

## SCHEDULES

### SCHEDULE 6

Article 21

#### PROTECTIVE PROVISIONS

#### PART 1

#### FOR THE PROTECTION OF ELECTRICITY, GAS, WATER AND SEWERAGE UNDERTAKERS

##### Application

1. For the protection of the undertakers referred to in this Part of this Schedule the following provisions have effect unless otherwise agreed in writing between Network Rail and the undertaker concerned.

2. The provisions of paragraph 1 of Part 1 of Schedule 5 (provisions relating to statutory undertakers, etc.), in so far as they relate to the removal of apparatus, do not apply in relation to apparatus to which this Part of this Schedule applies.

3. This Part of this Schedule does not apply to apparatus in respect of which the relations between Network Rail and the undertaker are regulated by the provisions of Part 3 of the 1991 Act.

##### Interpretation

4. In this Part of this Schedule—

“alternative apparatus” means alternative apparatus adequate to enable the undertaker in question to fulfil its statutory functions in a manner no less efficient than previously;

“apparatus” means—

- (a) in the case of an electricity undertaker, electric lines or electrical plant (as defined in the Electricity Act 1989(1)) belonging to or maintained by that 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, any mains, pipes or other apparatus belonging to or maintained by that undertaker for the purposes of water supply; and
- (d) in the case of a sewerage undertaker—
  - (i) any drain or works vested in the undertaker under the Water Industry Act 1991(2); 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 or an agreement to adopt made under section 104 of that Act,

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(1) 1989 c. 29.

(2) 1991 c. 56.

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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;

“functions” includes powers and duties;

“in”, in a context referring to apparatus or alternative apparatus in land, includes a reference to apparatus or alternative apparatus under, over or upon land; and

“undertaker” means—

- (a) any licence holder within the meaning of Part 1 of the Electricity Act 1989;
  - (b) a gas transporter within the meaning of Part 1 of the Gas Act 1986<sup>(3)</sup>;
  - (c) a water undertaker within the meaning of the Water Industry Act 1991; and
  - (d) a sewerage undertaker within the meaning of Part 1 of the Water Industry Act 1991,
- for the area of the authorised works, and in relation to any apparatus, means the undertaker to whom it belongs or by whom it is maintained.

### **Acquisition of apparatus**

5. Regardless of any provision in this Order or anything shown on the land plan, Network Rail must not acquire any apparatus otherwise than by agreement.

### **Alternative apparatus**

6.—(1) If, in the exercise of the powers conferred by this Order, Network Rail acquires any interest in any land in which any apparatus is placed, that apparatus must not be removed under this Part of this Schedule and any right of an undertaker to maintain 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 undertaker in question.

(2) If, for the purpose of executing any works in, on, under or over any land purchased, held, appropriated or used under this Order, Network Rail requires the removal of any apparatus placed in that land, it must give to the undertaker in question written notice of that requirement, together with a plan and section of the work proposed, and of the proposed position of the alternative apparatus to be provided or constructed.

(3) Any alternative apparatus to be constructed in land of Network Rail under this Part of this Schedule is to be constructed in such manner and in such line or situation as may be agreed between the undertaker in question and Network Rail, or in default of such agreement settled by arbitration in accordance with article 20 (arbitration).

(4) In any case where alternative apparatus is to be provided or constructed under sub-paragraph (2), or if in consequence of the exercise of any of the powers conferred by this Order an undertaker reasonably needs to remove any of its apparatus, Network Rail must, subject to sub-paragraph (5), afford to the undertaker the necessary facilities and rights for the construction of alternative apparatus in other land of Network Rail and subsequently for the maintenance of that apparatus.

(5) If alternative apparatus or any part of such apparatus is to be constructed elsewhere than in other land of Network Rail, or Network Rail is unable to afford such facilities and rights as are mentioned in sub-paragraph (4) in the land in which the alternative apparatus or part of such apparatus is to be constructed, the undertaker in question must, on receipt of a written notice to

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(3) 1986 c. 44.

that effect from Network Rail, as soon as reasonably possible use its best endeavours to obtain the necessary facilities and rights in the land in which the alternative apparatus is to be constructed.

(6) The undertaker in question must, after the alternative apparatus to be provided or constructed has been agreed or settled by arbitration in accordance with article 20 (arbitration), and after the grant to the undertaker of any such facilities and rights as are referred to in sub-paragraph (4) or (5), proceed without unnecessary delay to construct and bring into operation the alternative apparatus and subsequently to remove any apparatus required by Network Rail to be removed under the provisions of this Part of this Schedule.

(7) Regardless of anything in sub-paragraph (6), if Network Rail gives notice in writing to the undertaker in question that it desires itself to execute any work, or part of any work in connection with the construction or removal of apparatus in any land of Network Rail, that work, instead of being executed by the undertaker, must be executed by Network Rail without unnecessary delay under the superintendence, if given, and to the reasonable satisfaction of the undertaker.

(8) Nothing in sub-paragraph (7) authorises Network Rail 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 300 millimetres of the apparatus.

7.—(1) Where, in accordance with the provisions of this Part of this Schedule, Network Rail affords to an undertaker facilities and rights for the construction and maintenance in land of Network Rail of alternative apparatus in substitution for apparatus to be removed, those facilities and rights are to be granted upon such terms and conditions as may be agreed between Network Rail and the undertaker in question or in default of agreement settled by arbitration in accordance with article 20 (arbitration).

(2) In settling those terms and conditions in respect of alternative apparatus to be constructed in or along any railway of Network Rail, the arbitrator must—

- (a) give effect to all reasonable requirements of Network Rail for ensuring the safety and efficient operation of the railway and for securing any subsequent alterations or adaptations of the alternative apparatus which may be required to prevent interference with any proposed works of Network Rail or the traffic on the railway; 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 in or along the railway for which the alternative apparatus is to be substituted.

(3) If the facilities and rights to be afforded by Network Rail 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 less favourable on the whole to the undertaker in question 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 by Network Rail to that undertaker as appears to the arbitrator to be reasonable having regard to all the circumstances of the particular case.

#### **Existing apparatus: protection and access**

8.—(1) Not less than 28 days before starting the execution of any of the authorised works that are near to, or will or may affect, any apparatus the removal of which has not been required by Network Rail under paragraph 6(2), Network Rail must submit to the undertaker in question a plan, section and description of the works to be executed.

