

SCHEDULES

SCHEDULE 8

PROTECTIVE PROVISIONS

PART 1

PROTECTION FOR NETWORK RAIL

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

2. In this Part of this Schedule—

“construction” includes execution, placing, alteration and reconstruction and “construct” and “constructed” have corresponding meanings;

“Control Period” means the period during which Network Rail is required to implement the financial framework determined by the ORR at an access charges review in relation to the maintenance, renewal and enhancement of Network Rail’s infrastructure;

“Control Period 6” means the Control Period planned to commence on 1 April 2019 and conclude on 31 March 2024, or such other dates as may be advised by the ORR from time to time;

“the engineer” means an engineer appointed by Network Rail for the purposes of this Order;

“the funding period” means Control Period 6 or, if later, the period ending two years after the railway forming part of the scheduled works is first opened for public use;

“network licence” means the network licence, as amended from time to time, granted to Network Rail by the Secretary of State in exercise of powers under section 8 (licences) of the Railways Act 1993⁽¹⁾;

“Network Rail” includes any associated company of Network Rail Infrastructure Limited which holds property for railway purposes, and for the purpose of this definition “associated company” means any company which is (within the meaning of section 1159 (meaning of “subsidiary” etc.) of the Companies Act 2006)⁽²⁾ the holding company of Network Rail Infrastructure Limited, a subsidiary of Network Rail Infrastructure Limited or another subsidiary of the holding company of Network Rail Infrastructure Limited;

“Network Rail Infrastructure Limited” means Network Rail Infrastructure Limited, a company limited by shares and incorporated under the Companies Act 1985, whose registered number is 02904587 and registered office is 1 Eversholt Street, London, NW1 2DN; “Network Rail third party agreement” means any agreement between Network Rail and any other party (a “third party”) concerning railway property or any asset held by a third party which is used in conjunction with railway property;

“ORR” means the Office of Rail and Road;

(1) 1993 c. 43.

(2) 2006 c. 46.

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

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

“railway property” means any railway belonging to Network Rail and—

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

“specified work” means so much of any of the authorised works as is situated upon, across, under, over or within 15 metres of, or may in any way adversely affect, railway property.

3.—(1) Where under this Part of this Schedule Network Rail is required to give its consent or approval in respect of any matter, that consent or approval must not be unreasonably withheld or delayed but may be subject to reasonable conditions and is subject to the condition that Network Rail complies with any relevant railway operational procedures and any obligations under its network licence or under statute.

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

- (a) co-operate with TfL with a view to avoiding undue delay and securing conformity as between any plans approved by the engineer and requirements arising from those procedures; and
- (b) use its reasonable endeavours to avoid any conflict arising between the application of those procedures and the proper implementation of the authorised works under this Order.

4.—(1) TfL must not exercise the powers conferred by article 16 (protective works to buildings) or article 18 (power to survey and investigate land, etc.) or the powers conferred by section 11(3) (powers of entry) of the 1965 Act or the Compulsory Purchase (Vesting Declarations) Act 1981(3) as applied by this Order in respect of any railway property unless the exercise of such powers is with the consent of Network Rail.

(2) TfL must not in the exercise of the powers conferred by this Order prevent pedestrian or vehicular access to any railway property, unless preventing such access is with the consent of Network Rail.

(3) TfL must not exercise the powers conferred by section 271 or 272 of the 1990 Act, as applied by Schedule 7 (provisions relating to statutory undertakers, etc.), in relation to any right of access of Network Rail to railway property, but such right of access may be diverted with the consent of Network Rail.

(4) TfL must not under the powers conferred by this Order acquire or use, or acquire new rights over or seek to impose any restrictions on the use of, any railway property except with the consent of Network Rail.

5.—(1) TfL must, before commencing construction of any specified work, supply to Network Rail proper and sufficient plans of that work for the reasonable approval of the engineer and the specified work must not be commenced except in accordance with such plans as have been approved in writing by the engineer or settled by arbitration under article 45 (arbitration).

(3) 1981 c. 66.

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

(3) If, following service of notice under sub-paragraph (2), the engineer has not by the expiry of the further 28 day period intimated his approval or disapproval, he is deemed to have approved the plans as submitted.

(4) If by the end of the period of 28 days beginning with the date on which written notice was served on the engineer under sub-paragraph (2), Network Rail gives notice to TfL that Network Rail desires itself to construct any part of a specified work which in the opinion of the engineer will or may affect the stability of railway property or the safe operation of traffic on the railways of Network Rail, then if TfL desires such part of the specified work to be constructed, Network Rail must construct it with all reasonable despatch on behalf of and to the reasonable satisfaction of TfL in accordance with the plans approved or deemed to be approved or settled under this paragraph, and under the supervision (where appropriate and if given) of TfL.

