

From: [REDACTED]
To: [M25 Junction 28](#)
Cc: [REDACTED]
Subject: M25 J28 - Cadent's Deadline 5 Response [CMCK-UK.FID15278449]
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[Cadent_s Deadline 5 Response - M25 J28 - 13 April 2021\(652172592_1\).PDF](#)

Good afternoon

Please see attached.

Kind regards

Jessica

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M25 J28 IMPROVEMENTS PROJECT (THE PROJECT)
CADENT GAS LIMITED
DEADLINE 5 RESPONSE 13 APRIL 2021

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 Examining Authority's (**ExA**) request for an update on the status of protective provisions for Deadline 5.

2. PROTECTIVE PROVISIONS IN THE DRAFT DCO

2.1 Cadent's preferred form of protective provisions (the **Cadent PPs**) are appended (**Appendix 1**). Cadent previously provided these to the ExA at Deadline 2.

2.2 The Cadent PPs are the form of protective provisions that Cadent requests are included in the DCO.

2.3 Cadent is concerned that the Applicant has not included the Cadent PPs within the draft DCO. The Applicant has previously included these protective provisions on all DCOs that have affected Cadent's apparatus (The A585 Windy Harbour to Skippool Highway Development Consent Order 2020 (the A585 DCO), The M42 Junction 6 Development Consent Order 2020 (the M42 DCO) and The A38 Derby Junctions Development Consent Order 2021 (the A38 DCO)), and the Applicant has included these protective provisions within the other DCO that it is promoting and which is currently in examination (the M54 to M6 Link Road Scheme (the **M54 Scheme**)).

2.4 On the M54 to M6 Link Road Scheme, the Applicant submitted a revised draft DCO at Deadline 8 which included its preferred form of Cadent's preferred provisions. As the Applicant has not provided its preferred draft to date and did not make substantive comment on the ExA's questions at Deadline 2 or in response to Cadent at Deadline 3, these are the most recent version of the Applicant's preferred form of protective provisions.

2.5 To assist the ExA, appended (at **Appendix 2**) is a tracked change version of the Cadent PPs against the protective provisions in favour of Cadent included in the Deadline 8 draft DCO for the M54 to M6 Link Road Scheme.

2.6 Cadent has fully engaged with the ExA's questions in respect of its protective provisions throughout the examination of the Project. Cadent has previously provided its:

2.6.1 preferred form of protective provisions to the ExA at Deadline 2; and

2.6.2 attended the issue specific hearing on the draft DCO as requested to provide an update.

2.7 Cadent has sought to engage with the Applicant to reach an agreed position on protective provisions across all schemes that it is promoting (subject to any scheme specific requirements), and negotiations are ongoing. Cadent remains committed to reaching an agreed position if possible and will continue to engage with the Applicant. It is hoped that this form of protective provisions can serve as the template between the two parties for future projects.

2.8 Whilst there are other tracked changes shown, these are drafting points that represent specific drafting differences between the M54 Scheme and this Project and are not matters of disagreement between Cadent and the Applicant.

3. CADENT’S POSITION

- 3.1 In its written questions dated 13 January 2021 (Question CA1.19), the ExA requested that Cadent provide its preferred wording, clean and tracked changed, together with an explanation of where the difference(s) of opinion(s) lie, at Deadline 5. Cadent’s position is set out below.
- 3.2 As above, the Applicant has not submitted its preferred form of protective provisions to the examination of this Project to date, has not included them in the draft DCO and has not proved a material response to the relevant questions and submissions at Deadline 2 and Deadline 3. Therefore, it is not possible for Cadent to provide commentary on where the specific drafting differences lie on this Project.
- 3.3 However, the Applicant has submitted updated preferred protective provisions at Deadline 8 of the M54 Scheme (which is currently in examination and further progressed through its examination than the Project). Therefore, Cadent has assumed that the Applicant’s position on this Project is the same and that the Applicant’s preferred form of protective provisions on the M54 Scheme represents the Applicant’s preferred form of protective provisions on the Project.
- 3.4 On the M54 Scheme, the ExA requested that the Applicant and Cadent set out their full and final position for the recent Deadline 8. Therefore, Cadent has assumed that the Applicant’s full and final position on the M54 Scheme represents the Applicant’s current position on this Project.
- 3.5 The Applicant’s full and final position on the M54 Scheme noted three outstanding points in respect of the protective provisions. These are the:
- 3.5.1 exclusion of consequential loss from the indemnity;
 - 3.5.2 exclusion of deductions and reductions for betterment and deferral of renewal; and
 - 3.5.3 extent of the expenses clauses.
- 3.6 The first and second of these points were subject to Cadent’s submissions at Deadline 2 and these are expanded upon below.
- 3.7 The third of these points was a new point that was introduced late in the examination process on the M54 Scheme, and to date it has not been introduced by the Applicant on this scheme. Therefore, Cadent has not made submissions on this point but reserves its right to do so in the event that the Applicant seeks to introduce this point late into the examination process for this Project too.

