

PLANNING ACT 2008
INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE) RULES 2010

APPLICATION FOR THE WEST MIDLANDS INTERCHANGE
DEVELOPMENT CONSENT ORDER

Planning Inspectorate Reference: TRO 50005

Written Representations of
NETWORK RAIL INFRASTRUCTURE LIMITED
for Deadline 2 of the Examination

5 April 2019

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1. DEFINITIONS

1.1 In this written representation the words and phrases in column (1) below are given the meaning contained in column (2) below:

Words and Phrases	Meaning
1993 Act	Railways Act 1993
2008 Act	Planning Act 2008
Applicant	Four Ashes Limited (and where the context so admits any successors to it holding the powers in the DCO)
Application	the application for the DCO received by the Planning Inspectorate for development consent for the West Midlands Interchange proposals
Authorised Development	the “authorised development” as defined in the Draft DCO
Book of Reference	the Book of Reference submitted with the Application
DCO	the proposed West Midlands Interchange Development Consent Order
DCLG Guidance	DCLG Guidance “Planning Act 2008: Guidance related to the procedures for compulsory acquisition” (September 2013)
Draft DCO	the draft DCO submitted with the Application and (where relevant) subsequent iterations
Facility Owner	has the same meaning as in section 17(6) of the 1993 Act
Land Plan	the land plan submitted with the Application
LC7	Condition 7 of the Network Licence, which regulates disposal of (including grant of easements over) Network Rail's operational land
Network	the railway network for which Network Rail is the Facility Owner
Network Licence	the network licence granted by the Secretary of State for Transport in exercise of his powers under Section 8 of the 1993 Act to Network Rail (then called Railtrack PLC) on 31st March 1994 as amended or modified from time to time, or any Network Licence granted to a successor of Network Rail, as the context permits
Network Code	the common set of rules and industry procedures that apply to all parties who have a contractual right of access to the track owned and operated by Network Rail which is managed and maintained by Network Rail and overseen by the ORR and which code was formerly known as the National Track Access Conditions 1995
Network Rail	Network Rail Infrastructure Limited
Network Rail Land	land held by Network Rail listed in the Book of Reference and shown on the Land Plans
Order Lands	the land shown on the Land Plan

ORR	Office of Rail and Road
Possession	the temporary closure of a section of the rail network which is placed under the exclusive possession of an engineer
Protective Provisions	Network Rail's standard protective provisions in the form at Annex 1.
RRAP	Road Rail Access Point
RRAP Access	the access track from Gravelly Way to the RRAP located on the WCML, North of Station Road, running through plots 14 and 18 of the Land Plan
Statement of Reasons	the Statement of Reasons submitted with the Application
Steps Access	the stepped access from the Gravelly Way overbridge to the WCML
Temporary Powers	the powers contained in articles 35 and 36 of the Draft DCO
Track Access Agreement	an agreement in between a Train Operating Company (or Freight Operating Company) and Network Rail allowing them access to the Network and which is subject to ORR approval.
WCML	the West Coast Main Line of the Network, which connects London to Birmingham, Manchester, Liverpool and Glasgow.

1.2 In this written representation references to Plots are references to Plots identified in the Book of Reference and the Land Plans.

2. BACKGROUND

2.1 Network Rail

2.1.1 Network Rail owns and operates the rail infrastructure of Great Britain. Its purpose is to deliver a safe, reliable and efficient railway for Great Britain. Network Rail is primarily responsible for maintenance, repair and renewal of track, stations, signalling and electrical control equipment. Train services on the Network are operated by Train Operating Companies (**TOCs**) and Freight Operating Companies (**FOCs**) to which Network Rail, as Facility Owner of the Network, grants rights to use the Network in the form of track, station, and depot access contracts approved by the ORR. Network Rail is a company limited by guarantee.

2.2 Network Licence

2.2.1 Network Rail operates under the Network Licence which was granted under Section 8 of the Railway Act 1993. This Network Licence contains a set of conditions under which Network Rail must operate in the public interest. As the operator and owner of the national rail infrastructure, Network Rail has a key role to play in railway safety and improving railway performance and efficiency.

