

# **GUIDANCE FOR APPLICANTS AND LANDOWNERS AND/OR OCCUPIERS**

## **Application to the Secretary of State for Energy and Climate Change for the grant of a Necessary (Compulsory) Electricity Wayleave in England and Wales**

**This document amends the “Guidance for Applicants and Landowners and/or Occupiers” published by the Department of Energy and Climate Change in July 2010**

June 2013

## **This document is intended to provide general guidance to:**

- (1) Electricity companies (holders of an electricity licence) who propose applying to the Secretary of State (SoS) for the grant of a necessary wayleave; and
- (2) Owners and/or occupiers in England and Wales whose land is or may be the subject of such applications.

## **The present legislation governing such matters is:**

- paragraphs 6, 7 and 8 of Schedule 4 to the Electricity Act 1989 (the 1989 Act); and
- the Electricity (Compulsory Wayleaves) (Hearings Procedure) Rules 1967 (SI No.450 of 1967).

### **IMPORTANT NOTICE:**

It should be noted that the Department has to take a view on whether the SoS has jurisdiction to proceed with a necessary wayleave application. This guidance therefore sets out the Department's interpretation of the legislation and includes case law where applicable. Ultimately though, only the Courts can decide on the correct interpretation of the relevant legislation. Interested parties should seek their own legal advice.

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### ***FURTHER INFORMATION ON NECESSARY WAYLEAVES***

If you require any further information or have any questions regarding necessary wayleaves please contact the Wayleaves Manager, Development Consents & Planning Reform, Department of Energy and Climate Change, 3 Whitehall Place, London SW1A 2HH  
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## 1. INTRODUCTION - ELECTRICITY COMPANIES AND COMPULSORY PROCEDURES

1.1 The electricity networks feed electricity to nearly all of the households in England and Wales. The networks are owned and operated by The National Grid Company plc and electricity distribution companies (i.e. electricity licence holders). Licence holders who distribute or transmit electricity have the respective duties contained in **section 9 of the Electricity Act 1989 (as amended by the Utilities Act 2000)** to develop and maintain an efficient, co-ordinated and economical system of electricity distribution and transmission.

1.2 They operate therefore under a regime that reflects their public service role, and the compulsory powers set out in **section 10 of, and Schedules 3 and 4 to, the Electricity Act 1989** give the licence holders the requisite powers to enable them to comply with their statutory duties and obligations.

1.3 Electricity companies need permission to install their electric lines and associated equipment (such as poles, pylons, staywires and transformers) on, over or under private land and to have access to that land for the purposes of inspecting, maintaining, repairing, adjusting, altering, replacing or removing the line or equipment. Commonly, electricity companies do this through negotiation of a contractual arrangement with the landowner and/or the occupier of the land; this is called a voluntary wayleave. Electricity companies may also obtain a voluntary easement, which, unlike a voluntary wayleave, is usually permanent (because it confers a right over the land itself, rather than one which can only be enforced against a particular owner or occupier of the land).

1.4 As indicated above, most rights to install an electric line and to keep it installed, together with access to the land, are secured voluntarily between parties. However, if an agreement cannot be reached through negotiation, the electricity companies, who have a public service role to undertake, have access to compulsory procedures. The electricity companies may seek a Compulsory Purchase Order under **Schedule 3 to the 1989 Act** or a “necessary” wayleave under **Schedule 4 to the 1989 Act**.

