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Our reference AHPK/1218485

Your reference TR010063

**19 November 2024**

Dear Sir

**Application for a development consent order for the M5 Junction 10 Highways Improvements Scheme (Reference: TR010063)**

**National Grid Electricity Distribution (West Midlands) plc – Response to Written Questions – Deadline 9**

We continue to act on behalf of National Grid Electricity Distribution (West Midlands) plc ("**NGED**").

NGED remains the licensed distribution network operator under Section 6 Electricity Act 1989 (the "**EA1989**") for the area in which the M5 Junction 10 Development Consent Order 202[X] (the "**Order**") is proposed to have effect and which was submitted by Gloucestershire County Council (the "**Applicant**").

Please accept the contents of this letter as NGED's response to the Examining Authority's Written Questions 3 (published on 7 November 2024).

NGED reserves its right to appear at the upcoming hearings to provide further detail on the below.

**1. Response to Q5.0.1**

1.1 Please see Response to Q5.0.2 and Response to Q6.4.1 below for further detail on NGED's latest position in respect of the Order and the outstanding matters with the Applicant.

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## 2. **Response to Q5.0.2**

- 2.1 NGED has no objection in principle to the acquisition of the land rights sought by the Applicant (as set out in the Order), **provided that** its two key requirements are satisfied prior to the granting of the Order.
- 2.2 In a previous additional submission submitted on 6 November 2024 [\[AS-109\]](#) (the "**D7 Submission**"), we set out NGED's latest position in respect of negotiations with the Applicant and identified NGED's two key requirements as follows:
- (a) a satisfactory set of protective provisions in favour of NGED have been agreed with the Applicant and these have been included in the Order ("**Requirement 1**"); and
  - (b) an asset protection agreement has been entered into between on the parties on terms which are satisfactory to NGED ("**Requirement 2**").
- 2.3 If Requirement 1 and Requirement 2 are not satisfied prior to the granting of the Order, NGED considers that the granting of the Order has the potential to cause serious detriment (for the purpose of Section 127 of the Planning Act 2008) to NGED's assets and interests which form part of its undertaking.
- 2.4 A further update on the protective provisions and asset protection agreement referred to in Requirements 1 and 2 are referred to below at Response to 6.4.1(i).

## 3. **Response to Q6.4.1(i)**

### *Update on Requirement 1*

- 3.1 In the D7 Submission, we confirmed that the Applicant had included a set of protective provisions in the latest draft Order [\[REP7-002\]](#) at Part 5 of Schedule 9, which NGED considers to be inadequate to satisfactorily protect its assets and interests forming part of its undertaking (the "**Applicant's PPs**").
- 3.2 Since the D7 Submission, no further progress has been made between the parties on the outstanding points in the protective provisions and NGED's Requirement 1 remains unsatisfied.
- 3.3 We have appended a marked-up version of the Applicant's PPs to this submission at **Schedule 3** to show what changes NGED requires to be made to the Applicant's PPs before it considers Requirement 1 to be satisfied.
- 3.4 We note the Applicant submitted its case in respect of Statutory Undertaker's Land on 13 November 2024 [\[AS-110\]](#) (the "**Applicant's Case**").
- 3.5 NGED does not agree with the Applicant's belief that the Applicant's PPs "reflect best practice" (Paragraph 6.1.4 of the Applicant's Case).
- 3.6 NGED's preferred form protective provision at **Schedule 3** have been included in all the granted development consent orders listed in **Schedule 2**.
- 3.7 NGED agrees with the Applicant that there are two outstanding points which need to be resolved before NGED's Requirement 1 is satisfied, these are as follows:
- (a) Definition of "specified works"; and
  - (b) Approvals process for specified works.
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- 3.8 The Applicant has included a third outstanding point in the Applicant's Case, which relates to NGED's extent of liability for negligence under Paragraph 9(5) of the protective provisions in **Schedule 3**.
- 3.9 The Applicant previously agreed to the inclusion of Paragraph 9(5) of the protective provisions in **Schedule 3** in correspondence between the parties. However, we note in the Applicant's Case that the Applicant has now decided to withdraw its agreement on this point.
- 3.10 For the avoidance of doubt, NGED's responses to each of the Applicant's position on all three points in the Applicant's Case is set out in the table at **Schedule 1** of this submission.
- 3.11 Accordingly, NGED disagrees with the Applicant's view (at Paragraph 6.1.12 of the Applicant's Case) that "*any interference [to NGED's undertaking] can be minimised through the [Applicant's Protective Provisions] to be included in the DCO*".

