

## **M25 junction 28 improvement scheme**

**TR010029**

### **9.91 Applicant's comments on CMS Cameron McKenna Nabarro Olswang LLP on behalf of Cadent Gas's Deadline 5 submission**

Rules 8(1)(b)

Planning Act 2008

Infrastructure Planning (Examination Procedure) Rules 2010

Volume 9

April 2021

# Infrastructure Planning

## Planning Act 2008

### The Infrastructure Planning (Examination Procedure) Rules 2010

### M25 junction 28 scheme

### Development Consent Order 202[x ]

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# Table of contents

Chapter	Pages
1. Purpose and structure of this response	4
2. REP5-064 CMS Cameron McKenna Nabarro Olswang LLP on behalf of Cadent Gas update on the status of protective provisions	5

## 1. Purpose and structure of this response

- 1.1.1 This document provides the comments of the applicant, Highways England, in response to CMS Cameron McKenna Nabarro Olswang LLP's on behalf of Network Rail Infrastructure Limited's update on the status of Protected Provisions (REP5-064) submitted to the Examining Authority (ExA) at Deadline 5 (13 April 2021).
- 1.1.2 Highways England has sought to provide comments where it is helpful to the Examination to do so, for instance where a representation includes a request for further information or clarification from Highways England or where Highways England considers that it would be appropriate for the Examining Authority (ExA) to have Highways England's views in response to a matter raised by an Interested Party in its representations. Where issues raised within a representation have been dealt with previously by Highways England, for instance in response to a question posed by the ExA in its first round of written questions or within one of the application documents submitted to the Examination, a cross reference to that response or document is provided to avoid unnecessary duplication. The information provided in this document should, therefore, be read in conjunction with the material to which cross references are provided.
- 1.1.3 Highways England has not provided comments on every point made within the representation (for instance, Highways England has not responded to comments made about the adequacy of its pre-application consultation given that Highways England has already provided a full report of the consultation it has undertaken as part of its application for the Development Consent Order (DCO)) and the Planning Inspectorate has already confirmed the adequacy of the pre-application consultation undertaken when the application was accepted for Examination. In some cases, no comments have been provided, for instance, because the written representation was very short, or because it expressed objections in principle to the Scheme or expressions of opinion without supporting evidence.
- 1.1.4 For the avoidance of doubt, where Highways England has chosen not to comment on matters raised by Interested Parties, this is not an indication Highways England agrees with the point or comment raised or opinion expressed.

## 2. REP5-064 CMS Cameron McKenna Nabarro Olswang LLP on behalf of Cadent Gas update on the status of protective provisions

Response reference:	Representation Issue	HE Response
REP5-064-01	<p>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 <b>M54 Scheme</b>)).</p>	<p>Cadent is aware that—</p> <p>(a) bespoke protective provisions (PPs) for Cadent's particular benefit (based largely on the M42 J6 precedent) have been under negotiation between the parties for some months with drafts travelling between the parties, and it is Highways England's intention to include those in the DCO if agreement on the form is reached;</p> <p>(b) the PPs for Cadent's benefit included in the DCOs cited by Cadent are not identical and Cadent seeks to depart from that wording in certain respects on this scheme (and the M54 Scheme also at examination), hence the ongoing negotiations;</p> <p>(c) a number of issues of principle (explained below) remain outstanding as between the parties on those PPs, both on this scheme and others (notably the M54 Scheme to which Cadent refers in its submission);</p> <p>(d) in any event, the M25 J28 dDCO contains, in Schedule 9, PPs for the benefit of statutory undertakers including gas undertakers, which would apply to Cadent in the event that a form of bespoke PPs for Cadent is not agreed.</p>
REP5-064-02	<p>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.</p> <p>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.</p> <p>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:</p> <p style="padding-left: 40px;">2.6.1 preferred form of protective provisions to the ExA at Deadline 2; and</p> <p style="padding-left: 40px;">2.6.2 attended the issue specific hearing on the draft DCO as requested to provide an update ...</p> <p>2.8 Whilst there are other tracked changes shown [as between the J28 and M54 PPs], these are drafting points that represent specific drafting differences between the M54</p>	<p>Highways England appends to this note the current form of PPs it is proposing for inclusion in the DCO for Cadent's benefit.</p> <p>Highways England also attaches a comparison showing the differences between the PPs now proposed by Highways England and those proposed by Cadent at Deadline 5. This removes the "scheme specific" drafting differences shown in Cadent's Deadline 5 comparison (referred to in Cadent's para. 2.8) and so makes clear the few substantive points of principle between the parties. Highways England has also taken account of certain minor drafting changes agreed between the parties on the M54 Scheme, and which can also be agreed on this scheme (again, shown in the comparison).</p> <p>Highways England indicates below its position on the substantive outstanding points.</p>