## Compulsory Purchase Orders

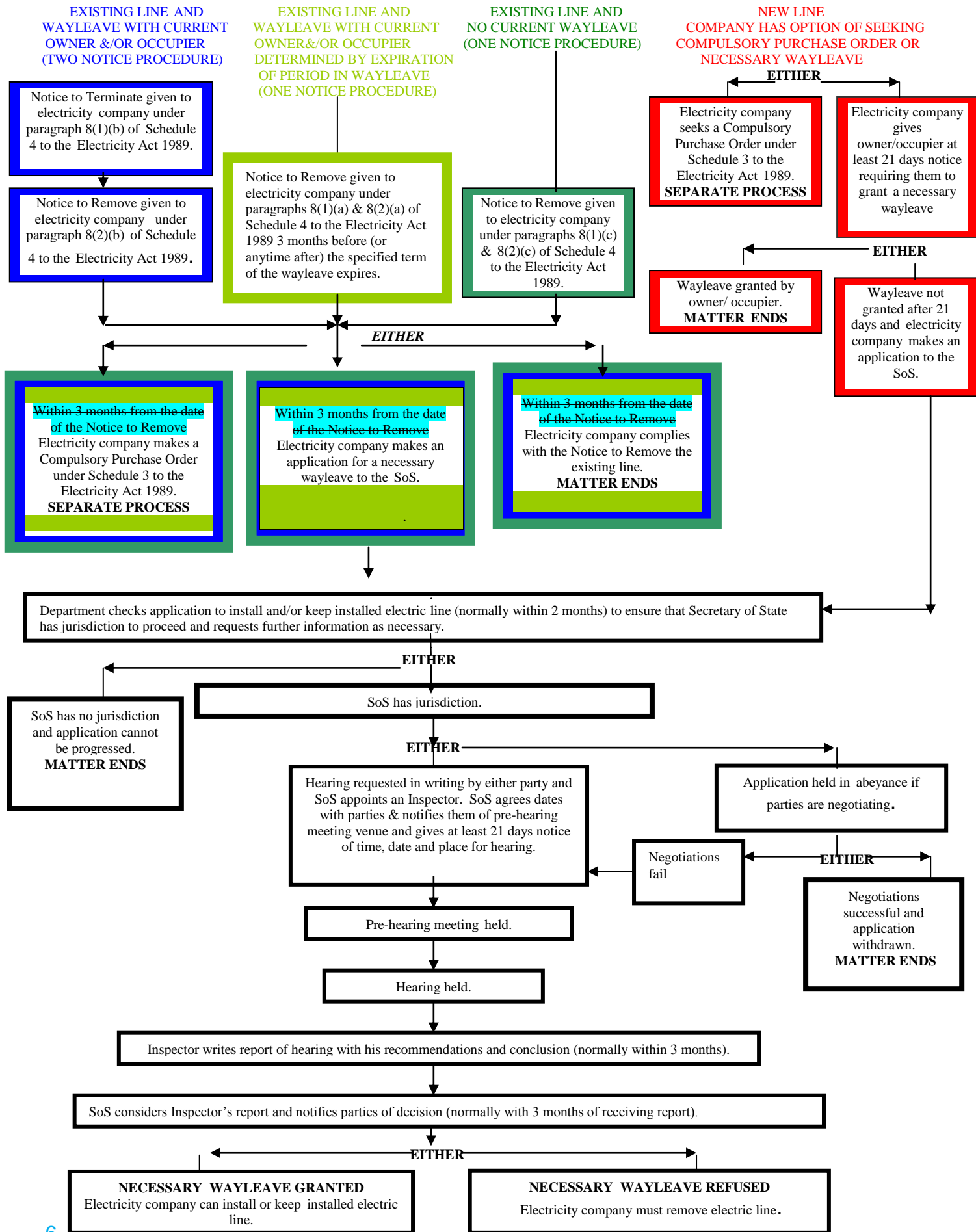
1.5 Compulsory Purchase Orders have been used to acquire land at power station sites for example but can also be used, where appropriate, for the installation and retention of electric lines, more usually when underground cables are involved. In such cases, the electricity company will make an Order and then seek confirmation from the SoS. Where statutory objections are raised (i.e. objections from owners, lessees and occupiers) the SoS is required to hold a public inquiry before making a decision on the Order. Public inquiries relating to electric lines are held in accordance with **The Compulsory Purchase (Inquiries Procedure) Rules 2007, SI 3617/2007**.

## Wayleaves

1.6 More commonly the use of compulsory powers to install a new electric line or retain an existing one occurs under **Schedule 4 to the Electricity Act 1989**. It is usual for electricity companies to try to negotiate a voluntary wayleave or an easement with landowners and/or occupiers of land before invoking more formal processes. Where, however, the company either wishes to install a new electric line and agreement cannot be reached or, where the electricity company has received written Notice(s) requesting the removal of an existing electric line but feels unable to do so and wishes to retain the line, the electricity company may apply to the SoS for a compulsory wayleave (the legislation uses the term “necessary wayleaves” for compulsory wayleaves) under **paragraphs 6 and 8 of Schedule 4 to the 1989 Act**. The procedures and circumstances relating to such applications are described in more detail in the following sections. An important point to note is that all parties will be afforded an opportunity of being heard by a person appointed by the SoS before the SoS reaches a decision on an application. Unlike a voluntary wayleave, a compulsory wayleave under Schedule 4 will bind future owners (paragraph 6(6)(b) of Schedule 4 to the 1989 Act).

1.7 There are statutory procedures involved whether an application is for a new electric line or an owner and/or occupier is seeking removal of an existing line from their land. In either case the owner and/or occupier is entitled to be heard at a hearing conducted by an Engineering Inspector appointed to give an independent view to the SoS (such hearings are held in accordance with **The Electricity (Compulsory Wayleaves) (Hearings Procedure) Rules 1967**). The Inspector will consider the presentations of both the electricity company and the owner and/or occupier and produce a report for the SoS. The SoS (or officials acting on the SoS’s behalf) will then consider whether or not a necessary wayleave should be granted.

## 2. FLOWCHART OF THE NECESSARY WAYLEAVE PROCESS



### **3. GIVING NOTICES AND MAKING NECESSARY WAYLEAVE APPLICATIONS**

3.1 The legislation recognises two situations: (1) where the application for the grant of a necessary wayleave relates to a new electric line and (2) where it relates to an existing one.