*Update on Requirement 2*

- 3.12 As flagged in the D7 Submission, NGED previously provided the Applicant with its standard form asset protection agreement.
- 3.13 As of today's date, the parties have agreed in principle a form of asset protection agreement which is satisfactory to NGED.
- 3.14 While progress has been made on the asset protection agreement, NGED's Requirement 2 will not be fully satisfied until the asset protection agreement has legally completed.

**4. Summary**

- 4.1 In summary, NGED maintains its position that it does not object in principle to the granting of the Order.
- 4.2 However, until both NGED's Requirement 1 and 2 are fully satisfied, there is a risk of NGED's undertaking suffering serious detriment (for the purpose of Section 127 of the Planning Act 2008) if the Order is granted.
- 4.3 Therefore, in light of the Applicant's position on the protective provisions to date and Requirement 2 not yet being satisfied, NGED's holding objection to the granting of the Order remains in place and outstanding.

Yours sincerely,

[Redacted signature block]

**Arthur Hopkinson**  
Associate  
for **Osborne Clarke LLP**

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### Schedule 1

Outstanding Point	Applicant's Position	NGED's Position
<p><b>Definition of "specified works"</b></p>	<p><i>"The definition of "specified works" means any of the authorised development carried out within a certain distance from the statutory undertaker's apparatus. This is relevant because any "specified works" require that the Applicant seeks consent from NGED following the procedure set out in paragraph 60 onwards (Retained apparatus).</i></p> <p><i>NGED's position is that their preferred set of protective provisions should require that the definition of "specified works" captures anything within the single distance of 6 metres.</i></p> <p><i>The Applicant believes that such an approach would not be practical taking into account Scheme-specific issues. For this reason, the Applicant included a graded definition in the protective provisions for the protection of NGED in Schedule 9, which follow the HSE Guidance, Note 6 on "Avoiding danger from overhead power lines"</i></p>	<p>As the Applicant states, the definition of "specified works" sets a minimum distance within which the Applicant must seek NGED's approval of the authorised development works.</p> <p>The Applicant has proposed a distance of 6 metres for NGED's pylons, towers and Extra High Voltage assets only, and a distance of 1 metre for any other High Voltage or Low Voltage assets. This is taken from the HSE Guidance, Note 6 on "Avoiding danger from overhead power lines" (the "<b>Guidance</b>").</p> <p>The distances provided in the Guidance are expressed as "exclusion zones" which are distinct from the "specified works" distances in the protective provisions.</p> <p>"Exclusion zones" are the distances which the Applicant must not infringe upon under any circumstances. Whereas the "specified works" distances are the areas within which the Applicant must have NGED sign-off approval of their works plans.</p> <p>The "exclusion zones" are expressed in the Guidance as minimum distances and so it is not unreasonable for a distribution network operator to require additional safeguard distances in respect of its network where it considers it is necessary.</p> <p>Finally, the Guidance relates to overhead line works only and NGED has a number of underground electricity cable assets situated within the Order land.</p> <p>Therefore, the definition as taken from the Guidance is not suitable for use in the protective provisions here and NGED's position is that this definition is not sufficient to adequately protect all of NGED's assets within the land impacted by the Order.</p> <p>NGED's required "specified" works distance for all of its assets (regardless of voltage) in the protective provisions is 6 metres.</p> <p>The reason for this is that it provides NGED with the opportunity to raise issues with any of the authorised development which has the potential to adversely impact NGED's electricity distribution network.</p>

