



Department
of Energy &
Climate Change

ELECTRICITY ACT 1989

GUIDANCE FOR APPLICANTS AND LANDOWNERS AND/OR OCCUPIERS

**Application to the Secretary of State for
Energy and Climate Change from 1 October
2013, for the grant of a Necessary
(Compulsory) Electricity Wayleave or Felling
and Lopping of Trees Order in England and
Wales**

January 2014

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 for the grant of a necessary wayleave for the installation of new electric lines or retention of existing electric lines or for a Felling and Lopping of Trees Order; 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, 8 and 9 of Schedule 4 to the Electricity Act 1989 (the 1989 Act);
- the Electricity (Necessary Wayleaves and Felling and Lopping of Trees) (Hearing Procedures)(England and Wales) Rules 2013 (SI No.1987/2013); and
- The Electricity (Necessary Wayleaves and Felling and Lopping of Trees)(Charges)(England and Wales) Regulations 2013.

IMPORTANT NOTICE: It should be noted that the Department has to determine whether the Secretary of State has jurisdiction to proceed with a necessary wayleave application or Felling and Lopping of Trees Order. This guidance therefore sets out the Department's interpretation of the legislation and includes case law where applicable. Ultimately 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 AND/OR TREE FELLING OR LOPPING ORDERS

If you require any further information or have any questions regarding necessary wayleaves and/or tree felling or lopping procedures please contact the Wayleaves Manager, National Infrastructure Consents, Department of Energy and Climate Change, Kings Building, 2nd Floor, c/o 3 Whitehall Place, London SW1A 2AW, e-mail: david.gamble@decc.gsi.gov.uk , Tel: 0300 068 5672

SECTION 1

INTRODUCTION

ELECTRICITY COMPANIES AND COMPULSORY PROCEDURES

1 The electricity networks feed electricity to nearly all of the households in England and Wales. The networks are owned and operated by National Grid Electricity Transmission plc. and electricity distribution companies (jointly referred to in this guidance as “licence holders”). Relevant licences are granted under section 6 of the Electricity Act 1989. Licence holders who distribute or transmit electricity have duties contained in **section 9 of the Electricity Act 1989 (“the 1989 Act”)** to develop and maintain an efficient, co-ordinated and economical system of electricity distribution and transmission.

1.1 Therefore, licence holders operate under a regime that reflects their public service role, including the compulsory powers set out in **section 10 of, and Schedules 3 and 4 to, the 1989 Act**. These powers enable licence holders to comply with their statutory duties and obligations.

1.2 Licence holders 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, they do this through negotiation of a contractual arrangement with the landowner and/or the occupier of the land; this is called a voluntary wayleave. Licence holders 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).

1.3 However, where an agreement cannot be reached through negotiation, the licence holders, who have a public service role to undertake, have access to compulsory procedures. The electricity licence holders may promote a Compulsory Purchase Order under **Schedule 3 to the 1989 Act** or apply for a “necessary” (compulsory) wayleave under **Schedule 4 to the 1989 Act**.

Compulsory Purchase Orders

1.4 Compulsory Purchase Orders can be made by licence holders for the installation and retention of electric lines. In such cases, the licence holder will make an Order for the compulsory acquisition of land or rights over land, and then seek confirmation of the Order from the Secretary of State. Where statutory objections are raised (i.e. objections from owners, lessees and occupiers) the Secretary of State is required to give these statutory objectors the opportunity to be heard and to hold a public inquiry where these objections are maintained before making a decision on the Order. The procedure for promoting a Compulsory Purchase Order is set out in Schedule 3 to the 1989 Act and in the Acquisition of Land Act 1981. The Department for Communities and Local Government produces a booklet explaining

the Compulsory Purchase Procedure, this can be found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/11487/147639.pdf

Their Circular 06/2004 “Compulsory Purchase and the Crichel Down Rules” provides guidance to local planning authorities. Public inquiries into objections maintained for Compulsory Purchase Orders relating to electric lines are held in accordance with **The Compulsory Purchase (Inquiries Procedure) Rules 2007, SI 3617/2007**¹.

Necessary Wayleaves

1.5 More commonly the use of compulsory powers to secure rights to install a new electric line or retain an existing electric line occurs on application by licence holders to the Secretary of State for a compulsory wayleave (the legislation uses the term “necessary wayleaves”) under **Schedule 4 to the Electricity Act 1989**. It is usual, but not mandatory, for licence holders to firstly try to negotiate a voluntary wayleave or voluntary easement with landowners and/or occupiers of land before invoking the more formal process under Schedule 4 of the Act. Where a mutual arrangement cannot be made between parties, the licence holder may apply to the Secretary of State for a necessary wayleave 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. The Secretary of State will usually grant any necessary wayleave for a period of 15 years but may grant it for a longer or shorter period on a case by case basis subject to representations by affected parties.

1.6 Landowners and/or occupiers should note that the necessary wayleave will not be registered against the title of the property to which it refers, but is enforceable by the licence holder against subsequent landowners and/or occupiers in circumstances where the land is sold or the occupant changes during the period in which the necessary wayleave is in force. The Secretary of State has no role in the monitoring or enforcement of the necessary wayleave if granted.

1.7 There are statutory procedures involved both where an application is made for a new electric line and where 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. **The Electricity (Necessary Wayleaves and Felling and Lopping of Trees)(Hearing Procedures)(England and Wales) Rules 2013** (“the Hearing Rules”)² provide for representations to be made through a written representations procedure or an oral hearing procedure conducted by an Inspector appointed by the Secretary of State. The Hearing Rules also apply in respect of an application for an

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/7668/compulsorypurchaserules.pdf

² The Electricity (Necessary Wayleaves and Felling and Lopping of Trees)(Hearings Procedures)(England and Wales) Rules 2013 apply in respect of applications submitted in England and Wales on or after 1 October 2013 <http://www.legislation.gov.uk/ukxi/2013/1987/article/1/made>

The Electricity (Compulsory Wayleaves)(Hearings Procedure) rules 1967 continue to apply in respect of applications submitted in England and Wales before 1 October 2013 (and applications in Scotland, which are made to Scottish Ministers rather than the Secretary of State)

<http://www.legislation.gov.uk/ukxi/1967/450/contents/made>

Order for the felling or lopping of trees or shrubs (see below). The Inspector will consider the representations of both the licence holder and the owner and/or occupier at the hearing or through the written representations procedure and produce a report with a recommendation for the Secretary of State. The Secretary of State (or officials acting on the Secretary of State's behalf) will then consider whether or not a necessary wayleave (or an Order for the felling or lopping of trees) should be granted.

Tree felling or lopping of trees and shrubs

1.8 Where a tree or shrub is in close proximity to an electric line or electrical plant and requires essential vegetation management because it poses a risk to safety or security of supply, the Secretary of State may make an Order to empower a licence holder to cause the tree or shrub to be felled or lopped **under paragraph 9 of Schedule 4 to the 1989 Act**. In most circumstances however, and before the licence holder refers the matter to the Secretary of State for the grant of an Order, the licence holder will usually hold discussions with the landowner and/or occupier to agree mutual terms. Licence holders also have a duty to comply with requirements contained in the Electricity Safety, Quality and Continuity Regulations 2002 (ESQCR)³ as amended, to keep sufficient distance between vegetation and overhead power lines.

1.9 The licence holder should first give a notice to the landowner and/or occupier that essential vegetation works to fell or lop the tree, or to cut back its roots on their land, are needed to be carried out because of a risk to safety or security of supply. Paragraph 9(2) of Schedule 4 to the 1989 Act says that in giving notice, the licence holder must pay reasonably incurred expenses for the landowner and/or occupier to comply with the notice. However, in most circumstances the licence holder will usually offer to undertake the necessary works on behalf of the landowner and/or occupier at the licence holder's expense as working in close proximity to electricity lines is dangerous and the licence holders are better equipped to undertake this work.

