

THE INFRASTRUCTURE PLANNING (EXAMINATIONS PROCEDURE) RULES 2010

COTTAM SOLAR PROJECT DEVELOPMENT CONSENT ORDER

PINS REFERENCE EN010133

**RESPONSE ON BEHALF OF CADENT GAS
LIMITED TO THE EXAMINATION AUTHORITY'S
SECOND WRITTEN QUESTIONS**



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| ExQ | Question to | Question | Response on behalf of Cadent Gas Limited |
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| 2.1.16 | All parties with protective provisions for their benefit included in Schedule 16 (Protective Provisions) of the dDCO. | Please provide an update on discussions regarding protective provisions, identifying any outstanding areas of disagreement/ proposed wording. | <p>Following Cadent's response to the ExA's First Written Questions [REP2-081] and further negotiations with the Applicant a number of matters have now been agreed with the Applicant. the Protective Provisions within Schedule 16 Part 6.</p> <p>In terms of the specific amendments requested by Cadent and which do not yet appear in the Protective Provisions within Schedule 16 Part 6 dDCO [REP3-004] (or a completed side agreement with the Applicant) these consist of the following:</p> <p><u>Definition of Commence</u></p> <p>Cadent require this definition to include more than archaeological works and request that this be updated as follows:</p> <p>“commence” and “commencement” has the same meaning as in article 2 of this Order save that commence and commencement shall be construed for the purposes of this Part 6 to include any below ground surveys, monitoring, work operations, remedial work in respect of any contamination or other adverse ground condition, the receipt and erection of construction plant and equipment, and non-intrusive investigations for the purpose of assessing ground conditions;</p> <p><u>Inclusion of definitions related to acceptable insurance and security in paragraph 62 and text to be included in paragraph 71</u></p> <p>Provision needs to be included within the dDCO that the works in the vicinity of Cadent's apparatus are not commenced unless: (1) there is third party liability insurance effected and maintained for the construction period of the relevant works; and (2) the person or body undertaking the works (acknowledging the ability to transfer the benefit of the DCO) has the appropriate net worth at the time of commencing works to enable it to meet any liability arising from damage to Cadent's apparatus or that there is appropriate security in place through a bond or guarantee.</p> <p>Cadent derives no benefit from the Project and needs to ensure that it is not be exposed to any costs or losses as a result of the Project. Money spent and costs incurred by Cadent is ultimately passed on to consumers in their energy bills. This is not appropriate in respect of losses caused by a third party and Cadent requires, therefore, the comfort that works near its apparatus are the subject of appropriate insurance and security.</p> |

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| | | | <p>The corresponding drafting is as follows:</p> <p><u>New definitions:</u></p> <p>“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.;</p> <p>“acceptable insurance” means a third party liability insurance effected and maintained by the undertaker to a level of not less than £50,000,000 (fifty million pounds) per occurrence or series of occurrences arising out of one event. Such insurance must be maintained for the construction period of the authorised works which constitute specified works and arranged with an internationally recognised insurer of repute operating in the London and worldwide insurance market underwriters whose security/credit rating meets the same requirements as an “acceptable credit provider”, such policy must include (but without limitation):</p> <p>(a) Cadent as a Co-Insured;</p> <p>(b) a cross liabilities clause;</p> <p>(c) a waiver of subrogation in favour of Cadent; and</p> <p>(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;</p> <p>“acceptable security” means either:</p> <p>(a) evidence provided to Cadent’s reasonable satisfaction that the Undertaker has a tangible net worth of not less than £50,000,000.00 (Fifty Million Pounds (or an equivalent financial measure));</p> <p>(b) a parent company guarantee from a parent company in favour of Cadent to cover the undertaker’s liability to Cadent to a cap of not less than £50,000,000 (fifty million pounds) per asset per event up to a total liability cap of £50,000,000 (fifty million pounds) (in a form reasonably satisfactory to Cadent and where required by Cadent, accompanied with a legal opinion confirming the due capacity and authorisation of the parent company to enter into and be bound by the terms of such guarantee); or</p> <p>(c) a bank bond or letter of credit from an acceptable credit provider in favour of Cadent Gas Limited to cover the undertaker’s liability to Cadent for an amount of not less than £50,000,000 (fifty million pounds) per asset per event up to a total liability cap of £50,000,000 (fifty million pounds) (in a form reasonably satisfactory to Cadent);</p> <p>“parent company” means a parent company of the undertaker acceptable to Cadent and which will have been approved by Cadent acting reasonably;</p> |

