

From: [REDACTED]
To: [Immingham OCGT](#)
Cc: [REDACTED]
Subject: VPI Immingham OCGT DCO - Cadent's submission - 7 February 2020 [CMCK-UK.FID14234943]
Date: 07 February 2020 18:44:04
Attachments: [REDACTED]

Good afternoon,

I attach Cadent's submission to the Examining Authority which provides an update at close of examination regarding the status of the protective provisions for Cadent's benefit.

I should be grateful if you would confirm receipt.

Kind regards,
Katy

Katy Abrahams
Associate



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THE VPI IMMINGHAM OCGT DEVELOPMENT CONSENT ORDER 20[] (“THE PROJECT”)

7 FEBRUARY 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”).
- 1.2 The purpose of this submission is to provide the Examining Authority with an update at close of examination regarding the status of the protective provisions for Cadent’s benefit.
- 1.3 Cadent has made a number of submissions to the examination of the Project. In Cadent’s earlier submissions, it outlines in detail why adequately worded protective provisions are required.
- 1.4 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, Cadent’s deadline 6 submission dated 20 December 2019 and Cadent’s deadline 6a submission dated 23 January 2020.

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. PROTECTIVE PROVISIONS

- 3.1 Cadent has consistently communicated its requirements as to the form of protective provisions that it requires to the Promoter since April 2019. Cadent has negotiated in good faith to tailor its standard form protective provisions to the circumstance of this scheme. Unfortunately, despite Cadent’s best efforts to reach agreement, this has not been forthcoming.
- 3.2 The material points between the parties have been the indemnity, security and insurance provisions.
- 3.3 On 18 January 2020 Cadent provided the Promoter with full justification for why these provisions are required. The Promoter provided comments on these protective provisions yesterday afternoon (6 February 2020) and Cadent has been given sight of the protective provisions that the

Promoter has submitted for deadline 7. The Promoter has accepted that the indemnity be uncapped and as such, Cadent does not make further representations as to the importance of an uncapped indemnity. The Promoter's deadline 7 version of the protective provisions for the benefit of Cadent are not agreed. The material points between the parties remain the insurance, security and arbitration provisions.

- 3.4 Appendix 1 contains the protective provisions that Cadent requires are included on the face of the Order for its objection to be treated as removed and to avoid serious detriment to Cadent's undertaking in terms of section 127 of the Planning Act 2008. Appendix 2 contains a redline showing the amendments to the Promoter's deadline 7 submission that Cadent is requesting.

4. CADENT - REGULATORY PROTECTION FRAMEWORK

- 4.1 Cadent's gas pipelines are regulated by the Pipeline Safety Regulations 1996. Under Regulation 15, it is an offence to cause damage to a pipeline as may give rise to a danger to persons and could result in enforcement action by the Health and Safety Executive (**HSE**).

- 4.2 The Pipeline Safety Regulations 1996 requires that pipelines are designed, constructed and operated so that the risks are as low as is reasonably practicable. In judging compliance with the Regulations, the HSE expects duty-holders to apply relevant good practice as a minimum.

- 4.3 Well established national standards and protocols for gas pipelines assist the HSE in ascertaining whether the risks incurred in working with such pipelines have been mitigated as much as reasonably practicable. The following standards are relevant:

- (a) **IGEM/TD/1: Steel Pipelines for High Pressure Gas Transmission (Pipeline over 16 bar).**

(a) This Standard applies to the design, construction, inspection, testing, operation and maintenance of pipelines and associated installations, designed after the date of publication. It sets out engineering requirements "for the safe design, construction, inspection, testing, operation and maintenance of pipelines and associated installations, in accordance with current knowledge."

(b) This Standard is intended to protect from possible hazards members of the public and those who work with pipelines and associated installations, as well as the environment, so far as is reasonably practicable, it is also intended to ensure that the security of gas is maintained.

- (b) **TSP/SSW/22 'Safe Working in the Vicinity of Cadent HP pipelines':**

(a) This specification manages industry protection of plant;

(b) It is aimed at third parties carrying out work in the vicinity of Cadent high pressure gas pipelines (above 7 bar gauge) and associated installations and is provided to ensure that individuals planning and undertaking work take appropriate measures to prevent damage;

(c) It states that "any damage to a high pressure gas pipeline or its coating can affect its integrity and can result in failure of the pipeline with potential serious hazardous consequences for individuals located in the vicinity of the pipeline if it were to fail". The requirements in this document are in line with the requirements of the IGE (Institution of Gas Engineers) recommendations IGE/SR/18 Edition 2 - Safe Working Practices To Ensure The Integrity Of Gas Pipelines And Associated Installations; and

- (c) The HSE's guidance document **HS(G)47** 'Avoiding Danger from Underground Services'. This guidance document is aimed at those involved in carrying out work on or near apparatus. Its purpose is avoiding danger from underground services, and it outlines the potential dangers of working near underground services and gives advice on how to reduce any direct risks to people's health and safety, as well as the indirect risks arising through damage to apparatus;
- (d) **IGE recommendations IGE/SR/18**: This standard regulates safe working practices to ensure the integrity of gas pipelines and associated installations. This standard outline management procedures and safety precautions affecting the design, construction, maintenance and demolition of services, structures and other works in the vicinity of gas plant.

4.4 These standards have the specific intention of protecting:

- (a) the integrity of the pipelines and thus the transmission of gas;
- (b) the safety of the area surrounding a major accident hazard pipeline; and
- (c) the safety of personnel involved in working with major accident hazard pipelines.

4.5 Cadent has a statutory duty under its Licence to ensure that these Regulations and protocols are complied with. Cadent requires specific provisions in place for an appropriate level of control and assurance that the industry regulatory standards will be complied with in connection with works to connect to and in the vicinity of the Gas mains.