#### **Applications relating to a new electric line**

3.2 Where an electricity company is unable to agree a voluntary wayleave and wishes to apply to the SoS for the grant of a necessary wayleave it should first give the landowner and/or occupier a minimum period of 21 days' written notice (the Notice) that it requires the grant of a necessary wayleave (**see paragraph 6(1)(b) of Schedule 4 to the 1989 Act**). If, after the specified period, the owner and/or occupier has failed to give the necessary wayleave, or has given the wayleave subject to terms and conditions to which the electricity company objects, then the electricity company may apply to the SoS for the grant of the necessary wayleave in accordance with **paragraph 6(3) of Schedule 4 to the 1989 Act**.

3.3 The Notice sets the statutory wayleave proceedings in operation. Electricity companies should note that the landowner and/or occupier must have had Notice served and the specified Notice period in writing of a minimum of at least 21 days must have been completed before the application to the SoS for a necessary wayleave may be made. Any applications made before the specified Notice period has been completed will be rejected.

3.4 The application to the SoS should attach a copy of the Notice to the landowner and/or occupier. The application should clearly identify the land that is the subject of the necessary wayleave application and the name of the landowner and/or occupier of the land. Applications should also attach a map clearly showing the boundaries of the owner and/or occupier's land affected and the route of the proposed electric line across the land, including the position of any supporting poles or towers. All required documentation must be provided by the applicant to enable the application to progress.

#### **Applications relating to an existing electric line**

3.5 Some wayleaves are determined by the expiration of a period specified in the wayleave agreement. In those cases, the landowner and/or occupier who is party to the wayleave agreement may, either within 3 months before the end of the specified period, or at any time

afterward, give the electricity company a Notice to Remove the electric line, as provided for by **paragraphs 8(1)(a) and 8(2)(a) of Schedule 4 to the 1989 Act** (commonly called the 1-step procedure).

3.6 Where there is a wayleave in existence and the owner and/or occupier requires the electric line which is the subject of that wayleave to be removed, they must first give a Notice to Terminate the existing wayleave agreement in accordance with a term contained in it (wayleaves normally contain a clause requiring either 6 or 12 months Notice of termination) and as provided for by **paragraph 8(1)(b) of Schedule 4 to the 1989 Act**. Once the period required for the Notice of Termination has been completed the owner and/or occupier must then give a subsequent Notice to Remove to the electricity company to remove the electric line as provided for by **paragraph 8(2)(b) of Schedule 4**. Accordingly, in such cases two Notices are required before the electricity company may apply to the SoS for the grant of a wayleave (2-step procedure):

- (1) a Notice to Terminate the existing agreement; and
- (2) a subsequent Notice to Remove the electric line<sup>1</sup>.

3.7 As Schedule 4 to the 1989 Act is not specific on what form a Notice to Remove should take, the Department has decided to simplify the process, and has made available a template for landowners and/or occupiers to complete. This template is attached as Annex A.

3.8 A voluntary wayleave ceases to be binding following a change in ownership or occupancy of the land and, in such cases, a Notice to Remove the electric line may be given at any time after the change in ownership or occupancy as provided for by **paragraphs 8(1)(c) and 8(2)(c) of Schedule 4 to the 1989 Act** (1-step). However, these cases are not always clear-cut. For example, a new landowner and/or occupier may have received wayleave payments from the electricity company before serving the Notice to Remove and thus a contract may have been created between the parties (an implied wayleave agreement) requiring compliance with the two-notice procedure described above in paragraph 3.6 (2-step). A necessary wayleave, however, runs with the land for the duration of the term set out.

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<sup>1</sup> The Department considers that the Notice to Remove needs to make a clear reference to the removal of the electric line or apparatus from the land. It should not simply be a request to reposition, move or divert, relocate or underground the electric line (unless the notice makes it clear that the line is to be repositioned, relocated or diverted off the land in question i.e. removed). Similarly, it should not be a request to the company to make contact and discuss what can be done about the electric line.



3.9 In implied wayleave cases, there will be no written agreement containing a notice period. The Department takes the view that a requirement for “reasonable” notice would be implied in such cases and considers six months prior notice to be sufficient (most voluntary wayleaves usually require 6 or 12 months prior notice). In cases where there is no form of agreement (express or implied) with the current landowner and/or occupier, it is the Department’s view that, in relation to overhead lines, only a ‘bare permission’ exists for the line. As this is a type of licence revocable at will, the Department takes the view that this is withdrawn whenever the landowner and/or occupier gives Notice to Remove. This applies even if the landowner and/or occupier has been in the property for many years (1-step).

