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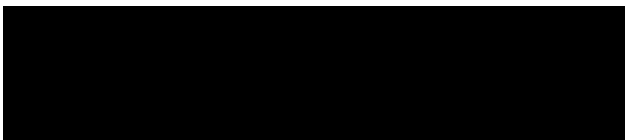
Dear Sir

**PLANNING ACT 2008: APPLICATIONS FOR THE ABLE MARINE ENERGY  
PARK DEVELOPMENT CONSENT ORDER AND FOR CERTIFICATES  
UNDER SECTION 127**

DLA Piper acts on behalf of C.GEN Killingholme Limited ("C.GEN").

Please find enclosed C.GEN's response to the Secretary of State's "minded to grant"  
decision letter dated 28 August 2013 and the comments of Able Humber Ports  
Limited dated 15 October 2013.

Yours faithfully



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The Planning Act 2008 ("2008 Act")

**Applications for the Able Marine Energy Park Development Consent Order and for Certificates under Section 127**

**Department for Transport Reference: TWA 8/1/4**

**Representation of C.GEN Killingholme Limited (Interested Party reference: 10015531)**

15 November 2013

## **PART 1 - INTRODUCTION**

1. This representation is prepared on behalf of C.GEN Killingholme Limited ("C.GEN"). It relates to the 'minded to grant' decision of the Secretary of State dated 28 August 2013 (the "Decision") on the application by Able Humber Ports Limited ("Able") for the Able Marine Energy Park ("AMEP") Development Consent Order (the "Able Application") and Able's response to the Decision on 15 October 2013 ("Able's Response").
2. This representation addresses matters of general concern, and those relating to the Killingholme Branch Railway, arising from the various documents issued by the Secretary of State and Able's Response in turn.

### **C.GEN**

3. C.GEN is a UK-based company that is part of the C.GEN group of businesses ("C.GEN Group"), whose headquarters are in Luxembourg. C.GEN is affiliated to the C.RO Ports Group, owners of C.RO Ports Killingholme. The businesses are, however, separate and distinct companies.
4. C.GEN was an interested party (reference number: 10015531) in the Examination into the Application. During the course of the Examination C.GEN made several written representations and made representations at both the issue specific hearings and the compulsory acquisition hearings.
5. On 25 March 2013, C.GEN made an application to the Secretary of State for Energy and Climate Change for a development consent order to authorise the construction and operation of a Nationally Significant Infrastructure Project ("NSIP") in the form of a 470MWe thermal generating station ("Generating Station") and associated infrastructure (the "C.GEN Project") in North Killingholme, Lincolnshire (the "C.GEN Application"). The Project is located on land owned by C.GEN and is in close proximity to that affected by the Able Application.
6. The Generating Station is intended to operate either as a Combined Cycle Gas Turbine ("CCGT") plant or as an Integrated Gasification Combined Cycle ("IGCC") plant. When operating as a CCGT plant, the Generating Station would be fired on natural gas which would be obtained from existing high pressure gas supply networks in the area. When operating as an IGCC plant the Generating Station would be fuelled principally by coal, possibly blended with petroleum coke (petcoke) or biomass.
7. In compliance with Overarching NPS for Energy (EN-1), the Generating Station will be

carbon capture ready ("CCR") as it will be ready to operate as either a CCGT plant or an IGCC plant fired on solid fuel.

8. The new generating capacity that will be provided by the C.GEN Project will be enough to supply electricity for up to one million homes and has the potential to help reduce the UK's carbon emissions by displacing electricity generation from older and less environmentally friendly coal-fired power stations. Operation of the Generating Station as an IGCC plant with CO2 capture will emit up to 88 per cent less CO2 than existing coal-fired power stations in the UK.
9. The C.GEN Application was accepted on 19 April 2013 and commenced Examination on 12 September 2013.

## **PART 2 - REPRESENTATIONS ON RAILWAY MATTERS**

### **10. The Killingholme Branch Railway (the "Railway")**

- 10.1 C.GEN notes from the Decision, that the Secretary of State, before making the Development Consent Order ("the Order") sought by the Able Application, requires satisfactory evidence from Able that "the project will not jeopardise any future operations of the Killingholme Branch railway" having sought the views of Network Rail and the Office of Rail Regulation (the "ORR"). C.GEN welcomes the approach of seeking an absolute assurance from Able.
- 10.2 At paragraph 40, the Decision specifically repeats the need for these assurances in relation to the Railway given the proposed compulsory acquisition of four easements for the purpose of creating level crossings.
- 10.3 It is clear that the onus is on Able to show any future operations will not be jeopardised. This includes C.GEN's proposed use of the Railway to transport solid fuel, as well as waste and other materials, in connection with the C.GEN Project. It is anticipated that the C.GEN Project will require, on average, the arrival of five trains per day, a total of ten train movements a day to supply it with solid fuel to operate as an IGCC plant. Whilst the protective provisions currently provide for "up to five trains per day", it should be borne in mind that C.GEN's project is being promoted based upon an *average* of five trains per day. Therefore, C.GEN agrees with the Secretary of State that any use of the Railway should be protected, and the words "up to five trains per day" should be deleted. This would resolve the apparent conflict between the Secretary of State's request for Able to show how any use of the

Railway would not be compromised and the apparent limitation on the protection afforded by the version of the protective provisions annexed to the Secretary of State's decision.

- 10.4 In relation to the point above, the reason why the protection of C.GEN's use of the railway should not be compromised is that whilst an average of five trains per day is predicted, in practice the use of the railway may fluctuate within that overall average. This is in itself related to good practice by C.GEN in managing coal/solid fuel stocks and storage. The rationale for this is as follows:

#### Fuel stock management

- 10.4.1 C.GEN considers that it is best practice that coal intended for use at C.GEN's power station should be stored, insofar as possible, in its covered storage building at C.GEN's Project, *inter alia* to minimise dust;
- 10.4.2 As such it is important that coal off-loaded in (say) the Port of Immingham is brought to the C.GEN Project area as swiftly as possible;
- 10.4.3 C.GEN needs flexibility because ships transporting the coal will vary in size, including unloading cape-size ships, and larger vessels will require more trains to unload them; and
- 10.4.4 Allowing interference with unloading and transporting coal to C.GEN's site if it requires more than 5 trains per day is undesirable from an economic and environmental point of view, as it will lead to unnecessary prolonged use of open air storage at Immingham.

#### Factors requiring flexibility in use of the railway network

- 10.4.5 There are a number of factors that could put the railway network or the loading/unloading facilities out of operation for a period of time, or otherwise interrupt fuel deliveries: industrial action, equipment outages, weather or accidents, railway perturbation and marine delays resulting in the late arrivals of vessels;
- 10.4.6 If no solid fuel could be imported during the disruption, C.GEN's Project would continue to consume its stock of solid fuel in order to comply with its contractual obligations to supply electricity;

10.4.7 Once the affected railway network and/or railway loading or unloading facilities could be put back into service (or to address marine delays), more than 4500 tonnes per day of solid fuel (ie the approximate average daily solid fuel consumption for the C.GEN plant, requiring an average of five half trains per day) would need to be moved by rail each day in order to refill the stock held by C.GEN's Project; and

10.4.8 A limitation on the protection afforded to C.GEN to 5 half trains would effectively make it impossible for C.GEN to refill stock.

10.5 The Able Application no longer proposes the acquisition of the Railway, although the exact status of the various plans and wordings of the Order is not clear. This is welcomed, as C.GEN has consistently maintained that Able cannot show that it meets the tests in s.122 of the 2008 Act. It cannot show that acquisition of the Railway in its entirety is needed for the development for which consent is sought, nor that there is a compelling case in the public interest for the land comprising the Railway to be acquired.

10.6 As C.GEN submitted during the course of the Examination, it would be directly and adversely affected by the proposed privatisation of the Railway and/or any restriction upon its use or the manner of its operation. Such a restriction would increase, with an increased number of level crossings. Further, the acquisition of level crossings can cause similar mischief to outright acquisition.

10.7 Whilst the Able Application no longer proposes acquisition of the Railway (it is understood, but not clear on the face of the publicly available documents or Able's representations), the proposed compulsory acquisition to provide four level crossings would restrict the use of the Railway in such a way as to prejudice the future operation of the Railway in relation to its use by C.GEN. In this sense, acquisition of level crossings, each of which can impede C.GEN's enjoyment of service by the Railway, may as well be the acquisition of the railway between the two outer crossings (which is unacceptable in any case). The Panel's view, at paragraph 18.195 of its Report, is that C.GEN's interests are fully protected if the line remains in the operational network, as now proposed by Able. However, the Panel failed to address the consequences of the erection of level crossings, far less level crossings with a passing loop - a passing loop is authorised by the Order, but nowhere is its interaction with level crossings/easements assessed. The panel also failed to take account of the wording of the draft Order and particularly the protective provisions required for C.GEN.

- 10.8 The provision of four level crossings on the Railway would close the entire section of the line just as effectively as the compulsory acquisition of the Railway by Able between the two outer crossings. Further, each level crossing represents a weak link in the line where any interference or malfunction can affect services. It is for this very reason that the ORR restricts the erection of new level crossings except in 'exceptional circumstances'<sup>1</sup>. Each crossing would be at least partially controlled by a third party - Able. C.GEN welcomes the Secretary of State's recognition of this concern at paragraph 40 of the Decision and considers that the justification for any additional crossings has not been shown, far less that the circumstances are 'exceptional'.
- 10.9 It should be noted that the ORR's safety concerns regarding level crossings which result in the requirement to show 'exceptional circumstances' do not simply relate to the safety of the public, but also include the safety of rail traffic, something which the Panel, at paragraph 18.187 of their Report, did not appear to appreciate. Even with the erection of level crossings, vehicle-train conflicts remain an enhanced possibility as a result of the Able proposals. Consequently, C.GEN has considerable concerns about the operational impacts on its future use of the Railway were compulsory acquisition to proceed. Lengthy, slow-moving traffic such as that which Able predicts, either increases the risk of such conflicts or the amount of barrier down-time.
- 10.10 C.GEN selected the site for the C.GEN Project for reasons that include its proximity to the Railway and - subject to the necessary agreements with Network Rail - the ability to obtain a solid fuel supply by rail. With the level crossings currently proposed, that rail access cannot now be guaranteed.
- 10.11 The Panel concludes, at paragraph 18.198 of its Report, that there is a compelling case in the public interest. That conclusion is based on their assessment of the nature of the land to be acquired as "four easements which will not reduce or restrict the use of the railway line or otherwise significantly diminish [Network Rail's] assets." C.GEN is not aware of any evidence before the Panel that it has seen or been able to test that demonstrates that four (or any) easements would not reduce or restrict, etc. the use of the railway line. Further, nowhere is it provided that the easements and their use would not (or, more appropriately, a presumption that they should not) affect the Railway and its use. Nor is there any remedy, absent the provision of indemnities (for C.GEN or any other person) in the Order, for any effect that did occur.

