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19 March 2019

Dear Sirs,

**HIGHWAYS ENGLAND'S DEADLINE 6 SUBMISSION – POST HEARING SUBMISSIONS INCLUDING WRITTEN SUBMISSIONS OF ORAL CASES**

ISH5: Agenda item 2: The divergence between the Applicant and Highways England on timescales for approvals and deemed approvals.

In our written representations and subsequent submissions we have raised the principle of deemed approval as a fundamental issue for Highways England. Highways England is a strategic highway company operating under the terms of the Infrastructure Act 2015 including a licence issued by the Secretary of State for Transport. Of relevance to the issue of deemed approval is section 5(2) of the 2015 Act which reads:

***“...a strategic highways company must also, in exercising its functions, have regard to the effect of the exercise of those functions on—***

...

***(b) the safety of users of highways”***

In addition, section 4.2 of the License itself contains a statutory direction that reads:

***“Without prejudice to the general duties on the Licence holder under section 5 of the Infrastructure Act 2015, the Licence holder must, in exercising its***

***functions and complying with its legal duties and other obligations, act in a manner which it considers best calculated to: ...***

***...(e) Protect and improve the safety of the network.....”.***

Highways England objects to the imposition of deemed approval provisions due to the issue of safety and has real concerns over being forced into a position that creates potential safety implications for the public using the Strategic Road Network (SRN) and could put Highways England in breach of its statutory duties. Only Highways England as the licensed highway authority can determine the safety implications of any development proposition that introduces changes to its network. This statutory duty to have regard to the safety of users of highways is negated by the very principle of deemed approval introducing the possibility that changes could be made to the SRN without Highways England having appropriate regard to the issue of safety.

Highways England has considered the deemed approval provisions requested by the Applicant and any implications of the same and concluded which are acceptable and which are not. Highways England does not object to the principle of deemed approval across the entire DCO, however Highways England cannot compromise on safety. Highways England does not object to Articles in the draft DCO that impose a deemed approval provision on Highways England where we consider it does not pose a significant safety risk. That being said, in such situations Highways England does consider a longer period is necessary to determine any application than what is being proposed by the Applicant and has asked for this period to be extended to 56 days. This gives a more realistic timeframe for officers to reach an informed decision on an application rather than issue a blanket refusal due to lack of time. This should ultimately be of benefit to the Applicant.

The only Article within the draft DCO that remains in issue in this regard is Article 13. Article 13(3) provides for deemed approval to be granted for new proposed accesses should an application for the same be made and a response not be issued in time. Highways England has specific policy obligations imposed by the DfT in respect of new accesses on the trunk road network. DfT Circular 02/2013 contains a general presumption against new trunk road accesses being approved - although consideration can be given on a case by case basis for some (non-motorway standard) trunk roads. The assessment of such proposals must be made on their merits and is a matter for Highways England regarding the core function of the network and safety of such proposals. Any requirement to depart from this policy is not within Highways England's gift (being under DfT control) and as such the principle of deemed approval in this regard forms a direct challenge to government policy.

The other cause for concern with regards deemed approval relates to the Protective Provisions (paragraph 15 to Part 2 of Schedule 13). The Protective Provisions have

been drafted in such a way to mirror a standard section 278 agreement and largely reflect the process that Highways England would expect a developer to follow should it wish to carry out work on the SRN. Highways England would not accept being made subject to deemed approval in these circumstances and does not consider the position should be any different just because consent is being granted by way of a DCO. Highways England does not agree with the position advanced by the Applicant that this application ought to be treated differently due to a need to demonstrate a route to delivery. It is acknowledged that the application process under the Planning Act 2008 is certainly different and more focussed in this regard however in our view once consent has been granted it has no specific status that means it ought to receive more favourable treatment.

The Protective Provisions have in general been agreed on the basis that they ensure that no work is either accepted as an appropriate design, or constructed on site, if it would not be compliant with the Design Manual for Roads and Bridges. Deemed approval is not workable with this requirement. These provisions are written to ensure the safety of the travelling public is paramount with only suitable work being taken forward and implemented for use. Should deemed approval apply in terms of design and specification work then the risk of unsuitable work being constructed on site and the likelihood of adverse safety incidents occurring increases. This is something that Highways England cannot tolerate as highway authority and network operator with statutory obligations to protect the safety of the SRN.

As drafted, the Protected Provisions are clear that the Works become the responsibility of Highways England on completion. So long as they have been carried out in accordance with the “approved” details Highways England has no choice but to accept them even if it thinks there are fundamental safety issues. Noting of course that “approval” in this regard may be deemed approval there is then a liability on the taxpayer to carry that risk or spend the money to put things right due to issues that have bypassed the approval of the highway authority. Anything that can create an ongoing safety risk, and liability for the taxpayer, should not be subject to deemed approval due to the inherent risks that creates.

Highways England has significant concerns over the risk that timescales are missed (whether due to IT failures or simple human error) and approval is deemed to have been granted. If Highways England was made subject to deemed approval then in an effort to avoid this a system would need to be set up to ensure a refusal was issued before time runs out (although it could never be 100% fool proof). With such a standardised system the Applicant would then be forced to resubmit and the clock would start again. This could, in theory, continue indefinitely and would not give the Applicant the certainty of engagement that it desires. As a responsible public body Highways England would prefer to fully engage in a constructive manner and take the appropriate time to consider and decide on an application, with ongoing dialogue and



input from the Applicant as necessary. There is concern that operating under the shadow of deemed approval would create a more adversarial application process which ultimately would not benefit the Applicant.