(5) When signifying approval of the plans the engineer may specify any protective works (whether temporary or permanent) which in the engineer's opinion should be carried out before the commencement of the construction of a specified work to ensure the safety or stability of railway property or the continuation of the safe and efficient operation of the railways of Network Rail or the services of operators using those railways (including any relocation de-commissioning and removal of works, apparatus and equipment necessitated by a specified work and the comfort and safety of passengers who may be affected by the specified works), and such protective works as may be reasonably necessary for those purposes are to be constructed by Network Rail, or by TfL, if Network Rail so desires, and such protective works must be carried out at the expense of TfL in either case with all reasonable despatch and TfL must not commence the construction of the specified works until the engineer has notified TfL that the protective works have been completed to the engineer's reasonable satisfaction.

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

- (a) without unnecessary delay in accordance with the plans approved or deemed to have been approved or settled under paragraph 5;
- (b) under the supervision (where appropriate and if given) and to the reasonable satisfaction of the engineer;
- (c) in such manner as to cause as little damage as is possible to railway property; and
- (d) so far as is reasonably practicable, so as not to interfere with or obstruct the free, uninterrupted and safe use of any railway of Network Rail or the traffic on it or the use by passengers of railway property.

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

(3) Nothing in this Part of this Schedule imposes—

- (a) any liability on TfL with respect to any damage, costs, expenses or loss attributable to the negligence of Network Rail or its servants, contractors or agents; or

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- (b) any liability on Network Rail with respect to any damage, costs, expenses or loss attributable to the negligence of TfL or its servants, contractors or agents.

7. TfL must—

- (a) at all times afford reasonable facilities to the engineer for access to a specified work during its construction; and
- (b) supply the engineer with all such information as the engineer may reasonably require with regard to a specified work or the method of constructing it.

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

9.—(1) If any permanent or temporary alterations or additions to railway property, or to any protective works under paragraph 5(5), are reasonably necessary by reason or in consequence of the construction of a specified work or during a period of 12 months after the opening for public use of any authorised work that includes a specified work, in consequence of that specified work for public use in order to ensure the safety of railway property or the safe operation of the railway of Network Rail, such alterations and additions may be carried out by Network Rail and if Network Rail gives to TfL reasonable notice of its intention to carry out such alterations and additions (which must be specified in the notice), TfL must pay to Network Rail the reasonable cost of those alterations or additions including, in respect of any such alterations and additions as are to be permanent, a capitalised sum representing the increase of the costs which may be expected to be reasonably incurred by Network Rail in maintaining, working and, when necessary, renewing any such alterations or additions.

(2) If during the construction of a specified work by TfL, Network Rail gives notice to TfL that Network Rail desires itself to construct that part of the specified work which in the opinion of the engineer is endangering the stability of railway property or the safe operation of traffic on the railways of Network Rail then, if TfL desires that part of the specified work to be constructed, Network Rail must assume construction of that part of the specified work and TfL must, regardless of any such approval of a specified work under paragraph 5(1), pay to Network Rail all reasonable expenses to which Network Rail may be put and compensation for any loss which it may suffer by reason or in consequence of the execution by Network Rail of that specified work.

(3) The engineer must, in respect of the capitalised sums referred to in this paragraph and paragraph 10(a) provide such details of the formula by which those sums have been calculated as TfL may reasonably require.

(4) If the cost of maintaining, working or renewing railway property is reduced in consequence of any such alterations or additions a capitalised sum representing such saving must be set off against any sum payable by TfL to Network Rail under this paragraph.

(5) TfL will use reasonable endeavours not (whether by itself, its contractors or agents) to exercise any of the powers of this Order, or to do or omit to do any other thing, that would or might cause Network Rail to be in breach of any Network Rail third party agreement of which a copy has been provided to TfL in writing.