2.2.2 Under Part III, Part A, Condition 1.1 of the Network Licence, the purpose of the Licence is (amongst other things) to secure the operation and maintenance, improvement, enhancement and development of the Network in accordance with best practice and in a timely, efficient and economical manner. This is both in respect of the quality and capability of the Network and in the facilitation of railway service performance in respect of services for the carriage of passengers and goods by railway operating on the Network. Condition 1.2 of the Network Licence places Network Rail under a duty to achieve this purpose.

- 2.2.3 Under the obligations set out in its Network Licence, Network Rail is also required to ensure the safe and efficient operation of the Network to the reasonable satisfaction of railway service providers and funders. If the ORR was to find Network Rail in breach of its licence obligations (including our overarching general duty) then the consequences could be an enforcement order or significant financial penalty.

2.3 The Application site

- 2.3.1 The Application site is located on the part of the WCML between Wolverhampton and Stafford. The railway is double track and in the location of the Application site is "plain track" in that there are no points on the lines allowing for the transfer of trains from the Down (away from London) to the Up (towards London) track or vice versa. The WCML here is intensively used by a number of TOCs and FOCs. Virgin West Coast trains operate between Birmingham and the North West and Scotland. Arriva Cross Country trains connect the South West with Manchester. Local services are provided by London Northwestern Railway. The WCML also sees frequent freight trains operated by DB Schenker, Freightliner and other FOCs.
- 2.3.2 The line is either approximately on the same level as the neighbouring land or in a shallow cutting. It is crossed by the existing Gravelly Way bridge and an old accommodation bridge to the north of Gravelly Way.
- 2.3.3 South of the Application site a loop line exists on the up side of the railway, with points providing access to this third track at either end of the loop.

2.4 The RRAP and other accesses to the WCML

- 2.4.1 At the southern set of points, opposite the SI Group's premises and north of Station Road there is a RRAP giving Network Rail maintenance access to the WCML. The RRAP is accessed from Gravelly Way, with the access route running parallel to Gravelly Way on its south side, west of the WCML, then running south, parallel to the WCML between Gravelly Way and the RRAP. It is located within plots 18 and 14 of the Land Plan and can be clearly seen on the underlying OS mapping.
- 2.4.2 In addition, the WCML can be accessed from steps that lead down from Gravelly Way, on the Up (eastern) side of the WCML. This private means of access connects to Gravelly Way at the junction of plots 21 and 61 of the Order Lands.
- 2.4.3 Given the intensity of use of the WCML in this location, the accesses to the railway are key to Network Rail's being able to fulfil its obligations under its Network Licence. All the means of access are key to Network Rail's undertaking.
- 2.4.4 Additional accesses in the vicinity are at the A5 overbridge to the north and from Station Drive to the south. Both of these accesses appear to lie within the Order Land but are unaffected by any proposals submitted by the Applicant.

3. PROTECTIVE PROVISIONS

- 3.1 As a result of its licence obligations, and in furtherance of its statutory undertaking to operate and maintain the national network, Network Rail has developed standard protective provisions it required to be included in all statutory instruments where third parties seek powers affecting Network Rail's undertaking. Without Network Rail's standard Protective Provisions, the confirmation of a development consent order allowing the Applicant to acquire rights over and above Network Rail's operational railway would significantly harm Network Rail's role and ability to undertake its obligations as infrastructure owner and operator. Network Rail seeks the incorporation of its standard Protective Provisions in all relevant orders, without alteration.
- 3.2 Network Rail requests that the DCO be slightly amended to include the Protective Provisions in the form of the attached standard draft. The standard draft is at Annex 1.

