

## SCHEDULES

### SCHEDULE 9

Article 34

#### 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—

“acceptable credit provider” means a bank or financial institution with a credit rating that is not lower than “A-” if the rating is assigned by Standard & Poor’s Ratings Group or Fitch Ratings, or “A3” if the rating is assigned by Moody’s Investors Services Inc.;

“acceptable insurance” means a third party liability insurance effected and maintained by the promoter with a limit of indemnity of not less than £25,000,000 (Twenty-Five Million Pounds) per occurrence or series of occurrences arising out of one event. Such insurance must be maintained for the construction period of the authorised works which constitute specified works and arranged with an internationally recognised insurer of repute operating in the London and worldwide insurance market underwriters whose security/credit rating meets the same requirements as an “acceptable credit provider”. Such policy must include (but is not limited to)—

- (a) National Grid Electricity Transmission Plc and National Grid Gas Plc as a Co-Insured;
- (b) a cross liabilities clause; and
- (c) contractors’ pollution liability for third party property damage and third party bodily damage arising from a pollution/contamination event with cover of £10,000,000 (Ten Million Pounds) per event or £20,000,000 (Twenty Million Pounds) in aggregate;

“acceptable security” means either—

- (a) a parent company guarantee from a parent company in favour of National Grid Electricity Transmission Plc and National Grid Gas Plc to cover the promoter’s liability to National Grid Electricity Transmission Plc and National Grid Gas Plc to a cap of not less than £10,000,000 (Ten Million Pounds) per asset per event up to a total liability cap of £25,000,000 (Twenty-Five Million Pounds) (in a form reasonably satisfactory to the undertaker and where required by the undertaker, accompanied with a legal opinion confirming the due capacity and authorisation of the parent company to enter into and be bound by the terms of such guarantee); or

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- (b) a bank bond or letter of credit from an acceptable credit provider in favour of National Grid Electricity Transmission Plc and National Grid Gas Plc to cover the promoter's liability to National Grid Electricity Transmission Plc and National Grid Gas Plc for an amount of not less than £10,000,000 (Ten Million Pounds) per asset per event up to a total liability cap of £25,000,000 (Twenty-Five Million Pounds) (in a form reasonably satisfactory to the undertaker);

“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(1), belonging to or maintained by that undertaker;
- (b) in the case of a gas undertaker, any mains, pipes or other apparatus belonging to or maintained by a gas transporter for the purposes of gas supply,

together with any replacement apparatus and such other apparatus constructed pursuant to the Order that becomes operational apparatus of the undertaker 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 and construction of any works authorised by this Part of this Schedule;

“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;

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(1) 1989 c. 29; the definition of “electrical plant” has been amended by section 108 of and paragraphs 24 and 38 to Schedule 6 to the Utilities Act 2000 (c. 27).

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“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;

“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 (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/SSW/22”); and

“undertaker” means, as appropriate, National Grid Electricity Transmission Plc and National Grid Gas Plc in their capacity as—

- (a) an electricity undertaker, being a licence holder within the meaning of Part 1 of the Electricity Act 1989; and
- (b) a gas transporter within the meaning of Part 1 of the Gas Act 1986(2).

**3.** Except for paragraphs 4 (apparatus in stopped up streets), 9 (retained apparatus: protection of Gas Undertakers), 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 Part 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)** Without prejudice to the generality of any other protection afforded to the undertaker elsewhere in the Order, where any street is stopped up under the Order, if the undertaker has any apparatus in the street or accessed via that street the undertaker will be entitled to the same rights in respect of such apparatus as it enjoyed immediately before the stopping up and the promoter will grant to the undertaker, or will procure the granting to the undertaker of, legal easements reasonably satisfactory to the specified undertaker in respect of such apparatus and access to it prior to the stopping up of any such street or highway.

(2) Notwithstanding the temporary stopping up or diversion of any highway under the powers of article 13 (temporary prohibition or restriction of use of streets), 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

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(2) 1986 c. 44; section 7(1) has been amended by sections 149 and 197 of and Schedule 23 to the Energy Act 2004 (2004 c. 20), and by regulations 18 of the Electricity and Gas (Internal Markets) Regulations 2011 (S.I. 2011/2704).

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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 sub-paragraph (1), prior to the carrying out of any part of the authorised works (or in such other timeframe as may be agreed between 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 Part of this Schedule shall prevail.

(4) Any agreement or consent granted by the undertaker under paragraphs 9 or 10 or any other paragraph of this Part of this Schedule shall not be taken to constitute agreement under paragraph 6.

### **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-paragraphs (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 do so.

(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 sub-paragraph (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

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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 of 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 undertaker 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 of 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;

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- (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; and
  - (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 40 (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-

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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 works by or on behalf of the promoter or in consequence of any act or default of the promoter (or any person employed or authorised by him) in the course of carrying out such works, including without limitation works carried out by the promoter under this Part of this Schedule or any subsidence resulting from any of these works, any damage is caused to any apparatus or alternative apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal for the purposes of the authorised works) or property of 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 this sub-paragraph (1) unless the undertaker fails to carry out and execute the works properly with due care and attention and in a skilful and workman like manner or in a manner that does not accord with the approved plan.

(3) Nothing in sub-paragraph (1) shall impose any liability on the promoter in 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 undertaker with the benefit of the Order pursuant to section 156 of the Planning Act 2008 or article 7 (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 12.

(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.