		<p>The 6 metre distance is a reasonable distance and is sufficiently certain to give the Applicant clarity on when it needs to have authorised development works approved by NGED.</p> <p>The practicality of the distance has been queried by the Applicant who has cited the administrative burden of getting its works approved by NGED within 6 metres of its assets.</p> <p>Ultimately, this is a programming point for the Applicant prior to commencement of development, as is the case for all promoters of Nationally Significant Infrastructure Projects. The same distance of 6 metres has been accepted by other promoters on large linear development consent order schemes. Please refer to the protective provisions included within the granted development consent orders listed in <b>Schedule 2</b> to this letter.</p> <p>Therefore, NGED does not consider the Applicant has justified a reduced distance in respect of the Order and the minimum distance of 6 metres should remain in the protective provisions.</p>
<p><b>Approvals process for specified works</b></p>	<p><i>"NGED's preferred drafting required the Applicant to give 60 days' notice (together with works plans) to NGED before starting any specified works. NGED is entitled to make "reasonable requirements" during that 60-day period.</i></p> <p><i>Under NGED's preferred draft, where the Applicant submits revised plans, the 60-day notice period set out above resets. The Applicant proposed to reduce the 'reset' period to 40 days. The Applicant also sought to reduce the 'reset' period from 60 to 40 days where the Applicant submits a revised works plan in response to a reasonable requirement of NGED.</i></p> <p><i>The Applicant maintains that the timescales set out in the protective provisions included in the dDCO [REP7-002] provide appropriate protection to NGED whilst also minimising approval periods so that unnecessary delays would</i></p>	<p>The timescale in NGED's preferred drafting provides sufficient certainty to the Applicant as to the timescales for the approval of any "specified works". NGED shall have 60 days from the date of a submission of plan of works to raise comments or approve it.</p> <p>The 60 day period is required because NGED is a large organisation which has statutory obligations under the EA1989 to maintain the regional electricity distribution network.</p> <p>Therefore, the timescale required to raise comments on any "specified works" needs to account for the competing demands of NGED's network and other internal resourcing constraints due to the scale of its regional operations.</p> <p>While delays to the Applicant's project are a developer risk which is reasonable for the Applicant to accept as the promoter of the Order, the protective provisions do provide the Applicant with some comfort in respect of the 60 day timeframe.</p> <p>Paragraph 7(3) confirms that, if NGED does not provide any comments on the submitted plan or confirmation of the same, then it will have deemed to approve it and the Applicant may commence its works.</p> <p>Additionally, Paragraph 7(8) clarifies that in the case of an emergency the Applicant does not need to comply with the 60 day timeframe, but instead can commence works and then deal with the approval of the plan after the fact.</p>

	<p><i>not obstruct the implementation of the Scheme."</i></p>	<p>Finally, Paragraph 11 sets out a general cooperation clause which requires NGED to co-ordinate with the Applicant to ensure the efficient and economic execution of the authorised development.</p> <p>This 60 day timescale and the comfort provided by the other paragraphs mentioned above has been accepted as market standard by the wider development industry. Please refer to the protective provisions included with the granted development consent orders listed in <b>Schedule 2</b> to this letter.</p> <p>Therefore, NGED does not consider the Applicant has justified a reduced timescale in respect of the Order and the timescale of 60 days should remain in the protective provisions.</p>
<p><b>NGED's extent of liability for negligence</b></p>	<p><i>"In their preferred set of protective provisions, NGED sought to limit their liability to the Applicant for negligence or breach of contract in respect of any diversion to the value of that diversion. This could pose significant risks to the Applicant where the result of NGED's not only negligence but also breach of contract would have a much greater impact and value than the works in question. The fact that this has been agreed on similar highway schemes cannot justify the Applicant assuming a risk of this quantity."</i></p>	<p>This relates to Paragraph 9(5) of the protective provisions.</p> <p>As expressed above, NGED considers this matter to have already been agreed by the Applicant.</p> <p>In previous negotiations, the Applicant had accepted the inclusion of Paragraph 9(5) provided Paragraph 11 was included in the protective provisions.</p> <p>Paragraph 11 provides some comfort to the Applicant that NGED will use its best endeavours to co-ordinate with the Applicant to ensure the efficient and economic execution of the authorised development.</p> <p>NGED has accepted the inclusion of Paragraph 11 in the protective provisions included at <b>Schedule 3</b>. However, it appears the Applicant has now changed its position in respect of Paragraph 9(5) despite what was previously agreed.</p> <p>Paragraph 9(5) is required is because it is unreasonable for NGED to be held negligent for costs which exceed the costs of any diversion works it may need to carry out due to the Order.</p> <p>This is because, but for the Applicant's Order, NGED would not be carrying out any diversion works and so it is proportionate to limit their liability/costs exposure to its required interventions as a result of the authorised development.</p> <p>Similarly, it is unreasonable for NGED to be liable for losses incurred by the Applicant which are the result of delays to the authorised development because of NGED diversion works.</p> <p>Again, without the existence of the Order, NGED would not need to carry out such diversion works and must balance scheduling the works with competing works requests across its regional distribution network.</p>

