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Date: 30 January 2020
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Email: jessicacraven@eversheds-sutherland.com

By post and email to manstonairport@planninginspectorate.gov.uk

Dear Sir/Madam

**Proposed Manston Airport Development Consent Order
Network Rail's Responses to the Secretary of State's request for comments
and information**

I write to you on behalf of Network Rail Infrastructure Limited ("Network Rail") in order to respond to the Secretary of State's letter of request for comments and further information dated 17th January 2020.

Paragraph 20 of this letter has been directed to both Network Rail and other Interested Parties to provide comments upon the set of Protective Provisions appended to the letter and proposed to be included in the Order, if made.

Network Rail has also taken the opportunity to provide the Secretary of State with an update on the current status of negotiations with RiverOak Strategic Partners Ltd ("the Promoter") following the closure of the Examination on 9th July 2019.

Comments on the Protective Provisions

Network Rail notes the Secretary of State's proposal that a set of Protective Provisions for the benefit of Network Rail will now be included in the Order if made.

Whilst the principle of the Protective Provisions now being included in the Order is very much welcomed by Network Rail the actual form of Protective Provisions set out in Annex C are not agreed by Network Rail as they do not provide all the protections Network Rail requires. The full set of protections required are set out in Network Rail's previous representation and correspondence with the Planning Inspectorate.

Accordingly, Network Rail has set out below the additional clauses that Network Rail require to be inserted into the Protective Provisions and the reasoning for such clauses. For ease of reference I have also enclosed a full version of the Protective Provisions which Network Rail requires to be included in the Order, if made.

Protection from Compulsory Acquisition

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Network Rail does not object in principle to the Order, however Network Rail does object to the Order conferring on the Promoter the unfettered power to compulsorily acquire rights over land or subsoil which forms part of Network Rail's operational railway and which Network Rail rely upon for the carrying out of its statutory undertaking.

Network Rail does recognise that the DCO Scheme requires the use of subsoil under and use of other rights over Network Rail's operational railway. However, Network Rail would expect the necessary subsoil rights or other rights to be acquired through an agreed easement rather than through the exercise of compulsory acquisition powers. This approach must be adopted to ensure that Network Rail can comply with its statutory duties to maintain the safe, efficient and economic operation of the railway and to ensure such rights do not affect the continued use of the railway by passenger and freight operators.

Network Rail has proposed that the Promoter enters into an easement in order to agree the necessary rights required for the DCO Scheme. The current status of negotiations on the easement are discussed in further detail below.

Network Rail therefore requires the protection of its land and interests in land from compulsory acquisition to be included in the Protective Provisions. The absence of this protection would create a serious detriment to Network Rail's ability to comply with its statutory and regulatory obligations.

The protections have been widely incorporated in other DCOs including; The Port of Tilbury (Expansion) Order 2019, The Northampton Gateway Rail Freight Interchange order 2019, The Triton Knoll Electrical System Order 2016, The Meaford Gas Fired Generating Station Order 2016, The M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016 and The East Midlands gateway Rail Freight Interchange and Highway Order 2016 to name a few.

Asset Protection Agreement

Network Rail always requires a form of asset protection agreement to be entered into to regulate the delivery of any third party works which have a direct interface with and impact on the operational railway.

Network Rail requires the Promoter to enter into such an asset protection agreement to ensure the appropriate and necessary technical, engineering and safety requirements for working on or near Network Rail's operational railway are applied to the DCO Scheme.

Whilst Network Rail understands that the Promoter does not currently anticipate any works to the pipeline underneath Network Rail's operation railway, an asset protection agreement must be entered into in the future should need for such works be required to regulate the construction of any works.

Currently, there is no obligation or requirement for the Promoter to enter into such an asset protection agreement should this be required in the future. In the absence of a Framework Agreement (further information on the status of this is set out below) which would require the Promoter to enter into a form of asset protection, Network Rail requires the Protective Provisions to include this obligation. Such drafting has been preceded in other DCOs including Thames Tideway Tunnel Development Consent Order 2014.