1.10 Where the landowner and/or occupier is unwilling to comply with the licence holder's notice to allow necessary tree cutting works to be undertaken and if within 21 days from giving the notice the licence holder's requirements have not been complied with, and neither the landowner and/or occupier has given a counter-notice to the licence holder objecting to the requirements of the notice, the licence holder may cause the vegetation to be felled or lopped or to have its roots cut back. If within 21 days the landowner and/or occupier does serve a counter-notice to the licence holder objecting to the requirements of the notice, the licence holder can refer the matter to the Secretary of State and apply for an Order to empower the licence holder to fell or lop the relevant trees or shrubs **under Paragraph 9 of Schedule 4 to the 1989 Act**.

1.11 Before making such an Order the Secretary of State must give the parties an opportunity of being heard in accordance with Paragraph 9(6) to the 1989 Act. Any

³ <http://www.legislation.gov.uk/ukxi/2002/2665/contents/made>

hearing will be conducted in accordance with **the Hearing Rules** following the same procedures as indicated above for necessary wayleaves.

SECTION 2

GIVING NOTICES AND MAKING NECESSARY WAYLEAVE APPLICATIONS AND/OR MAKING TREE FELLING OR LOPPING ORDERS

Necessary Wayleaves

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

(a) Applications for the grant of a necessary wayleave for a new electric line under paragraph 6 of Schedule 4 to the 1989 Act.

2.1 Where a licence holder is unable to agree a voluntary wayleave with the landowner and/or occupier to install a new electric line on, under or over land and seeks to apply to the Secretary of State for the grant of a necessary wayleave, the licence holder must at 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 grant the licence holder the wayleave voluntarily, or has granted the wayleave subject to terms and conditions to which the licence holder objects, then the licence holder may apply to the Secretary of State for the grant of a necessary wayleave in accordance with **paragraph 6(3) of Schedule 4 to the 1989 Act**.

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

2.3 Details of what information the application must include are set out below at paragraph 2.19. The licence holder must send a copy of the application to the landowner and/or occupier (**Rule 3(1) of the Hearing Rules**).

(b) Applications for the grant of a necessary wayleave relating to retention of an existing electric line under paragraphs 6(2) and 8 of Schedule 4 to the 1989 Act

No existing wayleave: the “one-step procedure”

2.4 When a wayleave agreement (either a voluntary or necessary wayleave) has expired, the landowner and/or occupier may, either within three months before the wayleave expires or at any time afterward, serve the licence holder with 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 one-step procedure).

2.5 The one-step procedure also applies where there is no form of agreement in place or where 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**. However, such cases are not always clear-cut, as it is possible that an “implied” wayleave may have been created between the parties (discussed further below), in which case the “two-step procedure” will apply.

Wayleave in existence: the “two-step procedure”

2.6 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 serve a **Notice to Terminate** the existing wayleave agreement in accordance with a term contained within it (wayleaves normally contain a clause requiring either six or twelve 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 to Terminate** has expired the owner and/or occupier must then serve a subsequent **Notice to Remove** on the licence holder 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 licence holder may apply to the Secretary of State for the grant of a necessary wayleave (two-step procedure):

(Step 1) a Notice to Terminate the existing agreement; and
(Step 2) a subsequent Notice to Remove the electric line.

2.7 The Secretary of State 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, a request to the licence holder to make contact and discuss what can be done about the electric line should not be considered to be a notice to remove.

2.8 As Schedule 4 to the 1989 Act is not specific on what form a Notice to Remove should take, the Secretary of State has made available a template for landowners and/or occupiers to use. This template is attached as Annex A and whilst its use is not mandatory, it would be helpful if it could be used in most cases, or if not, then any Notice to Remove must clearly state in the letter from landowners and/or occupiers (or their agent) that a Notice to Remove is being served in accordance with Schedule 4 of the Electricity Act 1989. There should not be any doubt that it is their intention to request for the line to be removed from their land.

Implied wayleaves

2.9 As noted above, a voluntary wayleave ceases to be binding following a change in ownership or occupancy of the land and, in such cases, the one-step

procedure is likely to apply. However, such cases are not always clear-cut. For example, a new landowner and/or occupier may have received wayleave payments from the licence holder over a period of time and thus a contract may have been created between the parties (an implied wayleave agreement) requiring compliance with the two-step notice procedure described above in paragraph 2.6. The acceptance by the landowner of the overhead line on the land for a sustained period after a Notice to Remove could potentially indicate that a new and implied wayleave has arisen, in which case a new Notice to Terminate and Notice to Remove may be required. However, it is the Secretary of State's view that in most cases a single payment made after the Notice to Remove is unlikely to indicate an implied wayleave.

2.10 In implied wayleave cases, there will be no written agreement containing a notice period. The Secretary of State takes the view that a requirement for "reasonable" notice would be implied in such cases and considers six months prior notice to be appropriate in most cases (most voluntary wayleaves usually require six or twelve months prior notice).

Temporary continuation of wayleaves

2.11 **Paragraph 8 of Schedule 4 to the 1989 Act** provides that if the licence holder makes an application for a necessary wayleave or a Compulsory Purchase Order within three months of the Notice to Remove, then the existing wayleave is temporarily continued until the application is determined by the Secretary of State. Conversely, if the licence holder does not, within three months of the date of the Notice to Remove, make an application for a necessary wayleave (or a Compulsory Purchase Order), the licence holder must remove the line from the land in question, as temporary rights to retain the line on the land until the wayleave application has been determined will not have been secured. After the three month period, the licence holder can still make a valid application to the Secretary of State for a necessary wayleave but if the line is being retained on the land without the consent of the owner and/or occupier then the line will be in place without legal authority. The landowner and/or occupier are likely to have a claim in trespass against the licence holder in such circumstances, and may be able to claim damages in the Courts. The Secretary of State would advise the landowner and/or occupier to seek their own legal advice in such circumstances. The Secretary of State may also take into consideration whether a line is in place without consent when determining the merits of a necessary wayleave application received after the three month period specified in paragraph 8 of Schedule 4 to the 1989 Act.

Good practice for Notices

2.12 To avoid unnecessary applications being made to the Secretary of State by licence holders, it is suggested that if the wording of the Notice to Remove leaves any doubt as to the landowner's intentions, then the licence holder should check the situation with the landowner and/or occupier. If it is the landowner's intent to request removal, then the licence holder should guide them to the Notice to Remove template document at Annex A so that they can provide the correct information to the licence holder. A plan should be included with a Notice to Remove that identifies the electric line and the land, as it is not always the case that the licence holder will have

this information and if it is not provided, or the land is unregistered, it is not clear to the licence holder what electric line or lines are intended to be the subject of a Notice to Remove.

2.13 It is recommended that, as a matter of good practice, licence holders and landowners and/or occupiers submit their notices to the other parties by “signed for” or special delivery (as these methods require an acknowledgement of receipt). There is no requirement for the owner and/or occupier to copy notices to the Department.

Submission and processing of applications

2.14 In accordance with the Department’s Digital by Default agenda, it is expected that all applications for necessary wayleaves and tree felling and lopping Orders including supporting documentation, are submitted through its on-line electronic portal service see: <https://www.og.decc.gov.uk/EIP.htm>. The portal makes the application and notification process more efficient by taking advantage of the speed of electronic transfer and provides a reliable audit of the entire application. The portal service is accessible by licence holders, Local Planning Authorities and regulatory stakeholders who must register with the Department for an account. Details about the portal itself can be found on the following page where there are specific questions for the three categories above as well as a FAQ and online tutorials: https://itportal.decc.gov.uk/eng/fox/ecp/EIP_LOGIN/login. If any user experiences technical difficulties with the electronic portal service, the Wayleaves Manager should be alerted as soon as possible so that the problem is resolved or the application is submitted to the Secretary of State by alternative means.

2.15 Exceptionally the Department will accept applications submitted by email or post. In such instances this should be agreed in advance with the Wayleaves Manager, and “signed for” or special delivery post is recommended. Licence holders, landowners and/or occupiers are advised to check with the Department’s Wayleaves Manager that the application has been received.

