

**M25 J28 IMPROVEMENTS PROJECT (THE PROJECT)**  
**CADENT GAS LIMITED**  
**DEADLINE 7 RESPONSE 20 MAY 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 7.

**2. PROTECTIVE PROVISIONS IN THE DRAFT DCO**

2.1 Cadent's preferred form of protective provisions (the **Cadent PPs**) were appended (**Appendix 1**) to Cadent's Deadline 5 submission.

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

2.3 Cadent welcomes the submission of protective provisions by the Applicant at Deadline 6. Cadent agrees that the substantive matters to be agreed between the parties are those summarised by the Applicant.

2.4 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.

**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 was set out at Deadline 5.

3.2 The Applicant had not submitted its preferred form of protective provisions to the examination of this Project and did not respond to Question CA1.19 at Deadline 5. Cadent welcomes the subsequent submission of protective provisions by the Applicant at Deadline 6.

3.3 Cadent agrees that the substantive matters to be agreed between the parties are those summarised by the Applicant. These are the:

3.3.1 exclusion of consequential loss from the indemnity, and in particular the requirement for the indemnity to extend to third party contractual liability Cadent has in respect of the indirect or consequential loss of a landowner in whose land apparatus is contained;

3.3.2 exclusion of deductions and reductions for betterment and deferral of renewal; and

3.3.3 extent of the expenses clauses.

3.4 The first and second of these points were the subject of Cadent’s submissions at Deadline 5 and these are expanded upon below. The third of these points was a new point that was introduced late in the examination process by the Applicant at Deadline 6.

Provision	Change	Reasoning
<b>1. Consequential loss</b>		
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 <a href="#">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</a></p>	<p>Cadent set out its position at Deadline 5, and Cadent welcomes the inclusion of this wording (in square brackets) in the Applicant’s submission at Deadline 6.</p> <p>Cadent notes that the Applicant’s justification for its position relies heavily on the A38 DCO. Cadent understands from press reports that the Secretary of State may have consented to a judgment in respect of a legal challenge to the making of the A38 DCO. The effect of this would be that the A38 DCO decision would be quashed and of no effect. If the A38 DCO decision is quashed, then no weight can be placed on this decision in determining the Application.</p> <p>The effect of this is that there would be one Secretary of State decision that supports the Applicant’s position (without any detailed reasoning or discussion of the point in dispute), with two Secretary of State decisions that support Cadent’s position (with detailed reasoning and discussion on the point, including the most recent A1 DCO decision, the A1 Birtley to Coal House Improvement Scheme). The references for these decisions were provided in Cadent’s Deadline 5 submission.</p>
<b>2. Betterment and deferral of benefit discount</b>		
Paragraph 10 Expenses	Delete sub-paragraphs (2) to (4)	<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 or is required by legislation to apply in the operation of its business, and Cadent set out its position at Deadline 5. The justification for Cadent’s position is set out below and is clearly made out.</p> <p>The Town and Country Planning Act 1990 (the <b>TCPA</b>) sets out, in some detail, the compensation provisions that apply where a statutory undertaker is required to relocate apparatus as a consequence of development. This is the correct basis against which to consider Paragraph 10 and the Expenses clause.</p>