4. NETWORK RAIL'S GENERAL APPROACH TO ASSET PROTECTION AND WORKS AFFECTING THE NETWORK

4.1 Asset Protection and related agreements

- 4.1.1 Absent the Protective Provisions the Draft DCO could allow the Applicant to take entry on to the Network Rail Land by way of its temporary possession powers to undertake pre-construction and construction works without the appropriate railway protection measures being in place. This would have a major impact on the operation and the safety of the railway.
- 4.1.2 The Protective Provisions mean in practice that if the Applicant needs to undertake survey work and/or tree clearance before construction commences, or take possession this must be undertaken following Network Rail giving its consent, save for Network Rail not being able to unreasonably withhold its consent.
- 4.1.3 An Asset Protection Agreement (**APA**) would support the review of the design, and facilitate access on to the Network Rail Land. An Asset Protection Agreement is a contracting agreement between Network Rail and an outside party to allow interaction and to establish roles, responsibilities and liabilities of a project over, under or adjacent to the railway. It is therefore submitted that Network Rail would be acting reasonably in requiring that any such required agreement be entered in to before giving its consent to the exercise of powers over its railway.
- 4.1.4 By proceeding under an APA, Network Rail is fulfilling its statutory duty to protect the railway, with the Asset Protection Team managing access, site safety management, engineering services, and possession arrangements as necessary.
- 4.1.5 Asset protection is required for:
- (a) The Works to connect the Project to the WCML
 - (b) Bridge demolition works
 - (c) Works to construct new bridges at Gravelly Way
 - (d) The proposed service tunnel under the WCML

No detailed asset protection, outside party asset protection, bridge or other agreements are yet in place.

4.2 Possessions

- 4.2.1 The closure of a section of the Network requires what is known as a Possession:
- (a) A "Rules of the Route" Possession is a schedule of engineering access opportunities that do not conflict with the approved planned operational services. The schedule of the Rules of the Route is negotiated with formal consultation with train operators and Network Rail's Integrated Planning Managers. Rules of Route possessions have a minimum of 18 weeks possession and isolation booking timescales.
 - (b) Any Possession that does not comply with Rules of the Route opportunities is contractually in breach of the conditions with the train operating companies and therefore considered disruptive. Disruptive access requires significant negotiations with Train Operating Companies and Freight Operating Companies and triggers penalties/compensation having to be paid to them under the Schedule 4 (planned disruption) mechanism in Track Access Agreements. Disruptive possessions have booking timescales of approximately 2 years.

- 4.2.2 The preliminary and construction works, if not managed under the provisions of Network Rail Asset Protection Agreement(s) or in relation to construction a Bridge Agreement would be likely to have a major impact on the safety of the operational railway. Proposed works must be reviewed and approved by the appropriate teams within Network Rail and without this process the Applicant and its authorised personnel and contractors could take entry on to the Network Rail Land at short notice and without an approved/booked Possession of the railway line, therefore forcing Network Rail to stop the trains. This would be contrary to Network Rail's Network Licence.
- 4.2.3 Entry onto the live railway line, without any Network Rail approved Possession, could also mean Network Rail incurring considerable expense in terms of the penalties/compensation having to be paid to Train Operating Companies and Freight Operating Companies who would be unable to run their trains along this stretch of line. Such compensation is payable under Schedule 8 (unplanned disruption) mechanism in Track Access Agreements.
- 4.2.4 No railway Possessions have been booked on behalf of the Applicant for the construction of the bridge and the type of possession required is not yet known.

4.3 Network Rail's General Approach to Bridges over the Railway and structures under the Railway

- 4.3.1 Network Rail will require time for the scheme and land requirements to be fully reviewed and considered. Network Rail as a result requires that its standard Protective Provisions are included in the DCO as made to ensure the need for its land is dealt with in accordance with the following procedure.
- 4.3.2 The land and rights required will be submitted for approval through Network Rail's internal clearance process.
- 4.3.3 Clearance is Network Rail's internal process for authorising the disposal of any interest in land. Although it is not in itself a statutory process, it is a process which allows Network Rail to undertake the due diligence necessary to ensure that it complies with its Network Licence.
- 4.3.4 The current requirements in relation to Clearances are as follows:
- (a) Clearance for the bridge easement for the new Gravelly Way Bridges.
 - (b) Clearance for the grant of an easement for a service structure under the WCML.

Network Rail internal Business and Technical clearance was sought and obtained in September 2018 for the proposed new bridge and culvert. The clearance provides an in principle agreement but is subject to detailed designs being submitted by the Applicant and accepted by Network Rail. In addition the Applicant will need to enter into the appropriate legal agreements for the proposed works. In terms of the required property rights, Network Rail has not yet issued an LC7 consultation due to the lack of information to enable it to consider the proposals in detail and to then consult with the relevant TOCs and FOCs.

