

A585 WINDY HARBOUR TO SKIPPOL IMPROVEMENT SCHEME (THE PROJECT)
DEADLINE 8 – 1 OCTOBER 2019
CADENT GAS LIMITED

1. INTRODUCTION

- 1.1 Cadent Gas Limited (**Cadent**) is a statutory undertaker for the purposes of the Planning Act 2008 (**PA 2008**) and is providing comments on the final form of draft DCO (dDCO) submitted by the Promoter.
- 1.2 Cadent has made a number of submissions to the examination of the Project to date. This document should be read alongside Cadent's submissions at Deadline 1, Deadline 2, Deadline 3 and Deadline 5.

2. PROTECTIVE PROVISIONS - UPDATE

- 2.1 Cadent has reached agreement with the Promoter on the form of the protective provisions including the specific matters Cadent has raised during the examination (including insurance and security), save for two outstanding issues which this response addresses in detail.

3. PROTECTIVE PROVISIONS – OUTSTANDING ISSUES

- 3.1 The two outstanding issues under the protective provisions relate to the form of the indemnity and the extent of the arbitration powers.
- 3.2 Please find enclosed Cadent's preferred form of protective provisions which it requests that the Secretary of State includes within the DCO (if made). Please also find enclosed the Promoter's preferred protective provisions and a comparison against the Promoter's preferred form of protective provisions, showing the differences. By way of a summary, these relate to Paragraph:
- 3.2.1 28(3)(c), which purports to exclude liability; and
- 3.2.2 15, which relates to arbitration and specifically the powers excluded from arbitration.
- 3.3 These outstanding issues were not raised by Cadent in previous submissions as they have only been raised by the Promoter and brought to Cadent's attention after Deadline 7. In respect of Paragraph:
- 3.3.1 28(3)(c), this issue and the Promoter's preferred drafting was first brought to Cadent's attention on Friday 20 September 2019; and
- 3.3.2 32, this issue was first brought to Cadent's attention on Friday 27 September 2019.
- 3.4 Accordingly, Cadent has not had sufficient time to consider the full consequences of the Promoter's proposed protective provisions. Cadent's response at Deadline 5 demonstrates that it had understood the only outstanding issues at that stage to be insurance and security, and until Friday 20 September 2019 these were the only outstanding issues.
- 3.5 We set out Cadent's position on these outstanding issues below. However, Cadent considers that it is not appropriate for the Promoter to raise these issues at such a late point in the examination when Cadent and the Promoter have been engaged in positive discussions throughout, and indeed prior to,

the examination of the Project. Cadent should not be prejudiced by the Promoter raising issues at the very end of the examination, and Cadent reserves its right to submit further representations at Deadline 9 in light of this.

Issue	Cadent's Position
<p>Paragraph 28(3)(c) Consequential Loss</p>	<p>Paragraph 28(3)(c) of the Promoter's preferred protective provisions seeks to exclude the Promoter from liability for indirect and consequential losses that third parties may suffer.</p> <p>The consequence of this wording would be that Cadent would be responsible for any indirect and consequential losses that a third party would suffer as a result of damage or a loss of supply <u>caused by the Promoter</u>.</p> <p>This is not acceptable and Cadent does not accept this position.</p> <p>The scope of the indemnity is agreed save for this point. For clarity, the indemnity only applies in respect of third party claims as follows: "<i>any other expenses, loss, demands, proceedings, damages, claims, penalty or costs <u>properly incurred by or recovered from Cadent</u>, 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</i>"¹.</p> <p>The indemnity also provides that Cadent must give the Promoter reasonable notice of any such third party claim or demand and that "<i>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</i>"².</p> <p>Therefore, before the Promoter could be liable to Cadent for a third parties' costs under the indemnity, three things would need to occur:</p> <ol style="list-style-type: none"> 1. First, the Promoter must have caused damage or in any interruption in any service provided, or in the supply of any goods, that have caused loss to the third party; 2. Second, that third parties' costs must have been properly incurred by or recovered from Cadent; and 3. Third, Cadent must have either settled that claim having consulted and considered the Promoter's representations or have been obliged to make the payment in under a statutory compensation scheme. <p>This procedure ensures that the indemnity only applies to properly incurred or recovered costs, and provides the Promoter with the opportunity to make</p>

