

SCHEDULES

SCHEDULE 9

Article 53

PROTECTION FOR ELECTRICITY, GAS, WATER AND SEWERAGE UNDERTAKERS

Application and Interpretation

1. This Schedule has effect unless otherwise agreed in writing between the Agency and the specified undertaker concerned.

On-street apparatus

2. This Schedule does not apply to anything done or proposed to be done in relation to or affecting apparatus in respect of which the relations between the Agency and the specified undertaker are regulated by the provisions of Part 3 of the 1991 Act.

3. The provisions of Schedule 8 (statutory undertakers, etc.), in so far as they relate to the removal of apparatus, do not apply in relation to apparatus to which this Schedule applies.

4.—(1) In this Schedule—

“alternative apparatus” means alternative apparatus adequate to enable the specified undertaker in question to fulfil its statutory functions in a manner not less efficient than previously;

“apparatus” means—

- (a) in the case of an electricity undertaker, electric lines or electrical plant (as defined in section 64(1) the Electricity Act 1989⁽¹⁾) belonging to or maintained by that specified undertaker;
- (b) in the case of a gas undertaker, any mains, pipes or other apparatus belonging to or maintained by a gas transporter for the purposes of gas supply;
- (c) in the case of a water undertaker—
 - (i) mains, pipes or other apparatus belonging to or maintained by that specified undertaker for the purposes of water supply; and
 - (ii) mains, pipes or other apparatus that is the subject of an agreement to adopt made under section 51A of the Water Industry Act 1991⁽²⁾ (agreements to adopt water main or service pipe); and
- (d) in the case of a sewerage undertaker—
 - (i) any drain or works vested in the specified undertaker under the Water Industry Act 1991; and
 - (ii) any sewer which is so vested or is the subject of a notice of intention to adopt given under section 102(4) of that Act⁽³⁾ (adoption of sewers and disposal works) or

(1) Section 64(1) of the Electricity Act 1989 was amended by paragraph 38(4) of Schedule 6(11) of the Utilities Act 2000 (c. 27).

(2) Section 51A was inserted by section 92(1) of the Water Act 2003 (c. 37), and amended by section 10(1) and (2) of the Water Act 2014 (c. 21).

(3) Section 102(4) was amended by section 96(1)© of the Water Act 2003 and paragraphs 2 and 90 of Schedule 7 to the Water Act 2014.

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- an agreement to adopt made under section 104 of that Act⁽⁴⁾ (agreement to adopt sewer, drain or sewage disposal works, at future date),
- and includes a sludge main, disposal main (within the meaning of section 219 of that Act) or sewer outfall and any manholes, ventilating shafts, pumps or other accessories forming part of any such sewer, drain or works,
- and includes any structure in which apparatus is or is to be lodged or which gives or will give access to apparatus;
- “in land”, in relation to apparatus or alternative apparatus, includes a reference to under, over, across, along or upon land;
- “plans” includes sections, specifications and method statements;
- “specified undertaker” means—
- (a) Western Power Distribution (South West) plc, whose registered office is Avonbank, Feeder Road, Bristol, BS2 0TB; and
 - (b) Wessex Water Services Limited, whose registered office is Operation Centre, Claverton Down Road, Claverton Down, Bath, Somerset, United Kingdom, BA2 7WW.
- or any person succeeding any such company as a licence holder within the meaning of Part 1 of the Electricity Act 1989, a gas transporter within the meaning of Part 1 of the Gas Act 1986⁽⁵⁾, a water undertaker within the meaning of the Water Industry Act 1991, or as a sewerage undertaker, and “the specified undertaker” in relation to any apparatus means the specified undertaker to whom the apparatus belongs or by whom it is maintained.
- (2) In paragraph (1), “functions” includes powers and duties.

Acquisition of land

- 5.—(1) Regardless of any provision in this Order or anything shown on the deposited plans the Agency must not acquire any apparatus other than by agreement with the specified undertaker.
- (2) The Agency may, in the exercise of the powers conferred by this Order, acquire or appropriate any interest in any land in which any apparatus is placed and, following the removal of such apparatus in accordance with the provisions of this Schedule, any rights in that land relating to that apparatus are extinguished, but that apparatus must not be removed under this Schedule and any right of a specified undertaker to use, maintain or renew that apparatus in that land must not be extinguished, until alternative apparatus has been constructed and is in operation to the reasonable satisfaction of the specified undertaker in question.

