

From: [REDACTED]
To: Immingham_OCGT
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Subject: VPI Immingham - Cadent - Deadline 6a submission - 23 01 20 [CMCK-UK.FID14234943]
Date: 23 January 2020 11:10:16
Attachments: [REDACTED]

Good morning,

Please see the attached.

Kind regards,
Katy

Katy Abrahams
Associate



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**THE VPI IMMINGHAM OCGT DEVELOPMENT CONSENT ORDER 20[] (“THE PROJECT”)
DEADLINE 6a – 23 JANUARY 2020 - CADENT GAS LIMITED**

1. INTRODUCTION

- 1.1 Cadent Gas Limited (“Cadent”) is a statutory undertaker for the purposes of the Planning Act 2008 (the “Act”) and is responding to the Examining Authority’s rule 17 request for further information in which it requests statutory undertakers to submit their case on the tests in section 127 and 138 of the Act.
- 1.2 Cadent has made a number of submissions to the examination of the Project to date. This document should be read alongside Cadent’s relevant representation in respect of the Project which was made on 24 June 2019, the written representations made on 12 September 2019, the responses to the Examining Authorities’ further written questions which were submitted on 14 November 2019 and Cadent’s deadline 6 submission dated 20 December 2019.

2. BACKGROUND

- 2.1 Cadent has intermediate pressure and high pressure (major accident hazard) gas pipelines which are affected by the dDCO. The Promoter is seeking to acquire new rights over plots 78, 79, 80, 86, 107, 108, 109 and 110.
- 2.2 The Promoter is seeking powers of compulsory acquisition over this land to ensure that it has the necessary rights to operate, maintain and reconstruct the existing pipeline. Schedule 6 of the dDCO provides that over the plots where Cadent has apparatus, the Promoter is seeking the acquisition of the following new rights:
- (a) to pass and repass on foot, with or without vehicles, plant and machinery; and
 - (b) to retain, use, maintain, inspect, alter, remove, refurbish, reconstruct, replace, protect and improve an underground gas pipeline, control systems and any other ancillary apparatus and any other works necessary.
- 2.3 The broad scope of the new rights that the Promoter is seeking (for example to alter, remove, refurbish, reconstruct, improve) are akin to usual construction activities permitted pursuant to a DCO. As such, Cadent requires the same protections as it would in respect of a DCO granting powers to construct works adjacent to its apparatus.

3. SECTION 127 OF THE ACT

- 3.1 Section 127 of the Act provides that:
- (a) an order granting development consent may include provision authorising the compulsory acquisition of rights over statutory undertakers’ land by the creation of a new right over land only to the extent that the Secretary of State is satisfied of the matters set out below:
 - (a) the rights can be purchased without serious detriment to the carrying on of the undertaking, or
 - (b) any detriment to the carrying on of the undertaking, in consequence of the acquisition of the right, can be made good by the undertakers by the use of other land belonging to or available for acquisition by them.
- 3.2 The first limb of the test is addressed below. The second limb of the test is not applicable.

- 3.3 The protective provisions included at Schedule 9, Part 11 of the dDCO submitted by the Promoter at deadline 5 are for the benefit of Cadent. These are based on Cadent's standard form but several sections have been removed or amended by the Promoter. As proposed by the Promoter, these are not adequate to prevent serious detriment to the carrying on of Cadent's undertaking.
- 3.4 Further to Cadent's deadline 6 submission, Cadent has accepted the removal of various paragraphs of its standard form protective provisions on the basis that they are not applicable in the circumstances. The Promoter is seeking further amendment to Cadent's standard protective provisions on the basis that it states that the main construction works authorised by the Order do not affect Cadent's apparatus. However, as outlined at paragraph 2.3 above, the rights that the Promoter is seeking are broad and are akin to usual construction activities. As such, Cadent must ensure that adequate protection exists for its apparatus.
- 3.5 Cadent and the Promoter are continuing to negotiate the form of protective provisions which Cadent requires to be included on the face of the Order.
- 3.6 On 18 January Cadent provided the Promoter with full justification for why certain remaining paragraphs contained within its standard form protective provisions and which remain applicable in the circumstances (which we include at appendix 1 for reference) are required. Cadent is awaiting a response from the Promoter as to whether this tailored form of the protective provisions included at appendix 1 can be accepted.
- 3.7 The material points that remain outstanding between the parties are the indemnity, security and insurance provisions.

