

SCHEDULES

SCHEDULE 9

PROTECTIVE PROVISIONS

PART 5

FOR THE PROTECTION OF HOLFORD GAS STORAGE LIMITED

Indemnity

64.—(1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction of any such works authorised by this Part of this Schedule or in consequence of the construction, use, maintenance, decommissioning or failure of any of the authorised works by or on behalf of the promoter or in consequence of any act or default of the promoter (or any person employed or authorised by him) in the course of carrying out such works, including without limitation works carried out by the promoter under this Part of this Schedule or any subsidence resulting from any of these works, any damage is caused to any apparatus or property of the undertaker, or there is any interruption in any service provided by the undertaker, or the undertaker becomes liable to pay any amount to any third party (including but not limited to INOVYN Enterprises), the promoter will bear and pay on demand the cost reasonably incurred by the undertaker in making good such damage, restoring the supply or paying such amount and indemnify the undertaker for any other expenses, loss, demands, proceedings, damages, claims, penalty or costs incurred by or recovered from the undertaker, by reason or in consequence of any such damage or interruption or the undertaker becoming liable to any third party as aforesaid provided that at all times the undertaker shall be under an obligation to take reasonable steps to mitigate its loss.

(2) The fact that any act or thing may have been done by the undertaker on behalf of the promoter or in accordance with a plan approved by the undertaker or in accordance with any requirement of the undertaker or under its supervision will not (unless sub-paragraph (3) applies), excuse the promoter from liability under the provisions of this sub-paragraph (1) unless the undertaker fails to carry out and execute the works properly with due care and attention and in a skilful and workman like manner or in a manner that does not accord with the approved plan.

(3) Nothing in sub-paragraph (1) shall impose any liability on the promoter in any circumstances in respect of—

- (a) any damage or interruption to the extent that it is attributable to the neglect or default of the undertaker, its officers, servants, contractors or agents;
- (b) loss of profits, loss of use, loss of revenue, loss of contract, loss of goodwill, loss of products, loss of productivity, loss of profitability or any indirect or consequential losses of any nature whatsoever save that the sums payable by the promoter under sub-paragraph (1) shall include a sum equivalent to the relevant costs in circumstances where
 - (i) the undertaker is liable to make payment of the relevant costs pursuant to the terms of an agreement between the undertaker and a gas storage customer relating to the storage of gas in the undertaker's apparatus; and

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- (ii) the existence of that agreement and the extent of the undertaker's liability to make payment of the relevant costs pursuant to its terms has previously been disclosed in writing to the promoter,

but not otherwise.

(4) Not to commence construction (and not to permit the commencement of such construction) of the authorised works on any land owned by the undertaker or in respect of which the undertaker has an easement, wayleave or lease for its apparatus or any other interest or to carry out any works within 15 metres of the undertaker's apparatus until the following conditions are satisfied—

- (a) unless and until the undertaker is satisfied acting reasonably (but subject to all necessary regulatory constraints) that the promoter has first provided the acceptable security (and provided evidence that it shall maintain such acceptable security for the construction period of the authorised works from the proposed date of commencement of construction of the authorised works) and the undertaker has confirmed the same to the promoter in writing; and
- (b) unless and until the undertaker is satisfied acting reasonably (but subject to all necessary regulatory constraints) that the promoter has procured acceptable insurance (and provided evidence to the undertaker that it shall maintain such acceptable insurance for the construction period of the authorised works from the proposed date of commencement of construction of the authorised works) and undertaker has confirmed the same in writing to the promoter.

(5) In the event that the promoter fails to comply with sub-section (4) nothing in this Part of this Schedule shall prevent the undertaker from seeking injunctive relief (or any other equitable remedy) in any court of competent jurisdiction.

(6) "relevant costs" means the costs, direct losses and expenses (including loss of revenue) reasonably incurred by a gas storage customer as a consequence of any restriction of the use of the undertaker's apparatus as a result of the construction, maintenance or failure of any specified works or any such act or omission as mentioned in sub-paragraph (1); "gas storage customer" means any person licensed to ship, transmit, distribute or supply gas under the Gas Act 1986⁽¹⁾.

(1) 1986 c. 44.