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

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

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

### **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 works, the promoter or an undertaker requires the removal of apparatus under paragraph 7(2) or an undertaker makes requirements for the protection or alteration of apparatus under paragraphs 9(5), 9(7), 10(6) or 10(8), 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 each undertaker shall use its best endeavours to co-operate with the promoter for that purpose.

(2) For the avoidance of doubt whenever the statutory undertaker's consent, agreement or approval to 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**

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

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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 40 (arbitration).

## **PART 2**

### **FOR THE PROTECTION OF OPERATORS OF ELECTRONIC COMMUNICATIONS CODE NETWORKS**

**17.** For the protection of the operator referred to in this Part of this Schedule, the following provisions, unless otherwise agreed in writing between the undertaker and the operator concerned, are to have effect.

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

“the 2003 Act” means the Communications Act 2003(3);

“conduit system” has the same meaning as in the electronic communications code and references to providing a conduit system are to be construed in accordance with paragraph 1(3A) of that code;

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

“electronic communications code” has the same meaning as in Chapter 1 of Part 2 of the 2003 Act;

“electronic communications code network” means—

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

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

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

**19.** The exercise of the powers conferred by article 29 (statutory undertakers) is subject to paragraph 23 of Schedule 2 of the Telecommunications Act 1984(4).

**20.—(1)** Subject to paragraphs 20(2) and 20(3), if as the result of the authorised development or its construction, or of any subsidence resulting from any of those works—

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

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(3) 2003 c. 21.

(4) 1984 c. 12.

the undertaker must bear and pay the reasonable and proper costs incurred by the operator in making good such damage or restoring the supply as the case may be and must make proper and reasonable compensation to an operator for any other expenses, loss, damaged, penalty or costs incurred by it.

(2) Nothing in paragraph 20(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 an operator, its officers, servants, contractors or agents.

(3) The operator must give the undertaker reasonable notice of any such claim or demand and no settlement or compromise may be made without the consent of the undertaker which, if it withholds such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand.

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

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

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

## PART 3

### FOR THE PROTECTION OF THE CANAL & RIVER TRUST

**23.** The following provisions are to have effect for the protection of the Canal & River Trust, unless otherwise agreed in writing between the undertaker and the Canal & River Trust.

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

“construction” includes execution, placing, alteration and reconstruction and “construct” and “constructed” have corresponding meanings;

“the engineer” means an engineer appointed by the Canal & River Trust and approved by the undertaker for the purposes of this Order;

“Canal & River Trust” means the Canal & River Trust acting as a trustee of the Waterways Infrastructure Trust or any successor body performing the same functions and which holds any waterways within the order limits;

“code of practice” means the Code of Practice for Works Affecting the Canal & River Trust April 2016 as amended from time to time;

“detriment” means any damage to the waterway or any other property of the Canal & River Trust caused by the presence of the authorised works and, without prejudice to the generality of that meaning, includes—

- (a) any effect on the stability of the Canal & River Trust property or the safe operation of any waterway;
- (b) any obstruction of, or interference with, or hindrance or damage to, navigation or to any use of the waterway (including towing paths);
- (c) the erosion of the bed or banks of the waterway, or the impairment of the stability of any works, lands or premises forming part of the waterway;
- (d) the deposit of materials or the siltation of the waterway so as to damage the waterway;
- (e) the pollution of the waterway;

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- (f) any significant alteration in the water level of the waterway, or significant interference with the supply of water thereto, or drainage of water therefrom;
- (g) any harm to the ecology of the waterway (including any adverse impact on any site of special scientific interest comprised in the Canal & River Trust network); and
- (h) any interference with the exercise by any person of rights over the Canal & River Trust's network;

“plans” includes sections, designs, design data, drawings, specifications, soil reports, calculations, descriptions (including descriptions of methods of construction), programmes and details of the extent, timing and duration of any proposed use and/or occupation of any Canal & River Trust property;

“specified work” means so much of Work No.10 as is situated upon, across, under, over or within 15 metres of, or may in any way affect the waterway; and

“waterway” means the canal within the order limits and includes any pond or other waterway or course situated on Canal & River Trust property, any works, services, apparatus, equipment, lands (including subsoil) or premises belonging to or under the control of the Canal & River Trust and held or used by it in connection with its statutory functions.

**25.—(1)** Where under this Part of this Schedule or anywhere else under this Order the Canal & River Trust (or the engineer) is required to give its consent or approval in respect of any matter, that consent or approval is subject to the condition that the Canal & River Trust must observe the provisions of its code of practice for works affecting waterways and where the code of practice is adhered to and its provisions observed, such consent must not be unreasonably withheld. For the avoidance of doubt, any consent may be issued subject to reasonable conditions including any condition which required compliance with the code of practice or any applicable part thereof and in respect of article 16 (discharge of water), it is reasonable to impose the following conditions—

- (a) requiring the payment of such charges as are typically charged by the owner of the relevant waterway;
- (b) specifying the maximum volume of water which may be discharged in any period; and
- (c) authorising the Canal & River Trust on giving reasonable notice (except in an emergency, when the Canal & River Trust may require immediate suspension) to the undertaker to require the undertaker to suspend the discharge of water or reduce the flow of water where this is necessary by reason of any operational or environmental requirement of the Canal & River Trust

(2) In so far as any specified work or the acquisition of rights under and/or over or use of the Canal & River Trust property is or may be subject to the code of practice, the Canal & River Trust must—

- (a) co-operate with the undertaker with a view to avoiding undue delay and securing conformity as between any plans approved by the engineer and requirements emanating from that code; and
- (b) use its reasonable endeavours to avoid any conflict arising between the application of that code and the proper implementation of the authorised development pursuant to this Order.