Removal of apparatus

- 6.—(1) If, for the purpose of executing any works in, on or under any land purchased, held, appropriated or used under this Order, the Agency requires the removal of any apparatus placed in that land, it must give to the specified undertaker written notice of that requirement, together with plans of the work proposed, and of the proposed position of the alternative apparatus to be provided or constructed and in that case (or if in consequence of the exercise of any of the powers conferred by this Order a specified undertaker reasonably needs to remove any of its apparatus) the Agency must, subject to sub-paragraph (3), afford to the specified undertaker the necessary facilities and rights for the construction of alternative apparatus in other land of the Agency and for the subsequent use, maintenance and renewal of that apparatus.

(4) Section 104 was amended by section 96(4) of the Water Act 2003, by section 42(3) of the Flood and Water Management Act 2010 (c. 29), and by section 11(1) and (2) of the Water Act 2014.

(5) 1986 c. 44.

(2) If alternative apparatus or any part of such apparatus is to be constructed elsewhere than in other land of the Agency, or the Agency is unable to afford such facilities and rights as are mentioned in sub-paragraph (1), in the land in which the alternative apparatus or part of such apparatus is to be constructed, the specified undertaker in question must, on receipt of a written notice to that effect from the Agency, as soon as reasonably possible use reasonable endeavours to obtain the necessary facilities and rights in the land in which the alternative apparatus is to be constructed.

(3) The obligation imposed on the specified undertaker under sub-paragraph (2) does not extend to the exercise by the specified undertaker of any power to acquire any land or rights in land by compulsory purchase order.

(4) Any alternative apparatus to be constructed in land of the Agency under this Schedule is to be constructed in such manner and in such line or situation as may be agreed between the specified undertaker and the Agency or in default of agreement settled by arbitration in accordance with article 68 (arbitration).

(5) The specified undertaker must, after the alternative apparatus to be provided or constructed has been agreed or settled by arbitration in accordance with article 68 (arbitration), and after the grant to the specified undertaker of any such facilities and rights as are referred to in sub-paragraphs (1) or (2), proceed with all reasonable despatch to construct and bring into operation the alternative apparatus and subsequently to remove any apparatus required by the Agency to be removed under the provisions of this Schedule.

(6) Regardless of anything in sub-paragraph (5), if the Agency gives notice in writing to the specified undertaker in question that it desires itself to execute any work to which this sub-paragraph applies, that work, instead of being executed by the specified undertaker, may be executed by the Agency with the prior written consent of the specified undertaker (which must not be unreasonably withheld or delayed and is to be subject to any such conditions as are reasonable and proper to protect the apparatus) in accordance with plans and in a position agreed between the specified undertaker and the Agency or, in default of agreement, determined by arbitration, with all reasonable despatch under the superintendence, if given, and to the reasonable satisfaction of the specified undertaker.

(7) In carrying out any work under sub-paragraph (6) the Agency must comply with all statutory obligations which would have been applicable had the works been carried out by the specified undertaker.

(8) Sub-paragraph (6) applies to any part of any work necessary in connection with construction of alternative apparatus, or the removal of apparatus required to be removed, as will take place in any land of the Agency.

(9) Nothing in sub-paragraph (6) authorises the Agency to execute the placing, installation, bedding, packing, removal, connection or disconnection of any apparatus, or execute any filling around the apparatus (where the apparatus is laid in a trench) within 600 millimetres of the apparatus.

Facilities and rights for alternative apparatus

7.—(1) Where, in accordance with this Schedule, the Agency affords to a specified undertaker facilities and rights for the construction, use, maintenance and renewal in land of the Agency of alternative apparatus in substitution for apparatus to be removed, those facilities and rights must be granted upon such terms and conditions as may be agreed between the Agency and the specified undertaker or in default of agreement settled by arbitration in accordance with article 68 (arbitration).

(2) In settling those terms and conditions in respect of the alternative apparatus to be constructed across or along the authorised works, the arbitrator must—

- (a) give effect to all reasonable requirements of the Agency for ensuring the safety and efficient operation of the authorised works and for securing any subsequent alterations

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or adaptations of the alternative apparatus which may be required to prevent interference with any proposed works of the Agency; and

- (b) so far as it may be reasonable and practicable to do so in the circumstances of the particular case, give effect to the terms and conditions if any applicable to the apparatus constructed across or along the authorised works for which the alternative apparatus is to be substituted and to any other reasonable requirements of the specified undertaker.