Indemnity

- 3.8 Cadent has a duty to maintain its network in an efficient state, in good repair and any damage to its network would impact on financial outlay (for which Ofgem requires Cadent to act responsibly to recover losses from third parties as part of its obligations to provide an efficient distribution network).
- 3.9 As communicated to the Promoter, the form of protective provisions included at Schedule 9, Part 11 of the draft DCO do not fully regulate the interaction between the Project and Cadent's apparatus. Schedule 9, Part 11 does not adequately address the principle that Cadent should not be exposed to any liability as a result of a third-party scheme which it derives no benefit from (a principle recognised by the Secretary of State in the Eggborough decision).
- 3.10 The Promoter is seeking to cap the indemnity it provides. An uncapped indemnity from the Promoter to Cadent is required because:
- (a) Cadent is receiving no direct benefit from the Project and therefore should not be put to any cost in respect of it;
 - (b) Cadent is a statutory undertaker with responsibilities and a duty to its regulator and the general public to conduct itself in an efficient and cost-effective way. It therefore requires equivalence in monetary terms arising from the impact of the Project;
 - (c) the Promoter should be responsible to Cadent for the full extent of any losses to which Cadent is put by reason of execution of works which are entirely within the Promoter's control; and
 - (d) as a means to properly and appropriately incentivise the Promoter to adhere to all appropriate standards, codes and details relevant to the execution of the Project in the proximity of and in relation to Cadent's apparatus.

Insurance

- 3.11 Cadent's standard protective provisions include a requirement for the Promoter, and any contractor(s) working near Cadent's assets, to hold third party liability insurance for the period of the works.
- 3.12 This is a fundamental requirement for Cadent, to ensure that it is properly protected against any damage caused by the Promoter or its contractors.
- 3.13 The Promoter has agreed to provide insurance, however the level of insurance to be provided is still to be agreed between the parties.

Security

- 3.14 Cadent's standard protective provisions include a requirement for the Promoter to provide appropriate security (by way of parent company guarantee or bond) to cover any liability to Cadent. This principle is commonplace, as security provisions ensure that the indemnity provisions are meaningful, and that the Promoter is in a financial position to deliver on any liability arising under the indemnity provisions. This is particularly important given that the Promoter is an SPV and has not provided evidence of covenant strength.
- 3.15 The Promoter is taking the stance that security provisions are not required on the basis that they believe that insurance alone is sufficient.
- 3.16 Cadent's position is that security is also required, particularly given that: (1) the level of insurance proposed by the Promoter is not yet agreed; and (2) even if such insurance is provided, there remains the possibility that any such policy cannot be claimed against because the conditions attached thereto are not met.

4. SECTION 138 OF THE ACT

- 4.1 Section 138(4) provides that the order may include provision for the extinguishment of the relevant right, or the removal of the relevant apparatus, only if the Secretary of State is satisfied that the extinguishment or removal is necessary for the purpose of carrying out the development to which the order relates. This is not applicable in the circumstances as the Promoter is not seeking to extinguish a relevant right or to remove Cadent's apparatus.

5. SUMMARY

- 5.1 Cadent has consistently communicated its requirements to the Promoter since April 2019, and has negotiated in good faith to tailor its standard form protective provisions to the circumstance of this scheme. It will continue these discussions to seek to agree terms before the close of examination.
- 5.2 In the event that suitably worded protective provisions cannot be agreed then the following consequences may arise from the exercise of unfettered compulsory purchase powers:
- (a) any damage to apparatus potentially has serious hazardous consequences for individuals and property located in the vicinity of the apparatus if it were to fail; and
 - (b) potentially significant consequences arising from continuity of supply.
- 5.3 In the event that suitably worded protective provisions are agreed, then Cadent considers this sufficient to remove any serious detriment to its undertaking. However, in the absence of suitably worded protective provisions, Cadent considers that the Secretary of State would be unable to

satisfy itself that the rights can be purchased without serious detriment to the carrying on of Cadent's undertaking (in accordance with section 127 of the Act).

- 5.4 Cadent reserves its position to further update the Examining Authority ahead of close of examination as to whether agreement with the Promoter has been reached.

APPENDIX 1

SCHEDULES

SCHEDULE 9

PROTECTIVE PROVISIONS

PART 11

FOR THE PROTECTION OF CADENT GAS LIMITED AS GAS UNDERTAKER

Application

1. For the protection of Cadent the following provisions will, unless otherwise agreed in writing between the undertaker and Cadent, have effect.