5. ASSET PROTECTION

5.1 Cadent is required to comply with the terms of the Licence, and is regulated by Ofgem. As money spent and costs incurred by Cadent is ultimately passed on to consumers in their energy bills, one of Cadent's duties is to ensure that it conducts itself in an efficient and cost-effective way. Cadent must ensure that it is suitably protected and indemnified by promoters from the financial implications of their schemes.

5.2 Any damage to Cadent's assets or their coating can affect their integrity and can result in failure of the gas pipeline or main with potential serious, hazardous consequences for individuals and/or property located in the vicinity of the gas pipelines or mains if they were to fail. It could also lead to loss of supply for individuals and business premises in the vicinity of the pipeline.

5.3 Cadent is required to comply with a number of Industry Safety Standards and legal requirements in fulfilment of its licence responsibilities (as summarised in section 4 above). Cadent must ensure that its network is maintained in an efficient state, in efficient working order and in good repair. Cadent is therefore required to keep its network whole and to maintain safety standards. This includes addressing the adverse impacts of third party development on its network.

5.4 Cadent must be kept or made whole again, during and following the carrying out and operation of any third party development either by way of the physical replacement of alternative apparatus or, where appropriate, in monetary compensation. As part of measures designed to meet this objective, Cadent requires adequate protection which includes a means of recovering of all of its properly incurred costs, expenses and losses caused by or on behalf of the third party promoter. This follows the widely understood and accepted principle of 'equivalence' but for which those costs, expenses and losses will be incurred by Cadent.

6. SERIOUS DETRIMENT TO CADENT'S UNDERTAKING

- 6.1 Cadent maintains that without adequate protective provisions qualifying the exercise of unfettered compulsory powers or work in proximity to its apparatus the following consequences will arise:
- (a) health and safety risk because compliance with industry safety standards, legal requirements and Health and Safety Executive standards cannot be assured;
 - (b) any damage to apparatus has potentially serious hazardous consequences for individuals located in the vicinity of the pipeline/apparatus if it were to fail; and
 - (c) risk of potentially significant consequences to individuals and businesses arising from continuity of supply, and consequently to Cadent's undertaking and compliance with licence obligations if unrecoverable losses are sustained by Cadent due to this scheme.

7. INSURANCE

- 7.1 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.
- 7.2 This is a fundamental requirement for Cadent, to ensure that it is properly protected against any damage caused by the Promoter or its contractors.
- 7.3 As a statutory undertaker, 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. A reduced cap on insurance could expose Cadent to irrecoverable losses that would not otherwise be incurred in the ordinary course of operations. Cadent's position is maintained that it should not have to bear any liabilities in excess of a reduced cap on insurance where these liabilities are caused by a scheme from which Cadent receives no direct benefit.
- 7.4 The Promoter has agreed to provide insurance, however the level of insurance to be provided is not agreed between the parties. Cadent has made clear to the Promoter that it cannot accept a reduced cap. The rights that the Promoter is requesting include remove, refurbish, reconstruct, replace and improve their existing pipeline. These rights are broad and are akin to usual construction activities permitted pursuant to a DCO and extend beyond just "maintenance". As such, Cadent's standard £50 million cap is required. This level has been agreed with other promoters (for example Highways England – see Cadent's deadline 8 submission on the A585 Windy Harbour to Skippool Improvement Scheme) and is considered a reasonable balance between unquantifiable potential losses and levels of insurance reasonably available. Cadent derives no benefit from the Order, has no control over the works carried out pursuant to the Order and cannot be exposed to any liability as a result of the scheme.
- 7.1 In relation to nationally significant infrastructure projects ("NSIPs"), the Secretary of State has recently determined on The Eggborough Gas Fired Generating Station Order 2018 (2018 No. 1020) (see Appendix 3) that an indemnity cap was not appropriate. In that case, the Secretary of State held that an uncapped indemnity would place an unreasonable and unjustified burden on the third party in question, which would face a risk of potential costs and losses through no fault of its own. Please see Appendix 2. It is clear from the rationale that the statutory undertaker status of the third party was a material factor in the Secretary of State's decision that warranted protection from any financial costs of the third party project. The same principle applies to Cadent

and to the level of cap on insurance that is required. Cadent derives no benefit from the Order, and cannot be exposed to any liability as a result of the scheme.

7.2 Cadent's position is, and remains, that its standard £50 million cap is appropriate.

8. SECURITY

8.1 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 their liability to Cadent - to back up the indemnity and as a way to secure the Promoter's overall performance. This principle is commonplace, as security provisions ensure that the indemnity provisions are meaningful.

8.2 It is appropriate that Cadent is comfortable 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.

8.3 The Promoter has agreed to provide security, however it will not agree for such provisions to be included on the face of the Order. This is not appropriate, as to exclude such provisions from the face of the Order could lead to misunderstanding and future submissions that security is not always required, which is categorically not the case.

8.4 At the time of writing, Cadent and the Promoter have also not entered into a side agreement to secure security.

8.5 Security is also required on the face of the Order because (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.

8.6 The level of security to be provided is also not agreed between the parties. The Promoter will agree to provide £25 million of security. Cadent's requirement (for the reasons outlined at section 7 above) is for £50 million to be provided.

9. ARBITRATION

9.1 Paragraph 14 of the protective provisions regulates the matters that are subject to arbitration, and those that are not subject to arbitration. In respect of this:

- (a) Cadent's protective provisions carve a number of paragraphs out of the scope of arbitration; but
- (b) the Promoter's protective provisions do not carve any paragraphs out of the scope of arbitration.

9.2 Cadent seeks to carve certain paragraphs out of the scope of arbitration given the importance of these paragraphs to the protection of Cadent's apparatus. The Promoter does not have any issues with the scope of these paragraphs, and therefore recognises the importance of protecting Cadent's apparatus, but they seek to subject these paragraphs to arbitration.

