

Date: 3 October 2024

## Written Representations of BOC Limited

in relation to the proposed application by H2 Teesside Limited for an order granting development consent for the H2 Teesside Hydrogen Project (reference EN070009)

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Fieldfisher LLP ("**FF**") represent BOC Limited ("**BOC**"). We are instructed by BOC to advise them in relation to the proposed application by H2 Teesside Limited (the "**Applicant**") for an order granting Development Consent for the H2 Teesside Hydrogen Project (the "**Application**").

## **1. Summary**

- 1.1 Currently the Applicant is of the view that BOC is not entitled to specific standalone protective provisions.
- 1.2 While BOC do not object in principle to the Application, this is on the basis that acceptable protective provisions are agreed between BOC and the Applicant.
- 1.3 Unfortunately, however there has been very limited progress in agreeing such protective provisions. In this respect, BOC object to the proposed acquisition of land and rights in their current form.
- 1.4 The Application site is located in the Teesside industrial hub where BOC's infrastructure assets for the production and supply of industrial gases is integral to the functioning of Teesside.
- 1.5 BOC's preliminary investigations have identified 243 plots across 812 entries listed in the Book of Reference ("**BoR**") as land that BOC owns or has an interest in, in respect of which powers to acquire land or to create or extinguish rights are sought for the purposes of the Application.
- 1.6 In summary, a significant percentage of BOC's total pressurised gas infrastructure is affected by the Application and requires detailed protections to be put in place on a plot-by-plot basis to ensure its safety and security of supply to end users within the wider Teesside site.

## **2. BOC**

BOC is the largest provider of industrial, medical and special gases in the UK and Ireland. As well as atmospheric gases, BOC supply thousands of different types of gas, and gas mixtures to more than 400,000 customers across an enormous range of industries. With a network of major production facilities, distribution centres and retail stores across the UK and Ireland, BOC supplies compressed, bulk and pipeline gases, chemicals, engineering solutions and associated equipment.

## **3. BOC's interests in the Application site and Teesside**

- 3.1 We note that the BoR does not currently list all plots in which BOC has an interest. BOC are working through the BoR to understand the references to BOC on a plot-by-plot basis and where plot references are missing. This is in order to ensure that protective provisions capture the full extent of rights that need to be retained. BOC will then supply this detail as part of the negotiations on the protective provisions.
- 3.2 When exiting the main HPF site, the Applicant's proposed hydrogen pipeline heads southwest along the Corridor, following the alignments of BOC pipelines which served the former steelworks site (the "**Pipeline**") and are to be retained for future developments. The Pipeline through the Corridor will stretch some 1.9km and be of buried construction, with a pipe diameter of 24 inches.
- 3.3 The Corridor is known to be congested and will require multiple crossings of existing services and pipelines which the Application states will be developed following engagement with the owners of existing apparatus. BOC will require clarity on how congestion in the Corridor will be dealt with.

#### 4. Statutory and regulatory requirements and other concerns

- 4.1 BOC are under a continuous obligation pursuant to statute and regulation (including but not limited to the Pipe-Lines Act 1962, the Pipeline Safety Regulations 1996 and the Energy Act 2003) to keep its pipeline infrastructure in good repair and maintenance, to keep it safe and promote fuel resilience.
- 4.2 BOC require access to the entirety of its pipeline infrastructure to comply with their statutory and regulatory obligation. If BOC's rights were to be extinguished and equivalent replacement rights not granted, BOC would be unable to carry out maintenance, monitoring and emergency works. This could ultimately mean its pipeline infrastructure could become hazardous thereby posing significant health and safety risks.

