M42 Junction 6 Development Consent Order

Scheme Number TR010027

8.101 Position Statement on Cadent Gas Protective Provisions

Planning Act 2008

Rule 8 (1)(k)

The Infrastructure Planning (Examination Procedure) Rules 2010

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1.1 Background

1.1.1 Highways England (**the Applicant**) and Cadent Gas Limited (**Cadent**) have sought to reach agreement on the form of protective provisions (**PPs**) to be included in the DCO. While agreement has largely been reached (see dDCO submitted at Deadline 9, Schedule 12, Part 5), there are a number of points of difference between the parties, on which the Examining Authority is asked to rule.

1.2 Background to Protective provisions (PPs)

1.2.1 The PPs included in the dDCO build on long-established statutory provisions which protect utilities from the adverse impacts of construction of projects on their apparatus (e.g. setting out a process for agreeing the form of diversions, restricting access to apparatus during construction, and so on).

1.2.2 The typical process for developing PPs on a given scheme is as follows:

a. A “standard” form of PPs is included in a dDCO for a given project when applied for, for the benefit of all electricity, gas, water and sewerage utilities (see M42 J6 dDCO, articles 35 and 43 and Schedule 12, Part 1) and for operators of electronic communications code networks (see M42 J6 dDCO, articles 35 and 43 and Schedule 12, Part 1).

b. However, certain utilities, including Cadent, tend to object or make representations as a matter of course to the application of these “standard” PPs, arguing that they do not provide adequate protection for its apparatus, either in general or given the impact of the particular scheme. They seek to agree that their own preferred form of “bespoke” PPs will apply instead. In truth, the standard PPs do provide sufficient protection, as can be seen from their extensive historic use and the fact that many statutory undertakers accept them. The bespoke PPs sought by some statutory undertakers therefore represent a preferred position, rather than one that is essential for the protection of their undertaking. This can be seen from Cadent’s own submissions which in most cases refer to the “appropriateness” of their preferred wording being in the PPs, rather than its “necessity”.

c. The Applicant and the utility (e.g. Cadent) then seek to reach agreement on the form of “bespoke” PPs to apply in respect of that utility’s apparatus, rather than the “standard” PPs. Depending on the terms, the “bespoke” PPs are included on the face of the DCO, or in a side agreement. A side agreement may also provision for other matters necessary to deal with the utility’s objection to the form of DCO, such as the granting of particular rights over land for access or laying of utility apparatus, or as regards the conduct of particular diversion works.

d. The utility then withdraws its objection/representation to the scheme on the basis that satisfactory protection has been secured.

1.2.3 Historically, PPs have been included in legislation where it is necessary to give statutory effect to the arrangements in place between a promoter and an affected third party. This could be because it is necessary to regulate the interaction between the statutory regimes authorising the new development and the existing infrastructure, because third party rights are affected in a way that could not be achieved, by private agreement, or where the effect of the arrangements would be to fetter the statutory discretion conferred by the legislation. So, for example, in the PPs for the benefit of all electricity, gas, water and sewerage utilities contained in the DCO at Schedule 12, Part 1,:

a. para. 1(1) makes clear that written agreements between the promoter and a utility undertaker can override the protective provisions in the DCO;

b. para. 4 (Apparatus in stopped up streets) preserves the utility's existing statutory rights, exercisable against third parties (e.g. land owners), in respect of its apparatus in the street, notwithstanding that the street is stopped up under the article 17 of the DCO. A contractual provision as between the Applicant and the utility could not preserve those rights;

c. para. 3 (On street apparatus) provides that the protective provisions contained in Part 1 of Schedule 12 do not apply where relations between the promoter and a utility are regulated by the New Roads and Street Works Act 1991 (i.e. in respect of apparatus in a street), thereby removing any implication that the DCO overrides the 1991 Act. The effect of the 1991 Act cannot be interfered with by contract;

d. para. 5 (protective works to buildings) and para. 6 (acquisition of land) limit how the Applicant may exercise the statutory powers conferred by articles 22 and 24 respectively;

e. paras. 7 (removal of apparatus), 8 (facilities and rights for alternative apparatus) and 9 (retained apparatus) limit how the Applicant may exercise the statutory powers to carry out the authorised development, such as those conferred by article 35 to extinguish the rights of, and remove or reposition apparatus belonging to, statutory undertakers;

f. paras. 10 and 11 (expenses and costs) place a statutory duty on the Applicant as undertaker of the authorised works to meet the utilities' costs in respect of works to apparatus;

g. para. 12 (co-operation) places a statutory duty on the Applicant to co-ordinate the authorised works and on the utility to co-operate in that regard.

1.2.4 (Similar provision is made in Schedule 12, Part 2 re operators of Electronic Communications Code Networks.)

