

**M54 – M6 LINK ROAD (THE PROJECT)
DEADLINE 6 – 12 FEBRUARY 2021
CADENT GAS LIMITED
RESPONSE TO EXAMINING AUTHORITY’S (EXA) THIRD ROUND OF WRITTEN
QUESTIONS**

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 ExA’s third round of written questions which includes a question directed at Cadent.

2. EXA QUESTIONS

2.1 Please see below Cadent’s response to the ExA’s third round of written questions.

ExA’s Question	Cadent’s Response
3.5.7	<p>As set out in Cadent’s relevant representations and Deadline 4 response, its position remains that it is not satisfied that the tests under section 127 of the PA 2008 can be met unless and until it has appropriate and adequate protective provisions in place.</p> <p>Cadent’s preferred form of protective provisions is enclosed at Appendix 1 (the “Cadent PPs”). Cadent has provided these to the Applicant and to the ExA in response to ExA Question 1 and again in Cadent’s Deadline 4 response. To assist the ExA, enclosed at Appendix 2 is a tracked change version of the Cadent PPs compared against the protective provisions contained in the current dDCO.</p> <p>Substantially similar protective provisions to the Cadent PPs have been agreed in 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).</p> <p>For each of the A585 DCO, M42 DCO and A38 DCO a number of issues remained in dispute between Cadent and the Applicant at the end of the examination and these issues were put to the Secretary of State for determination. On the A585 DCO, the Secretary of State determined in favour of Cadent. On the M42 DCO and the A38 DCO, the Secretary of State determined in favour of the Applicant.</p> <p>Cadent has accepted the substantive decision of the Secretary of State on the M42 DCO and the A38 DCO (save in respect of consequential loss and betterment discounts, which is addressed below). Therefore, the Cadent PPs</p>

	<p>enclosed are based on the protective provisions included in the M42 DCO (which are substantially the same as those included in the A38 DCO).</p> <p>Since the M42 DCO was made, Cadent has sought to engage with the Applicant to reach an agreed position on Cadent’s protective provisions across all schemes (subject to any scheme specific requirements).</p> <p>Cadent does not accept that the indemnity within the Cadent PPs should include a carve out in respect consequential loss, and considers that the Secretary of State’s decision on the A585 DCO was correct on this ground. This is reflected by the Secretary of State’s decision of 19 January 2021 on a recent scheme (the A1 Birtley to Coal House Improvement Scheme) promoted by the Applicant where detailed consideration was given to similar wording in respect of another undertaker (Network Rail) and where it was confirmed that this wording was not appropriate for inclusion in that DCO.</p> <p>Cadent does not accept that the betterment and deferral of benefit discounts should apply for works outside of the highway, and these provisions are not included in its preferred form of protective provisions. Cadent derives no benefit from the scheme, and for this scheme the Cadent diversion will be through private land. Imposing a costs liability on it, 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. These costs could cause a serious detriment to Cadent’s undertaking.</p> <p>As described in Cadent’s Deadline 4 response, Cadent is in discussions with the Applicant regarding the form of protective provisions. Positive progress has been made in discussions between Cadent and the Applicant, and Cadent understands that agreement has almost been reached on the form of protective provisions for the Project. This is confirmed in the Applicant’s response to Deadline 5 where the Applicant stated that: <i>“agreement on the final form of protective provisions is understood to have been reached. Highways England expects to insert the agreed form of protective provisions into the next version of the dDCO”</i>.¹</p>
<p>3.0.4 and 3.4.2</p>	<p>Cadent has no comment to make on these questions at this stage, but Cadent reserves its right to respond to representations submitted in response to these questions.</p>

CMS CAMERON MCKENNA NABARRO OLSWANG LLP

12 FEBRUARY 2021

¹ Section 2.4.5 of Document Reference: 8.24 Applicant Responses to Further Written Question Responses from Interested Parties and Other Deadline 4 Representations

APPENDIX 1: CADENT'S PREFERRED PROTECTIVE PROVISIONS

SCHEDULES

SCHEDULE []

PROTECTIVE PROVISIONS

PART [#]

FOR THE PROTECTION OF CADENT GAS LIMITED

Application

1. For the protection of Cadent the following provisions will, unless otherwise agreed in writing between the undertaker and Cadent, have effect.

