

Application by Esso Petroleum Company Limited for an Order granting Development Consent for the Southampton to London Pipeline Project

Written Representation submitted on behalf of Network Rail Infrastructure Limited

Planning Inspectorate Reference No: EN070005

Reference No: 20022766

1 Introduction

- 1.1 This written representation (**Written Representation**) is submitted on behalf of Network Rail Infrastructure Limited (**Network Rail**) in response to the application by Esso Petroleum Company Limited (**Applicant**) for the Southampton to London Pipeline Project Development Consent Order (**DCO**). The Applicant seeks development consent for the authorised development described in Schedule 1 to the DCO (**Proposed Development**).
- 1.2 The Proposed Development will comprise significant engineering works to operational railway land and land adjacent to and crossing under operational railway, which is owned, operated and maintained by Network Rail pursuant to its network licence granted under section 8 of the Railways Act 1993 (as amended) (**Network Licence**).
- 1.3 The Applicant is seeking to compulsorily acquire and seek permanent and temporary rights over land owned by Network Rail.
- 1.4 The proposed route of the Applicant's pipeline (**Pipeline route**) interacts with operational railway at 7 locations in 6 different railway lines, comprising: 6 'under-track crossings' (**UTCs**) and 1 level crossing.
- 1.5 The 6 railway lines affected comprise part of the Wessex route of railway lines and are used extensively by both passenger and freight services. To give the Examining Authority (**ExA**) an idea of the usage of these lines, the South west Main Line (one of the railway lines under which it is proposed that the Pipeline route will cross (is used by up to 42 passenger trains per hour during peak hours. It is imperative that the Proposed Development proceeds in consultation and agreement with Network Rail and with the appropriate protections in place, as set out in this Written Representation.
- 1.6 Network Rail submitted a section 56 representation [**RR-268**] on 26 July 2019.
- 1.7 Network Rail objects to temporary and permanent compulsory powers being granted or executed or the extinguishment of the rights held by Network Rail over operational railway land and third party land on which it relies for the carrying out of its statutory undertaking. However Network Rail is willing to enter into agreements with the Applicant to enable the Proposed Development to be carried out while safeguarding Network Rail's undertaking.
- 1.8 Network Rail also objects to the seeking of powers to carry out works under and/or to operational and non-operational railway land belonging to Network Rail without first securing appropriate protective provisions for Network Rail's statutory undertaking.
- 1.9 Whilst negotiations with the Applicant are in progress and Network Rail is hopeful that its concerns can be resolved during the course of the Examination, in the absence of an agreement that safeguards its interests, Network Rail requests that the ExA recommend that the attached Protective Provisions are included as Part 3 of Schedule 9 to the Order.
- 1.10 Network Rail has also been asked by the ExA to submit a Statement of Common Ground with the Applicant (**SoCG**). The SoCG is being submitted by the Applicant at this Deadline 2.

2 Network Rail's duties and the Clearance approval process

Network Rail's statutory duties

- 2.1 Network Rail owns, operate and maintains the railway infrastructure of Great Britain pursuant to the Network Licence. Network Rail must comply with regulatory consents or approvals

required under the Railways Act 1993 and the Network Licence, by either the Office of Rail and road or the Secretary of State for Transport.

- 2.2 Network Rail considers that there is no compelling case in the public interest for the compulsory acquisition of land and rights over its land as the Applicant and Network Rail should instead negotiate matters by private agreement to grant the Applicant the necessary rights.
- 2.3 Network Rail also considers that the Secretary of State, in applying section 127 of the Planning Act 2008, cannot conclude that new rights and restrictions over the railway land can be created without serious detriment to Network Rail's undertaking; and no other land is available to Network Rail which means that the detriment can be made good by them.

Network Rail Clearance required for the Proposed Development

- 2.4 Clearance is a two-stage process by which Network Rail's technical and asset protection engineers review a proposal before clearance can be granted for a proposal to proceed subject to engineering and other conditions.
- 2.5 On the basis of information supplied to Network Rail by the Applicant regarding the installation, operation and maintenance of the UTCs and other relevant Works, Network Rail is in the process of applying for Technical and Business Clearance. Please note that the Clearances being applied for are not based upon the scheme described by the Class Rights (identified in the Book of Reference as Class Rights 2 – 4) but are based on details supplied by the Applicant during the course of discussions.
- 2.6 Subject to the Proposed Development design submitted by the Applicant being acceptable to Network Rail's asset protection team and its engineers, Network Rail hopes to obtain Clearance for the UTCs and other relevant Works before the closure of the Examination.
- 2.7 Network Rail can confirm that Clearance has not yet been applied for in relation to all of the Works that affect Network Rail infrastructure. Network Rail has not received all of the necessary information from the Applicant. However, Network Rail understands that the Applicant will be submitting the necessary information soon and Network Rail will keep the ExA informed regarding the Clearance process at the relevant Examination deadlines.

3 DCO Powers sought by the Applicant and the impact for Network Rail

Powers sought by the Applicant in respect of railway property

- 3.1 Network Rail has freehold and other property interests in 59 plots of land (**Plots**) that are identified in the Book of Reference and the Land Plans submitted with the application for the DCO.
- 3.2 The Applicant is seeking DCO powers in relation to the Plots to carry out Work Nos. 1B, 1C, 1Ei, 1Eii, 1G and 1H (works to construct a high-pressure aviation fuel pipeline), Work Nos. 8CS, 8CT and 8CV (works to construct a temporary construction access) and for the purposes of environmental mitigation described in Schedule 1 to the DCO (**Works**).
- 3.3 In order to undertake the Works the Applicant is seeking:
 - (a) temporary possession for the purposes of carrying out the Proposed Development and for maintaining it, including the creation and maintenance of environmental mitigation (Plots 379, 380A, 380B, 380C, 380D, 382A, 382B, 383, 384, 390, 392, 394, 397, 398,

400, 401, 543, 544, 548, 549, 533, 554, 1068, 1155, 1232, 1237, 1262, 1267, 1272, 1277 and 1278); and

- (b) compulsory acquisition of interests and rights in the land and possibly also temporary possession for the purposes of carrying out the Proposed Development (including environmental mitigation) and for maintaining it (Plots 381A, 381B, 381C, 393, 399, 545, 550, 655, 1071, 1101, 1115, 1127, 1147, 1153, 1270, 1271, 1273, 1274, 1280, 1760, 2220, 2223, 2225, 2226 and 2232).

