contractors or agents.

72. The undertaker must—

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

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

74.—(1) If any permanent or temporary alterations or additions to railway property are reasonably necessary in consequence of the construction or completion of a specified work , or during a period of 24 months after the completion of that work in order to ensure the safety of railway property or the continued safe operation of the railway of Network Rail, such alterations and additions may be carried out by Network Rail and if Network Rail gives to the undertaker 56 days' notice (or in the event of an emergency or safety critical issue such notice as is reasonable in the circumstances) of its intention to carry out such alterations or additions (which must be specified in the notice), the undertaker must pay to Network Rail the reasonable cost of those alterations or additions including, in respect of any such alterations and additions as are to be permanent, a capitalised sum representing the increase of the costs which may be expected to be reasonably incurred by Network Rail in maintaining, working and, when necessary, renewing any such alterations or additions.

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

(3) The engineer must, in respect of the capitalised sums referred to in this paragraph and paragraph 75(a) provide such details of the formula by which those sums have been calculated as the undertaker may reasonably require.

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

75. 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 under the provisions of paragraph 70(3) a capitalised sum representing the cost of maintaining and renewing those works;
- (b) in respect of the approval by the engineer of plans submitted by the undertaker and the supervision by the engineer of the construction of a specified work;

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

**76.—(1)** In this paragraph-

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

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

(2) This paragraph applies to EMI only to the extent that such EMI is not attributable to any change to Network Rail’s apparatus carried out after approval of plans under paragraph 70(1) for the relevant part of the authorised development giving rise to EMI (unless the undertaker has been given notice in writing before the approval of those plans of the intention to make such change).

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

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

- (a) the undertaker must consult with Network Rail as early as reasonably practicable to identify all Network Rail’s apparatus which may be at risk of EMI, and thereafter must continue to consult with Network Rail (both before and after formal submission of plans under paragraph 70(1)) in order to identify all potential causes of EMI and the measures required to eliminate them;
- (b) Network Rail must make available to the undertaker all information in the possession of Network Rail reasonably requested by the undertaker in respect of Network Rail’s apparatus identified pursuant to sub-paragraph (a); and
- (c) Network Rail must allow the undertaker reasonable facilities for the inspection of Network Rail’s apparatus identified pursuant to sub-paragraph (a).

(5) In any case where it is established that EMI can only reasonably be prevented by modifications to Network Rail’s apparatus, Network Rail must not withhold its consent unreasonably to modifications of Network Rail’s apparatus, but the means of prevention and the method of their execution must be selected in the reasonable discretion of Network Rail, and in relation to such modifications paragraph 70(1) has effect subject to [this](#) sub-paragraph.

(6) Prior to the commencement of operation of the authorised development the undertaker shall test the use of the authorised development in a manner that shall first have been agreed with Network Rail and if, notwithstanding any measures adopted pursuant to sub-paragraph (3), the testing 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) forthwith 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;
- (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; and
- ~~(e) the undertaker shall not allow the use or operation of the authorised development in a manner that has caused or will cause EMI until measures have been taken in accordance with this paragraph to prevent EMI occurring.~~

(8) Where Network Rail approves modifications to Network Rail's apparatus pursuant to 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;
- (b) any modifications to Network Rail's apparatus approved pursuant to those subparagraphs must be carried out and completed by the undertaker in accordance with paragraph 71.

(9) To the extent that it would not otherwise do so, the indemnity in paragraph 80(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 (6) applies.

(10) In relation to any dispute arising under this paragraph the reference in article 62 (Arbitration) to the Institution of Civil Engineers shall be read as a reference to the Institution of Engineering and Technology.

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

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

79. Any additional expenses which Network Rail may reasonably incur in altering, reconstructing or maintaining railway property under any powers existing at the making of this Order by reason of the existence of a specified work must, provided that ~~not less than~~ 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.

**80.**—(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 (~~but subject always to the remaining provisions of this paragraph and~~ to article 35 (no double recovery)) which may be occasioned to or reasonably incurred by Network Rail—

- (a) by reason of the construction, maintenance or operation of a specified work or the failure thereof; or

- (b) by reason of any act or omission of the undertaker or of any person in its employ or of its contractors or others whilst engaged upon a specified work;
- (c) by reason of any act or omission of the undertaker or any person in its employ or of its contractors or others whilst accessing to or egressing from the authorised development;
- (d) in respect of any damage caused to or additional maintenance required to, railway property or any such interference or obstruction or delay to the operation of the railway as a result of access to or egress from the authorised development by the undertaker or any person in its employ or of its contractors or others;
- (e) in respect of costs incurred by Network Rail in complying with any railway operational procedures or obtaining any regulatory consents which procedures are required to be followed or consents obtained to facilitate the carrying out or operation of the authorised development;

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

(2) Network Rail must –

- (a) give the undertaker reasonable written notice ~~(and in any event not less than 7 days)~~ of any such claims or demands
- (b) not ~~admit any liability or~~ make any ~~offer to settle or any~~ settlement or compromise of such a claim or demand without the prior consent of the undertaker ~~(which, if it withholds such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand); and~~
- ~~(c) take such steps as are within its control and are reasonable in the circumstances to mitigate any liabilities relating to such claims or demands; and~~
- ~~(d) keep the undertaker informed in relation to the progress of any such claims and demands and pay due regard to the undertaker's reasonable representations in relation to them.~~

(3) The ~~undertaker is not liable 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 (1) shall if relevant include a sum equivalent to the relevant costs ~~in circumstances where;~~

~~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~~

~~the existence of that agreement and the extent of Network Rail's liability to make payment of the relevant costs pursuant to its terms previously disclosed in writing to the undertaker,~~

~~but not otherwise.~~

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

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

(6) In this paragraph—

“the relevant costs” means the costs, ~~direct~~ losses and expenses (including loss of revenue) reasonably incurred by each train operator as a consequence of any specified work including but not limited to any restriction of the use of Network Rail's railway network as a result of

the construction, maintenance or failure of a specified work or any such act or omission as mentioned in subparagraph (1); and

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

**81.** Network Rail must, on receipt of a request from the undertaker, from time to time provide the undertaker free of charge with written estimates of the costs, charges, expenses and other liabilities for which the undertaker is or will become liable under this Part of this Schedule (including the amount of the relevant costs mentioned in paragraph 80) and with such information as may reasonably enable the undertaker to assess the reasonableness of any such estimate or claim made or to be made pursuant to this Part of this Schedule (including any claim relating to those relevant costs).

**82.** 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.

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

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

**85.** The undertaker must give written notice to Network Rail if any application is proposed to be made by the undertaker for the Secretary of State’s consent, under article 12 (consent to transfer benefit of Order) of this Order and any such notice must be given no later than 28 days before any such application is made and must describe or give (as appropriate)—

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

**86.** The undertaker must no later than 28 days from the date that the plans submitted to and certified by the Secretary of State in accordance with article 60 (certification of documents, etc.) provide a set of those plans to Network Rail in a format specified by Network Rail.

**87.** In relation to any dispute arising under this part of this Schedule (except for those disputes referred to in paragraph 76(11)) the provisions of article 62 (Arbitration) shall not apply and any such dispute, unless otherwise provided for, must be referred to and settled by a single arbitrator to be agreed between the parties or, failing agreement, to be appointed on the application of either party (after giving notice in writing to the other) to the President of the Institution of Civil Engineers.