Interpretation

2. In this Part of this ~~Schedule~~—

“alternative apparatus” means appropriate alternative apparatus to the reasonable satisfaction of Cadent to enable Cadent to fulfil its statutory functions in a manner no less efficient than previously;

“apparatus” means any gas mains, pipes, pressure governors, ventilators, cathodic protections, cables or other apparatus belonging to or maintained by Cadent for the purposes of Cadent’s undertaking together with any replacement apparatus and such other apparatus constructed pursuant to this Order that becomes operational apparatus of Cadent for the purposes of Cadent’s undertaking and includes any structure in which apparatus is or will be lodged or which gives or will give access to apparatus;

“authorised works” has the same meaning as is given to the term “authorised development” in article 2(1) of the Order and includes any associated development authorised by the Order and for the purposes of this Part of this Schedule includes the use and maintenance of the authorised works and construction of any works authorised by this Schedule;

“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;

Commented [RG1]: To be included when the DCO is finalised.

Commented [RG2]: Cadent can accept the deletion of “acceptable insurance” from the face of the Order provided that it is included in the side agreement.

“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 works or activities (including maintenance) undertaken in association with the authorised works 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 Schedule does not apply to apparatus in respect of which the relations between the undertaker and Cadent are regulated by the provisions of Part 3 of the 1991 Act, except for—

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

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

(3) The Protective Provisions in this Part of this Schedule apply and take precedence over article 9 (Application of the New Roads and Street Works Act 1991 and the Traffic Management Act 2004) of the Order which shall not apply to Cadent.

Apparatus of Cadent in stopped up streets

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

Protective works to buildings

5. (1) The undertaker must exercise the powers conferred by article 18 (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) and if by reason of the exercise of those powers any damage to any apparatus (other than apparatus the repair of which is not reasonably necessary in the view of its intended removal or abandonment) or property of Cadent or any interruption in the supply of gas by Cadent, as the case may be, is caused, the undertaker must bear and pay on demand the cost reasonably incurred by Cadent in making good such damage or restoring the supply; and, subject to sub-paragraph (2), shall -

(a) pay compensation to Cadent for any loss sustained by it; and
(b) indemnify Cadent against all claims, demands, proceedings, costs, damages and expenses which may be made or taken against or recovered from or incurred by Cadent, by reason of any such damage or interruption.
(2) Nothing in this paragraph imposes any liability on the undertaker with respect to any damage or interruption to the extent that such damage or interruption is attributable to the act, neglect or default of Cadent or its contractors or workmen; and Cadent will give to the undertaker reasonable notice of any claim or demand as aforesaid and no settlement, admission of liability or compromise thereof shall be made by Cadent, save in respect of any payment requirement under a statutory compensation scheme, without first consulting the undertaker and giving the undertaker an opportunity to make representations as to the claim or demand.

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 of any part of the authorised works (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 works.

(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 and any right of Cadent to maintain that apparatus in that land must not be extinguished or interfered with 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 do so.

(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 of this Part of this Schedule and the arbitrator must make such provision for the payment of compensation by the undertaker to Cadent as appears to the arbitrator to be reasonable having regard to all the circumstances of the particular case.

Retained apparatus: protection of Cadent

9.—(1) Not less than 56 days before the commencement of any specified works the undertaker must submit to Cadent a plan and, if reasonably required by Cadent, a ground monitoring scheme in respect of those works.

(2) The plan to be submitted to Cadent under sub-paragraph (1) must include a method statement and describe—

- (a) the exact position of the works;
- (b) the level at which these are proposed to be constructed or renewed;
- (c) the manner of their construction or renewal including details of excavation, positioning of plant etc.;
- (d) the position of all apparatus;
- (e) by way of detailed drawings, every alteration proposed to be made to or close to any such apparatus; and
- (f) any intended maintenance regimes.

(3) The undertaker must not commence any specified works until Cadent has given written approval of the plan so submitted (and the ground monitoring scheme if required).