		<p>In order to maintain its statutory responsibilities under the Electricity Act 1989, NGED cannot commit to prioritising the Applicant's diversion works for the Applicant to the detriment of the remainder of its electricity undertaking.</p> <p>The risk to the Applicant incurring costs which exceed the value of the diversion works and which relate to delays to their construction timetable are typical development risks, for which it is market standard for the developer to take on. This is evidenced by the fact that all other promoters of the development consent orders listed in <b>Schedule 2</b> have agreed to Paragraph 9(5) in the respective protective provisions for their schemes.</p> <p>Therefore, NGED does not consider the Applicant should be treated differently in respect of the Order and Paragraph 9(5) should remain in the protective provisions.</p>
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## **Schedule 2**

1. Part 5 of Schedule 9 to the M54 to M6 Link Road Development Consent Order 2022
  2. Part 7 of Schedule 16 to the Portishead Branch Line (MetroWest Phase 1) Order 2022
  3. Part 6 of Schedule 9 to the A47 Wansford to Sutton Development Consent Order 2023
  4. Part 2 of Schedule 6 to the East Northamptonshire Resource Management Facility Order 2023
  5. Part 4 of Schedule 15 to the Cottam Solar Project Order 2024
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### Schedule 3

**PART 5**  
**FOR THE PROTECTION OF NATIONAL GRID ELECTRICITY DISTRIBUTION**  
**(WEST MIDLANDS) PLC**

**Application**

1. For the protection of National Grid Electricity Distribution (West Midlands) plc the following provisions, unless otherwise agreed in writing between the undertaker and National Grid Electricity Distribution (West Midlands) plc, have effect.

**Interpretation**

2. In this Part of this Schedule—

“alternative apparatus” means alternative apparatus adequate to enable NGED to fulfil its statutory functions in a manner not less efficient than previously and where the context requires includes any part of such alternative apparatus;

“alternative rights” means all and any necessary legal easements, leases, consents, or permissions required by NGED in order to permit or authorise a diversion and to permit or authorise NGED to lay, keep, operate, maintain, adjust, repair, alter, relay, renew, supplement, inspect, examine, test and remove the alternative apparatus;

“apparatus” means electric lines or electrical plant as defined in the 1989 Act, belonging to or maintained by NGED;

“diversion” means an alteration to the NGED Network in order to enable or facilitate the authorised development;

“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;

“NGED” means National Grid Electricity Distribution (West Midlands) plc (company number 03600574) whose registered office is at Avonbank, Feeder Road, Bristol, BS2 0TB;

“NGED Network” means NGED’s distribution network operated pursuant to its distribution licence issued pursuant to section 6 of the 1989 Act;

"plan" or "plans" includes all designs, drawings, specifications, method statements, programmes, calculations, risk assessments and other documents that are reasonably necessary to properly and sufficiently describe and assess the works to be executed;

"specified work" means so much of any of the authorised development that is carried out within 6 metres of any apparatus ~~comprising pylons, towers and Extra High Voltage (EHV) assets; and (b) 1 meter of apparatus comprising high voltage (HV) and low voltage (LV) assets.~~

“undertaker” means Gloucestershire County Council or such other person as has the benefit of the Order; and

other terms have the meaning given in article 2 (interpretation).

**Precedence of 1991 Act in respect of apparatus in streets**

3. This Part of this Schedule does not apply to apparatus in respect of which the relations between the undertaker and NGED are regulated by the provisions of Part 3 (street works in England and Wales) of the 1991 Act.

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(a) 1989 C. 29. The definition of “electricity plant” (in section 64) was amended by paragraphs 24 and 38(1) and (3) of Schedule 6 to the Utilities Act 2000 (c.27).