(2) Those works are to be executed only in accordance with the plan, section and description submitted under sub-paragraph (1) and in accordance with such reasonable requirements as may be made in accordance with sub-paragraph (3) by the undertaker for the alteration or otherwise for the

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protection of the apparatus, or for securing access to it, and an officer of the undertaker is entitled to watch and inspect the execution of those works.

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

(4) If an undertaker in accordance with sub-paragraph (3) and in consequence of the works proposed by Network Rail, reasonably requires the removal of any apparatus and gives written notice to Network Rail of that requirement, paragraphs 1 to 7 apply as if the removal of the apparatus had been required by Network Rail under paragraph 6(2).

(5) Nothing in this paragraph precludes Network Rail 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, a new plan, section and description instead of the plan, section and description previously submitted, and having done so the provisions of this paragraph apply to and in respect of the new plan, section and description.

(6) Network Rail is not required to comply with sub-paragraph (1) in a case of emergency but in that case it must give to the undertaker in question notice as soon as is reasonably practicable and a plan, section and description 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.

## **Expenses**

9.—(1) Subject to the following provisions of this paragraph, Network Rail must repay to an undertaker the reasonable expenses incurred by that undertaker in, or in connection with, the inspection, removal, alteration or protection of any apparatus or the construction of any new apparatus (including costs or compensation payable in connection with the acquisition of land for that purpose) which may be required in consequence of the execution of any of the authorised works as are referred to in paragraph 6(2).

(2) The value of any apparatus removed under the provisions of this Part of this Schedule (other than apparatus that is re-used as alternative apparatus) 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 Part of this Schedule—

(a) apparatus of better type, of greater capacity or of greater dimensions is placed in substitution for existing apparatus of worse type, of smaller capacity or of smaller dimensions; or

(b) apparatus (whether existing apparatus or apparatus substituted for existing apparatus) is placed at a depth greater than the depth at which the existing apparatus was,

and the placing of apparatus of that type or capacity or of those dimensions or the placing of apparatus at that depth, as the case may be, is not agreed by Network Rail or, in default of agreement, is not determined by arbitration in accordance with article 20 (arbitration) to be necessary, then, if such placing involves cost in the construction of works under this Part of 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 sub-paragraph would be payable to the 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 a placing of apparatus of greater dimensions than those of 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 had been so determined.

(5) An amount which apart from this sub-paragraph would be payable to an undertaker in respect of works under 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 undertaker any financial benefit by deferment of the time for renewal of the apparatus in the ordinary course, be reduced by the amount which represents that benefit.

(6) Any dispute as to whether a financial benefit is conferred in accordance with sub-paragraph (5) or as to the amount of such financial benefit which cannot be agreed is to be determined in accordance with article 20 (arbitration).

**Damage to apparatus: costs, losses, etc.**

**10.**—(1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction 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 an undertaker, or there is any interruption in any service provided or in the supply of any goods by any undertaker, Network Rail must—

- (a) bear and pay the cost reasonably incurred by that undertaker in making good such damage or restoring the supply; and
- (b) make reasonable compensation to that undertaker for any other expenses, loss, damages, penalty or costs incurred by the undertaker,

by reason or in consequence of any such damage or interruption.

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

(3) An undertaker must give Network Rail reasonable notice of any such claim or demand and no settlement or compromise is to be made without the consent of Network Rail 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.

**Enactments and agreements**

**11.** Nothing in this Part of this Schedule affects the provisions of any enactment or agreement regulating the relations between Network Rail and an undertaker in respect of any apparatus laid or erected in land belonging to Network Rail on the date on which this Order is made.

## PART 2

### FOR THE PROTECTION OF OPERATORS OF ELECTRONIC COMMUNICATIONS CODE NETWORK

**12.**—(1) For the protection of any operator, the following provisions have effect, unless otherwise agreed in writing between Network Rail and the operator.

(2) In this Part of this Schedule—

“electronic communications apparatus” has the same meaning as in the electronic communications code;

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“the electronic communications code” has the same meaning as in Chapter 1 of Part 2 of the 2003 Act<sup>(4)</sup>;

“electronic communications code network” means—

- (a) so much of an electronic communications network or infrastructure system provided by an electronic communications code operator as is not excluded from the application of the electronic communications code by a direction under section 106 of the 2003 Act; and
- (b) an electronic communications network which the Secretary of State is providing or proposing to provide;

“electronic communications code operator” means a person in whose case the electronic communications code is applied by a direction under section 106 of the 2003 Act;

“infrastructure system” has the same meaning as in the electronic communications code and references to providing an infrastructure system are to be construed in accordance with paragraph 7(2) of that code; and

“operator” means the operator of an electronic communications code network.

**13.—**(1) Subject to sub-paragraphs (2) to (4), if as the result of the authorised works or their construction, or of any subsidence resulting from any of those works—

- (a) any damage is caused to any electronic communications apparatus belonging to an operator (other than apparatus the repair of which is not reasonably necessary in view of its intended removal for the purposes of those works), or other property of an operator; or
- (b) there is any interruption in the supply of the service provided by an operator,

Network Rail must bear and pay the cost reasonably incurred by the operator in making good such damage or restoring the supply and must—

- (i) make reasonable compensation to that operator for loss sustained by it; and
- (ii) indemnify that operator against claims, demands, proceedings, costs, damages and expenses which may be made or taken against, or recovered from, or incurred by, that operator by reason, or in consequence, of any such damage or interruption.

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

(3) The operator must give Network Rail reasonable notice of any such claim or demand and no settlement or compromise of the claim or demand may be made without the consent of Network Rail 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.

(4) Any difference arising between Network Rail and the operator under this paragraph is to be referred to and settled by arbitration under article 20 (arbitration).

**14.** This Part of this Schedule does not apply to—

- (a) any apparatus in respect of which the relations between Network Rail and an operator are regulated by the provisions of Part 3 of the 1991 Act; or
- (b) any damage, or any interruption, caused by electro-magnetic interference arising from the construction or use of the authorised works.

**15.** Nothing in this Part of this Schedule affects the provisions of any enactment or agreement regulating the relations between Network Rail and an operator in respect of any apparatus laid or erected in land belonging to Network Rail on the date on which this Order is made.

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(4) 2003 c. 21.

