

SCHEDULES

SCHEDULE 10

Article 46

PROTECTIVE PROVISIONS

PART 1

PROTECTION OF NETWORK RAIL INFRASTRUCTURE LIMITED

1. The following provisions of this Schedule shall have effect unless otherwise agreed in writing between the undertaker and Network Rail and, in the case of paragraph 14, any other person on whom rights or obligations are conferred by that paragraph.

2. 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 Network Rail for the purposes of this Order;

“plans” includes sections, designs, design data, software, drawings, specifications, soil reports, calculations, descriptions (including descriptions of methods of construction), staging proposals, programmes and details of the extent, timing and duration of any proposed occupation of railway property;

“railway operational procedures” means procedures specified under any access agreement (as defined in the 1993 Act) or station lease;

“railway property” means any railway belonging to Network Rail and any station, land, works, apparatus and equipment belonging to Network Rail or connected therewith and includes any easement or other property interest held or used by Network Rail for the purposes of such railway or works, apparatus or equipment; and

“specified work” means so much of any of the authorised works as is situated upon, across, under, over or within 15 metres of, or may in any way affect, railway property.

3.—(1) Where under this Schedule Network Rail is required to give its consent or approval in respect of any matter, that consent or approval is subject to the condition that Network Rail complies with any relevant railway operational procedures.

(2) In so far as any specified work or the acquisition or use of railway property is or may be subject to railway operational procedures, Network Rail shall—

(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 those procedures; and

(b) use their reasonable endeavours to avoid any conflict arising between the application of those procedures and the proper implementation of the authorised works pursuant to this Order.

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4.—(1) The undertaker shall not exercise the powers conferred by article 22 (power to acquire land) or section 11(3) of the 1965 Act in respect of any railway property unless the exercise of such powers is with the consent of Network Rail.

(2) The undertaker shall not in the exercise of the powers conferred by this Order prevent pedestrian or vehicular access to any railway property, unless preventing such access is with the consent of Network Rail.

(3) The undertaker shall not under the powers of this Order acquire or use or acquire new rights over any railway property except with the consent of Network Rail.

(4) The undertaker shall not exercise the powers conferred by section 271 or 272 of the 1990 Act, as applied by Schedule 9, in relation to any right of access of Network Rail to railway property, but such right of access may be diverted with the consent of Network Rail.

(5) Where Network Rail is asked to give its consent pursuant to sub-paragraph (1), (2), (3) or (4), such consent shall not be unreasonably withheld but may be given subject to reasonable conditions.

5.—(1) The undertaker shall before commencing construction of any specified work supply to Network Rail proper and sufficient plans of that work for the reasonable approval of the engineer and the specified work shall not be commenced except in accordance with such plans as have been approved in writing by the engineer or settled by arbitration.

(2) The approval of the engineer under sub-paragraph (1) shall not be unreasonably withheld or delayed, and if by the end of the period of 28 days beginning with the date on which such plans have been supplied to Network Rail the engineer has not intimated his disapproval of those plans and the grounds of his disapproval the undertaker may serve upon the engineer written notice requiring the engineer to intimate his approval or disapproval within a further period of 28 days beginning with the date upon which the engineer receives written notice from the undertaker. If by the expiry of the further period of 28 days the engineer has not intimated his approval or disapproval, he shall be deemed to have approved the plans as submitted.

(3) If by the expiry of 28 days beginning with the date on which written notice was served upon the engineer under sub-paragraph (2), Network Rail gives notice to the undertaker that Network Rail desires itself to construct any part of a specified work which in the opinion of the engineer will or may affect the stability of railway property or the safe operation of traffic on the railways of Network Rail then, if the undertaker desires such part of the specified work to be constructed, Network Rail shall 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 (where appropriate and if given) of the undertaker.

