

THE INFRASTRUCTURE PLANNING (EXAMINATIONS PROCEDURE) RULES 2010

IMMINGHAM EASTERN RO-RO TERMINAL DEVELOPMENT CONSENT ORDER

PINS REFERENCE TR030007

**DEADLINE 9 SUBMISSION ON BEHALF OF
CADENT GAS LIMITED**

**RESPONSE TO DRAFT DCO SUBMITTED AT
DEADLINE 8**

1 INTRODUCTION

- 1.1 Cadent Gas Limited ("Cadent") is a licensed gas transporter under the Gas Act 1986, with a statutory responsibility to operate and maintain the gas distribution networks in North London, Central and North West England. Cadent's primary duties are to operate, maintain and develop its networks in an economic, efficient and coordinated way.
- 1.2 Cadent has previously identified that it will require adequate protective provisions to be included within the DCO to ensure that its apparatus and land interests are adequately protected and to include compliance with relevant safety standards.
- 1.3 Due to the sporadic nature of the Applicant's engagement with Cadent agreement has not been reached on the form of the Protective Provisions to be included in the dDCO and the Protective Provisions included with Deadline 8 version of the dDCO ("**the dDCO**") in Part 9 of Schedule 4 are not acceptable to Cadent in a number of respects. Details of the changes required by Cadent are shown in bold together with the reason for this in the table below.
- 1.4 As explained in Cadent's Written Representation [REP2-027] Cadent is required to comply with the terms of its Licence in the delivery of its statutory responsibilities. It is regulated by the Network Code which contains relevant conditions as to safe transmission of gas and compliance with industry standards on transmission, connection and safe working in the vicinity of its Apparatus. Cadent require all Applicants carrying out Authorised Development in the vicinity of their Apparatus to comply with: (a) CD/SP/SSW/22 Cadent's policies for safe working in the vicinity of Cadent's Assets; (b) ICE (institution of Gas Engineers) recommendations IGE/SR/18 Edition 2 Safe Working Practices to Ensure the Integrity of Gas Pipelines and Associated Installations, and (c) the HSE's guidance document HS(G)47 Avoiding Danger from Underground Services.
- 1.5 The industry standards referred to above have the specific intention of protecting: (a) the integrity of the pipelines and thus the distribution of gas; (b) the safety of the area surrounding gas pipelines; and (c) the safety of personnel involved in working with gas pipelines.

2 CHANGES REQUIRED

Relevant Part of dDCO	Response on behalf of Cadent Gas Limited
<p>Schedule 4 Part 9 paragraph 99 (Application)</p>	<p>Normally in any other made DCO Cadent' Protective Provisions are expressed to apply as follows</p> <p><i>"For the protection of Cadent the following provisions will, unless otherwise agreed in writing between the undertaker and Cadent, have effect."</i></p> <p>This means that the Protective Provisions apply not only for the construction of any work or activity that the undertaker is authorised by this Order to construct or carry out but all activities authorised by the dDCO including, for example, use and maintenance.</p> <p>With the Applicant's Deadline 8 changes to the dDCO the Protective Provisions only have effect during the construction of the authorised works (as defined in Schedule 4 Part 9 which as currently drafted is limited to the construction of work no 6).</p> <p>Cadent understand that the Applicant's rationale for limiting the Protective Provisions to construction is that Cadent's existing apparatus is subject to an easement and the terms of that easement should govern use and maintenance of the Project. The easement has not, however, been entered into in contemplation of the authorised works and hence the need for Protective Provisions in favour of Cadent which the Applicant has accepted by including the Protective Provisions in the dDCO, albeit seeking to restrict these significantly.</p> <p>The Protective Provisions in the dDCO include indemnity provisions which are expressed in the Deadline 8 dDCO to apply beyond construction. Paragraph 107 of the dDCO states (our emphasis in bold):</p> <p>"107.—(1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction of any 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 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 him) 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</p>