¹ Paragraph 11(1) of the protective provisions

² Paragraph 11(4) of the protective provisions

	<p>representations on any such claim. This is sufficient protection for the Promoter.</p> <p>Notwithstanding the above and the framework of the indemnity, there is a more important principle at stake: Cadent derives no benefit from the Project. Therefore, Cadent should not be exposed to any costs or losses as a result of the Project, whether foreseeable or not.</p> <p>There is no objectively justifiable reason to allocate responsibility for damage or interruption caused by the Promoter such that the Promoter is responsible for foreseeable costs and losses and Cadent is responsible for unforeseeable costs and losses. In both instances, the losses are caused solely by the Promoter and regulated by the terms of the indemnity as identified above.</p> <p>On this point, money spent and costs incurred by Cadent is ultimately passed on to consumers in their energy bills. This is not appropriate in respect of losses caused by a third party.</p> <p>Notwithstanding the late addition of this provision, Cadent has been in discussion with its insurance team and has identified that it is not insured for such losses caused by third parties, which is why it is so important that the indemnity is not unfairly limited.</p> <p>As the Secretary of State noted in the Eggborough decision³, exposing a third party that derives no benefit from the Project with the risk of losses as a result of that Project would place an unreasonable and unjustified burden on that third party. Ultimately, Cadent would face a risk of potential costs and losses through no fault of its own. Such costs and losses are unquantified, and when associated with the potential scale of costs and losses that a third party could suffer as a result of having its gas supply interrupted could be significant.</p> <p>Whilst the Eggborough DCO includes an exclusion of unforeseen consequential loss, the Examining Authority's report makes it quite clear that such a clause places an unreasonable and unjustified burden on the third party in that instance⁴. Whilst the Examining Authority ultimately recommended the inclusion of additional wording and the inclusion of an amended clause, this was based on the relevant promoter's justification during that specific examination. This should not be viewed as a precedent.</p> <p>In the current instance, the Promoter has provided no justification for the inclusion of Paragraph 28(3)(c) to date as it has not sought to include such wording until after Deadline 7. The Promoter has provided no justification for the inclusion of Paragraph 28(3)(c) to Cadent through negotiations, other than the fact that the wording is included within the Eggborough DCO. Ultimately, the type of costs and losses that the Canal and Rivers Trust may</p>
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³ See section 7.5 of the Secretary of State's decision letter dated 20 September 2018

⁴ See Section 8.5.30 of the Recommendation Report of Richard Allen B.Sc (Hons) PGDip MRTPI dated 27 June 2018

	<p>have suffered pursuant to the Eggborough DCO could be materially different to those that Cadent may suffer as a result of the Project.</p> <p>In addition to the above, there are examples of DCOs with protective provisions regulating the relationship between the Promoter and Cadent's statutory predecessor (National Grid Gas plc) which include the indemnity but which do not include this provision⁵.</p> <p>Finally, the Promoter's preferred wording actually goes beyond the standard protective provisions it has included within its own draft of the DCO (see Paragraph 11 of Part 1 of Schedule 10 to the dDCO), which does not carve out such indirect or consequential loss in the same way in the corresponding provisions. This reflects the Promoter's position throughout the examination.</p> <p><u>Therefore, Cadent requests that the Secretary of State does not include paragraph 28(3)(c) within the Order (if made).</u></p>
Parargaph 32 Arbitration	<p>Paragraph 15 of the protective provisions regulates the matters that are subject to arbitration, and those that are not subject to arbitration. In respect of this:</p> <ol style="list-style-type: none"> 1. Cadent's protective provisions carve the provisions of paragraph 26 out of the scope of arbitration; but 2. the Promoter's protective provisions do not carve the provisions of paragraph 26 out of the scope of arbitration. <p>Cadent seek to carve paragraph 26 out of the scope of arbitration given the importance of this paragraph to the protection of Cadent's retained apparatus. The Promoter not have any issues with the scope of paragraph 9, and therefore recognise the importance of protecting Cadent's retained apparatus, but they seek to subject paragraph 26 to arbitration.</p> <p>The reason that Paragraph 26 is required to protect Cadent's apparatus is as follows:</p> <ol style="list-style-type: none"> 1. Major Accident Hazard pipelines are regulated by the Pipeline Safety Regulations 1996. Under Regulation 15, it is an offence to cause damage to a pipeline as may give rise to a danger to persons and could result in enforcement action by the HSE. 2. The Pipeline Safety Regulations 1996 requires that pipelines are operated so that the risks are as low as is reasonably practicable. In judging compliance with the Regulations, the HSE expects duty-holders to apply relevant good practice as a minimum.