- (4) Any approval of Cadent given under sub-paragraph (3)—
- (a) may be given subject to reasonable conditions for any purpose mentioned in sub-paragraph (5); and
 - (b) must not be unreasonably withheld or delayed and Cadent must meaningfully engage with the undertaker within 28 days of the date of submission of the plan under sub-paragraph (1).
- (5) Cadent may require such modifications to be made to the plan as may be reasonably necessary for the purpose of securing its apparatus against interference or risk of damage or for the purpose of providing or securing proper and convenient means of access to any apparatus.
- (6) Specified works must only be executed in accordance with—
- (a) the plan submitted under sub-paragraph (1) (and ground monitoring scheme if required), as approved or as amended from time to time by agreement between the undertaker and Cadent; and
 - (b) all conditions imposed under sub-paragraph (4)(a), and Cadent will be entitled to watch and inspect the execution of those works.
- (7) Where Cadent requires any protective works to be carried out by itself or by the undertaker (whether of a temporary or permanent nature) such protective works, inclusive of any measures or schemes required and approved as part of the plan approved pursuant to this paragraph, must be carried out to Cadent's satisfaction prior to the commencement of any specified works (or any relevant part thereof) for which protective works are required prior to commencement.
- (8) If Cadent, in consequence of the works proposed by the undertaker, reasonably requires the removal of any apparatus and gives written notice to the undertaker of that requirement, paragraphs 1 to 3 and 6 to 8 apply as if the removal of the apparatus had been required by the undertaker under paragraph 7(2).
- (9) Nothing in this paragraph precludes the undertaker from submitting at any time or from time to time, but in no case less than 56 days before commencing the execution of the specified works, a new plan, instead of the plan previously submitted, and having done so the provisions of this paragraph will apply to and in respect of the new plan.
- (10) As soon as reasonably practicable after any ground subsidence event attributable to the authorised works (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 works including without limitation—

- (a) any costs reasonably incurred by or compensation properly paid by Cadent in connection with the acquisition of rights or the exercise of statutory powers for such apparatus including without limitation all costs (including professional fees) incurred by Cadent as a consequence of Cadent;
 - (i) using its own compulsory purchase powers to acquire any necessary rights under paragraph 7(3) if it elects to do so; or
 - (ii) exercising any compulsory purchase powers under this Order transferred to or benefitting Cadent;
- (b) in connection with the cost of the carrying out of any diversion work or the provision of any alternative apparatus;
- (c) the cutting off of any apparatus from any other apparatus or the making safe of redundant apparatus;

- (d) the approval of plans;
- (e) the carrying out of protective works, plus a capitalised sum to cover the cost of maintaining and renewing permanent protective works;
- (f) the survey of any land, apparatus or works, the inspection and monitoring of works or the installation or removal of any temporary works reasonably necessary in consequence of the execution of any such works referred to in this Part of this Schedule;
- (g) any watching brief pursuant to sub-paragraph 9(6).

Indemnity

11.—(1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction of any such works authorised by this Part of this Schedule (including without limitation relocation, diversion, decommissioning, construction and maintenance of apparatus or alternative apparatus) or in consequence of the construction, use, maintenance or failure of any of the authorised works (including works carried out under article 18 (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 works carried out by Cadent in the exercise of any functions conferred by this Order pursuant to a grant or transfer under article 8 (Consent to transfer benefit of Order).

(4) Cadent must give the undertaker reasonable notice of any such third party claim or demand and no settlement, admission of liability or compromise must, unless payment is required in connection with a statutory compensation scheme, be made without first consulting the undertaker and considering their representations.

(5) (The undertaker confirms that:

- (a) it is a self-insuring body, bound by the guidance set out in the HM Treasury Handbook “Managing Public Money”;
- (b) it holds a certificate of exemption under which the Secretary of State exempts it from any obligation to maintain Employers Liability Insurance but it shall be under an obligation to effect and maintain any insurance it is required to hold by statute or law unless an appropriate certificate of exemption is held;
- (c) if, at any time, it ceases to comply with (a) or (b) above it will immediately notify Cadent in writing, shall forthwith put into place the acceptable insurance and then maintain that acceptable insurance for the construction period of the authorised development; and
- (d) its response to any indemnity provided under this Part of this Schedule will not be reduced in anyway and any claim shall not be prejudiced because of the undertaker’s self-insuring strategy.

(6) In the event that the undertaker fails to comply with sub-paragraph (5) of this Part of this Schedule, nothing in this Part of this Schedule shall prevent Cadent from seeking injunctive relief (or any other equitable remedy)

in any court of competent jurisdiction Cadent must use its reasonable endeavours to mitigate in whole or in part and to minimise any costs, expenses, loss, demands, and penalties to which the indemnity under this paragraph applies and if reasonably requested to do so by the undertaker Cadent must provide an explanation of how the claim has been minimised.

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 works, 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 works 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 42 (Arbitration).