The 6 UTCs on the Pipeline route

- 3.4 The 6 UTCs to be constructed pursuant to **Work No. 1** on the Pipeline route are located on the following railway lines (numbered 1 - 6 below). For the purposes of illustrating the location of the UTCs we attach at **Appendix 3** a plan with corresponding UTC numbers 1-6 shown marked by hand. Please note that this plan has been produced by the Applicant and, save for the locations of UTC numbers 1-6 marked indicatively, the other information on the Plan has not been verified by Network Rail. The UTCs are as follows:

- 1 Alton Line between Alton and Bentley Stations (Plot 655);
- 2 South West Main Line between Farnborough Main and Fleet Stations (Plots 1071, 1101, 1115, 1127, 1147, 1113 and 1155);
- 3 North Down Line between Farnborough North and Blackwater Stations (Plot 1270);
- 4 Ascot to Guildford Line between Frimley and Ash Vale Stations (Plot 2180);
- 5 Chertsey Branch of the Waterloo to Reading Line between Chertsey and Addlestone Stations (Plot 1760); and
- 6 Waterloo to Reading Line between Ashford and Feltham Stations (Plots 2232, 2223, 2224, 2225 and 2226).

- 3.5 The Applicant and Network Rail are in discussions regarding the Works required to the UTCs. As referred to above, Network Rail notes that the design of the scheme being proposed by the Applicant differs from the Class Rights being sought by the Applicant (specified in the Book of Reference (Class Rights 2-4)).

- 3.6 Network Rail can confirm that the Class Rights set out in respect of the UTCs and identified in the Book of Reference are not considered to be acceptable by Network Rail (as we refer below). Network Rail is still considering the design of the UTCs and will revert with further information for the ExA at the appropriate Examination deadline. When the precise impact of the Works in respect of the railway lines listed above has been assessed, the proposed works will be subject to Network Rail Clearance, as we explain below.

The Level Crossing at Farnborough North and other level crossings

- 3.7 The Works require the temporary possession of the Farnborough North Railway Station Level Crossing (Plots 1232 and 1237) to construct a temporary construction access to the east side of Farnborough Street (**Work No. 8CS**). Network Rail and the Applicant are investigating the ownership of this Level Crossing and the impact on it of the Works. The Applicant must provide details of the type, size, timing and frequency of construction traffic that will use the level crossing, to enable a risk assessment to be undertaken.

- 3.8 Clearance has not yet been granted for this temporary construction access. Until such time as Clearance has been obtained, Network Rail is unable to confirm whether the proposed Works to the level crossing are acceptable.
- 3.9 As we refer below, Network Rail invites the ExA to request that the Applicant amend Requirement 7 of the DCO to require consultation with and the approval of Network Rail to the Construction Traffic Management Plan in respect of the Farnborough North Level Crossing and potentially other level crossings.
- 3.10 Network Rail and the Applicant are to assess other level crossings in the area of the Proposed Development to check whether there will be an impact on these during the construction phase of the Works. If any assessment or upgrade of a level crossing is required as a result of the Proposed Development the cost of such upgrade would have to be met by the Applicant. Further, if any level crossing is privately owned, the landowner's consent would need to be obtained before the Works could proceed.

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

- 3.11 As we refer above, Network Rail's asset protection team and its engineers are still considering the design of the UTCs as set out in the Book of Reference and, further to ongoing discussions between the Applicant and Network Rail's asset protection team, Network Rail will provide the ExA with further explanation of any matters on which they cannot agree during the course of the Examination.
- 3.12 Network Rail can, however, confirm:
- (a) The Pipeline Depth: Class 2 B Rights stipulate that the Pipeline will be installed at a depth of "not less than 1200mm" below the present surface of the land. Network Rail's asset protection team have confirmed that this depth is insufficient. Network Rail is considering the appropriate depth for the pipeline as it crosses under the different railway lines and will update the Applicant and the ExA as soon as it can regarding this.
 - (b) Class 4 Rights refer to a maintenance period of "up to 5 years". Network Rail notes that maintenance by the Applicant of the pipeline cannot be limited but must endure for the lifetime of the pipeline.
- 3.13 On the basis that the Class Rights set out in the Book of Reference cannot be agreed to by Network Rail, in so far as they relate to Network Rail property, the DCO should not, it is submitted, be granted without the compulsory acquisition and other relevant DCO powers being excluded in respect of Network Rail property without Network Rail's consent, as we have specified in the attached Protective Provisions and as we refer below. Should the DCO provide that compulsory acquisition powers do not apply to railway property, as Network Rail requests, the design of the scheme and other engineering matters that will have a direct impact on the safe operation of the railway can be dealt with by agreement between the Applicant and Network Rail's asset protection team and its engineers.

How the Applicant can address Network Rail's concerns

- 3.14 Network Rail and the Applicant have begun discussions to seek to ensure that the property agreements (or the form of these documents, as appropriate) are agreed before the close of the Examination. Those discussions relate to the following documents:
- (a) Protective Provisions that provide sufficient protection for Network Rail, its infrastructure and the safe operation of the railway, as referred to below;

- (b) Deeds of easement in relation to the Plots enabling the Applicant to install, operate and maintain the Works. Network Rail has provided the Applicant with its standard form Deed of easement and negotiations with the Applicant regarding the terms of the property agreements are ongoing;
- (c) A framework agreement that describes and attaches the deed of easement that will be entered into, the protective provisions, clearance conditions and any necessary BAPA/APA (see below) for the benefit of Network Rail; and
- (d) A Basic Asset Protection Agreement (**BAPA**) and /or Asset Protection Agreement (**APA**) or agreements that regulate how Network Rail's assets will be protected during the construction and operation of the Proposed Development and ensure that Network Rail has full access rights during the construction and operation phases of the Proposed Development.