- 4.3.5 Clearance is also a process which must be completed before the ORR will issue consent under LC7 of Network Rail's Network Licence.
- 4.3.6 Under LC7 of the Network Licence, Network Rail must obtain consent from the ORR before it makes a disposal. The term disposal includes both transfers of land and the granting of easements. The ORR requires Network Rail to provide details of its internal Clearances with the notice of disposal.
- 4.3.7 Clearance must therefore be approved before the land and rights required for a scheme can be considered for disposal.

- 4.3.8 Network Rail's approach to road over rail highway bridges is to grant the highway authority rights to construct and maintain the bridge. This entails the making of two agreements:
- (a) A property agreement for the granting of a permanent easement to construct and then to have, use and maintain bridge within the airspace over the railway line; and
 - (b) An Overbridge Agreement which governs the design, construction and future inspection, repair, maintenance and renewal and removal of the bridge.
- 4.3.9 The Bridge Agreement details the arrangements for the introduction and ongoing management of an outside party bridge over the railway. It is for the life of the structure. It sets out ownership, roles and responsibilities, liability and insurance for a new overbridge. It details the location of the structure, provides a bespoke bridge reference number, defines technical requirements and details key attributes such as headroom and lateral clearance. The Bridge Agreement was created in association with the then County Surveyor's Society (now ADEPT) in order to protect the railway corridor (as defined under the Railway Act) from the risk imported through the construction of new bridges. It also gives a mechanism to escalate matters in order to protect the railway corridor.
- 4.3.10 Network Rail does not consider that it is appropriate to transfer the freehold title to the airspace in which a bridge is to be constructed to the Applicant. Instead Network Rail's practice is to grant rights above and to dedicate the bridge and the way it carries as highway if requested. This avoids a situation at the end of the operational life (and/or stopping up) of the road bridge where a local highway authority owns airspace over the railway which it no longer requires, resulting fragmentation of ownership of railway land.
- 4.3.11 Subject to the outcome of its clearance process, Network Rail will consider granting rights to maintain sub surface structures under its railway, such as the proposed service tunnel under the WCML that it believes the Applicant is considering. At this time the Applicant has not provided sufficient detail to Network Rail to allow Network Rail to determine if the Applicant's proposals are acceptable to Network Rail.

5. RELEVANT PROVISIONS OF THE 2008 ACT

5.1 Section 127 of the 2008 Act

5.1.1 Compulsory Acquisition of Statutory Undertakers' Land

- (a) Section 127 contains provisions conveying special protection for statutory undertakers' land by introducing a special test which must be applied by the Secretary of State before powers of compulsory acquisition are granted. Under Section 127(1):

(1) *This section applies in relation to land ("statutory undertakers' land") if—*

- (a) *the land has been acquired by statutory undertakers for the purposes of their undertaking,*
- (b) *a representation has been made about an application for an order granting development consent before the completion of the examination of the application, and the representation has not been withdrawn, and*
- (c) *as a result of the representation the Secretary of State is satisfied that—*