10. TfL must repay to Network Rail all reasonable fees, costs, charges and expenses reasonably incurred by Network Rail—

- (a) in constructing any part of a specified work on behalf of TfL as provided by paragraph 5(4) or in constructing any protective works under the provisions of paragraph 5(5) including, in respect of any permanent protective works, a capitalised sum representing the cost of maintaining and renewing those works;

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- (b) in respect of the approval by the engineer of plans submitted by TfL and the supervision by the engineer of the construction of a specified work;
- (c) in respect of the employment or procurement of the services of any inspectors, signalmen, watchmen and other persons whom it is reasonably necessary to appoint for inspecting, signalling, watching and lighting railway property and for preventing, so far as may be reasonably practicable, interference, obstruction, danger or accident arising from the construction or failure of a specified work;
- (d) in respect of any special traffic working resulting from any speed restrictions which may in the opinion of the engineer require to be imposed by reason or in consequence of the construction or failure of a specified work or from substitution or diversion of services which may be reasonably necessary for the same reason; and
- (e) in respect of any additional temporary lighting of railway property in the vicinity of the specified works, being lighting made reasonably necessary by reason or consequence of the construction or failure of a specified work.

11.—(1) In this paragraph—

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

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

(2) This paragraph applies to EMI only to the extent that such EMI is not attributable to any change to Network Rail’s apparatus carried out after approval of plans under paragraph 5(1) for the relevant part of the authorised works giving rise to EMI (unless TfL has been given notice in writing before the approval of those plans of the intention to make such change).

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

(4) In order to facilitate TfL’s compliance with sub-paragraph (3)—

- (a) TfL must consult with Network Rail as early as reasonably practicable to identify all Network Rail’s apparatus which may be at risk of EMI, and must continue to consult with Network Rail (both before and after formal submission of plans under paragraph 5(1)) in order to identify all potential causes of EMI and the measures required to eliminate them;
- (b) Network Rail must make available to TfL all information in the possession of Network Rail reasonably requested by TfL in respect of Network Rail’s apparatus identified under paragraph (a); and
- (c) Network Rail must allow TfL reasonable facilities for the inspection of Network Rail’s apparatus identified under paragraph (a).

(5) In any case where it is established that EMI can only reasonably be prevented by modifications to Network Rail’s apparatus, Network Rail must not withhold its consent unreasonably to modifications of Network Rail’s apparatus, but the means of prevention and the method of their execution must be selected in the reasonable discretion of Network Rail, and in relation to such modifications paragraph 5(1) has effect subject to this sub-paragraph.

(6) If at any time prior to the commencement of operation of any part of the authorised works regardless of any measures adopted under sub-paragraph (3), the testing or commissioning of the

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authorised works causes EMI then TfL must immediately upon receipt of notification by Network Rail of such EMI either in writing or communicated orally (such oral communication to be confirmed in writing as soon as reasonably practicable after it has been issued) immediately cease to use (or procure the cessation of use of) TfL's apparatus causing such EMI until all measures necessary have been taken to remedy such EMI by way of modification to the source of such EMI or (in the circumstances, and subject to the consent, specified in sub-paragraph (5)) to Network Rail's apparatus.

(7) In the event of EMI having occurred—

- (a) TfL must afford reasonable facilities to Network Rail for access to TfL's apparatus in the investigation of such EMI;
- (b) Network Rail must afford reasonable facilities to TfL for access to Network Rail's apparatus in the investigation of such EMI; and
- (c) Network Rail must make available to TfL any additional material information in its possession reasonably requested by TfL in respect of Network Rail's apparatus or such EMI.

(8) Where Network Rail approves modifications to Network Rail's apparatus under sub-paragraph (5) or (6)—

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

(9) To the extent that it would not otherwise do so, the indemnity in paragraph 15(1) applies to the costs and expenses reasonably incurred or losses suffered by Network Rail through the implementation of the provisions of this paragraph (including costs incurred in connection with the consideration of proposals, approval of plans, supervision and inspection of works and facilitating access to Network Rail's apparatus) or in consequence of any EMI to which sub-paragraph (6) applies.

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

(11) In relation to any dispute arising under this paragraph the reference in article 45 (arbitration) to the Institution of Civil Engineers is to be read as a reference to the Institution of Electrical Engineers.

12. TfL must not provide any illumination or illuminated sign or signal on or in connection with a specified work in the vicinity of any railway belonging to Network Rail unless it has first consulted Network Rail and it must comply with Network Rail's reasonable requirements for preventing confusion between such illumination or illuminated sign or signal and any railway signal or other light used for controlling, directing or securing the safety of traffic on the railway belonging to Network Rail.

13. If at any time after the completion of a specified work, not being a work vested in Network Rail, Network Rail gives notice to TfL informing it that the state of maintenance of any part of the specified work appears to be such as adversely affects the operation of railway property, TfL must, on receipt of such notice, take such steps as may be reasonably necessary to put that specified work in such state of maintenance as not adversely to affect railway property.