Notices

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

APPENDIX 2: COMPARISON BETWEEN CADENT'S PREFERRED PROTECTIVE PROVISIONS AND THE DRAFT DCO PROTECTIVE PROVISIONS

PARTS

SCHEDULES

SCHEDULE 1

PROTECTIVE PROVISIONS

PART 1

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

Application

1. For the protection of Cadent the following provisions will, unless otherwise agreed in writing between the undertaker and Cadent, have effect.

Interpretation

2. In this Part of this ~~Schedule~~—

~~“1991 Act” means the New Roads and Street Works Act 1991;~~

~~“acceptable insurance” means a third party public & products liability insurance maintained by the undertaker or their contractors with a limit of fifty million pounds (£50,000,000) in respect of any one occurrence without limit to the number of occurrences in any annual policy period, but fifty million pounds (£50,000,000) for any one occurrence and in the aggregate per annum in respect of liability arising out of products and pollution or contamination liability;~~

“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 ~~gas supply~~ 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 ~~transmission, distribution and/or supply~~ Cadent’s undertaking and includes any structure in which apparatus is or will be lodged or which gives or will give access to apparatus;

~~“authorised works” has the same meaning as is given to the term “authorised development” in article 2(1) of the Order and includes any associated development authorised by the Order and for the purposes of this Part of this Schedule includes the use and maintenance of the authorised works and construction of any works authorised by this Schedule;~~

“Cadent” means Cadent Gas Limited and includes its successors in title or any successor as a gas transporter within the meaning of Part 1 of the Gas Act 1986;

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

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

“deed of consent” means a deed of consent, crossing agreement, deed of variation or new deed of grant agreed between the parties acting reasonably in order to vary ~~and~~ 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;

Commented [RG1]: To be included when the DCO is finalised.

Commented [RG2]: Cadent can accept the deletion of “acceptable insurance” from the face of the Order provided that it is included in the side agreement.

“functions” includes powers and duties;

“ground mitigation scheme” means a scheme approved by Cadent (such approval not to be unreasonably withheld or delayed) setting out the necessary measures (if any) for a ground subsidence event;

“ground monitoring scheme” means a scheme for monitoring ground subsidence which sets out the apparatus which is to be subject to such monitoring, the extent of land to be monitored, the manner in which ground levels are to be monitored, the timescales of any monitoring activities and the extent of ground subsidence which, if exceeded, shall require the undertaker to submit for Cadent’s approval a ground mitigation scheme;

“ground subsidence event” means any ground subsidence identified by the monitoring activities set out in the ground monitoring scheme that has exceeded the level described in the ground monitoring scheme as requiring a ground mitigation scheme;

“in” in a context referring to apparatus or alternative apparatus in land includes a reference to apparatus or alternative apparatus under, over, across, along or upon such land;

~~“maintain” and “maintenance” for the purposes of this Part of the Schedule shall include the ability and right to do any of the following in relation to any apparatus or alternative apparatus of Cadent including retain, lay, construct, inspect, maintain, protect, use, access, enlarge, replace, renew, remove, decommission or render unusable or remove the apparatus;~~

~~“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 works~~ or activities (including maintenance) undertaken in association with the authorised ~~development which works which—~~

- (a) will or may be situated over, or within 15 metres measured in any direction of any apparatus the removal of which has not been required by the undertaker under ~~sub-paragraph 24(2) (removal of apparatus sub-paragraph 7(2))~~ or otherwise; or
- (b) may in any way adversely affect any apparatus the removal of which has not been required by the undertaker under ~~sub-paragraph 24(2) (removal of apparatus 7(2))~~ or otherwise; or

~~include any of the activities that are referred to in paragraph 8 of T/SP/SSW/22 (Cadent’s policies for safe working in proximity to gas apparatus “Specification for safe working in the vicinity of Cadent High pressure Gas pipelines and associated installation requirements for third parties GD/SP/SSW/22”); and~~

~~“undertaker” means the undertaker as defined in article 2(1) of this Order.~~

On Street Apparatus

~~3.—(1) Except for paragraphs 21 (apparatus of Cadent in stopped up streets), 26 (retained apparatus – protection of Cadent), 27 (expenses) and 28 (indemnity) of this Schedule which will apply in respect of the exercise of all or any powers under the Order affecting the rights and apparatus of Cadent, the other provisions of this Schedule do. This Schedule does not apply to apparatus in respect of which the relations between the undertaker and Cadent are regulated by the provisions of Part 3 (street works in England and Wales) of the 1991 Act, except for—~~

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

~~(2) Paragraphs 24 (removal of apparatus) and 25 (facilities and rights for alternative apparatus) of this Schedule shall apply to diversions even where carried out under the 1991 Act, in circumstances. 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) The Protective Provisions in this Part of this Schedule apply and take precedence over article 9 (Application of the New Roads and Street Works Act 1991 and the Traffic Management Act 2004) of the Order which shall not apply to Cadent.

