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**Our ref** KALG/RBHU/CAP/154863.00157

Dear Sir or Madam

**A38 Derby Junctions Development Consent Order (the "Order")  
Written Statement of Cadent Gas Limited**

We are writing on behalf of our client, Cadent Gas Limited (“**Cadent**”). Cadent is an interested party in the examination of the Order.

Further to our deadline 7 submission dated 10 March 2020, we write to update the Examining Authority and to address the Examining Authority’s further written question 9.10 that was issued on 5<sup>th</sup> May.

**UPDATE**

As you will be aware, the Secretary of State issued its decision letter and made the A585 Windy Harbour to Skipool Improvement Scheme Development Consent 2020 (the “**Windy Harbour DCO**”) on 9 April 2020.

In the Windy Harbour DCO (as for this Order), Highways England sought to exclude liability under the indemnity provision in the protective provisions for Cadent’s benefit for “*any direct or consequential loss of any third party arising from any such damage or interruption, which is not reasonably foreseeable*”. Highways England is continuing to make the same point on the Order without any justification.

The Secretary of State and Examining Authority has found in Cadent’s favour on this specific point, that this was not justified and Highways England’s proposed carve out was not included in the Windy Harbour DCO.

This is consistent with previous statutory instruments that affect Cadent’s apparatus. Please see:

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1. Paragraph 51 of Part 4 of Schedule 9 to The A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016; and
2. Paragraph 52 of Part 4 of Schedule 9 to The M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016.

Highways England has not acknowledged or accepted the decision of the Secretary of State and the Examining Authority on the Windy Harbour DCO nor, as far as we are aware, is Highways England challenging that decision. Furthermore, Highways England has made no case for departing from what is the standard legislative position. Put very simply, there is no scheme specific reason to exclude consequential losses from the indemnity and depart from the standard legislative position or the Secretary of State's recent decision.

It is also important to note that Highways England's position in respect of Cadent remains fundamentally inconsistent with Highways England's drafting of its Order and its approach to other undertakers: please see paragraph 11 of Part 1 of Schedule 9 to the DCO submitted for Deadline 9. This is the provision that would apply to Cadent if Cadent had not required (and had largely agreed) bespoke protective provisions, and it does not exclude consequential losses from its costs recovery process. This is the "standard" form of protective provisions.

Cadent requests that a consistent approach is taken by the Examining Authority and Secretary of State going forwards on this point. In light of the precedent set by the recent decision of the Secretary of State on the Windy Harbour DCO and all previous statutory instruments made under the Planning Act 2008 which regulate the relationship between Highways England's schemes and Cadent's apparatus, Cadent reiterates its position that paragraph 59(3)(c) of Schedule 9, Part 5 should be omitted from the Order. Cadent submits that it would be irrational to include this wording in light of the extensive legislative precedent.

**FURTHER WRITTEN QUESTION 9.10**

Further to question 9.10 of the Examining Authority's further written questions issued on 5 May regarding whether there is serious detriment to Cadent's undertaking, Cadent directs the Examining Authority to its submission dated 31 January in response to the Examining Authority's question 10.14 of its second round of written questions.

We should be grateful if you would confirm receipt.

Yours faithfully



**CMS Cameron McKenna Nabarro Olswang LLP**