## **No acquisition except by agreement**

4. Regardless of any provision in this Order, the undertaker must not acquire any apparatus otherwise than by agreement.

## **Removal of apparatus**

5.—(1) If, in the exercise of the powers conferred by this Order, the undertaker requires that apparatus is relocated or diverted, that apparatus must not be removed under this Part of this Schedule and any right of NGED to maintain that apparatus in that land must not be extinguished until alternative apparatus has been constructed, alternative rights acquired or granted for the alternative apparatus and the alternative apparatus is in operation and access to it has been provided if necessary to the reasonable satisfaction of NGED in accordance with sub-paragraphs (2) to (10) or with such alternative or supplementary provisions as the undertaker and NGED may agree between them.

(2) If, for the purpose of executing any works for the authorised development in, on or under 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 NGED 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.

(3) If as a direct consequence of the exercise of any of the powers conferred by this Order NGED reasonably needs to remove or divert any of its apparatus and the removal of that apparatus has not been required by the undertaker under sub-paragraph (2) then NGED must give to the undertaker 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 this Part has effect as if the removal or diversion of such apparatus had been required by the undertaker under sub-paragraph (2).

(4) If as a direct consequence of the removal or diversion of apparatus under sub-paragraph (2) or (3) alternative apparatus is to be constructed in land owned or controlled by the undertaker then the undertaker must afford to NGED the necessary facilities alternative rights and any necessary third party consent or approvals for the construction of alternative apparatus in the other land owned or controlled by the undertaker.

(5) If the undertaker or NGED requires to remove or divert any apparatus placed within the Order land and alternative apparatus is to be constructed in land not owned or controlled by the undertaker as a consequence of the removal or diversion of apparatus then NGED shall use its reasonable endeavours to obtain alternative rights in the land in which the alternative apparatus is to be constructed.

(6) If alternative apparatus is to be constructed in land not owned or controlled by the undertaker and NGED is unable to obtain such alternative rights as are mentioned in sub-paragraph (5), the undertaker and NGED shall consider whether there is an alternative engineering solution that can achieve the diversion without the need for the use of compulsory powers. Should such an alternative engineering solution not be practicable and deliverable in a reasonable timescale and at a reasonable cost (which shall be determined by the undertaker acting reasonably), NGED may but shall not be compelled to use the powers of compulsory acquisition set out in this Order or the 1989 Act to obtain the necessary facilities and rights in the land outside the Order limits in which the alternative apparatus is to be constructed in accordance with a timetable agreed between NGED and the undertaker.

(7) Any alternative apparatus required pursuant to sub-paragraphs (2) or (3) must be constructed in such manner and in such line or situation as may be agreed between NGED and the undertaker or in default of agreement settled in accordance with paragraph 10.

(8) NGED must, after the alternative apparatus to be provided or constructed has been agreed or settled pursuant to paragraph 10, and after the acquisition by or grant to NGED of any such facilities and alternative rights as are referred to in sub-paragraphs (2) to (6), proceed without unnecessary delay to construct and bring into operation the alternative apparatus and subsequently to remove any apparatus required to be removed under the provisions of this Part of this Schedule.

(9) Regardless of anything in sub-paragraph (8), if the undertaker gives notice in writing to NGED 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 controlled by the undertaker, that work, instead of being executed by NGED, must be executed by the undertaker—

- (a) in accordance with plans and specifications and in such line or situation agreed between the undertaker and NGED, or, in default of agreement, determined in accordance with paragraph (10); and
- (b) without unnecessary delay under the superintendence, if given, and to the reasonable satisfaction of NGED.

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

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

6.—(1) Where, in accordance with the provisions of this Part of this Schedule, the undertaker affords to NGED facilities and alternative rights for the construction and maintenance in land of the undertaker of alternative apparatus in substitution for apparatus to be removed, those facilities and alternative rights must be granted upon such terms and conditions as may be agreed between the undertaker and NGED or in default of agreement settled in accordance with paragraph 10.

(2) In settling those terms and conditions in respect of alternative apparatus to be constructed in the land of the undertaker, the expert must—

- (a) give effect to all reasonable requirements of the undertaker for ensuring the safety and efficient operation of the authorised development and for securing any subsequent alterations or adaptations of the alternative apparatus which may be required to prevent interference with any proposed works of the undertaker;
- (b) have regard to the terms and conditions, if any, applicable to the apparatus for which the alternative apparatus is to be substituted;
- (c) have regard to NGED's ability to fulfil its service obligations and comply with its licence conditions; and
- (d) have regard to the standard form rights NGED ordinarily secures for the type of alternative apparatus to be constructed in the circumstances similar to the authorised development.