3.10 ~~If the electricity company does not intend to comply with the Notice to Remove, paragraph 8(3) of Schedule 4 to the 1989 Act states that the licence holder must make an application for a necessary wayleave within 3 months of the date of the Notice in accordance with paragraph 6(2) of Schedule 4 to the 1989 Act (or a Compulsory Purchase Order by virtue of paragraph 1 of Schedule 3 to the 1989 Act) or remove the line. It is the Department’s view that this means that the SoS must actually receive the application within the 3-month period from the date of the Notice to Remove. For example, where the Notice to Remove is dated 1 January, an application needs to be received by the SoS by 31 March; not 1 April (which would be a day late). The Department also considers that the electricity company must actually receive the Notice to Remove (and if necessary the Notice to Terminate) referred to in paragraph 8 of Schedule 4 to the 1989 Act for it to be effective, but that the 3-month period for making an application for a necessary wayleave runs from the date of the Notice to Remove; not the date of receipt of the Notice to Remove (but see 3.12 below).~~ Paragraph 8(3) of Schedule 4 to the 1989 Act states that if the licence holder does not within 3 months of the date of the Notice to Remove make an application for a necessary wayleave (or a compulsory purchase order under paragraph 1 of Schedule 3 to the 1989 Act), the licence holder must remove the line. After this point, if the licence holder retains the line without the consent of the owner or occupier then the line will be in place without legal authority. The owner or occupier is likely to have a claim in trespass against the licence holder in such circumstances, and may be able to claim damages. The Secretary of State may also take into consideration whether a line is in place illegally when considering the merits of a necessary wayleave application.

3.11 It is suggested that if the wording of the Notice to Remove leaves any doubt as to the landowner’s intentions then the company should check the situation with the landowner. If it is their intent to request removal then the company should guide them to the Department’s

template document so that they can provide the correct information. ~~The period allowed for making applications should provide adequate time to do this, and the Department rigorously enforces the 3-month rule.~~

3.12 It is recommended that, as a matter of good practice, companies and landowners and/or occupiers send their applications and notices by recorded or special delivery (as these methods require an acknowledgement of receipt). Alternatively, electricity companies are also able to submit applications for necessary wayleaves and CPOs via the Department's on-line electronic portal service. Any supporting documentation that cannot be transmitted electronically should follow by post. Electricity companies, landowners and/or occupiers should check with the Department's Wayleaves Manager that the application has been received, most importantly if the application has not been submitted via the electronic portal service. All necessary wayleave applications are dated on receipt. Exceptionally the Department will also accept applications by e-mail if agreed in advance with the Wayleaves Manager. ~~If confirmation of receipt has not been given prior to the end of the 3-month period for making necessary wayleave applications, contact should be made with the Department's Wayleaves Manager.~~ There is no requirement for the owner and/or occupier to copy notices to the Department.

3.13 Given that it is common for electricity companies to make necessary wayleave applications as a precautionary measure, they are advised to copy the application to the landowner and/ or occupier and explain the reasons why the application to the Department has been made. This will usually be in circumstances where the statutory time limit is pressing. Whilst this is not a requirement of the 1989 Act, the Department considers it is particularly important where the possibility of parties reaching a voluntary agreement exists.

3.14 It should be noted that before an electricity company applies to the SoS for the grant of a necessary wayleave to retain an existing electric line it is not necessary for it to serve a notice on the owner and/ or occupier in accordance with **paragraph 6(1)(b) of Schedule 4 to the 1989 Act** as this only applies to new electric lines.

3.15 The SoS needs to be satisfied that the Department has jurisdiction to consider the necessary wayleave application under **Schedule 4 to the 1989 Act**. It is important therefore that all required documentation is provided to the Department at the time of application. The Department may still need to ask parties for further information.

3.16 To assist the Department to deal with cases efficiently and as quickly as possible, the following information should be provided by companies in their necessary wayleave applications:

**For all necessary wayleave applications**

- (a)
  - (i) details of the owner and/or occupier and Title as per Land Registry;
  - (ii) the location of the land; and
  - (iii) details of the electric line and apparatus in question (a definition of an “electric line” is given **in section 64 to the 1989 Act** and the Department considers that an electric substation is “electrical plant” as defined in section 64 and Schedule 4 is therefore not applicable in such cases).
  
- (b) a statement as to whether the application is for one or more necessary wayleaves and the number of lines covered by each necessary wayleave applied for (see paragraph 3.21 below).
  
- (c) a statement as to whether the necessary wayleave application is to install a new electric line under **paragraph 6(1)(a)** or to keep an electric line installed under **paragraph 6(2)**.
  
- (d) a plan/map submitted electronically (or of reasonable scale, but ideally on A4 or A3 size paper to make electronic scanning easier) clearly detailing:
  - i) the landowner and/or occupier’s affected land boundaries;
  - ii) the electric lines and apparatus in question crossing that land (showing a distinction between lines placed or to be placed under or over ground);  
and
  - iii) other electric lines crossing the land but not subject to the necessary wayleave application.

(e) confirmation of the state of play on negotiations (i.e. whether they are continuing and the necessary wayleave application should be held in abeyance, or whether a hearing is required).