(4) 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 the commencement of construction of a specified work to ensure the safety or stability of railway property or the continuation of safe and efficient operation of the railways of Network Rail or the services of operators using the same (including any relocation, decommissioning and removal of works, apparatus and equipment necessitated by a specified work and the comfort and safety of passengers who may be affected by the specified work) and such protective works as may be reasonably necessary for those purposes shall be constructed by Network Rail or by the undertaker, if Network Rail so desires, and such protective works shall be carried out at the expense of the undertaker, in either case with all reasonable dispatch and the undertaker shall 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.—(1) Any specified work and any protective works to be constructed by virtue of paragraph 5(4) shall, when commenced be constructed—

- (a) with all reasonable dispatch in accordance with the plans approved or deemed to have been approved or settled under paragraph 5;
- (b) under the supervision (where appropriate and if given) and to the reasonable satisfaction of the engineer; and
- (c) in such manner as to cause as little damage as is possible to railway property and as little interference as is possible with the conduct of traffic on the railways of Network Rail.

(2) If any damage to railway property or any such interference or obstruction shall be caused by the carrying out of, or in consequence of the construction of a specified work, the undertaker shall, notwithstanding any such approval, make good such damage and shall pay to Network Rail all reasonable expenses to which Network Rail may be put and compensation for any loss which it may sustain by reason of any such damage, interference or obstruction.

(3) Without prejudice to any other operational railway requirement, the undertaker shall give to the engineer not less than 180 days' notice of its intention to commence the construction of a specified work and also, except in emergency (when it shall give such notice as may be reasonably practicable), of its intention to carry out any works for the maintenance or repair of a specified work in so far as such work of repair or maintenance may affect railway property.

(4) Nothing in this paragraph shall impose any liability on the undertaker with respect to any costs, damages, expenses or loss attributable to the negligence of Network Rail or its servants, contractors or agents.

7. The undertaker shall—

- (a) at all times afford reasonable facilities to the engineer for access to a specified work 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.

8. Network Rail shall at all times afford reasonable facilities to the undertaker and its agents for access to any works carried out by Network Rail under this Schedule during their construction and shall supply the undertaker with such information as it may reasonably require with regard to such works or the method of constructing them.

9.—(1) If during the construction of a specified work or during a period of 12 months after the completion of that work any alterations or additions, either permanent or temporary, to railway property are reasonably necessary in consequence of the construction of a specified work in order to ensure the safety of railway property or the continued safe and efficient operation of the railways of Network Rail and Network Rail gives to the undertaker reasonable notice of its intention to carry out such alterations or additions (which shall be specified in the notice), the undertaker shall pay to Network Rail the reasonable cost of those alterations or additions including, in respect of any such alterations or additions as are to be permanent, a capitalised sum representing the increase of the costs which may be expected to be reasonably incurred by Network Rail in maintaining, working and, when necessary, renewing any such alterations or additions.

(2) If during the construction of a specified work by the undertaker, Network Rail gives notice to the undertaker that Network Rail elects itself to construct that part of the specified work which in the opinion of the engineer is endangering the stability of railway property or the safe operation of traffic on the railway of Network Rail then, if the undertaker decides that part of the specified work is to be constructed, Network Rail shall assume the construction of that specified work and the undertaker shall, notwithstanding any such approval of the specified work under paragraph 5(1), pay to Network Rail all reasonable expenses to which Network Rail may be put and compensation for any loss which it may suffer by means of the execution by Network Rail of that specified work.

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(3) The engineer shall, in respect of the capitalised sums referred to in this paragraph and paragraph 10(a) provide such details of the formula by which those sums have been calculated as the undertaker may reasonably require.

10. The undertaker shall repay to Network Rail all reasonable fees, costs, charges and expenses reasonably incurred by Network Rail—

- (a) in constructing any part of a specified work on behalf of the undertaker as provided by paragraph 5(3) or in constructing any protective works under the provisions of paragraph 5(4) including, in respect of any 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 the engineer of the construction of a specified work and otherwise in connection with the implementation of the provisions of this Schedule;
- (c) in respect of the employment or procurement of the services of any inspectors, signalmen, watchmen and other persons whom it shall be reasonably necessary to appoint for inspecting, signalling, watching and lighting railway property and for preventing, so far as may be reasonably practicable, interference, obstruction, danger or accident arising from the construction or failure of a specified work;
- (d) in respect of any special traffic working resulting from any speed restrictions which may, in the opinion of the engineer, require to be imposed by reason or in consequence of the construction or failure of a specified work or from the substitution or diversion of services which may be reasonably necessary for the same reason; and
- (e) in respect of any additional temporary lighting of railway property in the vicinity of the specified works, being lighting made reasonably necessary by reason or in consequence of the construction or failure of a specified work.