(3) If the facilities and rights to be afforded by the Agency in respect of any alternative apparatus, and the terms and conditions subject to which those facilities and rights are to be granted, are in the opinion of the arbitrator more or less favourable on the whole to the specified undertaker than the facilities and rights enjoyed by it in respect of the apparatus to be removed and the terms and conditions to which those facilities and rights are subject, the arbitrator must make such provision for the payment of compensation to or by the Agency by or to that specified undertaker as appears to the arbitrator to be reasonable having regard to all the circumstances of the particular case.

Retained apparatus: protection and plan approval

8.—(1) Not less than 28 days before starting the execution of any works of the type referred to in paragraph 6(1) that are near to, or will or may affect, any apparatus the removal of which has not been required by the Agency under paragraph 5(1), the Agency must submit to the specified undertaker in question plans of those works.

(2) Those works are to be executed only in accordance with the plans submitted under sub-paragraph (1) and in accordance with such reasonable requirements as may be made in accordance with sub-paragraph (3) by the specified undertaker for the alteration or otherwise for the protection of the apparatus, or for securing access to it, and an officer of the specified undertaker is entitled to watch and inspect the execution of those works.

(3) Any requirements made by the specified undertaker under sub-paragraph (2) must be made within a period of 21 days beginning with the date on which the plans under sub-paragraph (1) are submitted to it.

(4) If a specified undertaker in accordance with sub-paragraph (3) and in consequence of the works proposed by the Agency, reasonably requires the removal of any apparatus and gives written notice to the Agency of that requirement, paragraphs 1 to 6 apply as if the removal of the apparatus had been required by the Agency under paragraph 5(1).

(5) Nothing in this paragraph precludes the Agency from submitting at any time or from time to time, but in no case less than 28 days before commencing the execution of any works, new plans instead of the plans previously submitted, and having done so the provisions of this paragraph apply to and in respect of the new plans.

(6) The Agency is not required to comply with sub-paragraph (1) in a case of emergency but in that case it must give to the specified undertaker notice as soon as is reasonably practicable and plans of those works as soon as reasonably practicable subsequently and must comply with sub-paragraph (2) in so far as is reasonably practicable in the circumstances.

(7) Nothing in sub-paragraph (6) entitles the Agency to carry out works to any apparatus but, upon receipt of notice from the Agency, the specified undertaker must proceed to carry out such works as may be required without unreasonable delay.

Expenses

9.—(1) Subject to the following provisions of this paragraph, the Agency must repay to a specified undertaker the reasonable expenses incurred by that specified undertaker in, or in connection with—

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- (a) the inspection, removal and relaying or replacing, alteration or protection of any apparatus or the construction of any alternative apparatus under any provision of this Schedule (including any costs reasonably incurred or compensation properly paid in connection with the acquisition of facilities and rights or exercise of statutory powers for such apparatus);
- (b) the cutting off of any apparatus from any other apparatus, or the making safe of any redundant apparatus in consequence of the exercise by the Agency of any power under this Order; and
- (c) the survey of any land, apparatus or works; the inspection, superintendence and monitoring of works; or the installation or removal of any temporary works reasonably necessary in consequence of the exercise by the Agency of any power under this Order; and any other work or thing rendered reasonably necessary in consequence of the exercise by the Agency of any such power,

within a reasonable time of being notified by the specified undertaker that it has incurred such expenses.

(2) The value of any apparatus removed under the provisions of this Schedule is to be deducted from any sum payable under sub-paragraph (1), that value being calculated after removal.

(3) If in accordance with the provisions of this Schedule—

- (a) alternative apparatus of better type, of greater capacity or of greater dimensions is placed in substitution for existing apparatus except where this has been solely due to using the nearest currently available type, or
- (b) apparatus or alternative apparatus is placed at a depth greater than the depth at which the apparatus was situated

and the placing of that apparatus is not agreed by the Agency or, in default of agreement, is not determined by arbitration in accordance with article 68 (arbitration) to be necessary, then, if such placing involves cost in the construction of works under this Schedule exceeding that which would have been involved if the apparatus placed had been of the existing type, capacity or dimensions, or at the existing depth, as the case may be, the amount which apart from this paragraph would be payable to the specified undertaker in question by virtue of sub-paragraph (1), is to be reduced by the amount of that excess.