**26.—(1)** The undertaker must not exercise the powers conferred by article 20 (compulsory acquisition of land) or the powers conferred by section 11(3) of the 1965 Act against the Canal & River Trust in respect of any Canal & River Trust property.

(2) The undertaker must not in the exercise of the powers conferred by this Order prevent pedestrian or vehicular access to any of the Canal & River Trust property, unless preventing such access is with the consent of the Canal & River Trust.

(3) The undertaker must not exercise the powers conferred by sections 271 or 272 of the 1990 Act, as applied by article 29 (statutory undertakers) to this Order, in relation to any right of access of the Canal & River Trust to Canal & River Trust property, but such right of access may be diverted with the consent of the Canal & River Trust.

(4) The undertaker shall not exercise any power conferred by this Order to discharge water into the waterway under article 16 (discharge of water) or in any way interfere with the supply of water to or the drainage of water from the waterway unless such exercise is with the consent of the Canal & River Trust, save as to surface water discharge which will not require the consent of the Canal & River Trust.

(5) The undertaker shall not exercise the powers conferred by article 18 (authority to survey and investigate the land) of this Order in relation to the waterway unless such exercise is with the consent of the Canal & River Trust.

**27.—(1)** The undertaker must before commencing construction of any specified work or carrying out any works on Canal & River Trust property whatsoever supply to the Canal & River Trust proper and sufficient plans of that work and such further particulars available to it as the Canal & River Trust may within 14 days of the submission of the plans reasonably require for the reasonable approval (having regard to the undertaker's timetable for the construction of the authorised development) of the engineer and the specified work must not be commenced without such approval except in accordance with article 40 (arbitration).

(2) If—

- (a) at the expiry of the period of 28 days beginning on the date on which plans (and any other particulars reasonably required under sub-paragraph (1)) have been submitted to the Canal & River Trust for its consent under sub-paragraph (1); and
- (b) the engineer has not served
  - (i) notice of refusal of those plans; and
  - (ii) the grounds for refusal upon of those plans,

the undertaker may serve upon the engineer a determination notice.

(3) If—

- (a) the undertaker has served a determination notice referred to in paragraph 27(2) and the period of 14 days from the date of service has expired; and
- (b) the engineer has not served upon the undertaker;
  - (i) notice of refusal of those plans; and
  - (ii) the grounds of refusal,

the engineer is deemed to have approved the plans as submitted.

(4) If by the end of the period of 28 days beginning with the date on which written notice was served upon the engineer under paragraph 27(2), the Canal & River Trust gives notice to the undertaker that the Canal & River Trust desires itself to construct any part of a specified work which in the opinion of the engineer may or will cause any detriment in respect of Canal & River Trust property or the safe operation of any waterway, then if the undertaker requires such part of such specified work to be constructed the Canal & River Trust must construct it with all reasonable dispatch on behalf of and to the reasonable satisfaction of the undertaker in accordance with the plans approved or deemed to be approved or settled under this paragraph, and under the supervision of the undertaker.

(5) When signifying his approval of the plans, the engineer may specify any protective works (whether temporary or permanent) which in his opinion should be carried out before commencement of the construction of a specified work to prevent any detriment and such protective works (which for

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the avoidance of doubt may include requirements to fence any proposed works in order to separate the same from the waterways, ponds or watercourses situated on the Canal & River Trust property either on a permanent or temporary basis) as may be reasonably necessary to prevent detriment must be constructed by the undertaker, as agreed between the parties or settled by arbitration in accordance with article 40 (arbitration) and such protective works must be carried out at the expense of the undertaker with all reasonable dispatch and the undertaker must not commence the construction of the specified works until the engineer has notified the undertaker that the protective works have been completed to his reasonable satisfaction.

(6) The undertaker shall pay to the Canal & River Trust a capitalised sum representing the reasonably increased or additional cost of maintaining and, when necessary, renewing any works, including any permanent protective works provided under sub-paragraph (5) above, and of carrying out any additional dredging of the waterway reasonably necessitated by the exercise of any of the powers under this Order but if the cost of maintaining the waterway, or of works of renewals of the waterway, is reduced in consequence of any such works, a capitalised sum representing such reasonable saving shall be set off against any sum payable by the undertaker to the Canal & River Trust under this paragraph.

(7) In the event that the undertaker fails to complete the construction of, or part of, the specified works the Canal & River Trust may, if reasonably required in order to avoid detriment, serve on the undertaker a notice in writing requesting that construction be completed. Any notice served under this sub-paragraph shall state the works that are to be completed by the undertaker and lay out a timetable for the works' completion. If the undertaker fails to comply with this notice within 35 days, the Canal & River Trust may construct any of the specified works, or part of such works (together with any adjoining works) in order to complete the construction of, or part of, the specified works and the undertaker shall reimburse the Canal & River Trust all costs, fees, charges and expenses it has reasonably incurred in carrying out such works.

**28.** The undertaker shall not use any land or property of the Canal & River Trust forming part of the waterway for the passage or siting of vehicles, plant and machinery employed in the construction of the specified works other than—

- (a) with the consent in writing of the engineer whose consent shall not be unreasonably withheld; and
- (b) subject to compliance with such reasonable requirements as the engineer may from time to time specify—
  - (i) for the prevention of the detriment; or
  - (ii) in order to avoid or reduce any inconvenience to the Canal & River Trust, its officers and agents and all other persons lawfully on such land or property, but nothing in this paragraph shall apply in relation to anything done in accordance with any approval given by the Canal & River Trust under paragraph 27.