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| | | | <p>Addition to end of paragraph 71(indemnity)</p> <p>(5) The undertaker must not commence construction (and must not permit the commencement of such construction) of the authorised works on any land owned by Cadent or in respect of which Cadent has an easement or wayleave for its apparatus or any other interest or to carry out any works within 15 metres in any direction of Cadent's apparatus until the following conditions are satisfied:</p> <ul style="list-style-type: none"> (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 will maintain such acceptable security for the construction period of the authorised works from the proposed date of commencement of construction of the authorised works) and 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 will maintain such acceptable insurance for the construction period of the authorised works from the proposed date of commencement of construction of the authorised works) and Cadent has confirmed the same in writing to the undertaker. <p>(6) In the event that the undertaker fails to comply with sub-paragraph 67(5) of this Part of this Schedule, nothing in this Part of this Schedule will prevent Cadent from seeking injunctive relief (or any other equitable remedy) in any court of competent jurisdiction.</p> <p>Retained Apparatus (paragraph 69)</p> <p>Sub-paragraph (4) and (8) seek to impose deadlines on Cadent's response. Cadent's approvals are not to be unreasonably withheld or delayed. Cadent cannot agree to curtail the time for responses due to Cadent's statutory functions and the legislation governing pipelines.</p> <ol style="list-style-type: none"> 1. 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. 2. 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. 3. 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. |

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| | | | <p>4. These industry standards have the intention of protecting: a. integrity of the pipelines, Cadent’s network and distribution of gas; b. safety of the local area surrounding gas pipelines; and c. safety of personnel involved in working near to gas pipelines.</p> <p>Cadent therefore needs to ensure that the industry regulatory standards are being complied with and that there are no health and safety risks which could have potentially serious consequences for individuals or property located in proximity to the pipeline/s.</p> <p>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.</p> <p>For all of the above reasons, it is for Cadent, as an experienced gas undertaker under statutory and Licence obligations, to determine what measures are reasonable for the protection and integrity of its network and not a third party and it cannot be rushed into those decisions.</p> <p>Indemnity (paragraph 72)</p> <p>Cadent needs to ensure that it is not be exposed to any costs or losses as a result of the Project and therefore all expenses, costs etc need to be covered. For clarity, the indemnity only applies in respect of third party claims as follows: “any other expenses, loss, demands, proceedings, damages, claims, penalty or costs properly 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”. The indemnity also provides that Cadent must give the Applicant reasonable notice of any such third party claim or demand and that “no settlement, admission of liability or compromise must, unless payment is required in connection with a statutory compensation scheme, is to be made without first consulting the undertaker and considering their representations”. Therefore, before the Applicant could be liable to Cadent for a third parties’ costs under the indemnity, three things would need to occur:</p> <ol style="list-style-type: none"> 1. First, the Applicant must have caused damage or in any interruption in any service provided, or in the supply of any goods, that have caused loss to the third party; 2. Second, that third parties’ costs must have been properly incurred by or recovered from Cadent; and 3. Third, Cadent must have either settled that claim having consulted and considered the Applicant’s representations or have been obliged to make the payment in under a statutory compensation scheme. This procedure ensures that the indemnity |

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| | | | <p>only applies to properly incurred or recovered costs, and provides the Applicant with the opportunity to make representations on any such claim. This is sufficient protection for the Applicant.</p> <p>The additional wording at sub-paragraph (5) enables a dispute to be created and a risk that Cadent is unable to recover all costs or losses and should be deleted. On this point, money spent and costs incurred by Cadent is ultimately passed on to consumers in their energy bills. This is not appropriate in respect of losses caused by a third party.</p> <p>Arbitration (paragraph 75)</p> <p>Paragraph 75 of the Protective Provisions needs to regulate the matters that are subject to arbitration, and those that are not subject to arbitration. As drafted all disputes are referable to arbitration. Cadent seek to carve out of the scope of arbitration certain paragraphs from arbitration for the same reasons noted above in terms of retained apparatus and limiting Cadent's proper consideration. Cadent cannot agree to certain matters being determined by arbitration due to Cadent's statutory functions and the legislation governing pipelines. It is for Cadent, as an experienced gas undertaker under statutory and Licence obligations, to determine what measures are reasonable for the protection and integrity of its network and not a third party.</p> <p>This paragraph needs to start:</p> <p>Save for differences or disputes arising under sub-paragraphs 67(2), 67(4), 68(1), 71(5) (new paragraph above) and paragraph 69</p> <p>With the exception of the above the protective provisions can otherwise be agreed.</p> |