Highways England has not misunderstood the intention behind these provisions and does understand that the Applicant is seeking to ensure appropriate engagement. It ought to be recognised however that Highways England has statutory responsibilities to support economic growth<sup>1</sup> (i.e. to support developments such as this one) and as a public body must act reasonably. It should not therefore be necessary for Highways England to be made subject to deemed approval provisions to ensure its engagement and a public body should not be forced into a position against its will where safety is potentially compromised. It should be noted that Highways England has worked closely with the Applicant on the East Midlands Gateway scheme, the DCO for which does not contain deemed approval provisions. In our view Highways England has maintained a sound relationship with the Applicant throughout the design approval and delivery phases of the works on that scheme, both of which have now completed.

It should be recognised that Highways England only has finite resources and officers have competing priorities when it comes to approval of such matters (not least potentially another NSIP in close proximity to this one). By pushing for deemed approval to apply the Applicant is seeking to have its submission prioritised over all others. Highways England has never been subject to deemed approval before and therefore should deemed approval apply here this would set a precedent which will only add to the burden on officers –it would be highly likely that the Applicant for Rail Central would also seek similar provisions in their DCO and should both orders be granted consent this could create a significant burden for already stretched officers in this region operating under the shadow of deemed approval.

The position Highways England is taking in this regard is not particularly unusual. As a comparable example, during the North London Heat and Power Generating Station DCO examination National Grid objected to deemed approval provisions on the basis that it would have the potential to undermine safe working. The Secretary of State accepted these submissions and confirmed that the requirement for an approval not to be unreasonably withheld or delayed would be appropriate to ensure the Applicant received a response in a timely manner.<sup>2</sup> Deemed approval provisions were therefore removed before the order was made. Highways England submit that a similar position should be taken with regards this application and would not object to being subject to a similar obligation.

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<sup>1</sup> See paragraphs 4.2 and 4.3 of Highways England's Licence

<sup>2</sup> See letter dated 26 January 2017 issued by the Department for Business, Energy and Industrial Strategy appended hereto (particularly the third bullet point in Annex 2).



Highways England does not accept that the position it takes is hypocritical (due to the existence of deemed approval provisions in its own DCOs). It should be noted that Highways England is only objecting to these provisions where the issue relates to highway safety. Highways England is a responsible public body and competent highway authority with vast experience. Our supply chain is set up via very strict tender requirements to produce 100% compliant design work with safety as the number one imperative. As such the safety concerns that are identified in respect of this application will not apply to those Highways England DCOs that the Applicant seeks to use as a comparator. The relevant statutory bodies in those cases had the opportunity to consider the deemed approval provisions requested and any implications of the same and concluded them to be acceptable on the basis of the case presented by Highways England. In respect of this application Highways England has considered the deemed approval provisions requested by the Applicant and any implications of the same and concluded which are acceptable and which are not.

ISH5: Agenda item 8b - Control of lorry movements out of the main site.

Highways England has no material interest in the proposed right turn ban for HGVs. This proposal has been developed to satisfy the concerns of the County Council regarding the impact of the extra HGVs on the A508. This is not a trunk road. The proposal will result in all HGVs leaving the site travelling to junction 15 of the M1 motorway but this has been assessed and Highways England is satisfied that the traffic can be accommodated.

ISH5: Agenda item 9 - Regulation 123 of the CIL Regulations 2010.

Highways England agrees with the response given by the Applicant in respect of Regulation 123 and its applicability to the application. It is our view that Regulation 123 and the pooling restrictions set out therein do not apply to consents granted pursuant to the 2008 Act given the definition of “*determination*” in Regulation 123 (4).

ISH5: Agenda item 11c - M1 Slip Road.

Highways England agrees with the position put forward by the Applicant in answer to the ExA’s questions in this regard. It is necessary for the special road to stop slightly short of the enlarged dumbbell roundabout in order to provide a pedestrian and cycle crossing (which could not be provided should motorway regulations apply).

Further, given that the M1 southbound diverge slip road is on a wholly new alignment the existing slip road is to be stopped up. In the case of the other areas of the junction the change in the alignment is less significant and the highway in these areas is to be

widened. Therefore it would not be appropriate to stop up any existing areas of highway in this regard.

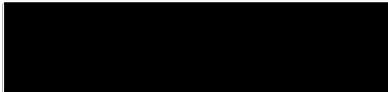
ISH5: Action point 4 – Tilbury 2

The Applicant for Tilbury 2 accepted Highways England’s safety concerns in respect of deemed approval. It therefore agreed not to include such within the Highways England Protective Provisions. Contrast this with the other Protective Provisions included within Schedule 10 of that order which do include deemed approval; e.g. Thurrock Council and Network Rail (although note, 56 day period for Network Rail).

ISH5: Action point 5 – Article 45(3)

Highways England is satisfied that Article 45(3) does not apply to the Protective Provisions and therefore the concerns raised in this regard at ISH5 are withdrawn.

Yours faithfully



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Your Ref:

Our Ref: EN010071

Date: 26 January 2017

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Dear Sir/Madam

**Planning Act 2008 (as amended) and the Infrastructure Planning  
(Examination Procedure) Rules 2010 (as amended) –**

**Application by the North London Waste Authority (“the Applicant”) for an  
Order Granting Development Consent for the North London Heat and Power  
Project**

**REQUEST FOR COMMENTS FROM THE APPLICANT, NATIONAL GRID, THE  
LONDON BOROUGH OF ENFIELD AND TRANSPORT FOR LONDON ON THE  
APPLICATION FOR THE PROPOSED NORTH LONDON HEAT AND POWER  
PROJECT- EN010071**

Following the completion of the examination on 24 August 2016, the Examining Authority submitted a Report and Recommendation in respect of its findings and conclusions on the above application to the Secretary of State for Business, Energy and Industrial Strategy (“the Secretary of State”) on 24 November 2016. In accordance with section 107 of the Planning Act 2008, the Secretary of State has three months to determine the application.