**29.—(1)** Before the commencement of the initial construction of any part of the specified works and again following practical completion of the specified works the undertaker shall bear the reasonable cost of the carrying out by a qualified engineer (“the surveyor”), to be approved by the Canal & River Trust and the undertaker, of a survey including a dip-survey to measure the depth of the waterway (“the survey”) of so much of the waterway and any land and existing works of the undertaker which may provide support for the waterway as will or may be affected by the specified works.

(2) For the purposes of the survey the undertaker shall—

- (a) on being given reasonable notice (save in case of emergency, when immediate access shall be afforded) afford reasonable facilities to the surveyor for access to the site of the specified works and to any land and existing works of the undertaker which may provide support for the waterways as will or may be affected by the specified works; and



- (b) supply the surveyor as soon as reasonably practicable with all such information as he may reasonably require with regard to such existing works of the undertaker and to the specified works or the method of their construction.

(3) The reasonable costs of the survey shall include the costs of any dewatering or reduction of the water level of any part of the waterway (where reasonably required) which may be effected to facilitate the carrying out of the survey and the provisions of this Part of this Schedule shall apply with all necessary modifications to any such dewatering or reduction in the water level as though the same were specified works.

(4) Copies of the survey shall be provided to both the Canal & River Trust and the undertaker at no cost to the Canal & River Trust.

**30.**—(1) Without prejudice to its obligations under the foregoing provisions of this Part of this Schedule the undertaker shall consult, collaborate and respond constructively to any approach, suggestion, proposal or initiative made by the Canal & River Trust—

- (a) the design and appearance of the specified works, including the materials to be used for their construction; and
- (b) the environmental effects of those works,

and shall have regard to such views as may be expressed by the Canal & River Trust to the extent that these accord with the requirements of the local planning authority in response to such consultation pursuant in particular to the requirements imposed on the Canal & River Trust by section 22 (general environmental and recreational duties) of the British Waterways Act 1995<sup>(5)</sup> and to the interest of the Canal & River Trust in preserving and enhancing the environment of its waterways.

(2) Any specified work and any protective works to be constructed must, when commenced, be constructed—

- (a) with all reasonable dispatch (having regard to the undertaker's timetable for construction of the authorised development) in accordance with the plans approved or deemed to have been approved or settled under paragraph 27(3) and with any requirements made under paragraph 27(5);
- (b) under the supervision (where appropriate and if given) and to the reasonable satisfaction of the engineer;
- (c) in such manner as to cause as little detriment as possible;
- (d) in such a manner to ensure that no materials are discharged or deposited into any stream, watercourse, waterway, pond or any other water feature on or forming part of the Canal & River Trust property otherwise than in accordance with article 16 (discharge of water); and
- (e) in such a manner as to cause as little inconvenience as is reasonably practicable to the Canal & River Trust, its officers and agents and all other persons lawfully using the waterway, except to the extent that temporary obstruction has otherwise been agreed by the Canal & River Trust.

(3) If any damage or detriment to the waterway is caused by the carrying out of, or in consequence of the construction of a specified work or protective work, the undertaker must make good such damage and must pay to the Canal & River Trust all reasonable and proper expenses that the Canal & River Trust may incur or may be put and reasonable and proper compensation for any loss which it may sustain by reason of such damage, interference or obstruction.

(4) Nothing in this Part of this Schedule imposes any liability on the undertaker with respect to any damage, costs, expenses or loss attributable to the negligent act or default of the Canal & River Trust or its servants, contractors or agents or any liability on the Canal & River Trust with respect

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(5) 1995 c. 1.

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of any damage, costs, expenses or loss attributable to the negligent act or default of the undertaker or its servants, contractors or agents.

(5) Nothing in this Order shall authorise the undertaker to make or maintain any permanent work in or over the waterway so as to impede or prevent (whether by reducing the width of the waterway or otherwise) the passage of any vessel which is of a kind (as to its dimensions) for which the Canal & River Trust is required by section 105(1)(b) and (2) (maintenance of waterways) of the Transport Act 1968(6) to maintain the waterway.

(6) Following the completion of the construction of the specified works the undertaker shall restore the waterway to a condition no less satisfactory than its condition immediately prior to the commencement of those works unless otherwise agreed between the undertaker and the Canal & River Trust.

**31.—**(1) The undertaker shall give to the engineer 30 days' notice of its intention to commence the construction of any of the specified or protective works, or, in the case of repair carried out in an emergency, such notice as may be reasonably practicable so that, in particular, the Canal & River Trust may where appropriate arrange for the publication of notices bringing those works to the attention of users of the Canal & River Trust's network.

(2) The undertaker must—

- (a) at all times afford reasonable facilities to the engineer for access to a specified works during its construction; and
- (b) supply the engineer with all such information as he may reasonably require with regard to a specified work or the method of constructing it.

**32.—**(1) The undertaker shall provide and maintain at its own expense in the vicinity of the specified or protective works such temporary lighting and such signal lights for the control of navigation as the engineer may reasonably require during the construction or failure of the specified or protective works.

(2) The Canal & River Trust, on being given reasonable notice, must afford reasonable facilities to the undertaker and its agents for access to any works carried out by the Canal & River Trust under this Part of this Schedule during their construction and must supply the undertaker with such information as it may reasonably require with regard to such works or the method of constructing them and the undertaker shall reimburse the Canal & River Trust's reasonable costs in relation to the supply of such information.