Provision	Change	Reasoning
<i>1. Consequential loss</i>		
Paragraph 11 Indemnity	<p>Delete sub-paragraph 3(c)</p> <p>As an alternative, Cadent would be happy to accept the following the following amendment to sub-paragraph 3(c) to:</p> <p>“any indirect or consequential loss of any third party arising from any such damage or interruption, which is not reasonably foreseeable at the commencement of the relevant works referred to in sub-paragraph (1) SAVE THAT the undertaker’s indemnity under para. (1)(b) shall extend to any contractual liability Cadent has in respect of the indirect or consequential loss of a</p>	<p>It is understood that this remains disputed by the Applicant, although the Applicant has not set out a position on this matter at any stage of the examination and so Cadent does not understand the Applicant’s reason for refusing to accept this wording.</p> <p>Cadent’s position on this was set out in its response at Deadline 2.</p> <p>If consequential loss wording is to be included then Cadent will require that the additional words shown in tracked changes are included to address its</p>

landowner in whose land apparatus is or, pursuant to the works will be, located

current exposure to liability (this liability stems from the standard easement it enters into with landowners which includes a full indemnity and under which Cadent would be responsible for losses caused by the Applicant). The Applicant has not sought to justify its position on this wording during the examination and has not submitted a material response to Cadent's submissions to the examination.

Cadent is aware of four DCO projects which the Applicant has promoted where the issue of consequential loss within an indemnity for the benefit of a statutory undertaker has remained in dispute. These are the A585 Windy Harbour to Skippool Highway Development Consent Order 2020 (the **A585 DCO**), The M42 Junction 6 Development Consent Order 2020 (the **M42 DCO**), The A38 Derby Junctions Development Consent Order 2021 (the **A38 DCO**) and the A1 Birtley to Coal House Improvement Scheme Development Consent Order 2021 (the **A1 DCO**).

In each of these cases, the question for the Secretary of State was whether to exclude the consequential loss wording altogether (the undertaker's standard position) or include the consequential loss wording (the Applicant's position).

For the Project, Cadent is prepared to accept the consequential loss wording, but **only if** additional wording shown in tracked changes (to cover an identified liability risk that Cadent should not be exposed to) is included.

The consequential loss carve out leaves Cadent exposed to any third party consequential loss claims from landowners where Cadent has legal easements. As a matter of industry practice Cadent is required to give full indemnities in its gas easements which do not include a consequential loss carve out, otherwise Cadent would not be able to obtain those land rights. Unlike other utilities (for example those in the electricity sector), Cadent has to obtain legal easements as Cadent does not have statutory rights across third

		<p>party land. Cadent cannot rely upon contractual wayleaves or statutory rights as a way of obtaining access across private land.</p> <p>The carve out of consequential loss leaves Cadent in a position where it has given, but not received, a full indemnity. It is unreasonable and unacceptable that a loss Cadent suffers as a result of the actions of the Applicant, and which may be recoverable under common law, should be excluded from the indemnity. This risk is clearly identifiable and quantifiable by the Applicant as it only applies in respect of landowners in whose land apparatus is situated so is a narrow exclusion to a broad carve-out to the indemnity which Cadent is otherwise content to accept.</p> <p>This issue has the potential to cause serious detriment to Cadent in the event that it is subject to such a claim by a landowner. Cadent derives no benefit from this scheme and should not be exposed to any risk.</p> <p>The most recent DCO decision to consider the consequential loss point was the A1 DCO, where the Secretary of State concluded that the exclusion of consequential loss from an indemnity in favour of a statutory undertaker was not appropriate and excluded the consequential loss wording from the A1 DCO. This is the only one of the four Secretary of State decisions identified where the approach to consequential loss in an indemnity has been considered in detail and it is the only one of the four decisions where the Secretary of State has expressly considered the point. See sections 81 to 85 of the A1 DCO Decision Letter.</p> <p>The decision on the A1 DCO reflected the earlier decision of the Secretary of State in the A585 DCO, which is the only other DCO decision to consider the specific point in any detail (Pages 94 and 95, Table 1, ExA Report). The Secretary of State agreed with the ExA's position on the A585 DCO in adopting Cadent's position and</p>
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		<p>excluding the proposed consequential loss wording from the A585 DCO.</p> <p>In neither the A38 DCO decision or the M42 DCO decision did the Examining Authority or the Secretary of State deal with the consequential loss wording in any detail and so the cross references requested by the ExA cannot be provided. For this reason, it is not possible to discern the reasons for an alternative conclusion to the A585 DCO or the A1 DCO being reached. Given this, and given the detailed consideration given to such wording by the Secretary of State in the subsequent A1 DCO decision, Cadent submits that little weight can be attached to the A38 DCO and M42 DCO decisions.</p> <p>In the A38 DCO, the Secretary of State did not address this in the decision letter. The ExA only considered this in one line in the recommendation report (see 7.10.40).</p> <p>In the M42 DCO, the Secretary of State did not address this in the decision letter. The Secretary of State simply cross referred to the ExA report, which did not address the consequential loss point.</p> <p>The Applicant's position on the consequential loss point for this Project, particularly in light of the recent A1 DCO decision, is unknown given the lack of any submissions to the examination.</p> <p>It is for the Applicant to justify the wording of its own DCO and in this respect it has not done that.</p>
2. Betterment and deferral of benefit discount		
Paragraph 10 Expenses	Delete sub-paragraphs (2) to (4)	<p>It is understood that this remains in dispute by the Applicant, although the Applicant has not set out a position on this matter at any stage of the examination and so Cadent does not understand the Applicant's reason for refusing to accept this wording.</p> <p>Betterment or deferral of renewal for works that are fully outside of the</p>