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<sup>1</sup> Office of Rail Regulation, *Level Crossings: A guide for managers, designers and operators*, Railway Safety Publication 7, p81

- 10.12 At paragraph 40 of the Decision, the Secretary of State invites Able to reconsider its proposal for access across the railway in consultation with Network Rail and the ORR. The Decision notes that, should this require a reduction in the number of level crossings, Able is asked to propose consequential amendments to the Order.
- 10.13 For the reasons set out above, C.GEN is of the view that the level crossings proposed would jeopardise the future operation of the Railway. Able has not been able to show a need for the proposed development, in the absence of an identified customer for the Able project. As such, Able cannot establish a need to cross the Railway: any purported justification for a multiplicity of crossing points is wholly speculative. Nor has Able put forward any alternative to acquiring the Railway in its entirety or acquiring four easements for the provision of level crossings, such as providing bridges over the Railway alongside a single, heavy-duty signalised crossing.
- 10.14 In these circumstances, C.GEN is of the view that the proposed acquisition should not be permitted. The Order should be amended to provide (at most) for modernisation of the existing level crossing to a single, signalised heavy-duty crossing alone - in the control of Network Rail. All other crossings should be by bridge.

## **11. The Killingholme Loop**

- 11.1 C.GEN welcomes the finding of the Secretary of State, and the Panel's finding, that, while there remains uncertainty about the need for and route of the possible Killingholme Loop railway scheme, the line which currently runs through the site of the Able Application should remain within the operational network of Network Rail.
- 11.2 As the Panel and the Secretary of State note, this is necessary to address C.GEN's concerns as a potential user of the Killingholme Loop.

## **12. The Draft Order**

- 12.1 C.GEN notes from paragraph 51 of the Decision that the Secretary of State agrees with the Panel's conclusions on the text of the draft Order.
- 12.2 During the course of the Examination, C.GEN sought additional text to be included in the Order to ensure that no agreement that it might have with Network Rail could be overridden by Able. At paragraph 51(f) of the Decision, the Secretary of State accepts the Panel's conclusion that that text is not necessary and that use of the Railway would be safeguarded by the protective provisions in Parts 5 and 6 of Schedule 9 to the Order.



- 12.3 Those protective provisions state that Able shall not unreasonably prevent C.GEN's access to the Railway and must not cause unreasonable interference with or unreasonably prevent the free, uninterrupted and safe use by C.GEN of the Railway by up to five trains per day (although see above in relation to the number of trains).
- 12.4 C.GEN is of the view that those protective provisions will not be effective in providing the protection C.GEN requires to guarantee its use of the Railway for the C.GEN Project. A test of 'reasonableness' is not objectively capable of being employed in these circumstances. In particular, it is not appropriate to apply a test of reasonableness to interference given there are no details of how the interaction of the construction and operation of the Able project with the Railway will be managed. Further, the benefit of the presumption of reasonableness is not made clear in the provisions. For instance, an extended interference with the railway may be a reasonable consequence of Able's activities, but have a highly deleterious effect on C.GEN's Generating Station. This would be akin to permitting reasonable interference with a highway at the behest of a private party, something that would not be acceptable.
- 12.5 Whilst the Panel's report notes that a working agreement between C.GEN and Able requires both parties to behave reasonably, there is no provision made in the Order requiring the parties to enter into such an agreement. Nor is there any mechanism for C.GEN to approve proposed interference with the Railway. As a result, the protection on which the Panel and Secretary of State rely is ineffective and does not achieve the position that both the Panel and the Secretary of State seek.
- 12.6 C.GEN notes that, whilst the Secretary of State has left unaltered the requirement in paragraph 48 of Part 5 of Schedule 9 to the draft Order relating to C.GEN's use of the Railway "*...by up to five trains per day*", the Decision is clear that the Secretary of State requires assurances from Able that it will not jeopardise any future operations of the Railway.
- 12.7 In this regard, C.GEN notes that there are a number of provisions in the draft Order that do not enable that assurance to be given:
- 12.7.1 Article 11 provides that Able may, from time to time within the area of jurisdiction, construct and maintain roads, railway lines, buildings, sheds, offices, workshops, depots, walls, foundations, fences, gates, tanks, pumps, conduits pipes...etc. The Railway lies within the area of jurisdiction and, as such, it is clear that any number of the activities listed in Article 11 have the potential to jeopardise future operation of the Railway - these must be restricted;

- 12.7.2 Pursuant to Article 42, Able has the power to extinguish the rights of, remove or reposition the apparatus belonging to statutory undertakers, if such extinguishment, removal or repositioning is necessary for carrying out the authorised development. Quite plainly, this could include apparatus belonging to Network Rail, including the railway itself; and
- 12.7.3 At paragraph 3 of Schedule 1, Work No. 3 remains that enables construction of a passing loop. It is not clear if this would be Network Rail's work, how level crossings would interact with it and how it might affect use of the branch line. The Panel has not addressed this and it must be resolved before the Order is made.
- 12.8 Generally, the draft Order must be reviewed to ensure that it does not enable interference with the Railway by other means. Currently, it contains many inconsistencies.
- 12.9 At paragraph 19.100 of its Report, the Panel recommends the removal of the usual requirement that the powers to compulsorily acquire easements over the Railway can only be exercised with the consent of Network Rail, that consent not to be unreasonably withheld. This is an important requirement as it enables Network Rail to prevent an acquisition of land which would adversely affect the safe and efficient operation of the railway. By reasoning that such a power subverts the purpose of the sanction of compulsory acquisition, the Panel has failed to understand the purpose of the requirement to safeguard the safe and efficient operation of the railway. C.GEN submits that this requirement should be included in the draft Order. Able is protected by the ability to refer questions of reasonableness to Arbitration under the Order, meaning that this is capable of objective resolution - powers of compulsory acquisition are not subverted.
- 12.1 This point is distinct from the concerns raised above regarding the provision preventing Able from causing unreasonable interference (i.e. allowing reasonable interference) with the use of the Railway by C.GEN (see paras 12.3-12.4). The reasonableness of Network Rail's failure to give consent to the acquisition of land in these circumstances is capable of being resolved by Arbitration under the terms of the Order. This is because the governing principle is the safety and efficiency of the railway, which is a matter which is capable of being objectively assessed. The reasonableness of any interference with use of the Railway, is not, absent any such overarching and objective principle.
- 12.2 At paragraph 19.101 of its Report, the Panel rejects a fundamental aspect of protection for Network Rail, by refusing the request for Able to indemnify Network Rail in respect of claims arising in respect of a specified work. Were the level crossings proposed to cause

interference with C.GEN's use of the railway, Network Rail would not be indemnified against a claim by C.GEN for loss caused as a result of that interference.

- 12.3 Further, by stating that the parties can avoid having to go through the courts if Network Rail consults Able, the Panel fails to understand that a lengthy and costly court process is only avoided if Able does not benefit from statutory immunity, not by consultation.
- 12.4 C.GEN is of the view that the indemnity in favour of Network Rail should be provided. Consequently, in light of the Panel's conclusion at paragraph 19.102, the same protection should be applied to all parties benefitting from protective provisions.

### **PART 3 - REPRESENTATIONS ON ABLE'S RESPONSE**

#### **13. Able Response on Rail Matters**

- 13.1 Able has produced a summary document, which seeks to address the matters in the Secretary of State's letter. Able admits that it has failed to do so, instead stating that the matter should be addressed by "Network Change" (para 1.1.2). This is not a point accepted by either Network Rail or the ORR in their representations. Both say that Network Change can be used, not that it resolves the issue.
- 13.2 Further, there are additional problems with the assertion that Network Change can address this:
- 13.2.1 The scope of Network Change desired by Able has not been set out. This means that C.GEN cannot respond on the subject as to whether it agrees with the point or not. There is no information as to whether Able intends this to address level crossings, removal of railway from the network, the extent of any changes to the network, new works, etc.;
- 13.2.2 The Network Change process requires the assent of all access beneficiaries (as set out at paragraph d(ii) on page G2 of the attached document) and there is no real prospect of Able achieving such assent;
- 13.2.3 Only Access Beneficiaries and Network Rail can apply for Network Change. As such, it is not open to Able to promote Network change;
- 13.2.4 Network Rail has stated to C.GEN that it has not been provided with details of level crossings proposed by Able, meaning that neither C.GEN, nor Network Rail, nor the Secretary of State can know what is proposed, far less whether it is

acceptable (in this sense, Able has simply failed to address the question put by the Secretary of State). This is particularly problematic for C.GEN as, absent detailed level crossing proposals addressing the Secretary of State's concerns, it cannot understand whether the proposals will affect (inter alia) train length.

- 13.3 Able reports that Network Rail "will support and promote" a solution (para 3.1.5) that is safe. However, this is not provided in the Statement of Common Ground between Network Rail and the point does not address the Secretary of State's requirement not to interfere with future use. Furthermore, none of the solutions for the branch line is set out and no evidence is given that C.GEN can see or understand as to the likely impact on use of the railway (including as to train lengths). Even if the parties agree that such solutions exist, this process demands that those who may be affected are allowed to understand them, their environmental and practical impacts and to comment, particularly where (as for C.RO) the proposals may interfere with their legal rights.
- 13.4 In addition, the assertion by Able and Network Rail that modification of rail infrastructure can only be achieved by Network Change obscures the requirement for development consent in respect of such proposals. There is no evidence that such proposals have been designed or can be understood so that C.GEN can comment.
- 13.5 The response of the ORR is problematic (section 3.2). The ORR appears to have concluded that the "exceptional circumstances" test has been met, and that "movements on the level are the only practicable means of crossing the Killingholme Branch". It reached both conclusions without the benefit of balanced consideration and, apparently unaware that Able itself has stated that the Railway need not be crossed "on the level" in its submissions to the Examining Authority. Able's only concern in constructing a bridge crossing was that it might result in loss of developable land and be expensive to implement. Neither is an "exceptional circumstance" since Able has at no point shown the existence of any customer for AMEP, far less that sufficient customers exist to require multiple crossings of the Railway as part of AMEP. The Secretary of State should afford little weight to the views of the ORR and must form his own view on the points raised, allowing the points to be tested orally.

#### **14. Western Diversion Option Study**

- 14.1 Able has submitted this document, which presents alternative alignments of the Railway which would maintain its ability to function. C.GEN considers that the diversion of the railway should be possible, but the matter has not been properly examined and it would be

risky for the Secretary of State to rely upon this document.

- 14.2 Before relying upon this study the Secretary of State should require that it is expanded and updated. The study looks at two options, both of which interfere with Able's arrangement of AMEP. However, no attempt seems to have been made to optimise the alignment to minimise effects. For instance, the areas of overspill storage and ecological mitigation land shown on figure 3.1 are available to Able in order to improve the alignment of the Railway if a realignment is pursued. Further, the use of the existing arrangement of AMEP as a base plan tends to prejudge the question of the effect on usable space. No attempt appears to have been made to reconfigure AMEP itself to allow a more westerly realignment of the Railway.
- 14.3 In section 3.2 it is suggested that change to the areas shown is not possible. However:
- 14.3.1 Ecological mitigation area A could be reconfigured or relocated to avoid the disturbance Able alleges would occur (although, C.GEN's own evidence suggests little disturbance would occur even if the railway passed through the mitigation area). If Able wished, it could change the shape of the mitigation area, whilst preserving its size and maintaining the railway along one edge;
- 14.3.2 There is no suggestion that the realignment of the railway would affect the quay;
- 14.3.3 The heavy component manufacturing area could be configured so as to be properly accommodated to the East of a realigned railway. There is no evidence that this would not be possible;
- 14.3.4 Able concedes that the supply chain park need not be to the east of the Railway; and
- 14.3.5 There is no evidence that the use of the Overspill Storage Area for enclosed activities (for instance) would result in the disturbance of the North Killingholme Haven Pits as Able alleges.
- 14.4 Simply put, there are solutions, not investigated by Able, which do allow realignment of the railway, and which might better secure the Secretary of State's desire to avoid any interference with its use.
- 14.5 Two solutions for a western realignment are provided. However, both are sub-optimal and have not properly tested alternatives within their scope. As such, it is not possible to attach weight to their dismissal until they have been properly considered.