2.16 There is a charge of £34 payable by the licence holder on submitting an application for a necessary wayleave or an Order for the felling or lopping of trees as prescribed by **The Electricity (Necessary Wayleaves and Felling and Lopping of Trees)(Charges)(England and Wales) Regulations 2013**. This payment is made through the electronic portal system (or if agreed with the Department by cheque made payable to “DECC” or to “The Department of Energy and Climate Change”). The Department will not process an application until the payment is received. However, the Department considers that for the purposes of the three month period under **paragraph 8(3) of Schedule 4 to the 1989 Act**, the relevant date for calculating that period is the receipt of the application by the Secretary of State, rather than the receipt of the payment.

2.17 The licence holder must also send a copy of the necessary wayleave application and any accompanying documents to the landowner and/or occupier (**Rule 3(1) of the Hearing Rules**). We recommend that this is done by recorded or “signed for” post. **Rule 19 of the Hearing Rules** also provide that documents may be exchanged by email if consent is given to this.

2.18 It should be noted that before a licence holder applies to the Secretary of State 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.

2.19 The Department needs to be satisfied that the Secretary of State 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 by the licence holder to the Department at the time of application (including the processing fee). The Department may still need to ask parties for further information, however the Department will not take steps to independently confirm the accuracy of the landowner and/or occupier information contained in the application form.

Information to be provided with the application

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

For all necessary wayleave applications

- (a) details of the owner and/or occupier and (for registered land) Title as per Land Registry (where appropriate);
 - (i) the location of the land; and
 - (ii) details of the electric line and apparatus in question (a definition of an “electric line” is given in **section 64 of the 1989 Act** and the Department considers that if there are separate circuits on a common support this constitutes a single electric line. An electric substation is “electrical plant” as defined in section 64 and Schedule 4 to the 1989 Act and therefore does not fall within the definition of an “electric line”).
- (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 2.24 below).
- (c) a statement as to whether the necessary wayleave application is to install a new electric line under **paragraph 6(1)(a) of Schedule 4 to the 1989 Act** or to keep an electric line installed under **paragraph 6(2) of Schedule 4 to the 1989 Act**.
- (d) a plan/map should be submitted electronically with the application via the portal clearly detailing:
 - i) the landowner and/or occupier’s affected land boundaries;
 - ii) the electric lines 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).

Then:

For existing electric lines only

(f) confirmation of which part of **paragraph 8(1) of Schedule 4 to the 1989 Act** 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 ideally on the Departmental template at Annex A, 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 to the 1989 Act**).

(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 and/or occupier requiring them to grant the necessary wayleave in accordance with

paragraph 6(1)(b) of 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) of Schedule 4 to the 1989 Act**; 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.

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

2.22 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 always be included in all subsequent correspondence.

2.23 In the case of necessary wayleave or tree lopping applications relating to the installation of new electric lines made in a separate application to the Secretary of State under section 37 of the 1989 Act, it would be useful for the licence holder to provide a summary of pre-application consultation with the landowner and/or occupier so that the Secretary of State may take this into account when considering whether there are any exceptional circumstances which mean the written representations procedure should not be used.

2.24 It is the Department's view that the Secretary of State can only grant or refuse any necessary wayleave applied for in the application. Where an application for a necessary wayleave contains more than one electric line, each line in the application will be considered separately by the Secretary of State in accordance with the provisions in **paragraph 6 of Schedule 4 to the 1989 Act**. Accordingly, the Secretary of State has the discretion to grant a necessary wayleave for one of the electric lines on the owner and/or occupier's land in an application relating to more than one electric line, whilst refusing others within the same application. However, the Secretary of State cannot grant any necessary wayleave for an alternative route or on a basis that is different to that set out and applied for in the application.

Orders for the felling or lopping of trees

2.25 Where a tree or shrub is or will be in close proximity to an electric line or electrical plant and the licence holder has found it necessary to require the vegetation to be pruned or cut-back to maintain safety standards and clearances to the line, the licence holder may give the occupier of the land notice requiring him within 21 days, to fell or lop the tree or cut back its roots to rectify the obstruction.

2.26 Where the occupier of the land is not also the landowner, a copy of the notice should also be served on the landowner by the licence holder. The landowner and occupier have 21 days from the date of the notice within which to comply with the

requirements of the notice. If, within 21 days the occupier or landowner cannot agree with the licence holder for the required works to be carried out, they can give a counter-notice to the licence holder objecting to the requirements of the notice. If the only disagreement about undertaking the required works is in relation to who carries out and pays for the works, the Department would strongly encourage the licence holder to clarify their position in regard to this. Unless the counter-notice is withdrawn by the landowner and occupier, the licence holder has statutory powers under **paragraph 9 of Schedule 4 to the 1989 Act** to refer the matter to the Secretary of State for the grant of a tree felling and lopping of trees Order. Any applications made by the licence holder before the completion of the 21 day period will be rejected by the Secretary of State.

Choice of hearing procedure and holding cases in abeyance

2.27 On receipt of a valid application for either a necessary wayleave or a tree felling or lopping Order, the Secretary of State is required under **Rule 3(2) of the Hearing Rules** to give notice to each party to seek that party's consent for the written representations procedure to apply in respect of the determination of the application. However, in cases where the parties are continuing to negotiate, the Secretary of State may choose to hold a case 'in abeyance', that is, to put it on hold pending the outcome of negotiations (exercising the discretion under **Rule 18 of the Hearing Rules** to allow further time for any required step). Even if the application is not put into abeyance at this point (in which case it will proceed to the written representations procedure or oral hearing procedure), the parties may wish to continue their negotiations.

2.28 The Secretary of State strongly encourages the parties to reach a negotiated settlement wherever possible, and an application may be put into abeyance at any point if agreed by both parties, including in advance of an oral hearing in which case a hearing date may be postponed. Nevertheless, due to historically high levels of applications held in prolonged abeyance, it is the Secretary of State's view that the period of abeyance should generally be no longer than six months from the date of the application (although a longer period may be allowed for if appropriate in the circumstances), after which time the Secretary of State would expect the application to either progress to the written representations or oral hearing stage or be withdrawn by the applicant because a negotiated settlement has been reached between parties. The Secretary of State does not consider it is acceptable to leave applications waiting in abeyance for extended periods of months or years awaiting conclusion of settlements between landowner and/or occupier and licence holders. In the case of applications relating to new electric lines the Secretary of State will take into consideration that the new line would have to be granted consent through the Electricity Act 1989 section 37 overhead line application process. However, in the case of applications relating to existing lines, the question of whether it is necessary or expedient for the line to remain on the land should be determined by the Secretary of State within a reasonable timescale if a voluntary agreement cannot be reached.

2.29 If a party wishes to consent to the use of the written representations procedure, then it should do so by giving notice to the Secretary of State within 30

working days⁴ of the Secretary of State's notice (**Rule 3(3) of the Hearing Rules**) (see Annex E). If both parties provide their consent, or the Secretary of State receives no response from either party to the Secretary of State's notice, under **Rule 3(2) of the Hearing Rules** and unless the Secretary of State considers that there are exceptional circumstances which require an oral hearing to be held, the Secretary of State will apply the written representations procedure in accordance with **Rule 3(4) of the Hearing Rules**. The Secretary of State will give notice to the parties as to which procedure will apply (**Rule 3(6) of the Hearing Rules**).

⁴ "working day" means any day other than a Saturday, Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971(2)

SECTION 3

THE NECESSARY WAYLEAVE OR TREE FELLING OR LOPPING HEARING

Purpose and scope of the necessary wayleave hearing

3 The purpose and scope of the necessary wayleave hearing procedures (both by written representations and oral hearing) is to receive evidence as to:

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

3.1 In scope, a necessary wayleave written representations procedure or oral hearing is focused on establishing the effect on private land interests, thus the 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 a new 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 a new overhead line, the location of supports on the land in question. It may also be appropriate to consider the impact on landowner and/or occupiers property rights under Article 1 of Protocol 1 to the European Convention on Human Rights.

3.2 Evidence presented at the hearing in respect of alternatives to the necessary wayleave should demonstrate the impact of complying with the Notice to Remove i.e. removing the electric line from the land in cases of existing lines. However, alternatives may also be considered in order to demonstrate why the parties have failed to reach agreement to either divert or underground the lines across land.