## PART 3

### FOR THE PROTECTION OF SOUTHERN GAS NETWORKS PLC AS GAS UNDERTAKER

#### **Application**

**16.** For the protection of SGN the following provisions will have effect unless otherwise agreed in writing between the undertaker and SGN.

#### **Interpretation**

**17.** In this Part of this Schedule—

“1991 Act” means the New Roads and Street Works Act 1991;

“alternative apparatus” means appropriate alternative apparatus to the satisfaction of SGN to enable SGN to fulfil its statutory functions in a manner no less efficient than that enabled by its existing apparatus;

“apparatus” means any gas mains, pipes, pressure governors, ventilators, cathodic protections, cables or other apparatus belonging to or maintained by SGN for the purposes of gas distribution together with any replacement apparatus and such other apparatus constructed pursuant to the Order that becomes operational apparatus of SGN for the purposes of transmission distribution and/or supply and includes any structure in which apparatus is or will be lodged or which gives or will give access to apparatus;

“authorised works” has the same meaning as in article 2 (interpretation) of this Order and for the purposes of this Part of this Schedule includes the use and maintenance of the authorised works and construction of any works authorised by this Part of this Schedule;

“commence” means beginning to carry out any material operation (as defined in section 56(4) of the 1990 Act) forming part of the authorised works;

“functions” includes powers and duties;

“ground mitigation scheme” means a scheme approved by SGN (such approval not to be unreasonably withheld or delayed) setting out the necessary measures (if any) for managing a ground subsidence event;

“ground monitoring scheme” means a scheme for monitoring ground subsidence which sets out the apparatus which is to be subject to such monitoring, the extent of the land to be monitored, the manner in which ground levels are to be monitored, the timescales of any monitoring activities and the extent of ground subsidence which, if exceeded, requires the undertaker to submit for SGN’s approval a ground mitigation scheme;

“ground subsidence event” means any ground subsidence identified by the monitoring activities carried out pursuant to the ground monitoring scheme that has exceeded the level described in the ground monitoring scheme as requiring a ground mitigation scheme;

“in” in a context referring to apparatus or alternative apparatus in land includes a reference to apparatus or alternative apparatus under, over, across, along or under such land;

“maintain” and “maintenance” shall include the ability and right to do any of the following in relation to any apparatus or alternative apparatus of SGN including retain, lay, construct, inspect, maintain, protect, use, access, enlarge, replace, renew, remove, decommission or render unusable or remove the apparatus;

“plan” or “plans” include all designs, drawings, specifications, method statements, soil reports, programmes, calculations, risk assessments and other documents that are reasonably necessary to describe and assess the works to be executed;

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“rights” shall include rights and restrictive covenants and in relation to decommissioned apparatus the surrender of rights, release of liabilities and transfer of decommissioned apparatus;

“SGN” means Southern Gas Networks plc or its successors in title or successor bodies and/or any successor as a gas transporter within the meaning of Part 1 (gas supply) of the Gas Act 1986;

“specified works” means any of the authorised works or activities undertaken in association with the authorised works which—

- (a) will or may be situate over, or within 15 metres measured in any direction of any apparatus the removal of which has not been required by the undertaker under paragraph 22(2) or otherwise; and/or
- (b) may in any way adversely affect any apparatus the removal of which has not been required by the undertaker under paragraph 22(2) or otherwise;

“undertaker” means Network Rail as defined in article 2 (interpretation) of this Order.

### **On street apparatus**

**18.**—(1) Except for paragraphs 19 (apparatus of SGN in stopped up streets), 21 (removal of apparatus) in so far as paragraph 18(2) applies, 22 (facilities and rights for alternative apparatus) in so far as paragraph 18(2) applies, 23 (retained apparatus: protection of SGN), 24 (expenses) and 25 (indemnity) of this Part of this Schedule which will apply in respect of the exercise of all or any powers under the Order affecting the rights and apparatus of SGN, the other provisions of this Part of this Schedule do not apply to apparatus in respect of which the relations between the undertaker and SGN are regulated by Part 3 of the 1991 Act.

(2) Paragraphs 20 and 21 of this Part of this Schedule shall apply to diversions even where carried out under the 1991 Act in circumstances where any apparatus is diverted from an alignment within the existing adopted public highway but not wholly replaced within existing adopted public highway.

(3) The Protective Provisions in this Part of this Schedule apply and take precedence over article 16 (statutory undertakers, etc.) of, and Schedule 5 (provisions relating to statutory undertakers, etc.) to, the Order which shall not apply to SGN.

### **Apparatus of SGN in stopped up streets**

**19.**—(1) Without prejudice to the generality of any other protection afforded to SGN elsewhere in the Order, where any street is stopped up under article 13 (street to be stopped up), if SGN has any apparatus in the street or accessed via that street SGN will be entitled to the same rights in respect of such apparatus and access as it enjoyed immediately before the stopping up and the undertaker will grant to SGN, or will procure the granting to SGN of, legal easements reasonably satisfactory to SGN in respect of such apparatus and access to it prior to any stopping up of any such street or highway but nothing in this paragraph affects any right of the undertaker or of SGN to require the removal of that apparatus under paragraph 21.

(2) The Protective Provisions in this Part of this Schedule apply and take precedence over article 16 of, and Schedule 5 to, the Order which shall not apply to SGN.

### **Acquisition of land**

**20.**—(1) Regardless of any provision in this Order or anything shown on the land plans or contained in the book of reference to the Order, the undertaker may not appropriate or acquire any land interest or appropriate, acquire, extinguish, interfere with or override any easement, other interest or right and/or apparatus of SGN otherwise than by agreement.



(2) As a condition of agreement between the parties in sub-paragraph (1), prior to the carrying out of any part of the authorised works (or in such other timeframe as may be agreed between SGN and the undertaker) that are subject to the requirements of this Part of this Schedule that will cause any conflict with or breach the terms of any easement and/or other legal or land interest of SGN and/or affects the provisions of any enactment or agreement regulating the relations between SGN and the undertaker in respect of any apparatus laid or erected in land belonging to or secured by the undertaker, the undertaker must as SGN reasonably requires enter into such deeds of consent and variations upon such terms and conditions as may be agreed between SGN and the undertaker acting reasonably and which must be no less favourable on the whole to SGN than the pre-agreement position unless otherwise agreed by SGN, and it will be the responsibility of the undertaker to procure and/or secure the consent and entering into of such deeds and variations by all other third parties with an interest in the land at that time who are affected by such authorised works.