## **15. The Alternative Rosper Road Loop**

- 15.1 Able has proposed this solution, which has never been properly or previously canvassed, which does not benefit from environmental impact assessment ("EIA") and which does not have the benefit of having been the subject of consultation. As such, it can be afforded only limited weight by the Secretary of State. Furthermore, it does not address the question of securing any use of the Railway.
- 15.2 The Rosper Road Loop is a material change to the AMEP project and the mitigation that it proposes. It is in itself capable of being an NSIP and requires site assembly (and powers of compulsory acquisition in default of agreement) and EIA and as such cannot be guaranteed to be acceptable. If the Secretary of State were to rely upon this he would have to conclude there was a reasonable prospect of its delivery, which he cannot currently do.
- 15.3 Able would require powers of compulsory acquisition for this solution if it were to be promoted. There is no certainty - or even reasonable prospect of landowner agreement - and so the proposal rests on Able's assertion of the likelihood of powers of compulsion being granted. Given that these would have to include the provision of an unassessed overbridge over the land of the Highways Agency, still less weight can be given to this.
- 15.4 C.GEN's position is that this solution may be acceptable, but only subject to the existing Railway being afforded the protection that it seeks. Regardless of whether Able promotes this in order to reduce the likelihood of the Killingholme Loop being promoted by Network Rail, as an important prospective beneficiary of the Railway it must be properly protected and it must be assured that rail access to C.GEN's Project (as well as CPK) will not be interfered with by the unnecessary construction of level crossings. If any weight is to be afforded to this proposal it must be accompanied by full and proper protection for C.GEN in the form of protective provisions and an indemnity.

## **16. Procedural matters**

- 16.1 Able is understandably casting around for solutions in relation to the problems presented by its failure properly to consult in relation to AMEP. The proposals it is now advancing are flawed and jeopardise any decision founded upon them. Before proceeding further, the Secretary of State should require Able to resubmit its application and, at the very least, recommence its examination on the basis of clear and fixed application proposals. This is for the following reasons:

16.1.1 Able has not addressed the matter on which the Secretary of State wished to

receive assurances. It has sought to show that it cannot adopt a western diversion of the railway and that a Rosper Road Loop could be built. It has not shown how level crossings can operate safely, or the amount of use of such crossings, down-times, interference with rail use or the like. Able has not met the standard of proof demanded by the questions asked by the Secretary of State;

- 16.1.2 The proposals of Able are unclear. It has not provided alternative drafting for the DCO. Its drawings have not been amended. Drawings used in some of its submissions appear to maintain that it seeks the compulsory acquisition of the Railway. The locations of level crossings and easements have not been shown;
- 16.1.3 The changes in the proposals amount to a major variation of the AMEP project, which goes beyond the changes disallowed by the IPC in relation to the Brig-y-Cwm energy from waste project and envisaged by the letter of Bob Neil dealing with changes to NSIP applications;
- 16.1.4 The assertions of AMEP rest upon interpretations of statements made by Network Rail on the topic of Network Change, which need to be tested by cross-examination since the interpretation given by Able goes further than the words used by Network Rail;
- 16.1.5 The extent of Network Change proposed is wholly unclear and its consequences (and likelihood of success) cannot be understood. This is particularly the case since it requires the agreement of all access beneficiaries, which is very unlikely to be achieved by Able;
- 16.1.6 Able seeks to ascribe weight to statements by the ORR that are based upon meetings with AMEP and submissions by AMEP in which the views of other parties have not been sought, given or afforded weight. There is a real risk that the ORR, which must act quasi-judicially, has prejudged important matters upon which it must form an opinion in due course. As such, the prejudice of the ORR would result in the contamination of the Secretary of State's decisions should he afford the ORR's views weight; and
- 16.1.7 The Secretary of State should afford parties like C.GEN the right to be heard on these matters. Effectively, the approach of Able is prolonging the hearing process and amending the application by other means and without the ability for those affected to be heard in respect of matters of great importance to their businesses.

## **PART 4 - REPRESENTATIONS ON GENERAL MATTERS**

### **17. Flood Protection Issues**

17.1 C.GEN notes from paragraph 10 of the Decision that the resolution of flood protection issues at the main development site has been addressed by the Environment Agency by way of legal agreement relating to flood defence works. Given the location of the proposed C.GEN Project, were any tidal or fluvial flooding to occur, C.GEN may very well be affected. As such, the legal agreement that has been entered into by Able and the Environment Agency is of interest to C.GEN and should be published so that its terms can be considered, and an opportunity provided for those affected to comment upon it, prior to a decision being made by the Secretary of State.

### **18. Traffic Impact of the Able Project**

18.1 The Secretary of State has concluded, at paragraph 31 of the Decision, that the traffic impacts of the Able project have been assessed comprehensively. However, this conclusion does not acknowledge that the assessment was undertaken on an assessment that all construction traffic would be entering the Able site at 07.00 and leaving at 19.00. That assumption is not secured by the provisions of the draft Order or Able's Travel Plan.

### **19. The Draft Order**

19.1 C.GEN acknowledges that, as recorded at paragraph 19.128 of the Panel's Report, by the close of the examination it was common ground between Able and National Grid that Able has no intention of acquiring any of National Grid's interests or extinguishing any rights currently enjoyed by National Grid in the Order Land, or of interfering with any of National Grid's equipment. However, C.GEN is concerned that the Panel has not included any provision for indemnities for statutory undertakers in the protective provisions in Schedule 9 to the draft Order. The Panel's reasoning for excluding any indemnities is provided at paragraph 19.101 of its Report in relation to its findings for Network Rail.

19.2 Given the proposals for the C.GEN Project, described above, C.GEN is concerned that were any interference with National Grid's infrastructure to occur as a result of AMEP which caused loss to C.GEN, or any of the other energy undertakings in the surrounding area, National Grid would not be indemnified against any claims for recovery of those losses. Able may plead that its activities are authorised by statute, resulting in protection from suit.



- 19.3 The panel fails to understand that by stating that the parties can avoid having to go through the courts by consultation deprives C.GEN of proper protection. If Able has statutory immunity as a result of its proposed order it neither has an incentive to consult nor is there a remedy available in damages should it fail to do so.
- 19.4 C.GEN is of the view that indemnities in favour of all statutory undertakers should be provided in the protective provisions at Schedule 9 to the Order.

**DLA Piper UK LLP**

**15 November 2013**

# Part G - Network Change

## Explanatory Note

- A. *Part G is concerned with the procedures which Access Parties must go through when certain types of change to the Network (defined as “Network Change”) occur or are proposed.*
- B. *The definition of “Network Change” is broad, and much of it is expressed in non-exhaustive terms (i.e. after some general words of definition, Network Change is said to “include” certain specific things by way of illustration or example, but that does not necessarily mean that other things are excluded). The definition should always be considered carefully and in its entirety before any decision is made as to whether a particular change falls within the scope of Part G (see generally the Rail Regulator’s judgment in Network Rail Infrastructure Limited v Great North Eastern Railway Limited [2003] RR 2). The following specific points should also be noted:*
- (i) only changes which are likely to have a material effect on the operation of the Network or of trains operated on the Network are Network Changes;*
  - (ii) Network Changes can either be physical (e.g. changes to the layout, configuration or condition of the Network) or operational (e.g. the introduction of a speed restriction on a section of track, a change to the way Network Rail maintains track or a change to the monitoring points used in the application of Schedule 8 of the Track Access Agreements), but operational changes are only Network Changes if they last, or are likely to last, for more than six months;*
  - (iii) the definition of Network Change includes changes which will generally be seen in a positive light (e.g. enlargement of capacity on a stretch of track) as well as changes which are more likely to be characterised as having a negative impact (e.g. reduction of capacity or deterioration in condition);*
  - (iv) closures of lines which are covered by the statutory procedures under the Act (i.e. lines which are, or have in the preceding five years been, used for passenger services) and changes made under the Systems Code are not Network Changes; and*
  - (v) closures of lines which are not covered by the statutory procedures under the Act (i.e. lines which are, or have in the preceding five years, been used only for freight services) are Network Changes.*
- C. *From a procedural point of view, Part G divides Network Changes into two categories: those proposed by Network Rail and those proposed by an Access Beneficiary. All Network Changes, whether proposed by Network Rail or by an Access Beneficiary, are implemented by Network Rail.*

- D. *The general principle is that before any Network Change can be implemented:*
- (i) it must be formally proposed under Part G; and*
  - (ii) it must be accepted by those Access Beneficiaries whom it will affect (and, where the change is proposed by an Access Beneficiary, by Network Rail); or*
  - (iii) to the extent that there is any dispute as to whether the change should be implemented, or the terms on which it should be implemented, such dispute must be resolved (whether by agreement or in accordance with the ADRR) in favour of the change being implemented.*
- E. *However, it is recognised that:*
- (i) safety considerations will sometimes dictate that Network Rail must make a Network Change very quickly, without recourse to all the procedures under Part G. In such cases, Network Rail's obligations under Part G may be subordinated to the interests of safety to a greater or lesser extent, depending on the circumstances (see further Condition G1.10); and*
  - (ii) where a Network Change is required to be made as a result of a Change of Law or a Direction of a Competent Authority, most of the normal obligations of Access Parties under Part G do not apply (see further Condition G9).*
- F. *Condition GA imposes a general obligation on Network Rail to facilitate Network Change, which includes a number of specific obligations to provide information to Access Beneficiaries and to publish documents generated under Part G on its website. Network Rail is also obliged to publish model terms and conditions which it is prepared to use in connection with the implementation of Network Change proposals.*
- G. *Conditions G1 and G2 are concerned with proposals made by Network Rail. Conditions G3 and G4 are concerned with proposals made by Access Beneficiaries. Conditions G5 to G7 inclusive are concerned with proposals made by Network Rail using the Complex Projects Procedure. Condition G8 is concerned with the expiry and reversal process of a Short Term Network Change. G9 is concerned with mandatory changes (resulting from a Change of Law or a Direction of a Competent Authority). Condition G10 is concerned with the processes that may be adopted for establishing and implementing Network Changes. Condition G11 is concerned with dispute resolution in connection with Network Change proposals.*
- H. *Except where it elects to follow the Complex Projects Procedure (see note J below for guidance), where Network Rail wishes to make a Network Change proposal the procedure is as follows:*
- (i) Network Rail gives a notice of proposal and sets a deadline for Access Beneficiaries to respond to it. Conditions G1.1 and G1.2 specify the persons to whom the notice must be given and what it must contain. In particular, the notice is to contain information on the likely material effects of*

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*the Network Change and the reasons for its proposal and proposals as to how affected Access Beneficiaries should be compensated for the costs, losses and expenses which they may incur as a result of the implementation of the proposed change.*