	<p>Section 279 of the TCPA provides a statutory right to compensation in a number of circumstances, including where apparatus needs to be removed/re-sited to facilitate development. This applies to diversions outside of the highway and includes the following rights of compensation:</p> <ul style="list-style-type: none"> <li>• Section 279(2): Where by virtue of section 271 of the TCPA: <ul style="list-style-type: none"> <li>○ any right vested in or belonging to statutory undertakers is extinguished; or</li> <li>○ any requirement is imposed on statutory undertakers,</li> </ul> <p>those undertakers shall be entitled to compensation from the acquiring or appropriating authority at whose instance the right was extinguished or the requirement imposed.</p> </li> <li>• Section 279(4): Where: <ul style="list-style-type: none"> <li>○ works are carried out for the removal or re-siting of statutory undertakers' apparatus; and</li> <li>○ the undertakers have the right to carry out those works by virtue of section 273 or an order of Ministers under that section,</li> </ul> <p>the undertakers shall be entitled to compensation from the acquiring or appropriating authority.</p> </li> </ul> <p>Section 271 of the TCPA applies where any land has been acquired compulsorily, including “<i>compulsorily under any other enactment</i>” and there is a land right in favour of Cadent. Section 273 of the TCPA applies where Cadent is required to remove or re-site apparatus affected by development. This legislation is directly applicable to the issue at stake.</p> <p>Section 280 of the TCPA then sets out how compensation is to be calculated. This is: “<i>a) the amount of any expenditure reasonably incurred in <b>acquiring land, providing apparatus, erecting buildings or doing work for the purpose of any adjustment of the carrying on of the undertaking rendered necessary</b> (a “business adjustment”); b) the appropriate amount for loss of profits; and c) where the compensation is in respect of the imposition of a requirement to remove apparatus, the amount of any expenditure reasonably incurred by the statutory undertakers or, as the case may be, the operator in complying with the requirement, reduced by the value after removal of the apparatus removed.</i>”</p> <p>Section 280(2)(c) sets out the <b>only</b> deduction that is applied in such circumstances: This provides that compensation is to be: “<b><i>reduced by the value after removal of the apparatus removed</i></b>”. The provisions</p>
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	<p>in respect of NRSWA and the Highways Act 1980 are not replicated, and there is no provision for a deduction or reduction for betterment or deferral of renewal. If there is a dispute as to compensation, this is referable to the Upper Tribunal. In this context, Section 281 of the TCPA provides that a statutory undertaker can elect for compensation to be determined in accordance with the CPO compensation rules instead of pursuant to Section 280.</p> <p>This demonstrates that Section 280 is a different method of compensation than “standard” CPO compensation, which demonstrates a fundamental error in the Applicant’s reference to betterment in CPO compensation to support their position. The Government has provided an alternative form of compensation to be paid to statutory undertakers such as Cadent in respect of works outside of the highway where their apparatus needs to be removed or re-sited.</p> <p>The Applicant’s justification for the inclusion of this wording is based solely on legislation that applies to work inside, and not outside, the highway and relates to specific circumstances (street works in respect of NRSWA and stopping up of highways in respect of the Highways Act 1980). This reflects and supports Cadent’s position: the Government has applied a specific expenses regime in respect of certain works within the highway, and that does not form part of the specific expenses regime that the Government has applied to the diversion of apparatus as a consequence of development outside of the highway.</p> <p>The Applicant’s justification also makes reference to betterment in the context of CPO compensation. As the ExA and Secretary of State will be aware, betterment is a complex principle of CPO compensation with a very specific meaning. As the very first paragraph of the link that the Applicant provided (in its Deadline 6 response) to the Valuation Office guidance makes clear, in CPO compensation: “<i>The term ‘betterment’ in terms of compulsory purchase refers to <b><u>any increase in the value of a claimant’s retained land resulting from the implementation of a scheme of public works</u></b>”</i>. Betterment in CPO compensation addresses a materially different set of circumstances relating to retained land, and does not provide <u>any</u> support for applying deductions or reductions in respect of the relocation of apparatus. Cadent does not hold retained land which will increase in value. The correct framework to look at is the relevant framework in the TCPA which addresses the relocation of apparatus and which supports Cadent’s position.</p> <p>In any event, the protective provisions prevent the Applicant from acquiring Cadent’s interest or apparatus otherwise than by agreement, and so powers of compulsory acquisition (and subsequent compensation) are not relevant to this point.</p> <p>If the Government had intended that deductions or reductions in respect of betterment or the deferral of renewal were intended to apply then, as with NRSWA and the Highways Act 1980, the compensation</p>
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		<p>provisions set out in the TCPA would include the same deductions and reductions. The Government did not do this, and there is no basis for interpreting the Government’s intentions differently.</p> <p>The Applicant’s request to include this wording boils down to its contention that “<i>the benefit that a utility undertaker may receive from the installation of an improved apparatus or the replacement of ageing apparatus is self-evident</i>”. The Applicant provides no evidence of such a benefit in support of this statement, and this assertion is insufficient to displace Cadent’s position.</p> <p>It is for the Applicant to justify the terms of its own DCO. The reliance on previous DCOs is not sufficient justification, and through this submission (and throughout this examination) Cadent has demonstrated that its position is consistent with primary legislation and justified. Applying additional deductions and reductions could cause serious detriment to Cadent’s undertaking by putting Cadent in a materially worse position than it would otherwise be in.</p>
<b>3. Expenses</b>		
Paragraph 3	Delete sub-paragraph 3	<p>The Applicant’s position is inconsistent with all DCOs which contain protective provisions in favour of Cadent, and does not reflect the agreed position on those schemes.</p> <p>Please see for example the terms of: 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>The Applicant’s position has been introduced late in the examination (at Deadline 6, following Deadline 5 when the ExA had requested that the parties set out their full and final position) and materially departs from precedent.</p> <p>Cadent requests that the Secretary of State includes its preferred wording in the DCO.</p>

3.5 Cadent reserves the right to respond to the Applicant’s submissions.

**CMS CAMERON MCKENNA NABARRO OLSWANG LLP**

**20 MAY 2021**