(3) The undertaker and SGN agree that where there is any inconsistency or duplication between the provisions set out in this Part of this Schedule relating to the relocation and/or removal of apparatus, including but not limited to the payment of costs and expenses relating to such relocation and/or removal of apparatus and the provisions of any existing easement, rights, agreements and licences granted, used, enjoyed or exercised by SGN and/or other enactments relied upon by SGN as of right or other use in relation to the apparatus, then the provisions in this Part of this Schedule shall prevail.

(4) Any agreement or consent granted by SGN under paragraph 23 or any other paragraph of this Part of this Schedule, shall not be taken to constitute agreement under sub-paragraph (1).

(5) As a condition of an agreement between the parties in sub-paragraph (1) that involves decommissioned apparatus being left in situ the undertaker must unless otherwise agreed accept the surrender of any existing easement and/or other interest of SGN in such decommissioned apparatus and consequently acquire title to such decommissioned apparatus and release SGN from all liabilities in respect of such decommissioned apparatus from the date of such surrender.

(6) Where an undertaker acquires land which is subject to any SGN right or interest (including without limitation, easements and agreements relating to rights or other interests) and the provisions of paragraph 21 do not apply, the undertaker must—

- (a) retain any notice of SGN's easement, right or other interest on the title to the relevant land when registering the undertaker's title to such acquired land;
- (b) (where no such notice of SGN's easement, right or other interest on the title exists in relation to such acquired land or any such notice is registered only on the Land Charges Register) include (with its application to register title to the undertaker's interest in such acquired land at the Land Registry) a notice of SGN's easement, right or other interest in relation to such acquired land and SGN must provide reasonable assistance to the undertaker to assist that registration; and
- (c) provide up to date official entry copies to SGN within 20 working days of receipt of such up to date official entry copies.

### **Removal of apparatus**

**21.—**(1) If in the exercise of the agreement reached in accordance with paragraph 20 or in any other authorised manner, the undertaker acquires any interest in any land in which any apparatus is placed, that apparatus must not be decommissioned or removed under this Part of this Schedule and any right of SGN to maintain that apparatus in that land must not be extinguished until alternative apparatus has been constructed, is in operation and the rights and facilities referred to in sub-paragraph (2) have been provided, to the reasonable satisfaction of SGN and in accordance with sub-paragraphs (2) to (5) inclusive.

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(2) If for the purpose of executing any works in, on, under or over any land purchased, held, appropriated or used under this Order, the undertaker requires the removal of any apparatus placed in that land, it must give to SGN advance written notice of that requirement, together with a plan and section 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 SGN reasonably needs to move or remove any of its apparatus) the undertaker must afford to SGN to its satisfaction (taking into account paragraph 22(1)) the necessary facilities and rights—

- (a) for the construction of alternative apparatus (including appropriate working areas required to reasonably and safely undertake necessary works by SGN in respect of the apparatus);
- (b) subsequently for the maintenance of that apparatus (including appropriate working areas required to reasonably and safely undertake necessary works by SGN in respect of the apparatus); and
- (c) to allow access to that apparatus (including appropriate working areas required to reasonably and safely undertake necessary works by SGN in respect of the apparatus).

(3) If the undertaker is unable to afford such facilities and rights as are mentioned in subparagraph (2), in the land in which the alternative apparatus or part of such apparatus is to be constructed, SGN may, on receipt of written notice to that effect from the undertaker, take such steps as are reasonable in the circumstances in an endeavour to obtain the necessary facilities and rights in the land in which the alternative apparatus is to be constructed save that this obligation shall not extend to the requirement for SGN to use its compulsory purchase powers to this end unless it (in its absolute discretion) elects to so do.

(4) Any alternative apparatus to be constructed in land of, or land secured by the undertaker, under this Part of this Schedule must be constructed in such manner and in such line or situation as may be agreed between SGN and the undertaker.

(5) SGN must, after the alternative apparatus to be provided or constructed has been agreed, and subject to the prior grant to SGN of such facilities and rights as are referred to in sub-paragraphs (2) and (3) have been afforded to SGN to its satisfaction, then to proceed without unnecessary delay to construct and bring into operation the alternative apparatus and subsequently to decommission or remove any apparatus required by the undertaker to be decommissioned or removed under the provisions of this Part of this Schedule.

### **Facilities and rights for alternative apparatus**

**22.—**(1) Where in accordance with the provisions of this Part of this Schedule, the undertaker affords to or secures for SGN facilities and rights in land for the access to, construction and maintenance of alternative apparatus in substitution for apparatus to be decommissioned or removed, those facilities and rights must be granted upon such terms and conditions as may be agreed between the undertaker and SGN and must be no less favourable on the whole to SGN than the facilities and rights enjoyed by it in respect of the apparatus to be decommissioned or removed unless otherwise agreed by SGN.

(2) If the facilities and rights to be afforded by the undertaker and agreed with SGN under subparagraph (1) in respect of any alternative apparatus, and the terms and conditions subject to which those facilities and rights are to be granted, are less favourable on the whole to SGN than the facilities and rights enjoyed by it in respect of the apparatus to be decommissioned or removed (in SGN's reasonable opinion) then the terms and conditions to which those facilities and rights are subject in the matter will be referred to arbitration in accordance with paragraph 29 (arbitration) of this Part of this Schedule and the arbitrator must make such provision for the payment of compensation by the undertaker to SGN as appears to the arbitrator to be reasonable having regard to all the circumstances of the particular case.

### **Retained apparatus: protection of SGN**

**23.**—(1) Not less than 56 days before the commencement of any specified works, the undertaker must submit to SGN a plan and, if reasonably required by SGN, a ground monitoring scheme in respect of those works.

(2) The plan to be submitted to SGN under sub-paragraph (1) must include a method statement and describe—

- (a) the exact position of the works;
- (b) the level at which these are proposed to be constructed or renewed;
- (c) the manner of their construction or renewal including details of excavation, positioning of plant etc.;
- (d) the position of all apparatus;
- (e) by way of detailed drawings, every alteration proposed to be made to or close to any such apparatus; and
- (f) any intended maintenance regimes.

(3) The undertaker must not commence any works to which sub-paragraphs (1) and (2) apply, until SGN has given written approval of the plans so submitted.