⁵ See Paragraph 51 of Part 4 of Schedule 9 to The A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 and Paragraph 52 of Part 4 of Schedule 9 to The M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016

	<p>3. Well established national standards and protocols for major accident hazard pipelines assist the HSE in ascertaining whether the risks incurred in working with such pipelines have been mitigated as much as reasonably practicable. The following standards are relevant to Cadent’s apparatus:</p> <ul style="list-style-type: none"> a. IGEM/TD/1: This Institution of Gas Engineers (IGE) Standard applies to the design, construction, inspection, testing, operation and maintenance of pipelines and associated installations, designed after the date of publication. It sets out engineering requirements “for the safe design, construction, inspection, testing, operation and maintenance of pipelines and associated installations, in accordance with current knowledge.” b. This Standard is intended to protect from possible hazards members of the public and those who work with pipelines and associated installations, as well as the environment, so far as is reasonably practicable, it is also intended to ensure that the security of gas is maintained. c. IGE recommendations IGE/SR/18: This standard reegulates safe working practices to ensure the integrity of gas pipelines and associated installations. This standard outline management procedures and safety precautions affecting the design, construction, maintenance and demolition of services, structures and other works in the vicinity of gas plant. d. HSE’s guidance document HS(G)47: This guidance document is aimed at those involved in carrying out work on or near apparatus. Its purpose is avoiding danger from underground services, and it outlines the potential dangers of working near underground services and gives advice on how to reduce any direct risks to people’s health and safety, as well as the indirect risks arising through damage to apparatus. e. TSP/SSW/22: This Cadent specification manages industry protection of plant. f. It is aimed at third parties carrying out work in the vicinity of Cadent gas pipelines and associated installations and is provided to ensure that individuals planning and undertaking work take appropriate measures to prevent damage.
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	<p>g. The requirements in this document are in line with the requirements of the IGE IGE/SR/18 Edition 2 - Safe Working Practices To Ensure The Integrity Of Gas Pipelines And Associated Installations, and the HSE's guidance document HS(G)47 Avoiding Danger from Underground Services.</p> <p>4. These industry standards have the intention of protecting the:</p> <ul style="list-style-type: none"> a. integrity of the pipelines, Cadent's network and distribution of gas; b. safety of the local area surrounding gas pipelines; and c. safety of personnel involved in working near to gas pipelines <p>5. Cadent therefore requires an appropriate level of control and assurance that the industry regulatory standards will be complied with in connection with works in the vicinity of its apparatus. Failure to comply with industry safety standards, legal requirements or Health and Safety standards create a health and safety risk and could have potentially serious consequences for individuals or property located in proximity to the pipeline/s.</p> <p>6. Cadent has the benefit of a gas transporter licence (the Licence) under section 7 of the Gas Act 1986 (the Act). Cadent has a statutory duty under its Licence to ensure that these Regulations and protocols are complied with. Cadent requires specific provisions in place for an appropriate level of control and assurance that the industry regulatory standards will be complied with in connection with works to connect to and in the vicinity of the apparatus.</p> <p>For all of the above reasons, it is crucial that Cadent retains protection over how its network operates and how its network is protected.</p> <p>The Promoter has offered no explanation for its late position to Cadent, other than a vague concern that Cadent may not act reasonably in protecting its apparatus. These concerns are unfounded, and in any event the Promoter would be open to explore other avenues if it felt that was the case. Cadent is under a statutory duty to conduct itself in an efficient and economic manner in operating its network, and for this reason it must retain control over how it operates that network.</p> <p>It is for Cadent, as an experienced gas undertaker under statutory and Licence obligations, to determine what measures are reasonable for the protection and integrity of its network.</p> <p>It is also worth noting that the Promoter accepts Cadent's position in respect of apparatus that is to be removed and new apparatus that is to be constructed</p>
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	<p>under sub-paragraph 24(2) of the protective provisions, as sub-paragraph 24(2) is carved out of the arbitration provisions for the same reasons identified above given Cadent's statutory duties. The Promoter has offered no justification for treating paragraph 26 any differently to sub-paragraph 24(2) or taking an inconsistent position.</p> <p><u>Therefore, Cadent requests that the Secretary of State includes paragraph 15 within the Order (if made) in the form included in Cadent's preferred protective provisions.</u></p>
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CMS CAMERON MCKENNA NABARRO OLSWANG LLP

1 OCTOBER 2019