

**From:** Stewart, Sophie [<mailto:ophie.Stewart@dlapiper.com>]  
**Sent:** 05 April 2016 15:35  
**To:** North London HPP  
**Cc:** Batterton, Andrew; [nicholas.dexter@nationalgrid.com](mailto:nicholas.dexter@nationalgrid.com); [anita.kasseean@shlegal.com](mailto:anita.kasseean@shlegal.com)  
**Subject:** EN010071 - NLHPP [DLAP-UKMATTERS.FID3822344]

Dear Sirs

Response to Examining Authority's first written questions.  
Question 10.2

We act on behalf of National Grid Electricity Transmission Plc (NGET) and National Grid Gas Plc (NGG) (together 'National Grid') and we are responding on behalf of National Grid to the Examining Authority's first written question 10.2 concerning the acceptability of draft Articles 21-23 of the DCO. This response should be read in conjunction with National Grid's earlier submitted relevant representation dated 18<sup>th</sup> December 2015, our response to Deadline 1 dated 9 March 2016 and the written representations submitted on 23 March 2016.

National Grid objects to the inclusion of Articles 21-23 in so far as they authorise the interference with or extinguishment of National Grid's existing rights in respect of its apparatus within and in close proximity to the Order Land.

The inclusion of protective provisions at Schedule 16 of the DCO is inadequate to remove the objection to the compulsory acquisition powers. The current provisions do not provide National Grid with the protections that it requires to maintain its operational network. National Grid has provided protective provisions to the Applicant that it considers to be necessary but the Applicant has advised National Grid that it will not submit them in substitute for those currently appearing on the face of the Order. The Applicant has told us that it believes that the Examining Authority will not accept a substitute set of protective provisions that will apply only to National Grid and that its suggested provisions must remain.

National Grid's standard protective provisions (amended to remove unnecessary provisions for a particular scheme) are promoted as part of all third party DCO applications that seek to interfere with National Grid's rights. We attach the set the of provisions provided to the Applicant and would ask that the Examining Authority includes these in any approved DCO in lieu of those currently in schedule 16 insofar as National Grid is concerned. If the Examining Authority considers that these provisions contain protections which are not necessary for this scheme, National Grid is of course happy to work with the Applicant and the Examining Authority to remove or amend the relevant text.

National Grid is continuing to work with the Applicant to put in place an agreement to deal with National Grid's other objections to the scheme, namely how decommissioned assets are dealt with and mechanisms to resolve potential conflicts between this scheme and National Grid's already consented North London Reinforcement Project. National Grid will continue to keep the Examining Authority apprised with progress.

We would be grateful if the Examining Authority could inform us of whether it accepts National Grid's protective provisions for inclusion within any DCO made.

Yours faithfully

**Sophie Stewart**  
Associate

**T** +441512374775  
**F** +44 (0) 151 236 9208  
**M** +447885261920  
**E** [sophie.stewart@dlapiper.com](mailto:sophie.stewart@dlapiper.com)



DLA Piper UK LLP  
[www.dlapiper.com](http://www.dlapiper.com)

# SCHEDULES

## SCHEDULE 16

### PROTECTIVE PROVISIONS

#### PART 1

#### FOR THE PROTECTION OF NATIONAL GRID AS ELECTRICITY AND GAS UNDERTAKER

##### **Application**

1. For the protection of the undertaker referred to in this Part of this Schedule the following provisions will, unless otherwise agreed in writing between the promoter and the undertaker, have effect.

##### **Interpretation**

2. 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 the undertaker to enable the undertaker 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, belonging to or maintained by that undertaker and any of its entities;

(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 and any of its entities;

together with any replacement apparatus and such other apparatus constructed pursuant to the Order that becomes operational apparatus of the undertaker or any of its entities 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 is given to the term "authorised development" in article 2 of this Order and includes any associated development authorised by the Order and for the purposes of this Part of this Schedule includes the use and maintenance of the authorised works;

“commence” has the same meaning as in article 2 of this Order and commencement shall be construed to have the same meaning;

“deed of consent” means a deed of consent, crossing agreement, deed of variation or new deed of grant agreed between the parties acting reasonably in order to vary and/or replace existing easements, agreements, enactments and other such interests so as to secure land rights and interests as are necessary to carry out, maintain, operate and use the apparatus in a manner consistent with the terms of this Part of this Schedule;

“functions” includes powers and duties;

“ground mitigation scheme” means a scheme approved by the undertaker (such approval not to be unreasonably withheld or delayed) setting out the necessary measures (if any) for 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 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, shall require the promoter to submit for the undertaker's approval a ground mitigation scheme;

“ground subsidence event” means any ground subsidence identified by the monitoring activities set out in 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 upon 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 the undertaker including construct, use, repair, alter, inspect, renew 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 properly and sufficiently to describe and assess the works to be executed;