Relevant Part of dDCO	Response on behalf of Cadent Gas Limited
	<p>the authorised works) 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—"</p> <p>If the ExA accept paragraph 99 in the dDCO there is, therefore, an inconsistency created by paragraph 99. Given that Cadent's existing easement has not been entered into in contemplation of the dDCO paragraph 99 should be revised to follow the usual drafting:</p> <p>"For the protection of Cadent the following provisions will, unless otherwise agreed in writing between the undertaker and Cadent, have effect."</p> <p>Even if the ExA were minded to limit to construction activities Cadent is not able to accept the provisions falling away on completion of construction as there may be claims that are brought or defects identified post construction. The more appropriate response would be to remove the wording in bold in paragraph 107 above. Cadent derives no benefit from the Project and needs to ensure that it is not exposed to any costs or losses as a result of the Project. 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 and Cadent requires, therefore, the comfort that it can rely on the indemnity for any costs incurred or claim brought as a consequence of the construction of the authorised development whenever the costs are incurred or the claim is brought. The completion of the construction of the authorised development should not limit Cadent's ability to do so in the usual manner.</p>
<p>Schedule 4 Part 9 paragraph 100 (Interpretation)</p>	<p>Definition of Authorised Works</p> <p>Normally in standard Protective Provisions for the benefit of Cadent the Protective Provisions apply to the authorised development/works as defined by the DCO. The application of the Protective Provisions are then limited to Specified Works.</p> <p>The dDCO includes a definition of Specified Works as follows (our emphasis in bold):</p> <p>“specified works” means any of the authorised works or activities undertaken in association with the authorised works which—</p>

Relevant Part of dDCO	Response on behalf of Cadent Gas Limited
	<p>(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 subparagraph 103(2) or otherwise;</p> <p>(b) may in any way adversely affect any apparatus the removal of which has not been required by the undertaker under subparagraph 103(2) or otherwise; and/or</p> <p>(c) include any of the activities that are referred to in CD/SP/SSW/22 (Cadent's policies for safe working in the vicinity of Cadent's Assets)".</p> <p>Cadent is content with the definition of Specified Works in the dDCO but not authorised works since (as a consequence of the dDCO) all of the above would then be limited to work no 6. So the definition of Specified Works becomes:</p> <p>"specified works" means <u>any of the work no 6 works</u> or activities undertaken in association with work no 6 which—</p> <p>(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 subparagraph 103(2) or otherwise;</p> <p>(b) may in any way adversely affect any apparatus the removal of which has not been required by the undertaker under subparagraph 103(2) or otherwise; and/or</p> <p>(c) include any of the activities that are referred to in CD/SP/SSW/22 (Cadent's policies for safe working in the vicinity of Cadent's Assets)".</p> <p>Whilst work no 6 is the closest works to Cadent's apparatus the authorised works in Schedule 1 include a whole host of undefined ancillary work which would enable such works to take place within the Order Limits including construction compounds, earthworks, drainage and utility works not necessarily associated with Work no 6. To accept the Applicant's definition of "authorised works" in paragraph 100 means that these works (and the other Work numbers) are not subject to the Protective Provisions and Cadent's</p>

Relevant Part of dDCO	Response on behalf of Cadent Gas Limited
	<p>existing easement does not provide the necessary safeguards. Yet all such works, as well as the use of the area of Work No. 6 for a construction compound for other works could include driving heavy vehicles over gas pipelines or undertaking works near Cadent's apparatus, thereby requiring protective works to ensure the integrity of Cadent's pipelines and thus the distribution of gas; the safety of the area surrounding gas pipelines; and importantly the safety of personnel involved in working on the authorised works in the vicinity of Cadent's gas pipelines.</p> <p>dDCO paragraph 100 definition of "authorised works" should, therefore, be revised to read:</p> <p>“authorised works” has the same meaning as is given to the term "authorised development” in article 2 of this Order and includes any associated development authorised by the Order;</p>
<p>Schedule 4 Part 9 paragraph 100 (Interpretation) and paragraph 107</p>	<p>Inclusion of definitions related to acceptable insurance and security and text to be included in paragraph 107</p> <p>Provision needs to be included within the dDCO that the works in the vicinity of Cadent's apparatus are not commenced unless: (1) there is third party liability insurance effected and maintained for the construction period of the relevant works; and (2) the person or body undertaking the works (acknowledging the ability to transfer the benefit of the DCO) has the appropriate net worth at the time of commencing works to enable it to meet any liability arising from damage to Cadent's apparatus or that there is appropriate security in place through a bond or guarantee.</p> <p>Cadent derives no benefit from the Project and needs to ensure that it is not exposed to any costs or losses as a result of the Project. 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 and Cadent requires, therefore, the comfort that works near its apparatus are the subject of appropriate insurance and security.</p> <p>The following additional definitions need to be included in paragraph 100 (Interpretation) in Part 9 of Schedule 4:</p>