#### 5. Protective provisions

- 5.1 BOC object to the proposed acquisition of land and rights in their current form in the Application unless acceptable protective provisions are agreed. The agreement of protective provisions is of critical importance to ensure that BOC retains all necessary protections and rights to enable it to repair maintain and operate its apparatus and pipeline network and ensure it can comply with its statutory obligations. Appropriate protective provisions should also mitigate any health and safety concerns.
- 5.2 The Applicant's Solicitor, Pinsent Masons LLP ("**PM**"), provided draft generic protective provisions to FF on 24 April 2024. FF confirmed on the same day that such generic protective provisions would not be suitable to protect BOC's extensive infrastructure at the Application site. FF, after PM's cost undertaking was received on 6 June 2024, FF prepared draft protective provisions and these were sent to PM on 17 June 2024. Please see Annex 2 for these draft protective provisions.
- 5.3 We understand from Baker Rose, who attended the first Issues Specific Hearing on 28 August 2024 ("**ISH1**") on behalf of BOC, that the Applicant stated the protective provisions were "in progress with BOC". This is incorrect. Please see Annex 1 which shows the timeline of communication between FF and PM in relation to the agreement of protective provisions (and other matters). In summary at the time of the ISH1, FF had only heard from PM on three occasions in the 10 weeks since the draft protective provisions were sent to them (and two of these times related solely to queries on invoices).
- 5.4 Due to the lack of communication from PM, FF wrote to them on 6 September 2024 in an attempt to progress the draft protective provisions. On 11 September 2024, PM responded stating, inter alia, that:
- (a) there is no justification for the protective provisions that BOC are seeking based on the current information provided; and
  - (b) BOC should not be entitled to the protective provisions on the basis that it did not seek them in relation to the Net Zero Development Consent Order ("**NZT DCO**").
- 5.5 It is BOC's position that it has provided sufficient information for the Applicant to understand the location and nature of its property rights / interests as far as they relate to the Application. BOC has completed land interest questionnaires, together with pdf plans showing the alignment of its pipeline apparatus and an explanation of the type of pipeline apparatus impacted and the basis of such rights. Accordingly, it should not hold up the progress of agreeing the protective provisions.
- 5.6 BOC rejects the Applicant's attempt to use another project (the NZT DCO or any other DCO) as basis to deny it standalone protective provisions (in this entirely separate Application) which are themselves precedented for projects such as these. The Applicant is seeking land, power and

rights in land in which BOC has extensive rights and interests in respect of its extensive gas distribution network. BOC is seeking to mitigate the impact of the Applicant's project on its operations and it is in both parties' interest to do this.

5.7 While BOC did not apply for its own specific protective provisions under the NZT DCO it does wish to do so this time around in order to ensure:

- (a) that all parts of the BOC infrastructure are adequately protected; and
- (b) so that it has a direct contractual nexus with the Applicant.

BOC does not wish to rely on third parties and third-party approvals to protect its interests. As stated above at paragraph 5.6, the grant of protective provisions, such as those at Annex 2, is well precedented.

5.8 BOC are happy for the protective provisions to be included on the face of the order or by way of an agreement (provided that in the case of the latter, this would need to be in good time to ensure that appropriate protective provisions could be included within the order if a suitable agreement is not entered into).

## 6. Costs

6.1 PM provided FF with a cost undertaking to cover costs and disbursements reasonably and properly incurred by FF in the negotiation and settlement of the protective provisions and side agreement(s) whether or not the matter proceeds to completion, up to £15,000 plus VAT (the "**Undertaking**").

6.2 As at the date of these written representations, FF's August invoice of £558 plus VAT remains outstanding.

6.3 To date, we have not sought to invoice the Applicant for the costs incurred for identifying the interests BOC has in the Application site, however we have reserved the right to invoice the Applicant for all costs BOC has incurred in dealing with the Application.

## 7. Conclusion

7.1 Currently, as discussed at paragraphs 5.4, 5.6 and 5.7 above, the Applicant is arguing that BOC should not be entitled to specific standalone protective provisions. While BOC do not object in principle to the Application, this must be on the basis that acceptable protective provisions are agreed between BOC and the Applicant. As outlined at paragraph 5 above, there has been very limited progress in agreeing such protective provisions. In this respect, BOC object to the proposed acquisition of land and rights in their current form.