- (i) *the land is used for the purposes of carrying on the statutory undertakers' undertaking, or*
 - (ii) *an interest in the land is held for those purposes.*
- (b) It is clear that Section 127 of the 2008 is engaged as:
 - (i) Statutory undertaker is defined in Section 127(8) of the 2008 Act by reference to Section 8 of the Acquisition of Land Act 1981. Section 8(1)(a) of the 1981 Act includes: "any person authorised by any enactment to construct, work or carry on... any railway... undertaking".
 - (ii) Network Rail has made a representation in respect of the Application.
 - (iii) Network Rail is the owner of the Network Rail Land and operates the railway. The railway continues to be used for rail traffic. It follows that Network Rail is also a statutory undertaker within the meaning of Section 127(8) of the 2008 Act.
- (c) Under Sections 127(2) and (3) a development consent order "may include provision authorising the compulsory acquisition of statutory undertakers' land only to the extent that the Secretary of State is satisfied" that one of the following is satisfied:
 - (3) *...the nature and situation of the land are such that—*
 - (a) *it can be purchased and not replaced without serious detriment to the carrying on of the undertaking, or*
 - (b) *if purchased it can be replaced by other land belonging to, or available for acquisition by, the undertakers without serious detriment to the carrying on of the undertaking.*
- (d) Sections 127(2) and (3) should be applied to Temporary Possession .
- (e) Taking of temporary possession of parts of Network Rail's operational railway pursuant to the DCO would interrupt rail services and cause delays and cancelled services for passengers. Absent the Protective Provisions, and agreement between the Applicant and Network Rail the Draft DCO would not provide adequate safeguards to minimise disruption to services and would therefore cause serious detriment to the carrying on of Network Rail's undertaking.
- (f) The established system of railway "possessions" under the Network Code provides a far more suitable and balanced mechanism under which these works may be carried out. It is essential that the any closure of the railway necessitated by the Authorised Development is of a very limited duration (ie limited to a matter of days and not years).
- (g) Network Rail is also particularly concerned about the loss of its RRAP Access and Steps Access. Both are integral to the ability for Network Rail to maintain the WCML. Both would be extinguished without replacement as a result of the operation of article 28 of the Draft DCO.
- (h) Absent the Protective Provisions, the taking of unspecified rights over the Network Rail Land in the uncontrolled way provided for by the Draft DCO would be likely to have detrimental impacts on Network Rail's statutory undertaking. The extent and nature of these impacts is uncertain, but due to the wide discretion which is afforded by the Draft DCO they could be very severe indeed.

6. NETWORK RAIL'S CONCERNS

6.1 Access to the WCML

- 6.1.1 Network Rail requires to understand what provision for the replacement of the RRAP, RRAP Access and the Steps Access will be given by the Applicant.
- 6.1.2 Network Rail also requires to understand that its accesses from the A5 Overbridge and from Station Drive to the north and south of the Application site respectively, will not be affected by the proposed works. Both locations appear to be in the limits of land to be acquired or used but it is not clear what impact on these private means of access is proposed.

6.2 Height of Bridges – Limits of Deviation

- 6.2.1 Network Rail is also concerned about the vertical Limits of Deviation contained in Article 4 of the draft DCO. Article 4 (1) (b) may allow for the Applicant to move downwards the level of the proposed Gravelly Way bridges, and this could severely impact on the WCML.

6.3 Effect of the proposed Temporary Possession Powers on Network Rail

- 6.3.1 The Draft DCO contains powers of temporary possession. It is possible that, in relation to land under the ownership of Network Rail referred to in this document as the Network Rail Land, these powers could be exercised against Network Rail's interest, and affecting the operational railway.
- 6.3.2 This would be unacceptable to Network Rail.

6.4 Protective Provisions

- 6.4.1 There are protective provisions for the benefit of Network Rail which are well precedented both in orders under the Transport and Works Act 1992 and development consent orders.
- 6.4.2 The Draft DCO contains protective provisions which broadly follow these precedents. However Network Rail requires its standard form to be included in the draft DCO rather than the current form.
- 6.4.3 Network Rail's version of the Protective Provisions is at Annex 1 below.

7. SUMMARY AND CONCLUSIONS

- 7.1 Network Rail operates under the Network Licence which was granted under Section 8 of the Railway Act 1993. This Network Licence contains a set of conditions under which Network Rail must operate in the public interest. As the operator and owner of the national rail infrastructure, Network Rail has a key role to play in railway safety and improving railway performance and efficiency.
- 7.2 Under the obligations set out in its Network Licence, Network Rail is also required to ensure the safe and efficient operation of the Network to the reasonable satisfaction of railway service providers and funders. If the ORR was to find Network Rail in breach of its licence obligations (including our overarching general duty) then the consequences could be an enforcement order or significant financial penalty.
- 7.3 Without Network Rail's standard Protective Provisions, the confirmation of a development consent order allowing the Applicant to acquire rights over and above Network Rail's operational railway would significantly harm Network Rail's role and ability to undertake its obligations as

infrastructure owner and operator. It would also be likely to leave Network Rail acting inconsistently with its Network Licence obligations in respect of its residual network