Requests of the ExA

- 3.15 Notwithstanding the ongoing discussions with the Applicant, Network Rail invites the ExA to request that the Applicant makes the following amendments to the DCO Requirements and the Protective Provisions:
- (a) Protective Provisions that provide sufficient protection for Network Rail, its infrastructure and the safe operation of the railway to be included in Part 3 of Schedule 9 to the DCO, as we refer below (and as attached at **Appendix 1**);
 - (b) Requirement 7 (*Construction traffic*) of Part 1 of Schedule 2 to the DCO to be amended to refer to the consultation with and approval by Network Rail of the Construction Traffic Management Plan in so far as the Plan addresses construction traffic affecting operational railway (in particular at the Farnborough North Railway Station Level Crossing but Network Rail is considering whether other locations will require its approval); and
 - (c) As a result of the type of the fuel that is passing through the pipeline, which poses a potentially greater risk to the railway in the event of a major incident, a new Requirement for inclusion in Part 1 of Schedule 2 to the DCO requiring Network Rail's approval of an ongoing maintenance plan for the pipeline addressing the steps to be taken in the event of an emergency, to safeguard the operational railway and those who use it. Network Rail is assessing the measures that will need to be in place and will provide the ExA and the Applicant with appropriate wording for a new Requirement as soon as it can and at the next appropriate Examination deadline.
- 3.16 The protective provisions contained in Part 3 of Schedule 9 to the draft DCO are not sufficient to fully protect Network Rail's statutory undertaking.
- 3.17 Appended to this document are the Protective Provisions that Network Rail wishes to be included in the DCO (**Appendix 1**) (**NR Protective Provisions**) and a comparison version showing the proposed amendments to the Protective Provisions submitted by the Applicant [**AS-059**] (**Appendix 2**). Network Rail requests that all of these proposed amendments are made by the Applicant. For the purposes of this Written Representation, we identify the following two points of concern to Network Rail:
- (a) A new paragraph 21, which dis-applies temporary possession, compulsory acquisition and other DCO powers in so far as they relate to railway property without the consent of Network Rail (such consent not to be unreasonably

withheld but which may be given subject to reasonable conditions) must be included in the protective provisions; and

- (b) An amended paragraph 32, which is Network Rail's standard indemnity, must also be included. This indemnity will be particularly necessary in this case because, as we refer below, Network Rail is consulting a train operating company regarding the Works (in relation to Ashford Railway Station where the Works will directly affect the train operating company) and also because of the nature of the fuel that is being transferred through the pipeline, which poses a significant risk to the railway in the event of a major incident. Therefore, a full indemnity covering Network Rail's potential costs, including those of train and freight operating companies, for which Network Rail is liable, is required.

Train operating companies (TOC)

- 3.18 In addition to the asset protection requirements of Network Rail, where the Works affect land that is leased by Network Rail to a TOC, Network Rail is under a duty to notify and consult the TOC before allowing the Works to be commenced.
- 3.19 In relation to the Works proposed to be undertaken at Ashford Railway Station, the Applicant has confirmed that these will affect the Station platforms. Network Rail is liaising with the relevant TOC and will confirm to the ExA and the Applicant the impact that the Works will have on the operation of trains. The ExA and the Applicant should note that, as a result of the Works, the station lease may need to be amended prior to the construction of the relevant Works.

Network Rail's objection to the DCO

- 3.20 For the reasons set out in this Written Representation Network Rail objects to the Proposed Development.
- 3.21 It is inconceivable that the construction, maintenance and operation of a pipeline under the heavily used Wessex-route railway lines could be carried out without Network Rail's prior approval given the significant risks to the safe operation of the railway and the passengers and train operating companies that use the line in the event of a problem during any phase of the Proposed Development.
- 3.22 In relation to the above-mentioned Works Network Rail is liaising closely with the Applicant and is willing to enter into private agreements to agree the extent and scope of the rights to be granted to the Applicant and the method of the construction of the Works (subject to the outcome of Network Rail's internal land clearance process, a process which is imposed on Network Rail by its Network Licence, and the requirements of any regulatory consents, referred to below).
- 3.23 Without these agreements and satisfactory protective provisions being in place, Network Rail considers that the Proposed Development, if carried out in relation to the Plots, will have a serious detrimental impact on the operation of the railway and will prevent Network Rail from operating the railway safely and efficiently and in accordance with its Network Licence. Until such agreements are in place Network Rail is unable to withdraw its objection to the DCO.

4 Conclusions

- 4.1 Network Rail does not object in principle to the Proposed Development subject to the outcome of Network Rail's internal clearance process and the requirements of any regulatory consents.

- 4.2 However, Network Rail strongly objects to the proposed compulsory acquisition of its land and rights over its land in order to construct, operate and maintain the Works for the reasons given in this Written Representation. Given the potential risk of major accidents during the installation and operation phases of the Proposed Development, Network Rail considers it to be of utmost importance that full protections are first put in place and that the Proposed Development should proceed by way of agreement rather than compulsory acquisition.
- 4.3 Network Rail requests that the Protective Provisions appended to this document be included in the DCO at Part 3 of Schedule 9.
- 4.4 Network Rail considers that the Secretary of State cannot allow the DCO to be granted without amendment, as the test in section 127 of the Planning Act 2008, cannot be satisfied. The granting of compulsory acquisition powers to the Applicant would result in serious detriment to Network Rail's undertaking; would raise significant health and safety concerns for the general public; and Network Rail does not have any other land available to it which could be used to avoid such detriment.
- 4.5 Network Rail is in ongoing discussions with the Applicant regarding the DCO. However, until such time as Network Rail is given the protection and assurances requested as detailed in this Written Representation, Network Rail's objection to the DCO will not be withdrawn.
- 4.6 Should sufficient progress regarding the Protective Provisions and private agreements to be entered into not be made between the parties in the coming weeks, Network Rail will request to be heard at an appropriate hearing to explain in detail the impacts of the pipeline scheme. Network Rail will of course respond to any Written Questions that the Panel wishes to ask.

Addleshaw Goddard LLP
14 November 2019

Appendix 1

Network Rail Protective Provisions

SCHEDULE 9 Articles 33 and 34

PROTECTIVE PROVISIONS

PART 3

PROTECTION FOR RAILWAY INTERESTS

18. The provisions of this Part have effect unless otherwise agreed in writing between the undertaker and Network Rail and, in the case of paragraph 32 any other person on whom rights or obligations are conferred by that paragraph.