9.3 The reason that Paragraph 6(2), 6(4), 7(1) and 8 are required to protect Cadent's apparatus is as follows:

- (a) Major Accident Hazard pipelines are regulated by the Pipeline Safety Regulations 1996. Under Regulation 15, it is an offence to cause damage to a pipeline as may give rise to a danger to persons and could result in enforcement action by the HSE.

- (b) The Pipeline Safety Regulations 1996 requires that pipelines are operated so that the risks are as low as is reasonably practicable. In judging compliance with the Regulations, the HSE expects duty- holders to apply relevant good practice as a minimum.
- (c) Well established national standards and protocols for major accident hazard pipelines assist the HSE in ascertaining whether the risks incurred in working with such pipelines have been mitigated as much as reasonably practicable. The relevant standards are noted at section 4.3, and the purpose of these standards at 4.4 of these representations.
- (d) Cadent therefore requires an appropriate level of control and assurance that the industry regulatory standards will be complied with in connection with works in the vicinity of its apparatus. Failure to comply with industry safety standards, legal requirements or Health and Safety standards create a health and safety risk and could have potentially serious consequences for individuals or property located in proximity to the pipeline/s.
- (e) Cadent has the benefit of a gas transporter licence (the **Licence**) under section 7 of the Gas Act 1986 (the **Act**). Cadent has a statutory duty under its Licence to ensure that these Regulations and protocols are complied with. Cadent requires specific provisions in place for an appropriate level of control and assurance that the industry regulatory standards will be complied with in connection with works to connect to and in the vicinity of the apparatus.

9.4 For all of the above reasons, it is crucial that Cadent retains protection over how its network operates and how its network is protected.

9.5 Cadent seeks to carve out 10(5) from the scope of arbitration because it is for Cadent as an experienced gas undertaker to determine what measures are reasonable in protecting its network in line with its Licence obligations.

9.6 The Promoter has offered no explanation for not being able to accept the carve outs that Cadent requires at paragraph 14.

9.7 Carving these sub-paragraphs out of the scope of arbitration does not restrict the other remedies the Promoter would have at law.

9.8 Therefore, Cadent requests that the Secretary of State includes paragraph 14 within the Order (if made) in the following form:

- (a) “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).”

10. CONCLUSION

10.1 Cadent requests that the protective provisions included at Appendix 1 are included on the face of the Order for the reasons outlined herein.

10.2 Cadent has to date reached an agreed position or agreed final submission to the Secretary of State based on Cadent’s standard form protective provisions and asset protection agreements with all other promoters of DCOs and CPOs which affect Cadent’s assets. It is therefore disappointing that the Promoter was not able to engage to reach an agreed position in respect of the Proposed Scheme.

10.3 Cadent's objection should only be treated as being withdrawn if the protective provisions which are attached at Appendix 1 are included on the face of the Order.

CMS CAMERON MCKENNA NABARRO OLSWANG LLP

7 FEBRUARY 2020

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 and/or its contractor(s) to a level of not less than £50,000,000 (fifty million pounds) (or such lower amount as may be approved by Cadent in writing) per occurrence or series of occurrences arising out of one event. Such insurance shall be maintained for the maintenance period 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) (or such lower amount as may be approved by Cadent in writing) (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) (or such lower amount as may be approved by Cadent in writing) (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;

“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;

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

“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 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 sub-paragraph (6), 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 is not required to comply with sub-paragraph (6) 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.

APPENDIX 2

SCHEDULES

SCHEDULE 9 PROTECTIVE PROVISIONS

PART ~~H~~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 and/or its contractor(s) to a level of not less than ~~£25,000,000~~ £50,000,000 (~~twenty five~~ twenty five million pounds) (or such lower amount as may be approved by Cadent in writing) per occurrence or series of occurrences arising out of one event. Such insurance shall be maintained for the maintenance period ~~of any 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) (or such lower amount as may be approved by Cadent in writing) (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) (or such lower amount as may be approved by Cadent in writing) (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;

“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;

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

“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.—~~

~~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.

~~(2) The Protective Provisions in this Part of this Schedule apply and take precedence over article 30 (*apparatus and rights of statutory undertakers in streets*) of the Order which shall not apply to Cadent.~~

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

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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 ~~must use its reasonable endeavours 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 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) ~~unless and until Cadent is satisfied acting reasonably (but subject to all necessary regulatory constraints) that the undertaker or its contractor 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.~~ 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 sub-paragraph (6), 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 is not required to comply with sub-paragraph (6) 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.

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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. ~~Any~~ 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.

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APPENDIX 3



Department for
Business, Energy
& Industrial Strategy

Department for Business,
Energy & Industrial Strategy

1 Victoria Street
London
SW1H 0ET

Dalton Warner Davis
21 Garlick Hill
London EC4V 2AU

W www.gov.uk

Our Ref: EN010081

20 September 2018

Dear Sir or Madam,

PLANNING ACT 2008

APPLICATION FOR THE EGGBOROUGH COMBINED CYCLE GAS TURBINE (GENERATING STATION) ORDER

I. Introduction

1.1 I am directed by the Secretary of State for Business, Energy and Industrial Strategy (“the Secretary of State”) to advise you that consideration has been given to the report dated 27 June 2018 of the Examining Authority (“the ExA”), Richard Allen B.Sc(Hons) PGDip MRTPI, who conducted an examination into the application (“the Application”) submitted on 30 May 2017 on behalf of Eggborough Power Limited (“the Applicant”) for a Development Consent Order (“the Order”) under section 37 of the Planning Act 2008 (“the 2008 Act”) for the Eggborough Combined Cycle Gas Turbine (“CCGT”) Generating Station (“the Development”).