**Then:**

**For existing electric lines only**

- (f) confirmation of which part of **paragraph 8(1)** is relevant.
- **(1)(a)** - the expiration of a period specified in the wayleave;
  - **(1)(b)** – termination by the owner and/or occupier in accordance with a term contained in the wayleave; or
  - **(1)(c)** – change of ownership and/or occupation of the land after the granting of a wayleave, which ceases to be binding on the landowner and/or occupier.
- (g) a copy of the written notice from the owner and/or occupier on the Departmental template to remove the electric line from the land.
- (h) a copy of any previous written Notice to Terminate from the owner and/or occupier (if applicable).
- (i) any relevant wayleave agreements (so that the Department can determine whether a necessary wayleave application is in accordance with either **paragraph 8(1)(a) or 8(1)(b) of Schedule 4**).
- (j) confirmation of whether or not circumstances have arisen that result in a contractual arrangement being implied by the action of parties (for example, the landowner and/or occupier has been or is receiving wayleave payments).
- (k) if it is not possible to locate the previous wayleave agreement for the electric line in question:
- i) confirmation of whether any record exists of wayleave payments having been made in the past for the electric line;

- ii) whether any record exists of an electric line consent being given for the installation of the line;
- iii) whether there are any records of previous objections or disputes regarding the electric line; and
- iv) confirmation of how long the line has been installed.

**Or:**

**For new electric lines only**

- (l) confirmation that:
  - i) at least 21 days notice has been given to the owner/occupier requiring them to give the necessary wayleave in accordance with **paragraph 6(1)(b) Schedule 4** to the 1989 Act (a copy of the notice should be attached);
  - ii) except for electric lines to be placed underground, that the land is not covered by a 'dwelling' as defined in **paragraph 6(8)**; and
  - iii) except in the case of electric lines to be placed underground, confirmation that planning permission is not in force for a 'dwelling' to be constructed.

3.18 The above list is not exhaustive. All necessary wayleave applications are different, and it is for the applicant to judge whether there is other information that might be relevant.

3.19 In cases where a previous necessary wayleave application has been made (e.g. where the previous application was made prematurely or there are other current applications relating to the same line), the Department's reference number should also be included. **The Department's reference number allocated to a particular necessary wayleave application should also always be included in all subsequent correspondence.**

3.20 Whilst not a requirement of the legislation, the Department recommends that the electricity company copy their necessary wayleave application to the landowner and/or occupier and explains why the application has been made.

3.21 It is the Department's view that the SoS can only grant or refuse any actual necessary wayleave applied for. Where an application for a necessary wayleave contains more than one electric line, each line in the application will be considered separately in accordance with the provisions in paragraph 6 of Schedule 4 of the Electricity Act 1989. Accordingly, the SoS has the discretion to grant a necessary wayleave for one of the electric lines on the owner's land in a multiple application, whilst refusing others within the same application. Applicants should bear this in mind when preparing applications and consider whether separate applications for different lines would be more appropriate (see paragraph 3.17(b) above). The SoS cannot grant any necessary wayleave for an alternative route or on a basis that is different to that set out in the application.

#### **4. THE NECESSARY WAYLEAVE HEARING**

4.1 On receipt of a valid necessary wayleave application, the SoS is obliged to offer the landowner and/or occupier the opportunity of being heard by an appointed person in accordance with **paragraph 6(5) of Schedule 4 to the 1989 Act** before deciding whether or not to grant a necessary wayleave. In most cases, however, it is usual for the electricity company to carry on negotiations with the landowner and/or occupier in order to try and reach an amicable settlement without the need for a hearing.

4.2 In the event that such negotiations are not successful the Department will, if requested to do so, proceed to arrange a hearing and will issue a formal notice of the hearing, detailing the person appointed, normally an Inspector from the Department's Engineering Inspectorate (who acts independently on such matters), and propose a date for the holding of the hearing. While the Department will try to meet the wishes of both parties on timing, the SoS's responsibility to act expeditiously on applications may lead the Department to impose a date if agreement cannot be reached. In circumstances where more than one request has been made for a hearing into necessary wayleave applications relating to the same electric line, the SoS will usually consider it appropriate to hold concurrent hearings.

4.3 Once a date is finalised the electricity company will be asked to arrange a suitable venue for the hearing near to the location of the existing or proposed electric line and to make arrangements for a verbatim transcript of the proceedings (if required) to be taken. The

electricity company should contact the Department if it has any doubts over the type of venue required or how the venue should be set out for the hearing.

4.4 It is not uncommon for parties to resume negotiations to try to reach a voluntary agreement after a hearing date has been set. The Department will agree to a postponement if both parties confirm in writing that they no longer wish to proceed with the hearing because they consider there is now the possibility of them reaching an agreement. However, as there is no provision under **Schedule 4 to the 1989 Act** to reimburse the costs of the parties or the Inspector, and in order to keep costs to a minimum (e.g. cancellation charges for the venue, transcript writer, the Inspector's travel and accommodation etc), the Department will generally only agree to such requests if received by both parties no later than 7 days before the date of the hearing. After that time, the Department will generally only cancel the hearing if the necessary wayleave application is formally withdrawn.

4.5 Wayleave hearings are governed by **The Electricity (Compulsory Wayleaves) (Hearings Procedure) Rules 1967 (the 1967 Rules)**, which set out the statutory procedure to be followed.

### **Pre-hearing meetings**

4.6 The Inspector may wish to hold a pre-hearing meeting with the parties to set out the issues that are likely to be relevant to the SoS's consideration of the necessary wayleave application and agree a provisional timetable for the actual hearing. A pre-hearing meeting also affords the Inspector and the parties the opportunity to agree a timescale for the exchange of proofs of evidence and any associated documents in order that the hearing may be conducted efficiently and effectively in the interests of all parties.