(4) For the purposes of sub-paragraph (3)—

- (a) an extension of apparatus to a length greater than the length of existing apparatus must not be treated as placing of apparatus of greater dimensions than those of the existing apparatus, except in a case where the apparatus as so extended serves a purpose (either additional to or instead of that served by the existing apparatus) which was not served by the existing apparatus; and
- (b) where the provision of a joint in a cable is agreed, or is determined to be necessary, the consequential provision of a jointing chamber or of a manhole must be treated as if it also had been agreed or so determined.

(5) An amount which apart from this sub-paragraph would be payable to a specified undertaker in respect of works by virtue of sub-paragraph (1) must, if the works include the placing of apparatus provided in substitution for apparatus placed more than 7 years and 6 months earlier so as to confer on the specified undertaker any financial benefit by deferment of the time for renewal of the apparatus in the normal course, be reduced by the amount which represents that benefit as calculated in accordance with the Code of Practice entitled “Measures Necessary where Apparatus is Affected by Major Works (Diversionary Works)”, approved by the Secretary of State on 30th June 1992 and as revised and re-issued from time to time.

(6) In any case where work is carried out by the Agency under paragraphs 5(6) to (8) and, if such work had been carried out by the specified undertaker, the repayment made to the specified

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undertaker under sub-paragraph (1) would fall to be reduced under sub-paragraphs (3) to (5), the specified undertaker must pay to the Agency such sum as represents the amount of that reduction.

Indemnity

10.—(1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction, maintenance or failure of any of the authorised works, any damage is caused to any apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal for the purposes of those works) or property of a specified undertaker, or there is any interruption in any service provided, or in the supply of any goods, by any specified undertaker, the Agency must bear and pay the cost reasonably incurred by that specified undertaker in making good such damage or restoring the supply, and must—

- (a) make reasonable compensation to that specified undertaker for any other expenses, loss, damages, penalty or costs incurred by the specified undertaker; and
- (b) indemnify the specified undertaker against all claims, demands, proceedings, costs, damages and expenses which may be made or taken against or recovered from, or incurred by, the specified undertaker,

by reason or in consequence of any such damage or interruption; and the fact that any act or thing may have been done by the specified undertaker on behalf of the Agency or in accordance with plans approved by the specified undertaker or in accordance with any requirement of the specified undertaker or under its supervision does not, subject to sub-paragraph (2), excuse the Agency from any liability under the provisions of this paragraph.

(2) Nothing in sub-paragraph (1) imposes any liability on the Agency with respect to any damage or interruption to the extent that it is attributable to the act, neglect or default of a specified undertaker, its officers, servants, contractors or agents.

(3) A specified undertaker must give the Agency reasonable notice of any such claim or demand and no settlement or compromise is to be made without the consent of the Agency, which, if it withholds such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand.

Access

11. If in consequence of the exercise of the powers conferred by this Order the access to any apparatus is materially obstructed the Agency must provide such alternative means of access to that apparatus as will enable the specified undertaker to maintain or use the apparatus no less effectively than was possible before the obstruction.

Cooperation

12. Where in consequence of the proposed construction of any of the authorised works, the Agency or the specified undertaker requires the removal of apparatus under paragraph 6(1) or the specified undertaker makes requirements for the protection or alteration of apparatus under paragraph 8(2), the Agency must use its best endeavours to co-ordinate the execution of the works in the interests of safety and the efficient and economic execution of the authorised works and the specified undertaker must use all reasonable endeavours to co-operate with the Agency for that purpose.

Exercise of safeguarding and survey powers

13.—(1) The Agency must, so far as is reasonably practicable, exercise the powers conferred by article 21 (protective works) so as not to obstruct or render less convenient the access to any apparatus.

(2) The Agency must not, in the exercise of the powers conferred by section 11(3) of the 1965 Act (powers of entry), as applied by this Order, or by article 23 (power to survey and investigate land, etc.), make any trial holes which interfere with any apparatus without the consent of the specified undertaker (which must not be unreasonably delayed or withheld).

Arbitration

14.—(1) Any difference arising between the Agency and a specified undertaker under this Schedule (other than a difference as to its meaning or construction) must be determined by arbitration in the manner provided by article 68 (arbitration).

(2) In determining any difference under this Schedule the arbitrator may, if the arbitrator thinks fit, require the Agency to execute any temporary or other works so as to avoid, so far as may be reasonably possible, interference with the use of any apparatus.