

## SCHEDULES

### SCHEDULE 5

#### PROTECTIVE PROVISIONS

##### Part I

###### Protection for electricity, gas and water undertakers

1.—(1) For the protection of the undertakers referred to in this Part of this Schedule the following provisions shall, unless otherwise agreed in writing between Railtrack and the undertaker concerned, have effect.

(2) In this Part of this Schedule—

“alternative apparatus” means alternative apparatus adequate to enable the undertaker in question to fulfil their statutory functions in a manner not 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<sup>(1)</sup>) 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 public gas transporter for the purposes of gas supply; and
- (c) in the case of a water undertaker, mains, pipes or other apparatus belonging to or maintained by that undertaker for the purposes of water supply;

(not being apparatus in respect of which the relations between Railtrack and the undertakers are regulated by the provisions of Part III of the Street Works Act) and includes any structure in which apparatus is or is to be lodged or which gives or will give access to apparatus;

“functions” includes powers and duties;

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

“undertaker” means any licence holder within the meaning of Part I of the Electricity Act 1989, public gas transporter within the meaning of Part I of the Gas Act 1986<sup>(2)</sup> and water undertaker within the meaning of the Water Industry Act 1991<sup>(3)</sup>; and, in relation to any apparatus, means the undertaker to whom it belongs or by whom it is maintained.

(3) The provisions of Schedule 4 to this Order shall not apply in relation to apparatus to which this Part of this Schedule applies.

2. Notwithstanding the temporary stopping up or diversion of any highway pursuant to article 10 of this Order, an undertaker shall be at liberty at all times to execute and do all such works and

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(1) 1989 c. 29.

(2) 1986 c. 44. A new section 7 was substituted by section 5 of the Gas Act 1995 (c. 45).

(3) 1991 c. 56.

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things in, upon or under any such highway as may be reasonably necessary or desirable to enable it to maintain or use any apparatus which at the time of the stopping up or diversion was in that highway.

3. Notwithstanding anything in this Order or shown on the deposited plans Railtrack shall not acquire any apparatus otherwise than by agreement.

4.—(1) If, in the exercise of the powers of this Order, Railtrack acquire 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 an undertaker 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 the undertaker in question.

(2) If, for the purpose of executing any works in, on or under any land purchased, held, appropriated or used under this Order, Railtrack require the removal of any apparatus placed in that land, they shall give to the undertaker in question written notice of that requirement, together with a plan and section of the work proposed, and of the proposed position of the alternative apparatus to be provided or constructed and in that case (or if in consequence of the exercise of any of the powers of this Order an undertaker reasonably needs to remove any of its apparatus) Railtrack shall, subject to sub-paragraph (3) below, afford to the undertaker the necessary facilities and rights for the construction of alternative apparatus in other land of Railtrack and thereafter 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 Railtrack, or Railtrack are unable to afford such facilities and rights as are mentioned in sub-paragraph (2) above, in the land in which the alternative apparatus or part of such apparatus is to be constructed, the undertaker in question shall, on receipt of a written notice to that effect from Railtrack, forthwith 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 Railtrack under this Part of this Schedule shall be constructed in such manner and in such line or situation as may be agreed between the undertaker in question and Railtrack or in default of agreement settled by arbitration pursuant to article 31.

(5) The undertaker in question shall, after the alternative apparatus to be provided or constructed has been agreed or settled by arbitration in accordance with article 31 above, and after the grant to the undertaker of any such facilities and rights as are referred to in sub-paragraph (2) or (3) above, proceed with all reasonable dispatch to construct and bring into operation the alternative apparatus and thereafter to remove any apparatus required by Railtrack to be removed under the provisions of this Part of this Schedule.

(6) Notwithstanding anything in sub-paragraph (5) above, if Railtrack give notice in writing to the undertaker in question that they desire themselves to execute any part of so much of the work necessary in connection with the construction of the alternative apparatus, or the removal of the apparatus required to be removed, as will take place in any land of Railtrack, that work, in lieu of being executed by the undertaker, shall be executed by Railtrack with all reasonable dispatch under the superintendence, if given, and to the reasonable satisfaction of the undertaker.

(7) Nothing in sub-paragraph (6) above shall authorise Railtrack 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.

5.—(1) Where, in accordance with the provisions of this Part of this Schedule, Railtrack afford to an undertaker facilities and rights for the construction, and maintenance, in land of Railtrack 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 Railtrack and the undertaker in question or in default of agreement settled by arbitration in accordance with article 31 above.

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

- (a) give effect to all reasonable requirements of Railtrack for ensuring the safety and efficient operation of the railway and for securing any subsequent alterations or adaptations of the alternative apparatus which may be required to prevent interference with any proposed works of Railtrack or the traffic on the railway; and
- (b) so far as it may be reasonable and practicable to do so in the circumstances of the particular case, give effect to the terms and conditions applicable to the apparatus, if any, constructed in or along the railway for which the alternative apparatus is to be substituted.

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

6.—(1) Not less than 28 days before commencing the execution of any works of the type referred to in paragraph 4(2) above that are near to, or will or may affect, any apparatus the removal of which has not been required by Railtrack under paragraph 4(2), Railtrack shall submit to the undertaker in question a plan, section and description of the works to be executed.

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

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

(4) If an undertaker in accordance with sub-paragraph (3) above and in consequence of the works proposed by Railtrack, reasonably require the removal of any apparatus and give written notice to Railtrack of that requirement, the foregoing provisions of this Part of this Schedule shall apply as if the removal of the apparatus had been required by Railtrack under paragraph 4(2) above.

(5) Nothing in this paragraph shall preclude Railtrack 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 in lieu of the plan, section and description previously submitted, and thereupon the provisions of this paragraph shall apply to and in respect of the new plan, section and description.

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

7.—(1) Subject to the following provisions of this paragraph, Railtrack shall repay to an undertaker the reasonable expenses incurred by that undertaker in, or in connection with, the inspection, removal, alteration or protection of any apparatus or the construction of any new apparatus which may be required in consequence of the execution of any such works as are referred to in paragraph 4(2) above.

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

(3) If in pursuance of 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 Railtrack or, in default of agreement, is not determined by 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 paragraph would be payable to the undertaker in question by virtue of sub-paragraph (1) above, shall be reduced by the amount of that excess.

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

(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 an undertaker in respect of works by virtue of sub-paragraph (1) above 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 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.

**8.—(1)** Subject to sub-paragraphs (2) and (3) below, if by reason or in consequence of the construction of any such works as are referred to in paragraph 4(2) above, any damage is caused to any apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal for the purposes of those works) or property of an undertaker, or there is any interruption in any service provided, or in the supply of any goods, by any undertaker, Railtrack shall—

(a) bear and pay the cost reasonably incurred by that undertaker in making good such damage or restoring the supply, and

(b) make reasonable compensation to that undertaker for any other expenses, loss, damages, penalty or costs incurred by, the undertaker,

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

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

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

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