Interpretation

2. In this Part of this Schedule—

“1991 Act” means the New Roads and Street Works Act 1991;

“acceptable credit provider” means a bank or financial institution with a credit rating that is not lower than: (i) “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 undertaker to a level of not less than £50,000,000 (fifty 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) Cadent 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 £10,000,000.00 (ten million pounds) per event or £20,000,000.00 (twenty million pounds) in aggregate;

“acceptable security” means either:

(a) a parent company guarantee from a parent company in favour of Cadent to cover the undertaker’s liability to Cadent to a cap of not less than £50,000,000 (fifty million pounds) per asset per event up to a total liability cap of £50,000,000 (fifty million pounds) (in a form reasonably satisfactory to Cadent and where required by Cadent, 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 Cadent Gas Limited to cover the undertaker’s liability to Cadent for an amount of not less than £50,000,000 (fifty million pounds) per asset per event up to a total liability cap of £50,000,000 (fifty million pounds) (in a form reasonably satisfactory to Cadent);

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

“apparatus” means any gas mains, pipes, pressure governors, ventilators, cathodic protections, cables or other apparatus belonging to or maintained by Cadent for the purposes of gas

distribution together with any replacement apparatus and includes any structure in which apparatus is or will be lodged or which gives or will give access to apparatus;

“Cadent” means Cadent Gas Limited and/or its successors in title and/or any successor as a gas transporter within the meaning of Part 1 of the Gas Act 1986.

“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 Cadent (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 undertaker to submit for Cadent'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;

“maintain” and “maintenance” shall include the ability and right to do any of the following in relation to any apparatus or alternative apparatus of Cadent including retain, lay, construct, inspect, maintain, protect, use, access, enlarge, replace, renew, remove, decommission or render unusable or remove the apparatus;

“Order land” has the same meaning as is given to the term "Order land" in article 2 of this Order;

“maintenance activity” means the diversion, replacement, relaying, removal, refurbishment, reconstruction or improvement of the high pressure gas pipeline which supplies gas to the authorised development by the undertaker, or any works which would include the breaking of the ground within 15 metres in any direction of any apparatus;

“maintenance period” means the period of time from the commencement of the maintenance activity to the completion of the maintenance activity;

“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 undertaker acceptable to Cadent and which shall have been approved by Cadent acting reasonably;

“rights” shall include rights and restrictive covenants, and in relation to decommissioned apparatus the surrender of rights, release of liabilities and transfer of decommissioned apparatus;

"specified works" means any intrusive activities undertaken by the undertaker within the Order land pursuant to the powers in article 19 (Power to override easements and other rights), article 21 (Compulsory acquisition of rights etc), article 22 (Private rights) and article 29 (Statutory undertakers) 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 undertaker under sub-paragraph 6(2) or otherwise;

(b) may in any way adversely affect any apparatus the removal of which has not been required by the undertaker under sub-paragraph 6(2) or otherwise; and/or

(c) include any of the activities that are referred to in paragraph 8 of T/SP/SSW/22 (Cadent's policies for safe working in proximity to gas apparatus "Specification for safe working in the vicinity of Cadent High pressure Gas pipelines and associated installation requirements for third parties GD/SP/SSW/22"; and

"undertaker" means the undertaker as defined in article 2 of this Order.

On Street Apparatus

3. (1) Except for paragraphs 4 (*apparatus in stopped up streets*), 7 (*Removal of Apparatus*) in so far as sub-paragraph 3(2) applies, 8 (*Facilities and Rights for Alternative Apparatus*) in so far as sub-paragraph 3(2) below applies, 9 (*retained apparatus: protection*), 10 (*expenses*) and 11 (*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 Cadent, the other provisions of this Schedule do not apply to apparatus in respect of which the relations between the undertaker and Cadent are regulated by the provisions of Part 3 of the 1991 Act.

3(2) Paragraph 7 and 8 of this Schedule shall apply to diversions even where carried out under the 1991 Act, in circumstances where any Apparatus is diverted from an alignment within the existing adopted public highway but not wholly replaced within existing adopted public highway.

3(3) Notwithstanding article 30 (*apparatus and rights of statutory undertakers in streets*) or any other powers in the Order generally, s85 of the 1991 Act in relation to cost sharing and the regulations made thereunder shall not apply in relation to any diversion of apparatus of Cadent under the 1991 Act.

Apparatus of Cadent in stopped up streets

4. (1) Notwithstanding the temporary stopping up or diversion of any highway under the powers of article 11 (*temporary prohibition or restriction of uses of streets*), Cadent 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 it would have been entitled to do immediately before such temporary stopping up or diversion in respect of any apparatus which at the time of the stopping up or diversion was in that highway.