Purpose and scope of a tree lopping and felling hearing

3.3 The purpose and scope of the tree lopping or felling hearing is to hear evidence as to why the licence holder considers that the effect of the trees (or vegetation) in question on the electric line(s) or electrical plant need to be urgently addressed by the landowner and occupier because they:

- obstruct or interfere with the installation, maintenance or working of the electric line or plant; or
- constitute an unacceptable source of danger (whether to children or other persons).

Applications to be considered under the written representations procedure

3.4 Where the Secretary of State has given notice (the “procedure notice”) to each party that the written representations procedure will be used, the Secretary of State will ask each party to submit a Statement of Evidence within 30 working days after the date of the procedure notice (**Rule 4(2) of the Hearing Rules**). The

applicant's Statement of Evidence must contain details as set out in **Rule 4(3) of the Hearing Rules**. For an application for a necessary wayleave, the applicant's Statement of Evidence must provide a description of the location of the proposed or existing electric line by reference to a map and the applicant's reasons for wishing to install or retain the electric line i.e. why it is necessary or expedient. For an application for an Order for the felling or lopping of trees, the applicant must provide a description of the location of the electric line and identify the individual trees to be felled or lopped by reference to a map and state why the applicant considers that it would be appropriate for the Secretary of State to make an order for the felling or lopping of such trees.

3.5 After the end of the 30 working day period (the "submission date") the Secretary of State will circulate the Statements of Evidence received to each of the other parties (or if no Statement of Evidence was received, confirmation of this). Where a Statement of Evidence has been received late (i.e. after the submission date), the Secretary of State may decide whether to take it into account, and will inform the parties of this (if it is to be taken into account, it will be circulated to the other parties) (**Rule 4(4) and (5) of the Hearing Rules**). If all of the parties submit their Statements of Evidence early (i.e. before the submission date), the Secretary of State may circulate the statements at that point, so as to accelerate the process (**Rule 4(7) of the Hearing Rules**). In any case where there is a large volume of documents, the Secretary of State may direct one party to send their submissions to another (**Rule 19(8) of the Hearing Rules**).

3.6 Following the circulation of the Statements of Evidence, each party may make representations in respect of a Statement of Evidence made by another party (**Rule 5 of the Hearing Rules**). Such representations should be made within 10 working days ("the further submission date") and the Secretary of State will circulate the further representations to each of the parties. If any further representations are received late (i.e. after the further submission date), the Secretary of State may decide whether they should be taken into account and will notify the parties accordingly.

3.7 Note that although the parties have discretion as to whether to submit a Statement of Evidence and/or further representations, the parties should take into account that the Inspector's report and recommendation will be based on the submitted evidence, and therefore it is likely to weaken a party's case if insufficient evidence is submitted.

3.8 The Secretary of State will appoint an Inspector to consider the relevant evidence and to submit to the Secretary of State a report and recommendation. Once the Inspector has been appointed, the Secretary of State will give notice to each party of the name of the Inspector (**Rule 6(3) of the Hearing Rules**). The Inspector may give notice to any party to request that party to provide such further information in respect of the relevant application ("the further information date") copying his request to the Secretary of State (**Rule 7 of the Hearing Rules**). The Inspector may also decide to conduct a site inspection either accompanied or unaccompanied prior to submitting his report to the Secretary of State.

Applications to be considered under the oral hearing procedure

3.9 Where notice has been given to the parties that the oral hearing procedure will apply, the Secretary of State will appoint an Inspector to conduct the oral hearing and to submit a report and recommendation to the Secretary of State. The Secretary of State will also notify the parties of the name of the Inspector (**Rule 8(3) of the Hearing Rules**). The Inspector will determine the date and time of the oral hearing and give notice to the parties of those matters relevant to the Secretary of State's consideration. If it is not possible to agree a date with parties the Secretary of State will set the date in accordance with Inspector availability. The Secretary of State will ask the licence holder to arrange a suitable venue for the hearing near to the location of the existing or proposed electric line. In some circumstances such as lengthy hearings or complex applications, the Inspector may request that the licence holder also make arrangements for a verbatim transcript of the proceedings to be made, however this is not a mandatory requirement. The Secretary of State will give notice of these details to each party not less than 15 working days before the oral hearing takes place (**Rule 9(3) of the Hearing Rules**).

3.10 In circumstances where more than one request has been made for a hearing into necessary wayleave or tree felling or lopping applications relating to the same electric line, the Secretary of State will usually consider it appropriate for the Inspector to hold concurrent hearings with the licence holder and relevant landowners and/or occupiers. **Should such hearings be in relation to an application made to the Secretary of State for a new electric line under section 37 of the Electricity Act 1989 that is subject to a public inquiry, the Secretary of State may also decide to conjoin both the public inquiry and hearings to be conducted by the same appointed Inspector.**

Pre-hearing meetings

3.11 The Inspector may wish at his discretion, to hold a pre-hearing meeting with the parties in advance of an oral hearing where the Inspector considers such a meeting may result in the oral hearing being conducted more efficiently and expeditiously (**Rule 10 of the Hearing Rules**). A pre-hearing meeting is not mandatory however under the Hearing Rules. If the Inspector does decide to hold a pre-hearing meeting the Inspector must notify the Secretary of State, as this meeting must take place **at least 30 working days before the oral hearing itself** (unless agreed with the Inspector and each of the parties). As with the oral hearing date, the parties will be consulted on a suitable date for the pre-hearing meeting and if one cannot be agreed, the Secretary of State will set the date in consultation with the appointed Inspector. When the Secretary of State has been notified by the Inspector of the date and time for the pre-hearing meeting, the Secretary of State will contact the licence holder who will arrange a suitable venue near to the location of the existing or proposed electric line if the pre-hearing meeting is to be attended in person.

3.12 The Inspector may alternatively decide in consultation with the parties to conduct the pre-hearing meeting by video conference or telephone (**Rule 10(3)(b) and (5) of the Hearing Rules**). In the case of a pre-hearing meeting to be

conducted by video conference or telephone, the Inspector will give the parties the relevant details to connect to the meeting.

3.13 Both parties will usually be asked to confirm their attendance at the pre-hearing meeting to the Secretary of State **no later than 14 days before the scheduled date**. If they do not do so the Inspector may decide to cancel the pre-hearing meeting. In these circumstances the application may be stopped until a clearer picture of the situation can be obtained.

3.14 At the pre-hearing meeting the Inspector will set out the issues that are likely to be relevant to the Secretary of State's consideration of the application. At the pre-hearing meeting the Inspector and the parties should also agree a date by which the Statements of Evidence are to be provided (in default of which the Statements may be disregarded) and to agree the timetable for the proceedings at the oral hearing. As soon as possible after the pre-hearing meeting the Inspector must give notice to each party and the Secretary of State, giving details of the timetable for the proceedings at the oral hearing and the date by which the Statements of Evidence are to be provided.

3.15 Alternatively, where at the Inspector's discretion a pre-hearing meeting is not held, the Inspector may decide it is more efficient to issue a pre-hearing note instead of holding a pre-meeting meeting. In such circumstances, the Inspector will provide the pre-hearing note to each party and to the Secretary of State.

Provision of documents for an oral hearing

3.16 Each party should submit a Statement of Evidence to the Inspector by the date set at the pre-hearing meeting or where a pre-meeting has not been held, before the tenth working day before the date of the oral hearing is due to commence (**Rule 11 of the Hearing Rules**). The Statement of Evidence should include the same matters as indicated above at paragraph 3.14 in respect of the written representations procedure. Each party must send at the same time as submitting its evidence to the Inspector, a copy of the Statement of Evidence to each other party and to the Secretary of State. The Inspector may disregard any Statement of Evidence received after the date notified at the pre-hearing meeting or received after the tenth working day before the date of the oral hearing is due to commence. Where the Inspector decides to disregard any Statement of Evidence the Inspector must give notice to each party and to the Secretary of State that the Statement of Evidence is to be disregarded.