		<p>highway are not discounts that Cadent applies in the operation of its business.</p> <p>The inclusion of such a deduction or reduction has the potential to lead to significant cost liabilities, that are not catered for because Cadent does not make allowance for such deductions and reductions. If the scheme were not consented through a DCO, such deductions and reductions would not apply.</p> <p>Cadent’s position is that the diversions are scheme costs that should be borne by the Applicant, and that there is no justification for Cadent being liable for a proportion of such costs when (but for the Project) Cadent would not incur them.</p> <p>Imposing a costs liability on Cadent, which could be significant and which is not planned for or required in terms of network management, is not appropriate. This would not apply if this scheme were not consented pursuant to a DCO.</p> <p>Therefore, these costs could cause a serious detriment to Cadent’s undertaking and could put Cadent in breach of its statutory duty which, by virtue of section 9 of the Gas Act 1986, is to: “<i>develop and maintain an efficient and economical pipe-line system for the conveyance of gas</i>”.</p>
3. Expenses		
Paragraph 3	<p>The Applicant has not proposed any changes to the standard position, as secured in the A38 DCO, A585 DCO and M42 DCO, as part of the examination into this Project.</p> <p>However, the Applicant (at a very late stage of the examination into the M54 Scheme) proposed a substantive change to this clause which could cause serious detriment to Cadent.</p>	<p>Cadent reserves its right to respond on this in the event that the Applicant introduces this as a new submission at Deadline 5.</p> <p>Cadent’s position on this point is consistent with all DCOs promoted by the Applicant that contain protective provisions in favour of Cadent. Please see for example: paragraph 45 of Part 5 of Schedule 12 to The M42 Junction 6 Development Consent Order 2020; paragraph 51 of Part 5 of Schedule 9 to The A38 Derby Junctions Development Consent Order 2021; and paragraph 20 of Part 3 of Schedule 10 to The A585 Windy Harbour to Skippool Highway Development Consent Order 2020.</p>

		This is also consistent with the protective provisions afforded to other gas undertakers by the Applicant, such as National Grid Gas plc and Southern Gas Networks plc.
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3.8 Cadent reserves the right to respond to the Applicant's submissions.

CMS CAMERON MCKENNA NABARRO OLSWANG LLP

13 APRIL 2021

APPENDIX 1
CADENT'S PREFERRED PROTECTIVE PROVISIONS

SCHEDULES

SCHEDULE []

PROTECTIVE PROVISIONS

PART [#]

FOR THE PROTECTION OF CADENT GAS LIMITED

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—

“alternative apparatus” means appropriate alternative apparatus to the reasonable 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 Cadent’s undertaking together with any replacement apparatus and such other apparatus constructed pursuant to this Order that becomes operational apparatus of Cadent for the purposes of Cadent’s undertaking 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 includes its successors in title or any successor as a gas transporter within the meaning of Part 1 of the Gas Act 1986;

“Cadent’s undertaking” means the rights, duties and obligations of Cadent Gas Limited as a public gas transporter within the meaning of Section 7 of the Gas Act 1986 (as amended by the Gas Act 1995);

“commence” and “commencement” 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;

“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 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;

“facilities and rights” for construction and for maintenance include any appropriate working areas required to reasonably and safely undertake that construction or maintenance, and any necessary rights of access;

“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” have effect as if Cadent’s existing apparatus was authorised development and as if the term maintain includes protect and use;

“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;

“rights” includes restrictive covenants and, in relation to decommissioned apparatus, the surrender of rights, release of liabilities and transfer of decommissioned apparatus; and

“specified works” means any of the authorised development or activities (including maintenance) undertaken in association with the authorised development 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 7(2) or otherwise; or
- (b) may in any way adversely affect any apparatus the removal of which has not been required by the undertaker under sub-paragraph 7(2) or otherwise.