4.7 Parties will be consulted over the date for a pre-hearing meeting and the electricity company will be asked to arrange a suitable venue for the meeting near to the location of the existing or proposed electric line. Both parties will be asked to confirm their attendance at the pre-hearing meeting to the DECC Wayleaves Manager no later than 14 days before the scheduled date. If they do not do so the Inspector may decide to cancel the meeting. In these circumstances the application may be stopped until a clearer picture of the situation can be obtained.

## **Provision of documents for a necessary wayleave hearing**

4.8 The electricity company is required not later than 14 days before the date of the hearing to provide the SoS and each objector (i.e. the landowner and/or occupier) with a written statement of its reasons for wishing to install or retain the electric line and a list of documents it wishes to use as evidence at the hearing (**see Rules 4(2) and 4(4) of the 1967 Rules**). The electricity company is also required to inform the objector where such documents may be inspected and copied prior to the hearing (**see Rule 4(4) of the 1967 Rules**). Although not a requirement, it would be beneficial to the process if the electricity company could supply copies of the documents specified in **Rule 4(4) of the 1967 Rules** to the objector and the Inspector at the same time it serves its statement of reasons.

4.9 Similarly, if any objector intends to present a lengthy submission, either as a statement of reasons or in evidence, it would again be beneficial to the process if it were presented to the other parties and the Inspector within the same timeframe as that applied to the electricity companies.

4.10 The Department will give parties at least 21 days notice of the date, time and place of the necessary wayleave hearing unless they agree a lesser period of notice in writing. The SoS has the discretion to vary the date, time and place of a hearing by giving prior written notice (**see Rule 4(1) of the 1967 Rules**). The Department will therefore normally agree to postpone a hearing already arranged if parties consider that a settlement is likely (see paragraph 4.4). In such cases, the written agreement of both the electricity company and the objector is required.

## **Appearing at the necessary wayleave hearing**

4.11 Parties may appear at the hearing (and where applicable the pre-hearing meeting) on their own behalf or may be represented by a barrister, solicitor or any other person (**see Rule 5(1) of the 1967 Rules**).

4.12 It should be noted that a necessary wayleave hearing is not a public inquiry, where members of the public may also contribute. This means that only the electricity company and the owner(s) and occupier(s) (or their representatives) are entitled to appear and make their case. They may, of course, call expert or relevant witnesses to give evidence on their behalf.



The hearing can be conducted in private if both parties request it (**see Rule 7(2) of the 1967 Rules**).

4.13 The necessary wayleave hearing proceeds by way of presentation of evidence, cross-examination and re-examination of those giving evidence and after the hearing has closed the Inspector will generally inspect the land affected by the electric line, accompanied by representatives of the electricity company and the landowner and/or occupier. This formal inspection, which is designed to give parties the opportunity to point out features addressed at the hearing, is not, however, automatic. A party who is of the view that such an inspection is required may therefore wish to make a formal request to the Inspector either before or during the hearing. No further evidence may be given or points raised during any formal site inspection (the Inspector cannot refer to any such evidence or points in his report or take them into account in his considerations).

#### **Purpose and scope of the necessary wayleave hearing**

4.14 The purpose of a necessary wayleave hearing is to hear evidence as to:

- (i) why it is necessary or expedient for the electric line to cross the particular land in question; and
- (ii) what the effects are of the electric line on the use and enjoyment of the land in question.

4.15 In scope, a necessary wayleave hearing is focused more on establishing the effect on private land interests, rather than matters of a more general planning nature that would be canvassed at a public inquiry. Accordingly, there is no right for third parties to appear and evidence may, at the request of the electricity company or owner and/or occupier, be given in private. Thus, evidence that will be relevant at a necessary wayleave hearing is site specific, for example, the effect of the electric line in question on farming (crops and animals), on the use of machinery, on wild fauna and flora and, in the case of an overhead line, on the outlook from buildings situated on the land in question. Other relevant evidence is likely to be the cost of any suggestions for local diversions of the application route and, in the case of an overhead line, the location of supports on the land in question.

4.16 Matters of a more general nature, such as the overall case for a new electric line and planning considerations that are not site-specific, will not normally be treated as appropriate for detailed discussion at the necessary wayleave hearing by the Inspector. Such matters are more properly considered in the context of the separate **section 37 (of the 1989 Act)** development consent application process, which allows local planning authorities and all those affected by a proposed electric line to make representations to the SoS.

### **Compensation**

4.17 Questions of compensation payments in respect of a necessary wayleave will not be addressed by the Inspector at the necessary wayleave hearing (although issues which relate to the impact on the use or enjoyment of the land and may subsequently be the subject of a claim for compensation may be raised in evidence at the hearing). The SoS has no power under **Schedule 4 to the 1989 Act** to prescribe financial conditions in any necessary wayleave case heard or to resolve disputes on the level of compensation. Compensation will fall to be settled by agreement between the parties or, failing agreement, by the Lands Tribunal at the request of either party (**see paragraph 7(4) of Schedule 4 to the 1989 Act**).