3.17 Where the Inspector determines that it is necessary or desirable to vary the date, time and place of a hearing the Inspector must give notice to the Secretary of State as soon as possible. Following receipt of a notice from the Inspector, the Secretary of State must give notice of the variation to each party.

Appearing at the oral hearing

3.18 The hearing usually takes place in public although a party may request the Inspector to hold the hearing in private (**Rule 12(2) of the Hearing Rules**). Such a request may only be granted where the Inspector considers that to hold the hearing

in private would not prejudice any of the parties. Parties entitled to appear at the hearing (and where applicable the pre-hearing meeting) may do so on their own behalf or may be represented by a barrister (counsel), solicitor or any other person.

3.19 Whilst a hearing usually takes place in a public place and members of the public are entitled to attend, they cannot contribute to proceedings. This means that only the licence holder and the owner(s) and occupier(s) (or their representatives) are entitled to appear and make their case before the Inspector. They may, of course, call expert or relevant witnesses to give evidence on their behalf. Unless the Inspector determines otherwise, the licence holder is entitled to give the first evidence and have the final say at the oral hearing (**Rule 12(6) of the Hearing Rules**). The Inspector may also determine the order in which the objectors are to give oral evidence.

3.20 The hearing will proceed by way of presentation of evidence, cross-examination and re-examination of those giving evidence. Each party may submit documents to the Inspector during the oral hearing in support of that party's oral evidence. Any party doing so must provide a copy of those supporting documents to each other party. The Inspector may disregard any supporting documents considered to be irrelevant or repetitious, or if new issues/evidence are submitted within the supporting documentation, or where the party has not provided copies of those supporting documents to each other party.

3.21 In exceptional circumstances it may be necessary for the Inspector to adjourn the hearing in which case the Inspector must give the parties reasonable notice of the date, time and place for the adjourned hearing to recommence (**Rule 12(14) of the Hearing Rules**). The Inspector is also able to proceed with the hearing in the absence of any party (**Rule 12(16) of the Hearing Rules**). In such a case the Inspector must take into account any oral evidence or Statement of Evidence provided by that party before the close of the oral hearing in so far as the Inspector considers such evidence to be relevant to the matters in issue.

SECTION 4

AFTER THE HEARING HAS CLOSED. INSPECTOR'S REPORT AND DECISION

Site Inspection

4 At any stage before the Inspector's report is submitted to the Secretary of State, the Inspector may inspect the relevant land. The Inspector must inspect the relevant land if requested by any party before or during the written representations procedure or oral hearing procedure, and if the Inspector considers that it is necessary in order to determine the relevant application. This inspection may be unaccompanied and without giving notice to the parties or accompanied by representatives of the applicant and the landowner and/or occupier after giving reasonable notice of the proposed date and time of inspection. This formal inspection will provide parties with the opportunity to point out features addressed in the Statements of Evidence or at the hearing however 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).

Inspector's Report

4.1 After the end of the written representations procedure or the close of the oral hearing, the Inspector must prepare and submit his report in writing to the Secretary of State. This report will detail the Inspector's findings of fact and recommendation(s) to either grant or refuse the application(s) made to the Secretary of State. The Inspector will also provide to the Secretary of State any supporting documents submitted to the Inspector or disregarded by him as provided at the hearing itself.

4.2 If the Secretary of State, after receipt of the Inspector's report, considers that the Inspector needs to address additional matters that have not been considered in his report, the Secretary of State may direct the Inspector:

- where the written representations procedure has been applied, to re-open the written representations procedure or to conduct an oral hearing, or
- where an oral hearing has been applied, to re-open the oral hearing or to conduct the written representations procedure.

4.3 As soon as possible after the re-opened procedure is completed, the Inspector will provide a further report to the Secretary of State that details the Inspector's further findings of fact and his recommendations.

Decisions

4.4 As soon as possible after receipt of the Inspector's report or the further Inspector's report the Secretary of State will give notice to each party of his decision to grant or refuse the relevant application and the reasons for that decision. The

Secretary of State's decision will be accompanied by a copy of the Inspector's report(s). The Department's aim is that within six months of the hearing, parties will be notified of the Secretary of State's decision. In the case of tree lopping or felling orders the Secretary of State would endeavour to determine these applications more speedily due to the need to maintain safety clearances between electric lines and vegetation.

4.5 In some cases, the Secretary of State's decision may differ from the Inspector on a finding of fact or where the Secretary of State takes into consideration any new issue of fact which the Inspector did not consider. In such instances the Secretary of State must provide to each party a statement of why the Secretary of State is disposed to disagree and reasons for such disagreement. Each party will be entitled to provide a statement to the Secretary of State within 15 working days. As soon as possible after the statement closing date the Secretary of State must give notice to each party a decision to grant or refuse the relevant application and the reasons for that decision and an explanation of how the Secretary of State has taken into account any representations received.

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

Compensation

4.7 Questions of compensation payments in respect of a necessary wayleave or tree lopping or felling Order will not be addressed by the Inspector at the hearing (although for necessary wayleaves 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 Secretary of State does not have power under **Schedule 4 to the 1989 Act** to prescribe financial conditions in any necessary wayleave or tree lopping 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 Upper Tribunal (Lands Chamber) at the request of either party (**see paragraph 7(4) of Schedule 4 to the 1989 Act**).

SECTION 5

CHARGES

5 Charges in respect of an application to the Department for either a necessary wayleave or tree lopping or felling Order are prescribed by The Electricity (Necessary Wayleaves and Felling and Lopping of Trees) (Charges) (England and Wales) Regulations 2013⁵ (“the Charges Regulations”).

5.1 There is a charge of £34 payable by the licence holder on submitting an application for a necessary wayleave or an Order for the felling or lopping of trees. As noted above at paragraph 2.15 this should be paid with the application through the Department’s electronic portal. Exceptionally in the case of paper applications being submitted, a cheque should be made payable to the “Department of Energy and Climate Change”.

5.2 The Charges Regulations also set out the costs payable by the licence holder in respect of the costs associated with an appointed Inspector who conducts a written representations hearings procedure or oral hearing on behalf of the Secretary of State. It should be noted that the charges payable under Regulation 4 of the Charges Regulations are different for applications relating to lines in England and Wales. The daily rate or pro rata for part of a day will be £1,000 per Inspector day for any procedures conducted by The Planning Inspectorate (PINS) England and £742 per Inspector day for those conducted by PINS Wales, plus the Inspector’s travel and subsistence. The daily rate applies to each day on which the Inspector is engaged on work connected with the relevant application, and is charged pro rata for part of a day (a day being 7.4 hours). The licence holder will be invoiced for the Inspector’s costs once the hearing has concluded, the Inspector’s report has been received by the Secretary of State and the Department is in receipt of an invoice from PINS for the Inspector’s costs. In the event that an application (which is subject of a hearings request) is put into abeyance, settled between parties before the hearing takes place, or at any stage throughout the hearings or written representations processes where the Inspector has been engaged on work connected with the relevant application to that date, the licence holder will be invoiced for any costs incurred by an Inspector.

5.3 There is no provision under Schedule 4 to the 1989 Act to reimburse the costs of the parties to a necessary wayleave or tree lopping hearing under Schedule 4, either from central funds or for the Secretary of State to make a direction as to the award of costs, and the Inspector cannot make cost awards between the parties. Therefore parties must be prepared to bear their own costs in respect of the written representations procedure or oral hearing.

⁵ The Electricity (Necessary Wayleaves and Felling and Lopping of Trees) (Charges) (England and Wales) Regulations 2013 <http://www.legislation.gov.uk/ukxi/2013/1986/note/made>

SECTION 6

SOME FREQUENTLY ASKED QUESTIONS RELATING TO NECESSARY WAYLEAVES APPLICATIONS AND TREE LOPPING AND FELLING ORDERS

WAYLEAVES

6. Q: Who can apply for a necessary wayleave and/or tree lopping or felling order?

A: Any holder of an electricity transmission, distribution or other electricity licence under the Electricity Act 1989.