19. In this Part —

"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 amended from time to time, granted to Network Rail by the Secretary of State in exercise of the powers in section 8 of the Railways Act 1993;

"Network Rail" means Network Rail Infrastructure Limited (registered company number 2904587) and any associated company of Network Rail Infrastructure Limited which holds property for railway purposes; and for the purpose of this definition "associated company" means any company which is (within the meaning of section 1159 of the Companies Act 2006 the holding company of Network Rail Infrastructure Limited, a subsidiary of Network Rail Infrastructure Limited or another subsidiary of the holding company of Network Rail Infrastructure Limited;

"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 —

- (a) any railway belonging to Network Rail;
- (b) any station, land, works, apparatus and equipment belonging to Network Rail or connected with any such railway; and
- (c) any easement or other property interest held or used by Network Rail for the purposes of such railway or works, apparatus or equipment;

"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.

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

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

- (a) co-operate with the undertaker with a view to avoiding undue delay and securing conformity as between any plans approved by the engineer and requirements emanating from those procedures; and
- (b) use 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.

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

- (a) article 14 (*Access to works*);
- (b) article 17 (*Discharge of water*);
- (c) article 18 (*Protective work to buildings*);
- (d) article 19 (*Authority to survey and investigate the land*);
- (e) article 20 (*Compulsory acquisition of land*);
- (f) article 22 (*Compulsory acquisition of rights and restrictive covenants*);
- (g) article 24 (*Private rights over land*);

- (h) article 27 (*Acquisition of subsoil only*);
- (i) article 28 (*Rights under or over streets*);
- (j) article 29 (*Temporary use of land for carrying out the authorised development*);
- (k) article 30 (*Temporary use of land for maintaining the authorised development*);
- (l) article 33 (*Statutory undertakers*);
- (m) article x (*private rights of way*);
- (n) article 41 (*Felling or lopping*);
- (o) article 42 (*Trees subject to tree preservation orders*);
- (p) 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*), in relation to any right of access of Network Rail to railway property, but such right of access may be diverted with the consent of Network Rail.

(4) The undertaker must not under the powers of this Order acquire or use or acquire new rights over, or seek to impose any restrictive covenants over, any railway property, or extinguish any existing rights of Network Rail in respect of any third party property, except with the consent of Network Rail.

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

22. (1) The undertaker must before commencing construction of any specified work supply to Network Rail proper and sufficient plans of that work for the reasonable approval of the engineer and the specified work must not be commenced except in accordance with such plans as have been approved in writing by the engineer or settled in accordance with paragraph 39 of this Part.

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

(3) If by the end of the period of 28 days beginning with the date on which written notice was served upon the engineer under sub-paragraph (2), Network Rail gives notice to the undertaker that Network Rail desires itself to construct any part of a specified work which in the opinion of the engineer will or may affect the stability of railway property or the safe operation of traffic on the railways of Network Rail then, if the undertaker desires such part of the specified work to be constructed, Network Rail must construct it without unnecessary delay on behalf of and to the reasonable satisfaction of the undertaker in accordance with the plans approved or deemed to be approved or settled under this paragraph, and under the supervision (where appropriate and if given) of the undertaker.

(4) When signifying approval of the plans, the engineer may specify any protective works (whether temporary or permanent) which in the opinion of the engineer must 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 them (including any relocation, de-commissioning and removal of works, apparatus and equipment necessitated by a specified work and the comfort and safety of passengers who may be affected by the specified works), and such protective works as may be reasonably necessary for those purposes must be constructed by Network Rail or by the undertaker, if Network Rail so desires, and such protective works must be carried out at the expense of the undertaker in either case without unnecessary delay and the undertaker must not commence the construction of the specified work until the engineer has notified the undertaker that the protective works have been completed to the engineer's reasonable satisfaction.

23. (1) Any specified work and any protective works to be constructed by virtue of paragraph 22(4) must, when commenced, be constructed—

(a) without unnecessary delay in accordance with the plans approved or deemed to have been approved or settled under paragraph 22;

(b) under the supervision (where appropriate and if given) and to the reasonable satisfaction of the engineer;

(c) in such manner as to cause as little damage as is possible to railway property; and

(d) so far as is reasonably practicable, so as not to interfere with or obstruct the free, uninterrupted and safe use of any railway of Network Rail or the traffic thereon and the use by passengers of railway property.

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

(3) Nothing in this Part 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.

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

25. Network Rail must at all times afford reasonable facilities to the undertaker and its agents for access to any works carried out by Network Rail under this Part 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.

26. (1) If any permanent or temporary alterations or additions to railway property are reasonably necessary in consequence of the construction of a specified work, or 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 22(3), pay to Network Rail all reasonable expenses to which Network Rail may be put and compensation for any loss which it may suffer by reason of the execution by Network Rail of that specified work.

(3) The engineer must, in respect of the capitalised sums referred to in this paragraph and paragraph 27(a) provide such details of the formula by which those sums have been calculated as the undertaker may reasonably require.

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

27. The undertaker must repay to Network Rail all reasonable fees, costs, charges and expenses reasonably incurred by Network Rail—

(a) in constructing any part of a specified work on behalf of the undertaker as provided by paragraph 22(3) or in constructing any protective works under paragraph 22(4) including, in respect of any permanent protective works, a capitalised sum representing the cost of maintaining and renewing those works;

(b) in respect of the approval by the engineer of plans submitted by the undertaker and the supervision by the engineer of the construction of a specified work;

(c) in respect of the employment or procurement of the services of any inspectors, signallers, guards 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.

28. (1) In this paragraph-

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

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

(2) This paragraph applies to EMI only to the extent that such EMI is not attributable to any change to Network Rail’s apparatus carried out after approval of plans under paragraph 22(1) for the relevant part of the authorised development giving rise to EMI (unless the undertaker has been given notice in writing before the approval of those plans of the intention to make such change).

(3) Subject to sub-paragraph (5), the undertaker must in the design and construction of the authorised development take all measures necessary to prevent EMI and must establish with

Network Rail (both parties acting reasonably) appropriate arrangements to verify their effectiveness.