Acquisition of land

5. (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 undertaker may not appropriate or acquire any land interest or appropriate, acquire, extinguish, interfere with or override any easement, other interest or right and/or apparatus of Cadent otherwise than by agreement.

(2) As a condition of agreement between the parties in sub-paragraph 5(1), prior to the carrying out of any part of the specified works (or in such other timeframe as may be agreed between Cadent and the undertaker) 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 Cadent and/or affects the provisions of any enactment or agreement regulating the relations between Cadent and the undertaker in respect of any apparatus laid or erected in land belonging to or secured by the undertaker, the undertaker must as Cadent reasonably requires enter into such deeds of consent and variations upon such terms and conditions as may be agreed between Cadent and the undertaker acting reasonably and which must be no less favourable on the whole to Cadent unless otherwise agreed by Cadent, and it will be the responsibility of the undertaker 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 specified works.

(3) The undertaker and Cadent 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 Cadent and/or other enactments relied upon by Cadent as of right or other use in relation to the apparatus, then the provisions in this Schedule shall prevail.

(4) Any agreement or consent granted by Cadent under paragraph 8 or any other paragraph of this Part of this Schedule, shall not be taken to constitute agreement under sub-paragraph 5(1).

Removal of apparatus

6.—(1) If, in the exercise of the agreement reached in accordance with paragraph 5 or in any other authorised manner, the undertaker acquires any interest in any land in which any apparatus is placed, that apparatus must not be decommissioned or removed under this Part of this Schedule and any right of Cadent to maintain that apparatus in that land must not be extinguished until alternative apparatus has been constructed, is in operation, and the rights and facilities referred to in sub-paragraph (2) have been provided, to the reasonable satisfaction of Cadent and in accordance with sub-paragraph (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 undertaker requires the removal of any apparatus placed in that land, it must give to Cadent advance 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 Cadent reasonably needs to move or remove any of its apparatus) the undertaker must afford to Cadent to its satisfaction (taking into account sub-paragraph 8(1) below) the necessary facilities and rights:

- (a) for the construction of alternative apparatus (including appropriate working areas required to reasonably and safely undertake necessary works by Cadent in respect of the apparatus);
- (b) subsequently for the maintenance of that apparatus (including appropriate working areas required to reasonably and safely undertake necessary works by Cadent in respect of the apparatus); and
- (c) to allow access to that apparatus (including appropriate working areas required to reasonably and safely undertake necessary works by Cadent in respect of the apparatus).

(3) If 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, Cadent may, on receipt of a written notice to that effect from the undertaker, take such steps as are reasonable in the circumstances in an endeavour to assist the undertaker in obtaining 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 Cadent to use its compulsory purchase powers to this end unless it (in its absolute discretion) elects to so do.

(4) Any alternative apparatus to be constructed in land of or land secured by the undertaker under this Part of this Schedule must be constructed in such manner and in such line or situation as may be agreed between Cadent and the undertaker.

(5) Cadent must, after the alternative apparatus to be provided or constructed has been agreed, and subject to the prior grant to Cadent of such facilities and rights as are referred to in sub-paragraph (2) or (3) have been afforded to Cadent to its satisfaction, then proceed without unnecessary delay to construct and bring into operation the alternative apparatus and subsequently to decommission or remove any apparatus required by the undertaker to be decommissioned or removed under the provisions of this Part of this Schedule.

Facilities and rights for alternative apparatus

7.—(1) Where, in accordance with the provisions of this Part of this Schedule, the undertaker affords to or secures for Cadent facilities and rights in land for the access to, construction and maintenance alternative apparatus in substitution for apparatus to be decommissioned or

removed, those facilities and rights must be granted upon such terms and conditions as may be agreed between the undertaker and Cadent and must be no less favourable on the whole to Cadent than the facilities and rights enjoyed by it in respect of the apparatus to be decommissioned or removed unless otherwise agreed by Cadent.

(2) If the facilities and rights to be afforded by the undertaker and agreed with Cadent under sub-paragraph 7(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 Cadent than the facilities and rights enjoyed by it in respect of the apparatus to be decommissioned or removed (in Cadent's opinion) then the terms and conditions to which those facilities and rights are subject in the matter will be referred to arbitration in accordance with paragraph 14 (*Arbitration*) of this Part of this Schedule and the arbitrator shall make such provision for the payment of compensation by the undertaker to Cadent as appears to the arbitrator to be reasonable having regard to all the circumstances of the particular case.