**33.—**(1) The undertaker shall not in the course of constructing a specified work or a protective work or otherwise in connection therewith do or permit anything which may result in the pollution of the waterway or the deposit of materials therein and shall take such steps as the engineer may reasonably require to avoid or make good any breach of its obligations under this paragraph.

(2) The undertaker must repay to the Canal & River Trust all reasonable and proper fees, costs, charges and expense reasonably incurred by the Canal & River Trust in respect of the approval by the engineer of plans submitted by the undertaker and the supervision by the engineer of the construction of a specified work.

**34.** If at any time during or after the completion of a specified work or a protective work, the Canal & River Trust gives notice to the undertaker informing it that the state of maintenance the work appears to be such waterway that the work is causing or likely to cause detriment, the undertaker must, on receipt of such notice, take such steps as may be reasonably necessary to put that specified work in such state of maintenance as not to cause such detriment.

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(6) 1968 c.73.

**35.**—(1) The undertaker must pay to the Canal & River Trust all reasonable and proper costs, charges, damages, expenses and losses not otherwise provided for in this Part of this Schedule which may be occasioned to and reasonably incurred by the Canal & River Trust—

- (a) by reason of the existence, construction or maintenance of a specified work or protective work; or
- (b) by reason of any act or omission of the undertaker or of any person in its employ or of its contractors or others whilst engaged upon the construction of a specified work or protective work,

and the undertaker must indemnify and keep indemnified the Canal & River Trust from and against all claims and demands arising out of or in connection with any of the matters referred to in paragraph 35(1)(a) and (b). The fact that any act or thing may have been done by the Canal & River Trust on behalf of the undertaker or in accordance with plans approved by the engineer or in accordance with any requirement of the engineer or under the engineer's supervisions or in accordance with any directions or awards of an arbitrator is not (if it was done without negligence on the part of the Canal & River Trust or any person in its employ or of its contractors or agents) to relieve the undertaker from any liability under the provision of this sub-paragraph.

(2) The Canal & River Trust must give the undertaker reasonable notice of any such claim or demand and save as such conduct would be contrary to law no settlement or compromise of such a claim or demand must be made without the prior written consent of the undertaker, such consent not to be unreasonably withheld or delayed.

**36.** The Canal & River Trust must, on receipt of a written request from the undertaker, from time to time provide the undertaker free of charge with written estimates of the costs, charges, expenses and other liabilities for which the undertaker is or will become liable under this Part of this Schedule and with such information as may reasonably enable the undertaker to assess the reasonableness of any such estimate or claim or to be made pursuant to this Part of this Schedule.

**37.** In the assessment of any sums payable to the Canal & River Trust under this Part of this Schedule, there must not be taken into account any increase in the sums claimed that is attributable to any action taken by or any agreement entered into by the Canal & River Trust if that action or agreement was not reasonably necessary and was taken or entered into with a view to obtaining the payment of those sums by the undertaker under this Part of this Schedule or increasing the sums so payable.

**38.** The undertaker and the Canal & River Trust may enter into, and carry into effect, agreement for the transfer to the undertaker of—

- (a) any Canal & River Trust property shown on the works and/or land plans and described in the book of reference;
- (b) any lands, works or other property held in connection with any such Canal & River Trust property; and
- (c) and rights and obligations (whether or not statutory) of the Canal & River Trust relating to any of the Canal & River Trust property or any lands, works or other property referred to in this paragraph.

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

**40.** The undertaker must repay to the Canal & River Trust in accordance with the Canal & River Trust's code of practice all reasonable fees, costs, charges and expenses reasonably incurred by the Canal & River Trust-

- (a) in constructing any part of a specified work on behalf of the undertaker or in constructing any protective works under the provisions of paragraph 27(5) including, in respect of any

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- permanent protective works, a capitalised sum representing the cost of maintaining and renewing those works;
- (b) in respect of the approval by the engineer of plans submitted by the undertaker and the supervision by him of the construction of a specified work or any protective works;
  - (c) in respect of the employment or procurement of the services of any persons whom it must be reasonably necessary to appoint for inspecting, signalling, watching and lighting Canal & River Trust property and for preventing, so far as may be reasonably practicable, interference, obstruction, danger or incident arising from the construction or failure of a specified work or any protective works;
  - (d) in respect of any additional temporary lighting of the Canal & River Trust property in the vicinity of the specified works or any protective works, being lighting made reasonably necessary by reason or in consequence of the construction or failure of a specified work or protective work; and
  - (e) In bringing the specified works or any protective works to the notice of users of the Canal & River Trust's network.

**41.**—(1) If any permanent or temporary alterations or additions to the Canal & River Trust property are reasonably necessary in consequence of the construction of a specified work, or during a period of 24 months after the completion of that work in order to ensure the safety of the Canal & River Trust property, the continued safe operation of the waterway or the prevention of a detriment such alterations and additions may be carried out by the Canal & River Trust and if the Canal & River Trust gives to the undertaker reasonable notice of its intention to carry out such alterations or additions (which must be specified in the notice), the undertaker must pay to the Canal & River Trust the reasonable cost of those alterations or additions including, in respect of any such alterations and additions as are to be permanent, a capitalised sum representing the increase of the costs which may be expected to be reasonably incurred by the Canal & River Trust in maintaining, working and, when necessary, renewing any such alterations or additions.