Negotiations with the Promoter

Framework Agreement

Network Rail first requested the Promoter to enter into a Framework Agreement on 18th January 2019. The Framework Agreement's purpose is to manage the direct interface of the DCO Scheme with the operational railway. The Framework Agreement collates and governs the operation and inclusion in the Order of the required Network Rail Protective Provision and the parties relationship as regards entering into the required easement and asset protection agreement.

It is Network Rail's position that the Framework Agreement will provide the Promoter with the rights it requires to access the subsoil under the operational railway with Network Rail's consent whilst maintaining Network Rail's required protections for the railway. If entered into the Promoter would not require the compulsory acquisition powers contained in the Order as the rights the Promoter requires would be provided by the easement contained in the Framework Agreement.

Unfortunately, despite Network Rail's regular correspondence, the Promoter has refused to provide comments on the Framework Agreement due to the easement not being agreed between the parties. Further information on the status of the easement negotiation is below.

Easement

As mentioned above, Network Rail is agreeable to granting the Promoter an easement to locate and operate a pipeline beneath its railway. It has provided a draft deed of easement to the Promoter which is based on the template form of deed of easement that Network Rail utilises for rights that cross below or above its operational railway. This document contains protective provisions for the benefit of Network Rail, the purpose of which are to ensure the continued operation of its rail network.

The Promoter initially objected to Network Rail's deed of grant being used in this instance. Their view was that given the purpose of the Promoter's use of the pipe beneath the railway (for drainage of an airport runway) that as well as giving the Promoter the various rights, that document should also contain reciprocal protections for the benefit of the airport as are included for the benefit of the railway.

Negotiations remain at an early stage though Network Rail has been able to make certain concessions not usually considered in order to progress the acquisition by the Promoter of this right by deed rather than compulsory purchase. Network Rail is prepared to agree, for example, that where it wishes to carry out works to the railway above the Promoter's pipe, it will engage with the Promoter to ensure the continued operation of the pipe and will move it if necessary to protect the operation of the airport. However, discussions have stalled regarding the inclusion of an indemnity in the deed of easement for the benefit of the Promoter.

Network Rail's deed of easement contains an indemnity as standard whereby the Promoter must cover any losses suffered by Network Rail as a result of it exercising the rights granted or in the event of any default. Such clause would always be required of any grantee of rights above or below the railway. The Promoter has asked Network Rail to provide a mutual indemnity for the benefit of the Promoter (which would go so far as to cover consequential loss suffered in the event some interruption to the right caused the airport to be closed). Network Rail is not in a position to

accept this wide-reaching liability and the latest compromise it has suggested is for indemnities to be removed from the document altogether.

While this means Network Rail will not have a direct route of recovery under an indemnity in the event the Promoter affects the operation of the railway, it does nonetheless wish to proceed by way of deed of easement to ensure the other protective provisions in the deed are put in place and can be relied on.

No substantive response has been received from the Promoter's solicitor since 20th December 2019 despite chasing.

Comments requested from Interested Parties

Late Representations

Network Rail is aware that they have been invited by the Secretary of State as an Interested Party to provide comments on various late representations submitted.

Network Rail has reviewed all of the late representations, however the content of the representations is such that Network Rail shall not be making further comments. Network Rail does not object in principle to the Order, Network Rail's concerns are specific to the protection of its existing railway infrastructure in order to comply with its statutory duty to maintain the safe, efficient and economic operation of the railway.

Draft Development Consent Order

In addition, Network Rail has been invited by the Secretary of State to comment upon the revised wording proposed to be incorporated in the Order if made. Network Rail is content with the proposed revised wording suggested at paragraphs 14, 15, 18 and 19 of the letter dated 17th January 2020.

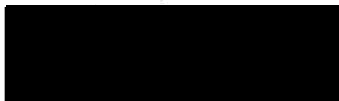
Network Rail's Position

Due to the Framework Agreement not being entered into, it is Network Rail's position that the draft Protective Provisions at Annex C of the letter do not go far enough to adequately protect Network Rail's infrastructure and would not enable Network Rail to ensure compliance with its statutory duty to maintain the safe, efficient and economic operation of the railway. Accordingly, Network Rail required the full set of well precededented Protective Provisions enclosed with this letter to be incorporated in the Order, if made.