On Street apparatus

3.—(1) This Part of this Schedule does 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, except for—

- (a) paragraphs 4, 9, 10 and 11; and
- (b) where sub-paragraph (2) applies, paragraphs 7 and 8.

(2) This sub-paragraph applies where any apparatus is diverted from an alignment within the existing adopted public highway but not wholly replaced within the existing public highway, notwithstanding that any diversion may be carried out under the provisions of Part 3 of the 1991 Act.

Apparatus of Cadent in stopped up streets

4.—(1) Where any street is stopped up under article 15 (Permanent stopping up of streets), if Cadent has any apparatus in the street or accessed via that street Cadent is entitled to the same rights in respect of such apparatus as it enjoyed immediately before the stopping up and the undertaker must grant to Cadent, or procure the granting to Cadent of, legal easements reasonably satisfactory to Cadent in respect of such apparatus and access to it prior to the stopping up of any such street or highway, but nothing in this paragraph shall affect any right of the undertaker or of Cadent to require the removal of that apparatus under paragraph 7.

(2) Notwithstanding the temporary alteration, diversion or restriction of use of any street under the powers of article 13 (*temporary alteration, diversion or restriction of use of streets*), Cadent will be at liberty at all times to take all necessary access across any such street and to execute and do all such works and things in, upon or under any such street as it would have been entitled to do immediately before such temporary alteration, diversion or restriction in respect of any apparatus which at the time of the stopping up or diversion was in that street.

Protective works to buildings

5. (1) The undertaker must exercise the powers conferred by article 21 (Protective work to buildings) so as not to obstruct or render less convenient the access to any apparatus without the written consent of Cadent (such consent not to be unreasonably withheld or delayed).

Acquisition of land

6.—(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 interest in land or appropriate, acquire, extinguish, interfere with or override any easement or other interest in land of Cadent otherwise than by agreement.

(2) As a condition of agreement between the parties in sub-paragraph (1), prior to the carrying out or maintenance of any part of the authorised development (or in such other timeframe as may be agreed between Cadent and the undertaker) that is subject to the requirements of this Part of this Schedule that will cause any conflict with or breach the terms of any easement or other legal or land interest of Cadent or affect 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 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 or secure the consent to 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 authorised development or maintenance thereof.

(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 or removal of apparatus, including but not limited to the payment of costs and expenses relating to such relocation or removal of apparatus and the provisions of any existing easement, rights, agreements and licences granted, used, enjoyed or exercised by Cadent and other enactments relied upon by Cadent as of right or other use in relation to the apparatus, then the provisions in this Schedule prevail.

(4) Any agreement or consent granted by Cadent under paragraph 9 or any other paragraph of this Part of this Schedule, is not to be taken to constitute agreement under sub-paragraph (1).

(5) As a condition of an agreement under sub-paragraph (1) that involves de-commissioned apparatus being left in situ the undertaker must accept a surrender of any existing easement or other interest of Cadent in such decommissioned apparatus and release Cadent from all liabilities in respect of such de-commissioned apparatus from the date of such surrender.

(6) Where an undertaker acquires land which is subject to any Cadent right or interest (including, without limitation, easements and agreements relating to rights or other interests) and the provisions of paragraph 7 do not apply, the undertaker must, unless Cadent agrees otherwise—

- (a) retain any notice of Cadent's easement, right or other interest on the title to the relevant land when registering the undertaker's title to such acquired land; and
- (b) (where no such notice of Cadent's easement, right or other interest exists in relation to such acquired land or any such notice is registered only on the Land Charges Register) include (with its application to register title to the undertaker's interest in such acquired land at the Land Registry) a notice of Cadent's easement, right or other interest in relation to such acquired land.

Removal of apparatus

7.—(1) If, in the exercise of the powers conferred by this Order, including pursuant to any agreement reached in accordance with paragraph 6, 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 facilities and rights referred to in sub-paragraph (2) have been provided, to the reasonable satisfaction of Cadent and in accordance with sub-paragraphs (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 paragraph 8(1)) the necessary facilities and rights—

- (a) for the construction of alternative apparatus; and
- (b) subsequently for the maintenance of that 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 must, 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), 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

8.—(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 of 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 (1) 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, then the terms and conditions to which those facilities and rights are subject may be referred to arbitration in accordance with paragraph 15 (*Arbitration*) of this Part of this Schedule and the arbitrator must 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

9.—(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 specified works until Cadent has given written approval of the plan so submitted (and the ground monitoring scheme if required).