(2) If during the construction of a specified work by the undertaker, the Canal & River Trust gives notice to the undertaker that the Canal & River Trust desires itself to construct that part of the specified work which in the opinion of the engineer is endangering the stability of the Canal & River Trust property or the safe operation of any waterway then, if the undertaker decided that part of the specified work is to be constructed, the Canal & River Trust shall assume construction of that part of the specified work under paragraph 27(4), pay to the Canal & River Trust all reasonable expenses to which the Canal & River Trust may be put and compensation for any loss which it may suffer by reason of the execution by the Canal & River Trust of that specified work.

(3) The engineer must, in respect of the capitalised sums referred to in this paragraph and paragraph 27, provide such details of the formula by which those sums have been calculated as the undertaker may reasonably require.

(4) If the cost of maintaining, working or renewing the Canal & River Trust property is reduced in consequence of any such alterations or additions, a capitalised sum representing such saving is to be set off against any sum payable by the undertaker to the Canal & River Trust under this paragraph.

**42.** Any additional expenses which the Canal & River Trust may reasonably incur in altering, reconstructing or maintaining the waterway under any powers existing at the date when this Order was made by reason of the existence of a specified work shall, provided that 56 days' previous notice of the commencement of such alteration, reconstruction or maintenance has been given to the undertaker, be repaid by the undertaker to the Canal & River Trust.

**43.**—(1) The fact that any act or thing may have been done by the Canal & River Trust on behalf of the undertaker or in accordance with plans approved by the engineer or in accordance with any requirement of the engineer or under the engineer's supervision or in accordance with any directions

or awards of an arbitrator shall not (if it was done without negligence on the part of the Canal & River Trust or of any person in its employ or of its contractors or agents) excuse the undertaker from any liability under the provisions of this paragraph.

(2) Nothing in sub-paragraph (2) shall impose any liability on the undertaker with respect to any damage or interruption to the extent that it is attributable to the neglect or wilful default of the Canal & River Trust, its officers, servants, contractors or agents.

**44.** Any difference arising between the undertaker and the Canal & River Trust under this Part of this Schedule (other than a difference as to the meaning or construction of this Part of this Schedule) shall be referred to and settled by arbitration in accordance with article 40 (arbitration) of this Order.

**45.** Any capitalised sum which is required to be paid under this Part of this Schedule shall be calculated by multiplying the cost of the maintenance or renewal works to the waterway necessitated as a result of the operation of the authorised development by the number of times that the maintenance or renewal works will be required during the operation of the authorised development.

## PART 4

### FOR THE PROTECTION OF SCOTTISH POWER ENERGY NETWORKS

**46.** For the protection of SPEN the following provisions are, unless otherwise agreed in writing between the undertaker and SPEN, to have effect.

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

“alternative apparatus” means alternative apparatus adequate to enable SPEN to fulfil its statutory functions in a manner not less efficient than previously;

“apparatus” means electric lines or electrical plant (as defined in the Electricity Act 1989(7)), belonging to or maintained by SPEN;

“functions” includes powers and duties;

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

“SPEN” means Scottish Power Energy Networks Holdings Limited.

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

**49.** Regardless of any provision in this Order or anything shown on the land plans, the undertaker may not acquire any apparatus otherwise than by agreement.

**50.—(1)** If, in the exercise of the powers conferred by this Order, the undertaker acquires any interest in any land in which any apparatus is placed, that apparatus shall not be removed under this Part of this Schedule and any right of SPEN to maintain that apparatus in that land shall not be extinguished until alternative apparatus has been constructed and is in operation to the reasonable satisfaction of SPEN.

(2) If, for the purpose of executing any works 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 shall give to SPEN written notice of that requirement, together with a plan and section of the work proposed, and of the proposed position of the alternative apparatus to be provided or constructed and in that case (or if in consequence of the exercise of any of the powers conferred by this Order SPEN reasonably needs to remove any of its apparatus) the undertaker shall, subject

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(7) 1989 c. 29; the definition of “electrical plant” has been amended by section 108 of and paragraphs 24 and 38 to Schedule 6 to the Utilities Act 2000 (c. 27).

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to sub-paragraph (3), afford to SPEN the necessary facilities and rights for the construction of alternative apparatus in other land of the undertaker and 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 the undertaker, or the undertaker is unable to afford such facilities and rights as are mentioned in sub-paragraph (2), in the land in which the alternative apparatus or part of such apparatus is to be constructed, SPEN shall, on receipt of a written notice to that effect from the undertaker, as soon as reasonably possible use its best endeavours to obtain the necessary facilities and rights in the land in which the alternative apparatus is to be constructed.

(4) Any alternative apparatus to be constructed in land of the undertaker under this Part of Schedule shall be constructed in such manner and in such line or situation as may be agreed between SPEN and the undertaker or in default of agreement settled by arbitration in accordance with article 40 (arbitration).

(5) SPEN shall, after the alternative apparatus to be provided or constructed has been agreed or settled by arbitration in accordance with article 40 (arbitration), and after the grant to SPEN 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 undertaker to be removed under the provisions of this Part of this Schedule.

(6) Regardless of anything in sub-paragraph (5), if the undertaker gives notice in writing to SPEN that it desires itself to execute any work, or part of any work in connection with the construction or removal of apparatus in any land of the undertaker, that work, instead of being executed by SPEN, shall be executed by the undertaker without unnecessary delay under the superintendence, if given, and to the reasonable satisfaction of SPEN.

(7) Nothing in sub-paragraph (6) shall authorise the undertaker to execute the placing, installation, bedding, packing, removal, connection or disconnection of any apparatus, or execute any filling around the apparatus (where the apparatus is laid in a trench) within 300 millimetres of the apparatus.