Network Rail remains open and willing to continue negotiations with the Promoter to agree the terms of the deed of easement and therefore ultimately agree and enter into the Framework Agreement with the Promoter.

Please do let me know if you have any further comments or questions on Network Rail's above responses.

Yours sincerely



Jessica Craven
Senior Associate

Eversheds Sutherland (International) LLP

CC. Stephen Sprei, Network Rail Surveyor

Enc. Network Rail's required Protective Provisions

SCHEDULE 9

Article [31 and 39]

PROTECTIVE PROVISIONS

PART 3

FOR PROTECTION OF NETWORK RAIL

1. The following provisions of this Part of this Schedule shall have effect, unless otherwise agreed in writing between the undertaker and Network Rail and, in the case of paragraph 14, any other person on whom rights or obligations are conferred by that paragraph.

2. In this Schedule—

"asset protection agreement" means an agreement to regulate the construction and maintenance of the specified works, prepared 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 his or her powers under section 8 of the Railways Act 1993;

"Network Rail" means Network Rail Infrastructure Limited 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 2006¹ the holding company of Network Rail Infrastructure Limited, a subsidiary of Network Rail Infrastructure Limited or another subsidiary of the holding company of Network Rail Infrastructure Limited;

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

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

"railway property" means any railway belonging to Network Rail Infrastructure Limited 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 the purposes of such railway or works, apparatus or equipment; and

"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.

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

(1) 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 shall—

- (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 project pursuant to this Order.

4.—(1) The undertaker shall not exercise the powers conferred by article 17 (*protective works to buildings*), 18 (*authority to survey and investigate the land*) article 19 (*compulsory acquisition of land*), article 22 (*compulsory acquisition of rights and restrictive covenants*), article 23 (*subsoil or new rights only to be acquired in certain land*), article 29 (*temporary use of land for carrying out the authorised development*), article 30 (*temporary use of land for maintain the authorised development*) and article 34 (*felling or lopping trees and removal of hedgerows*) or the powers conferred by section 11(3) of the 1965 Act in respect of any railway property unless the exercise of such powers is with the consent of Network Rail.

(2) The undertaker shall 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 shall not exercise the powers conferred by article 31 (statutory undertakers) or sections 271 or 274 of the 1990 Act, as applied by article 31 to this Order, in relation to railway property.

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

(5) Where Network Rail is asked to give its consent pursuant to this paragraph, such consent shall not be unreasonably withheld but may be given subject to reasonable conditions.

(6) The undertaker shall enter into an asset protection agreement prior to the commencement of the construction of any specified works.

5.—(1) The undertaker shall 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 shall 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) shall 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 his or her disapproval of those plans and the grounds of such disapproval the undertaker may serve upon the engineer written notice requiring the engineer to intimate his or her 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 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 shall construct it without reasonable 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 his or her 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 shall be constructed by Network Rail or by the undertaker, if Network Rail so desires, and such protective works shall be carried out at the expense of the undertaker in either case without reasonable delay and the undertaker shall not commence the construction of the specified works until the engineer has notified the undertaker that the protective works have been completed to his or her reasonable satisfaction.

6.—(1) Any specified work and any protective works to be constructed by virtue of paragraph 5(4) shall, when commenced, be constructed—

- (a) without reasonable delay in accordance with the plans approved or deemed to have been approved or settled under paragraph 5;
- (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 shall, notwithstanding any such approval, make good such damage and shall 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 shall impose 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.

7. The undertaker shall—

- (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 he or she may reasonably require with regard to a specified work or the method of constructing it.