(4) Any approval of Cadent given under sub-paragraph (3)—

- (a) may be given subject to reasonable conditions for any purpose mentioned in sub-paragraph (5); and
- (b) must not be unreasonably withheld or delayed and Cadent must meaningfully engage with the undertaker within 28 days of the date of submission of the plan under sub-paragraph (1).

(5) Cadent may require such modifications to be made to the plan as may be reasonably necessary for the purpose of securing its 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) Specified works must only be executed in accordance with—

- (a) the plan submitted under sub-paragraph (1) (and ground monitoring scheme if required), as approved or as amended from time to time by agreement between the undertaker and Cadent; and
- (b) 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 8 apply as if the removal of the apparatus had been required by the undertaker under paragraph 7(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) As soon as reasonably practicable after any ground subsidence event attributable to the authorised development (including such an event attributable to its maintenance)—

- (a) the undertaker must implement an appropriate ground mitigation scheme; and
- (b) 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 10.

(11) The undertaker is not required to comply with sub-paragraph (1) where it needs to carry out emergency works 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 the conditions imposed under sub-paragraph (4)(a) insofar as is reasonably practicable in the circumstances.

(12) In this paragraph, “emergency works” means works whose execution at the time when they are executed is required in order to put an end to, or to prevent the occurrence of, circumstances then existing or imminent (or which the person responsible for the works believes on reasonable grounds to be existing or imminent) which are likely to cause danger to persons or property.

Expenses

10.—(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 reasonably incurred by Cadent in, or in connection with, the inspection, removal, relaying or replacing, alteration or protection of any apparatus or the construction of any new or alternative apparatus which may be required in consequence of the execution of any authorised development including without limitation—

- (a) any costs reasonably incurred by or compensation properly paid by Cadent in connection with the 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 paragraph 7(3) if it elects to do so; or
 - (ii) exercising any compulsory purchase powers under this 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 such works referred to in this Part of this Schedule;
- (g) any watching brief pursuant to sub-paragraph 9(6).

Indemnity

11.—(1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction of any such 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 authorised development (including works carried out under article 21 (Protective work to buildings) 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 the undertaker) in the course of carrying out such 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 authorised development) 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 accompanied by an invoice or claim from Cadent, 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, compensation or costs properly incurred by, paid 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 part of the authorised development carried out by Cadent in the exercise of any functions conferred by this Order pursuant to a grant or transfer under article 9 (Consent to transfer benefit of the Order).

(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 undertaker and considering their representations.

Enactments and agreements

12. Except where this Part of this Schedule provides otherwise, nothing in this Part of this Schedule affects 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

13.—(1) Where in consequence of the proposed construction of any part of the authorised development, the undertaker or Cadent requires the removal of apparatus under paragraph 7(2) or Cadent makes requirements for the protection or alteration of apparatus under paragraph 9, the undertaker must 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 authorised development and taking into account the need to ensure the safe and efficient operation of Cadent's undertaking and Cadent must 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

14. If in consequence of any agreement reached in accordance with paragraph 6(1) or the powers conferred by this Order the access to any 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

15. Save for differences or disputes arising under sub-paragraphs 7(2) and 7(4) 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 54 (Arbitration).

Notices

16. Notwithstanding article 47 (Service of notices) any plans submitted to Cadent by the undertaker pursuant to sub-paragraph 9(1) must be sent via email to Cadent Gas Limited Plant Protection at plantprotection@cadentgas.com as well as via post to Plant Protection, Cadent Gas Limited, Brick Kiln Street, Hinckley, Leicestershire, LE10 0NA, or such other address as Cadent may from time to time appoint instead for that purpose and notify to the undertaker in writing.

APPENDIX 2
REDLINE COMPARISON BETWEEN CADENT'S PREFERRED PROTECTIVE PROVISIONS
AND THOSE IN THE DEADLINE 8 DRAFT DCO ON THE M54 SCHEME

SCHEDULES

SCHEDULE []

PROTECTIVE PROVISIONS

PART [#]

FOR THE PROTECTION OF CADENT GAS ~~LTD AS GAS UNDERTAKER~~LIMITED

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—

“alternative apparatus” means appropriate alternative apparatus to the reasonable 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 Cadent’s undertaking together with any replacement apparatus and such other apparatus constructed pursuant to this Order that becomes operational apparatus of Cadent for the purposes of Cadent’s undertaking 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 includes its successors in title or any successor as a gas transporter within the meaning of Part 1 of the Gas Act 1986;