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

(a) the undertaker must consult with Network Rail as early as reasonably practicable to identify all Network Rail's apparatus which may be at risk of EMI, and thereafter must continue to consult with Network Rail (both before and after formal submission of plans under paragraph 22(1)) in order to identify all potential causes of EMI and the measures required to eliminate them;

(b) Network Rail must make available to the undertaker all information in the possession of Network Rail reasonably requested by the undertaker in respect of Network Rail's apparatus identified 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 reasonably be prevented only 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 22(1) has effect subject to this 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 the 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 the EMI until all measures necessary have been taken to remedy the EMI by way of modification to the source of the 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 the EMI;

(b) Network Rail must afford reasonable facilities to the undertaker for access to Network Rail's apparatus in the investigation of the 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 the EMI.

(8) Where Network Rail approves modifications to Network Rail's apparatus pursuant to sub-paragraphs (5) or (6) –

(a) Network Rail must allow the undertaker reasonable facilities for the inspection of the relevant part of Network Rail's apparatus;

(b) any modifications to Network Rail's apparatus approved pursuant to those sub-paragraphs must be carried out and completed by the undertaker in accordance with paragraph 23.

(9) To the extent that it would not otherwise do so, the indemnity in paragraph 32(1) applies to the costs and expenses reasonably incurred or losses suffered by Network Rail through the implementation of the provisions of this paragraph (including costs incurred in connection with the consideration of proposals, approval of plans, supervision and inspection of works and facilitating access to Network Rail's apparatus) or in consequence of any EMI to which sub-paragraph (6) applies.

(10) For the purpose of paragraph 27(a) any modifications to Network Rail's apparatus under this paragraph are deemed to be protective works referred to in that sub-paragraph.

(11) In relation to any dispute arising under this paragraph the reference in article 47 (Arbitration) to the Secretary of State must be read as a reference to the President of the Institution of Engineering and Technology.

29. 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.
30. 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.

31. Any additional expenses which Network Rail may reasonably incur in altering, reconstructing or maintaining railway property under any powers existing at the making of this Order by reason of the existence of a specified work must, provided that at least 56 days' prior notice of the commencement of such alteration, reconstruction or maintenance has been given to the undertaker, be paid by the undertaker to Network Rail.

32. (1) The undertaker must pay to Network Rail all reasonable costs, charges, damages and expenses not otherwise provided for in this Part (subject to article 46 (*no double recovery*)) 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 the supervision of the engineer 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 written 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 if relevant 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 sub-paragraph (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.

33. Network Rail must, on receipt of a request from the undertaker, from time to time provide the undertaker free of charge with written estimates of the costs, charges, expenses and other liabilities for which the undertaker is or will become liable under this Part (including the amount of the relevant costs mentioned in paragraph 32) and with such information as may reasonably enable the undertaker to assess the reasonableness of any such estimate or claim made or to be made pursuant to this Part (including any claim relating to those relevant costs).
34. In the assessment of any sums payable to Network Rail under this Part, no account must be taken of any increase in the sums claimed that is attributable to any action taken by or any agreement entered into by Network Rail if that action or agreement was not reasonably necessary and was taken or entered into with a view to obtaining the payment of those sums by the undertaker under this Part or increasing the sums so payable.
35. The undertaker and Network Rail may, subject in the case of Network Rail to compliance with the terms of its network licence, enter into, and carry into effect, agreements for the transfer to the undertaker of—
 - (a) any railway property shown on the Works Plans 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.

36. Nothing in this Order, or in any enactment incorporated with or applied by this Order, prejudices or affects the operation of Part 1 of the Railways Act 1993.

37. 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 8 (Consent to transfer benefit of Order) of this Order and any such notice must be given no later than 28 days before any such application is made and must describe or give (as appropriate)—

(a) the nature of the application to be made;

(b) the extent of the geographical area to which the application relates; and

(c) the name and address of the person acting for the Secretary of State to whom the application is to be made.

38. 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 44 (Certification of documents, etc.) are certified by the Secretary of State, provide a set of those plans to Network Rail in a format specified by Network Rail.

39. In relation to any dispute arising under this part of this Schedule (except for those disputes referred to in paragraph 28(11) of this Part), unless otherwise provided for, must be referred to and settled by a single arbitrator to be agreed between the parties or, failing agreement, to be appointed on the application of either party (after giving notice in writing to the other) to the President of the Institution of Civil Engineers.

Appendix 2

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

PROTECTIVE PROVISIONS

PART 3

PROTECTION FOR RAILWAY INTERESTS~~48.~~

18. The provisions of this Part have effect unless otherwise agreed in writing between the undertaker and Network Rail and, in the case of paragraph 32 any other person on whom rights or obligations are conferred by that paragraph.~~49.~~

19. In this Part —“

“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;
~~425~~ “

“network licence” means the network licence, as amended from time to time, granted to Network Rail by the Secretary of State in exercise of the powers in section 8 of the Railways Act 1993(a); “1993;

“Network Rail” means Network Rail Infrastructure Limited (registered company number 2904587) and any associated company of Network Rail Infrastructure Limited which holds property for railway purposes; and for the purpose of this definition “associated company” means any company which is (within the meaning of section 1159 of the Companies Act 2006(b)) 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 — =

- (a) any railway belonging to Network Rail;
- (b) any station, land, works, apparatus and equipment belonging to Network Rail ~~and/or~~ connected with any such railway; and
- (c) any easement or other property interest held or used by Network Rail for the purposes of such railway or works, apparatus or equipment; "

"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. ~~20.—~~

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

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

- (a) co-operate with the undertaker with a view to avoiding undue delay and securing conformity as between any plans approved by the engineer and requirements emanating from those procedures; and
- (b) use 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. ~~24.—~~

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

- (a) article 14 (*Access to works*);
- (b) article 17 (*Discharge of water*);
- (c) article 18 (*Protective work to buildings*);
- (d) article 19 (*Authority to survey and investigate the land*);
- (e) article 20 (*Compulsory acquisition of land*);
- (f) article 22 (*Compulsory acquisition of rights and restrictive covenants*);
- (g) article 24 (*Private rights over land*);

- (h) article 27 (*Acquisition of subsoil only*):
- (i) article 28 (*Rights under or over streets*):
- (j) article 29 (*Temporary use of land for carrying out the authorised development*):
- (k) article 30 (*Temporary use of land for maintaining the authorised development*):
- (l) article 33 (*Statutory undertakers*):
- (m) article x (*private rights of way*):
- (n) article 41 (*Felling or lopping*):
- (o) article 42 (*Trees subject to tree preservation orders*):
- (p) 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*), in relation to any right of access of Network Rail to railway property, but such right of access may be diverted with the consent of Network Rail.