- (ii) Network Rail consults with operators of railway assets likely to be affected by the proposed change and may adjust the deadline for responses in the light of consultation.*
  - (iii) If the deadline for responses is 60 or more days after the date of Network Rail's notice, Network Rail may require Access Beneficiaries to submit preliminary responses or estimates of the costs, losses and expenses which they may incur as a result of the implementation of the proposed change.*
  - (iv) Access Beneficiaries are entitled to be reimbursed 75% of their reasonable costs of assessing a Network Change proposal by Network Rail. Network Rail may require Access Beneficiaries to provide it with estimates of such assessment costs, or to cease incurring such costs.*
  - (v) In responding formally to a Network Change proposal, an Access Beneficiary must either accept the proposal in its entirety or object to it on one or more of the grounds specified in Condition G2.1.1(a). Grounds for objection fall into four categories: objections to the proposed change because it would breach the Access Beneficiary's access contract; objections to the change proposal on the grounds that it does not contain sufficient information to allow the Access Beneficiary to make an informed response; objections to the proposed change on the grounds that it would result in a material deterioration in performance that could not adequately be compensated; and objections to the proposed change because it does not take into account the reasonable expectations of the Access Beneficiary in relation to the future use of the part of the Network in question. When making a claim for compensation for costs, losses and expenses which it may incur as a result of the proposed change, an Access Beneficiary must state on what terms it believes such compensation should be paid. The benefits of the change to the Access Beneficiary and its chances of recouping its costs or losses from third parties (including passengers) are to be taken into account when determining the amount of such compensation.*
  - (vi) Network Rail must then either reach agreement with any objecting Access Beneficiaries, refer the matters in dispute in accordance with the ADRR or abandon the proposal. Implementation will then depend on whether the ADRR proceedings result in a determination that the change should be implemented on terms which are acceptable to Network Rail. If no Access Beneficiary objects to a Network Change proposal, Network Rail is entitled to implement following the procedure set out in Condition G10.*
- I. The Short Term Network Change process allows Network Rail to propose to maintain any part of the Network at less than the published capability for a specified period. Condition G8 provides Access Beneficiaries with the ability to request, at Network Rail's cost, the reversal of any such change should they have*

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a reasonable expectation as to the future use of the relevant part of the Network before the expiry of the specified period.

- J. Where Network Rail wishes to make a Network Change proposal using the Complex Projects Procedure, this should be carried out as follows:
- (i) Before giving formal notice of a proposal for a Network Change which it intends to progress using the Complex Projects Procedure, Network Rail must advise all affected Access Beneficiaries that it intends to initiate that procedure. The information provided must include details of the proposed change, the reasons for it being progressed and a draft plan setting out the intended stages and timetable for the procedure. Network Rail must also include a draft Scope of the proposal.
  - (ii) Network Rail must consult with all affected Access Beneficiaries on the information it has provided. Access Beneficiaries must take all reasonable steps to supply any information that Network Rail has requested to enable it to develop its proposal, and to provide a response to Network Rail within 30 days (or such longer period as Network Rail may specify) of receiving the consultation information. Due consideration must be given to the views contained in all responses and where Network Rail disagrees with the views of any Access Beneficiary, it must send a written explanatory response to that Access Beneficiary.
  - (iii) Once the consultation process outlined above has been completed, Network Rail may, if it wishes to proceed with the proposed Network Change, issue a notice of intended Scope to each affected Access Beneficiary.
  - (iv) Upon receipt of a notice of intended Scope, each Access Beneficiary must within 30 days (or longer if specified by Network Rail) respond in writing to Network Rail stating whether it agrees to the Scope. It can only refuse to agree if it believes that if the Scope were to be proposed as a Network Change at least one of the 'normal' reasons for rejection of a Network Change proposal, set out in Condition G2.1.1(a), would apply (see note H(v) above). Access Beneficiaries who do not respond within the specified timescales, e.g. 30 days, are deemed to have agreed to the Scope.
  - (v) If the Scope cannot be agreed by Network Rail and an affected Access Beneficiary, either party can refer the matter to dispute (using the process set out in Condition G11).
  - (vi) Access Beneficiaries are entitled to be reimbursed 100% of their minimum reasonable costs of assessing Network Rail's notice of proposed Scope. Network Rail may require Access Beneficiaries to provide it with accurate estimates of such assessment costs to enable it to assess whether they are reasonable, or if necessary to cease incurring any further costs.

- (vii) *At any time before a Network Change notice is issued, Network Rail may issue further notices of intended Scope to consult about the inclusion of further elements which it would like to form part of the Scope.*
  - (viii) *If Network Rail chooses to proceed with a Network Change using the Complex Projects Procedure it may issue a Network Change notice or notices (using the process in Condition G1) to consult on the implementation of Preparatory Works to facilitate the development of the project. Access Beneficiaries must take all reasonable steps to facilitate such works, although they have the same rejection or acceptance rights as they would if the Preparatory Works were issued as a Network Change proposal in their own right.*
  - (ix) *Once the Scope has been agreed by an Access Beneficiary, Network Rail may issue a Network Change notice to consult on the implementation of the proposed change. An Access Beneficiary cannot reject elements of the Scope which are included in such a proposal for Network Change, unless the Scope has changed from that which was agreed such that it is likely materially to affect that Access Beneficiary. If an Access Beneficiary is thus prevented from rejecting the Network Change proposal under normal grounds but would otherwise have been able to do so, it can reject the proposal if it believes the proposal for Network Change is not to the benefit of the industry as a whole.*
- K. *Where an Access Beneficiary wishes to make a Network Change proposal, the procedure is as follows:*
- (i) *The Access Beneficiary (“Sponsor”) gives a notice of proposal to Network Rail. Condition G3.2 prescribes the contents of such a notice. In particular, the notice is to contain information on the likely material effects of the Network Change and the reasons for its proposal and proposals as to how Network Rail and affected Access Beneficiaries should be compensated for the costs, losses and expenses which they may incur as a result of the implementation of the proposed change. Network Rail must then evaluate the proposal and be permitted to consult with Access Beneficiaries and other relevant persons about the effects of the proposal.*
  - (ii) *Within 30 days of receiving the Sponsor’s notice, Network Rail gives a notice setting out the Sponsor’s proposal and adding further information on its own account (in particular, where it disagrees with elements of the Sponsor’s proposal). The notice includes a deadline for Network Rail to respond to the Sponsor’s notice of proposal, which may be adjusted in the light of consultation.*
  - (iii) *If the deadline for responses is 90 or more days after the date of Network Rail’s notice, the Sponsor may require Network Rail to submit preliminary responses or estimates of the costs, losses and expenses which it may incur as a result of the implementation of the proposed change.*

- (iv) *Network Rail is entitled to be reimbursed 75% of its reasonable costs of assessing a Network Change proposal by the Sponsor. The Sponsor may require Network Rail to provide it with estimates of such assessment costs, or to cease incurring such costs.*
- (v) *In responding formally to a Network Change proposal, Network Rail must state on its own behalf and on behalf of any other Access Beneficiary, whether the proposal is accepted in its entirety or objected to on one or more of the grounds specified in Condition G4.1.1(a) or (b). If a Network Change proposal is accepted and Network Rail and/or an affected Access Beneficiary make a claim for compensation for costs, losses and expenses which it may incur as a result of the proposed change, Network Rail must state on what terms it (or another Access Beneficiary) believes such compensation should be paid. The benefits of the change to Network Rail or any other Access Beneficiary and their chances of recouping their costs or losses from third parties (including passengers) are to be taken into account when determining the amount of any compensation.*
- (vi) *The Sponsor must then either reach agreement with Network Rail and other Access Beneficiaries to the extent that they raise objections to the proposal, refer the matters in dispute for determination in accordance with the ADRR or abandon the proposal. Implementation will then depend on whether the ADRR proceedings (see further Condition G10) result in a determination that the change should be implemented. If there are no objections to the proposal the Sponsor is entitled to require Network Rail to implement it following the procedure set out in Condition G9.*
- (vii) *Where a proposal for Network Change proposed by an Access Beneficiary requires the implementation of a Vehicle Change, that Access Beneficiary must follow the required procedures under Part F as well as those under Part G.*

L. *This Explanatory Note does not form part of the Network Code.*

## Revised Part G

### DEFINITIONS

In this Part G, unless the context otherwise requires:

- “authorised variation” means a variation to an established Network Change, where:
- (a) the terms and conditions on which the Network Change in question was established contain a variation procedure;
  - (b) that variation procedure has been followed in accordance with its terms; and
  - (c) the result of the operation of that variation procedure is that the established Network Change has been varied;
- “change” includes:
- (a) improvement or deterioration, enlargement or reduction; and
  - (b) for the purposes of paragraph (b) of the definition of Network Change, a series of changes;
- “Complex Projects Procedure” means the procedure set out in Conditions G5 to G7;
- “Effective Date” means the date specified in a notice of proposal of a Short Term Network Change upon which the Short Term Network Change is proposed to become effective;
- “Established Date” means the first date upon which a Short Term Network Change can be implemented in accordance with Condition G10, whether or not the change is implemented on that day;
- “established Network Change” means a change falling within the definition of “Network Change” and which:



- (a) in the case of a Network Change proposed by Network Rail, Network Rail is entitled to carry out having complied with the procedural and other requirements of this Part G; and
- (b) in the case of a Network Change proposed by an Access Beneficiary, Network Rail is required by this Part G to carry out,

and “establish” and “establishment” of a Network Change shall be construed accordingly;

“Expiry Date” means the date specified in a notice of proposal in relation to a Short Term Network Change which shall not be more than two years, or such longer period as is agreed between Network Rail and each Access Beneficiary that may be affected by the implementation of the proposed Short Term Network Change or determined in accordance with Condition G11, from the later of the Effective Date and the Established Date;

“Governmental Body” means any local, national or supra-national agency, authority, department, inspectorate, minister, ministry, official, court, tribunal, or public or statutory person (whether autonomous or not and including the Office of Rail Regulation);

“method of delivery” includes the means of securing access to an operational document and the ability to make use of the data contained in an operational document;

“modification” includes additions, alterations and omissions, and cognate expressions shall be construed accordingly;

“Network Change” means, in relation to an Access Beneficiary:

- (a) any change in or to any part of the Network (including its layout, configuration or condition) which is likely materially to affect the operation of:
  - (i) the Network; or
  - (ii) trains operated by, or anticipated as being operated in accordance with the terms of any

access option, by or on behalf of that Access Beneficiary on the Network; or

- (b) any change to the operation of the Network (being a change which does not fall within paragraph (a) above) which:
  - (i) is likely materially to affect the operation of trains operated by, or anticipated as being operated in accordance with the terms of any access option, by or on behalf of that Access Beneficiary on the Network; and
  - (ii) has lasted or is likely to last for more than six months,

including

- (x) a temporary speed restriction;
  - (y) a material change to the location of any of the specified points referred to in Condition B1.1(a); or
  - (z) a change to the method of delivery of any operational documentation (other than Railway Group Standards) owned or used by an Access Party; or
- (c) any material variation to an established Network Change, other than an authorised variation,

but does not include a closure (as defined in the Railways Act 2005) or a change made under the Systems Code;

“Preparatory Works” means testing, trials, pilot activities, surveys and all other activities reasonably necessary to develop the proposed Network Change;

“Relevant Costs” means, in respect of any Network Change implemented in accordance with Condition G9:

- (a) in respect of Network Rail, all costs, direct losses and expenses (including loss of revenue and liabilities to other Access Beneficiaries but excluding

liabilities under any Access Beneficiary's Access Agreement as a consequence of any Restriction of Use in connection with the implementation of that Network Change) incurred by Network Rail as a consequence of the implementation of that Network Change;