Relevant Part of dDCO	Response on behalf of Cadent Gas Limited
	<p>“acceptable credit provider” means a bank or financial institution with a credit rating that is not lower than: (i) “A-” if the rating is assigned by Standard & Poor’s Ratings Group or Fitch Ratings; and “A3” if the rating is assigned by Moody’s Investors Services Inc.;</p> <p>“acceptable insurance” means a third party liability insurance effected and maintained by the undertaker to a level of not less than £50,000,000 (fifty million pounds) per occurrence or series of occurrences arising out of one event. Such insurance must be maintained for the construction period of the authorised works which constitute specified works and arranged with an internationally recognised insurer of repute operating in the London and worldwide insurance market underwriters whose security/credit rating meets the same requirements as an “acceptable credit provider”, such policy must include (but without limitation):</p> <ul style="list-style-type: none"> (a) Cadent as a Co-Insured; (b) a cross liabilities clause; (c) a waiver of subrogation in favour of Cadent; and (c) contractors’ pollution liability for third party property damage and third party bodily damage arising from a pollution/contamination event with cover of £10,000,000.00 (ten million pounds) per event or £20,000,000.00 (twenty million pounds) in aggregate; <p>“acceptable security” means either:</p> <ul style="list-style-type: none"> (a) evidence provided to Cadent’s reasonable satisfaction that the Undertaker has a tangible net worth of not less than £50,000,000.00 (Fifty Million Pounds (or an equivalent financial measure)); (b) a parent company guarantee from a parent company in favour of Cadent to cover the undertaker’s liability to Cadent to a cap of not less than £50,000,000 (fifty million pounds) per asset per event up to a total liability cap of £50,000,000 (fifty million pounds) (in a form reasonably satisfactory to Cadent and where required by Cadent, accompanied with a legal opinion confirming the due capacity and authorisation of the parent company to enter into and be bound by the terms of such guarantee); or (c) a bank bond or letter of credit from an acceptable credit provider in favour of Cadent Gas Limited to cover the undertaker’s liability to Cadent for an amount of not less than £50,000,000 (fifty million pounds) per asset per event up to a total liability cap of £50,000,000 (fifty million pounds) (in a form reasonably satisfactory to Cadent); <p>“parent company” means a parent company of the undertaker acceptable to Cadent and which will have been approved by Cadent acting reasonably;</p>

Relevant Part of dDCO	Response on behalf of Cadent Gas Limited
	<p>The following additional clause needs to be added to paragraph 107 (indemnity) of Part 9 of Schedule 4</p> <p>(5) The undertaker must not commence construction (and must not permit the commencement of such construction) of the authorised works on any land owned by Cadent or in respect of which Cadent has an easement or wayleave for its apparatus or any other interest or to carry out any works within 15 metres in any direction of Cadent's apparatus until the following conditions are satisfied:</p> <p>(a) unless and until Cadent is satisfied acting reasonably (but subject to all necessary regulatory constraints) that the undertaker has first provided the acceptable security (and provided evidence that it will maintain such acceptable security for the construction period of the authorised works from the proposed date of commencement of construction of the authorised works) and Cadent has confirmed the same to the undertaker in writing; and</p> <p>(b) unless and until Cadent is satisfied acting reasonably (but subject to all necessary regulatory constraints) that the undertaker has procured acceptable insurance (and provided evidence to Cadent that it will maintain such acceptable insurance for the construction period of the authorised works from the proposed date of commencement of construction of the authorised works) and Cadent has confirmed the same in writing to the undertaker.</p> <p>(6) In the event that the undertaker fails to comply with sub-paragraph 107(5) of this Part of this Schedule, nothing in this Part of this Schedule will prevent Cadent from seeking injunctive relief (or any other equitable remedy) in any court of competent jurisdiction.</p>