## **Annex 1 Correspondence between PM and FF**

1. 26 February 2024 – email from PM to FF confirming that PM act for the Applicant and that draft documents would be provided for review in due course.
2. 24 April 2024 – email from PM to FF confirming acceptance of the Application for examination on 22 April 2024 and attaching draft generic protective provisions extracted from the draft Application order.
3. 24 April 2024 – email from PM to FF objecting to those provisions.
4. 25 April 2024 – email from PM to FF seeking confirmation that BOC wished to replicate the protective provisions from the NZT.
5. 25 April 2024 – email from FF to PM stating that BOC wished to base protective provisions on the NZT Sembcorp provisions.
6. 6 June 2024 – email from PM to FF providing an undertaking in respect of BOC's costs and confirming that PM would revert in early course with respect to the draft protective provisions.
7. 10 June 2024 – email from FF to PM requesting amendments to the costs undertaking.
8. Further emails between FF and PM regarding the costs undertaking.
9. 17 June 2024 – email from FF to PM attaching draft protective provisions.
10. 17 June 2024 – email from FF to PM requesting update on the revised cost undertaking.
11. 24 June 2024 – email from FF to PM chasing for comments on the draft protective provisions and the revised cost undertaking.
12. 28 June 2024 – email from FF to PM chasing for comments on the draft protective provisions and the revised cost undertaking.
13. 1 July 2024 – email from PM to FF confirmed reviewing the draft protective provisions with the Applicant and will revert 'as soon as [we] can' with substantive comments and chasing revised undertaking.
14. 3 July 2024 – email from FF to PM on the revisions to the cost undertaking being requested.
15. 9 July 2024 – email from FF to PM chasing for comments on the draft protective provisions and the revised cost undertaking.
16. 15 July 2024 – email from FF to PM chasing for comments on the draft protective provisions and the revised cost undertaking.
17. 22 July 2024 – email from FF to PM sending June's invoice.
18. 23 July 2024 – email from PM to FF querying June's invoice.
19. 24 July 2024 – email from FF to PM chasing for comments on the draft protective provisions and response to query on June's invoice.
20. 29 July 2024 – email from FF to PM sending July's invoice.
21. 29 July 2024 – email from PM to FF querying June's invoice.

22. 8 August 2024 – email from FF to PM responding to query on July's invoice.
23. 20 August 2024 – email from FF to PM chasing for payment of June and July's invoices.
24. 29 August 2024 – email from FF to PM chasing for payment of June and July's invoices.
25. 2 September 2024 – email from FF to PM sending August's invoice.
26. 6 September 2024 – letter from FF to PM relating to lack of communication from PM.
27. 11 September 2024 – letter from PM to FF in response to letter of 6 September 2024.
28. 20 September 2024 – letter from FF to PM in response to letter of 11 September 2024.
29. 2 October 2024 – email from FF to PM chasing for payment of August's invoice.

**Annex 2 Draft Protective Provisions**



## FOR THE PROTECTION OF BOC LIMITED

### Application of this Part

1.

- (1) For the protection of BOC as referred to in this Part of this Schedule the following provisions have effect, unless otherwise agreed in writing between the undertaker and BOC.

### Interpretation of this Part

2. In this Part of this Schedule—

“alternative apparatus” means appropriate alternative apparatus to the satisfaction of BOC to enable BOC to fulfil its statutory functions in a manner no less efficient than previously;

“apparatus” any mains, pipes or other apparatus belonging to or maintained by BOC for the purposes of gas and water supply and any electrical cabling infrastructure, together with any replacement apparatus and such other apparatus constructed pursuant to the Order that becomes operational apparatus of BOC 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 development” includes any development authorised by the Order and (unless otherwise specified) for the purposes of this Part of this Schedule includes the use and maintenance of the authorised development and construction of any works authorised by this Schedule;

“BOC” means BOC Limited (Company Number **00337663**) whose registered office is at Forge, 43 Church Street West, Woking, Surrey, England, GU21 6HT or any successor as a gas and water transporter within the meaning of Part 1 of the 1986 Act;

“ground mitigation scheme” means a scheme approved by BOC (such approval not to be unreasonably withheld or delayed) setting out the necessary mitigation 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, will require the undertaker to submit for BOC’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 or on land; and

“specified works” means any of the authorised development or activities undertaken in association with the authorised development (including but not limited to piling) which—