“parent company” means a parent company of the promoter acceptable to and which shall have been approved by the Undertaker acting reasonably

“promoter” means the undertaker as defined in article 2 of this Order;

“undertaker” means, as appropriate—

(c) National Grid Electricity Transmission plc, an electricity undertaker being a licence holder within the meaning of Part 1 of the Electricity Act 1989; and

(d) National Grid Gas plc, a gas transporter within the meaning of Part 1 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 situated over, or within 15 metres measured in any direction of any apparatus the removal of which has not been required by the promoter under paragraph 7(2) or otherwise;

(b) may in any way adversely affect any apparatus the removal of which has not been required by the promoter under paragraph 7(2) or otherwise; and/or

(c) include any of the activities that are referred to in paragraph 8 of T/SP/SSW/22;

3. Except for paragraphs 4 (*apparatus in stopped up streets*), 9 and 10 (*retained apparatus: protection*), 11 (*expenses*) and 12 (*indemnity*) 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 the undertaker, the other provisions of this Schedule do not apply to apparatus in respect of which the relations between the promoter and the undertaker are regulated by the provisions of Part 3 of the 1991 Act.

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

4.—(1) Notwithstanding the temporary stopping up or diversion of any highway under the powers of article 13 (*temporary stopping up of streets and rights of way*), an undertaker will be at liberty at all times to take all necessary access across any such stopped up highway and/or to execute and do all such works and things in, upon or under any such highway as may be reasonably necessary or desirable to enable it to maintain any apparatus which at the time of the stopping up or diversion was in that highway.

### **Protective works to buildings**

5.—(1) The promoter, in the case of the powers conferred by article 17 (*protective work to buildings*), must exercise those powers so as not to obstruct or render less convenient the access

to any apparatus without the written consent of the undertaker and, if by reason of the exercise of those powers any damage to any apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal or abandonment) or property of the undertaker or any interruption in the supply of electricity and/or gas, as the case may be, by the undertaker is caused, the promoter must bear and pay on demand the cost reasonably incurred by the undertaker in making good such damage or restoring the supply; and, subject to sub-paragraph (2), shall—

- (a) pay compensation to the undertaker for any loss sustained by it; and
- (b) indemnify the undertaker against all claims, demands, proceedings, costs, damages and expenses which may be made or taken against or recovered from or incurred by that undertaker, by reason of any such damage or interruption.

(2) Nothing in this paragraph imposes any liability on the promoter with respect to any damage or interruption to the extent that such damage or interruption is attributable to the act, neglect or default of an undertaker or its contractors or workmen; and the undertaker will give to the promoter reasonable notice of any claim or demand as aforesaid and no settlement or compromise thereof shall be made by the undertaker, save in respect of any payment required under a statutory compensation scheme, without first consulting the promoter and giving the promoter an opportunity to make representations as to the claim or demand.

### **Acquisition of land**

6. (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 promoter may not acquire any land interest or apparatus or override any easement and/or other interest of the undertaker otherwise than by agreement.

(2) As a condition of agreement between the parties in paragraph 6(1), prior to the carrying out of any part of the authorised works (or in such other timeframe as may be agreed between the undertaker and the promoter) 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 the undertaker and/or affects the provisions of any enactment or agreement regulating the relations between the undertaker and the promoter in respect of any apparatus laid or erected in land belonging to or secured by the promoter, the promoter must as the undertaker reasonably requires enter into such deeds of consent upon such terms and conditions as may be agreed between the undertaker and the promoter acting reasonably and which must be no less favourable on the whole to the undertaker unless otherwise agreed by the undertaker, and it will be the responsibility of the promoter 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 promoter and the undertaker 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 the undertaker and/or other enactments relied upon by the undertaker as of right or other use in relation to the apparatus, then the provisions in this Schedule shall prevail.

(4) Any agreement or consent granted by the undertaker under paragraph [9] or [10] or any other paragraph of this part of this Schedule, shall not be taken to constitute agreement under sub-paragraph 6(1).

### **Removal of apparatus**

7.—(1) If, in the exercise of the agreement reached in accordance with paragraph 6 or in any other authorised manner, the promoter 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 in accordance with sub-paragraph (2) to (5) inclusive.

(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 promoter requires the removal of any apparatus placed in that land, it must give to the undertaker 56 days' advance 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 undertaker reasonably needs to remove any of its apparatus) the promoter must, subject to sub-paragraph (3), afford to the undertaker to its satisfaction (taking into account paragraph 8(1) below) the necessary facilities and rights

(a) for the construction of alternative apparatus in other land of or land secured by the promoter; and

(b) subsequently for the maintenance of that apparatus.

