

**A38 DERBY JUNCTIONS SCHEME (THE PROJECT)
DEADLINE 7 – 10 MARCH 2020
CADENT GAS LIMITED**

1. INTRODUCTION

- 1.1 Cadent Gas Limited (**Cadent**) is a statutory undertaker for the purposes of the Planning Act 2008 (**PA 2008**) and is responding to the Promoter’s deadline 6 submission in which is provided an updated dDCO.
- 1.2 These submissions supplement Cadent’s relevant representations which were received on 29 July 2019, Cadent’s response to the ExA’s first round of written questions which was submitted on 5 November 2019, its deadline 4 submission dated 31 January 2020 and its deadline 5 submission dated 7 February 2020.

2. DRAFT DEVELOPMENT CONSENT ORDER

- 2.1 Cadent’s deadline 5 submission outlined that the purpose at Schedule 5 does not expressly include three further purposes for which Cadent will require rights for its replacement apparatus.
- 2.2 As previously outlined, Cadent requires the purpose to be amended to read:
- 2.2.1 “for the diversion, operation, maintenance, protection and decommissioning of, and access to”. (emphasis added)
- 2.3 This clarification of the purpose is necessary because the standard easements that Cadent requires are drafted as at 2.3.1 and 2.3.2 below:
- 2.3.1 “To retain, lay, construct, inspect, maintain, protect, use, enlarge, replace, renew, remove or render unusable [a] [the] pipeline[s] for the distribution or storage of gas or other ancillary materials (whether such gas or materials are distributed by Cadent Gas Limited on its own behalf or on behalf of other persons) and all necessary apparatus ancillary thereto (all herein together called “the Works”) in upon beneath and over [a] [the] strip[s] of land shown coloured; and
- 2.3.2 To pass over the Strip of Land and so much of the Land as is reasonably necessary for the purposes of the Works and any other works belonging to Cadent Gas Limited or used by or in connection with the Undertaking and which are contiguous with the Strip of Land at all reasonable times and in an emergency at any time whether or not with workmen vehicles machinery and apparatus.” (emphasis added)
- 2.4 The purpose in the DCO needs to be broad enough to ensure that rights equivalent to Cadent’s standard easements can be acquired.
- 2.5 The Promoter’s deadline 6 submission of the amended dDCO did not include the insertions required by Cadent and Cadent has put its concerns to the Promoter again to re-consider. Cadent has further explained the following to the Promoter:
- 2.5.1 “**Protection**” is required for Cadent because as a gas undertaker it requires the rights to remove works or planting which affect its apparatus (i.e. buildovers, trees whose roots are affecting the pipeline etc);

- 2.5.2 “**Decommissioning**” is not covered by the definition of “maintain” in the dDCO (as the Promoter suggests). “Remove” is included within the definition of “maintain”, however a situation where decommissioned apparatus is left in situ is not covered (which is emerging as environmental best practice for decommissioning gas pipelines); and
- 2.5.3 The Promoter is resisting the inclusion of “**operation**” on the basis that it believes this to be implicit. On this basis, it should have no objection to the inclusion of “operation” within the purpose specified in Schedule 5.

2.6 Cadent is awaiting a response from the Promoter regarding these points.

2.7 It is Cadent’s understanding and expectation that the Promoter intends to transfer the benefit of the DCO to each utility whose apparatus is being diverted to the extent required so that each can vest in itself (via GVD) the rights it requires for its diverted apparatus. In other words, the Promoter will transfer the benefit of the DCO to Cadent in respect of compulsory acquisition powers to acquire rights in the diversion plots to construct, operate etc. Work no. 9(1) (and then again 11 more times to each other undertaker to acquire rights for the other works listed in Work no. 9). Cadent has asked the Promoter to confirm that its understanding is correct and is awaiting a response.

3. PROTECTIVE PROVISIONS

3.1 Cadent welcomes the inclusion of protective provisions for its benefit in the Promoter’s deadline 6 submission of the dDCO.

3.2 However there are a number of points which are not agreed between the parties.

3.3 To assist the Promoter, Cadent appends a version of the Protective Provisions to be included at Schedule 9, Part 5 with the points that are not agreed between the parties in italics and drafting notes included in bold.

3.4 These outstanding points relate to paragraphs:

3.4.1 59(3)(c) which purports to exclude liability;

3.4.2 63 which relates to arbitration and specifically the powers excluded from arbitration;

3.4.3 The definition of “Acceptable Insurance and paragraph 59(5) and 59(6);

3.4.4 Paragraph 55(3); and

3.4.5 Paragraph 58(1).

3.5 The first two points set out at 3.4.1 and 3.4.2 above are also currently before the Examining Authority on the Promoter’s A585 Windy Harbour scheme (and are the only outstanding points on the otherwise agreed protective provisions). The points at 3.4.3 and 3.4.4 have been accepted by the Promoter on the A585 scheme, however are before the Examining Authority on the M42 scheme. The point at 3.4.5 is a new point which has been raised by the Promoter on this scheme and was not included for either A585 or M42.