On 13 December 2016, the Secretary of State invited comments from the Applicant, National Grid and any landowners affected by compulsory acquisition on issues relating to the application. The responses can be viewed at:

<https://infrastructure.planninginspectorate.gov.uk/projects/london/north-london-heat-and-power-project/?ipcsection=docs>

There are several issues on which the Secretary of State should be grateful if parties identified in bold below could provide an update or further clarification.

**Time Limit for Exercise of Authority to Acquire Land Compulsorily**

Having considered the responses from the Applicant, Transport for London and the

evidence submitted by the Applicant in the application and during the examination, the Secretary of State is minded to allow the undertaker a period of 5 years to exercise its compulsory acquisition powers, rather than the 7 years requested by the Applicant. The Secretary of State notes the reasons put forward by the Applicant but does not consider that the Applicant has demonstrated that having 5 years for the exercise of compulsory acquisition powers would prevent a phased approach or necessitate the acquisition of all rights immediately following commencement. The Applicant is therefore asked to provide any additional information to demonstrate why a 5 year period would prevent a phased approach to construction or necessitate the acquisition of all rights immediately following the commencement of the Development.

### **Plot 21 – New Footpath**

The Secretary of State has considered the responses from the Applicant and the National Grid on whether a further power should be included within the proposed Order to allow for the new footpath to be temporarily stopped up or diverted. In light of these responses, the Secretary of State is minded to insert such a power into Article 12 (Public rights of way). However, he considers it appropriate that the precise details of any future stopping up or diversion of the footpath should be subject to control by the relevant public authorities rather than being agreed solely between the Applicant and National Grid, as was proposed by the Applicant. He therefore proposes to include this in the form below and invites comments from **National Grid**, the **London Borough of Enfield** and **Transport for London** and the **Applicant** on the adequacy of these powers.

*"(6) Subject to paragraph 12(7), the undertaker may at any time during the construction and maintenance of the authorised development, temporarily suspend any public right of way over the proposed footpath labelled RW08 on plan C\_0014 Rev 00 for a reasonable period of time if necessary in connection with works by National Grid Electricity Transmission Plc authorised by The National Grid (North London Reinforcement Project) Order 2014.*

*(7) The public right of way specified in paragraph 12(6) must not be suspended under this article unless the physical extent and duration of the temporary suspension and the provision of an alternative right of way has been agreed between the undertaker and National Grid Electricity Transmission PLC, and approved by the relevant planning authority which may attach reasonable conditions to any approval (such approval to be obtained in accordance with the provisions of Schedule 3 (procedure for approvals, consents and appeals))."*

### **Protective Provisions – National Grid**

The Secretary of State has considered the comments received from the Applicant and National Grid on the protective provisions attached to the consultation letter of 13 December 2016. The Secretary of State has made amendments to the protective provisions attached to this letter at Annex 1 to reflect these comments where considered appropriate. A summary of the reasoning for these amendments to the protective provisions is also attached to this letter at Annex 2. The Secretary of State invites comments from **National Grid** and the **Applicant** on the adequacy of these protective provisions.

### **The deadline for any response is 3 February 2017.**

Responses to the points outlined in this letter should be submitted by email to [NLHPP@pins.gsi.gov.uk](mailto:NLHPP@pins.gsi.gov.uk). Please send any hard copy response to North London Heat

and Power Project Team, Secretary of State for Business, Energy and Industrial Strategy c/o the Planning Inspectorate, Eagle Wing 3/18, Temple Quay House, Temple Quay, Bristol, BS1 6PN. If you will have difficulty in submitting a response by the consultation deadline, please inform the Project Team.

Your response will be published on the North London Heat and Power project page of the Planning Portal website as soon as possible after 3 February 2017.

This letter is without prejudice to the Secretary of State's decision whether or not to grant development consent for the North London Heat and Power Project, and nothing in this letter is to be taken to imply what that decision might be.

Yours faithfully

***Giles Scott***

Giles Scott  
Head of Energy Infrastructure Planning and Coal Liabilities

**SCHEDULE 13**  
**PROTECTIVE PROVISIONS**

**PART 5**

Protection of National Grid as Electricity and Gas Undertaker

**Application**

1. For the protection of the statutory undertaker referred to in this Part of this Schedule the following provisions will, unless otherwise agreed in writing between the undertaker and the statutory undertaker, have effect.

**Interpretation**

2. In this Part of this Schedule—

“1991 Act” means the New Roads and Street Works Act 1991;

“alternative apparatus” means appropriate alternative apparatus to the satisfaction of the statutory undertaker to enable the statutory undertaker to fulfil its statutory functions in a manner no less efficient than previously;

“apparatus” means—

(a) in the case of an electricity undertaker, electric lines or electrical plant as defined in the Electricity Act 1989, belonging to or maintained by the statutory undertaker for the purposes of electricity supply, transmission or distribution and any of its entities;

(b) in the case of a gas undertaker, any mains, pipes or other apparatus belonging to or maintained by the statutory undertaker for the purposes of gas supply and any of its entities;

together with any replacement apparatus and such other apparatus constructed pursuant to the Order that becomes operational apparatus of the statutory undertaker or any of its entities for the purposes of transmission, distribution and supply and includes any structure in which apparatus is or will be lodged or which gives or will give access to apparatus;

“authorised works” has the same meaning as is given to the term “authorised development” in article 2 of this Order and for the purposes of this Part of this Schedule includes the use and maintenance of the authorised works;

“commence” has the same meaning as in article 2 of this Order and commencement shall be construed to have the same meaning;