“Cadent’s undertaking” means the rights, duties and obligations of Cadent Gas Limited as a public gas transporter within the meaning of Section 7 of the Gas Act 1986 (as amended by the Gas Act 1995);

“commence” ~~has the same meaning as in article 2(1) of the Order and~~ and ~~“commencement shall be construed to have the same meaning save that for the purposes of this Part of the Schedule the terms commence and commencement”~~ include any below ground surveys, monitoring, work operations, remedial work in respect of any contamination or other adverse ground conditions, the receipt and erection of construction plant and equipment, and non-intrusive investigations for the purpose of assessing ground conditions;

“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 or replace existing easements, agreements, enactments and other such interests so as to secure land rights and interests as are necessary to ~~carry~~ carry out, maintain, operate and use the apparatus in a manner consistent with the terms of this Part of this Schedule;

“facilities and rights” for construction and for maintenance include any appropriate working areas required to reasonably and safely undertake that construction or maintenance, and any necessary rights of access;

“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” ~~for the purposes of this Part of the Schedule shall~~ have effect as if Cadent’s existing apparatus was authorised development and as if the term maintain includes protect and use, ~~improve, landscape, preserve, decommission, refurbish or replace;~~

“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;

“rights” includes restrictive covenants and, in relation to decommissioned apparatus, the surrender of rights, release of liabilities and transfer of decommissioned apparatus; and

“specified works” means any of the authorised development or activities (including maintenance) undertaken in association with the authorised development ~~which:~~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 24(2) (removal of apparatus)~~sub-paragraph 7(2) or otherwise; or
- (b) may in any way adversely affect any apparatus the removal of which has not been required by the undertaker under ~~sub-paragraph 24(2) (removal of apparatus)~~7(2) or otherwise; or.

On Street ~~A~~apparatus

3.—~~(1)~~1 This Part of this Schedule does not apply to apparatus in respect of which the relations between the undertaker and Cadent are regulated by the provisions of Part 3 (~~street works in England and Wales~~) of the 1991 Act, except for—

~~paragraphs 21 (apparatus of Cadent in stopped up streets), 26 (retained apparatus: protection of Cadent), 27 (expenses) and 28 (indemnity); and~~

- (a) paragraphs 4, 9, 10 and 11; and
- (b) where sub-paragraph (2) applies, paragraphs ~~24 (removal of apparatus) and 25 (facilities and rights for alternative apparatus)~~7 and 8.

(2) This sub-paragraph applies where any apparatus is diverted from an alignment within the existing adopted public highway but not wholly replaced within the existing ~~adopted~~ public highway, notwithstanding that any diversion may be carried out under the provisions of Part 3 of the 1991 Act.

~~Paragraph 27 (expenses) does not apply where the authorised development constitutes major highway works, major bridge works or major transport works for the purposes of Part 3 of the 1991 Act, but instead—~~

~~the allowable costs of the relocation works are to be determined in accordance with section 85 (sharing of cost of necessary measures) of that Act and any regulations for the time being having effect under that section; and~~

~~the allowable costs are to be borne by the undertaker and Cadent in such proportions as may be prescribed by any such regulations.~~

Apparatus of Cadent in stopped up streets

4.—~~(1)~~1 Where any street is stopped up under article ~~13–15 (p~~Permanent stopping up ~~and restriction of use of streets, public rights of way and private means of access),~~), if Cadent has any apparatus in the street or accessed via that street Cadent is entitled to the same rights in respect of such apparatus as it enjoyed immediately before the stopping up and the undertaker must grant to Cadent, or procure the granting to Cadent of, legal easements reasonably satisfactory to Cadent in respect of such apparatus and access to it prior to the stopping up of any such street or highway, but nothing in this paragraph shall affect any right of the undertaker or of Cadent to require the removal of that apparatus under paragraph ~~24 (removal of apparatus)~~7.

(2) Notwithstanding the temporary ~~stopping up,~~ alteration, diversion or restriction of use of any street under the powers of article ~~12–13 (temporary stopping up and~~ alteration, diversion or restriction of use of streets), ~~—,~~ Cadent will be at liberty at all times to take all necessary access across any such street and to execute and do all such works and ~~things~~ things in, upon or under any such street as it would have been entitled to do immediately before

such temporary ~~stopping up~~, alteration, diversion or restriction ~~of use~~ in respect of any apparatus which at the time of the stopping up or diversion was in that street.

Protective works to buildings

5.—~~(1)~~ The undertaker ~~must~~ exercise the powers conferred by article ~~18-21~~ ~~(p~~ Protective work to buildings) so as not to obstruct or render less convenient the access to any apparatus without the written consent of Cadent ~~(such consent not to be unreasonably withheld or delayed)~~.