3.6 We set out Cadent’s position on these outstanding issues below.

| Issue | Cadent's Position |
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| <p>Paragraph 59(3)(c)</p> <p>Consequential Loss</p> | <p>The Promoter is seeking to include the following wording at paragraph 59(3)(c) of the protective provisions:</p> <p><i>“59(3)(c) any direct or consequential loss of any third party (including but not limited to loss of use, revenue, profit, contract, production, increased cost of working or business interruption) arising from any such damage or interruption, which is not reasonably foreseeable”.</i></p> <p>This seeks to exclude the Promoter from liability for indirect and consequential losses that third parties may suffer and is not agreed by Cadent.</p> <p>The consequence of this wording would be that Cadent would be responsible for any indirect and consequential losses that a third party would suffer as a result of damage or a loss of supply <i>caused by the Promoter</i>.</p> <p>This is not acceptable and Cadent does not accept this position.</p> <p>The scope of the indemnity is agreed save for this point. For clarity, the indemnity only applies in respect of third party claims as follows: <i>“any other expenses, loss, demands, proceedings, damages, claims, penalty or costs <i>properly incurred by or recovered from Cadent</i>, 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”</i>¹.</p> <p>The indemnity also provides that Cadent must give the Promoter reasonable notice of any such third party claim or demand and that <i>“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”</i>².</p> <p>Therefore, before the Promoter 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 Promoter 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 Promoter's representations or have been obliged to make the payment under a statutory compensation scheme. |

¹ Paragraph 59(1)(b) of the protective provisions

² Paragraph 59(4) of the protective provisions

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| | <p>This procedure ensures that the indemnity only applies to properly incurred or recovered costs, and provides the Promoter with the opportunity to make representations on any such claim. This is sufficient protection for the Promoter.</p> <p>Notwithstanding the above and the framework of the indemnity, there is a more important principle at stake: Cadent derives no benefit from the Project. Therefore, Cadent should not be exposed to any costs or losses as a result of the Project, whether foreseeable or not.</p> <p>There is no objectively justifiable reason to allocate responsibility for damage or interruption caused by the Promoter such that the Promoter is responsible for foreseeable costs and losses and Cadent is responsible for unforeseeable costs and losses. In both instances, the losses are caused solely by the Promoter and regulated by the terms of the indemnity as identified above.</p> <p>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>Cadent has been in discussion with its insurance team and has identified that it is not insured for such losses caused by third parties, which is why it is so important that the indemnity is not unfairly limited.</p> <p>As the Secretary of State noted in the Eggborough decision³, exposing a third party that derives no benefit from the Project with the risk of losses as a result of that Project would place an unreasonable and unjustified burden on that third party. Ultimately, Cadent would face a risk of potential costs and losses through no fault of its own. Such costs and losses are unquantified, and when associated with the potential scale of costs and losses that a third party could suffer as a result of having its gas supply interrupted could be significant.</p> <p>Whilst the Eggborough DCO includes an exclusion of unforeseen consequential loss, the Examining Authority's report makes it quite clear that such a clause places an unreasonable and unjustified burden on the third party in that instance⁴. Whilst the Examining Authority ultimately recommended the inclusion of additional wording and the inclusion of an amended clause, this was based on the relevant Promoter's justification during that specific examination. This should not be viewed as a precedent.</p> <p>In the current instance, the Promoter has provided no justification for the inclusion of Paragraph 59(3)(c), other than the fact that the wording is included within the Eggborough DCO. Ultimately, the type of costs and losses that the Canal and Rivers Trust may have suffered pursuant to the</p> |
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³ See section 7.5 of the Secretary of State's decision letter dated 20 September 2018 which is appended hereto

⁴ See Section 8.5.30 of the Recommendation Report of Richard Allen B.Sc (Hons) PGDip MRTPI dated 27 June 2018 which is appended hereto

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| | <p>Eggborough DCO could be materially different to those that Cadent may suffer as a result of the Project.</p> <p>There are examples of other DCOs with protective provisions regulating the relationship between the Promoter and Cadent’s statutory predecessor (National Grid Gas plc) which include the indemnity but which do not include this provision⁵.</p> <p><u>Therefore, Cadent requests that the Secretary of State does not include paragraph 59(3)(c) within the Order (if made).</u></p> |
| <p>Parargaph 63 Arbitration</p> | <p>Paragraph 63 of the protective provisions regulates the matters that are subject to arbitration, and those that are not subject to arbitration. In respect of this:</p> <ol style="list-style-type: none"> 1. Cadent’s protective provisions carve the provisions of paragraph 57 (Retained apparatus: protection of Cadent) out of the scope of arbitration; but 2. the Promoter’s protective provisions do not carve the provisions of paragraph 57 out of the scope of arbitration. <p>Cadent seek to carve paragraph 57 out of the scope of arbitration given the importance of this paragraph to the protection of Cadent’s retained apparatus. The Promoter does not have any issues with the scope of paragraph 57, and therefore recognise the importance of protecting Cadent’s retained apparatus, but they seek to subject paragraph 57 to arbitration.</p> <p>The reason that Paragraph 57 is required to protect Cadent’s apparatus is as follows:</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 |