“functions” includes powers and duties;

“ground mitigation scheme” means a scheme approved by the statutory undertaker (such approval not to be unreasonably withheld or delayed) setting out the necessary measures (if any) for a ground subsidence event;

“ground monitoring scheme” means a scheme for monitoring ground subsidence which sets out the apparatus which is to be subject to such monitoring, the extent of land to be monitored, the manner in which ground levels are to be monitored, the timescales of any monitoring activities and the extent of ground subsidence which, if exceeded, shall require the undertaker to submit for the statutory undertaker’s approval a ground mitigation scheme;

“ground subsidence event” means any ground subsidence identified by the monitoring activities set out in the ground monitoring scheme that has exceeded the level described in the ground monitoring scheme as requiring a ground mitigation scheme;

“in” in a context referring to apparatus or alternative apparatus in land includes a reference to apparatus or alternative apparatus under, over, across, along or upon such land;

“maintain” and “maintenance” shall include the ability and right to do any of the following in relation to any apparatus or alternative apparatus of the statutory undertaker including construct, use, repair, alter, inspect, renew or remove the apparatus

“plan” or “plans” include all designs, drawings, specifications, method statements, soil reports, programmes, calculations, risk assessments and other documents that are reasonably necessary properly and sufficiently to describe and assess the works to be executed;

“undertaker” means the undertaker as defined in article 2 of this Order;

“statutory undertaker” means, as appropriate—

- (a) National Grid Electricity Transmission Plc as an electricity undertaker being a licence holder within the meaning of Part 1 of the Electricity Act 1989; and
- (b) National Grid Gas Distribution Limited as a gas transporter within the meaning of Part 1 of the Gas Act 1986.

“specified works” means any of the authorised works or activities undertaken in association with the authorised works which:

- (a) will or may be situated over, or within 15 metres measured in any direction of any apparatus, the removal of which has not been required by the undertaker under paragraph 7(2) or otherwise;
- (b) may in any way adversely affect any apparatus the removal of which has not been required by the undertaker under paragraph 7(2) or otherwise; and
- (c) include any of the activities that are referred to in paragraph 8 of T/SP/SSW/22;

**3.** Except for paragraphs 4 (apparatus of statutory undertakers), 9 (retained apparatus: protection gas undertakers), 10 (retained apparatus: protection: electricity undertakers), 11 (expenses) and 12 (indemnity) of this Part of this Schedule which will apply in respect of the exercise of all or any powers under the Order affecting the rights and apparatus of the statutory undertaker, the other provisions of this Part of this Schedule do not apply to apparatus in respect of which the relations between the undertaker and the statutory undertaker are regulated by the provisions of Part 3 of the 1991 Act.

### **Apparatus of Statutory Undertakers**

**4.—(1)** Subject to paragraph 4(2), if as a consequence of the exercise of the powers of this Order access to the apparatus is to be materially obstructed, the undertaker must first give the statutory undertaker 14 days written notice of its intention, and provide such reasonable alternative means of access to such apparatus as will enable the statutory undertaker to operate, maintain, repair or replace, or use the apparatus.

(2) In the event of an emergency, the statutory undertaker will be at liberty to access and execute and do all such works and things in, upon or under the Order land if it reasonably considers that immediate measures must be taken. In such circumstances, the statutory undertaker must notify the undertaker as soon as reasonably practicable of such emergency measures and must provide details of the emergency measures and any alternative means of access to the relevant part of the Order land so far as is reasonably safe and practicable.

### **Protective works to Buildings**

**5.—(1)** In relation to plot 4 the undertaker, in exercising the powers conferred by article **Error! Reference source not found.** (protective work to buildings), must exercise those powers so as not to obstruct the access to any apparatus without the written consent of the statutory undertaker and, if by reason of the exercise of those powers any damage to any apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal or abandonment) or property of the statutory undertaker or any interruption in the supply of electricity and gas, as the case may be, by the

statutory undertaker is caused, the undertaker must bear and pay on demand the cost reasonably incurred by the statutory undertaker in making good such damage or restoring the supply; and, subject to paragraph 5(2), shall—

- (a) pay compensation to the statutory undertaker for any loss sustained by it; and
- (b) indemnify the statutory undertaker against all claims, demands, proceedings, costs, damages and expenses which may be made or taken against or recovered from or incurred by that statutory undertaker, by reason of any such damage or interruption.

(2) Nothing in this paragraph imposes any liability on the undertaker with respect to any damage or interruption to the extent that such damage or interruption is attributable to the act, neglect or default of a statutory undertaker or its contractors or workmen; and the statutory undertaker will give to the undertaker reasonable notice of any claim or demand as aforesaid and no settlement or compromise thereof shall be made by the statutory undertaker, save in respect of any payment required under a statutory compensation scheme, without first consulting the undertaker and giving the undertaker an opportunity to make representations as to the claim or demand.

### **Acquisition of land**

6.—(1) Regardless of any provision in this Order or anything shown on the land plans or contained in the book of reference to the Order, the undertaker may not exercise any power to acquire any land interest or apparatus or override any easement and/or other interest of the statutory undertaker otherwise than by agreement (such agreement not to be unreasonably withheld or delayed).

(2) As a condition of agreement between the parties in paragraph 6(1), prior to the carrying out of any part of the authorised works (or in such other timeframe as may be agreed between the statutory undertaker and the undertaker) that are subject to the requirements of this Part of this Schedule that will cause any conflict with or breach the terms of any easement and/or other legal or land interest of the statutory undertaker and/or affects the provisions of any enactment or agreement regulating the relations between the statutory undertaker and the undertaker in respect of any apparatus laid or erected in land belonging to or secured by the undertaker, the undertaker must as the statutory undertaker reasonably requires enter into such deeds of consent upon such terms and conditions as may be agreed between the statutory undertaker and the undertaker acting reasonably and which must be no less favourable on the whole to the statutory undertaker unless otherwise agreed by the statutory undertaker, and it will be the responsibility of the undertaker to procure and/or secure the consent and entering into of such deeds and variations by all other third parties with an interest in the land at that time who are affected by such authorised works.