Retained apparatus: protection of Cadent

8.—(1) Not less than 56 days before the commencement of any specified works the undertaker must submit to Cadent a plan and, if reasonably required by Cadent, a ground monitoring scheme in respect of those works.

(2) The plan to be submitted to Cadent 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 undertaker must not commence any works to which sub-paragraphs 1 and (2) apply until Cadent has given written approval of the plan so submitted.

(4) Any approval of Cadent required under sub-paragraph (3)—

- (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, Cadent may require such modifications to be made to the plans as may be reasonably necessary for the purpose of securing 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) and (2) or as relevant sub-paragraph (4), as approved or as amended from time to time by agreement between the undertaker and Cadent and in accordance with all conditions imposed under sub-paragraph (4)(a), and Cadent will be entitled to watch and inspect the execution of those works.

(7) Where Cadent requires any protective works to be carried out by itself or by the undertaker (whether of a temporary or permanent nature) such protective works, inclusive of any measures or schemes required and approved as part of the plan approved pursuant to this paragraph, must be carried out to Cadent's satisfaction prior to the commencement of any specified works (or any relevant part thereof) for which protective works are required prior to commencement

(8) If Cadent, 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, paragraphs

1 to 3 and 6 to 7 apply as if the removal of the apparatus had been required by the undertaker under sub-paragraph 6(2).

(9) Nothing in this paragraph precludes the undertaker from submitting at any time or from time to time, but in no case less than 56 days before commencing the execution of the specified works, a new plan, instead of the plan previously submitted, and having done so the provisions of this paragraph will apply to and in respect of the new plan.

(10) The undertaker will not be required to comply with sub-paragraph (1) where it needs to carry out emergency works as defined in the 1991 Act but in that case it must give to Cadent notice as soon as is reasonably practicable and a plan of those works and must comply with—

- (a) the conditions imposed under sub-paragraph (4)(a) insofar as is reasonably practicable in the circumstances; and
- (b) sub-paragraph (11) at all times.

(11) At all times when carrying out any specified works the undertaker must comply with Cadent's policies for safe working in proximity to gas apparatus "Specification for safe working in the vicinity of Cadent High pressure Gas pipelines and associated installation requirements for third parties SPGD/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 any specified works the undertaker shall implement an appropriate ground mitigation scheme save that Cadent 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 9.

Expenses

9.—(1) Subject to the following provisions of this paragraph, the undertaker must pay to Cadent on demand all charges, costs and expenses reasonably anticipated or incurred by Cadent in, or in connection with, the inspection, removal, relaying or replacing, alteration or protection of any apparatus or rights or the construction of any new or alternative apparatus which may be required in consequence of the execution of any specified works including without limitation—

- (a) any costs reasonably incurred by or compensation properly paid by Cadent in connection with the negotiation or acquisition of rights or the exercise of statutory powers for such apparatus including without limitation all costs (including professional fees) incurred by Cadent as a consequence of Cadent;
 - (i) using its own compulsory purchase powers to acquire any necessary rights under sub-paragraph 7(3) if it elects to do so; and/or
 - (ii) exercising any compulsory purchase powers in the Order transferred to or benefitting Cadent;
- (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 specified works;
- (g) any watching brief pursuant to sub-paragraph 8(6).

(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 undertaker or, in default of agreement, is not determined by arbitration in accordance with article 14 (*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 Cadent by virtue of sub-paragraph (1) will be reduced by the amount of that excess save where it is not possible or appropriate in the circumstances (including due to statutory or regulatory changes) to obtain the existing type of apparatus at the same capacity and dimensions or place at the existing depth in which case full costs will be borne by the undertaker.

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

- (a) an extension of apparatus to a length greater than the length of existing apparatus will not be treated as a placing of apparatus of greater dimensions than those of the existing apparatus; and
- (b) where the provision of a joint in a pipe or cable is agreed, or is determined to be necessary, the consequential provision of a jointing chamber or of a manhole will be treated as if it also had been agreed or had been so determined.