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

9.—(1) If any permanent or temporary alterations or additions to railway property, are reasonably necessary in consequence of the construction of a specified work, or during a period of 24 months after the completion of that work in order to ensure the safety of railway property or the continued safe operation of the railway of Network Rail, such alterations and additions may be carried out by Network Rail and if Network Rail gives to the undertaker reasonable notice of its intention to carry out such alterations or additions (which shall be specified in the notice), the undertaker shall 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 shall assume construction of that part of the specified work and the undertaker shall, 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 shall, in respect of the capitalised sums referred to in this paragraph and paragraph 10(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 shall be set off against any sum payable by the undertaker to Network Rail under this paragraph.

10. The undertaker shall 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 5(3) or in constructing any protective works under the provisions of paragraph 5(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 and otherwise in connection with the implementation of the provisions of this Part of this Schedule;
- (c) in respect of the employment or procurement of the services of any inspectors, signallers, watch-person and other persons whom it shall be reasonably necessary to appoint for inspecting, signaling, 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.

11.(1) In this paragraph-

“EMI” means, subject to sub-paragraph (2), electromagnetic interference with Network Rail apparatus generated by the operation of the authorised works 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 works) 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 5(1) for the relevant part of the authorised works 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 works 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 5(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 5(1) have effect subject to the sub-paragraph.

(6) If at any time prior to the commencement of regular revenue-earning operations comprised in the authorised works and notwithstanding any measures adopted pursuant to sub-paragraph (3), the testing or commissioning of the authorised works 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; 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 pursuant to sub-paragraphs (5) or (6) –

- (a) Network Rail must allow the undertaker reasonable facilities for the inspection of the relevant part of Network Rail's apparatus;
- (b) any modifications to Network Rail's apparatus approved pursuant to those sub-paragraphs must be carried out and completed by the undertaker in accordance with paragraph 6.

(9) To the extent that it would not otherwise do so, the indemnity in paragraph 15(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 10(a) any modifications to Network Rail's apparatus under this paragraph shall be deemed to be protective works referred to in that paragraph.

(11) (In relation to any dispute arising under this paragraph the reference in 43 (Arbitration) to the Institution of Civil Engineers shall be read as a reference to the Institution of Electrical Engineers.

12. 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 shall, 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.

13. The undertaker shall 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 shall have first consulted Network Rail and it shall 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.

14. 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 shall, 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.

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

- (a) by reason of the construction or maintenance of a specified work or the failure thereof, or
- (b) by reason of any act or omission of the undertaker or of any person in its employ or of its contractors or others whilst engaged upon a specified work,

and the undertaker shall 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 shall give the undertaker reasonable notice of any such claim or demand and no settlement or compromise of such a claim or demand shall be made without the prior consent of the undertaker.

(3) The sums payable by the undertaker under sub-paragraph (1) shall 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 shall promptly pay to each train operator the amount of any sums which Network Rail receives under sub-paragraph (3) which relates to the relevant costs of that train operator.

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

(6) In this paragraph—

"the relevant costs" means the costs, direct losses and expenses (including loss of revenue) reasonably incurred by each train operator as a consequence of any restriction of the use of Network Rail's railway network as a result of the construction, maintenance or failure of a specified work or any such act or omission as mentioned in 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.

16. Network Rail shall, on receipt of a request from the undertaker, from time to time provide the undertaker with written estimates of the costs, charges, expenses and other liabilities for which the undertaker is or will become liable under this Part (including the amount of the relevant costs mentioned in paragraph 15) and with such information as may reasonably enable the undertaker to assess the reasonableness of any such estimate or claim made or to be made pursuant to this Part (including any claim relating to those relevant costs).

17. In the assessment of any sums payable to Network Rail under this Part there shall 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 or increasing the sums so payable. 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.

18. Nothing in this Order, or in any enactment incorporated with or applied by this Order, shall prejudice or affect the operation of Part I of the Railways Act 1993.

19. The undertaker shall give written notice to Network Rail if any application is proposed to be made by the undertaker for the Secretary of State's consent, under article 8 (*consent to transfer the benefit of Order*) of this Order and any such notice shall be given no later than 28 days before any such application is made and shall 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.

20. Any difference or dispute arising between the undertaker and Network Rail under this Part of this Schedule shall be referred to and settled by arbitration under article 43 (*arbitration*).