**51.—**(1) Where, in accordance with the provisions of this Part of this Schedule, the undertaker affords to SPEN facilities and rights for the construction and maintenance in land of the undertaker of alternative apparatus in substitution for apparatus to be removed, those facilities and rights shall be granted upon such terms and conditions as may be agreed between the undertaker and SPEN or in default of agreement settled by arbitration in accordance with article 40 (arbitration).

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

- (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; and
- (b) so far as it may be reasonable and practicable to do so in the circumstances of the particular case, give effect to the terms and conditions, if any, applicable to the apparatus constructed in or the land for which the alternative apparatus is to be substituted.

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

**52.**—(1) Not less than 28 days before starting the execution of any works of the type referred to in paragraph 50(2) that are near to, or will or may affect, any apparatus the removal of which has not been required by the undertaker under paragraph 50(2), the undertaker shall submit to SPEN a plan, section and description of the works to be executed. Any submission must note the time limits imposed on SPEN under sub-paragraph (3) below.

(2) Those works shall be executed only in accordance with the plan, section and description submitted under sub-paragraph (1) and in accordance with such reasonable requirements as may be made in accordance with sub-paragraph (3) by SPEN for the alteration or otherwise for the protection of the apparatus, or for securing access to it, and SPEN shall be entitled to watch and inspect the execution of those works.

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

(4) If SPEN in accordance with sub-paragraph (3) and in consequence of the works proposed by the undertaker, reasonably requires the removal of any apparatus and gives written notice to the undertaker of that requirement, sub-paragraphs (1) to (6) shall apply as if the removal of the apparatus had been required by the undertaker under paragraph 50(2).

(5) Nothing in this paragraph shall preclude the undertaker from submitting at any time or from time to time, but in no case less than 28 days before commencing the execution of any works, a new plan, section and description instead of the plan, section and description previously submitted, and having done so the provisions of this paragraph shall apply to and in respect of the new plan, section and description.

(6) The undertaker shall not be required to comply with sub-paragraph (1) in a case of emergency but in that case it shall give to SPEN notice as soon as is reasonably practicable and a plan, section and description of those works as soon as reasonably practicable subsequently and shall comply with sub-paragraph (2) in so far as is reasonably practicable in the circumstances.

**53.**—(1) Subject to the following provisions of this paragraph, the undertaker shall repay to SPEN the reasonable expenses incurred by SPEN in, or in connection with, the inspection, removal, alteration or protection of any apparatus or the construction of any new connection.

(2) There shall be deducted from any sum payable under sub-paragraph (1) the value of any apparatus removed under the provisions of this Part of this Schedule, that value being calculated after removal.

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

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

(b) apparatus (whether existing apparatus or apparatus substituted for existing apparatus) is placed at a depth greater than the depth at which the existing apparatus was, and the placing of apparatus of that type or capacity or of those dimensions or the placing of apparatus at that depth, as the case may be, is not agreed by the undertaker or, in default of agreement, is not determined by arbitration in accordance with article 40 (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 SPEN by virtue of sub-paragraph (1) shall be reduced by the amount of that excess.

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

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- (a) an extension of apparatus to a length greater than the length of existing apparatus shall not be treated as a placing of apparatus of greater dimensions than those of the existing apparatus; and
- (b) where the provision of a joint in a cable is agreed, or is determined to be necessary, the consequential provision of a jointing chamber or of a manhole shall 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 SPEN in respect of works by virtue of sub-paragraph (1) shall, 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 SPEN 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.

**54.**—(1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction of any such works referred to in paragraph 50(2), any damage is caused to any apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal for the purposes of those works) or property of SPEN the undertaker is to—

- (a) bear and pay the cost reasonably incurred by SPEN in making good such damage or restoring the supply; and
- (b) make reasonable compensation to SPEN for any other expenses, loss, damages, penalty or costs incurred by SPEN, 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 SPEN, its officers, servants, contractors or agents.

(3) SPEN must give the undertaker reasonable notice of any such claim or demand and no settlement or compromise is to be made without the consent of the undertaker which, if it withholds such consent, is to have the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand.

**55.** Nothing in this Part of this Schedule shall affect the provisions of any enactment or agreement regulating the relations between the undertaker and SPEN in respect of any apparatus laid or erected in land belonging to the undertaker on the date on which this Order is made.

## PART 5

### FOR THE PROTECTION OF HOLFORD GAS STORAGE LIMITED

#### Application

**56.** For the protection of the undertaker as 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

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

“acceptable credit provider” means a bank or financial institution with a credit rating that is not lower than “A-” if the rating is assigned by Standard & Poor’s Ratings Group or Fitch Ratings and “A3” if the rating is assigned by Moody’s Investors Services Inc.;

“acceptable insurance” means a third party liability insurance effected and maintained by the promoter with a limit of indemnity of not less than £10,000,000.00 (Ten Million Pounds)



per occurrence or series of occurrences arising out of one event. Such insurance shall be maintained for the construction period of the authorised works which constitute specified works and arranged with an internationally recognised insurer of repute operating in the London and worldwide insurance market underwriters whose security/credit rating meets the same requirements as an “acceptable credit provider”, such policy shall include (but without limitation)—

- (a) the undertaker as a co-insured;
- (b) a cross liabilities clause; and
- (c) contractors’ pollution liability for third party property damage and third party bodily damage arising from a pollution/contamination event with cover of £4,000,000.00 (Four Million Pounds) per event or £4,000,000.00 (Four Million Pounds) in aggregate;