(4) Any approval of SGN required under sub-paragraph (3)—

- (a) may be given subject to reasonable conditions for any purpose mentioned in sub-paragraphs (5) or (7); and
- (b) must not be unreasonably withheld.

(5) In relation to any work to which sub-paragraphs (1) and/or (2) apply, SGN may require such modifications to be made to the plans as may be reasonably necessary for the purpose of securing apparatus against interference or risk of damage or for the purpose of providing or securing proper and convenient means of access to any apparatus.

(6) Works to which this paragraph applies must only be executed in accordance with the plan, submitted under sub-paragraphs (1) and (2) or as relevant sub-paragraph (4), as approved or as amended from time to time by agreement between the undertaker and SGN and in accordance with all conditions imposed under sub-paragraph (4)(a), and SGN will be entitled to watch and inspect the execution of those works having given reasonable notice of their wish to do so.

(7) Where SGN requires any protective works to be carried out by itself or by the undertaker (whether of a temporary or permanent nature) such protective works, inclusive of any measures or schemes required and approved as part of the plan approved pursuant to this paragraph, must be carried out to SGN's satisfaction prior to the commencement of any authorised works (or any relevant part thereof) for which protective works are required prior to commencement.

(8) If SGN in consequence of the works proposed by the undertaker, reasonably requires the removal of any apparatus and gives written notice to the undertaker of that requirement, paragraphs 1 to 3 and 5 to 7 apply as if the removal of the apparatus had been required by the undertaker under paragraph 21(2).

(9) Nothing in this paragraph precludes the undertaker from submitting at any time or from time to time but in no case less than 56 days before commencing the execution of the authorised works, a new plan, instead of the plan previously submitted, and having done so the provisions of this paragraph will apply to and in respect of the new plan.

(10) The undertaker will not be required to comply with sub-paragraph (1) where it needs to carry out emergency works as defined in the 1991 Act, but in that case it must give to SGN notice as soon as is reasonably practicable and a plan of those works and must comply with—

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- (a) the conditions imposed under sub-paragraph (4)(a) insofar as is reasonably practicable in the circumstances (where any such applicable conditions have been imposed at that time); and
- (b) sub-paragraph (11) at all times.

(11) As soon as reasonably practicable after any ground subsidence event attributable to the authorised works the undertaker must implement an appropriate ground mitigation scheme save that SGN retains the right to carry out any further necessary protective works for the safeguarding of its apparatus and can recover any such costs in line with paragraph 24.

### **Expenses**

**24.**—(1) Subject to the following provisions of this paragraph, the undertaker must pay to SGN on demand all charges, costs and expenses reasonably anticipated or incurred by SGN in, or in connection with, the inspection, removal, relaying or replacing, alteration or protection of any apparatus or rights or the construction of any new or alternative apparatus which may be required in consequence of the execution of any authorised works as are referred to in this Part of this Schedule including without limitation—

- (a) any costs reasonably incurred by or compensation properly paid by SGN in connection with the negotiation or acquisition of rights or the exercise of statutory powers for such apparatus including without limitation all costs (including professional fees) incurred by SGN as a consequence of SGN—
  - (i) using its own compulsory purchase powers to acquire any necessary rights under paragraph 21(3) if it elects to do so; and/or
  - (ii) exercising any compulsory purchase powers in the Order transferred to or benefitting SGN;
- (b) in connection with the cost of the carrying out of any diversion work or the provision of any alternative apparatus;
- (c) the cutting off of any apparatus from any other apparatus or the make safe of any redundant apparatus;
- (d) the approval of plans;
- (e) the carrying out of protective works, plus a capitalised sum to cover the cost of maintaining and renewing permanent protective works;
- (f) the survey of any land, apparatus or works, the inspection and monitoring of works or the installation or removal of any temporary works reasonably necessary in consequence of the execution of any such works referred to in this Part of this Schedule; and
- (g) any watching brief pursuant to paragraph 23(6).

(2) There will be deducted from any sum payable under sub-paragraph (1) the value of any apparatus removed under the provisions of this Part of this Schedule and which is not re-used as part of the alternative apparatus, that value being calculated after removal.

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

- (a) apparatus of better type, of greater capacity or of greater dimensions is placed in substitution for existing apparatus of worse type, of smaller capacity or of smaller dimensions; or
- (b) apparatus (whether existing apparatus or apparatus substituted for existing apparatus) or placed at a depth greater than the depth at which the existing apparatus was situated,

and the placing of apparatus of that type or capacity or of those dimensions or the placing of apparatus at that depth, as the case may be, is not agreed by the undertaker or, in default of agreement, is not determined by arbitration in accordance with article 20 (arbitration) to be necessary, then, if such

placing involves cost in the construction of works under this Part of 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 sub-paragraph would be payable to SGN by virtue of sub-paragraph (1) will be reduced by the amount of that excess save where it is not possible or appropriate in the circumstances (including due to statutory or regulatory changes) to obtain the existing type of apparatus at the same capacity and dimensions or place at the existing depth in which case full costs will be borne by the undertaker.

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

- (a) an extension of apparatus to a length greater than the length of existing apparatus will not be treated as a placing of apparatus of greater dimensions than those of the existing apparatus; and
- (b) where the provision of a joint in a pipe or cable is agreed or is determined to be necessary, the consequential provision of a jointing chamber or of a manhole will be treated as if it also had been agreed or had been so determined.

### **Indemnity**

**25.**—(1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction of any works authorised by this Part of this Schedule (including without limitation, relocation, diversion, decommissioning, construction and maintenance of apparatus or alternative apparatus) or in consequence of the construction, use, maintenance or failure of any of the authorised works by or on behalf of the undertaker or in consequence of any act or default of the undertaker (or any person employed or authorised by him) in the course of carrying out such works, including without limitation works carried out by the undertaker under this Part of this Schedule or any subsidence resulting from any of these works, any damage is caused to any apparatus or alternative apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal for the purposes of the authorised works) or property of SGN, or there is any interruption in any service provided, or in the supply of any goods, by SGN or SGN becomes liable to pay any amount to any third party, the undertaker will—

- (a) bear and pay on demand the cost reasonably incurred by SGN in making good such damage or restoring the supply; and
- (b) indemnify SGN for any other expenses, loss, demands, proceedings, damages, claims, penalty or costs incurred by or recovered from SGN by reason or in consequence of any such damage or interruption or SGN becoming liable to any third party as aforesaid, other than arising from any default of SGN.