Acquisition of land

6.—~~(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 interest in land or appropriate, acquire, extinguish, interfere with or override any easement or other interest in land of Cadent otherwise than by agreement.

(2) As a condition of agreement between the parties in sub-paragraph (1), prior to the carrying out or maintenance of any part of the authorised development (or in such other timeframe as may be agreed between Cadent and the undertaker) that is subject to the requirements of this Part of this Schedule that will cause any conflict with or breach the terms of any easement or other legal or land interest of Cadent or affect 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 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 or secure the consent ~~to~~ 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 authorised development or maintenance thereof.

(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 or removal of apparatus, including but not limited to the payment of costs and expenses relating to such relocation or removal of apparatus and the provisions of any existing easement, rights, agreements and licences granted, used, enjoyed or exercised by Cadent and other enactments relied upon by Cadent as of right or other use in relation to the apparatus, then the provisions in this Schedule prevail.

(4) Any agreement or consent granted by Cadent under paragraph ~~26 (retained apparatus: protection of Cadent)~~ ~~9~~ or any other paragraph of this Part of this Schedule, is not to be taken to constitute agreement under sub-paragraph (1).

(5) As a condition of an agreement under sub-paragraph (1) that involves de-commissioned apparatus being left in situ the undertaker must accept a surrender of any existing easement or other interest of Cadent in such decommissioned apparatus and release Cadent from all liabilities in respect of such de-commissioned apparatus from the date of such surrender.

(6) Where an undertaker acquires land which is subject to any Cadent right or interest (including, without limitation, easements and agreements relating to rights or other interests) and the provisions of paragraph ~~24 (removal of apparatus)~~ ~~7~~ do not apply, the undertaker must, unless Cadent agrees ~~otherwise~~ ~~otherwise~~—

- (a) retain any notice of Cadent's easement, right or other interest on the title to the relevant land when registering the undertaker's title to such acquired land; and
- (b) (where no such notice of Cadent's easement, right or other interest exists in relation to such acquired land or any such notice is registered only on the Land Charges Register) include (with its application to register title to the undertaker's interest in such acquired land at the Land Registry) a notice of Cadent's easement, right or other interest in relation to such acquired land.

Removal of apparatus

7.—~~(1)~~ If, in the exercise of the powers conferred by this Order, including pursuant to any agreement reached in accordance with paragraph ~~23 (acquisition of land)~~ ~~6~~, 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 facilities and rights referred to in sub-paragraph (2) have been provided, to the reasonable satisfaction of Cadent and in accordance with sub-paragraphs (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 25(1) (facilities and rights for alternative apparatus) below~~paragraph 8(1)) the necessary facilities and ~~rights:~~rights

- (a) for the construction of alternative apparatus; and
- (b) subsequently for the maintenance of that apparatus.

(3) If the undertaker is unable to afford such facilities and rights as are mentioned in ~~sub-~~sub-paragraph (2), in the land in which the alternative apparatus or part of such apparatus is to be constructed, Cadent must, 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 ~~does~~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-~~sub-paragraph (2) or (3), 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

8.—~~(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 of 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 (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, then the terms and conditions to which those facilities and rights are subject may be referred to arbitration in accordance with paragraph 15 (Arbitration) of this Part of this Schedule and the arbitrator must 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.

~~Cadent than the facilities and rights enjoyed by it in respect of the apparatus to be decommissioned or removed then the terms and conditions to which those facilities and rights are subject in the matter may be referred to arbitration in accordance with paragraph 33 (arbitration) of this Part of this Schedule and the arbitrator must 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

9.—~~(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 specified works until Cadent has given written approval of the plan so submitted (and the ground monitoring scheme if required).

(4) Any approval of Cadent given under sub-paragraph (3)—

- (a) may be given subject to reasonable conditions for any purpose mentioned in ~~sub-~~sub-paragraph (5); and
- (b) must not be unreasonably withheld or delayed and Cadent must meaningfully engage with the undertaker within 28 days of the date of submission of the plan under ~~sub-~~sub-paragraph (1).

(5) Cadent may require such modifications to be made to the plan as may be reasonably necessary for the purpose of securing its 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) Specified works must only be executed in accordance with—

- (a) the plan submitted under sub-paragraph (1) (and ground monitoring scheme if required), as approved or as amended from time to time by agreement between the undertaker and Cadent; and
- (b) 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 ~~18-1 to 20-3 and 23-6 to 25-8~~ apply as if the removal of the apparatus had been required by the undertaker under ~~sub-paragraph 24(2) (removal of apparatus)~~paragraph ~~7(2)~~7(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 ~~(and ground monitoring scheme if required)~~, 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 ~~(and ground monitoring scheme if required)~~.

