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To: [A38 Derby Junctions](#)
Cc: [Hutchison, Robin](#)
Subject: Cadent Gas Limited - Deadline 9 Submission
Date: 26 March 2020 13:53:25
Attachments: [Cadent Gas Limited - Deadline 9 Submission\(638259451_1\).PDF](#)

Dear Sir/Madam,

Please find attached Cadent's deadline 9 submission. This should be read alongside Cadent's deadline 7 submission.

Please acknowledge receipt.

Regards,

Rob

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**A38 DERBY JUNCTIONS SCHEME (THE PROJECT)
DEADLINE 9 – 26 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, its deadline 5 submission dated 7 February 2020 and its deadline 7 submission dated 10 March 2020.

2. DRAFT DEVELOPMENT CONSENT ORDER

- 2.1 Cadent's deadline 5 and deadline 7 submissions outlined that the purpose at Schedule 5 does not expressly include three further purposes for which Cadent will require rights for its replacement apparatus. As a gas undertaker, Cadent has particular considerations which may not apply to other utilities.
- 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 In light of the Promoter's response at deadline 8, Cadent maintains that this purpose must be extended to the wording identified at section 2.2.1. Cadent's response to the Promoter's deadline 8 submission is set out in full at section 3.
- 2.4 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:
- 2.4.1 "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
- 2.4.2 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)
- 2.5 The purpose in the DCO needs to be broad enough to ensure that rights equivalent to Cadent's standard easements can be acquired.

- 2.6 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:
- 2.6.1 **"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);
 - 2.6.2 **"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
 - 2.6.3 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.
- 2.7 The Promoter responded in its deadline 8 response, and Cadent's position on this is as follows
- 2.7.1 **"Protection"**
 - (a) The Promoter's view is that: *"protection" is not a right to be acquired, it is akin to a desire for a landowner not to interfere with Cadent's assets. If a landowner interfered with Cadent's assets and caused damage to them any loss caused would be either a contractual or tortious matter to be resolved between Cadent and the landowner and any such dispute is outside of the scope of the DCO and something which Highways England cannot control.*
 - (b) The Promoter's view is not correct and is not consistent with the terms of its dDCO. In particular, the Promoter's statement that this is *"outside of the scope of the DCO"* is not correct.
 - (c) Article 26 of the dDCO provides that: *"The undertaker may **acquire such rights** over the Order land or **impose restrictive covenants** affecting the land as may be required for any purpose for which that land may be acquired under article 23"*. This makes it very
 - (d) Article 2(2) of the dDCO further provides that: *"References in this Order to rights over land include references to rights to do or to place and maintain, anything in, on or under land or in the airspace above its surface, and references in this Order to the imposition of restrictive covenants are references to the creation of rights over land which interfere with the interests or rights of another and are for the benefit of land which is acquired under this Order or is otherwise comprised in the Order land"*.
 - (e) The Promoter's book of reference makes it very clear that it is intending to create such rights and that the purpose of certain rights is for the: ***creation and compulsory acquisition of new rights (including where necessary, a right to impose restrictive covenants)***.
 - (f) There are two ways in which the protection of apparatus can be secured pursuant to the dDCO. It can either be secured by a:

- (i) *Positive Right*: It can be framed as a right to take actions to protect apparatus, for example a right to remove works that may be interfering with Cadent's apparatus. This is standard in gas CPOs to protect apparatus.
 - (ii) *Restrictive Covenant*: It can also be framed as a restrictive covenant to prevent interference with apparatus in order to protect that apparatus, for example a restriction to prevent landowners from placing works over the.
- (g) Both formations of this right / restrictive covenant would be permissible under the dDCO provided that schedule 5 extends to include the word "protection". This is something that the DCO can control.
- (h) Therefore, Cadent's position is that the purposes under schedule 5 must include "protection".
- (i) Cadent agrees that if a landowner subsequently breached a right of protection and interfered with then this would be a matter for Cadent to take action on and would be outside of Highways England control at that point in time. This is entirely appropriate as it is for Cadent to protect its own apparatus. As such, the right of protection (which would form the basis of the subsequent cause of action for Cadent to take) should be included in the dDCO.

2.7.2 "Operation"

- (a) The Promoter's view is that: "*Highways England does not consider that the inclusion of "operation" is necessary because it is implicit that any apparatus installed in land is intended to be used – that is the purpose of the rights being sought and it is clear from the inclusion of these rights in the Order that "operation" is not to be excluded*".
- (b) Cadent is a statutory undertaker that is subject to statutory duties and it cannot operate on implicit rights: it requires explicit rights.
- (c) If the purpose of the dDCO is to include operation then it must set this out explicitly. Operation is not expressly a sub-set of the other rights identified in schedule 5 as it relates to a separate activity.
- (d) Cadent's concern is that the subsequent acquisition of rights either does not expressly include operation, or purports to include operation in spite of this not being explicit in the dDCO, and this could then be subject to legal challenge.
- (e) Cadent does not understand why the Promoter continues to object to the inclusion of the word "operate" within schedule 5 to make this explicit.
- (f) Therefore, Cadent's position is that the purposes under schedule 5 must include "protection".

2.7.3 "Decommissioning"

- (a) The Promoter's view is that it: "*considers that "decommissioning" is covered by the definition of "maintain" in the dDCO*". The Promoter does not expand on this statement or justify this statement.
- (b) This ignores the points that Cadent makes that the definition of "*maintain*" does not extend far enough to include all activities that could be comprised within "*decommissioning*".
- (c) As Cadent made clear in its previous submissions, decommissioning could comprise leaving decommissioned apparatus in situ (which is emerging as environmental best practice for decommissioning gas pipelines). This is not covered by the current definition of "*maintain*".
- (d) Therefore, Cadent's position is that the purposes under schedule 5 must include "*decommissioning*".