Response reference:	Representation Issue	HE Response
	<p>Scheme and this Project and are not matters of disagreement between Cadent and the Applicant.</p> <p>(Similar concern raised at paras. 3.1 to 3.4)</p>	
REP5-064-03	<p>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.</p>	<p>Highways England agrees that both parties have sought 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. Highways England remains committed to reaching an agreed position if possible and will continue to engage. It is hoped that this form of protective provisions can serve as the template between the two parties for future projects.</p>
REP5-064-04	<p><b>Issue 1: Exclusion of consequential loss from the indemnity (para. 11(3)(c))</b></p> <p>Cadent seeks the deletion of sub-paragraph 11(3)(c) or, as an alternative, the following amendment:</p> <p><u>“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) <b>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 landowner in whose land apparatus is or, pursuant to the works will be, located”</b></u></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 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.</p> <p>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).</p>	<p>Paragraph 11 of the PPs under discussion provides that Highways England will indemnify Cadent for certain losses caused by the scheme. Sub-paragraph (3) carves out certain types of loss (e.g. (a) loss caused by Cadent’s negligence). Sub-paragraph (3)(c) excludes any indirect or consequential losses which are not reasonably foreseeable at the commencement of the relevant works.</p> <p>The Secretary of State has previously considered the need for Highways England to provide an indemnity to Cadent which covers indirect and consequential loss. Detailed representations were made by Highways England and Cadent on the M42 Junction 6 Development Consent Order 2020 and A38 Derby Junctions Development Consent Order 2021 (both decided after the A585 DCO). On both occasions the Examining Authority and the Secretary of State each considered the specific point and each concluded that it was appropriate to exclude indirect and consequential loss from Highways England’s indemnity to Cadent. In the A38 Recommendation Report the ExA concluded that <i>“section 127 [PA 2008] requires Cadent to be protected from serious detriment in undertaking its functions, however it does not protect it from all the costs of doing so”</i>. Similar wording appears in the M42 J6 examination report. The exclusion of indirect and consequential losses was held to be entirely consistent with the Highways England’s position as a publicly funded body. As such, Highways England seeks the inclusion of sub-paragraph 3(c) on this scheme.</p> <p>Cadent seeks to place reliance on the A1 Birtley to Coal House Development Consent Order 2021 relating to representations specific to Network Rail. Highways England considers that this approach – for a different undertaker and on different wording – should not displace the directly relevant and express consideration given by the Secretary of State to consequential loss in relation to Cadent’s undertaking on the M42 J6 and A38 schemes.</p> <p>As an alternative, Cadent accepts the inclusion of (c) in principle with the addition of the underlined words. The effect of these words would be to require Highways England to cover a contractual commitment given by Cadent to a landowner. Cadent contends that the carve out of consequential loss leaves Cadent in a position where it has given (through its easement), but not received (from Highways England), a full indemnity. Cadent submits this is <i>“a narrow exclusion to a broad carve out to the indemnity which Cadent is otherwise content to accept”</i>, but that, if not excluded, <i>“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”</i>.</p>