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

A: Where the necessary wayleave application relates to a new electric line the Secretary of State cannot grant a necessary wayleave where a dwelling covers the land or where planning permission exists for a house to be constructed, unless the line is to be placed underground (**see paragraph 6(4) of Schedule 4 to the 1989 Act**). The same restriction 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 service of notice requirements and statutory periods specified in **Schedule 4 to the 1989 Act**. The Secretary of State may not have jurisdiction to proceed with an application if the procedures and process for serving notice periods have not been observed by parties (although note that a wayleave application may be made more than 3 months after the Notice to Remove – see paragraph 2.11 above). The Secretary of State may also seek further information from the parties in order to form a view on whether the Secretary of State has jurisdiction to proceed with a necessary wayleave application. The Secretary of State recognises licence holders may decide to make a necessary wayleave application to retain an electric line in order to protect their position regarding the statutory time limits **in Schedule 4 to the 1989 Act**. If these statutory time limits are not complied with by the licence holder, the line will remain installed on the land without the legal consent of the owner and/or occupier who is likely to have a claim in trespass against the licence holder and may be able to claim damages. The licence holder can still make a valid application to the Secretary of State after the three month period has passed since receipt of a Notice to Remove.

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 Secretary of State takes the view, based on general legal principles, that “owner” for the purposes of Schedule 4 to the 1989 Act 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 Secretary of State’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 Secretary of State may require parties to provide further information to help 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 Secretary of State consider to be a valid Notice to Remove?

A: A Notice to Remove an electric line must be in writing and delivered by the landowner and/or occupier to the relevant licence holder. The Notice should make it clear that the owner and/or occupier **are asking the licence holder to remove the electric line and/or other apparatus from their land**. The Department has produced a template Notice to Remove which it suggests should be used where possible as it may assist landowners and/or occupiers by making their intention clear. 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 the owner and/or occupier by writing to the licence holder to whom the original Notice was given. This usually happens in circumstances where the landowner has agreed a mutual arrangement with the licence holder and granted a voluntary wayleave. However, in circumstances where a voluntary wayleave has not been granted, the licence holder may wish to continue with their necessary wayleave application. Upon receipt of the letter of withdrawal, the licence holder will write to the Secretary of State withdrawing their application for a necessary wayleave, if that is their wish. The Secretary of State will confirm in writing that no further action will be taken with the application.

6.6 Q: What factors will be taken into consideration in determining whether the written representations route is used?

A: The written representations route will be used in cases where both parties have agreed to the use of that procedure unless the Secretary of State considers that there are exceptional circumstances which require a hearing. We anticipate that such exceptional circumstances are likely to be very unusual cases in which it would

not be in the public interest or the interests of the parties for the application to be dealt with by written representations.

6.7 Q: Will hearings automatically proceed to a hearing or written representations even if the parties are negotiating?

A: The Secretary of State has discretion **under Rule 18 of the Hearing Rules** to extend time at any part of the process, and therefore may put cases into abeyance while the parties are negotiating. The Secretary of State encourages parties to negotiate a voluntary agreement wherever possible, while ensuring that cases are progressed as soon as possible if negotiations come to an end. In cases where there has not been a prior indication that the parties are negotiating, the Secretary of State will on receipt of an application write to the parties in accordance with **Rule 3(2) of the Hearing Rules** to seek consent for the written representations procedure to be used. Following completion of this process the Secretary of State will issue a notice indicating which hearing process will be used.

6.8 Q: In what circumstances will the application be put into abeyance after a party has requested a hearing?

A: An application can be put into abeyance at any point if agreed by both parties. This would usually be in the case where parties are completing a voluntary negotiated settlement for instance. However, the Secretary of State is of the view that if a voluntary agreement cannot be reached between parties within six months of the date of the application and that the application has not been withdrawn in that time period, then the application should progress to the hearing. The Secretary of State does also have discretion to keep applications in abeyance for a longer period. In the case of applications made by licence holders in regard to new electric lines, the Secretary of State will take into consideration that the new line would have to be granted planning consent through the Electricity Act 1989 section 37 overhead line application process.

6.9 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 a new agreement they have with the licence holder, the Secretary of State considers that the termination and other clauses in the previous wayleave agreement are not necessarily binding on the parties.

6.10 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 types 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 a licence holder makes payments to a landowner in respect of their 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).

6.11 Q: If a payment is made after a Notice to Remove is served, does this automatically create an implied wayleave?

A: It is the Department's view that a single payment is unlikely to create an implied wayleave where there is a clear indication that the landowner/ occupier does not wish the electric line to remain (for example, where the payment follows shortly after a Notice to Remove has been issued). In contrast, where the line remains in place over a significant period of time and the landowner/ occupier receives payments (or another benefit from having the line in place), it is more likely that an implied wayleave will have arisen. However, each situation will be dependent on the specific facts of the case and be treated as such.

6.12 Q: Can an implied wayleave arise where payments are made to a person other than the landowner/ occupier?

A: It is the Department's view that it is not always crucial for payments to be made to the same legal person, and if the payments are made to a person closely connected to the landowner/ occupier (e.g. to a company in the same group of companies) then it is possible that an implied wayleave could arise between the landowner/ occupier and the licence holder. However, again, each situation will be dependent on the specific facts of the case.

6.13 Q: Can a landowner and/or occupier issue a notice to remove where an electric line swings onto neighbouring land only in high wind conditions?

A: Yes. The Department considers that a line which crosses land needs permission to do so, even if it only does so some of the time. However, this does not apply where the line swings such that the safety clearance distance impinges onto

the neighbouring land in high wind conditions, as the line is not physically crossing onto the land.

6.14 Q: Can the Secretary of State determine the compensation payable?

A: No. The Secretary of State has no powers under **Schedule 4 to the 1989 Act** to prescribe financial conditions to any necessary wayleave or to determine the level of compensation payable by the licence holder to the landowner and/or occupier. Financial compensation is a matter to be settled by agreement between the parties or, failing agreement, by the Upper Tribunal (Lands Chamber) 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*).

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

A: No. There is no provision for the Secretary of State under **Schedule 4 to the 1989 Act** to make an award of costs for any party involved in the necessary wayleave process. All parties should be prepared to meet their own 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*).

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

A: A necessary wayleave if granted by the Secretary of State will usually be subject to a condition that it may only be terminated after 15 years (necessary wayleaves granted by the Secretary of State are binding on successive owners and/or occupiers – **see paragraph 6(6)(b) of Schedule 4 to the 1989 Act**). It is the Secretary of State's view that a 15 year term generally represents an appropriate 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 at the hearing. Necessary wayleaves can only be terminated after the period specified in the condition attached to the wayleave.

6.17 Q: How long does the statutory process take from the request for a necessary wayleave or tree lopping or felling hearing to notification of the Secretary of State's decision?

A: Our aim is that the overall process from request for a hearing to notification of the Secretary of State's decision on a necessary wayleave application can take approximately 8-12 months. However, some cases may take longer. In the case of tree lopping and felling Orders, the Secretary of State would have regard to the licence holder's safety and operating obligations and would endeavour to determine these applications more expeditiously if possible. The Secretary of State will appoint Inspectors from the Planning Inspectorate in England and Wales to

conduct the hearing on the Secretary of State's behalf. However, it will be the Secretary of State who decides whether the application is granted or not.

6.18 Q: Does the Planning Inspectorate have any responsibility for granting necessary wayleaves under the Planning Act 2008 process?

A: The Planning Inspectorate will consider applications for necessary wayleaves associated with Nationally Significant Infrastructure projects which are submitted for development consent. There is no need for developers to make a separate application under the 1989 Act as any necessary wayleaves or easements will be incorporated in the Planning Act process.

TREE LOPPING AND FELLING ORDERS

6.19 Q: Can an order require felling or lopping of a tree protected by a Tree Preservation Order (TPO)?

A: There are limited exceptions to TPOs for statutory undertakers including electricity licence holders. The relevant local planning authority can provide further guidance on the extent of the exception. Parties should refer to Part 3 of the "Town and Country Planning (Tree Preservation) (England) Regulations 2012" S.I. 2012/605 see: <http://www.legislation.gov.uk/uksi/2012/605/contents/made>

6.20 Q: Who is the notice served on when the tree or shrub is overhanging from an adjacent plot of land?

A: The notice should be served on the owner and occupier of the land on which the tree or shrub is growing (based on 1989 Act Schedule 4 paragraph 9(1)).