Apparatus of Cadent in stopped up streets

~~4.—(1) Without prejudice to the generality of any other protection afforded to Cadent elsewhere in the Order, where~~ Where any street is stopped up under article 13 ~~(Permanent stopping up and restriction of use of streets and private means of access).~~ (Permanent stopping up and restriction of use 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 24 ~~(removal of apparatus)~~.

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

~~The Protective Provisions in this Part of this Schedule apply and take precedence over article 32(2) to (7) (apparatus and rights of statutory undertakers in stopped up streets) to the Order which shall not apply to Cadent.~~

Protective works to buildings

~~5.—(1) The undertaker, in the case of~~ must exercise the powers conferred by article 18 ~~(protective work to buildings), must exercise those powers~~ 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) and if by reason of the exercise of those powers any damage to any apparatus (other than apparatus the repair of which is not reasonably necessary in the view of its intended removal or abandonment) or property of Cadent or any interruption in the supply of gas by Cadent, as the case may be, is caused, the undertaker must bear and pay on demand the cost reasonably incurred by Cadent in making good such damage or restoring the supply; and, subject to ~~(2) Nothing in this paragraph imposes any liability on the undertaker with respect to any damage or interruption to the extent that such damage or interruption is attributable to the act, neglect or default of Cadent or its contractors or workmen; and Cadent will give to the undertaker reasonable notice of any claim or demand as aforesaid and no settlement, admission of liability or compromise thereof shall be made by Cadent, save in respect of any payment requirement under a statutory compensation scheme, without first consulting the undertaker and giving the undertaker an opportunity to make representations as to the claim or demand.~~

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 of~~ maintenance of any part of the authorised ~~development works~~ (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 of any part of the authorised development~~ works.

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

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

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

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

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

Removal of apparatus

7.—~~(1)~~ 1 If, in the exercise of the powers conferred by this Order, including pursuant to any agreement reached in accordance with paragraph ~~23 (acquisition of land) or in any other authorised manner~~ 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 ~~or interfered with~~ until alternative apparatus has been constructed, is in operation, and ~~the rights and facilities and rights~~ referred to in sub-paragraph (2) have been provided, to the reasonable satisfaction of Cadent and in accordance with ~~sub-paragraph~~ sub-paragraphs (2) to (5) inclusive.

~~to (5) inclusive.~~

(2) If, for the purpose of executing any works in, on, under or over any land purchased, held, appropriated or used under this Order, the undertaker requires the removal of any apparatus placed in that land, it must give to Cadent advance written notice of that requirement, together with a plan and section of the work proposed, and of the proposed position of the alternative apparatus to be provided or constructed and in that case (or if in consequence of the exercise of any of the powers conferred by this Order Cadent reasonably needs to move or remove any of its apparatus) the undertaker must afford to Cadent to its satisfaction (taking into account ~~sub-paragraph 25(1) (facilities and rights for alternative apparatus) below~~ paragraph 8(1)) the necessary facilities and ~~rights~~ rights—

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

(3) If the undertaker is unable to afford such facilities and rights as are mentioned in ~~sub-~~ sub-paragraph (2), in the land in which the alternative apparatus or part of such apparatus is to be constructed, Cadent must, on receipt of a written notice to that effect from the undertaker, take such steps as are reasonable in the circumstances in an endeavour to assist the undertaker in obtaining the necessary facilities and rights in the land

in which the alternative apparatus is to be constructed save that this obligation ~~does~~ shall not extend to the requirement for Cadent to use its compulsory purchase powers to this end unless it (in its absolute discretion) elects to so do.

(4) Any alternative apparatus to be constructed in land of or land secured by the undertaker under this Part of this Schedule must be constructed in such manner and in such line or situation as may be agreed between Cadent and the undertaker.

(5) Cadent must, after the alternative apparatus to be provided or constructed has been agreed, and subject to the prior grant to Cadent of such facilities and rights as are referred to in ~~sub-~~ sub-paragraph (2) or (3), then proceed without unnecessary delay to construct and bring into operation the alternative apparatus and subsequently to decommission or remove any apparatus required by the undertaker to be decommissioned or removed under the provisions of this Part of this Schedule.