(2) The fact that any act or thing may have been done by SGN on behalf of the undertaker or in accordance with a plan approved by SGN (save where that plan has been negligently approved by SGN) or in accordance with any requirement of SGN or under its supervision including under any watching brief will not (unless sub-paragraph (3) applies) excuse the undertaker from liability under the provisions of sub-paragraph (1) unless SGN 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) or (2) imposes any liability on the undertaker in respect of any damage or interruption to the extent that it is attributable to the neglect or default of SGN, its officers, servants, contractors or agents.

(4) SGN must give the undertaker reasonable notice of any such third party claim or demand and no settlement or compromise must, unless payment is required in connection with a statutory compensation scheme, be made without first consulting the undertaker and its representations.

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### **Enactments and agreements**

**26.** Save to the extent provided for to the contrary elsewhere in this Part of this Schedule or by agreement in writing between SGN and the undertaker, nothing in this Part of this Schedule affects the provisions of any enactment or agreement regulating the relations between the undertaker and SGN in respect of any apparatus laid or erected in land belonging to the undertaker on the date on which this Order is made.

### **Co-operation**

**27.—(1)** Where in consequence of the proposed construction of any of the authorised works, the undertaker or SGN requires the removal of apparatus under paragraph 21(2) or SGN makes requirements for the protection or alteration of apparatus under paragraph 23, the undertaker must use its best endeavours to co-ordinate the execution of the authorised works, efficiently and in the interests of safety and taking into account the need to ensure the safe and efficient operation of SGN's undertaking and SGN shall use its best endeavours to co-operate with the undertaker for that purpose.

(2) For the avoidance of doubt whenever SGN's consent, agreement or approval is required in relation to plans, documents or other information submitted by SGN or the taking of action by SGN, it must not be unreasonably withheld or delayed.

### **Access**

**28.** If in consequence of the agreement reached in accordance with paragraph 20(1) or the powers granted under this Order the access to any apparatus (including appropriate working areas required to reasonably and safely undertake necessary works by SGN in respect of the apparatus) is materially obstructed, the undertaker must provide such alternative rights and means of access to such apparatus as will enable SGN to maintain or use the apparatus no less effectively than was possible before such obstruction.

### **Arbitration**

**29.** Any difference or dispute arising between the undertaker and SGN under this Part of this Schedule must, unless otherwise agreed in writing between the undertaker and SGN, be determined by arbitration in accordance with article 20 (arbitration).

### **Notices**

**30.** The plans submitted to SGN by the undertaker pursuant to paragraph 23(1) must be sent to SGN at [easments@sgn.co.uk](mailto:easments@sgn.co.uk) or such other address as SGN may from time to time appoint instead for that purpose and notify to the undertaker.

## **PART 4**

### **FOR THE PROTECTION OF SOUTH EASTERN POWER NETWORKS PLC**

**31.** For the protection of South Eastern Power Networks plc, the following provisions have effect, unless otherwise agreed in writing between the undertaker and South Eastern Power Networks plc.

**32.** In this Part of this Schedule—

“alternative apparatus” means alternative apparatus adequate to enable the utility undertaker to fulfil its statutory functions in a manner no less efficiently as is achievable using the apparatus which the alternative apparatus is to replace;

“apparatus” means electric lines and electrical plant (as defined in section 64(1) of the Electricity Act 1989) belonging to or maintained by the utility undertaker;

“functions” includes powers and duties;

“in” in a context referring to apparatus or alternative apparatus in land includes a reference to apparatus or alternative apparatus under, over or upon land;

“plan” or “plans” include all designs, drawings, specifications, method statements, soil reports, programmes, calculations, risk assessments and other documents that are reasonably necessary properly and sufficiently to describe the works to be executed;

“undertaker” means Network Rail Infrastructure Limited (Company Number 0294587) whose registered office is at 1 Eversholt Street, London NW1 2DN; and

“utility undertaker” means South Eastern Power Networks plc.

### **On street apparatus**

**33.** This Part of this Schedule does not apply to apparatus in respect of which the relations between the undertaker and the utility undertaker are regulated by the provisions of Part 3 of the 1991 Act.

### **Acquisition of land**

**34.** Regardless of any provisions in this Order or anything shown on the land plan or contained in the book of reference to the Order, the undertaker must not acquire any land interest or any apparatus or otherwise override any easement and/or other interest of the utility undertaker otherwise than by agreement, such agreement not to be unreasonably withheld or delayed.

### **Removal of apparatus**

**35.—(1)** If, in the exercise of the agreement reached in accordance with paragraph 34 or in any other authorised manner, the undertaker acquires any interest in any land in which any apparatus is placed or requires that the utility undertaker’s apparatus is relocated or diverted, that apparatus must not be removed under this Part of this Schedule and any right of the utility undertaker to maintain or use 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 utility undertaker in accordance with sub-paragraphs (2) to (7).

(2) If for the purpose of executing any works in, on or under any land purchased or acquired, held, appropriated or used under this Order, the undertaker requires the removal of any apparatus placed in that land, it must give to the utility undertaker at least 56 days’ written notice of that requirement, together with a plan 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 the utility undertaker reasonably needs to remove any of its apparatus) the undertaker must, subject to sub-paragraph (3), afford to the utility undertaker to its reasonable satisfaction (taking into account paragraph 36(1)) the necessary facilities and rights for the construction of alternative apparatus in other land and subsequently for the maintenance and use of that apparatus.

(3) If alternative apparatus or any part of such apparatus is to be constructed elsewhere than in other land of the undertaker, or the undertaker is unable to afford such facilities and rights as are mentioned in sub-paragraph (2) in the land in which the alternative apparatus or part of such apparatus is to be constructed, the utility undertaker must, on receipt of a written notice to that effect from the undertaker, 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 with the undertaker’s assistance if reasonably required by the utility undertaker, save that this obligation

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does not extend to the requirement for the utility undertaker to use its powers of compulsory acquisition.

(4) Any alternative apparatus to be constructed in land of or land secured by the undertaker under this Part of this Schedule must be constructed in such manner and in such line or situation as may be agreed between the utility undertaker and the undertaker or in default of agreement settled by arbitration in accordance with article 20 (arbitration).