(4) The undertaker must not under the powers of this Order acquire or use or acquire new rights over, or seek to impose any restrictive covenants over, any railway property, or extinguish any existing rights of Network Rail in respect of any third party property, except with the consent of Network Rail.

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

22. (1) The undertaker must before commencing construction of any specified work supply to Network Rail proper and sufficient plans of that work for the reasonable approval of the engineer and the specified work must not be commenced except in accordance with such plans as have been approved in writing by the engineer or settled by arbitration under article 47 (arbitration) in accordance with paragraph 39 of this Part.

(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 ~~the~~such plans have been supplied to Network Rail the engineer has not intimated their disapproval of those plans and the grounds of such disapproval, the undertaker may serve upon the engineer written notice requiring the engineer to intimate approval or disapproval within a further period of ~~14~~28 days beginning with the date upon which the engineer receives written notice from the undertaker and if, by the expiry of ~~(a) 1993 C. 43. (b) 2006 c. 40. 126~~ the further ~~14~~28 days' period specified in the written notice, the engineer has not intimated approval or disapproval, the engineer is deemed to have approved the plans as submitted.

(3) If by the end of the period of ~~14~~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 ~~(together with any adjoining part of the specified work which the undertaker reasonably requires to be constructed with that work)~~ with all reasonable dispatch without unnecessary delay on behalf of and to the reasonable satisfaction of the undertaker in accordance with the plans approved or deemed to be approved or settled under this paragraph, and under the supervision (where appropriate and if given) of the undertaker.

(4) When signifying approval of the plans, the engineer may specify any protective works (whether temporary or permanent) which in the opinion of the engineer must 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 them (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 ~~work~~works), and such protective works as may be reasonably necessary for those purposes ~~are to~~must be constructed by Network Rail or by the undertaker, if Network Rail so desires, and such protective works must be carried out at the expense of the undertaker in either case ~~with all reasonable dispatch,~~ without unnecessary delay and the undertaker must not commence the construction of the specified work until the engineer has notified the undertaker that the protective works have been completed to the engineer's reasonable satisfaction. ~~22.—~~

23. (1) Any specified work and any protective works to be constructed by virtue of paragraph 22(4) must, when commenced, be constructed—

(a) ~~with all reasonable dispatch~~without unnecessary delay in accordance with the plans approved or deemed to have been approved or settled under paragraph 22;

(b) under the supervision (where appropriate and if given) and to the reasonable satisfaction of the engineer;

(c) in such manner as to cause as little damage as is ~~reasonably 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 ~~is~~shall be caused by the carrying out of, or in consequence of the construction of a specified work, the undertaker must, notwithstanding any such approval, make good such damage and must pay to Network Rail all reasonable expenses to which Network Rail may be put and compensation for any loss which it may sustain by reason of any such damage, interference or obstruction.

(3) Nothing in this Part 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. 23.—

24. 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 the engineer may reasonably require with regard to a specified work or the method of constructing it. 24.—

25. Network Rail must at all times afford reasonable facilities to the undertaker and its agents for access to any works carried out by Network Rail under this Part during their construction and

~~427~~—must supply the undertaker with such information as it may reasonably require with regard to such works or the method of constructing them. ~~25.~~—

26. (1) If any permanent or temporary alterations or additions to railway property are reasonably necessary in consequence of the construction of a specified work, or during a period of ~~42~~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 22(~~4~~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 27(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 the saving must be set off against any sum payable by the undertaker to Network Rail under this paragraph. ~~26.~~—

27. The undertaker must ~~pay~~repay to Network Rail all reasonable fees, costs, charges and expenses reasonably incurred by Network Rail—

(a) in constructing any part of a specified work on behalf of the undertaker as provided by paragraph 22(3) or in constructing any protective works under paragraph 22(4) including, in respect of any permanent protective works, a capitalised sum representing the cost of maintaining and renewing those works;

(b) in respect of the approval by the engineer of plans submitted by the undertaker and the supervision by the engineer of the construction of a specified work;

(c) in respect of the employment or procurement of the services of any inspectors, signallers, guards and other persons whom it ~~is~~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, ~~need~~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. 27.—

28. (1) In this paragraph—=

“EMI” means, subject to sub-paragraph (2), electromagnetic interference with Network Rail apparatus generated by the operation of the authorised development where such interference is of a level which adversely affects the safe operation of Network Rail’s apparatus; and ~~428-~~

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

(2) This paragraph applies to EMI only to the extent that ~~the~~such EMI is not attributable to any change to Network Rail’s apparatus carried out after approval of plans under paragraph 22(1) for the relevant part of the authorised development giving rise to EMI (unless the

undertaker has been given notice in writing before the approval of those plans of the intention to make such change).

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

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

(a) the undertaker must consult with Network Rail as early as reasonably practicable to identify all Network Rail's apparatus which may be at risk of EMI, and thereafter must continue to consult with Network Rail (both before and after formal submission of plans under paragraph 22(1)) in order to identify all potential causes of EMI and the measures required to eliminate them;

(b) Network Rail must make available to the undertaker all information in the possession of Network Rail reasonably requested by the undertaker in respect of Network Rail's apparatus identified 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 reasonably be prevented only by modifications to Network Rail's apparatus, Network Rail must not withhold ~~or delay~~ its consent unreasonably to modifications of Network Rail's apparatus, but ~~Network Rail may, in its reasonable discretion, select 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 22(1) has effect subject to this 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 ~~subparagraph~~ 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 the 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 the EMI until all measures necessary have been taken to remedy the EMI by way of

modification to the source of the 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 the EMI;

(b) Network Rail must afford reasonable facilities to the undertaker for access to Network Rail's apparatus in the investigation of the 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 the EMI.

(8) Where Network Rail approves modifications to Network Rail's apparatus pursuant to ~~subparagraph~~sub-paragraphs (5) or (6)— =

(a) Network Rail must allow the undertaker reasonable facilities for the inspection of the relevant part of Network Rail's apparatus; ~~429~~

(b) any modifications to Network Rail's apparatus approved pursuant to those ~~subparagraph~~sub-paragraphs must be carried out and completed by the undertaker in accordance with paragraph 23.