Facilities and rights for alternative apparatus

8.—~~(1)~~ Where, in accordance with the provisions of this Part of this Schedule, the undertaker affords or secures for Cadent facilities and rights in land for the access to construction and maintenance of alternative apparatus in substitution for apparatus to be decommissioned or removed, those facilities and rights must be granted upon such terms and conditions as may be agreed between the undertaker and Cadent and must be no less favourable on the whole to Cadent than the facilities and rights enjoyed by it in respect of the apparatus to be decommissioned or removed unless otherwise agreed by Cadent.

~~(2)~~ If the facilities and rights to be afforded by the undertaker and agreed with Cadent under sub-paragraph (1) ~~above~~ in respect of any alternative apparatus, and the terms and conditions subject to which those facilities and rights are to be granted, are less favourable on the whole to Cadent than the facilities and rights enjoyed by it in respect of the apparatus to be decommissioned or removed, then the terms and conditions to which those facilities and rights are subject ~~in the matter~~ may be referred to arbitration in accordance with paragraph ~~33~~ ~~{arbitration}~~ 15 of this Part of this Schedule and the arbitrator must make such provision for the payment of compensation by the undertaker to Cadent as appears to the arbitrator to be reasonable having regard to all the circumstances of the particular case.

Retained apparatus: protection of Cadent

9.—~~(1)~~ Not less than 56 days before the commencement of any specified works the undertaker must submit to Cadent a plan and, if reasonably required by Cadent, a ground monitoring scheme in respect of those works.

(2) The plan to be submitted to Cadent under sub-paragraph (1) must include a method statement and describe—

- (a) the exact position of the works;
- (b) the level at which these are proposed to be constructed or renewed;
- (c) the manner of their construction or renewal including details of excavation, positioning of plant etc.;
- (d) the position of all apparatus;
- (e) by way of detailed drawings, every alteration proposed to be made to or close to any such apparatus; and
- (f) any intended maintenance regimes.

(3) The undertaker must not commence any specified works until Cadent has given written approval of the plan so submitted (and the ground monitoring scheme if required).

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

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

(5) Cadent may require such modifications to be made to the plan as may be reasonably necessary for the purpose of securing its apparatus against interference or risk of damage or for the purpose of providing or securing proper and convenient means of access to any apparatus.

(6) Specified works must only be executed in accordance with ~~the plan, submitted under sub-paragraph (1), as approved or as amended from time to time by agreement between the undertaker and Cadent and in accordance with~~ 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

- (a) the plan submitted under sub-paragraph (1) (and ground monitoring scheme if required), as approved or as amended from time to time by agreement between the undertaker and Cadent; and
- (b) all conditions imposed under sub-paragraph (4)(a), and Cadent will be entitled to watch and inspect the execution of those works.

(7) Where Cadent requires any protective works to be carried out by itself or by the undertaker (whether of a temporary or permanent nature) such protective works, inclusive of any measures or schemes required and approved as part of the plan approved pursuant to this paragraph, must be carried out to Cadent's satisfaction prior to the commencement of any specified works (or any relevant part thereof) for which protective works are required prior to commencement.

(8) If Cadent, in consequence of the works proposed by the undertaker, reasonably requires the removal of any apparatus and gives written notice to the undertaker of that requirement, paragraphs ~~18-1 to 20-3 and 23-6 to 25-8~~ apply as if the removal of the apparatus had been required by the undertaker under ~~sub-paragraph 24(2) (removal of apparatus paragraph 7(2)).~~

(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~~ the specified works, a new plan, instead of the plan previously submitted, and having done so the provisions of this paragraph will apply to and in respect of the new plan.

~~The undertaker will not be required to comply with sub-paragraph (1) where it needs to carry out emergency works as defined in the 1991 Act 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; and~~

~~sub-paragraph (11) at all times.~~

~~At all times when carrying out any works authorised under the Order the undertaker must comply with the Cadent's policies for safe working in proximity to gas apparatus "Specification for safe working in the vicinity of Cadent High pressure Gas pipelines and associated installation requirements for third parties SPGD/SP/SSW22" and HSE's "HS(-G)47 Avoiding Danger from underground services".~~