- (a) will or may be situated over, or within 15 metres measured in any direction of any apparatus (the removal, capping off and/or plugging of which has not been required by the undertaker under paragraph [4](2) (removal, capping off and/or plugging of apparatus) or otherwise); and/or
- (b) in the case of explosive demolition works, will or may be situated over or within 50 metres in any direction of any apparatus (the removal, capping off and/or

- plugging of which has not been required by the undertaker under paragraph [4](2) (removal, capping off and/or plugging of apparatus) or otherwise);
- (c) may in any way adversely affect any apparatus (the removal, capping off and/or plugging of which has not been required by the undertaker under paragraph [4](2) (removal, capping off and/or plugging of apparatus) or otherwise); and/or
  - (d) includes any of the activities that are referred to in Linewatch's Booklet for Special Requirements for safe working in close proximity to high pressure pipelines (rev 23:03 as updated or replaced from time to time) and Linesearch Before U Dig (LinesearchbeforeUdig Safety Practices - LinesearchbeforeUdig (lsbud.co.uk)).

### **Protective works**

3. The undertaker, in the case of the powers conferred the Order, must exercise those powers so as not to obstruct or render less convenient the access to any apparatus for any purpose, including but not limited to repair, replacement and maintenance works, without the written consent of BOC.

### **Removal, capping off and/or plugging of apparatus**

4. —

- (1) If, in exercise of the powers conferred by this Order, the undertaker acquires any estate, interest or right in any land in which any apparatus is placed, the apparatus must not be removed, capped off and/or plugged, and any right of BOC to maintain the apparatus in the land must not be extinguished, until alternative apparatus has been constructed and is in operation to the reasonable satisfaction of BOC.
- (2) If, for the purpose of executing any works comprised in the authorised development in any land purchased, held, appropriated or used under this Order, the undertaker requires the removal, capping off and/or plugging of any apparatus placed in the Order land, it must give BOC advanced written notice of the requirement, together with a plan (including but not limited to details of the estimated and/or proposed timetable and duration of such removal, capping off and/or plugging works, and construction and bringing into operation of the alternative apparatus) 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 BOC reasonably needs to remove, cap off and/or plug any of its apparatus) the undertaker must afford to BOC the necessary facilities and rights for the construction, adjustment, alteration, use, repair, maintenance, renewal, inspection, removal, capping off, plugging and replacement of alternative apparatus and subsequently for the maintenance, repair, replacement and retention of the alternative apparatus.
- (3) If alternative apparatus or any part of such apparatus is to be constructed elsewhere than in the Order land, 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, BOC must, on receipt of a written notice to that effect from the undertaker, take such steps as are reasonable in the circumstances in an endeavour to assist the undertaker to obtain the necessary facilities and rights in the land in which the alternative apparatus is to be constructed save that this obligation must not extend to the requirement for BOC to use any powers it may have to this end unless it elects to so do.
- (4) Any alternative apparatus to be constructed in land of or seized by the undertaker under this Part must be constructed in such manner and in such line or situation as may be agreed between BOC and the undertaker or in default of agreement settled by an arbitrator under article [ ] (arbitration).

- (5) BOC must, after the alternative apparatus to be provided or constructed has been agreed, and subject to a written diversion agreement having been entered into between the parties and the grant to BOC 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 cap off and/or plug any apparatus required by the undertaker under the provisions of this Part of this Schedule.

### **Facilities and Rights for Alternative apparatus**

5. —

- (1) Where, in accordance with this Part, the undertaker affords or secures to BOC facilities and rights in land for the construction, use, maintenance and protection of the alternative apparatus in substitution for apparatus to be removed, capped off and/or plugged, those facilities and rights must be granted on such terms and conditions as may be agreed between the undertaker and BOC or in default of agreement determined by arbitration under article [ ] (arbitration), such terms to be no less favourable as a whole than the facilities and rights which applied to the apparatus to be removed, capped off and/or plugged unless otherwise agreed by BOC. Provided That for the avoidance of any doubt where the facilities and/or rights of BOC do not arise from explicit legal deeds and documents, then the undertaker must nonetheless grant to BOC such facilities and rights it may reasonably need to repair, replace, maintain and access the alternative apparatus.
- (2) If the facilities and rights to be afforded by the undertaker and agreed with BOC under subparagraph (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 BOC than the facilities and rights enjoyed by it in respect of the apparatus to be removed, capped off and/or plugged and the terms and conditions to which those facilities and rights are subject the matter will be referred to arbitration in accordance with article [ ] (arbitration) and the arbitrator may make such provision for the payment of compensation by the undertaker to BOC as appears to the arbitrator to be reasonable having regard to all the circumstances of the particular case.