⁵ See Paragraph 51 of Part 4 of Schedule 9 to The A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 and Paragraph 52 of Part 4 of Schedule 9 to The M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016 both of which are appended hereto

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| | <p>as reasonably practicable. The following standards are relevant to Cadent's apparatus:</p> <ol style="list-style-type: none">a. IGEM/TD/1: This Institution of Gas Engineers (IGE) 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.c. 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.d. HSE's guidance document HS(G)47: 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.e. TSP/SSW/22: This Cadent specification manages industry protection of plant.f. It is aimed at third parties carrying out work in the vicinity of Cadent gas pipelines and associated installations and is provided to ensure that individuals planning and undertaking work take appropriate measures to prevent damage.g. The requirements in this document are in line with the requirements of the IGE IGE/SR/18 Edition 2 - Safe Working Practices To Ensure The Integrity Of Gas Pipelines And Associated Installations, and the HSE's guidance |
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| | <p>document HS(G)47 Avoiding Danger from Underground Services.</p> <ol style="list-style-type: none">4. These industry standards have the intention of protecting the:<ol style="list-style-type: none">a. integrity of the pipelines, Cadent's network and distribution of gas;b. safety of the local area surrounding gas pipelines; andc. safety of personnel involved in working near to gas pipelines5. 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.6. 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. <p>For all of the above reasons, it is crucial that Cadent retains protection over how its network operates and how its network is protected.</p> <p>The Promoter has offered no explanation for its position to Cadent, other than a vague concern that Cadent may not act reasonably in protecting its apparatus. These concerns are unfounded, and in any event the Promoter would be open to explore other avenues if it felt that was the case. Cadent is under a statutory duty to conduct itself in an efficient and economic manner in operating its network, and for this reason it must retain control over how it operates that network.</p> <p>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.</p> <p>The Promoter accepts Cadent's position in respect of apparatus that is to be removed and new apparatus that is to be constructed under sub-paragraph 55(2) of the protective provisions, as sub-paragraph 55(2) is carved out of the arbitration provisions for the same reasons identified above given Cadent's statutory duties. The Promoter has offered no justification for treating</p> |
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| | <p>paragraph 63 any differently to sub-paragraph 55(2) or taking an inconsistent position.</p> <p><u>Therefore, Cadent requests that the Secretary of State includes paragraph 63 within the Order (if made) in the following form:</u></p> <p>“63. Save for differences or disputes arising under sub-paragraphs 55(2), 55(4) <u>and paragraph 57</u> 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 47 (arbitration).”</p> |
| <p>“Acceptable Insurance” definition and paragraph 59(5) and (6)</p> | <p>Cadent is seeking the inclusion of this definition and paragraph 59(5) and (6) on the face of the DCO.</p> <p>At this time no side agreement has been concluded, so if this wording is not included in the face of the Order Cadent risks losing an essential element of protection, which helps ensure funds are actually available in the event that losses are properly recoverable by Cadent under the protective provisions. The parties are in the process of agreeing a side agreement, and will update the Examining Authority if this is concluded. However, regardless of whether this insurance wording is included in a separate agreement, Cadent considers it is wholly appropriate for inclusion in the Order for the following reasons:</p> <ul style="list-style-type: none"> • This Promoter has very recently accepted the principle of this wording being included on the face of the DCO. This exact wording was included in this Promoter’s preferred form protective provisions submitted by this Promoter to the Examining Authority to be included on the face of the DCO for the A585 Scheme⁶. As such, Cadent sees no reason why these terms cannot be included on the face of this DCO. • Cadent derives no benefit from this scheme or other schemes promoted by this Promoter, and has gone to considerable trouble to accommodate each scheme through negotiating protective provisions for each scheme. Cadent considers it entirely appropriate that where possible a consistent approach is taken to the protective provisions between different schemes. Excluding insurance from the face of the Order for this scheme, but not for others, could lead to future misunderstandings and submissions that insurance is not always required by Cadent. This is of course emphatically not the case, as has been agreed by the Promoter. There is simply no reason to have an inconsistent approach between the Promoter’s different orders for the same agreed point. |

⁶ Paragraph 19, 28(5) and 28(6) of the Promoter’s preferred form protective provisions for the A585 Scheme