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

### **Retained apparatus**

7.—(1) Not less than 60 days before the undertaker intends to start the execution of any specified work where the removal of the apparatus in question has not been required under paragraph 5, the undertaker shall submit to NGED a plan of the specified works to be executed. Any submission must note the time limits imposed on NGED under sub-paragraph (3) below.

(2) Subject to sub-paragraph (3) below the undertaker shall not commence any works to which sub-paragraph (1) applies until NGED has identified any reasonable requirements it has for the alteration or protection of the apparatus, or for securing access to it.

(3) If by the expiry of 60 days beginning with the date on which a plan under sub-paragraph (1) is submitted NGED has not advised the undertaker in writing of any reasonable requirements for the alteration or protection of the apparatus, or for securing access to it, it shall be deemed not to

have any such requirements and the undertaker shall be at liberty to proceed with the specified works.

(4) The specified works referred to in sub-paragraph (1) must be executed only in accordance with the plan submitted under sub-paragraph (1) and in accordance with any reasonable requirements as may be notified in accordance with sub-paragraphs (2) and (3) by NGED and NGED shall be entitled to watch and inspect the execution of those works.

(5) At all times when carrying out the authorised development the undertaker shall comply with NGED's *Avoidance of Danger from Electricity Overhead Lines and Underground Cables* (2014), the Energy Network Association's *A Guide to the Safe Use of Mechanical Plant in the Vicinity of Electricity Overhead Lines* (undated), the Health and Safety Executive's *GS6 Avoiding Danger from Overhead Power Lines* and the Health and Safety Executive's *HSG47 Avoiding Danger from Underground Services (Third Addition)* (2014) as the same may be replaced from time to time.

(6) If NGED, in accordance with sub-paragraphs (2) and (3) and in consequence of the specified works proposed by the undertaker, reasonably requires the removal or diversion of any apparatus and gives written notice to the undertaker of that requirement, this Part of this Schedule applies as if the removal or diversion of the apparatus had been required by the undertaker under paragraph 5(3).

(7) Nothing in this paragraph 7 (Retained apparatus) precludes the undertaker from submitting at any time or from time to time, but in no case less than 60 days before commencing the execution of any specified works, a new plan instead of the plan previously submitted, and having done so the provisions of this paragraph 7 (Retained apparatus) apply to and in respect of the new plan.

~~(7) — Where the undertaker submits a revised plan of specified works pursuant to a reasonable requirement of NGED under this paragraph 7 (Retained apparatus), then subject to sub paragraphs (9) and (10) the revised plan must be submitted no less than 40 days before commencing the execution of the specified works.~~

~~(8) — The undertaker shall not commence any specified works to which sub paragraph (8) applies until NGED has identified any reasonable requirements it has for the alteration or protection of the apparatus, or for securing access to it.~~

~~(8) (9) If by the expiry of 40 days beginning with the date on which a revised plan under subparagraph (8) is submitted NGED has not advised the undertaker in writing of any reasonable requirements for the alteration or protection of the apparatus, or for securing access to it, it shall be deemed not to have any such requirements and the undertaker shall be at liberty to proceed with the specified works.~~ The undertaker is not required to comply with sub-paragraph (1) in a case of emergency but in that case it must give to NGED notice as soon as is reasonably practicable and a plan of those works as soon as reasonably practicable subsequently and must comply with any reasonable requirements stipulated by NGED under sub-paragraph (2) and with sub-paragraphs (4) and (5) in so far as is reasonably practicable in the circumstances. Nothing in this sub-paragraph prevents NGED from exercising its rights under sub-paragraph (6).

### **Expenses and costs**

**8.**—(1) Subject to the following provisions of this paragraph 8 (Expenses and costs), the undertaker must pay to NGED the proper and reasonable expenses reasonably incurred by NGED in, or in connection with, the inspection, removal, diversion, alteration or protection of any apparatus, the construction of any alternative apparatus and the acquisition or grant of alternative rights for the alternative apparatus, arising as a result of the powers conferred upon the undertaker pursuant to this Order.