(5) The utility undertaker must, after the alternative apparatus to be provided or constructed has been agreed or settled by arbitration in accordance with article 20, and subject to the grant to the utility undertaker of any such facilities and rights as are referred to in sub-paragraph (2) or (3), then proceed and as soon as reasonably practicable to construct and bring into operation the alternative apparatus and subsequently to remove any apparatus required by the undertaker to be removed under the provisions of this Part of this Schedule.

(6) Regardless of anything in sub-paragraph (5), if the undertaker gives notice in writing to the utility undertaker that the undertaker desires itself to execute any work, or part of any work in connection with the construction or removal of apparatus in any land of the undertaker, and the utility undertaker consents in writing to the execution of that work (such consent not to be unreasonably withheld), that work, instead of being executed by the utility undertaker, must be executed by the undertaker without unnecessary delay under the superintendence, if given, and to the reasonable satisfaction of the utility undertaker, which shall include compliance by the undertaker with all relevant statutory requirements and the utility undertaker's specifications and requirements relating to the execution of that work (and the utility undertaker shall be entitled to inspect such works to verify that they have been carried out in accordance with such requirements and specifications). At all times when carrying out any authorised works, the undertaker must comply with the utility undertaker's policies for development near overhead lines and HSE's guidance note 6 "Avoidance of Danger from Overhead Lines".

(7) If the undertaker gives notice in writing to the utility undertaker in accordance with sub-paragraph (6) and the utility undertaker does not respond to the notice within 56 days of receipt to confirm whether it consents to the execution of that work by the undertaker, the utility undertaker shall be deemed to have granted consent, subject to the superintendence of that work by the utility undertaker, if given, and to the works being carried out to the reasonable satisfaction of the utility undertaker, which shall include compliance by the undertaker with all relevant statutory requirements relating to the execution of that work.

(8) Nothing in sub-paragraphs (6) or (7) authorises the undertaker to execute the placing, installation, bedding, packing, removal, connection or disconnection of any apparatus, within 1 metre of other apparatus which does not form part of those works.

### **Facilities and rights for alternative apparatus**

**36.**—(1) Where in accordance with the provisions of this Part of this Schedule, the undertaker affords to or secures the utility undertaker facilities and rights for the construction, use and maintenance and protection in land of alternative apparatus in substitution for apparatus to be removed, those facilities and rights must be no less favourable on the whole to the utility undertaker than the facilities and rights enjoyed by it in respect of the apparatus to be removed, unless otherwise agreed by the utility undertaker or in default of agreement settled by arbitration in accordance with article 20 (arbitration).

(2) If the facilities and rights to be afforded by the undertaker and agreed with the utility undertaker under sub-paragraph (1) in respect of any alternative apparatus are less favourable on the whole to the utility 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 may be referred to arbitration in accordance with article 20 (arbitration) of the Order and the arbitrator may make such provision for the payment of compensation by the undertaker to the utility undertaker



as appears to the arbitrator to be reasonable having regard to all the circumstances of the particular case. In respect of the appointment of an arbitrator under this sub-paragraph article 20 (arbitration) of the Order shall apply.

### **Retained apparatus**

**37.**—(1) Not less than 56 days before commencement of any authorised works that are in, on or under any land purchased, held, appropriated or used under this Order that may affect, or is within 15 metres of, any apparatus the removal of which has not been required by the undertaker under paragraph 35(2), the undertaker must submit to the utility undertaker a plan of the works to be executed.

(2) In relation to works which will or may—

- (a) be situated on, over, under or within 15 metres, measured in any direction of any apparatus; or
- (b) involve embankment works within 15 metres of any apparatus,

the plan to be submitted to the utility undertaker must include a method statement describing—

- (a) the proposed position of the works;
- (b) the level at which these are proposed to be constructed or renewed;
- (c) the manner of their construction or renewal including details of excavation and positioning of plant;
- (d) the position of all apparatus; and
- (e) by way of detailed drawings, every alteration proposed to be made to or close to any such apparatus.

(3) In relation to any works which will or may be situated on, over, under or within 10 metres of any part of the foundations of an electricity tower or between any two or more electricity towers, the plan to be submitted under sub-paragraph (1) must, in addition to these matters set out in sub-paragraph (2), include in the method statement—

- (a) the details of any cable trench design, including route, dimensions and clearance to pylons foundations;
- (b) a demonstration that pylon foundations will not be affected prior to, during and post construction;
- (c) the details of load bearing capacities of trenches;
- (d) the details of cable installation methodology, including access arrangements, jointing bays and backfill methodology;
- (e) written details of the operations and maintenance regime for the cable, including frequency and method access; and
- (f) evidence that the trench bearing capacity is capable of taking the weight of the overhead line.

(4) The undertaker must not commence any works to which sub-paragraphs (1), (2) and (3) apply until the utility undertaker has given written approval of the plan submitted.

(5) Any approval of the utility undertaker required under sub-paragraph (2) or (3)—

- (a) may be given subject to reasonable conditions for any purpose mentioned in sub-paragraph (6) or (8);
- (b) is deemed to have been given if it is neither given nor refused within 56 days of the submission of the plan for approval, and, in the case of a refusal, accompanied by a statement of the grounds of refusal; and

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(c) must not be unreasonably withheld or delayed.

(6) Where the utility undertaker reasonably requires any protective works to be carried out by itself or the undertaker (whether of a temporary or permanent nature) such protective works, inclusive of any measures or schemes required and approved as part of the plan approved, pursuant to this paragraph, must be carried out to the utility undertaker's reasonable satisfaction, prior to the commencement of any authorised works (or any relevant part thereof) to which sub-paragraph (1) applies and the utility undertaker shall give notice of the need for such protective works within 56 days from the date of receipt of a plan pursuant to sub-paragraph (1) (except in an emergency where no such notice will be required).

(7) If the utility undertaker, in accordance with sub-paragraph (6) or (8) and in consequence of the works proposed by the undertaker, reasonably requires the removal of any apparatus and gives written notice to the undertaker of that requirement, paragraphs 1 to 7 apply as if the removal of the apparatus had been required by the undertaker under paragraph 35(2) provided always that the utility undertaker may require, following review of the information provided, the undertaker to enter into an asset protection agreement in a form required by the utility undertaker acting reasonably.