(10) As soon as reasonably practicable after any ground subsidence event attributable to the authorised development (including such an event attributable to its maintenance)—

- (a) the undertaker must implement an appropriate ground mitigation scheme; and
- (b) 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 ~~27 (expenses)~~10.

(11) The undertaker is not required to comply with sub-paragraph (1) where it needs to carry out emergency works 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 the conditions imposed under sub-paragraph ~~(4)~~(4)(a) insofar as is reasonably practicable in the circumstances.

(12) In this paragraph, “emergency works” means works whose execution at the time when they are executed is required in order to put an end to, or to prevent the occurrence of, circumstances then existing or imminent (or which the person responsible for the works believes on reasonable grounds to be existing or imminent) which are likely to cause danger to persons or property.

Expenses

10.—(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 reasonably incurred by Cadent in, or in connection with, the inspection, removal, relaying or replacing, alteration or protection of any apparatus or the construction of any new or alternative apparatus which may be required in consequence of the execution of any authorised development including without limitation—

- (a) any costs reasonably incurred by or compensation properly paid by Cadent in connection with the 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 24(3) (removal of apparatus)~~ paragraph 7(3) if it elects to do so; or
 - (ii) exercising any compulsory purchase powers under this 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 such works referred to in this Part of this Schedule;
- (g) any watching brief pursuant to sub-paragraph ~~26(6) (retained apparatus: protection of Cadent)~~ 9(6).

~~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.~~

~~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 paragraph 33 (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 to the extent that it is not possible in the circumstances (or it would be unlawful due to a statutory or regulatory change) 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.~~

~~For the purposes of sub-paragraph (3)—~~

~~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~~

~~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.~~

~~An amount which apart from this sub-paragraph would be payable to Cadent in respect of works by virtue of sub-paragraph (1) will, if the works include the placing of apparatus provided in substitution for apparatus placed more than 7 years and 6 months earlier so as to confer on Cadent any financial benefit by deferment of the time for renewal of the apparatus in the ordinary course, be reduced by the amount which represents that benefit.~~

Indemnity

11.—~~(1)~~ Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction of any such 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 authorised development (including works carried out under article ~~18~~21 (~~Protective work to buildings~~)) 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 the undertaker) in the course of carrying out such 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 authorised development) 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 accompanied by an invoice or claim from Cadent, 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, compensation or costs properly incurred by, paid 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) ~~(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 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 part of the authorised development carried out by Cadent in the exercise of any functions conferred by this Order pursuant to a grant or transfer under article ~~8; and~~9 (Consent to transfer benefit of the Order).

~~any indirect 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 at the commencement of the relevant works referred to in sub-paragraph (1).~~

(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 undertaker and considering their representations.

Enactments and agreements

12. Except where ~~in~~ this Part of this Schedule provides otherwise ~~or by agreement in writing between Cadent and the undertaker~~, nothing in this Part of this Schedule affects 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

13.—~~(1)~~ Where in consequence of the proposed construction of any part of the authorised development, the undertaker or Cadent requires the removal of apparatus under ~~sub-paragraph 24(2) (removal of apparatus)~~ paragraph 7(2) or Cadent makes requirements for the protection or alteration of apparatus under ~~paragraph 26 (retained apparatus: protection of Cadent)~~ 9, the undertaker must 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 authorised development and taking into account the need to ensure the safe and efficient operation of Cadent's undertaking and Cadent must use its best endeavours to co-operate with the undertaker for that purpose.

(2) ~~(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

14. If in consequence of any agreement reached in accordance with ~~sub-paragraph 23(1) (acquisition of land)~~ paragraph 6(1) or the powers conferred by this Order the access to any 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

15. Save for differences or disputes arising under sub-paragraphs ~~24(2) 24(4) (removal of apparatus) and 26(11) (retained apparatus protection of Cadent)~~ 7(2) and 7(4) 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 ~~43 54~~ (s)Arbitration).

Notices

16. Notwithstanding article ~~41 47~~ (s)Service of notices) ~~the any~~ plans submitted to Cadent by the undertaker pursuant to sub-paragraph ~~26(1) (retained apparatus protection of Cadent)~~ 9(1) must be sent via email to Cadent Gas Limited Plant Protection at plantprotection@cadentgas.com as well as via post to Plant Protection, Cadent Gas Limited, Brick Kiln Street, Hinckley, Leicestershire, LE10 0NA, or such other address as Cadent may from time to time appoint instead for that purpose and notify to the undertaker in writing.

~~to Cadent Gas Limited Plant Protection via email to plantprotection@cadentgas.com as well as by post to Plant Protection Limited, Cadent Gas limited, Brick Kiln Street, Hinckley, Leicestershire, LE10 0NA or such other address as Cadent may from time to time appoint instead for that purpose and notify to the undertaker in writing.~~