### **Retained apparatus**

6. —

- (1) Not less than 56 days before the commencement of any specified works the undertaker must submit to BOC a plan and, if reasonably required by BOC, a ground monitoring scheme in respect of those works.
- (2) The plan to be submitted to BOC under sub-paragraph (1) must include a method statement and risk assessments (RAMS) and describe—
- (a) the exact position of the works together with full details of all apparatus within a radius of 15 metres;
  - (b) in the case of explosive demolition works, the exact position of the works together with full details of all apparatus within a radius of 50 metres;
  - (c) the proposed details, timings and frequency of peak particle velocity measurements to be carried out;
  - (d) a comprehensive traffic management plan in respect of all traffic relating to the authorised development, including but not limited details of loading, axle weights, proposed mitigation measures to prevent localised differential settlement, and types of vehicles and machinery, frequency, and days and times of access;

- (e) the level at which these are proposed to be constructed or renewed (including but not limited to cover level);
  - (f) the manner of their construction or renewal including details of excavation, positioning of plant etc, Provided That:
    - (i) any excavation work within a radius of 1 metre of any apparatus must be hand dug and the apparatus should be located by hand digging prior to the use of mechanical excavation, and any mechanical excavation within 1 metre of any apparatus must use toothless buckets and be supervised by a qualified banksman; and
    - (ii) excavated spoil must not be stored within 5 metres of any excavated apparatus;
  - (g) the position of all apparatus;
  - (h) by way of detailed drawings, every alteration proposed to be made to or close to any such apparatus;
  - (i) any intended maintenance regimes; and
  - (j) anything else reasonably required by BOC relevant to the safety, security and access of the apparatus.
- (3) The undertaker must not commence any works to which sub-paragraphs (1) and (2) apply until BOC has given written approval of the plan so submitted.
- (4) Any approval of BOC required under sub-paragraph (3)—
- (a) may be given subject to reasonable conditions for any purpose mentioned in sub-paragraph (5) or (7); and
  - (b) must not be unreasonably withheld or delayed.
- (5) In relation to any work to which sub-paragraphs (1) and/or (2) apply, BOC may require such modifications to be made to the plans, specifications and method statements as may be reasonably necessary for the purpose of securing its apparatus against interference or risk of damage, including but not limited to works causing material vibrations, for the provision of protective works, or for the purpose of providing or seeming proper and convenient means of access to any apparatus.
- (6) Works executed under sub-paragraphs (1) and (2) must be executed in accordance with the plans, specifications and method statements, submitted under sub-paragraph (2) or as relevant sub-paragraph (5), as approved or as amended from time to time by agreement between the undertaker and BOC and in accordance with such reasonable requirements as may be made in accordance with sub-paragraph (5) or by BOC for the alteration or otherwise for the protection of the apparatus, or for seeming access to it, and BOC will be entitled to watch and inspect the execution of those works.
- (7) Where BOC 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 BOC's reasonable satisfaction prior to the commencement of any specified works for which protective works are required and BOC must give notice of its requirement for such works within 42 days of the date of submission of a plan pursuant to this paragraph (except in an emergency).
- (8) If BOC in accordance with sub-paragraph (4) or (6) and in consequence of the works proposed by the undertaker, reasonably requires the removal, capping off and/or plugging

of any apparatus and gives written notice to the undertaker of that requirement, paragraphs [1] (application), [4] (removal, capping off and/or plugging of apparatus) and [5] (facilities and rights for alternative apparatus) apply as if the removal, capping off and/or plugging of the apparatus had been required by the undertaker under paragraph [5](2) (facilities and rights for alternative apparatus).