(3) If alternative apparatus or any part of such apparatus is to be constructed elsewhere than in other land of or land secured by the promoter, or the promoter 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 undertaker must, on receipt of a written notice to that effect from the promoter, 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 the undertaker to use its compulsory purchase powers to this end unless it elects to so do.

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

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

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

8.—(1) Where, in accordance with the provisions of this Part of this Schedule, the promoter affords to or secures for the undertaker facilities and rights in land for the construction, use, maintenance and protection 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 promoter and the undertaker and must be no less favourable on the whole to the undertaker than the facilities and rights enjoyed by it in respect of the apparatus to be removed unless otherwise agreed by the undertaker.

(2) If the facilities and rights to be afforded by the promoter and agreed with the undertaker under paragraph 8(1) above 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 the 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 in the matter will be referred to arbitration in accordance with paragraph [16] (*Arbitration*) of this Part of this Schedule and, the arbitrator shall make such provision for the payment of compensation by the promoter to the undertaker as appears to the arbitrator to be reasonable having regard to all the circumstances of the particular case.

### **Retained apparatus: protection Gas Undertakers**

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

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

(4) Any approval of the undertaker required under sub-paragraph (2)—

- (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, the undertaker may require such modifications to be made to the plans as may be reasonably necessary for the purpose of securing its 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-paragraph (1) or as relevant sub paragraph (4), as approved or as amended from time to time by agreement between the promoter and the undertaker and in accordance with such reasonable requirements as may be made in accordance with sub-paragraphs (5) or (7) by the undertaker for the alteration or otherwise for the protection of the apparatus, or for securing access to it, and the undertaker will be entitled to watch and inspect the execution of those works.

(7) Where the undertaker requires any protective works to be carried out by itself or by the promoter (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 undertakers' satisfaction prior to the commencement of any authorised works (or any relevant part thereof) for which protective works are required and the undertaker must give 56 days' notice of such works from the date of submission of a plan pursuant to this paragraph (except in an emergency).

(8) If the undertaker in accordance with sub-paragraphs (5) or (7) and in consequence of the works proposed by the promoter, reasonably requires the removal of any apparatus and gives written notice to the promoter of that requirement, paragraphs 1 to 3 and 6 to 8 apply as if the removal of the apparatus had been required by the promoter under paragraph 7(2).

(9) Nothing in this paragraph precludes the promoter 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 promoter 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 undertaker notice as soon as is reasonably practicable and a plan of those works and must—

- (a) comply with sub-paragraphs (5), (6) and (7) insofar as is reasonably practicable in the circumstances; and
- (b) comply with sub-paragraph (11) at all times.

(11) At all times when carrying out any works authorised under the Order the promoter must comply with the undertaker's policies for safe working in proximity to gas apparatus "Specification for safe working in the vicinity of National Grid, High pressure Gas pipelines and associated

installation requirements for third parties T/SP/SSW22” and HSE’s “HS(~G)47 Avoiding Danger from underground services”.

(12) As soon as reasonably practicable after any ground subsidence event attributable to the authorised development the promoter shall implement an appropriate ground mitigation scheme save that the undertaker 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 10.

**Retained apparatus: Protection: Electricity Undertakers**

**10.**—(1) Not less than 56 days before the commencement of any authorised works that are near to, or will or may affect, any apparatus the removal of which has not been required by the promoter under paragraph 7(2) or otherwise, the promoter must submit to the undertaker a plan of the works to be executed and seek from National Grid details of the underground extent of their electricity tower foundations.

(2) In relation to works which will or may be situated on, over, under or within (i) 15 metres measured in any direction of any apparatus, or (ii) involve embankment works within 15 metres of any apparatus, the plan to be submitted to the undertaker 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;
- (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;
- (f) any intended maintenance regimes; and
- (g) an assessment of risks of rise of earth issues.

(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 the matters set out in sub-paragraph (2), include a method statement describing; -

- (a) details of any cable trench design including route, dimensions, clearance to pylon foundations;
- (b) demonstration that pylon foundations will not be affected prior to, during and post construction;
- (c) details of load bearing capacities of trenches;
- (d) details of cable installation methodology including access arrangements, jointing bays and backfill methodology;
- (e) a written management plan for high voltage hazard during construction and ongoing maintenance of the cable route;
- (f) written details of the operations and maintenance regime for the cable, including frequency and method of access;
- (g) assessment of earth rise potential if reasonably required by the undertaker's engineers.
- (h) evidence that trench bearing capacity is to be designed to 26 tonnes to take the weight of overhead line construction traffic

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

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

- (a) may be given subject to reasonable conditions for any purpose mentioned in sub-paragraphs (6) or 8); and,
- (b) must not be unreasonably withheld.

(6) In relation to any work to which sub-paragraphs (2) or (3) apply, the undertaker may require such modifications to be made to the plans as may be reasonably necessary for the purpose of securing its apparatus against interference or risk of damage or for the purpose of providing or securing proper and convenient means of access to any apparatus.