11. If at any time after the completion of a specified work, not being a work vested in Network Rail, Network Rail gives notice to the undertaker informing it that the state of maintenance of any part of the specified work not vested in Network Rail appears to be such as adversely affects the operation of railway property, the undertaker shall, 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 adversely to affect railway property.

12. The undertaker shall not provide any illumination or illuminated sign or signal on or in connection with a specified work in the vicinity of any railway belonging to Network Rail unless it shall have first consulted Network Rail and it shall comply with Network Rail's reasonable requirements for preventing confusion between such illumination or illuminated sign or signal and any railway signal or other light used for controlling, directing or securing the safety of traffic on the railway.

13. Any additional expenses which Network Rail may reasonably incur in altering, reconstructing or maintaining railway property under any powers existing at the making of this Order 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 Network Rail.

14.—(1) The undertaker shall pay to Network Rail all reasonable costs, charges, damages and expenses not otherwise provided for in this Schedule which may be occasioned to or reasonably incurred by Network Rail—

- (a) by reason of the construction or maintenance of a specified work or the failure thereof; 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 a specified work;

and the undertaker shall indemnify Network Rail from and against all claims and demands arising out of or in connection with a specified work or any such failure, act or omission; and the fact that any act or thing may have been done by Network Rail 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 his supervision shall not (if it was done without negligence on the part of Network Rail or of any person in its employ or of its contractors or agents) excuse the undertaker from any liability under the provisions of this Schedule.

(2) Network Rail shall give the undertaker reasonable notice of any such claim or demand and no settlement or compromise of such a claim or demand shall be made without the prior consent of the undertaker.

(3) The sums payable by the undertaker under sub-paragraph (1) shall include a sum equivalent to the relevant costs.

(4) Subject to the terms of any agreement between Network Rail and a train operator regarding the timing or method of payment of the relevant costs in respect of that train operator, Network Rail shall promptly pay to each train operator the amount of any sums which Network Rail receives under sub-paragraph (1) which relates to the relevant costs of that train operator.

(5) The obligation under sub-paragraph (3) to pay Network Rail the relevant costs shall, in the event of default, be enforceable directly by any train operator concerned to the extent that such sums would be payable to that operator pursuant to sub-paragraph (4).

(6) In this paragraph—

“the relevant costs” means the costs, direct losses and expenses (including loss of revenue) incurred by each train operator as a consequence of any restriction of the use of Network Rail’s railway network as a result of the construction, maintenance or failure of a specified work, or any such act or omission as mentioned in sub-paragraph (1); and

“train operator” means any person who is authorised to act as the operator of a train by a licence under section 8 of the 1993 Act.

15. Network Rail shall, on receipt of a request from the undertaker, from time to time provide to the undertaker at the cost of the undertaker, written estimates of the costs, charges, expenses and other liabilities for which the undertaker is or will become liable under this Schedule (including the amount of the relevant costs mentioned in paragraph 14) and with such information as may reasonably enable the undertaker to assess the reasonableness of any such estimate or claim made or to be made pursuant to this Schedule (including any claim relating to those relevant costs).

16. In the assessment of any sums payable to Network Rail under this Schedule there shall 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 Network Rail 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 Schedule or increasing the sums so payable.

17. The undertaker and Network Rail may, subject in the case of Network Rail to compliance with the terms of its network licence, enter into, and carry into effect, agreements for the transfer to the undertaker of—

- (a) any railway property shown on the works and land plans and described in the book of reference;
- (b) any lands, works or other property held in connection with any such railway property; and
- (c) any rights and obligations (whether or not statutory) of Network Rail relating to any railway property.