- (b) in respect of any Access Beneficiary, the amounts which would otherwise be due under that Access Beneficiary's Access Agreement as a consequence of any Restriction of Use in connection with the implementation of that Network Change;

“relevant response date” means:

- (a) in relation to a proposal for a Network Change under Condition G1, the later of such dates as are reasonably specified by Network Rail under Condition G1.2(a) and Condition G1.3.2 as the date on or before which an Access Beneficiary is to give notice of its response to that proposal under Condition G2.1, having regard to:
  - (i) the size and complexity of the change; and
  - (ii) the likely impact of the change on the Access Beneficiary,

and which shall not be less than 30 days from the date on which the notice of the proposal for change is given; and

- (b) in relation to a proposal for a Network Change under Condition G3, the later of such dates as are reasonably specified by Network Rail under Condition G3.3.1(c)(i) and Condition G3.4.3 as the date on or before which it is to give notice of its response to that proposal under Condition G4.1, having regard to:
  - (i) the size and complexity of the change; and
  - (ii) the likely impact of the change on Access

Beneficiaries,

and which shall not be:

- (A) less than 60 days; or
- (B) unless Network Rail and the Sponsor agree otherwise in writing, more than 90 days,

from the date on which Network Rail's notice under Condition G3.3.1(c) is given;

“Scope” means those elements of the scope of a proposed Network Change that are set out in a notice issued by Network Rail under Condition G5.4;

“Short Term Network Change” means a Network Change which Network Rail specifies as such in any proposal made under Condition G1, being a Network Change which involves only a temporary reduction in the capability of the Network for a defined period of time during which there is no reasonable expectation of a requirement for the capability being temporarily withdrawn;

“Sponsor” means, in relation to a proposal for a Network Change under Condition G3.1, the Access Beneficiary which has made the proposal;

“variation” means any modification to the terms or conditions (including as to the specification of the works to be done, their timing, the manner of their implementation, the costs to be incurred and their sharing, and the division of risk) on which an established Network Change is to be carried out, and “varied” and any other cognate words shall be construed accordingly; and

“variation procedure” means, in relation to an established Network Change, a procedure which:

- (a) forms part of the terms and conditions on which the Network Change is established; and
- (b) provides for the established Network Change itself to be varied after it has been first established.

## **CONDITION GA - FACILITATION OF NETWORK CHANGE**

### **A1 *Obligation to facilitate Network Change***

Network Rail shall take all reasonable steps to facilitate the development, establishment and implementation of any proposal for Network Change.

### **A2 *Limit of obligation***

Condition GA1 does not oblige Network Rail to do anything which it is not required to do under its network licence.

### **A3 *Facilitation***

The obligation of Network Rail under Condition GA1 includes:

- (a) the provision to an Access Beneficiary of such information concerning the condition, capacity and/or capability of the Network as:
  - (i) Network Rail is required at any time to hold or have appropriate access to under its network licence; and
  - (ii) that Access Beneficiary may reasonably request in connection with the development of a proposal for Network Change (whether the proposal is made by that Access Beneficiary or another person);
- (b) the publication on its website (subject to Condition A3 of the Network Code) of:
  - (i) every proposal for Network Change made by Network Rail under Condition G1.1 or by an Access Beneficiary under Condition G3.1;
  - (ii) every response to a proposal for Network Change made by an Access Beneficiary under Condition G2.1 or by Network Rail under Condition G4.1;
  - (iii) the determinations of matters which have been referred for determination in accordance with the ADRR under Condition G11.1 and which fall to be published in accordance with the ADRR;
  - (iv) every authorised variation;
  - (v) standard forms, produced after consultation with every other Access Party and approved by the Office of Rail Regulation, for the

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notification under this Part G of proposals for Network Change, and of responses to such proposals, which:

- (A) may include different forms for different types of Network Change having regard to the size, complexity and value of the change in question; and
  - (B) shall be used by any person notifying or responding to a proposal for Network Change under this Part G, unless it is not reasonably practicable for it to do so; and
- (vi) model terms and conditions, produced after consultation with every other Access Party and approved by the Office of Rail Regulation, by way of supplement to the terms of this Part G and on which Network Rail is prepared to contract for or in connection with the implementation of a Network Change which:
- (A) shall provide appropriate and proportionate forms of contract for different types of Network Change having regard to the size, complexity and value of the change in question;
  - (B) may include variation procedures; and
  - (C) shall, so far as reasonably practicable, form the basis of any terms and conditions relating to the implementation of a Network Change which are proposed by Network Rail under Condition G1 or by an Access Beneficiary under Condition G3;
- (c) the provision of a preliminary response to a proposal for Network Change by an Access Beneficiary under Condition G3.4;
- (d) such consultation before a notice of a proposal for a Network Change is submitted by an Access Beneficiary as may reasonably be expected to enable that Access Beneficiary to assess the feasibility and affordability of the proposed change; and
- (e) such consultation with the persons specified in Condition G1.1(a) and G3.1(b) before a notice of a proposal for a Network Change is given by Network Rail or submitted by an Access Beneficiary as:
- (i) Network Rail considers reasonably necessary; and
  - (ii) any person specified in Condition G1.1(a) and G3.1(b) may reasonably request,

to enable the proposal to be developed in an efficient and economical manner.

## **CONDITION G1 - NETWORK CHANGE PROPOSAL BY NETWORK RAIL**

### **1.1 *Notice of proposal***

Subject to Conditions G1.9 and G1.10, if Network Rail wishes to make a Network Change, it shall:

- (a) give notice of its proposal for Network Change to:
  - (i) each Access Beneficiary that may be affected by the implementation of the proposed Network Change;
  - (ii) the Secretary of State, and Scottish Ministers if they may be affected by the implementation of the proposed Network Change;
  - (iii) the Office of Rail Regulation; and
  - (iv) each Passenger Transport Executive that may be affected, Transport for London if it may be affected and the Welsh Assembly Government if it may be affected, by the implementation of the proposed Network Change; and
- (b) without delay publish on its website a summary of its proposal for Network Change.

### **1.2 *Content of notice of proposed Network Change***

A notice of a proposed Network Change given by Network Rail under Condition G1.1 shall:

- (a) state the relevant response date and the obligations of Access Parties under Conditions G1 and G2;
- (b) indicate whether and to what extent the proposed Network Change has been progressed using the Complex Projects Procedure;
- (c) indicate whether the proposed Network Change is a Short Term Network Change;
- (d) invite the persons specified in Condition G1.1(a)(ii)-(iv) to submit comments by the relevant response date;
- (e) contain:

- (i) the reasons why it is proposed to make the change, including the effects it is intended or may reasonably be expected to have on the operation of the Network or on trains operated on the Network;
  - (ii) a specification of the works to be done (including a plan showing where the work is to be done and the parts of the Network and associated railway assets likely to be affected);
  - (iii) the proposed times within which the works are to be done and when they are intended or may reasonably be expected to be begun and completed;
  - (iv) Network Rail's proposals (if any) for the division of the costs of carrying out the change, including any proposals in relation to the calculation or payment of compensation to Access Beneficiaries in respect of the change;
  - (v) in the case of a Short Term Network Change:
    - (A) Network Rail's proposals as to the Effective Date;
    - (B) Network Rail's proposals as to the Expiry Date;
    - (C) the estimated timescale in which the change could reasonably be reversed if so requested by an Access Beneficiary based on its reasonable expectations as to future use of the Network; and
    - (D) the capability of the relevant section of the Network before the proposed Short Term Network Change (and any Short Term Network Change which it succeeds) and the proposed reduction to that capability;
  - (vi) any additional terms and conditions which Network Rail proposes should apply to the change, including any proposed variation procedure;
  - (vii) the results of any consultation undertaken in accordance with Condition G5; and
  - (viii) the results of any Preparatory Works undertaken in accordance with Condition G6; and
- (f) be prepared to a standard, and in such detail, as is reasonably necessary, having due regard to the level of knowledge and expertise reasonably to



be expected of the persons specified in Condition G1.1(a), to enable any such person to assess the likely effect of the proposed change on its business and its performance of any obligations or the exercise of any discretions which it has in relation to railway services.

### **1.3 Consultation**

1.3.1 Network Rail shall, after giving notice of any proposal for Network Change under Condition G1.1, consult with each operator of railway assets likely to be materially affected by the proposed change to the extent reasonably necessary so as properly to inform that operator of the change and to enable that operator to assess the consequences for it of the proposed change.

1.3.2 After consultation under this Condition G1.3, Network Rail may notify a later relevant response date to the persons to whom the notice of proposal for Network Change was given.

### **1.4 Obligations on Access Beneficiaries to facilitate Network Change**

1.4.1 Except in the circumstances and to the extent specified in Condition G1.4.2, an Access Beneficiary shall, when consulted by Network Rail under Condition G1.3, take all reasonable steps to comply with any written request of Network Rail to provide Network Rail, within a reasonable period of time and at no cost to Network Rail, with:

- (a) a preliminary estimate of those costs, losses and expenses referred to in Condition G2.2; or
- (b) a preliminary written response in respect of the proposed Network Change, which shall:
  - (i) be binding on the Access Beneficiary, unless the Access Beneficiary indicates otherwise; and
  - (ii) if it is negative, include reasons.

1.4.2 An Access Beneficiary shall not be obliged to comply with a request from Network Rail under Condition G1.4.1:

- (a) unless:
  - (i) the relevant response date is 60 or more days after the date on which the proposal for Network Change was given; and

(ii) the request is made at the same time as Network Rail gives its notice under Condition G1.1; or

(b) to the extent that the Access Beneficiary is unable to comply with such a request, having regard to the information reasonably available to it.

### **1.5 Reimbursement of costs**

Subject to Conditions G1.4 and G2, each Access Beneficiary shall be entitled to reimbursement by Network Rail of 75% of all costs incurred by that Access Beneficiary in assessing any Network Change proposed by Network Rail. Those costs shall be the minimum reasonably necessary for that Access Beneficiary to carry out that assessment.

### **1.6 Further information regarding costs**

Each Access Beneficiary shall, upon request from Network Rail from time to time, provide Network Rail with written estimates of the costs of assessing a proposal for Network Change proposed by Network Rail (as referred to in Condition G1.5) including estimated costings of the work to be carried out and shall:

- (a) be entitled to require reasonable assurances of payment in respect of any material work to be carried out for the purposes of that evaluation before commencing such work; and
- (b) upon request from Network Rail from time to time, provide Network Rail with such information as may be reasonably necessary to enable Network Rail to assess the reasonableness of any estimate.

### **1.7 Accuracy of estimates**

Each Access Beneficiary shall ensure that any estimates given by it are, so far as reasonably practicable, accurate on the basis of the information reasonably available to it.

### **1.8 Obligation to incur no further costs**

An Access Beneficiary shall, if requested by Network Rail at any time, incur no further costs (except any costs which cannot reasonably be avoided) in respect of any proposal for Network Change made by Network Rail.

## **1.9 *Changes to the operation of the Network***

In the case of a Network Change within the meaning of paragraph (b) of that term's definition, Network Rail may commence implementing the procedure set out in this Part G and shall, upon notice being given by the relevant Access Beneficiary to Network Rail at any time after the expiry of the relevant period, promptly commence implementing and thereafter comply with that procedure as if that change were a Network Change proposed by Network Rail.