(9) To the extent that it would not otherwise do so, the indemnity in paragraph 32(1) applies to the costs and expenses reasonably incurred or losses suffered by Network Rail through the implementation of the provisions of this paragraph (including costs incurred in connection with the consideration of proposals, approval of plans, supervision and inspection of works and facilitating access to Network Rail's apparatus) or in consequence of any EMI to which sub-paragraph (6) applies.

(10) For the purpose of paragraph 27(a) any modifications to Network Rail's apparatus under this paragraph are deemed to be protective works referred to in that sub-paragraph.

~~(4011)~~ In relation to any dispute arising under this paragraph, the reference in article 47 ~~(arbitration)~~Arbitration to the Secretary of State must be read as a reference to the President of the Institution of Engineering and Technology. ~~28-~~

29. 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. ~~29.~~
30. 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. ~~30.~~
31. Any additional expenses which Network Rail may reasonably incur in altering, reconstructing or maintaining railway property under any powers existing at the making of this Order by reason of the existence of a specified work must, provided that at least 56 days' prior notice of the commencement of such alteration, reconstruction or maintenance has been given to the undertaker, be paid by the undertaker to Network Rail. ~~34.~~
32. (1) The undertaker must—~~(a)~~ pay to Network Rail all reasonable and proper costs, charges, damages and expenses not otherwise provided for in this Part (but subject to the provisions of this paragraph and article 46 (*no double recovery*)) which may be occasioned to or reasonably incurred by Network Rail—
- ~~(a)~~ by reason of—~~(i)~~ the construction or maintenance of a specified work or the failure of such a work; thereof or
- ~~(ii)~~ 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 ~~(b)~~ 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. ~~(2) The~~ and the fact that any act or thing may have been done by Network Rail on behalf of the undertaker or in accordance with plans approved by the engineer or in accordance with any requirement of the engineer or under the supervision of the engineer ~~does~~ 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 (1). (3)

(2) Network Rail must—(a) give the undertaker reasonable written notice of any such claims or demands as soon as reasonably possible after Network Rail become aware of any such claims or demands; (b) not admit liability or make any offer to settle or settle or compromise any claim or demand and no settlement or compromise of such a claim or demand shall be made without the prior consent of the undertaker (which, if it withholds such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand); (c) take all reasonable steps to mitigate any liabilities relating to such claims or demands; and (d) keep the undertaker informed in relation to the progress of any such claims and demands and pay due regard to the undertaker's reasonable representations in relation to them. 130 (4) In no circumstances is the undertaker liable to Network Rail under sub-paragraph (1) for any indirect or consequential loss or loss of profits, save that the

(3) The sums payable by the undertaker under that sub-paragraph (1) shall if relevant include a sum equivalent to the relevant costs in circumstances where— (a) Network Rail is liable to make payment of the relevant costs pursuant to the terms of an agreement between Network Rail and a train operator; and (b) the existence of that agreement and the extent of Network Rail's liability to make payment of the relevant costs pursuant to its terms has previously been disclosed in writing to the undertaker, but not otherwise.

(54) Subject to the terms of any agreement between Network Rail and a train operator regarding the amount, 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 (43) which relates to the relevant costs of that train operator.

(65) The obligation under sub-paragraph (43) to pay Network Rail the relevant costs is 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 (54).

(76) In this paragraph— “

"the relevant costs" means the costs, direct losses and expenses (including loss of revenue) reasonably incurred by each train operator as a consequence of any restriction of the use of Network Rail's railway network as a result of the construction, maintenance or failure of a specified work or any such act or omission as mentioned in sub-paragraph (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. ~~32.~~

~~33.~~ Network Rail must, on receipt of a request from the undertaker, from time to time provide the undertaker free of charge with written estimates of the costs, charges, expenses and other liabilities for which the undertaker is or will become liable under this Part (including the amount of the relevant costs mentioned in paragraph 32) and with such information as may reasonably enable the undertaker to assess the reasonableness of any such estimate or claim made or to be made pursuant to this Part (including any claim relating to those relevant costs). ~~33.~~

~~34.~~ In the assessment of any sums payable to Network Rail under this Part, no account must be taken of any increase in the sums claimed that is attributable to any action taken by or any agreement entered into by Network Rail if that action or agreement was not reasonably necessary and was taken or entered into with a view to obtaining the payment of those sums by the undertaker under this Part or increasing the sums so payable. ~~34.~~

~~35.~~ The undertaker and Network Rail may, subject in the case of Network Rail to compliance with the terms of its network licence, enter into, and carry into effect, agreements for the transfer to the undertaker of—

(a) any railway property shown on the Works Plans 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. ~~35.~~

~~36.~~ Nothing in this Order, or in any enactment incorporated with or applied by this Order, prejudices or affects the operation of Part 1 of the Railways Act 1993. ~~36.~~

~~37.~~ 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 8 (Consent to transfer benefit of Order) of this Order and any such notice must be given no later than 28 days before any such application is made and must describe or give (as appropriate)—

(a) the nature of the application to be made;

(b) the extent of the geographical area to which the application relates; and

(c) the name and address of the person acting for the Secretary of State to whom the application is to be made.

38. 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 44 (~~certification~~Certification of documents ~~etc.~~) 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 ~~a format specified by~~ Network Rail.

39. In relation to any dispute arising under this part of this Schedule (except for those disputes referred to in paragraph 28(11) of this Part), unless otherwise provided for, must be referred to and settled by a single arbitrator to be agreed between the parties or, failing agreement, to be appointed on the application of either party (after giving notice in writing to the other) to the President of the Institution of Civil Engineers.