ANNEX A

Notice to Remove Template for use by Landowner and/or Occupier

	Landowner/occupier details	Agents details if appropriate
Title		
Forename		
Surname		
Address		
Telephone		
Email		

In accordance with schedule 4 of the Electricity Act 1989 I hereby give to [insert name and address of licence holder to whom notice is being sent]

Notice to Remove the following existing electric lines and/or associated apparatus [insert details of the line or apparatus to which the notice to remove relates]

From the land at [Insert address of land on which line and apparatus is situated, including post code]. Please also include a map/plan showing the line and relevant land boundaries in question.

[*Delete as appropriate]

I confirm I am the owner and/or occupier* of the land in question giving this Notice to Remove. I am aware/am not aware* of any other owner and/or occupier of the land in question. Any other landowner and/or occupier of the land is indicated below:

[insert details].....

I enclose a copy of the wayleave for the line/apparatus to which this notice relates* OR, I have no record of the wayleave or other agreement for the installation of the line/apparatus to with this notice relates*

I confirm that I have read and understood the “Guidance for Applicants and Landowners and/or Occupiers” published by the Department of Energy and Climate Change, dated January 2014.

I am aware that, following service of this notice to remove, the licence holder is entitled to submit an application to the Secretary of State for a necessary wayleave. If an application for a necessary wayleave is submitted, then a statutory process will be engaged. I understand that I will be expected to participate in that process.

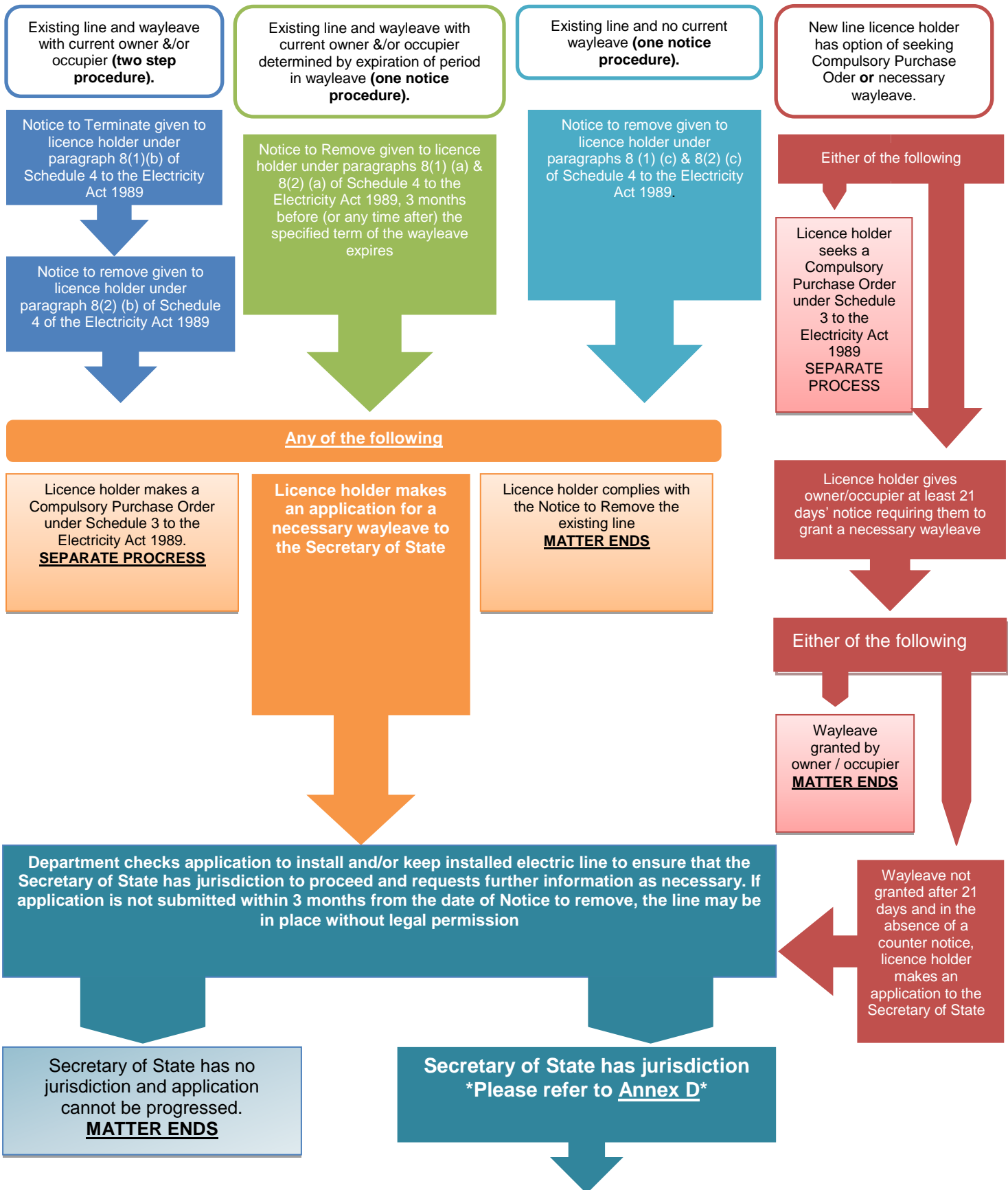
Signed.....Dated.....

And if Notice is being handled by a representative agent:

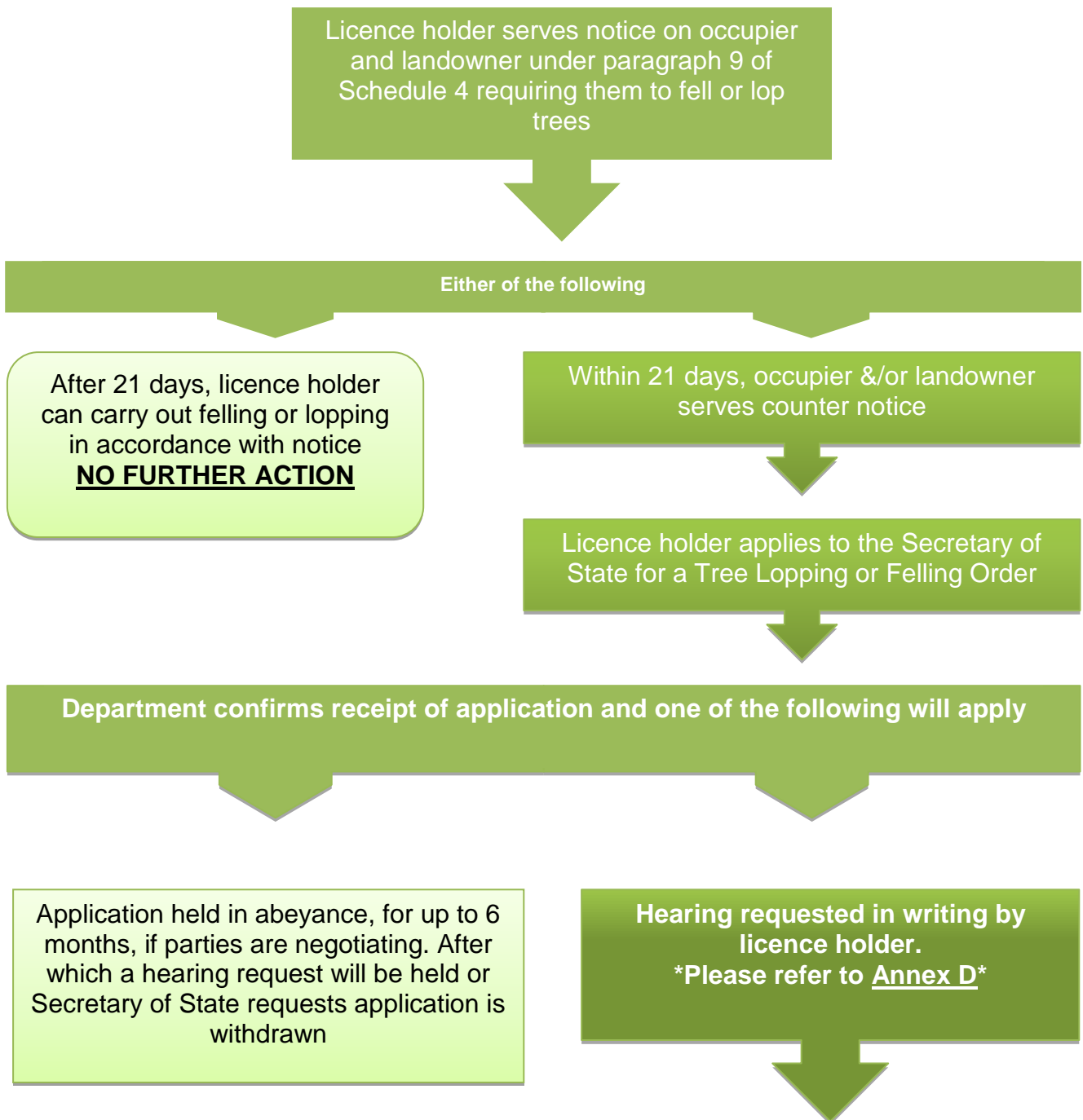
Signed.....Dated.....