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| | <ul style="list-style-type: none"> • It is operationally inappropriate if the future relationship between the parties cannot be readily understood by everyone through looking at the protective provisions in the Order, and instead separate contractual positions must identified and referred to. In practice the protective provisions will be reviewed and used by different teams to those involved in agreeing them. <p><u>Accordingly, Cadent requests that the Examining Authority make a determination in its favour that the definition of “Acceptable Insurance” and paragraph 59(5) and 59(6) be included on the face of the Order.</u></p> |
| <p>Paragraph 55(3)</p> <p>Removal of Apparatus</p> | <p>Cadent is seeking for paragraph 55(3) to read as follows:</p> <p>“If the undertaker is unable to afford such facilities and rights as mentioned in sub-paragraph (2), in the land in which the alternative apparatus or part of such apparatus is to be constructed, Cadent <u>may (acting reasonably in the circumstances)</u>, on receipt of a written notice to that effect from the undertaker, take such steps as are reasonable in the circumstances in any endeavour to assist the undertaker in obtaining the necessary rights and facilities 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 do so.”</p> <p>The Promoter is seeking to remove the wording underlined in bold and to replace this with the word “must”.</p> <p>The reason that Cadent is seeking this wording is that Cadent (and its personnel) has in the past been placed under significant pressure to obtain rights and facilities in land where an absolute obligation has been placed on it. Cadent will of course assist the Promoter as it has always done. However it is key that Cadent and the Promoter work in partnership to obtain rights and facilities and that it is not left to Cadent in isolation to secure. This goes back to the point that we make above that Cadent derives no benefit from the Project. As such, an absolute obligation on it to assist in securing rights and facilities, even where it is not reasonable to do so, is not appropriate.</p> <p><u>Cadent requests that the Examining Authority finds in its favour in respect of this wording.</u></p> |
| <p>Paragraph 58(1)</p> <p>Expenses</p> | <p>The Promoter has sought to include the wording underlined below into Cadent’s standard form protective provisions:</p> <p>“58(1) Subject to the following provisions of this paragraph, the undertaker must pay to Cadent on demand all charges, costs and expenses reasonably</p> |

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| | <p>anticipated or reasonably incurred by Cadent (<u>subject to an appropriate works agreement being agreed between Cadent and the undertaker</u>)”</p> <p>Notwithstanding that this is additional to the agreed position for A585 and M42, Cadent has agreed to the principle of providing the Promoter with a detailed design and estimate in so far as reasonably anticipated costs are incurred. However, Cadent’s reasonably incurred costs should not be subject to such a caveat. This proposed caveat as drafted would make recovery of Cadent’s expenses subject to future agreement (an agreement which may never be reached), while the purpose of this clause is to settle the principle that Cadent’s expenses are recoverable.</p> <p>As such, Cadent has proposed the following wording to the Promoter which addresses this (we assume unintended) drafting issue:</p> <p>“Subject to the following provisions of this paragraph, the undertaker must pay to Cadent on demand all charges, costs and expenses reasonably anticipated (<u>subject to Cadent first providing to the undertaker a detailed design and estimate which is agreed between the parties</u>) or reasonably incurred by Cadent”.</p> <p>Cadent is awaiting the Promoter’s response and will update the Examining Authority in due course as to the final agreed position.</p> |
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3.7 Cadent also notes that the referencing in the dDCO for Schedule 9, Part 5 needs attention, as the Promoter has not updated this when dropping the protective provisions into the dDCO. The appended version of the Protective Provisions for Cadent’s benefits includes the correct references.

4. PREVIOUS WRITTEN SUBMISSIONS

4.1 Cadent is not in a position yet to withdraw its objection.

4.2 A side agreement is still to be concluded which includes the insurance provisions, so that this crucial element of protection is not lost in the event that the Examining Authority or Secretary of State is minded to grant the DCO without this provision on the face of the Order. Cadent will continue to work with the Promoter to resolve its outstanding concerns and will provide a further update before the close of Examination if further progress is made.

4.3 Cadent reserves its right to make further representations as to the status of the matters outlined in this submission ahead of close of examination.

Appended:

1. Schedule 9, Part 5 Protective Provisions with drafting notes showing the points not agreed between Cadent and the Promoter in italics and drafting notes to assist in the Examining Authority in bold (with correct referencing);

2. Recommendation Report of Richard Allen B.Sc (Hons) PGDip MRTPI dated 27 June 2018 for the Eggborough Combined Cycle Gas Turbinr Power Station;
3. Secretary of State's decision letter dated 20 September 2018 for the Eggborough Combined Cycle Gas Turbine (Generating Station) Order;
4. The A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016;
5. The M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016; and
6. The Promoter's preferred form protective provisions submitted to the Examining Authority for the A585 Scheme.

CMS CAMERON MCKENNA NABARRO OLSWANG LLP

10 MARCH 2020