Document comparison by Workshare 9 on 14 November 2019 17:00:54

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Description	#34168059v1<Live> - NR: Esso Southampton to London DCO - PPs included in Draft DCO 3.1 dated May 2019 [AS-059]
Document 2 ID	interwovenSite://AG/Live/34163968/1
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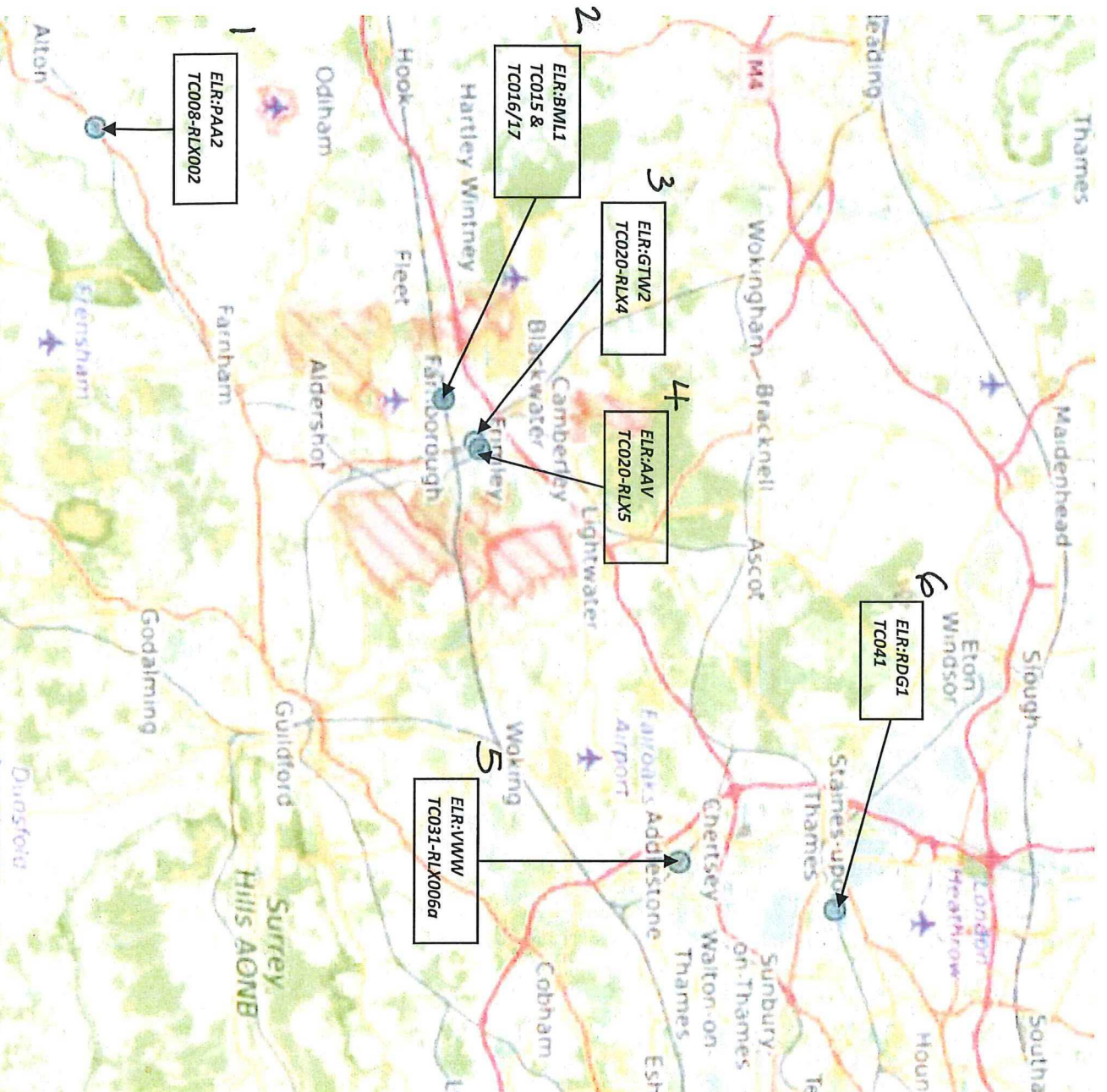
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Appendix 3

Plan showing locations of under-track crossings

(WR7430) SLP Rail Undertrack Crossings



UTXs Location Map (Not to scale)

**Application by Esso Petroleum Company Limited for an Order granting Development Consent
for the Southampton to London Pipeline Project**

Summary of Written Representation submitted on behalf of Network Rail Infrastructure Limited

Planning Inspectorate Reference No: EN070005

Reference No: 20022766

Summary of Written Representation

1. Network Rail (**NR**) does not object to the principle of the Proposed Development, subject to the outcome of NR's internal clearance process and the requirements of any regulatory consents. However, NR strongly objects to the proposed temporary and permanent compulsory powers being granted or executed or the extinguishment of the rights held by NR over operational railway land and third party land on which it relies for the carrying out of its statutory undertaking.
2. NR also objects to the Applicant's seeking of powers to carry out works under and/or to the operational and non-operational railway land belonging to NR without first securing appropriate protective provisions for NR's statutory undertaking.
3. NR engineers and the asset protection team are still considering the design of the Proposed Development (as set out in the Book of Reference and further to ongoing discussions between the Applicant and NR). NR will update the Examining Authority at the appropriate Examination deadline. NR can confirm that the depth of the pipeline specified in Class 2 B Rights in the Book of Reference is insufficient.
4. NR submits that it is inconceivable that the construction, maintenance and operation of a pipeline under the heavily used Wessex-route railway lines could be carried out without NR's prior approval due to the significant risks to the safe operation of the railway, the passengers and the train operating companies that use the line and in the event of a problem during any phase of the Proposed Development.
5. NR is in ongoing discussions with the Applicant with regards to the design of the Proposed Development, the private agreements referred to in the Written Representation and the protective provisions to be included in the DCO but until such time as NR is given the assurances detailed in this Written Representation, NR's objection to the DCO cannot be withdrawn.
6. NR requests that the protective provisions appended to the Written Representation be included in the DCO at Part 3 of Schedule 9 and that amendments be made to the Requirements of Part 1 of Schedule 2 to the DCO as set out in the Written Representation (to ensure that NR is consulted in relation to and approves a construction traffic management plan and ongoing maintenance plan regarding the steps to be taken, if necessary, to safeguard the operational railway).
7. If sufficient progress regarding the protective provisions for railway interests and the private agreements between NR and the Applicant is not made between the parties in the coming weeks, NR will request to be heard at an appropriate hearing to explain in detail the impacts of the pipeline scheme. NR will respond to any Written Questions the Panel wishes to ask.

Addleshaw Goddard LLP

14 November 2019