1.2 The Application was accepted for examination on 27 June 2017. The examination began on 27 September 2017 and was completed on 27 March 2018.

1.3 The Order, as applied for, would grant development consent for the construction and operation of a CCGT generating station of up to 2,500 megawatts (“MW”) on land located at the existing Eggborough Coal-Fired Power Station site near Selby in North Yorkshire.

1.4 The Development would comprise:

- An electricity generating station located on land at the existing Eggborough Power Station site, fuelled by natural gas and with a gross output of up to 2500 MW; a peaking and black start plant with a combined gross output of up to 299 MW; and cooling infrastructure;

- Temporary construction and laydown area involving the infilling of an existing on-site lagoon, and reserve space for carbon capture readiness;
- Works to the existing National Grid Electricity Transmission (“NGET”) sub-station including underground and overground electrical cables, replacement equipment and connections to busbars;
- Works to replace the existing cooling water intake and discharge infrastructure from the River Aire;
- Works to replace the existing groundwater and towns water supply connections;
- Installation of a high-pressure gas supply pipeline to link the proposed CCGT to the National Grid Gas Feeder pipeline;
- Installation of an above-ground installation for both the Applicant and National Grid Gas at the gas pipeline connection point;
- Landscaping and biodiversity enhancements;
- Surface water drainage works from the site to Hensall Dyke utilising an existing connection; and
- Vehicular, pedestrian and cycle access works.

1.5 Published alongside this letter on the Planning Inspectorate’s website¹ is a copy of the ExA’s Report of Findings and Conclusions and Recommendation to the Secretary of State (“the ExA Report”). The ExA’s findings and conclusions are set out in Chapters 4 to 8 of the ExA Report, and the ExA’s summary of conclusions and recommendation is at Chapter 9.

II. Summary of the ExA’s Report and Recommendation

2.1 The principal issues considered during the Examination on which the ExA has reached conclusions on the case for development consent are set out in the ExA Report under the following broad headings:

- Legal and Policy Context, including the relevant National Policy Statements, European and Local planning policy (Chapter 3);
- Finding and Conclusions in relation to policy and factual issues, which includes consideration of: Sources of Information; Environmental Impact Assessment (“EIA”) Methodology; the need for the proposed development and examination of alternatives; Agriculture and Socio-Economics; Air Quality and Emissions; Archaeology and Historic Environment; Biodiversity and Ecology; Carbon Capture Storage Readiness; Combined Heat and Power Readiness; Flooding and Water; Land Contamination and Ground Conditions; Landscape and Visual; Noise and Vibration; Statutory Nuisance and Human Health; Sustainability and Climate Change; Traffic and Transport; Waste Management; Cumulative and Combined Effects; and the existing Coal-fired Power Station (Chapter 4);
- Findings and Conclusions in Relation to the Habitats Regulations (Chapter 5);

¹ <https://infrastructure.planninginspectorate.gov.uk/projects/yorkshire-and-the-humber/eggborough-ccgt/>

- The ExA’s Conclusion on the Case for Development Consent (Chapter 6);
- Compulsory Acquisition and Related Matters (Chapter 7); and
- Draft Order and Related Matters, including the Deemed Marine Licence (“DML”) and other Legal Agreements and related documents (Chapter 8).

2.2 For the reasons set out in the Summary of Findings and Conclusions (Chapter 9) of the ExA Report, the ExA recommends that the Order be made, as set out in Appendix D to the ExA Report [ER 9.1.10].

III. Summary of the Secretary of State’s Decision

3.1 The Secretary of State has decided under section 114 of the 2008 Act to make, with modifications, an Order granting development consent for the proposals in the Application. This letter is the statement of reasons for the Secretary of State’s decision for the purposes of section 116 of the Planning Act 2008 and regulation 23(2)(d) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (“the 2009 Regulations”) – which apply to this application by operation of regulation 37(2) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017.

IV. Secretary of State’s Consideration of the Application

4.1 The Secretary of State has considered the ExA Report and all other material considerations, including the further representations received after the close of the ExA’s examination from the Applicant and the Crown Estate both dated 20 August 2018 in response to BEIS’s consultation letter dated 9 July 2018². The Secretary of State’s consideration of the ExA Report and further representations is set out in the following paragraphs. All numbered references, unless otherwise stated, are to paragraphs of the ExA Report.

4.2 The Secretary of State has had regard to the joint Local Impact Report (“LIR”) as submitted by North Yorkshire County Council (“NYCC”) and Selby District Council (“SDC”) [ER 3.10 and ER 4.2.5 – ER 4.2.6], the Development Plan [ER 3.11 and ER 4.2.7 – ER 4.2.9], environmental information as defined in Regulation 2(1) of the 2009 Regulations and to all other matters which are considered to be important and relevant to the Secretary of State’s decision as required by section 104 of the 2008 Act. In making the decision, the Secretary of State has complied with all applicable legal duties and has not taken account of any matters which are not relevant to the decision.

4.3 The Secretary of State notes nineteen relevant representations were made by statutory and non-statutory authorities, utility providers, NYCC and SDC, Hensall Parish Council and local residents [ER 4.2.1]. Written Representations, responses to questions and oral submissions made during the Examination were also taken into account by the ExA. Except as indicated otherwise in the paragraphs below, the Secretary of State agrees with the findings, conclusions and recommendations of the

² [https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010081/EN010081-001480-Egborough%20CCGT%20Consultation%20Letter%20Dated%209%20July%202018%20\(2\).pdf](https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010081/EN010081-001480-Egborough%20CCGT%20Consultation%20Letter%20Dated%209%20July%202018%20(2).pdf)

ExA as set out in the ExA Report, and the reasons for the Secretary of State's decision are those given by the ExA in support of his conclusions and recommendations.