(3) The undertaker and the statutory undertaker agree that where there is any inconsistency or duplication between the provisions set out in this Part of this Schedule relating to the relocation and/or removal of apparatus/including but not limited to the payment of costs and expenses relating to such relocation and/or removal of apparatus) and the provisions of any existing easement, rights, agreements and licences granted, used, enjoyed or exercised by the statutory undertaker and/or other enactments relied upon by the statutory undertaker as of right or other use in relation to the apparatus, then the provisions in this Schedule shall prevail.

(4) Any agreement or consent granted by the statutory undertaker under paragraph 9 or 10 or any other paragraph of this part of this Schedule, shall not be taken to constitute agreement under sub-paragraph 6(1).

### **Removal of apparatus**

7.—(1) If the undertaker acquires any interest in any land in which any apparatus is placed, that apparatus must not be removed under this part of this Schedule and any right of a statutory undertaker to maintain that apparatus in that land must not be extinguished until alternative apparatus has been constructed, and is in operation to the reasonable satisfaction of the statutory undertaker or the statutory undertaker has confirmed that no alternative apparatus is required.

(2) If, for the purpose of executing any works in, on, under or over any land purchased, held, appropriated or used under this Order, the undertaker requires the removal of any apparatus placed in that land, it must give to the statutory undertaker 56 days' advance written notice of that requirement, together with a plan of the work proposed.

## **Facilities and rights for alternative apparatus**

8.—(1) Where, in accordance with the provisions of this Part of this Schedule, the undertaker affords to or secures for the statutory undertaker facilities and rights in land for the construction, use, maintenance and protection of alternative apparatus in substitution for apparatus to be removed, those facilities and rights must be granted upon such terms and conditions as may be agreed between the statutory undertaker and the undertaker and must be no less favourable on the whole to the statutory undertaker than the facilities and rights enjoyed by it in respect of the apparatus to be removed unless otherwise agreed by the statutory undertaker.

(2) If the facilities and rights to be afforded by the undertaker and agreed with the statutory undertaker under paragraph 8(1) above in respect of any alternative apparatus, and the terms and conditions subject to which those facilities and rights are to be granted, are less favourable on the whole to the statutory undertaker than the facilities and rights enjoyed by it in respect of the apparatus to be removed and the terms and conditions to which those facilities and rights are subject in the matter will be referred to arbitration in accordance with paragraph 16 (arbitration) of this Part of this Schedule and, the arbitrator shall make such provision for the payment of compensation by the undertaker to the statutory undertaker as appears to the arbitrator to be reasonable having regard to all the circumstances of the particular case.

## **Retained apparatus: protection Gas Undertakers**

9.—(1) Not less than 56 days before the commencement of any specified works, the undertaker must submit to the statutory undertaker a plan of the works to be carried out and, if reasonably required by the statutory undertaker, a ground monitoring scheme in respect of those works.

(2) The plan to be submitted to the statutory undertaker under paragraph 9(1) must include a method statement and describe—

- (a) the exact position of the works;
- (b) the level at which these are proposed to be constructed or renewed;
- (c) the manner of their construction or renewal including details of excavation, positioning of plant etc.;
- (d) the position of all apparatus;
- (e) by way of detailed drawings, every alteration proposed to be made to or close to any such apparatus; and
- (f) any intended maintenance regimes.

(3) The undertaker must not commence any works to which paragraphs 9(1) and 9(2) apply until the statutory undertaker has given written approval of the plan so submitted.

(4) Any approval of the statutory undertaker required under paragraph 9(2)—

- (a) may be given subject to reasonable conditions for any purpose mentioned in paragraph 9(5) or 9(7); and,
- (b) must not be unreasonably withheld or delayed.

(5) In relation to any work to which paragraphs 9(1) and 9(2) apply, the statutory undertaker may require such modifications to be made to the plans as may be reasonably necessary for the purpose of securing its apparatus against interference or risk of damage or for the purpose of providing or securing proper and necessary means of access to any apparatus.

(6) Works to which this paragraph applies must only be executed in accordance with the plan, submitted under paragraph 9(1) or as relevant paragraph 9(4), as approved or as amended from time to time by agreement between the undertaker and the statutory undertaker and in accordance with such reasonable requirements as may be made in accordance with paragraphs 9(5) or 9(7) by the statutory undertaker for the alteration or otherwise for the protection of the apparatus, or for securing access to it, and the statutory undertaker will be entitled to watch and inspect the execution of those works.

(7) Where the statutory undertaker requires any protective works to be carried out by itself or by the undertaker (whether of a temporary or permanent nature) such protective works, inclusive of any measures or schemes required and approved as part of the plan approved pursuant to this paragraph, must be carried out to the statutory undertakers' satisfaction (the statutory undertaker's confirmation of whether it is

satisfied or not is not to be unreasonably withheld or delayed) prior to the commencement of any authorised works (or any relevant part thereof) for which protective works are required and the statutory undertaker must give 56 days' notice of such works from the date of submission of a plan pursuant to this paragraph (except in an emergency).

(8) If the statutory undertaker in accordance with paragraphs 9(5) or 9(7) and in consequence of the works proposed by the undertaker, reasonably requires the removal of any apparatus and gives written notice to the undertaker of that requirement, paragraphs 1 to 3 and 7 and 8 apply as if the removal of the apparatus had been required by the undertaker under paragraph 7(2).