## **1.10 *Network Change for safety reasons***

To the extent that a Network Change within the meaning of paragraph (a) of that term's definition is required to be made by Network Rail for safety reasons, Network Rail shall not be obliged to implement the procedure set out in this Part G in relation to that change until the change has lasted for three months. Upon expiry of the relevant period, Network Rail shall promptly commence implementing and thereafter comply with the procedure set out in this Part G as if the relevant Network Change were a Network Change proposed by Network Rail.

## **CONDITION G2 - RESPONSE BY ACCESS BENEFICIARY TO NETWORK CHANGE PROPOSAL**

### **2.1 *Obligation to give notice of response***

2.1.1 The Access Beneficiary shall give notice to Network Rail if it considers that:

- (a) one or more of the following conditions has been satisfied:
  - (i) the implementation of the proposed change would necessarily result in Network Rail breaching an access contract to which that Access Beneficiary is a party;
  - (ii) Network Rail has failed, in respect of the proposed change, to provide sufficient particulars to that Access Beneficiary under Condition G1.2;
  - (iii) the implementation of the proposed change would result in a material deterioration in the performance of that Access Beneficiary's trains which cannot adequately be compensated under this Condition G2 or (where that Access Beneficiary is a Train Operator) in respect of a Restriction of Use in connection with the implementation of the proposed change under that Train Operator's Access Agreement; or

- (iv) the proposed change does not adequately take account of the reasonable expectations of the Access Beneficiary as to the future use of the relevant part of the Network; and/or
- (b) one or more of the conditions set out in Condition G2.1.1(a) has been satisfied but it is prevented by Condition G5.7 from objecting to the proposed Network Change and the proposed Network Change is not, on the basis of the available evidence and taking account of the alternative solutions available and the progress made with the proposed Network Change, to the benefit of the industry as a whole; and/or
- (c) it should be entitled to compensation from Network Rail for the consequences of the implementation of the change either:
  - (i) in accordance with compensation terms proposed under Condition G1; or
  - (ii) on terms other than those proposed (if any) under Condition G1.

2.1.2 Any notice of the kind referred to in Condition G2.1.1(a) above shall include the reasons for the Access Beneficiary's opinion. Any notice of the kind mentioned in Condition G2.1.1(c)(ii) above shall include the reasons why the Access Beneficiary considers that any compensation terms proposed under Condition G1 are inappropriate and shall detail:

- (a) the amount of compensation required and the methodology used to calculate the amount of compensation required; or
- (b) if the Access Beneficiary is not reasonably able to provide details of the amount of compensation required, the methodology to be used to calculate the amount of compensation required; and in either case
- (c) the means by which the compensation should be paid, including any security or other assurances of payment which Network Rail should provide.

The notice referred to above shall contain such detail as is reasonable to enable Network Rail to assess the merits of the Access Beneficiary's decision.

## **2.2 Amount of compensation**

Subject to Condition G2.3 and Condition G2.4.1, the amount of the compensation referred to in Condition G2.1 shall be an amount equal to the amount of the costs, direct losses and expenses (including loss of revenue) which are reasonably incurred or can reasonably be expected to be incurred by

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the Access Beneficiary as a consequence of the implementation of the proposed change.

### **2.3 *Benefits to be taken into account***

There shall be taken into account in determining the amount of compensation referred to in Condition G2.2:

- (a) subject to Condition G2.4.2, the benefit (if any) to be obtained or likely in the future to be obtained by the Access Beneficiary as a consequence of the proposed Network Change; and
- (b) the ability or likely future ability of the Access Beneficiary to recoup any costs, losses and expenses from third parties including passengers and customers.

### **2.4 *Restrictions of Use***

2.4.1 The amount of the compensation referred to in Condition G2.2 shall exclude the amount of the costs, direct losses and expenses (including loss of revenue) which are reasonably incurred or can reasonably be expected to be incurred by the Train Operator as a consequence of any Restriction of Use in connection with the implementation of the proposed change.

2.4.2 The benefits taken into account in determining the amount of the compensation for the proposed change under Condition G2.3 shall exclude the benefit (if any) to be obtained or likely in the future to be obtained by the Train Operator as a consequence of any Restriction of Use in connection with the implementation of the proposed change (with that exclusion including any compensation payable to that Train Operator in respect of that Restriction of Use under its Access Agreement).

## **CONDITION G3 - NETWORK CHANGE PROPOSAL BY ACCESS BENEFICIARY**

### **3.1 *Notice of proposal***

An Access Beneficiary shall, if it wishes Network Rail to make a Network Change:

- (a) submit to Network Rail a proposal for such change; and
- (b) permit Network Rail to consult with:
  - (i) each Access Beneficiary that may be affected by the implementation of the proposed Network Change;

- (ii) the Secretary of State, and Scottish Ministers if they may be affected by the implementation of the proposed Network Change;
- (iii) the Office of Rail Regulation; and
- (iv) each Passenger Transport Executive that may be affected, Transport for London if it may be affected and the Welsh Assembly Government if it may be affected, by the implementation of the proposed Network Change,

to the extent provided for under Condition G3.3.1(b), subject to such requirements as to confidentiality as are reasonable.

### **3.2 Content of Sponsor's notice of proposal**

A notice of a proposed Network Change given by the Sponsor under Condition G3.1 shall:

- (a) contain:
  - (i) the reasons why it is proposed to make the change, including the effects it is intended or expected to have on the operation of the Network or on trains operated on the Network;
  - (ii) a specification of the works to be done (including a plan or plans showing where the work is to be done and the parts of the Network and associated railway assets likely to be affected);
  - (iii) the proposed times within which the works are to be done and when they are intended or expected to be begun and completed;
  - (iv) the Sponsor's proposals (if any) for the division of the costs of carrying out the change including any proposals in relation to the calculation or payment of compensation to Network Rail or any Access Beneficiary in respect of the change; and
  - (v) the additional terms and conditions (if any) which the Sponsor proposes should apply to the change, including any variation procedure; and
- (b) be prepared to a standard, and in such detail, as is reasonably necessary, having due regard to the level of knowledge and expertise reasonably to be expected of the persons specified in Condition G3.1(b), to enable:
  - (i) Network Rail; and

- (ii) any person specified in Condition G3.1(b),

to assess the likely effect of the proposed change on its business and its performance of any obligations or exercise of any discretions which it has in relation to railway services.

### **3.3 Evaluation of proposal and consultation**

3.3.1 If Network Rail receives a proposal for Network Change under Condition G3.1, it shall:

- (a) evaluate and discuss the proposal for change with the Sponsor for such period as is reasonable having due regard to the likely impact of the proposed Network Change on either or both of Network Rail and other operators of trains;
- (b) consult with each person specified in Condition G3.1(b) likely to be materially affected by the proposed change to the extent reasonably necessary so as properly to inform them of the change and to enable them to assess the consequences for them of the change; and
- (c) for the purpose of the consultation under Condition G3.3.1(b), within 30 days of the date on which the Sponsor's notice under Condition G3.1 was given, give a notice to the persons specified in Condition G3.1(b), with a copy to the Sponsor, inviting them to submit comments by the relevant response date and stating:
  - (i) the relevant response date and the obligations of Access Parties under Conditions G3 and G4;
  - (ii) the reasons given by the Sponsor under Condition G3.2(a)(i) for proposing to make the change;
  - (iii) Network Rail's estimate of the likely impact of the change on the operation and performance of the Network; and
  - (iv) Network Rail's own proposals as to:
    - (A) the arrangements for, and any proposed terms applicable to, the implementation of the change;
    - (B) the specification of the works to be done (including a plan or plans showing where the work is to be done and the

parts of the Network and associated railway assets likely to be affected);

- (C) the times within which the works are to be done and when they are intended or expected to be begun and completed;
- (D) the division of the costs of carrying out the change, including any proposals in relation to the calculation or payment of compensation to Access Beneficiaries in respect of the change; and
- (E) any additional terms and conditions which should apply to the change, including any proposed variation procedure.

3.3.2 In preparing a notice under Condition G3.3.1(c), Network Rail:

- (a) shall comply with the standard specified in Condition G3.2(b); and
- (b) in respect of each of the matters specified in Condition G3.3.1(c)(iv):
  - (i) shall have regard to any relevant statements and proposals contained in the Sponsor's notice under Condition G3.1;
  - (ii) shall give reasons for any differences between those statements and proposals and its own proposals under Condition G3.3.1(c)(iv); and
  - (iii) may annex to its notice any proposal contained in the Sponsor's notice under Condition G3.1 with which it agrees, stating its agreement, and, where appropriate, that it has no proposals of its own on the matter concerned.

### **3.4 *Facilitation of Network Change by Network Rail***

3.4.1 Except in the circumstances and to the extent specified in Condition G3.4.2, Network Rail shall, when consulted by the Sponsor, take all reasonable steps to comply with any written request of the Sponsor to provide the Sponsor, within a reasonable period of time, and at no cost to the Sponsor, with:

- (a) a preliminary estimate of those costs, losses and expenses referred to in Condition G4.2 which may be incurred by Network Rail; and/or
- (b) a preliminary written response in respect of the proposed Network Change, which shall:



- (i) be binding on Network Rail, unless Network Rail indicates otherwise; and
- (ii) if it is negative, include reasons.

3.4.2 Network Rail shall not be obliged to comply with a request from the Sponsor under Condition G3.4.1:

(a) unless:

- (i) the relevant response date is 90 or more days after the date on which Network Rail's notice under Condition G3.3.1(c) was given; and
- (ii) the request is made within 7 days of the Sponsor receiving Network Rail's notice under Condition G3.3.1(c); or

(b) to the extent that Network Rail is unable to comply with such a request, having regard to the information reasonably available to it.

3.4.3 After consultation with the Sponsor and under Condition G3.3.1(b), Network Rail may notify a later relevant response date to the Sponsor and the persons to whom it gave its notice under Condition G3.3.1(c).

### **3.5 *Reimbursement of costs***

Subject to Conditions G3.4 and G4, Network Rail shall be entitled to reimbursement by the Sponsor of 75% of all costs incurred by Network Rail in assessing any Network Change proposed by the Sponsor. Those costs shall be the minimum reasonably necessary for Network Rail to carry out that assessment.

### **3.6 *Provision of estimate of costs by Network Rail***

Network Rail shall, upon request from the Sponsor from time to time, provide the Sponsor with written estimates of the costs of assessing a proposal for Network Change submitted by the Sponsor (as referred to in Condition G3.5) including estimated costings of the work to be carried out and shall:

- (a) be entitled to require reasonable assurances of payment in respect of any material work to be carried out for the purposes of that assessment before commencing such work; and

- (b) upon request from the Sponsor from time to time provide the Sponsor or its agents with such information as may be reasonably necessary to enable the Sponsor to assess the reasonableness of any estimate.

### **3.7 Accuracy of estimates**

Network Rail shall ensure that any estimates given by it are, so far as reasonably practicable, accurate on the basis of the information reasonably available to it.

### **3.8 Obligation to incur no further costs**

Network Rail shall, if requested by the Sponsor at any time, incur no further costs (except any costs that cannot reasonably be avoided) in respect of any proposal for Network Change made by the Sponsor.