Need for the Proposed Development and Examination of Alternatives

4.4 After having regard to the comments of the ExA set out in Chapter 3 (ER 3.3] of the ExA Report, and in particular the conclusions on the case for development consent in Chapter 4.5, the Secretary of State is satisfied that in the absence of any adverse effects which are unacceptable in planning terms, making the Order would be consistent with energy National Policy Statements ("NPS") EN-1 (the Overarching NPS for Energy), EN-2 (the NPS for Fossil Fuel Electricity Generating Infrastructure), EN-4 (the NPS for Gas Supply Infrastructure and Gas and Oil Pipelines) and EN-5 (the NPS for Electricity Networks Infrastructure). Taken together, these NPSs set out a national need for development of new nationally significant electricity generating infrastructure of the type proposed by the Applicant. The Secretary of State notes that the ExA is satisfied that alternative options for the siting of the proposed CCGT and route corridor for Work No.6 (gas pipeline) were rigorously tested by the Applicant and that the requirements of NPS EN-1 and the EIA Regulations in this regard have been met [ER 4.5.13].

Carbon Capture Readiness ("CCR")

4.5 As set out in NPSs EN-1 and EN-2, all commercial scale fossil fuel generating stations with a generating capacity of 300MW or more have to be 'Carbon Capture Ready'. Applicants are required to demonstrate that their proposed development complies with guidance issued by the Secretary of State in November 2009³ or any successor to it.

4.6 The Secretary of State notes that the Application was accompanied by a Carbon Capture Storage and Carbon Capture Readiness Statement, which also included an economic assessment and information on Carbon storage and transport. It is also noted that the Environment Agency ("EA") were consulted and concluded there are no foreseeable barriers to carbon capture with regard to space and, following clarification by the Applicant during the Examination, confirmed that it had no concerns in respect of CCR matters and that provision for CCR is adequately secured through Requirements 31 and 32 of the Order. The Statement of Common Ground between the Applicant and NYCC/SDC also agrees that the Development complies with the relevant regulations and guidance [ER 4.10.3 -4.10.4]. No written questions were posed by the ExA during the Examination on this matter [ER 4.10.5].

4.7 The Secretary of State is satisfied with the ExA's assessment of this particular issue, and conclusion that the Development adequately makes provision for CCR,

³ Carbon Capture Readiness A guidance note for Section 36 Applications URN09D/810
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/43609/Carbon_capture_readiness_-_guidance.pdf

accords with all legislation and policy requirements, and that CCR is adequately provided for and secured in its recommended Order [ER 4.10.6].

Combined Heat and Power (“CHP”)

4.8 NPS EN-1 requires that applications for thermal generation stations under the Planning Act 2008 should either include CHP, or evidence that opportunities for CHP have been explored where the proposal is for a generating station without CHP. The Secretary of State notes that the Application was accompanied by a CHP Assessment which concludes that the provision of heat or steam is not viable at this stage. However, the CHP assessment demonstrates that the proposed Development meets the “Best Available Techniques” tests and will be designed and built as CHP Ready to supply any identified viable heat load up to a potential maximum of 33MWth and sufficient to meet the identified load of 21MWth [ER 4.11.3]. The Statements of Common Ground between the Applicant and the Environment Agency (“EA”) and the Applicant and NYCC/SDC agree that the proposed Development would be CHP ready, which would be secured by Requirement 28 of the recommended Order [ER 4.11.5].

4.9 The Secretary of State is satisfied with the ExA’s conclusion that the proposed Development adequately makes provision for CHP, accords with all legislation and policy requirements and CHP is adequately provided for and secured in the recommended Order [ER 4.11.7].

V. Biodiversity and Habitats

5.1 The Development is not directly connected with or necessary to the management of any European Site. Therefore, under Regulation 63 of The Conservation Of Habitats And Species Regulations 2017 (“the Habitats Regulations”), the Secretary of State is required to consider whether the Development would be likely, either alone or in-combination with other plans and projects, to have a significant effect on a European site. If likely significant effects cannot be ruled out, then the Secretary of State must undertake an Appropriate Assessment (“AA”) addressing the implications for the European Site in view of its conservation objectives. In light of any such assessment, the Secretary of State may grant development consent only if it has been ascertained that the Development will not, either on its own or in-combination with other plans and projects, adversely affect the integrity of such a site, unless there are no feasible alternative or imperative reasons of overriding public interest apply. The complete process of assessment is commonly referred to as a Habitats Regulations Assessment (“HRA”).

5.2 In undertaking the HRA, the Secretary of State considered the following European Sites:

- Skipwith Common Special Area of Conservation (SAC);
- Thorne Moor SAC;
- Hatfield Moor SAC;
- Humber Estuary SAC;

- Humber Estuary Special Protection Area (SPA);
- Humber Estuary Ramsar;
- Strensall Common SAC; and
- North York Moors SAC.

5.3 All of the above listed sites were thought to either have the potential to be impacted by the Development through changes to surface water or changes to air quality. However, on the basis of the information submitted as part of the Application, the Secretary of State has concluded that the Development, alone and in-combination is not likely to have a significant effect on the on the above listed sites. This is with the exception of the Thorne Moor SAC; at this site air emissions from the operational Development are expected to contribute to increased Nutrient Nitrogen Deposition.

5.4 To assess this effect further, the Secretary of State undertook an Appropriate Assessment. This assessment focused on the effect of the increase in Nutrient Nitrogen Deposition on the site's qualifying feature ('degraded raised bogs still capable of natural regeneration'). The assessment noted that the level of Nutrient Nitrogen Deposition at this site (and many other European Sites) already exceeds the measures established for the protection of vegetation, known as Critical Loads or Critical Levels. However, on the basis that the contribution from the Development, in-combination with other plans and projects, would result in no measurable change to the protected bog habitat, the Secretary of State has concluded that the Development, alone and in-combination with other plans and projects, will not have an adverse effect on the protected bog feature, and therefore the integrity of the Thorne Moor SAC. This conclusion is supported by Natural England, the Government's Statutory Nature Conservation Advisor.