(9) Nothing in this paragraph precludes the undertaker from submitting at any time or from time to time, but in no case less than 56 days before commencing the execution of the authorised works, a new plan, instead of the plan previously submitted, and having done so the provisions of this paragraph will apply to and in respect of the new plan.

(10) The undertaker will not be required to comply with paragraph 9(1) where it needs to carry out emergency works as defined in the 1991 Act but in that case it must give to the statutory undertaker notice as soon as is reasonably practicable and a plan of those works and must—

- (a) comply with paragraphs 9(5), 9(6) or 9(7) insofar as is reasonably practicable in the circumstances; and
- (b) comply with paragraph 9(11) at all times.

(11) At all times when carrying out any works authorised under the Order the undertaker must comply with the statutory undertaker's policies for safe working in proximity to gas apparatus "Specification for safe working in the vicinity of National Grid, High pressure Gas pipelines and associated installation requirements for third parties T/SP/SSW22" and HSE's "HS(-G)47 Avoiding Danger from underground services".

(12) As soon as reasonably practicable after any ground subsidence event attributable to the authorised development the undertaker shall implement an appropriate ground mitigation scheme save that the statutory undertaker retains the right to carry out any further necessary protective works for the safeguarding of its apparatus and can recover any such costs in line with paragraph 12 (indemnity).

### **Retained apparatus: Protection: Electricity Undertakers**

**10.—**(1) Not less than 56 days before the commencement of any specified works, the undertaker must submit to the statutory undertaker a plan of the works to be carried out and seek from the statutory undertaker details of the underground extent of their electricity tower foundations. The statutory undertaker must not unreasonably withhold or delay its provision of those details.

(2) The plan to be submitted to the statutory undertaker under paragraph 10(1) must include a method statement and describe—

- (a) the exact position of the works;
- (b) the level at which these are proposed to be constructed or renewed;
- (c) the manner of their construction or renewal including details of excavation, positioning of plant;
- (d) the position of all apparatus;
- (e) by way of detailed drawings, every alteration proposed to be made to or close to any such apparatus;
- (f) any intended maintenance regimes; and
- (g) an assessment of risks of rise of earth issues.

(3) In relation to any works which will or may be situated on, over, under or within 10 metres of any part of the foundations of an electricity tower or between any two or more electricity towers, the plan to be submitted under paragraph 10(1) must, in addition to the matters set out in paragraph 10(2), include a method statement describing—

- (a) details of any cable trench design including route, dimensions, clearance to pylon foundations;
- (b) demonstration that pylon foundations will not be affected prior to, during and post construction;
- (c) details of load bearing capacities of trenches;

- (d) details of cable installation methodology including access arrangements, jointing bays and backfill methodology;
- (e) a written management plan for high voltage hazard during construction and ongoing maintenance of the cable route;
- (f) written details of the operations and maintenance regime for the cable, including frequency and method of access;
- (g) assessment of earth rise potential if reasonably required by the statutory undertaker's engineers; and
- (h) evidence that trench bearing capacity is to be designed to 26 tonnes to take the weight of overhead line construction traffic.

(4) The undertaker must not commence any works to which paragraphs 10(2) or 10(3) apply until the statutory undertaker has given written approval of the plan so submitted.

(5) Any approval of the statutory undertaker required under paragraphs 10(2) or 10(3)—

- (a) may be given subject to reasonable conditions for any purpose mentioned in paragraphs 10(6) or 10(8); and,
- (b) must not be unreasonably withheld or delayed.

(6) In relation to any work to which paragraphs 10(2) or 10(3) apply, the statutory undertaker may require such modifications to be made to the plans as may be reasonably necessary for the purpose of securing its apparatus against interference or risk of damage or for the purpose of providing or securing proper and necessary means of access to any apparatus.

(7) Works to which this paragraph applies must only be carried out in accordance with the plan, submitted under paragraph 10(1) or as relevant paragraph 10(5), as approved or as amended from time to time by agreement between the undertaker and the statutory undertaker and in accordance with such reasonable requirements as may be made in accordance with paragraphs 10(6) or 10(8) by the statutory undertaker for the alteration or otherwise for the protection of the apparatus, or for securing access to it, and the statutory undertaker will be entitled to watch and inspect the execution of those works.

(8) Where the statutory undertaker requires any protective works to be carried out by itself or by the undertaker (whether of a temporary or permanent nature) such protective works, inclusive of any measures or schemes required and approved as part of the plan approved pursuant to this paragraph, must be carried out to the statutory undertakers' satisfaction (the statutory undertaker's confirmation of whether it is satisfied or not is not to be unreasonably withheld or delayed) prior to the commencement of any authorised works (or any relevant part thereof) for which protective works are required and the statutory undertaker shall give 56 days' notice of such works from the date of submission of a plan pursuant to this paragraph (except in an emergency).

(9) If the statutory undertaker in accordance with paragraphs 10(6) or 10(8) and in consequence of the works proposed by the undertaker, reasonably requires the removal of any apparatus and gives written notice to the undertaker of that requirement, paragraphs 1 to 3 and 7 to 9 apply as if the removal of the apparatus had been required by the undertaker under paragraph 7(2).

(10) Nothing in this paragraph precludes the undertaker from submitting at any time or from time to time, but in no case less than 56 days before commencing the execution of the authorised works, a new plan, instead of the plan previously submitted, and having done so the provisions of this paragraph shall apply to and in respect of the new plan.