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PART 2

PROTECTION OF NATIONAL GRID GAS PLC

Interpretation

18.—(1) In this Part of this Schedule—

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

“apparatus” means any mains, pipes, pressure governors, ventilators, cathodic protection, cables or other apparatus belonging to or maintained by the company for the purposes of the conveyance or storage of gas and includes any structure for the lodging therein of apparatus or for giving access to such apparatus, but the provisions of paragraphs 20 to 28 do not apply to apparatus in respect of which the relations between the undertaker and the company are regulated by the provisions of Part 3 of the 1991 Act;

“the company” means National Grid Gas plc, a gas transporter within the meaning of Part 1 of the Gas Act 1986(1) and includes any person succeeding the company as a gas transporter or any other successor in title, and any contractor appointed by the company to carry out its obligations under this agreement;

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

“functions” includes powers and duties;

“goods” includes gas conveyed by a gas transporter;

“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

“plans” includes sections, specifications and method statements.

(2) The provisions of Schedule 9 (provisions relating to statutory undertakers, etc.) shall not apply in relation to apparatus to which this Part of this Schedule applies.

Temporarily stopped up streets, etc: maintenance of apparatus

19.—(1) Notwithstanding the temporary stopping up or diversion of any highway pursuant to article 10 (temporary stopping up of streets), the company shall be at liberty at all times 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 or use any apparatus which at the time of the stopping up or diversion was in that highway.

(2) Sub-paragraph (1) shall not apply where alternative apparatus has been installed to replace the apparatus in question and is in operation or the apparatus is otherwise redundant.

Acquisition of apparatus

20. Notwithstanding anything in this Order or shown on the works and land plans the undertaker shall not acquire any apparatus or operational land belonging to the company otherwise than by agreement or consent of the company which shall not be unreasonably withheld or delayed but may be given subject to reasonable conditions.

(1) 1986 c. 44. A new section 7 was substituted by section 5 of the Gas Act 1995, c. 45, and was further amended by section 76 of the Utilities Act 2000 c. 27.

Removal of apparatus: alternative apparatus

21.—(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, and any right of the company 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 company.

(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 the company no less than 56 days' written notice of that requirement, together with plans 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 company reasonably needs to remove any of its apparatus) the undertaker shall, subject to sub-paragraph (3), afford to the company the necessary facilities and rights (including legal easements satisfactory to the company) for the construction of alternative apparatus in other land of the undertaker and thereafter for the retention, use, maintenance and renewal 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, the company shall, on receipt of a written notice to that effect from the undertaker, 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) The obligations imposed by sub-paragraph (3) shall not extend to the exercise by the company of any power to acquire compulsorily any land or rights in land.

(5) Any alternative apparatus to be constructed in land of the undertaker under this Part of this Schedule shall be constructed in such manner and in such line or situation as may be agreed between the company and the undertaker or, in default of agreement settled by arbitration pursuant to article 52 (arbitration).

(6) The company shall, after the alternative apparatus to be provided or constructed has been agreed or settled by arbitration in accordance with article 52 (arbitration), and after the grant to the company of any such facilities and rights as are referred to in sub-paragraph (2) or (3), proceed with all reasonable dispatch to construct and bring into operation the alternative apparatus and thereafter to remove any apparatus required by the undertaker to be removed under the provisions of this Part of this Schedule.

(7) Notwithstanding anything in sub-paragraph (6), if the undertaker gives notice in writing to the company that it desires itself 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 the undertaker, that work may, with the prior written consent of the company (which shall not be unreasonably withheld and shall be subject to any such conditions as are reasonable and proper to protect the apparatus), instead of being executed by the company be executed by the undertaker in accordance with plans, in a position and at a cost agreed between the company and the undertaker or, in default of agreement, determined by arbitration pursuant to article 52 (arbitration) with all reasonable despatch under the superintendence, if given, and to the reasonable satisfaction, of the company.