VI. Other Matters

Deemed Marine Licence Environmental Permit, and other consents, licences and permits

6.1 The Secretary of State notes that Schedule 13 of the Order is the Deemed Marine Licence ("DML") under the Marine and Coastal Act 2009 for cooling water and gas connections within the tidal section of the River Aire. The Marine Management Organisation ("MMO") submitted a number of written representations during the examination. It is understood that the MMO's principal concern had been in relation to the wording of part 2, paragraph (3)(4)(b) of the Applicant's draft DML, which they considered would have allowed the Applicant to undertake the proposed Development over a wider (and unassessed) area than indicated in the indicative DML Co-Ordinates [ER 8.8.3]. However, it is noted that revised wording was subsequently agreed within the Statement of Common Ground between the Applicant and the MMO [ER 8.8.5]. The revised wording has been included in the recommended Order and the Secretary of State agrees with the ExA that its inclusion in the Order adequately protects the interests and functions of the MMO [ER 8.8.6].

6.2 It is noted from the EA's Statement of Common Ground [REP3-008] submitted at Examination Deadline 3 that it was agreed that the proposed Development would

be subject to the Environmental Permitting regime under the Environmental Permitting Regulations 2010 ('EPR') covering operational emissions from the generating station. It was further agreed that the preferred approach to permitting the Proposed Development is to apply for a substantial variation to the existing Environmental Permit for the power station site (reference EPR/VP3930LH/V007).

6.3 The Statement of Common Ground agrees that the Secretary of State must be satisfied that potential emissions from the Development can be adequately regulated under the EPR, as outlined in paragraph 4.10.7 of NPS EN-1. It is noted, having considered the general content of the ES for the Development, the EA is satisfied and agrees that it is of a type and nature that should be capable of being adequately regulated under EPR. Further, the EA is not aware of anything that would preclude the granting of an Environmental Permit. The EA will examine information on air quality (including the air dispersion modelling), noise and other emissions to the environment which will be provided by the Applicant as part of the Environmental Permit application, but at this point in time they are not aware of any reason why it would not be possible to address these matters as part of the EPR application process and issues that may arise.

6.4 In the circumstances, the Secretary of State considers there are no reasons to believe the Environmental Permit will not be granted in due course.

6.5 Similarly, the Secretary of State notes there are various other consents, licences and permits that are likely to be required to construct and operate the proposed Development [ER 1.9.1] and has no reason to believe that the relevant approvals would also not be forthcoming.

VII. Consideration of Compulsory Acquisition and Related Further Representations

7.1 The Secretary of State notes that some issues relating to Compulsory Acquisition ("CA") and Temporary Possession ("TP") powers sought by the Applicant were unresolved at the close of the ExA's examination. As a result, the ExA recommended that the Secretary of State might wish to further consult the relevant interested parties [ER 7.6.25 and ER 7.6.29]. The BEIS consultation letter to the relevant interested parties (i.e. the Applicant, Crown Estates Commissioners and Northern Gas Networks) was issued on 9 July 2018. The outstanding issues and subsequent representations received by the Planning Inspectorate since the close of the ExA's examination are considered further below. The representations received in response to the consultation letter were:

- Dalton Warner Davis' letter of 23 July 2018 on behalf of the Applicant;
- The Crown Estate's letter of 20 July 2018;
- The Crown Estate's letter of 20 August 2018; and
- Dalton Warner Davis' letter of 20 August 2018 on behalf of the Applicant.

Crown Land/Section 135 Test

7.2 Section 135 of the Planning Act 2008 states that a DCO may include a provision authorising CA of an interest in Crown land only if: i) it is an interest which is for the time being held otherwise than by or on behalf of the Crown; and ii) the appropriate Crown authority consents to the CA. The Secretary of State notes that the Applicant is seeking powers to compulsorily acquire new rights over land that falls within the Crown interest (Plots 245, 255 and 690). Although the Applicant had been engaged with the Crown Estate's agents during the Examination to reach an agreement and stated in its submission at Deadline 9 that it had been signed, no further communication was received from the Crown Estate to confirm this or to state that it had authorised Crown land to be used. Without this confirmation, the ExA was unable to recommend that the Section 135 test has been passed and recommended that the Secretary of State seek confirmation from the Crown Estate that it has consented for Crown land to be used [ER 7.6.24 – ER 7.6.25]. Accordingly, the Crown Estate Commissioners were further consulted on this matter and confirmed by letter dated 20 August 2018 that it has reached a separate agreement with the Applicant which provides the Commissioners with sufficient assurance as to the way in which compulsory acquisition powers may be exercised and as a result confirmed their consent to the compulsory acquisition of third party interests in the relevant plots of land. This was subject to the inclusion of its suggested revised wording for Article 42 of the Order dealing with Crown rights. The Applicant has confirmed its agreement to the revised wording in the Order. The Secretary of State is also content with the Crown Estate's proposed revisions and is therefore satisfied that the Section 135 test in respect of Crown land is passed.

Northern Gas Networks Protective Provisions/Section 127 &138 Tests

7.3 Section 127 of the Planning Act 2008 relates to statutory undertakers' land. Section 127(5) and (6) states that a DCO may include provision authorising CA of a right over their land providing it can be done so without serious detriment to the carrying out of the undertaking, or that any detriment can be made good. Section 138 relates to the extinguishment of rights and section 138(4) states that a DCO may include a provision for the extinguishment of the relevant rights, or the removal of the relevant apparatus only if the Secretary of State is satisfied that the extinguishment or removal is necessary for the purposes of carrying out the development to which it relates. Both provisions are relevant to the statutory undertakers with land and equipment interests within the Order interests.