(11) The undertaker will not be required to comply with paragraph 10(1) where it needs to carry out emergency works as defined in the 1991 Act but in that case it must give to the statutory undertaker notice as soon as is reasonably practicable and a plan of those works and must—

- (a) comply with paragraphs 10(6), 10(7) and 10(8) insofar as is reasonably practicable in the circumstances; and
- (b) comply with paragraph 10(12) at all times.

(12) At all times when carrying out any works authorised under the Order, the undertaker must comply with the statutory undertaker's policies for development near overhead lines EN43-8 and HSE's guidance note 6 "Avoidance of Danger from Overhead Lines".

## Expenses

**11.**—(1) Subject to the following provisions of this paragraph, the undertaker must pay to the statutory undertaker on demand all charges, costs and expenses reasonably anticipated or reasonably and properly incurred by the statutory undertaker in, or in connection with, the inspection, removal, relaying or replacing, alteration or protection of any apparatus or the construction of any new or alternative apparatus which may be required in consequence of the carrying out of any authorised works as are referred to in this Part of this Schedule including without limitation—

- (a) in connection with the cost of the carrying out of any diversion work; and
- (b) the cutting off of any apparatus from any other apparatus or the making safe of redundant apparatus; and
- (c) the carrying out of protective works;
- (d) the survey of any land, apparatus or works, the inspection and monitoring of works or the installation or removal of any temporary works reasonably necessary in consequence of the execution of any such works referred to in this Part of this Schedule; and
- (e) the approval of plans.

(2) There will be deducted from any sum payable under paragraph 11(1) the value of any apparatus removed under the provisions of this Part of this Schedule, that value being calculated after removal.

(3) If in accordance with the provisions of this Part of this Schedule—

- (a) apparatus of better type, of greater capacity or of greater dimensions is placed in substitution for existing apparatus of worse type, of smaller capacity or of smaller dimensions; or
- (b) apparatus (whether existing apparatus or apparatus substituted for existing apparatus) is placed at a depth greater than the depth at which the existing apparatus was situated and the placing of apparatus of that type or capacity or of those dimensions or the placing of apparatus at that depth, as the case may be, is not agreed by the undertaker or, in default of agreement, is not determined by arbitration in accordance with article 35 (arbitration) to be necessary, then, if such placing involves cost in the construction of works under this Part of this Schedule exceeding that which would have been involved if the apparatus placed had been of the existing type, capacity or dimensions, or at the existing depth, as the case may be, the amount which apart from this sub-paragraph would be payable to the statutory undertaker by virtue of paragraph 11(1) will be reduced by the amount of that excess save where it is not possible in the circumstances to obtain the existing type of apparatus at the same capacity and dimensions or place at the existing depth in which case full costs will be borne by the undertaker.

(4) For the purposes of sub-paragraph (3)—

- (a) an extension of apparatus to a length greater than the length of existing apparatus will not be treated as a placing of apparatus of greater dimensions than those of the existing apparatus; and
- (b) where the provision of a joint in a pipe or cable is agreed, or is determined to be necessary, the consequential provision of a jointing chamber or of a manhole will be treated as if it also had been agreed or had been so determined.

(5) An amount which apart from this sub-paragraph would be payable to a statutory undertaker in respect of works by virtue of sub-paragraph (1) must, if the works include the placing of apparatus provided in substitution for apparatus placed more than 7 years and 6 months earlier so as to confer on the statutory undertaker any financial benefit by deferment of the time for renewal of the apparatus in the ordinary course, be reduced by the amount which represents that benefit.

## Indemnity

**12.**—(1) Subject to paragraphs 12(2) and 12(3), if by reason or in consequence of the construction of any such works authorised by this Part of this Schedule or in consequence of the construction, use, maintenance or failure of any of the authorised development by or on behalf of the undertaker or in consequence of any act or default of the undertaker (or any person employed or authorised by him) in the course of carrying out such works, including without limitation works carried out by the undertaker under this Part of this Schedule or any subsidence resulting from any of these works, any damage is caused to

any apparatus or alternative apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal for the purposes of those works) or property of the statutory undertaker, or there is any interruption in any service provided, or in the supply of any goods, by the statutory undertaker, or the statutory undertaker becomes liable to pay any amount to any third party, the undertaker will—

- (a) bear and pay on demand the cost reasonably and properly incurred by the statutory undertaker in making good such damage or restoring the supply; and
- (b) indemnify the statutory undertaker for any other proper and reasonable expenses, loss, demands, proceedings, damages, claims, penalty or costs incurred by or recovered from the statutory undertaker, by reason or in consequence of any such damage or interruption or the statutory undertaker becoming liable to any third party as aforesaid other than arising from any default of the statutory undertaker.

(2) The fact that any act or thing may have been done by the statutory undertaker with the agreement of and on behalf of the undertaker or in accordance with a plan submitted by the undertaker and approved by the statutory undertaker or in accordance with any requirement of the statutory undertaker or under its supervision will not (unless paragraph 12(3) applies), excuse the undertaker from liability under the provisions of paragraph 12(1) unless the statutory undertaker fails to carry out and execute the works properly with due care and attention and in a skilful and workman like manner or in a manner that does not accord with the approved plan.

(3) Nothing in paragraph 12(1) shall impose any liability on the undertaker in respect of—

- (a) any damage or interruption to the extent that it is attributable to the neglect or default of the statutory undertaker, its officers, servants, contractors or agents; and
- (b) any authorised works and/or any other works authorised by this Part of this Schedule carried out by the statutory undertaker as an assignee, transferee or lessee of the undertaker with the benefit of the Order pursuant to section 156 of the Planning Act 2008 or article **Error! Reference source not found.** (consent to transfer benefit of order) subject to the proviso that once such works become apparatus (“new apparatus”), any authorised works yet to be executed and not falling within this paragraph 12(3)(b) will be subject to the full terms of this Part of this Schedule including this paragraph 12.