Indemnity

10.—(1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of any specified works authorised by this Part of this Schedule (including without limitation relocation, diversion, decommissioning, construction and maintenance of apparatus or alternative apparatus) or in consequence of the construction, use, maintenance or failure of any of the specified works by or on behalf of the undertaker or in consequence of any act or default of the undertaker (or any person employed or authorised by him) in the course of carrying out such specified works, including without limitation works carried out by the undertaker under this Part of this Schedule or any subsidence resulting from any of these works, any damage is caused to any apparatus or alternative apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal for the purposes of the specified works) or property of Cadent, or there is any interruption in any service provided, or in the supply of any goods, by Cadent, or Cadent becomes liable to pay any amount to any third party, the undertaker will—

- (a) bear and pay on demand the cost reasonably incurred by Cadent in making good such damage or restoring the supply; and
- (b) indemnify Cadent for any other expenses, loss, demands, proceedings, damages, claims, penalty or costs incurred by or recovered from Cadent, by reason or in consequence of any such damage or interruption or Cadent becoming liable to any third party as aforesaid other than arising from any default of Cadent.

(2) The fact that any act or thing may have been done by Cadent on behalf of the undertaker or in accordance with a plan approved by Cadent or in accordance with any requirement of Cadent or under its supervision including under any watching brief will not (unless sub-paragraph (3) applies) excuse the undertaker from liability under the provisions of this sub-paragraph (1) unless Cadent 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 undertaker in respect of-

- (a) any damage or interruption to the extent that it is attributable to the neglect or default of Cadent, its officers, servants, contractors or agents; and

- (b) any specified works carried out by Cadent 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 specified 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 10.

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

(5) Cadent must use its reasonable endeavours to mitigate in whole or in part and to minimise any costs, expenses, loss, demands, and penalties to which the indemnity under this paragraph applies and if reasonably requested to do so by the promoter Cadent must provide an explanation of how the claim has been minimised

(6) The undertaker must not commence any Maintenance Activity (and must not permit the commencement of such Maintenance Activity) until the following conditions are satisfied:

- (a) unless and until Cadent is satisfied acting reasonably (but subject to all necessary regulatory constraints) that the undertaker has first provided the acceptable security (and provided evidence that it shall maintain such acceptable security for the Maintenance Period) and Cadent has confirmed the same to the undertaker in writing; and
- (b) unless and until Cadent is satisfied acting reasonably (but subject to all necessary regulatory constraints) that the undertaker has procured acceptable insurance (and provided evidence to Cadent that it shall maintain such acceptable insurance for the Maintenance Period) and Cadent has confirmed the same in writing to the undertaker.

(7) In the event that the undertaker fails to comply with 10(6) of this Part of this Schedule, nothing in this Part of this Schedule shall prevent Cadent from seeking injunctive relief (or any other equitable remedy) in any court of competent jurisdiction.

(8) The undertaker will not be required to comply with 10(6) of this Part where it needs to carry out emergency works as defined in the 1991 Act.

Enactments and agreements

11. Save to the extent provided for to the contrary elsewhere in this Part of this Schedule or by agreement in writing between Cadent and the undertaker, nothing in this Part of this Schedule shall affect the provisions of any enactment or agreement regulating the relations between the undertaker and Cadent in respect of any apparatus laid or erected in land belonging to the undertaker on the date on which this Order is made.

Co-operation

12.(1) Where in consequence of the specified works, the undertaker or Cadent requires the removal of apparatus under sub-paragraph 6(2) or Cadent makes requirements for the protection or alteration of apparatus under paragraph 8, the undertaker 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 specified works and taking into account the need to ensure the safe and efficient operation of Cadent’s undertaking and Cadent shall use its best endeavours to co-operate with the undertaker for that purpose.

(2) For the avoidance of doubt whenever Cadent’s consent, agreement or approval is required in relation to plans, documents or other information submitted by Cadent or the taking of action by Cadent, it must not be unreasonably withheld or delayed.

Access

13. If in consequence of the agreement reached in accordance with sub-paragraph 5(1) or the powers granted under this Order the access to any apparatus (including appropriate working areas required to reasonably and safely undertake necessary works by Cadent in respect of the apparatus) is materially obstructed, the undertaker must provide such alternative rights and means of access to such apparatus as will enable Cadent to maintain or use the apparatus no less effectively than was possible before such obstruction.

Arbitration

14. Save for differences or disputes arising under sub-paragraphs 6(2), 6(4), 7(1), 10(5) and paragraph 8 any difference or dispute arising between the undertaker and Cadent under this Part of this Schedule must, unless otherwise agreed in writing between the undertaker and Cadent, be determined by arbitration in accordance with article 42 (arbitration).

Notices

15. The plans submitted to Cadent by the undertaker pursuant to sub-paragraph 8(1) must be sent to Cadent Gas Limited Plant Protection at plantprotection@cadentgas.com or such other address as Cadent may from time to time appoint instead for that purpose and notify to the undertaker.