7.4 The Secretary of State notes that the Applicant and Northern Gas Networks had agreed to sign a private Asset Protection Agreement to protect the undertaker's interests. However, this was not signed by the close of the Examination [ER 7.6.27]. The ExA was content that the Section 127 and 138 tests are satisfied and there would be no serious detriment to Northern Gas Networks (or other statutory undertakers), but suggested the Secretary of State may want to seek confirmation from the Applicant that the private Asset Protection Agreement has been signed. Accordingly, the Applicant and Northern Gas Networks were further consulted on this matter and have

confirmed that an Asset Protection Agreement was signed on 12 July 2018. The Secretary of State is therefore satisfied that Northern Gas Networks' undertakings would be preserved and protected [ER 7.6.26 – ER 7.6.29].

Canal & River Trust ("CRT") Protective Provisions

7.5 The Secretary of State notes that CRT had also maintained an objection to the protective provisions in Schedule 12, Part 3 of the Applicant's draft Order. The objection related to an indemnity cap and also the Applicant's exclusion from liability for any consequential losses experienced by CRT as a result of the Development [ER 8.5.23-8.5.36]. The ExA reached a preliminary conclusion that both provisions placed an unreasonable and unjustified burden on CRT and as a result, recommended amendments to the draft Order. It is noted that the ExA's suggested modifications to the Applicant's final version of the draft Order, which are in line with the CRT's suggested wording, were not agreed before the close of the Examination. However, as both parties were given adequate opportunity to make their cases on this disagreement and their positions are clear, the Secretary of State considers nothing would have been gained by further consulting on the ExA's suggested modifications to Schedule 12, Part 3 of the Order. Further, the Secretary of State agrees with the ExA that the Applicant's suggested wording would place an unreasonable and unjustified burden on CRT, which would face a risk of potential costs and losses through no fault of its own [ER8.5.30] and is therefore satisfied with the ExA's recommendations on this matter [ER 8.5.32 - ER 8.5.36].

Human Rights Act 1998

7.6 The Secretary of State has considered the potential infringement of human rights in relation to the European Convention on Human Rights by the Development and the compulsory purchase powers contained in the draft Order. The Secretary of State notes the ExA's conclusion that: the Examination ensured a fair and public hearing; any interference with human rights arising from implementation of the Development is proportionate and strikes a fair balance between the rights of the individual and the public interest; and that compensation would be available in respect of any quantifiable loss. He agrees that there is no disproportionate or unjustified interference with human rights so as to conflict with the provisions of the Human Rights Act 1998 [ER 7.7.6].

Conclusion on CA [ER 7.7.1 – ER 7.7.6 and ER 9.1.5 – ER 9.1.9]

7.7 Having considered the ExA's analysis of CA and TP including the examination and also the further representations received, the Secretary of State agrees that the Development for which the land and rights are sought would be in accordance with national policy as set out in the relevant NPSs and that there is a national need for electricity generating capacity, including capacity from gas combustion. He is satisfied that the need to secure the land and rights required, and to construct the Development within a reasonable commercial timeframe represent a significant public benefit. The Secretary of State is content that the private loss to those affected is mitigated through

the choice of the Application land, and the limitation to minimum extent possible of the rights and interests proposed to be acquired. He agrees that the Applicant has explored all reasonable alternatives to the CA of the land, rights and interests sought and there are no better alternatives. The Secretary of State is content that adequate and secure funding would be available to enable CA within the statutory period following the Order being made and there would be no disproportionate or unjustified interference with human rights of individuals. In conclusion, the CA powers are justified and there is a compelling case in the public interest for land and interests to be compulsorily acquired and the Development would comply with the relevant sections of the Planning Act 2008.

VIII. Other Legal Agreements and Related Documents

8.1 The Secretary of State notes that, following concerns from the ExA during the Examination, no secure method for the demolition of the existing coal-fired power station existed. A signed Planning Agreement was therefore put in place under section 106 of the Town and Country Planning Act 1990 to secure its demolition in a timely manner if the Secretary of State makes the Order and the Development commences.

8.2 The Secretary of State understands that some loss of habitats on the Application site would occur through tree and existing lagoon removal, which the Applicant proposed would be mitigated through an agreed Landscape and Biodiversity Strategy secured by Requirement 6 of the Order. However, it is noted that there was a disagreement between the Applicant, Yorkshire Wildlife Trust and NYCC/SDC during the Examination over the Applicant's predicted onshore biodiversity offsetting calculations set out in the Indicative Landscape and Biodiversity Strategy. The Applicant subsequently recognised that its biodiversity offsetting calculations showed only a very small biodiversity gain, and on reflection it accepted more needed to be done. Yorkshire Wildlife Trust highlighted that an opportunity existed for the Applicant to contribute towards an off-site project in the Lower Aire Valley following a study on how natural processes could best be utilised to reduce flooding. This was one of two locations in the River Aire catchment (and the only one in the Lower Aire) which has high potential for habitat creation to be undertaken to reduce flood risk. As a result, a section 106 Planning Agreement was agreed to secure a financial contribution from the Applicant payable to SDC towards off-site wetland habitat creation in the Lower Aire Valley (ER 4.9).