(7) Works to which this paragraph applies must only be executed in accordance with the plan, submitted under sub-paragraph (1) or as relevant sub-paragraph (5), as approved or as amended from time to time by agreement between the promoter and the undertaker and in accordance with such reasonable requirements as may be made in accordance with sub-paragraphs (6) or (8) by the undertaker for the alteration or otherwise for the protection of the apparatus, or for securing access to it, and the undertaker will be entitled to watch and inspect the execution of those works.

(8) Where the undertaker requires any protective works to be carried out by itself or by the promoter (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 undertakers' satisfaction prior to the commencement of any authorised works (or any relevant part thereof) for which protective works are required and the undertaker shall give 56 days' notice of such works from the date of submission of a plan pursuant to this paragraph (except in an emergency).

(9) If the undertaker in accordance with sub-paragraphs (6) or (8) and in consequence of the works proposed by the promoter, reasonably requires the removal of any apparatus and gives written notice to the promoter of that requirement, paragraphs 1 to 3 and 6 to 8 apply as if the removal of the apparatus had been required by the promoter under paragraph 7(2).

(10) Nothing in this paragraph precludes the promoter 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 shall apply to and in respect of the new plan.

(11) The promoter 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 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) insofar as is reasonably practicable in the circumstances; and
- (b) comply with sub-paragraph (12) at all times.

(12) At all times when carrying out any works authorised under the Order, the promoter must comply with the undertaker's policies for development near overhead lines EN43-8 and HSE's guidance note 6 "Avoidance of Danger from Overhead Lines".

## **Expenses**

**11.**—(1) Subject to the following provisions of this paragraph, the promoter must pay to the undertaker on demand all charges, costs and expenses reasonably anticipated or incurred by the undertaker in, or in connection with, the inspection, removal, relaying or replacing, alteration or protection of any apparatus 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 the undertaker in connection with the acquisition of rights or the exercise of statutory powers for such apparatus including without limitation all costs incurred by the undertaker as a consequence of the undertaker;
  - (i) using its own compulsory purchase powers to acquire any necessary rights under paragraph 7(3); and/or
  - (ii) exercising any compulsory purchase powers in the Order transferred to or benefitting the undertaker;
- (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 making safe of 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.

(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) 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 promoter or, in default of agreement, is not determined by arbitration in accordance with article 34 (*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 by virtue of sub-paragraph (1) 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 promoter.

(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.

(5) An amount which apart from this sub-paragraph would be payable to an undertaker in respect of works by virtue of sub-paragraph (1) will, 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.

## **Indemnity**

**12.**—(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 or failure of any of the authorised development 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 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 undertaker, or there is any interruption in any service provided, or in the supply of any goods, by the undertaker, or the undertaker becomes liable to pay any amount to any third party, the promoter will—

- (a) bear and pay on demand the cost reasonably incurred by the undertaker in making good such damage or restoring the supply; and
- (b) 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 other than arising from any default of the undertaker..

(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 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 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; and
- (b) any authorised works and/or any other works authorised by this Part of this Schedule carried out by the undertaker as an assignee, transferee or lessee of the promoter with the benefit of the Order pursuant to section 156 of the Planning Act 2008 or article 8 (*consent to transfer benefit of order*) subject to the proviso that once such works become apparatus (“new apparatus”), any authorised works yet to be executed and not falling within this sub-section 3(b) will be subject to the full terms of this Part of this Schedule including this paragraph 11.

(4) The undertaker must give the promoter 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 promoter and considering their representations.

### **Enactments and agreements**

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

### **Co-operation**

14.(1) Where in consequence of the proposed construction of any of the authorised development, the promoter or the undertaker requires the removal of apparatus under paragraph 7(2) or the undertaker makes requirements for the protection or alteration of apparatus under paragraph (9), the promoter shall 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 development and taking into account the need to ensure the safe and efficient operation of the undertaker’s undertaking and the undertaker shall use its best endeavours to co-operate with the promoter for that purpose.

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

### **Access**

15. If in consequence of the agreement reached in accordance with paragraph 6(1) or the powers granted under this Order the access to any apparatus is materially obstructed, the promoter must provide such alternative means of access to such apparatus as will enable the

undertaker to maintain or use the apparatus no less effectively than was possible before such obstruction.

### **Arbitration**

**16.** Save for differences or disputes arising under paragraph 7(2), 7(4), 8(1), 9 and 11(5) any difference or dispute arising between the promoter and the undertaker under this Part of this Schedule must, unless otherwise agreed in writing between the promoter and the undertaker, be determined by arbitration in accordance with article 34 (*arbitration*).

SDS/SDS/80035/120019/UKM/74280322.1