(2) The value of any apparatus removed under the provisions of this Part of this Schedule must 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 NGED requires that alternative apparatus of better type, of greater capacity, of greater dimensions or at a greater depth is necessary in substitution for existing apparatus which for NGED's network requirements is over and above what is necessary as a consequence of and for the purpose of the authorised development,

NGED shall reduce the cost of such additional requirements from the amount payable by the undertaker pursuant to sub-paragraph (1).

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

- (a) an extension of apparatus to a length greater than the length of existing apparatus is not to 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 is to 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 a utility undertaker in respect of works by virtue of sub-paragraph (1), 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 utility undertaker any financial benefit by deferment of the time for renewal of the apparatus in the ordinary course, is to be reduced by the amount which represents that benefit.

### **Liability**

**9.**—(1) Subject to sub-paragraph (2), if by reason or in consequence of the construction of any specified work or any subsidence resulting from any of those 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 NGED the undertaker is to—

- (a) bear and pay the cost reasonably and properly incurred by NGED in making good such damage or restoring the supply; and
- (b) reimburse NGED for any other expenses, loss, damages, penalty or costs reasonably and properly incurred by NGED, by reason or in consequence of any such damage or interruption.

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

(3) NGED must give the undertaker reasonable notice of any third party claim or demand and no settlement, admission of liability or compromise must, unless payment is required in connection with a statutory compensation scheme, be made without first consulting the undertaker and considering their representations.

(4) NGED must act reasonably in relation to any claim or demand served under sub-paragraph (1) and use its reasonable endeavours to mitigate and minimise any costs, expenses, loss, demands, proceedings and penalties to which a claim or demand under sub-paragraph (1) applies.

(5) NGED's liability to the undertaker for negligence or breach of contract, in respect of each diversion, shall be limited to the value of that diversion and NGED shall not otherwise be liable to the undertaker for any losses or costs incurred by the undertaker resulting from delays to the authorised development as a result of its failure to undertake works to deliver any alternative apparatus.

### **Expert determination**

**10.**—(1) Article 40 (arbitration) shall apply to any difference as to the legal interpretation of this Part of this Schedule and as provided for in sub-paragraph (7).

(2) Save as provided for in sub-paragraph (1) or sub-paragraph (7) any difference under this Part of this Schedule must be referred to and settled by a single independent and suitable person who holds appropriate professional qualifications and is a member of a professional body relevant to the matter in dispute acting as an expert, such person to be agreed by the differing parties or, in the absence of agreement, identified by the President of the Institution of Civil Engineers or the President of the Institution of RICS or the President of the Institution of Engineering and

Technology (as relevant and agreed between NGED and the undertaker, both acting reasonably and without delay).

(3) All parties involved in settling any difference must use best endeavours to do so within 14 days from the date of a dispute first being notified in writing by one party to the other and in the absence of the difference being settled within that period the expert must be appointed within 21 days of the notification of the dispute.

(4) The costs and fees of the expert and the costs of NGED and the undertaker are payable by the parties in such proportions as the expert may determine. In the absence of such determination the costs and fees of the expert are payable equally by the parties who shall each bear their own costs.

(5) The expert must—

- (a) invite the parties to make submission to the expert in writing and copied to the other party to be received by the expert within 14 days of the expert's appointment;
- (b) permit a party to comment on the submissions made by the other party within 7 days of receipt of the submission;
- (c) issue a decision within 14 days of receipt of the submissions under sub-paragraph (b); and
- (d) give reasons for the decision.

(6) The expert must consider where relevant—

- (a) the development outcome sought by the undertaker;
- (b) the ability of the undertaker to achieve its outcome in a timely and cost-effective manner;
- (c) the nature of the power sought to be exercised by the undertaker;
- (d) the effectiveness, cost and reasonableness of proposals for mitigation arising from any party;
- (e) NGED's service obligations and licence conditions; and
- (f) any other important and relevant consideration.

(7) Any determination by the expert is final and binding, except in the case of manifest error in which case the difference that has been subject to expert determination may be referred to and settled by arbitration under article 46.

### Cooperation

11. Where in consequence of the proposed construction of any part of the authorised development, the undertaker or NGED requires apparatus to be removed, relocated or diverted under paragraph 5 or NGED makes requirements for the protection or alteration of apparatus under paragraph 7, 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 NGED's undertaking and NGED must use its best endeavours to co-operate with the undertaker for that purpose.