(10) As soon as reasonably practicable after any ground subsidence event attributable to the authorised ~~development works~~ (including such an event attributable to its ~~maintenance~~) the undertaker must implement an appropriate ground mitigation scheme and Cadent retains the right to carry out any further necessary protective works for the safeguarding of its apparatus and can recover any such costs in line with paragraph 27 (expenses); 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 as are referred to in this Part of this Schedule~~ works including without limitation—

- (a) any costs reasonably incurred by or compensation properly paid by Cadent in connection with the acquisition of rights or the exercise of statutory powers for such apparatus including without limitation all costs (including professional fees) incurred by Cadent as a consequence of Cadent;
 - (i) using its own compulsory purchase powers to acquire any necessary rights under ~~sub-paragraph 24(3) (removal of apparatus)~~ paragraph 7(3) if it elects to do so; or
 - (ii) exercising any compulsory purchase powers under this Order transferred to or benefitting Cadent;
- (b) in connection with the cost of the carrying out of any diversion work or the provision of any alternative apparatus;
- (c) the cutting off of any apparatus from any other apparatus or the making safe of redundant apparatus;
- (d) the approval of plans;
- (e) the carrying out of protective works, plus a capitalised sum to cover the cost of maintaining and renewing permanent protective works;
- (f) the survey of any land, apparatus or works, the inspection and monitoring of works or the installation or removal of any temporary works reasonably necessary in consequence of the execution of any such works referred to in this Part of this Schedule;
- (g) any watching brief pursuant to ~~sub-paragraph 26(6) (retained apparatus: protection of Cadent)~~ 9(6).

~~There will be deducted from any sum payable under sub-paragraph (1) the value of any apparatus removed under the provisions of this Part of this Schedule and which is not re-used as part of the alternative apparatus; that value being calculated after removal.~~

~~If in accordance with the provisions of this Part of this Schedule—~~

~~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~~

~~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 23 (arbitration) to be necessary, then, if such placing involves cost in the construction of works under this Part of this Schedule exceeding that which would have been involved if the apparatus placed had been of the existing type, capacity or dimensions, or at the existing depth, as the case may be, the amount which apart from this sub-paragraph would be payable to Cadent by virtue of sub-paragraph (1) will be reduced by the amount of that excess save to the extent that it is not possible in the circumstances (or it would be unlawful due to a statutory or regulatory change) to obtain the existing type of apparatus at the same capacity and dimensions or place at the existing depth in which case full costs will be borne by the undertaker.~~

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

~~an extension of apparatus to a length greater than the length of existing apparatus will not be treated as a placing of apparatus of greater dimensions than those of the existing apparatus; and~~

~~where the provision of a joint in a pipe or cable is agreed, or is determined to be necessary, the consequential provision of a jointing chamber or of a manhole will be treated as if it also had been agreed or had been so determined.~~

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

Indemnity

11.—~~(1)~~ Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction of any such works authorised by this Part of this Schedule (including without limitation relocation, diversion, decommissioning, construction and maintenance of apparatus or alternative apparatus) or in consequence of the construction, use, maintenance or failure of any of the authorised ~~development works~~ (including works carried out under article 18 (~~Protective work to buildings~~)) by or on behalf of the undertaker or in consequence of any act or default of the undertaker (or any person employed or authorised by the undertaker) in the course of carrying out such works, including without limitation works carried out by the undertaker under this Part of this Schedule or any subsidence resulting from any of these works, any damage is caused to any apparatus or alternative apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal for the purposes of the authorised development) or property of Cadent, or there is any interruption in any service provided, or in the supply of any goods, by Cadent, or Cadent becomes liable to pay any amount to any third party, the undertaker will—

- (a) bear and pay on demand accompanied by an invoice or claim from Cadent, the cost reasonably incurred by Cadent in making good such damage or restoring the supply; and
- (b) indemnify Cadent for any other expenses, loss, demands, proceedings, damages, claims, penalty ~~compensation~~ or costs properly incurred ~~by, paid~~ by or recovered from Cadent, by reason or in consequence of any such damage or interruption or Cadent becoming liable to any third party as aforesaid other than arising from any default of Cadent.

(2) ~~(2)~~ The fact that any act or thing may have been done by Cadent on behalf of the undertaker or in accordance with a plan approved by Cadent or in accordance with any requirement of Cadent or under its supervision including under any watching brief will not (unless sub-paragraph (3) applies) excuse the undertaker from liability under the provisions of this sub-paragraph (1) unless Cadent fails to carry out and execute the works properly with due care and attention and in a skilful and workman like manner or in a manner that does not accord with the approved plan.