“acceptable security” means either—

- (a) a parent company guarantee from a parent company in favour of the undertaker to cover the promoter’s liability to the undertaker to a cap of not less than £10,000,000.00 (Ten Million Pounds) per asset per event up to a total liability cap of £10,000,000.00 (Ten Million Pounds) (in a form reasonably satisfactory to the undertaker and where required by the undertaker, accompanied with a legal opinion confirming the due capacity and authorisation of the parent company to enter into and be bound by the terms of such guarantee); or
- (b) a bank bond or letter of credit from an acceptable credit provider in favour of the undertaker to cover the promoter’s liability to the undertaker for an amount of not less than £10,000,000.00 (Ten Million Pounds) per asset per event up to a total liability cap of £10,000,000.00 (Ten Million Pounds) (in a form reasonably satisfactory to the undertaker);

“apparatus” means cavities, pipelines, cables (electrical and datacoms), roads, compounds and equipment owned by the undertaker 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 and construction of any works authorised by this Part of this Schedule;

“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;

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

“INOVYN Enterprises” means INOVYN Enterprises Limited (Company No. 04651437);

“maintain” and “maintenance” shall include the ability and right to do any of the following in relation to any 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;

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“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;

“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;
- (b) may in any way adversely affect any apparatus the removal of which has not been required by the promoter under paragraph 62(2) or otherwise; and/or
- (c) include any of the activities that are referred to in paragraph 13 of the Linewatch’s “Special Requirements for the safe working in close proximity to high pressure pipelines” (Revision No 16.03); and

“undertaker” means Holford Gas Storage Limited (Company No. SC254265).

**58.** Except for paragraphs 59 (apparatus in stopped up streets), 62 (retained apparatus), 63 (expenses) and 64 (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 Part 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 undertaker in stopped up streets**

**59.**—(1) Without prejudice to the generality of any other protection afforded to the undertaker elsewhere in the Order, where any street is stopped up under the Order, if the undertaker has any apparatus in the street or accessed via that street the undertaker will be entitled to the same rights in respect of such apparatus as it enjoyed immediately before the stopping up and the promoter will grant to the undertaker, or will procure the granting to the statutory undertaker of, legal easements reasonably satisfactory to the specified undertaker in respect of such apparatus and access to it prior to the stopping up of any such street or highway.

(2) Notwithstanding the temporary stopping up or diversion of any highway under the powers of article 13 (temporary prohibition or restriction of use of streets), 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**

**60.** The promoter, in the case of the powers conferred by article 17 (protective work to buildings), must exercise those powers in accordance with paragraph 62 of this Part of this Schedule.

#### **Acquisition of land**

**61.**—(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 sub-paragraph (1), prior to the carrying out of any part of the authorised works (or in such other timeframe as may be agreed between 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) Any agreement or consent granted by the undertaker under paragraphs 64 or any other paragraph of this Part of this Schedule shall not be taken to constitute agreement under paragraph 61.

### **Retained apparatus**

**62.**—(1) Not less than 56 days before the commencement of any specified works the promoter must submit to the undertaker a plan 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 or delayed.

(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).

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(8) 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.

(9) 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 by calling the undertaker's emergency telephone line on 02476 183900 or such other telephone number notified by the undertaker to the promoter in writing and as soon as is reasonably practicable give to the undertaker 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 (10) at all times.

(10) At all times when carrying out any works authorised under the Order the undertaker must comply with the undertaker's policies for safe working in proximity to apparatus.

### Expenses

**63.** Subject to the following provisions of this paragraph, the promoter must pay to the undertaker on demand all charges, costs and expenses reasonably incurred by the undertaker in, or in connection with, the inspection, removal, relaying or replacing, alteration or protection of any 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) in connection with the cost of the carrying out of any assessment of the undertaker's apparatus under the Control of Major Accident Hazards Regulations 2015<sup>(8)</sup> reasonably necessary as a consequence of the authorised works;
- (b) implementing any mitigation measures required as a result of any assessment referred to in sub-paragraph (a) reasonably necessary as a consequence of the authorised works;
- (c) the approval of plans;
- (d) the carrying out of protective works, plus a capitalised sum to cover the cost of maintaining and renewing permanent protective works; and
- (e) 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.

### Indemnity

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

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(8) [S.I. 2015/483](#).

undertaker, by reason or in consequence of any such damage or interruption or the undertaker becoming liable to any third party as aforesaid provided that at all times the undertaker shall be under an obligation to take reasonable steps to mitigate its loss.

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

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

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

but not otherwise.

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

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

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

(6) "relevant costs" means the costs, direct losses and expenses (including loss of revenue) reasonably incurred by a gas storage customer as a consequence of any restriction of the use of the undertaker's apparatus as a result of the construction, maintenance or failure of any specified works

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or any such act or omission as mentioned in sub-paragraph (1); “gas storage customer” means any person licensed to ship, transmit, distribute or supply gas under the Gas Act 1986<sup>(9)</sup>.

### **Co-operation**

**65.**—(1) Where in consequence of the proposed construction of any of the authorised works, the undertaker makes requirements for the protection or alteration of apparatus under paragraphs 62(5) or 62(7), 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, efficient and economic operation of the undertaker’s apparatus 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 undertaker or the taking of action by the undertaker, it must not be unreasonably withheld or delayed.

### **Access**

**66.** If in consequence of the agreement reached in accordance with paragraph 61(1) of this Schedule 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**

**67.** 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 40 (arbitration).

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(9) 1986 c. 44.