(8) Nothing in this paragraph precludes the undertaker from submitting at any time or from time to time, but in no case less than 56 days before commencing the execution of any authorised works to which sub-paragraph (1) applies, a new plan, instead of the plan previously submitted, and having done so, the provisions of this paragraph shall apply to and in respect of the new plan.

(9) The undertaker will not be required to comply with sub-paragraph (1) where it needs to carry out emergency works as defined in the 1991 Act but in that case it must give to the utility undertaker notice as soon as is reasonably practicable and a plan of those works and must—

- (a) comply with sub-paragraphs (6), (7) and (8) in so far as is reasonably practicable in the circumstances; and
- (b) comply with sub-paragraph (2) at all times.

### **Expenses and costs**

**38.—**(1) Subject to the following provisions of this paragraph, the undertaker must pay to the utility undertaker on demand all charges, costs and expenses reasonably and properly incurred by the utility undertaker in, or in connection with—

- (a) the inspection, removal, alteration, relaying, replacing or protection of any apparatus or the construction of any apparatus or the construction of any new apparatus or alternative apparatus which may be required in consequence of the execution of any authorised works as are referred to in any of these provisions including without limitation—
  - (i) any costs reasonably and properly incurred by or compensation paid by the utility undertaker in connection with the acquisition of facilities and rights or the exercise of statutory powers for any such apparatus in consequence of the operation of any of these provisions;
  - (ii) the cost of the carrying out of any necessary diversion work or the provision of any alternative apparatus; and
  - (iii) the cutting off of any apparatus from any other apparatus, or the making safe of any redundant apparatus, in consequence of the exercise of any power conferred by this Order affecting the utility undertaker's apparatus;
- (b) the survey of any land, apparatus or works, the superintendence and monitoring of works and the installation or removal of any temporary works reasonably necessary in consequence of the exercise of any power conferred by this Order affecting the utility undertaker's apparatus;
- (c) the approval of plans;

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- (d) the carrying out of protective works plus a proportionate capitalised sum to cover the cost of maintaining and renewing permanent protective works;
  - (e) the survey of any land, apparatus or work, the inspection and monitoring of works or the installation or removal of any temporary works reasonably necessary in consequence of the execution of any such works referred to in this Part of this Schedule; and
  - (f) any other work or thing rendered reasonably necessary in consequence of the exercise of any power conferred by this Order affecting the utility undertaker's apparatus.
- (2) There must be deducted from any sum payable under sub-paragraph (1) the value of any apparatus removed under the provisions of this Part of this Schedule, that value being calculated, after removal.
- (3) If in accordance with the provisions of this Part of this Schedule—
- (a) apparatus of better type, of greater capacity or of greater dimensions is placed in substitution for existing apparatus of worse type, of smaller capacity or of smaller dimensions; or
  - (b) apparatus (whether existing apparatus or apparatus substituted for existing apparatus) is placed at a depth greater than the depth at which the existing apparatus was situated,
- and the placing of apparatus of that type or capacity or of those dimensions or the placing of apparatus at that depth, as the case may be, is not agreed by the undertaker or, in default of agreement, is not determined by arbitration in accordance with article 20 (arbitration) to be necessary, then, if such placing involves cost in the construction of works under this Part of 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 sub-paragraph will be reduced by the amount of that excess save where it is not possible in the circumstances to obtain the existing type of apparatus at the same capacity and dimensions or place at the existing depth in which case full costs will be borne by the undertaker.
- (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 a placing of apparatus of greater dimensions than those of the existing apparatus; and
  - (b) where the provision of a joint in a pipe or 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 had been so determined.

### **Compensation**

- 39.**—(1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction of any such works referred to in any of these provisions or in consequence of the construction, use, maintenance or failure of any of the authorised works by or on behalf of the undertaker or in consequence of any act or default by the undertaker (or any person authorised by the undertaker) in the course of carrying out the works, any damage is caused to any apparatus or alternative 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 the utility undertaker, or there is any interruption in any service provided, or in the supply of any goods, by the utility undertaker, the undertaker must—
- (a) bear and pay on demand the cost reasonably incurred by the utility undertaker in making good such damage or restoring the supply;
  - (b) make reasonable compensation to the utility undertaker for any other expenses, loss, damages, penalty or costs incurred by the utility undertaker; and

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- (c) compensate the utility undertaker against all losses, claims, demands, proceedings, costs, damages, penalty and expenses which may be made or taken against or recovered from or incurred by, the utility undertaker,

by reason or in consequence of any such damage or interruption or the utility undertaker becoming liable to any third party.

(2) The fact that any act or thing may have been done by the utility undertaker on behalf of the undertaker or in accordance with a plan approved by the utility undertaker or in accordance with any requirement of the utility undertaker or under its supervision does not, subject to sub-paragraph (3), excuse the undertaker from liability under the provisions of sub-paragraph (1).

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

(4) The utility undertaker must give the undertaker reasonable notice of any such claim or demand and no settlement or compromise is to be made, unless payment is required in connection with a statutory compensation scheme, without first consulting the undertaker and considering their representation.

(5) The utility undertaker must use its reasonable endeavours to mitigate and minimise any costs, expenses, loss, demands and penalties to which the compensation under sub-paragraph (1) applies. If requested to do so by the undertaker, the utility undertaker shall provide an explanation of how the claim has been minimised.

### **Co-operation**

**40.**—(1) Where in consequence of the proposed construction of any part of the authorised development, the undertaker or the utility undertaker requires the removal of apparatus under paragraph 35(2) or the utility undertaker makes requirements for the protection or alteration of apparatus under paragraph 37(6), the undertaker must use its best reasonable endeavours to co-ordinate the execution of the authorised works efficiently and in the interests of safety and taking into account the need to ensure the safe and efficient operation of the utility undertaker's undertaking and the utility undertaker must use its best endeavours to co-operate with the undertaker for that purpose.

(2) For the avoidance of doubt whenever the utility undertaker's consent, agreement or approval is required in relation to plans, documents or other information submitted by the undertaker or the taking of action by the undertaker, it must not be unreasonably withheld or delayed.

### **Enactments and agreements**

**41.** Save to the extent provided for to the contrary elsewhere in this Part of this Schedule, nothing in this Part of this Schedule affects the provisions of any enactment or agreement regulating the relations between the undertaker and the utility undertaker in respect of any apparatus laid or erected in land belonging to the undertaker on the date on which this Order is made.