(8) Within 14 days after the work of the type referred to in sub-paragraph (7) has been agreed between the undertaker and the company or determined by arbitration in accordance with article 52 (arbitration) and after the grant to or obtaining by the company of any such facilities and rights as referred to in sub-paragraphs (2) and (3), the company shall supply the undertaker with the names of at least three approved contractors (which may include the company or a subsidiary of the company) to carry out any part of the work necessary, and the undertaker shall be responsible

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for the engagement of the contractor of its choice from the names so supplied on such terms and conditions as the undertaker thinks fit.

(9) If the company does not provide the names of the contractors within the period required by sub-paragraph (8), the undertaker shall be entitled to carry out the necessary work using such contractor as it thinks fit, being a contractor who appears to the undertaker, following reasonable enquiry of the company, to be competent and suitably qualified to carry out that work.

(10) In carrying out any work under sub-paragraph (7) the undertaker shall comply with all statutory obligations which would have been applicable had the works been carried out by the company.

(11) On completion of any work under sub-paragraph (7) the undertaker shall provide to the company plans and any other documentation reasonably required by the company (in format to be approved by the company) for the purpose of the future identification and location of apparatus.

(12) Nothing in sub-paragraph (7) shall authorise the undertaker to execute the actual 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 500 millimetres of the apparatus where the apparatus is operating or only capable of operating at below 7 bar pressure or within 3,000 millimetres of the apparatus where the apparatus is operating or capable of operating at or in excess of 7 bar pressure, unless so authorised by the company acting reasonably.

22.—(1) Where, in accordance with the provisions of this Part of this Schedule, the undertaker affords to the company facilities and rights for the construction, use, maintenance and renewal, 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 the company or in default of agreement settled by arbitration in accordance with article 52 (arbitration).

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

- (a) give effect to all reasonable requirements of the undertaker 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 the undertaker or the operation of 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 any terms and conditions applicable to the apparatus 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 the company 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 the company as appears to him to be reasonable having regard to all the circumstances of the particular case.

Protection of apparatus

23.—(1) Not less than 56 days before commencing the execution of any works in, on or under any land purchased, held, appropriated or used under this Order that are near to, or will or may affect, any apparatus the removal of which has not been required by the undertaker under paragraph 21(2), the undertaker shall submit to the company plans of the works to be executed.

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

(3) Any requirements made by the company under sub-paragraph (2) shall be made within a period of 42 days beginning with the date on which the plans under sub-paragraph (1) are received by it.

(4) If the company 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, the foregoing provisions of this Part of this Schedule shall apply as if the removal of the apparatus had been required by the undertaker under paragraph 21(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, new plans in lieu of the plans previously submitted, and thereupon the provisions of this paragraph shall apply to and in respect of the new plans.

(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 the company notice as soon as is reasonably practicable and plans of those works as soon as reasonably practicable thereafter and shall comply with sub-paragraph (2) in so far as is reasonably practicable in the circumstances.

Stopped up highways: access to apparatus

24. Where, by reason of this Order, any part of any highway in which any apparatus is situated ceases to be part of a highway the company may exercise the same rights of access to such apparatus as it enjoyed immediately before the coming into force of this Order and the undertaker shall grant to the company legal easements satisfactory to the company in respect of such apparatus and access thereto but nothing in this paragraph shall affect any right of the company or of the undertaker to require removal of such apparatus under this Part of this Schedule or the power of the undertaker to execute works in accordance with paragraphs 21 and 23.

Repayment of expenses

25.—(1) Subject to the following provisions of this paragraph, the undertaker shall repay to the company the reasonable expenses incurred by the company in, or in connection with—

- (a) the inspection, removal and relaying or replacing, alteration or protection of any apparatus or the construction of any new apparatus under any provision of this Part of this Schedule (including any costs reasonably incurred or compensation properly paid in connection with the acquisition of rights or exercise of statutory powers for such apparatus), and in connection with the cost of the carrying out by the company of any connection work;
- (b) the cutting off of any apparatus from any other apparatus, or the making safe of any redundant apparatus in consequence of the exercise by the undertaker of any power conferred by the Order;
- (c) 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 exercise by the undertaker of any power conferred by the Order; and
- (d) any other work or thing rendered reasonably necessary in consequence of the exercise by the undertaker of any such power;

within 60 days of being notified by the company that it has incurred such expenses.