Response reference:	Representation Issue	HE Response
	<p>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).</p> <p>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.</p> <p>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 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 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</p>	<p>Highways England acknowledges that the Secretary of State and Examining Authority on the previously cited DCOs did not consider this specific point (as it was not raised by Cadent on those schemes) but considers that the Secretary of State and the Examining Authority's conclusions on A38 and M42 J6 that paragraph 11(3)(c) did not expose Cadent to "serious detriment" remains applicable and relevant: the risk and detriment arising from a claim under an easement is part of what the Secretary of State and Examining Authorities previously considered reasonable to exclude from Highways England's indemnity. Moreover, contrary to Cadent's contention, Highways England is <i>not</i> required to bear all costs of the scheme.</p> <p>Negotiations are continuing between the parties on this point (hence why the wording is shown in square brackets in the PPs provided).</p>

Response reference:	Representation Issue	HE Response
	<p>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>	
REP5-064-05	<p><b>Issue 2: Betterment and deferral of benefit discount</b></p> <p>Cadent seeks the deletion of sub-paragraphs 10(2) to (5)</p> <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 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,</p>	<p>Paragraph 10 (expenses) requires Highways England to reimburse Cadent for the costs it incurs in protecting its existing apparatus or constructing any new or alternate apparatus required as a consequence of the Scheme. Sub-paragraphs (2) to (3) allow Highways England to deduct from those costs:</p> <ul style="list-style-type: none"> <li>the value of any apparatus removed and not reused, for example the scrap value (sub-paragraph (2));</li> <li>the amount equivalent to the benefit Cadent receives as a result of better alternative apparatus being installed or placed at a greater depth. It should be noted that this only applies where the improved apparatus or depth is not agreed by Highways England or determined by an arbitrator to be necessary. It therefore cannot be "imposed" upon Cadent, but only applies where Cadent insists upon improvements that neither Highways England nor the arbitrator agrees are needed (sub-paragraph (3)).</li> </ul> <p>Sub-paragraph (4) records certain items which are not capable of being deducted from Cadent's costs. Sub-paragraph (5) recognises that Cadent may also derive a benefit where ageing apparatus is replaced with new, thereby deferring the time when it would otherwise have to be renewed.</p> <p>These provisions in the PPs, which apply to "off street" diversions, mirror both the New Roads and Streets Works Act 1991 cost-sharing provisions governing "on street" diversions, and the provisions that apply where apparatus has to be moved following the stopping up of a highway, under Schedule 12 to the Highways Act 1980. They have been in substantially similar form since at least the Public Utilities Street Works Act 1950. Their effect is to ensure that, where a utility undertaker is moved because of another scheme, it is compensated for its net loss, and any betterment that it does derive from the scheme is properly taken into account and calculating that net loss. This is an</p>