8.3 The Secretary of State notes that in the ExA's judgement, both agreements are essential to the recommendation to make the Order [ER 8.9.2]. The Secretary of State is aware that a new National Planning Policy Framework was published in July 2018 (i.e. after the close of the ExA's Examination). However, the Secretary of State is content that there are no significant dissimilarities in the approach taken to sustainable development or to nationally significant infrastructure in the new National Planning Policy Framework [ER 3.12.2]. The Secretary of State is also satisfied the same tests set out for planning obligations still apply [ER 3.12.2] and that both of the above agreements meet the tests in that they are: necessary to make the Development acceptable in planning terms; directly related to the Development; and fair and reasonably related in scale and kind to the Development [ER 4.9.26 and ER 4.21.13].

8.4 In addition, the Secretary of State notes an Agreement under section 111 of the Local Government 1972, section 1 of the Localism Act 2011 and section 93 of the Local Government Act 2003 has also been signed to ensure parties will adopt a collaborative and constructive approach to discharge the Requirements in the Order.

IX. General Considerations

Equality Act 2010

9.1 The Equality Act 2010 includes a public sector “general equality duty”. This requires public authorities to have due regard in the exercise of their functions to the need to eliminate unlawful discrimination, harassment and victimisation and any other conduct prohibited under the Act; advance equality of opportunity between people who share a protected characteristic and those who do not; and foster good relations between people who share a protected characteristic and those who do not in respect of the following “protected characteristics”: age; gender; gender reassignment; disability; marriage and civil partnerships⁴; pregnancy and maternity; religion and belief; and race. This matter has been considered by the Secretary of State who has concluded that there was no evidence of any harm, lack of respect for equalities, or disregard to equality issues.

Natural Environment and Rural Communities Act 2006

9.2 The Secretary of State, in accordance with the duty in section 40(1) of the Natural Environment and Rural Communities Act 2006, has to have regard to the purpose of conserving biodiversity, and in particular to the United Nations Environmental Programme Convention on Biological Diversity of 1992, when granting development consent.

9.3 The Secretary of State is of the view that the ExA’s report, together with the environmental impact analysis, considers biodiversity sufficiently to inform him in this respect. In reaching the decision to give consent to the Development, the Secretary of State has had due regard to conserving biodiversity.

X. Secretary of State’s conclusions and decision

10.1 For the reasons given in this letter, the Secretary of State considers that there is a compelling case for granting consent. Given the national need for the proposed Development, as set out in the relevant National Policy Statements referred to above, the Secretary of State does not believe that this is outweighed by the Development’s potential adverse local impacts, as mitigated by the proposed terms of the Order.

⁴ In respect of the first statutory objective (eliminating unlawful discrimination etc.) only.

10.2 The Secretary of State has therefore decided to accept the ExA's recommendation to make the Order granting development consent [ER 9.1.10]. In reaching this decision, the Secretary of State confirms regard has been given to the ExA Report, the joint LIR submitted by NYCC/SDC and to all other matters which are considered important and relevant to the Secretary of State's decision as required by section 104 of the 2008 Act. The Secretary of State confirms for the purposes of regulation 3(2) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 that the environmental information as defined in regulation 2(1) of those Regulations has been taken into consideration.

XI. Modifications to the Order by the Secretary of State

11.1 The Secretary of State has made the following modifications to the Order:

- Renaming the Order applied for from '*The Eggborough CCGT (Generating Station) Order*' to '*The Eggborough Gas Fired Generating Station Order 2018*' for consistency with other recent Orders for CCGT generating stations made by the Secretary of State;
- Amendments to Article 6 to clarify the entity having the benefit of the provisions of the Order; and
- Amendments to Article 42 (Crown rights) to reflect the revisions agreed by the Crown Estate and Applicant.

Other Drafting Changes

11.2 In addition to the above, the Secretary of State has made various changes to the draft Order which do not materially alter its effect, including changes to conform with the current practice for statutory instruments (for example, modernisation of language), changes in the interests of clarity and consistency and changes to ensure that the Order has the intended effect.

XII. Challenge to decision

12.1 The circumstances in which the Secretary of State's decision may be challenged are set out in the note attached at the Annex to this letter.

XIII. Publicity for decision

13.1 The Secretary of State's decision on this Application is being publicised as required by section 116 of the 2008 Act and regulation 23 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009.

13.2 Section 134(6A) of the Planning Act 2008 provides that a compulsory acquisition notice shall be a local land charge. Section 134(6A) also requires the compulsory acquisition notice to be sent to the Chief Land Registrar, and this will be the case where the order is situated in an area for which the Chief Land Registrar has given notice that he now keeps the local land charges register following changes made by Schedule 5 to the Infrastructure Act 2015. However where land in the order is situated in an area for which the local authority remains the registering authority for

local land charges (because the changes made by the Infrastructure Act 2015 have not yet taken effect), the prospective purchaser should comply with the steps required by section 5 of the Local Land Charges Act 1975 (prior to it being amended by the Infrastructure Act 2015) to ensure that the charge is registered by the local authority.

Yours sincerely

Gareth Leigh
Head of Energy Infrastructure Planning

LEGAL CHALLENGES RELATING TO APPLICATIONS FOR DEVELOPMENT CONSENT ORDERS

Under section 118 of the Planning Act 2008, an Order granting development consent, or anything done, or omitted to be done, by the Secretary of State in relation to an application for such an Order, can be challenged only by means of a claim for judicial review. A claim for judicial review must be made to the Planning Court during the period of 6 weeks beginning with the day after the day on which the Order is published. The decision documents are being published on the date of this letter on the Planning Inspectorate website at the following address:

<https://infrastructure.planninginspectorate.gov.uk/projects/yorkshire-and-the-humber/eggborough-ccgt/>

These notes are provided for guidance only. A person who thinks they may have grounds for challenging the decision to make the Order referred to in this letter is advised to seek legal advice before taking any action. If you require advice on the process for making any challenge you should contact the Administrative Court Office at the Royal Courts of Justice, Strand, London, WC2A 2LL (0207 947 6655)