3. ARTICLE 10 (4)

- 3.1 Cadent does not have objections to the drafting of the dDCO as (subject to Cadent's comments on schedule 5 being addressed) it allows Cadent to acquire the necessary rights and facilities that it requires for diverted apparatus. However, it is important that Promoter understands Cadent's position on this.
- 3.2 The Promoter's position on Article 10(4) is that it does not allow for the transfer of the benefit of compulsory purchase powers under the dDCO but does allow for the transfer of the benefit of rights acquired pursuant to those compulsory purchase powers. The dDCO does not support this position and Cadent considers that this view is incorrect.
- 3.3 Cadent's position is that Article 10(4) does allow for the transfer of the benefit of any provision of the dDCO to it. This is the clear meaning of Article 9(1), Article 9(2) and Article 10 of the dDCO (and indeed is standard DCO drafting). In this respect:
 - 3.3.1 Article 9(1), which is subject to Article 9(2) and Article 10, states that: "*Subject to article 10 (consent to transfer benefit of Order) and paragraph (2), the **provisions of this Order** conferring powers on the undertaker have effect solely for the **benefit** of the undertaker.*"
 - 3.3.2 It is also noted that Article 9(2), which Article 9(1) is subject to, goes on to state that: "*Paragraph (1) does not apply to the works for which consent is granted by this Order for the **express benefit** of owners and occupiers of land, statutory undertakers and other persons affected by the authorised development.*" Cadent is a statutory undertaker and the intention is that Cadent has the express benefit of the dDCO in respect of the works noted in Article 10(4)(a)(b).
 - 3.3.3 Article 9(1) is also always subject to Article 10.
 - 3.3.4 Article 10(4)(1) provides that: "*the undertaker may: (a) transfer to another person ("the transferee") **any or all of the benefit** of the **provisions of this Order** and such related statutory rights as may be agreed between the undertaker and the transferee*". This allows for the transfer of the benefit of any or all of the provisions of the Order, which includes the benefit of the provisions relating to the compulsory acquisition of land. There is no suggestion here that the benefit of only certain provisions of the Order may be transferred.

- 3.3.5 Article 10(3) provides that: “*the exercise by a person of any benefits or rights conferred in accordance with any transfer or grant under paragraph (1) is subject to the same restrictions, liabilities and obligations as would apply under this Order if those benefits or rights were exercised by the undertaker*”. This article ensures that, where the benefit of provisions such as those relating to compulsory acquisition is transferred, the transferee remains subject to all of the restrictions with the dDCO.
- 3.3.6 Article 10(4)(b) provides that the consent of the Secretary of State is required for a transfer or grant under this article **except where the transfer or grant is made to Cadent**. This simply provides that, because works are identified as being for Cadent’s benefit, there is no need for the Secretary of State to consent to the transfer as the Secretary of State would have to do for other third parties.
- 3.3.7 There is no further restriction within Article 10, or anywhere else within the dDCO, that restricts the provision at Article 10 or which provides that this provision does not extend to the powers of compulsory acquisition (or any other powers) under the dDCO.
- 3.3.8 Therefore, Article 10 and Article 9 must operate to allow for the transfer of the benefit of the provisions relating to compulsory acquisition to Cadent before those powers are exercised. If the Articles did not operate in this way, it would frustrate the ability of Cadent to use the dDCO to deliver its apparatus diversions as is intended.
- 3.4 The Promoter’s position would frustrate the purpose of Articles 9 and 10 altogether. For example:
- 3.4.1 If the benefit of the all of the provisions of the dDCO (or any DCO which includes similar standard provisions regarding the transfer of the benefit of such DCO) were transferred to a third party before the powers of compulsory acquisition had been exercised (and with the Secretary of State) consent then that party would take all of the benefit and all of the burden of the DCO including the powers of compulsory acquisition (which would be essential to deliver the NSIP). There is no justification for limiting this in the case of a partial transfer but not a full transfer as there is no wording in the dDCO that imposes such a limitation.
- 3.4.2 If the Promoter’s view on the operation of Article 10 were right, then by extension the benefit of a DCO could **never** be transferred before the powers of compulsory acquisition had been exercised. Again, this cannot be correct as it would frustrate the delivery of the NSIP and in some sectors, such as the energy sector, the benefit of consents is often transferred post-consent but pre-commencement.
- 3.5 If the intention of the Promoter is that some, but not all, of the provisions of the DCO can be transferred then this should be set out clearly in the DCO.
- 3.6 The reason that this is important to Cadent is that it needs to ensure that the powers of compulsory acquisition are exercised correctly so that the rights that are ultimately acquired for its diverted apparatus are appropriate.
- 3.7 It remains Cadent’s understanding and expectation that the Promoter will transfer the benefit of the dDCO 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.

4. PROTECTIVE PROVISIONS

- 4.1 Cadent welcomes the inclusion of protective provisions for its benefit in the Promoter's deadline 6 submission of the dDCO. Cadent notes that the Promoter (in its deadline 8 submission) made no comments on the protective provisions submitted by Cadent in its deadline 7 submission.
- 4.2 Cadent's position remains as per its deadline 7 submission.

5. PREVIOUS WRITTEN SUBMISSIONS

- 5.1 Cadent is not in a position yet to withdraw its objection.
- 5.2 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.
- 5.3 Cadent reserves its right to make further representations as to the status of the matters outlined in this submission ahead of close of examination.

CMS CAMERON MCKENNA NABARRO OLSWANG LLP

26 MARCH 2020