(3) Nothing in sub-paragraph (1) shall impose any liability on the undertaker in respect ~~of of~~

- (a) any damage or interruption to the extent that it is attributable to the neglect or default of Cadent, its officers, servants, contractors or agents; ~~and~~
- (b) any part of the authorised ~~development works~~ carried out by Cadent in the exercise of any functions conferred by this Order pursuant to a grant or transfer under article 8 ~~and~~ Consent to transfer benefit of Order.

~~any indirect or consequential loss of any third party arising from any such damage or interruption, which is not reasonably foreseeable.~~

(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.

(5) ~~The~~ undertaker confirms that:

- (a) it is a self ~~insuring~~ body, bound by the guidance set out in the HM Treasury Handbook “Managing Public Money”;
- (b) it holds a certificate of exemption under which the Secretary of State exempts it from any obligation to maintain Employers Liability Insurance but it shall be under an obligation to effect and maintain any insurance it is required to hold by statute or law unless an appropriate certificate of exemption is held;
- (c) if, at any time, it ceases to comply with (a) or (b) above it will immediately notify Cadent in writing, shall forthwith put into place the acceptable insurance and then maintain that acceptable insurance for the construction period of the authorised development; and
- (d) its response to any indemnity provided under this Part of this Schedule will not be reduced in anyway and any claim shall not be prejudiced because of the undertaker’s ~~self~~ self-insuring strategy.

(6) In the event that the undertaker fails to comply with sub-paragraph (5) of this Part of this Schedule, nothing in this Part of this Schedule shall prevent Cadent from seeking injunctive relief (or any other equitable remedy) in any court of competent jurisdiction Cadent must use its reasonable endeavours to mitigate in whole or in part and to minimise any costs, expenses, loss, demands, and penalties to which the indemnity under this paragraph

applies and if reasonably requested to do so by the undertaker Cadent must provide an explanation of how the claim has been minimised.

Enactments and agreements

12. Except where ~~in~~ this Part of this Schedule provides otherwise ~~or by agreement in writing between Cadent and the undertaker~~, nothing in this Part of this Schedule affects the provisions of any enactment or agreement regulating the relations between the undertaker and Cadent in respect of any apparatus laid or erected in land belonging to the undertaker on the date on which this Order is made.

Co-operation

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

(2) ~~(2)~~ For the avoidance of doubt whenever Cadent's consent, agreement or approval is required in relation to plans, documents or other information submitted by Cadent or the taking of action by Cadent, it must not be unreasonably withheld or delayed.

Access

14. If in consequence of any agreement reached in accordance with ~~sub-paragraph 23(1) (acquisition of land paragraph 6(1))~~ or the powers conferred by this Order the access to any apparatus is materially obstructed, the undertaker must provide such alternative rights and means of access to such apparatus as will enable Cadent to maintain or use the apparatus no less effectively than was possible before such obstruction.

Arbitration

15. Save for differences or disputes arising under sub-paragraphs ~~24(2) 24(4) (removal of apparatus) and 26(11) (retained apparatus protection of Cadent 7(2) and 7(4))~~ any difference or dispute arising between the undertaker and Cadent under this Part of this Schedule must, unless otherwise agreed in writing between the undertaker and Cadent, be determined by arbitration in accordance with article ~~43 42 4a~~ (Arbitration).

Notices

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

PART 4

FOR THE PROTECTION OF NATIONAL GRID AS ELECTRICITY UNDERTAKER

Application

~~—(1) For the protection of National Grid as referred to in this Part of this Schedule the following provisions have effect, unless otherwise agreed in writing between the undertaker and National Grid:~~

~~Subject to sub-paragraph (3) or to the extent otherwise agreed in writing between the undertaker and National Grid, where the benefit of this Order is transferred or granted to another person under article 8 (consent to transfer benefit of Order)—~~

~~any agreement of the type mentioned in sub-paragraph (1) has effect as if it had been made between National Grid and the transferee or grantee (as the case may be); and~~

~~written notice of the transfer or grant must be given to National Grid on or before the date of that transfer or grant.~~

~~Sub-paragraph (2) does not apply where the benefit of the Order is transferred or granted to National Grid (but see paragraph 44(3)(b)).~~

Interpretation

~~In this Part of this Schedule—~~

~~"alternative apparatus" means appropriate alternative apparatus to the reasonable satisfaction of National Grid to enable National Grid to fulfil its statutory functions in a manner no less efficient than previously;~~