### **3.9 Relationship with Vehicle Change**

If the implementation of a Network Change proposed by the Sponsor also requires the implementation of a Vehicle Change in respect of the trains operated by the Sponsor, the Sponsor shall follow the procedures and satisfy the requirements of both this Part G and Part F and the requirement for a Vehicle Change shall not preclude the right of the Sponsor to follow the procedure in this Part G for a Network Change or vice versa.

## **CONDITION G4 - RESPONSE BY NETWORK RAIL TO NETWORK CHANGE PROPOSAL**

### **4.1 Obligation to give notice of response**

4.1.1 Network Rail shall give notice to the Sponsor if:

- (a) it considers that one or more of the following conditions has been satisfied:
- (i) the implementation of the proposed change would necessarily result in Network Rail breaching any access contract (other than an access contract to which the Sponsor is a party);
  - (ii) the Sponsor has failed in a material respect to comply with its obligations under Condition G3.2 provided that Network Rail shall first have given the Sponsor a reasonable opportunity to remedy that failure;
  - (iii) the implementation of the proposed change would result in a material adverse effect on the maintenance or operation of the

Network or the operation of any train on the Network which in any such case cannot adequately be compensated under this Condition G4 or in respect of a Restriction of Use in connection with the implementation of the proposed change under the relevant Train Operator's Access Agreement; or

- (iv) the proposed change does not adequately take account of the reasonable expectations of an Access Party (other than the Sponsor) as to the future use of the relevant part of the Network;
- (b) any Access Beneficiary shall have given notice to Network Rail that it considers that any of the conditions specified in paragraph (a) above has been satisfied;
- (c) it considers that it should be entitled to compensation from the Sponsor for the consequences of the implementation of the change either:
- (i) in accordance with compensation terms proposed under Condition G3; or
  - (ii) on terms other than those proposed (if any) under Condition G3; and/or
- (d) any Access Beneficiary shall have given notice to Network Rail that it considers that it should be entitled to compensation from the Sponsor for the consequences of the implementation of the change either:
- (i) in accordance with compensation terms proposed under Condition G3; or
  - (ii) on terms other than those proposed (if any) under Condition G3.
- 4.1.2 Any notice of the kind referred to in Conditions G4.1.1(a) and (b) above shall include the reasons for the opinion in question. Any notice of the kind mentioned in Conditions G4.1.1(c)(ii) and (d)(ii) above shall include the reasons why Network Rail or the relevant Access Beneficiary considers that any compensation terms proposed under Condition G3 are inappropriate and shall detail:
- (a) the amount of compensation required and the methodology used to calculate the amount of compensation required; or
  - (b) if Network Rail or the relevant Access Beneficiary is not reasonably able to provide details of the amount of compensation required, the

methodology to be used to calculate the amount of compensation required; and in either case

- (c) the means by which the compensation should be paid, including any security or other assurances of payment which the Sponsor should provide.

The notice referred to above shall contain such detail as is reasonable to enable the Sponsor to assess the merits of Network Rail or the relevant Access Beneficiary's decision.

#### **4.2 *Amount of compensation***

Subject to Condition G4.3, the aggregate of the amount of the compensation referred to in Condition G4.1 shall be:

- (a) subject to Condition G4.4.1 an amount equal to the amount of the costs, direct losses and expenses (including loss of revenue) which are reasonably incurred or can reasonably be expected to be incurred by Network Rail or the relevant Access Beneficiary in question as a consequence of the implementation of the proposed change other than any such costs, losses or expenses which are attributable to the Sponsor improving its ability to compete with other operators of railway assets; and
- (b) an amount equal to the amount of costs, direct losses or expenses (including loss of revenue) which are reasonably incurred or can reasonably be expected to be incurred by Network Rail as consequence of implementing a Network Change including the recovery of any payments made by Network Rail to the relevant Train Operator under that Train Operator's Access Agreement for the relevant Restriction(s) of Use.

#### **4.3 *Benefits to be taken into account***

There shall be taken into account in determining the amount of compensation referred to in Condition G4.2:

- (a) subject to Condition G4.4.2 the benefit (if any) to be obtained or likely in the future to be obtained by Network Rail or the relevant Access Beneficiary as a consequence of the implementation of the proposed change; and

- (b) the ability or likely future ability of Network Rail or the relevant Access Beneficiary to recoup any costs, losses and expenses from third parties including passengers and customers.

#### **4.4 *Restrictions of Use***

- 4.4.1 The amount of the compensation referred to in Condition G4.2 shall in respect of any Train Operator exclude the amount of the costs, direct losses and expenses (including loss of revenue) which are reasonably incurred or can reasonably be expected to be incurred by that Train Operator as a consequence of any Restriction of Use in connection with the implementation of the proposed change.
- 4.4.2 The benefits taken into account in determining the amount of the compensation for the proposed change under Condition G4.3 shall in respect of any Train Operator exclude the benefit (if any) to be obtained or likely in the future to be obtained by that Train Operator as a consequence of any Restriction of Use in connection with the implementation of the proposed change (with that exclusion including any compensation payable to that Train Operator in respect of that Restriction of Use under its Access Agreement).

### **CONDITION G5 - SCOPE OF COMPLEX PROJECTS**

#### **5.1 *Consultation prior to making a proposal for Network Change using the Complex Projects Procedure***

Before submitting a proposal for Network Change which Network Rail intends to establish using the Complex Projects Procedure, Network Rail shall provide the following information to each Access Beneficiary which it considers may be affected by the implementation of the proposed Network Change:

- (a) that Network Rail intends to initiate the Complex Projects Procedure in respect of the proposed Network Change;
- (b) the details of the proposed Network Change which Network Rail can reasonably make available;
- (c) the reasons why Network Rail believes that the proposed Network Change is required including the effects it is intended or may reasonably be expected to have on the operation of the Network or on trains operated on the Network;

- (d) the reasons why Network Rail believes that the proposed Network Change should be established in accordance with the Complex Projects Procedure;
- (e) any other information Network Rail reasonably believes an affected Access Beneficiary may reasonably require to understand the proposed Network Change;
- (f) a draft plan setting out the intended stages and timetable for the Complex Projects Procedure; and
- (g) the Scope that Network Rail intends to propose under Condition G5.4.

## **5.2 Consultation with affected Access Beneficiaries**

Network Rail shall, having provided the information set out in Condition G5.1, consult with each Access Beneficiary which it considers may be affected by the proposed change. During the consultation process Network Rail shall give due consideration to the views of each Access Beneficiary and, where Network Rail disagrees with the views of an Access Beneficiary, shall provide that Access Beneficiary with a written response setting out the reasons why Network Rail disagrees with the views of that Access Beneficiary.

## **5.3 Facilitation by Access Beneficiaries**

Access Beneficiaries consulted under Condition G5.2 shall take all reasonable steps to make the consultation process effective, including:

- (a) the taking of all reasonable steps to provide Network Rail with such information as Network Rail reasonably requests in connection with the development of the proposal for Network Change under Condition G5.1; and
- (b) the provision to Network Rail of a response to Network Rail's consultation under Condition G5.2 in relation to the proposed Network Change within 30 days of being consulted by Network Rail, or such longer period as Network Rail may specify.

## **5.4 Notice of intended Scope**

Once the consultation procedure set out in Conditions G5.2 and G5.3 has concluded, Network Rail may, if it wishes to proceed with the proposed Network Change using the Complex Projects Procedure, issue a notice of intended Scope to each Access Beneficiary which it considers may be affected.

### **5.5 *Response to notice of intended Scope***

Each Access Beneficiary that receives a notice of intended Scope from Network Rail under Condition G5.4 shall, within 30 days, or such longer period as Network Rail specifies, of the receipt of such notice, respond to Network Rail in writing stating either that it:

- (a) agrees to the Scope set out in the notice; or
- (b) does not agree to the Scope set out in the notice and it considers that there is a reasonable likelihood that, if the Scope were to be proposed as part of a Network Change under Condition G1, the Access Beneficiary would be likely to succeed in preventing the Network Change being established solely due to it being entitled to give notice under Condition G2.1.1(a).

Any notice under (b) above that an affected Access Beneficiary does not agree to the Scope set out by Network Rail in the notice of intended Scope shall include the reasons why the affected Access Beneficiary does not so agree.

If an Access Beneficiary receives a notice of intended Scope from Network Rail under Condition G5.4 and fails to respond to Network Rail in writing within 30 days, or such longer period as Network Rail specifies, of the receipt of such notice, the affected Access Beneficiary shall be deemed to have agreed to the Scope as if the affected Access Beneficiary had given notice to Network Rail under Condition G5.5(a).

### **5.6 *Failure to agree Scope***

If an Access Beneficiary does not agree to the Scope under Condition G5.5(b), then Network Rail and the Access Beneficiary may enter into discussions with a view to agreeing the Scope, including any changes to the Scope which may be appropriate. At any time after an Access Beneficiary serves a notice under Condition G5.5(b) any Access Party may refer the issue in accordance with the ADRR for determination in accordance with Condition G11.

### **5.7 *Effect of agreement of Scope***

Once the relevant Scope of the proposed Network Change has been agreed under Conditions G5.5 or G5.6 or determined under Condition G5.6 with an Access Beneficiary, that Access Beneficiary shall not be entitled to give notice to Network Rail subsequently under Condition G2.1.1(a) to challenge any elements of the Network Change to the extent included in the Scope except where there is a change to the Scope which is likely materially to affect the Access Beneficiary since the Scope was agreed under Conditions G5.5 or G5.6 or determined under Condition G5.6.

#### **5.8 *Costs incurred by Access Beneficiaries due to the consultation process***

An Access Beneficiary shall be entitled to reimbursement by Network Rail of 100% of all costs reasonably incurred by that Access Beneficiary in complying with its obligations under Conditions G5.3 and G5.5. The costs shall be the minimum reasonably necessary for that Access Beneficiary to carry out the assessment.

#### **5.9 *Further information regarding costs***

Each Access Beneficiary shall, upon request from Network Rail from time to time, provide Network Rail with written estimates of the costs of complying with its obligations under Conditions G5.3 and G5.5 including estimated costings of the work to be carried out and shall:

- (a) be entitled to require reasonable assurances of payment in respect of any material work to be carried out for the purposes of that evaluation before commencing such work; and
- (b) upon request from Network Rail from time to time, provide Network Rail with such information as may be reasonably necessary to enable Network Rail to assess the reasonableness of any estimate.

#### **5.10 *Accuracy of estimates***

Each Access Beneficiary shall ensure that any estimates given by it are, so far as reasonably practicable, accurate on the basis of the information reasonably available to it.

#### **5.11 *Obligation to incur no further costs***

An Access Beneficiary shall, if requested by Network Rail at any time, incur no further costs (except any costs which cannot reasonably be avoided) in respect of any consultation in respect of a proposed Network Change to which this Condition G5 applies.



## **5.12 Further agreement of Scope**

If, at any time before Network Rail issues a notice of proposed change under Condition G1.1, Network Rail wishes to agree further elements of the proposed Network Change to be included in the Scope, Network Rail may issue further notices of intended Scope in respect of such further elements in accordance with Conditions G5.1 to G5.11 and once agreed or determined in accordance with Conditions G5.5 or G5.6 such further elements will be included in and form part of the Scope.

## **CONDITION G6 - PREPARATORY WORKS**

### **6.1 Network Rail's obligations in relation to Preparatory Works**

Network Rail may, if it wishes to proceed with a proposed Network Change using the Complex Projects Procedure, make proposals for the implementation of Preparatory Works under Condition G1, and except as provided in this Condition G6, Access Beneficiaries shall have the same rights in respect of such proposals as if each proposal of Preparatory Works was a separate Network Change proposal.