- (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 specified 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 Part 3 of the 1991 Act but in that case it must give to BOC notice as soon as is reasonably practicable and a plan of those works and must comply with sub-paragraphs (5), (6) and (7) insofar as is reasonably practicable in the circumstances and comply with sub-paragraph (10) at all times.
- (11) As soon as reasonably practicable to notify BOC of any ground subsidence event attributable to the authorised development and as soon as reasonably practicable thereafter the undertaker shall implement an appropriate ground mitigation scheme save that BOC 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 [8] (expenses).
- (12) To keep BOC updated of all peak particle velocity measurements without delay and as soon as reasonably practicable (after BOC acting reasonably considers that the results of the results show the potential to cause material vibration or stress to any apparatus and have notified the undertaker of the same), the undertaker shall carry out such mitigation actions as BOC shall reasonably require at the undertaker's cost without delay save that BOC retains the right to carry out any the said works itself and can recover any such costs in line with paragraph [8] (expenses).
- (13) To the extent that the authorised development results in any reduction of the level of cover over subterranean apparatus, the undertaker shall reinstate the level of cover to BOC's reasonable satisfaction without delay at the undertaker's cost save that BOC retains the right to carry out any the said works itself and can recover any such costs in line with paragraph [8] (expenses).
- (14) At all times when carrying out any works authorised under the Order the undertaker must ensure that all works comply with:
  - (a) Linewatch's Booklet for Special Requirements for safe working in close proximity to high pressure pipelines (rev23.03); and
  - (b) Linesearch Before U Dig (LinesearchbeforeUdig Safety Practices - LinesearchbeforeUdig (lsbud.co.uk)); and
  - (c) The Pipeline Safety Regulations 1996; and
  - (d) The Pipe-lines Act 1962;(all as updated or replaced from time to time)
- (15) The undertaker, in the case of the powers conferred by the Order, must not exercise those powers so as allow vehicular, construction or plant access to pass over the apparatus until protective works have been carried out to the reasonable satisfaction of BOC (including but not limited to weight spreader plates), details of which must be agreed by BOC acting reasonably, and the undertaker must agree in writing with BOC the maximum loading and frequency construction traffic.

## **Insurance**

7. —

- (1) The undertaker must at its own expense carry and maintain or cause to be carried or maintained insurance reasonably acceptable to BOC, in respect of the carrying out or authorising of any authorised development as may damage the apparatus with the following insurance coverages and limits, at minimum—
  - (a) Public Liability and all and any property damage to include without limitation losses arising from explosion, leakage, collapse or underground damage, contamination environmental impairment and clean-up costs: £20 million each and every claim; and
  - (b) Professional Indemnity insurance for an amount of at least £20 million for any one occurrence, or series of occurrences, arising out of any one event.
- (2) The undertaker must maintain such insurance with reputable insurers lawfully carrying on insurance business in the UK and on customary and usual terms and conditions prevailing for the time being in the insurance market.

## **Expenses**

8. —

- (1) Save where otherwise agreed in writing between BOC and the undertaker and subject to the following provisions of this paragraph, the undertaker must pay to BOC on demand all charges, costs and expenses properly incurred by BOC (including legal, professional and other third party costs) in, or in connection with, the supervision, inspection, removal, capping off and/or plugging, 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 development including without limitation—
  - (a) any costs reasonably incurred by or compensation properly paid by BOC in connection with the acquisition of rights or the exercise of any relevant powers for such apparatus including without limitation all costs incurred by BOC as a consequence of BOC—
    - (i) using any relevant powers to acquire any necessary rights under paragraph [3] (removal, capping off and/or plugging of apparatus); or
    - (ii) exercising any relevant powers in the Order transferred to or benefitting BOC;
  - (b) in connection with the cost of the carrying out of any diversion work or the provision of any alternative apparatus, where no written diversion agreement is otherwise in place;
  - (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, capped off and/or plugged under the provisions of this Part of this Schedule and which is not re-used as part of the alternative apparatus where it is reasonable to do so, that value being calculated after removal, capping off and/or plugging.
- (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 (acting reasonably) or, in default of agreement, is not determined by arbitration in accordance with article [ ] (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 BOC by virtue of sub-paragraph (1) will be reduced by the amount of that excess save to the extent that 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 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) Any amount which apart from this sub-paragraph would be payable to BOC 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 15 years earlier so as to confer on BOC 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**