3 SUMMARY OF CHANGES REQUESTED

3.1 In summary Cadent seek the following amendments in Part 9 of Schedule 4 of the dDCO:

(a) **Paragraph 99** should be revised to follow the usual drafting:

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

(b) **Paragraph 100** definition of "authorised works" should be revised to read:

"authorised works" has the same meaning as is given to the term "authorised development" in article 2 of this Order and includes any associated development authorised by the Order;

(c) **Paragraph 100** the following additional definitions should be added:

"acceptable credit provider" means a bank or financial institution with a credit rating that is not lower than: (i) "A-" if the rating is assigned by Standard & Poor's Ratings Group or Fitch Ratings; and "A3" if the rating is assigned by Moody's Investors Services Inc.;

"acceptable insurance" means a third party liability insurance effected and maintained by the undertaker to a level of not less than £50,000,000 (fifty million pounds) per occurrence or series of occurrences arising out of one event. Such insurance must be maintained for the construction period of the authorised works which constitute specified works and arranged with an internationally recognised insurer of repute operating in the London and worldwide insurance market underwriters whose security/credit rating meets the same requirements as an "acceptable credit provider", such policy must include (but without limitation):

(a) Cadent as a Co-Insured;

(b) a cross liabilities clause;

(c) a waiver of subrogation in favour of Cadent; and

(c) contractors' pollution liability for third party property damage and third party bodily damage arising from a pollution/contamination event with cover of £10,000,000.00 (ten million pounds) per event or £20,000,000.00 (twenty million pounds) in aggregate;

"acceptable security" means either:

(a) evidence provided to Cadent's reasonable satisfaction that the Undertaker has a tangible net worth of not less than £50,000,000.00 (Fifty Million Pounds (or an equivalent financial measure);

(b) a parent company guarantee from a parent company in favour of Cadent to cover the undertaker's liability to Cadent to a cap of not less than £50,000,000 (fifty million pounds) per asset per event up to a total liability cap of £50,000,000 (fifty million pounds) (in a form reasonably satisfactory to Cadent and where required by Cadent, accompanied with a legal opinion confirming the due capacity and authorisation of the parent company to enter into and be bound by the terms of such guarantee); or

(c) a bank bond or letter of credit from an acceptable credit provider in favour of Cadent Gas Limited to cover the undertaker's liability to Cadent for an amount of not less than £50,000,000 (fifty million pounds) per asset per event up to a total liability cap of £50,000,000 (fifty million pounds) (in a form reasonably satisfactory to Cadent);

“parent company” means a parent company of the undertaker acceptable to Cadent and which will have been approved by Cadent acting reasonably;

(d) Paragraph 107 (indemnity) needs to be amended to include the following additional sub paragraphs

(5) The undertaker must not commence construction (and must not permit the commencement of such construction) of the authorised works on any land owned by Cadent or in respect of which Cadent has an easement or wayleave for its apparatus or any other interest or to carry out any works within 15 metres in any direction of Cadent's apparatus until the following conditions are satisfied:

(a) unless and until Cadent is satisfied acting reasonably (but subject to all necessary regulatory constraints) that the undertaker has first provided the acceptable security (and provided evidence that it will maintain such acceptable security for the construction period of the authorised works from the proposed date of commencement of construction of the authorised works) and Cadent has confirmed the same to the undertaker in writing; and

(b) unless and until Cadent is satisfied acting reasonably (but subject to all necessary regulatory constraints) that the undertaker has procured acceptable insurance (and provided evidence to Cadent that it will maintain such acceptable insurance for the construction period of the authorised works from the proposed date of commencement of construction of the authorised works) and Cadent has confirmed the same in writing to the undertaker.

(6) In the event that the undertaker fails to comply with sub-paragraph 107(5) of this Part of this Schedule, nothing in this Part of this Schedule will prevent Cadent from seeking injunctive relief (or any other equitable remedy) in any court of competent jurisdiction.