### **6.2 Obligations of Access Beneficiaries in relation to Preparatory Works**

Each Access Beneficiary which is likely to be affected by the Preparatory Works shall take all reasonable steps to facilitate the Preparatory Works which are undertaken by Network Rail including by the taking of all reasonable steps to provide Network Rail with such information as Network Rail reasonably requests in connection with the development of the Preparatory Works.

### **6.3 Further Preparatory Works**

If at any time Network Rail is reasonably of the view that further Preparatory Works are required, Network Rail shall propose such further Preparatory Works in accordance with this Condition G6.

## **CONDITION G7 - COMPLEX PROJECTS NETWORK CHANGE**

If, having previously agreed or determined the Scope in accordance with Conditions G5.5 or G5.6, Network Rail wishes to implement a Network Change which it has progressed using the Complex Projects Procedure, it shall propose the Network Change in accordance with Condition G1.

## **CONDITION G8 - SHORT TERM NETWORK CHANGE**

### **8.1 Reversal of a Short Term Network Change**

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- 8.1.1 An Access Beneficiary may request in writing that Network Rail reverse the effect of a Short Term Network Change before its Expiry Date if the effect of the Short Term Network Change would prevent the Access Beneficiary using the Network in a manner consistent with the reasonable expectations of that Access Beneficiary as to the future use of the relevant part of the Network.
- 8.1.2 The Access Beneficiary shall include with any notice requesting the reversal of the effect of a Short Term Network Change served under Condition G8.1.1 evidence to support the Access Beneficiary's claim of reasonable expectations as to the future use of the relevant part of the Network which requires that reversal.
- 8.1.3 The Access Beneficiary shall provide Network Rail with such further information as Network Rail may reasonably require to enable Network Rail to assess the reasonableness of the Access Beneficiary's request to reverse the effect of a Short Term Network Change.
- 8.1.4 Upon receipt of a notice to reverse the effect of a Short Term Network Change served under Condition G8.1.1, Network Rail shall:
- (a) reverse the effect of the Short Term Network Change at its own cost by the later of the following:
    - (i) the earlier of:
      - (A) the estimated timescale for reversal set out in the notice of proposed Network Change served under Condition G1.1; and
      - (B) the timescale within which Network Rail can complete the reversal without incurring any greater cost than would have reasonably been incurred by Network Rail had the effect of the Short Term Network Change been reversed in accordance with the estimated timescale for reversal set out in the notice of proposed Network Change served under Condition G1.1; or
    - (ii) the earliest use for which the Access Beneficiary can demonstrate a reasonable expectation as to future use; or
  - (b) respond to the Access Beneficiary in writing within 30 days stating that Network Rail does not believe that the effect of the Short Term Network Change is preventing the Access Beneficiary using the Network in accordance with the reasonable expectations of that Access Beneficiary

as to the future use of the relevant part of the Network and giving reasons for its decision.

Network Rail shall not be liable to any Access Beneficiary if and to the extent that the date of the requested reversal is earlier than the date by which Network Rail must reverse the effect of the Short Term Network Change as calculated under Condition G8.1.4(a).

## **8.2 *Expiry of a Short Term Network Change***

Network Rail shall restore at its own cost any part of the Network which has been subject to a Short Term Network Change to its original capability as set out in the notice of proposal for the Short Term Network Change by the Expiry Date unless and to the extent that:

- (a) a Network Change has been implemented in place of the Short Term Network Change; or
- (b) a further Short Term Network Change has been implemented.

## **8.3 *Notification of reversal of a Short Term Network Change prior to the Expiry Date***

Network Rail shall publish details of each Short Term Network Change which is reversed prior to the Expiry Date.

## **CONDITION G9 - CHANGES IMPOSED BY COMPETENT AUTHORITIES**

Where Network Rail is required (other than at its own request or instigation) to implement a Network Change as a result of any Change of Law or any Direction of any Competent Authority other than the Office of Rail Regulation exercising any of its functions which do not fall within the definition of 'safety functions' as defined in section 4 of the Act:

- (a) Network Rail shall, except to the extent that the relevant Change of Law or Direction otherwise requires, comply with Conditions G1.1 and G1.2 (other than Condition G1.2(e)(iv)) in respect of that Network Change;
- (b) each Access Beneficiary shall make such alterations (if any) to its railway vehicles and its Services as are reasonably necessary to accommodate that Network Change and shall, except to the extent that the relevant Change of Law or Direction otherwise requires, comply with Conditions F2.1, F2.2 and F2.3 (other than Conditions F2.2(a)(vi) and F2.3.1(c)(v)(B) and (D));

- (c) subject to Condition G9(d), each Access Party shall bear its own costs or losses arising out of the implementation of the Network Change or the consequences thereof;
- (d) where Network Rail recovers compensation in respect of that Network Change from a Competent Authority or some other Governmental Body, it shall pay to Access Beneficiaries:
  - (i) where any compensation paid to Network Rail in relation to that Network Change is sufficient to cover the Relevant Costs of the Access Beneficiary and of Network Rail, the Relevant Costs of the Access Beneficiary; and
  - (ii) where such compensation is not so sufficient, such proportion of that compensation as the Access Beneficiary's Relevant Costs bears to the sum of Network Rail's Relevant Costs and all the Access Beneficiary's Relevant Costs in respect of that Network Change; and
- (e) Network Rail shall use reasonable endeavours to negotiate with the relevant Competent Authority or Governmental Body (as applicable) a level of compensation in respect of that Network Change which is sufficient to ensure that the Access Beneficiary receives compensation for all of its Relevant Costs. Network Rail shall from time to time consult with the Access Beneficiary and keep the Access Beneficiary informed in reasonable detail of the progress of such negotiations.

## **CONDITION G10 - ESTABLISHMENT AND IMPLEMENTATION**

### **10.1 *Implementation of a Network Rail proposed Network Change***

10.1.1 Network Rail shall be entitled to implement a proposed Network Change if:

- (a) it has not received a notice from any Access Beneficiary under Condition G2.1 by the relevant response date; or
- (b) it has received notice by the relevant response date from an Access Beneficiary under Condition G2.1(c) and either the amount of any compensation referred to in Condition G2.1 has been agreed, or resolved, or the method by which such compensation is to be calculated has been agreed or resolved under Condition G11; and
- (c) there is no other unresolved dispute under this Part G (whether under this Condition G10 or otherwise) as regards the proposed change between Network Rail and any affected Access Beneficiary.

10.1.2 Network Rail may, if it considers it expedient to do so in order to confirm whether or not Condition G10.1.1 has been satisfied, issue a notice to all affected Access Beneficiaries when it reasonably believes it is entitled to implement a proposed Network Change.

10.1.3 Network Rail's entitlement to implement a proposed Network Change shall be treated as confirmed 21 days after it has served a notice in respect of that Network Change in accordance with Condition G10.1.2 unless it receives notice from an Access Beneficiary within those 21 days disputing Network Rail's entitlement to implement that proposed Network Change under Condition G10.1.1 and giving full particulars of its reasons.

10.1.4 If Network Rail does not agree with the contents of a notice served by an affected Access Beneficiary in accordance with Condition G10.1.3, Network Rail may:

- (a) refer the matter for determination in accordance with the ADRR and Condition G11 shall apply; or
- (b) withdraw the proposed Network Change.

## **10.2 *Implementation of a Sponsor proposed Network Change***

10.2.1 The Sponsor shall be entitled to instruct Network Rail to implement a proposed Network Change if:

- (a) Network Rail has not given notice under Condition G4.1 by the relevant response date; or
- (b) Network Rail has given notice by the relevant response date under Condition G4.1.1(c) and either the amount of any compensation referred to in Condition G4.1 has been agreed, or resolved, or the method by which such compensation is to be calculated has been agreed or resolved under Condition G11; or
- (c) Network Rail has received notice from an Access Beneficiary under Condition G4.1.1(d) and either the amount of any compensation referred to in Condition G4.1 has been agreed, or resolved, or the method by which such compensation is to be calculated has been agreed or resolved under Condition G11; and
- (d) there is no other unresolved dispute under this Part G (whether under this Condition G10 or otherwise) as regards the proposed change between the Sponsor and any Access Party.

10.2.2 The Sponsor may, if it considers it expedient to do so in order to confirm whether or not Condition G10.2.1 has been satisfied, instruct Network Rail to issue a notice to all affected Access Beneficiaries when the Sponsor reasonably believes that it is entitled to instruct Network Rail to implement a proposed Network Change and Network Rail shall then serve such a notice within 7 days of the instruction.

10.2.3 The Sponsor's entitlement to instruct Network Rail to implement a proposed Network Change shall be treated as confirmed 35 days after Network Rail has served a notice in respect of that Network Change in accordance with Condition G10.2.2 unless:

- (a) Network Rail gives notice to the Sponsor within 35 days disputing the Sponsor's entitlement to require the implementation of that Network Change under Condition G10.2.1 and giving full particulars of its reasons; or
- (b) Network Rail receives notice from an Access Beneficiary within 21 days of the notice served by Network Rail disputing the Sponsor's entitlement to require the implementation of that Network Change under Condition G10.2.1 and giving full particulars of its reasons.

10.2.4 If the Sponsor does not agree with the contents of a notice served by Network Rail or an affected Access Beneficiary in accordance with Condition G10.2.3, the Sponsor may:

- (a) refer the matter for determination in accordance with the ADRR and Condition G11 shall apply; or
- (b) withdraw the proposed Network Change.

### **10.3 *When a Network Change may not be implemented***

10.3.1 Network Rail shall not be entitled, and a Sponsor shall not be entitled to require Network Rail, to implement a proposed Network Change unless it is so entitled to implement, or require the implementation of that Network Change under Condition G10.1.1 or Condition G10.2.1.

10.3.2 For the purposes of the Conditions G10.1.1 and G10.2.1, unresolved disputes shall include:

- (a) a notice has been served under Condition G2.1.1(a) or (b) or Condition G4.1.1(a) or (b) which has not been withdrawn, resolved under Condition G11 or agreed not to apply; and

- (b) a notice has been served under Condition G2.1.1(c) or Condition G4.1.1(c) or (d) which has not been agreed or resolved as referred to in Condition G10.1.1(b) or G10.2.1(b) or (c) or otherwise agreed, resolved or withdrawn.

## **CONDITION G11 - APPEAL PROCEDURE**

### **11.1 *Right of referral in accordance with the ADRR***

If any Access Party is dissatisfied as to:

- (a) any matter concerning the operation of the procedure in this Part G;
- (b) the contents of any notice given under Condition G2.1, G4.1, G5.5, G8.1.1 or G10 (and, in particular, the amount of any compensation referred to in those Conditions);
- (c) any estimate referred to in Condition G1.6 or G3.6;
- (d) the:
  - (i) proposed Expiry Date; or
  - (ii) estimated timescale in which a Short Term Network Change can be reasonably reversed,

in a notice of proposed Network Change given under Condition G1.1; or

- (e) the reasons given by Network Rail as to why it does not believe that the effect of the Short Term Network Change is preventing the Access Beneficiary using the Network in accordance with the reasonable expectations of that Access Beneficiary as to the future use of the relevant part of the Network under Condition G8.1.4(b),

that Access Party may refer the matter for determination in accordance with the ADRR.