9. —

- (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 or in consequence of the construction, use, maintenance, access or failure of any of the authorised development 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 it) 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, capping off and/or plugging for the purposes of the authorised development) or property of BOC, or there is any interruption in any service provided, or in the supply of any goods, by BOC, or BOC becomes liable to pay any amount to any third party, the undertaker will—

- (a) bear and pay on demand the cost reasonably and properly incurred by BOC in making good such damage or restoring the supply; and
  - (b) indemnify BOC for any other expenses, loss, demands, proceedings, damages, claims, penalty or costs incurred by or recovered from BOC, by reason or in consequence of any such damage or interruption or BOC becoming liable to any third party other than arising from any default of BOC.
- (2) The fact that any act or thing may have been done by BOC on behalf of the undertaker or in accordance with a plan approved by BOC or in accordance with any requirement of BOC as a consequence of the authorised development or under its supervision will not (unless sub-paragraph (3) applies), excuse the undertaker from liability under the provisions of this sub-paragraph (2) unless BOC 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) imposes any liability on the undertaker in respect of—
- (a) any damage or interruption to the extent that it is attributable to the neglect or default of BOC, its officers, employees, servants, contractors or agents; and
  - (b) any part of the authorised development and/or any other works authorised by this Part of this Schedule carried out by BOC as an assignee, transferee or lessee of the undertaker with the benefit of this Order pursuant to section 156 of the Planning Act 2008) subject to the proviso that once such works become apparatus (“new apparatus”), any authorised development 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.
- (4) BOC must give the undertaker reasonable notice of any such third party claim or demand and no settlement, admission of liability, compromise or demand is to be made without the consent of the undertaker (not to be unreasonably withheld or delayed).
- (5) BOC must use its reasonable endeavours to mitigate in whole or in part and to minimise any costs, expenses, loss, demands and penalties to which the indemnity under this paragraph applies where it is within BOC’s reasonable ability and control to do so and which expressly excludes any obligation to mitigate liability arising from third parties which is outside of BOC’s control. If requested to do so by the undertaker, BOC must provide an explanation of how the claim has been minimised or details to substantiate any cost or compensation claimed pursuant to sub-paragraph (1).
- (6) BOC must, in respect of any matter covered by the indemnity given by the undertaker in this paragraph, at all times act reasonably.

### **Enactments and agreements**

10. Save to the extent provided for to the contrary elsewhere in this Part of this Schedule or by agreement in writing between BOC 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 BOC in respect of any apparatus laid or erected in land belonging to the undertaker on the date on which this Order is made.



### **Notice of start and completion of commissioning**

11. Notice of the intended start of commissioning of the authorised development must be given to BOC no later than fourteen days prior to the date that commissioning is started.

### **Arbitration**

12. Any difference or dispute arising between the undertaker and BOC under this Part of this Schedule must, unless otherwise agreed in writing between the undertaker and that person, be referred to and settled by arbitration in accordance with article [ ] (arbitration).

### **Co-operation**

13. —

- (1) Where in consequence of the proposed construction of any part of the authorised development, the undertaker or BOC requires the removal, capping off and/or plugging of apparatus under paragraph [4](2) (removal, capping off and/or plugging of apparatus) or BOC makes requirements for the protection or alteration of apparatus under paragraph [6] (retained apparatus), the undertaker must use its best endeavours to co-ordinate the execution of the works in the interests of safety and the efficient and economic execution of the authorised development and taking into account the need to ensure the safe and efficient operation of BOC's operations.
- (2) For the avoidance of doubt whenever BOC'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.

### **Access**

14. If in consequence of the powers granted under this Order the access to any apparatus is materially obstructed, the undertaker must provide such alternative means of access to such apparatus as will enable BOC to repair, replace, maintain or use and access the apparatus (including but not limited to (where necessary) any excavation or temporary closing off of roads) no less effectively than was possible before such obstruction.

### **Notices**

15. Any plans submitted to BOC by the undertaker pursuant to paragraph [6] (retained apparatus) must be submitted to BOC's registered address or such other address as BOC may from time to time appoint instead for that purpose and notify to the undertaker in writing.