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(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 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 the undertaker 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 company by virtue of sub-paragraph (1), shall be reduced by the amount of that excess.

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

(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.

Indemnity

26.—(1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction, maintenance or failure, including subsidence, resulting from any of the works referred to in paragraph 21(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 the company or there is any interruption in any service provided or in the supply or conveyance of any goods by the company, the undertaker shall—

(a) bear and pay the cost reasonably incurred by the company in making good such damage or restoring the service, supply or conveyance; and

(b) indemnify the company against all claims, demands, proceedings, costs, damages and expenses which may be made against, or recovered from, or incurred by it,

by reason or in consequence of any such damage or interruption or exercise by the undertaker of its powers conferred by this Order.

(2) Nothing in sub-paragraph (1) shall impose 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 the company, its officers, servants, contractors or agents.

(3) The company shall give the undertaker 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 with such assistance from the company as may be reasonably necessary.

Payment for redundant apparatus

27.—(1) Where, by reason of the stopping up of any highway pursuant to this Order, any apparatus belonging to the company and laid or placed in such highway or elsewhere is rendered derelict or unnecessary, the undertaker shall, subject to sub-paragraph (2), pay to the company the value of such apparatus (which shall then become the property of the undertaker) and the reasonable cost of and any costs incidental to the cutting off of such apparatus from any other apparatus, and of and incidental to the execution or doing of any works or things rendered necessary or expedient by reason of such apparatus being so rendered derelict or unnecessary.

(2) The undertaker shall not under the provisions of this paragraph be required to pay to the company the value of any apparatus rendered derelict or unnecessary if, to the reasonable satisfaction of the company, other apparatus has at the expense of the undertaker been provided and laid and made ready for use in substitution for the apparatus so rendered derelict or unnecessary.

Existing enactments and agreements

28. Nothing in this Part of this Schedule shall affect the provisions of any enactment or agreement regulating the relations between the undertaker and the company in respect of any apparatus laid or erected in land belonging to the undertaker on the coming into force of this Order.

PART 3

PROTECTION OF CABLE AND WIRELESS PLC

29.—(1) The provisions of this Part of this Schedule shall have effect for the protection of C&W unless it is otherwise agreed in writing between the undertaker and C&W.

(2) In this Part of this Schedule—

“C&W” means Cable & Wireless Plc; and

“public communications provider” has the same meaning as in section 151(1) of the Communications Act 2003⁽²⁾.

30. The temporary stopping up or diversion of any street under article 10 (temporary stopping up of streets) shall not affect any right of a public communications provider under paragraph 9 of the Telecommunications Code (“the Code”), contained in Schedule 2 to the Telecommunications Act 1984⁽³⁾ as amended by Schedule 3 to the Communications Act 2003, in respect of any apparatus which at the time of the temporary stopping up or diversion is in that street.

31. If C&W suffers damage by reason or in consequence of the construction, use or failure of the authorised works or any subsidence resulting from those works, the undertaker shall pay the cost reasonably incurred by C&W in making good such damage, and shall indemnify C&W against claims, demands, proceedings, costs, damages and expenses which may be made or taken against or recovered from or incurred by C&W by reason or in consequence of any such damage, but—

- (a) nothing in this paragraph shall impose any liability on the undertaker with respect to any damage to the extent that such damage is attributable to any act or omission of C&W, its officers, servants, contractors or other agents; and
- (b) C&W shall give to the undertaker reasonable notice of any claim, demand or proceedings and shall make no settlement of any claim, demand or proceedings without the consent of the undertaker, such consent not to be unreasonably withheld.

(2) 2003 c. 21.

(3) 1984 c. 12.

Status: *This is the original version (as it was originally made). This item of legislation is currently only available in its original format.*

32. Nothing in this Order shall affect any right of a public communications provider under the Code.