### **Costs**

4.18 The Inspector cannot hear applications for costs and the parties must be prepared to bear their own costs. There is no provision under **Schedule 4 to the 1989 Act** to reimburse the costs of the parties to a necessary wayleave hearing under Schedule 4, either from central funds or for the SoS to make a direction as to the award of costs.

## **5. AFTER THE NECESSARY WAYLEAVE HEARING**

5.1 Following a hearing the Inspector will submit a written report to the SoS for Energy and Climate Change with conclusions and a recommendation as to whether or not the necessary wayleave applied for should be granted. The SoS will then consider the report and associated documentation before reaching a decision on the necessary wayleave application. The aim is that within six months of the hearing, parties will be notified of the SoS's decision. This will be in the form of a letter, a copy of the Inspector's report and, if a necessary wayleave is being granted, the wayleave document itself.

5.2 If an application for the grant of a necessary wayleave to retain an existing electric line is refused by the SoS the electricity company has one month from the date of the refusal to remove the line, or such longer period as the SoS may specify (**see paragraph 8(4) of Schedule 4 to the 1989 Act**).

5.3 The overall process from request for a necessary wayleave hearing to notification of the SoS's decision can usually take a minimum of 12 months. However, some cases may take longer.

## **6. SOME FREQUENTLY ASKED QUESTIONS RELATING TO NECESSARY WAYLEAVES**

**6.1 Q: Can the electricity company make an application for a necessary wayleave to install or retain an electric line on or over, or under, a dwelling or land which has planning permission for a dwelling?**

**A:** Where the necessary wayleave application relates to a new electric line the SoS is precluded by legislation from granting a necessary wayleave where a dwelling covers the land or where valid planning permission exists for a dwelling to be constructed, unless the line is to be placed underground (**see paragraph 6(4) of Schedule 4 to the 1989 Act**). The same constraint does not apply where the application for the grant of a necessary wayleave relates to an existing electric line. This interpretation has been upheld by the High Court (see *R v Secretary of State for Trade and Industry, ex parte Wolf (1997) QBD; unreported; case CO/0788/97*).

**6.2 Q: Why is it important for parties to abide by the notice requirements and statutory periods specified in Schedule 4 to the Electricity Act 1989?**

**A:** Parties should pay particular attention to the notice requirements and statutory periods specified in **Schedule 4 to the 1989 Act**. The SoS may not have jurisdiction to proceed with an application if the procedures and notice periods have not been observed. The Department may also seek further information from the parties in order to form a view on whether the SoS has jurisdiction to proceed with a necessary wayleave application. The Department recognises electricity companies may feel the need to make an application to retain an electric line in order to protect their position regarding the statutory time limits.

**6.3 Q: What is the definition of an “owner” and “occupier” in the Electricity Act 1989?**

**A:** The 1989 Act does not give a definition of “owner” or “occupier”. As a general rule, the Department takes the view, based on general legal principles, that “owner” for the purposes of Schedule 4 means the registered (i.e. in the HM Land Registry property register) proprietor (or owner of the ‘legal estate’ in the case of unregistered land) rather than a party who only has a beneficial interest in the land in question. The Department’s view is that the “occupier” is a party who has lawful possession (including temporary possession) of the land in question, or is

exercising a legal right to use the land, for example under the terms of a lease. However, these are clearly difficult issues and the Department may require parties to provide further information to help it take a view, particularly for example in cases where the ownership or occupation of the land in question is disputed, covered by a lease agreement, or a necessary wayleave hearing has been requested, but the land has been sold on to a new owner(s) since the Notice to Remove has been given.

**6.4 Q: What does the Department consider to be a valid Notice to Remove?**

**A:** A Notice to Remove an electric line must be in writing. The Department considers that the Notice needs to make a clear reference to the removal of the electric line and/or other apparatus from the owner and/or occupier's land. The Department has produced a template Notice to Remove which should be used where possible. This is attached as Annex A.

**6.5 Q: Can a Notice to Remove be withdrawn by the owner and/or occupier after it has been given?**

**A:** A Notice to Remove can be withdrawn by writing to the electricity company to whom the original Notice was given. The electricity company will then be able to write to the Department withdrawing their application for a necessary wayleave, if that is their wish. The Department will confirm in writing that no further action will be taken with the application.

**6.6 Q: Are the terms of a previous voluntary wayleave agreement binding on new owners and/or occupiers?**

**A:** Following a change of ownership and/or occupation, unless a new owner and/ or occupier has intended to incorporate the terms of the previous wayleave into an agreement he has with the electricity company, the Department considers that the termination and other clauses in the previous wayleave agreement are not necessarily binding on the parties.

**6.7 Q: What is an 'implied' wayleave?**

**A:** Paragraph 8 of Schedule 4 to the Electricity Act 1989 deals with the temporary continuation of wayleaves. It applies both to necessary wayleaves granted under **paragraph 6**

of **Schedule 4** and to wayleaves that arise “by agreement between the parties” The latter type of wayleaves are those that arise out of a contractual relationship between the parties.