ANNEX B

FLOWCHART OF THE NECESSARY WAYLEAVE NOTICE PROCESS

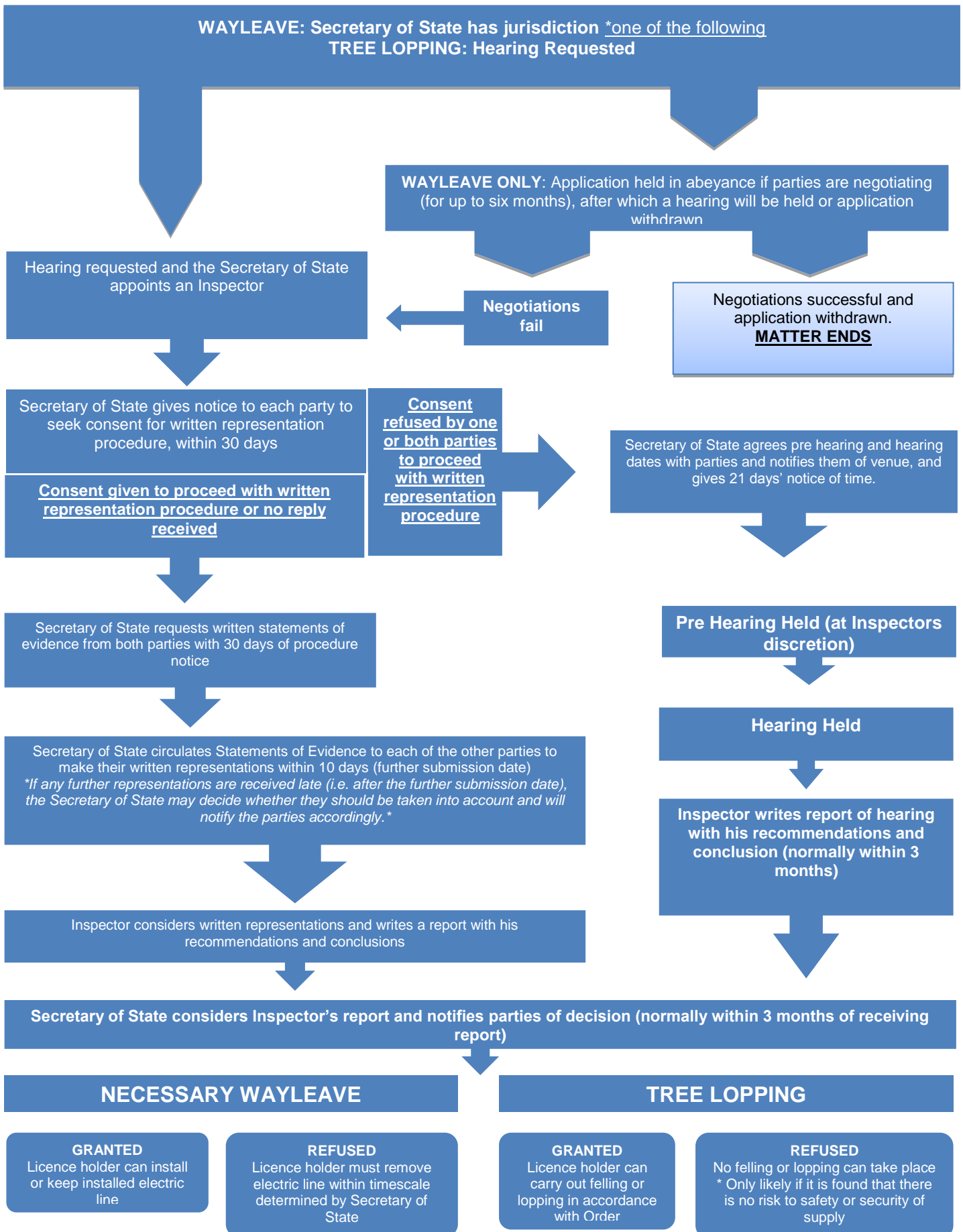


FLOWCHART OF TREE LOPPING OR FELLING NOTICE PROCESS



ANNEX D

FLOWCHART FOR NECESSARY WAYLEAVE AND TREE LOPPING HEARINGS



**FORM OF CONSENT TO THE WRITTEN REPRESENTATIONS PROCEDURE
under the Electricity (Necessary Wayleaves and Felling and Lopping of Trees)
(Hearing Procedures) (England and Wales) Rules 2013**

The Secretary of State acknowledges receipt of an application for a [necessary wayleave/ order for the felling or lopping of trees] submitted by [] in respect of land at [].

In accordance with [paragraph 6(5)/ paragraph 9(6)] of Schedule 4 to the Electricity Act 1989, you have a right to be heard in relation to this application.

The Electricity (Necessary Wayleaves and Felling and Lopping of Trees) (Hearing Procedures) (England and Wales) Rules 2013 (“the Rules”) provide for two procedures: a written representations procedure and an oral hearing procedure. The written representations procedure will only be used if you and each other party consents to the use of this procedure and the Secretary of State considers that there are no exceptional circumstances that require an oral hearing to be held. In all other cases the oral hearing procedure will be used.

At an oral hearing, you or your representative would have the right–

- to explain orally your case in relation to the [necessary wayleave/ order for the felling or lopping of trees];
- to cross-examine any witness called by another party; and
- to give oral evidence yourself and to call any witnesses in support of your case.

The written representations procedure involves no oral presentation of evidence or cross-examination. However, under the written representations procedure, you or your representative would have the right–

- to submit a Statement of Evidence explaining your case in relation to the [necessary wayleave/ order for the felling or lopping of trees]; and
- to respond to the Statements of Evidence submitted by the other parties by making further written representations.

If you consent to the use of the written representations procedure but it is nonetheless decided to hold an oral hearing, you would still have a right to appear at the hearing.

The written representations procedure is set out in Part 2 of the Rules, and the oral hearing procedure is set out in Part 3 of the Rules.

You may wish to seek legal or other professional advice before deciding whether or not to consent to the written representations procedure. The Secretary of State and the Secretary of State’s staff are not able to give you any advice as to whether or not you should consent.

Please return this form by [30th working day after date form sent]. If you refuse consent, arrangements will be made for the holding of an oral hearing at which you will have the opportunity to make representations.

Please note that if you do not return this form by [30th working day after date form sent], this will be taken as consent for the written representations procedure.

Please complete the statement at the end of this form including your name and address to indicate whether you consent to the use of the written representations procedure, sign and date in the spaces given and return the form to [] by [].

I, [], have read the above which I understand. I consent/ do not consent to the use of the written representations procedure.

Signed.....

Name.....

Address.....

Dated.....

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Department of Energy & Climate Change
3 Whitehall Place
London SW1A 2HH
www.decc.gov.uk