(4) The statutory undertaker must give the undertaker reasonable written notice of any such third party claim or demand and no settlement or compromise must, unless payment is required in connection with a statutory compensation scheme, be made without first consulting the undertaker and taking into account undertaker’s representations.

### **Enactments and agreements**

**13.** Save to the extent provided for to the contrary elsewhere in this Part of this Schedule or by agreement in writing between the statutory undertaker and the undertaker, nothing in this Part of this Schedule shall affect the provisions of any enactment or agreement regulating the relations between the undertaker and the statutory undertaker in respect of any apparatus laid or erected in land belonging to the undertaker on the date on which this Order is made.

### **Co-operation**

**14.—**(1) Where in consequence of the proposed construction of any of the authorised development, the undertaker or the statutory undertaker requires the removal of apparatus under paragraph 7(2) or the statutory undertaker makes requirements for the protection or alteration of apparatus under paragraphs 9 or 10 the undertaker shall use its best endeavours to co-ordinate the execution of the works in the interests of safety and the efficient and economic execution of the authorised development and taking into account the need to ensure the safe and efficient operation of the statutory undertaker’s undertaking and the statutory undertaker shall use its best endeavours to co-operate with the undertaker for that purpose.

(2) For the avoidance of doubt whenever the statutory undertaker’s consent, agreement or approval to is required in relation to plans, documents or other information submitted by the undertaker or the taking of action by the statutory undertaker, it must not be unreasonably withheld or delayed.

## **Access**

**15.** If in consequence of the powers granted under this Order the access to any apparatus is materially obstructed, the undertaker must provide such alternative means of access to such apparatus as will enable the statutory undertaker to maintain or use the apparatus no less effectively than was possible before such obstruction.

## **Arbitration**

**16.** Any difference or dispute arising between the undertaker and the statutory undertaker under this Part of this Schedule must, unless otherwise agreed in writing between the undertaker and the statutory undertaker, be determined by arbitration in accordance with article 35 (arbitration).

## **Approval Process**

**17.** When submitting the plans to the statutory undertaker for approval under paragraph 8 or paragraph 9 the undertaker must send the plans to the statutory undertaker in hard copy by recorded post and by email to such address as the statutory undertaker may notify the undertaker in writing from time to time and clearly bearing the name of the project and contact details for responses, unless otherwise agreed with the statutory undertaker.

The Secretary of State has made amendments to the protective provisions attached to the consultation letter to reflect comments received from National Grid and the Applicant where considered appropriate.

In particular, the Secretary of State notes the following (references are to the numbering in the attached protective provisions):

- As a general point, paragraph 1 of the protective provisions provides that they have effect unless otherwise agreed in writing between the Applicant and National Grid.
- The Applicant's request that the following additional wording be included in paragraphs 9(3) and 10(4) "such approval not to be unreasonably withheld". However, the Secretary of State considers this is already covered in paragraphs 9(4)(b) and 10(5)(b) which state that an approval of the statutory undertaker "must not be unreasonably withheld or delayed".
- National Grid's comments as to why deemed consent or approval has the potential to undermine safe working and has removed any deemed approval from the protective provisions in the attached. The Secretary of State considers that the requirement that an approval of the statutory undertaker "must not be unreasonably withheld or delayed" is appropriate to ensure that the Applicant receives a timely response from National Grid.
- National Grid's reasoning for the deletion of the requirement in paragraphs 9(7), 10(1) and 10(4) for it to provide a response within 14 days. The Secretary of State has amended these provisions in the attached to require instead that National Grid's responses "must not be unreasonably withheld or delayed".
- The Applicant's comments on the inclusion of "the approval of plans" in paragraph 11 (expenses). The Secretary of State considers that the Applicant will not be required to pay expenses for the approval of plans in accordance with this provision unless the statutory undertaker in fact incurs expenses for approving plans. Given this, the Secretary of State considers that the inclusion of "the approval of plans" is appropriate.
- The Applicant's comments on paragraphs 11(3)(a), 11(3)(b) and 11(5). The Secretary of State considers that it is appropriate to include these provisions as they are intended to provide protection to the statutory undertaker if such proposals materialise.
- National Grid's request to amend paragraph 16 (arbitration) to exclude its application to certain provisions. The Secretary of State notes that

paragraph 16 provides that it applies “unless otherwise agreed in writing between the undertaker and the statutory undertaker” and considers that it is not appropriate to otherwise exclude its application to certain provisions. The Secretary of State considers that the relevant regulatory requirements could be taken into account in arbitration.

- National Grid’s comments on paragraph 17 (approval process). The Secretary of State considers that the inclusion of paragraph 17 is appropriate to provide for the means of sending plans to the statutory undertaker. The Secretary of State has removed the reference to response periods from paragraph 17 given the removal of deemed approval and other response periods referred to above.
- National Grid’s request to include an additional paragraph titled “Acquisition of land”. The Secretary of State notes that the Examining Authority raised a specific question on this during the Examination. The Secretary of State notes National Grid’s comments that all DCOs that affect its interests require the exercise of compulsory acquisition powers to be subject to its approval in order to ensure it does not incur serious detriment. The Secretary of State also notes National Grid’s response that paragraph 6 does not emasculate the general application of compulsory acquisition powers and that instead paragraph 6 manages the engagement of the parties to ensure the protection of its interests in land and assets and safe working. Having considered National Grid’s response, the Secretary of State considers it appropriate to include paragraph 6 subject to the minor amendments in the attached. In particular, the Secretary of State considers that it is appropriate to amend paragraph 6 to provide that National Grid’s agreement to the exercise of the powers is not to be unreasonably withheld or delayed.