As in the case of almost all other types of contracts, contractual wayleaves can be created in a variety of ways. They may be created by a written or oral agreement or alternatively by conduct. Such conduct commonly occurs when an electricity company makes payments to a landowner in respect of the company’s electric lines on his land and the landowner accepts those payments without there being in place a written or oral wayleave agreement between the two parties. Whether a contractual wayleave arises from conduct will obviously depend on the particular facts of the case in question but, in the Department’s view, in the great majority of such cases a court would hold that a contract had been created. It is these contractual wayleaves that arise from conduct which the Department calls “implied wayleaves”.

Like wayleaves where a written agreement is in place, implied wayleaves require a Notice of termination followed by a Notice to Remove (i.e. in accordance with paragraphs 8(1)(b) and 8(2)(b) of Schedule 4 to the Electricity 1989) (2-step procedure). In the case of a wayleave that arises out of conduct, there will be no express term for terminating the wayleave and a court would therefore be likely to imply such a term as was reasonable. The Department takes the view that a reasonable period of Notice of termination of the agreement will be required, which the Department customarily takes to be six months (as written wayleave agreements usually contain termination periods of 6 or 12 months).

#### 6.8 **Q: Can the Secretary of State consider compensation matters?**

**A:** Whilst the legislation provides for the SoS to grant necessary wayleaves subject to terms and conditions, questions of financial compensation for the presence of an electric line are not the responsibility of the SoS who has no powers under **Schedule 4 to the 1989 Act** to prescribe financial conditions in any necessary wayleave case heard or to resolve disputes on the level of compensation. Financial compensation falls to be settled by agreement between the parties or, failing agreement, by the Lands Tribunal at the request of either party (**see paragraph 7(4) of Schedule 4 to the 1989 Act**). This interpretation is consistent with a High Court ruling under the predecessor legislation (see *West Midlands Joint Electricity Authority v Pitt (1932) All ER Rep 861*).

**6.9 Q: Can the Secretary of State make an award of costs?**

**A:** There is no provision under **Schedule 4 to the 1989 Act** to reimburse the costs of the parties for a necessary wayleave hearing, either from central funds or for the SoS to make a direction as to the award of costs. This was confirmed by the High Court (see *R v D.T.I, ex parte Healaugh Farms*. QBD; reported: *The Times* 27 December 1995, CO/1104/95).

**6.10 Q: How long does the Secretary of State grant a necessary wayleave for before the owner and/or occupier can terminate it?**

**A:** If after considering an Inspector's report and recommendations the SoS decides to grant a necessary wayleave, it will usually be granted subject to a condition that it may only be terminated after 15 years (necessary wayleaves granted by the SoS are binding on successive owners and/or occupiers – **see paragraph 6(6)(b) of Schedule 4 to the 1989 Act**). It is the Department's considered view that a 15 year term represents an equitable period which provides a balance between offering the electricity company a degree of certainty for the installation of apparatus whilst still affording the landowner the opportunity of having the position reviewed in the light of subsequent changes in circumstances and the local environment. Accordingly, parties who consider that, if granted, a necessary wayleave of a shorter or longer term would be more appropriate because of the particular circumstances should give their reasons as part of their evidence.

**6.11 Q: How long does the statutory process take from the request for a necessary wayleave hearing to notification of the Secretary of State's decision?**

**A:** The overall process from request for a hearing to notification of the SoS's decision on a necessary wayleave application can usually take a minimum of 12 months. However, some cases may take longer.

**6.12 Q: Will the Infrastructure Planning Commission (IPC) take responsibility for granting necessary wayleaves?**

A: The IPC will only consider applications for necessary wayleaves for new electric lines when the proposed electric line is of a voltage of 132kV and above<sup>2</sup> and/or the electric line forms a component part of an associated development for instance a wind farm. For new electric lines below 132kV and for wayleaves relating to existing lines, the Department will continue to receive and determine applications as is current practice

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<sup>2</sup> Planning Act 2008 (Nationally Significant Infrastructure Projects) (Electric Lines) Order 2013 has amended the voltage threshold



**Notice to Remove Template for Landowner and/or Occupier**

In accordance with schedule 4 of the Electricity Act 1989 I hereby give  
[insert name of electricity company and address notice sent  
to].....  
.....  
.....

Notice to Remove electric lines and/or associated apparatus [insert details of  
apparatus].....  
.....  
.....

From the land at  
.....  
.....  
.....

Name, address and tel. no. of landowner and/or  
occupier.....  
.....  
.....

I confirm that I have read and understand the “Guidance for Applicants and Landowners and/or  
Occupiers” published by the Department of Energy and Climate Change, dated July 2010.

Signed.....Dated.....

And if Notice being handled by a representative:

Signed.....Dated.....

Name, address and tel. no. of  
representative.....  
.....  
.....

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Department of Energy & Climate Change  
3 Whitehall Place  
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