- 7.4 Network Rail submits that its standard Protective Provisions should be included in the DCO if it is made. Annex 1 contains these Protective Provisions.
- 7.5 In order to comply with its Network Licence it requires any land and/or rights required for a scheme to be dealt with by private treaty via a series of template agreements.
- 7.6 It is respectfully requested that the Examining Authority recommend to the Secretary of State that the Draft DCO should not be made in its current form.
- 7.7 In the event that:
 - 7.7.1 Certain assurances which Network Rail has requested are provided to it by the Applicant; and
 - 7.7.2 The Protective Provisions are as set out in the Protective Provisions at Annex 1, Network Rail would be in a position to withdraw its objection to the Application.

Womble Bond Dickinson (UK) LLP

5 April 2019

ANNEX 1
Protective Provisions

SCHEDULE 1

PROTECTIVE PROVISIONS

FOR PROTECTION OF RAILWAY INTERESTS

1. The following provisions of this Schedule have effect, unless otherwise agreed in writing between the undertaker and Network Rail and, in the case of paragraph 15, any other person on whom rights or obligations are conferred by that paragraph.

2. In 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 his 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 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 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—

¹ 2006 c.46

- (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 pursuant to this Order.

4.—(1) The undertaker must not exercise the powers conferred by article 22 (authority to survey and investigate the land), 24 (compulsory acquisition of land), 25 (compulsory acquisition of rights), 26 (acquisition of part of certain properties), 28 (power to override easements and other rights), 35 (temporary use of land for carrying out the authorised development) and 36 (temporary use of land for maintaining the authorised development) 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 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 or article 33 (statutory undertakers and operators of the electronic communications code network), 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 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 must not be unreasonably withheld but may be given subject to reasonable conditions.

5.—(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 49 (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 his disapproval of those plans and the grounds of his disapproval the undertaker may serve upon the engineer written notice requiring the engineer to intimate his 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 his approval or disapproval, he 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 with all reasonable dispatch on behalf of and to the reasonable satisfaction of the undertaker in accordance with the plans approved or deemed to be approved or settled under this paragraph, and under the supervision (where appropriate and if given) of the undertaker.

(4) When signifying his approval of the plans the engineer may specify any protective works (whether temporary or permanent) which in his opinion should be carried out before the commencement of the construction of a specified work to ensure the safety or stability of railway property or the continuation of safe and efficient operation of the railways of Network Rail or the services of operators using the same (including any relocation de-commissioning and removal of works, apparatus and equipment necessitated by a specified work and the comfort and safety of passengers who may be affected by the specified works), and such protective

works as may be reasonably necessary for those purposes must be constructed by Network Rail or by the undertaker, if Network Rail so desires, and such protective works must be carried out at the expense of the undertaker in either case with all reasonable dispatch and the undertaker must not commence the construction of the specified works until the engineer has notified the undertaker that the protective works have been completed to his reasonable satisfaction.

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

- (a) with all reasonable dispatch in accordance with the plans approved or deemed to have been approved or settled under paragraph 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 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 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.

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

8. 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 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.

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 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 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 must be set off against any sum payable by the undertaker to Network Rail under this paragraph

10. 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 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 him of the construction of a specified work;
- (c) in respect of the employment or procurement of the services of any inspectors, signalmen, watchmen 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.

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 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 signaling 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 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 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 development and notwithstanding any measures adopted pursuant to 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) 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 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 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 article 49 (Arbitration) to the Lands Chamber of the Upper Tribunal 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 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.

13. 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.

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 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.

15.—(1)The undertaker must pay to Network Rail all reasonable costs, charges, damages and expenses not otherwise provided for in 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 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 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 his 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 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 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 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 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 Schedule (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 Schedule (including any claim relating to those relevant costs).

17. In the assessment of any sums payable to Network Rail under 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 Schedule or increasing the sums so payable.

18. 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.

19. 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.

20. 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 7 (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.

21. 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 47 (Certification of plans and documents) are certified by the Secretary of State, provide a set of those plans to Network Rail in the form of a computer disc with read only memory.