Response reference:	Representation Issue	HE Response
	<p>is to: “develop and maintain an efficient and economical pipe-line system for the conveyance of gas”.</p>	<p>uncontroversial principle that, according to the Valuation Office [<a href="https://www.gov.uk/guidance/land-compensation-manual-section-3-effect-of-the-acquisition-on-claimant-s-retained-land/part-2-betterment">https://www.gov.uk/guidance/land-compensation-manual-section-3-effect-of-the-acquisition-on-claimant-s-retained-land/part-2-betterment</a>] has applied since the rebuilding of London following the Great Fire in 1666.</p> <p>Highways England contends that the benefit that a utility undertaker may receive from the installation of an improved apparatus or the replacement of ageing apparatus is self-evident. The benefits of improved performance or replacement of ageing apparatus will apply irrespective of the location of the apparatus. These provisions are applied to other utility undertakers and were included in orders made by the Secretary of State for the M42 Junction 6 DCO 2020, A585 Windy Harbour to Skippool Highway DCO 2020 and A38 Derby Junctions DCO 2021 (in respect of Highways England’s schemes) and have been included, so far as Highways England is aware, in all protective provisions for Cadent’s benefit included in DCOs (by any promoter) since 2018. The form of these provisions predates the Gas Act 1986 by several decades, and so will have been taken into account by Parliament when framing the duty under section 9 of that Act. Highways England respectfully requests that the ExA and the Secretary of State uphold this position.</p>
<p>REP5-064-06</p>	<p><b>Paragraph 3: Expenses</b></p> <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. 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. 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.</p>	<p>Cadent’s submission refers to PPs paragraph 3(3) which Highways England has added to the PPs to clarify that the cost-sharing provisions in the New Roads and Streets Works Act 1991, s.85 continue to apply to on-street diversion works (i.e. major highway works, major bridge works or major transport works) and are not displaced, as Cadent contends they would be, by para. 3(1) and para. 10 (expenses) which refers to the Applicant bearing “all costs”.</p> <p>Highways England does not accept that is the effect of paragraphs 3 and 10, properly construed, without the addition of paragraph 3(3). This is because section 101(1) of the 1991 Act requires a special enactment such as a DCO to be construed consistently with Part 3 of the 1991 Act “<i>unless a contrary intention appears</i>”, and no intention to displace the cost-sharing provisions appears in the PPs. However, and unlike the other gas undertakers referred to, Cadent has adopted a different interpretation of the effect of the equivalent provision in the M42 Junction 6 Development Consent Order 2020, and so Highways England has included paragraph 3(3) for clarity.</p> <p>Moreover, a number of recent Cadent PPs on non-Highways England schemes have <i>specifically</i> included a paragraph 3(3) which <i>expressly</i> disapplies cost-sharing, supporting Highways England’s interpretation that sub-paragraph (1) itself would not do so: e.g. the Southampton to London Pipeline DCO, Schedule 9, Part 10, provides at paragraph 122(3): “<i>Notwithstanding article 29 (rights under or over streets) or any other powers in the Order generally, section 85 of the 1991 Act in relation to cost sharing and the regulations made thereunder will not apply in relation to any diversion of apparatus of Cadent under the 1991 Act</i>”. See also the Immingham Open Cycle Gas Turbine DCO 2020, Schedule 9, Part 11, paragraph 147(3) and West Midlands Rail Freight Interchange DCO 2020, Schedule 13, Part 8, paragraph 3(3), which are in similar terms.</p> <p>The continued application of cost-sharing provisions for such works is entirely consistent with the statutory position in Part 3 of the 1991 Act. Highways England is a publicly funded body and should be able to continue to benefit from the statutorily permitted cost sharing provisions for major works. If this sub-paragraph was to be excluded, it would increase the costs of delivering the scheme. Cadent has not demonstrated that the continued application of statutory cost-sharing</p>

Response reference:	Representation Issue	HE Response
		<p>provisions that regulate the relationship between every other street authority and statutory undertaker will result in a detriment, and certainly not a serious detriment, to the carrying on of its undertaking. Highways England respectfully requests that its proposed wording for sub-paragraph (3) is included.</p>

# **Appendix A. Highways England's proposed Protective Provisions with Cadent for inclusion in the DCO**

# 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 adopted public highway, notwithstanding that any diversion may be carried out under the provisions of Part 3 of the 1991 Act.

(3) Paragraph 10 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—

- (a) 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
- (b) 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) 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 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 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 (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 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).

(2) 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.

(3) 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 15 (*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.

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

- (a) 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
- (b) 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.

(5) 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 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;
- (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);
- (c) 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) [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 landowner in whose land apparatus is, or pursuant to the works will be, located.]

(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](mailto: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 B. Highways England's proposed Protective Provisions with Cadent for inclusion in the DCO (Tracked)**

# 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 adopted public highway, notwithstanding that any diversion may be carried out under the provisions of Part 3 of the 1991 Act.

(3) Paragraph 10 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—

- (a) 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
- (b) 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) 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 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 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 [\(and ground monitoring scheme if required\)](#), 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 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).

[\(2\) 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.](#)

[\(3\) 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 15 (*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.

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

- (a) 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
- (b) 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.

(5) 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 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);

(c) 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) [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 landowner in whose land apparatus is, or pursuant to the works will be, located.]

(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](mailto: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.

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Document 2 ID	iManage://IMANAGE/BDB1/23303151/1
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