14. Any additional expenses which Network Rail may reasonably incur in altering, reconstructing or maintaining railway property under any powers existing at the date when this Order was made by reason of the existence of a specified work (excluding any expenses incurred after the end of Control Period 6 in respect of a specified work vested in Network Rail), provided that 56 days' previous

notice of the commencement of such alteration, reconstruction or maintenance has been given to TfL, are to be repaid by TfL to Network Rail.

15.—(1) TfL must pay to Network Rail all reasonable costs, charges, damages and expenses not otherwise provided for in this Part of this Schedule (but subject to article 44 (no double recovery)) which may be occasioned to or reasonably incurred by Network Rail—

- (a) by reason or in consequence of the construction or maintenance of a specified work or the failure of such a work (excluding any costs, charges, damages and expenses incurred after the end of Control Period 6 in respect of a specified work vested in Network Rail); or
- (b) by reason or in consequence of any act or omission of TfL or of any person in its employment or of its contractors or others whilst engaged upon a specified work,

including (for the avoidance of doubt) any costs, charges, damages and expenses that are attributable to a breach by Network Rail of a Network Rail third party agreement when such breach is caused by or consequential on the exercise of the powers of this Order.

(2) In addition to the indemnity in sub-paragraph (1), TfL must indemnify and keep indemnified Network Rail from and against all claims and demands arising out of or in connection with a specified work (excluding any claims and demands arising after the end of Control Period 6 in respect of a specified work vested in Network Rail) or any such failure, act or omission; and the fact that any act or thing may have been done by Network Rail on behalf of TfL or in accordance with plans approved by the engineer or in accordance with any requirement of the engineer or under the engineer’s supervision will not (if it was done without negligence on the part of Network Rail or of any person in its employ or of its contractors or agents) excuse TfL from any liability under the provisions of this sub-paragraph.

(3) Network Rail must give TfL reasonable notice of any such claim or demand and must make no settlement or compromise of such a claim or demand without the prior consent of TfL.

(4) The sums payable by TfL under sub-paragraph (1) or (2) may include a sum equivalent to the relevant costs.

(5) Subject to the terms of any agreement between Network Rail and a train operator regarding the timing or method of payment of the relevant costs in respect of that train operator, Network Rail must promptly pay to each train operator the amount of any such sums which Network Rail receives under sub-paragraph (4) which relates to the relevant costs of that train operator.

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

(7) In this paragraph—

“the relevant costs” means the costs, direct losses and expenses (including loss of revenue) reasonably incurred by each train operator as a consequence of any restriction of the use of Network Rail’s railway network as a result of the construction, maintenance or failure of a specified work or any such act or omission as mentioned in sub-paragraph (1) or (2); and

“train operator” means any person who is authorised to act as the operator of a train by a licence under section 8 (licences) of the Railways Act 1993.

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

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17. In the assessment of any sums payable to Network Rail under this Part of this Schedule there must not be taken into account any increase in the sums claimed that is attributable to any action taken by or any agreement entered into by Network Rail if that action or agreement was not reasonably necessary and was taken or entered into with a view to obtaining the payment of those sums by TfL under this Part of this Schedule or increasing the sums so payable.

18. TfL must, no later than 28 days from the date that the plans submitted to and certified by the Secretary of State in accordance with article 42 (certification of plans, etc.) are certified by the Secretary of State, provide a set of those plans to Network Rail in the form of a computer disc with read only memory.

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

- (a) any railway property shown on the deposited plans and described in the book of reference;
- (b) any lands, works or other property held in connection with any such railway property; and
- (c) any rights and obligations (whether or not statutory) of Network Rail relating to any railway property or any lands, works or other property referred to in this paragraph.

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

21.—(1) If TfL proposes to exercise any of the powers of article 38 (powers of disposal, agreements for operation etc.), it shall not later than 28 days before any such application is made give written notice to Network Rail and any such notice must describe or give (as appropriate)—

- (a) the nature of the application to be made;
- (b) the extent of the geographical area to which the application relates; and
- (c) the name and address of the person acting for the Secretary of State to whom the application is made.

(2) If TfL proposes to enter into any agreements with respect to any of the matters set out under article 38(2), it shall not later than 28 days before any such agreement is entered into give written notice to Network Rail and any such notice must describe or give (as appropriate)—

- (a) the nature of the agreement;
- (b) the extent of the geographical area to which the agreement relates; and
- (c) the name and address of any other person who it is intended would be a party to the agreement.

(3) TfL and the Secretary of State must have due regard to any representations made by Network Rail in response to any notice received under sub-paragraphs (1) and (2).