1.2.5 Section 127 of the Planning Act 2008 provides (sub-s.(2) and (3)) that a DCO may authorise the compulsory acquisition of a statutory undertaker's land if the Secretary of State is satisfied that):

a. it can be purchased and not replaced without serious detriment to the carrying on of the undertaking, or

b. if purchased, it can be replaced by other land belonging to, or available for acquisition by, the undertakers without serious detriment to the carrying on of the undertaking;

and (sub-s.(5) and (6)) may authorise the acquisition of rights over such land or the creation of new rights if the Secretary of State is satisfied that:

c. the right can be purchased without serious detriment to the carrying on of the undertaking, or

d. any detriment to the carrying on of the undertaking, in consequence of the acquisition of the right, can be made good by the undertakers by the use of other land belonging to or available for acquisition by them.

The relevant test for the inclusion of statutory provisions in a DCO is therefore whether those are *necessary* to protect the statutory undertaking (*i.e*. to prevent "serious detriment" to it). If those matters can be addressed by contract, and those contractual provisions are agreed, then the PPs do not *have* to be part of the DCO (per Schedule 12, Part 1, para. (1)). That is the case irrespective of whether individual promoters might have felt (on another scheme) that it was expedient to agree to the inclusion of the PPs in the DCO authorising another scheme; the relevant test is whether the provisions *need* to be enshrined in legislation to give full effect to them.

1.3 The Applicant's representations on points of difference re Cadent

1.3.1 While agreement has largely been reached with Cadent on the form of PPs appropriate for inclusion in the DCO, (see dDCO submitted at Deadline 9, Schedule 12, Part 5), there are a number of points of difference between the parties, on which the Examining Authority is asked to rule. The Applicant's representations on these points of difference are set out below.

(a) Paragraph 49(3)

1.3.2 Paragraph 49 (Removal of Apparatus) makes provision in respect of the removal of Cadent's apparatus for the purposes of the authorised development once replacement apparatus is in place. The broad scheme of this provision is standard and agreed. In summary, it provides—

- 49(1): Cadent's apparatus is not to be decommissioned or removed (for the purposes of the authorised development) unless and until replacement apparatus has been installed and commissioned to Cadent's satisfaction.
- 49(2): the Applicant is to give Cadent advance notice of the need to remove its apparatus, and must afford to Cadent, to its satisfaction, the necessary facilities and rights for the construction and maintenance of that replacement apparatus.
- 49(3): If the Applicant cannot provide the necessary facilities and rights, then Cadent either must or may (see below) assist in obtaining those (but is in any event not obligated to use its own compulsory purchase powers in order to secure those facilities and rights).
- 49(4): The alternative apparatus must be constructed as agreed with Cadent.

- 49(5): Once the form of the alterative apparatus is agreed, Cadent must (without delay) construct it and bring it into use, and decommission and remove the existing apparatus.

1.3.3 The difference between the parties concerns the extent of Cadent's "assistance obligation" in para. 49(3), which states:

"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 [may (acting reasonably in the circumstances)] ***OR*** *[must], on receipt of a written notice to that effect from the undertaker, take such steps as are reasonable in the circumstances in an endeavour to assist the undertaker in obtaining the necessary facilities and rights in the land in which the alternative apparatus is to be constructed save that this obligation shall not extend to the requirement for Cadent to use its compulsory purchase powers to this end unless it (in its absolute discretion) elects to so do."*

Cadent considers this should read "may (acting reasonably in the circumstances)". The Applicant considers that it should read "must".

1.3.4 In its representations to the Examining Authority, Cadent contends that it is seeking this wording because it, and its personnel, have:

"… in the past been placed under significant pressure to obtain rights and facilities in land where an absolute obligation has been placed on it. Cadent will of course assist the Promoter as it has always done. However it is key that Cadent and the Promoter work in partnership to obtain rights and facilities and that it is not left to Cadent in isolation to secure. This goes back to the point that we make above that Cadent derives no benefit from the Project. As such, an absolute obligation on it to assist in securing rights and facilities, even where it is not reasonable to do so, is not appropriate."

1.3.5 In short, Cadent is concerned that The Applicant will simply "pass the burden" of obtaining such rights to Cadent. The Applicant considers that Cadent should be obliged to assist because:

a. Under paras. 49(2), the Applicant is first obliged to "afford to Cadent to its satisfaction … the necessary facilities and rights …(a) for the construction of alternative apparatus; and (b) subsequently for the maintenance of that apparatus" – so it is for Cadent to determine what facilities and rights are required, and the Applicant must first seek those facilities and rights itself and cannot simply pass the burden onto Cadent;

b. Cadent's obligation under para. 49(3) would be limited to taking "such steps as are reasonable in the circumstances in an endeavour to assist", which is entirely consistent with Cadent's desire that "Cadent and the Promoter work in partnership to obtain rights and facilities". It is also less of an obligation than the "best endeavours" obligation applicable under Part 1 of Schedule 12, which is the traditional burden;

c. the Applicant is to meet Cadent's costs in this regard (see para. 52(1)), and so if any burden is imposed on Cadent, it will be recoverable;

d. The facilities and rights to be obtained are those required for the relocation of Cadent's apparatus, therefore it is in Cadent's interest that they be acquired;

e. Cadent has a duty, under the Standard Special Conditions of its Gas Transporters Licence, to:

"at all times act in a manner calculated to secure that it has available to itself such resources, including (without limitation) management and financial resources, personnel, fixed and moveable assets, rights, licences, consents, and facilities, on such terms and with all such rights, as shall ensure that it is at all times able:

(a) to properly and efficiently carry on the transportation business of the licensee; and

(b) to comply in all respects with its obligations under this licence and such obligations under the Act as apply to those activities authorised by this licence including, without limitation, its duty to develop and maintain an efficient, coordinated and economical system of gas transportation."

f. Accordingly, this obligation places Cadent under no additional burden but simply clarifies how its Licence obligation applies in these circumstances; and

g. The practical effect of Cadent not assisting the Applicant in acquiring those rights would be to stymie the scheme authorised by the DCO, therefore it is entirely appropriate that Cadent be placed under an obligation in that regard. Conversely, the wording proposed by the Applicant is more likely to protect Cadent's statutory undertaking from serious detriment by ensuring that the necessary facilities and rights are obtained.

(b) Paragraph 53(3)(c)

1.3.6 Paragraph 53 (Indemnity) of the Protective Provisions includes an indemnity given by the Applicant in the event that:

"… 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 …"

Sub-paragraph 53(1) sets out the circumstances in which that indemnity will apply. Sub-paragraph 53(4) provides that Cadent must give the Applicant reasonable notice of third party claims and must not settle them or admit liability without consulting the Applicant and considering its representations. These terms have been agreed.

1.3.7 Sub-paragraph 53(3) records those instances in which the Applicant is not subject to liability pursuant to sub-paragraph 53(1). The parties have agreed two such instances:

a. any damage or interruption to the extent that it is attributable to the neglect or default of Cadent, its officers, servants, contractors or agents; and

b. any part of the authorised development carried out by Cadent following a grant or transfer of the powers of the DCO under article 8.

1.3.8 The difference between the parties relates to sub-paragraph (c). The Applicant requires the inclusion of sub-paragraph 56(3)(c), which records that nothing in sub-paragraph 56(1) shall impose any liability on the Applicant in respect of unforeseeable consequential losses:

> *"… any indirect or consequential loss of any third party (including but not limited to loss of use, revenue, profit, contract, production, increased cost of working or business interruption) arising from any such damage or interruption, which is not reasonably foreseeable …"*

The Applicant considers that, without the inclusion of sub-paragraph 53(3)(c), the risk of potential costs and losses through no fault of its own would place an unreasonable and unjustified burden on the Applicant, which would unacceptably raise the financial risk of the scheme. In particular, given the Applicant's inability to control the costs associated with any unforeseeable indirect and consequential losses, there is a real concern as to the potential adverse economic impacts on the delivery of the scheme. The Applicant notes that the Secretary of State has previously endorsed the principle of excluding indirect and consequential losses of third parties which were not reasonably foreseeable (per the Secretary of State's decision in respect of the Application for the Eggborough Cycle Gas Turbine (Generating Station) Order) and requests that the same approach is followed in this instance.

1.3.9 Cadent opposes the inclusion of sub-para. (c) on the following grounds.

1.3.10 First, Cadent argues that it derives no benefit from the M42 J6 project (or, it claims, any other scheme promoted by the Applicant), and so it should not be exposed to costs or losses (foreseeable or not). It considers there is no objectively justifiable reason for making the Applicant responsible for foreseeable losses and Cadent for unforeseeable, given the losses are caused (however remotely) by the Applicant. This, however, is to ignore that the scheme forms part of the national Road Investment Strategy and is a Nationally Significant Infrastructure project, considered by government to be of benefit to the entire country, therefore including Cadent as a utility undertaker and as a commercial business (in the absence of any evidence that its employees and vehicles make no use of the strategic road network). This specific project would not only improve traffic flow on the A45 and M42 (to the general benefit of Cadent, which has its headquarters in Coventry) but would also involve the replacement of the one of the oldest assets on the network. In any event, Cadent's argument that it should not be exposed to *any* costs or losses from a scheme in the public interest is misconceived: the Planning Act 2008, s.127 does not require a promoter to hold a utility harmless against the effects of a scheme, only to prevent "serious detriment" to its undertaking. Provided that such serious detriment can be avoided, as the Applicant submits is the case, then utilities are to be treated in the same way as society as a whole, sharing the costs and the benefits. There is no particular reason for Cadent to be treated differently from the rest of society in this case.

1.3.11 Second, Cadent argues that costs in this regard are not covered by its insurance and would be passed on to its consumers through energy bills. But the Applicant's additional costs in this regard (should it be required to bear unforeseeable third party losses) would be borne by the public sector, and so ultimately the taxpayer. Moreover, while Cadent's insurance *could* be modified to take account of that additional risk, the Applicant, by contrast, does not have commercial insurance cover, as required by *Managing Public Money*.

1.3.12 Third, Cadent places some reliance on the Examining Authority's report and the Secretary of State's decision on the Eggborough Combined Cycle Gas Turbine (Generating Station) Order. However, that case does not give any authority for Cadent's claim that unforeseeable losses should be indemnified. In that case, the Canal and River Trust (CRT) objected to the indemnity in the PPs to be included in the applicant's draft DCO for its benefit on the basis that, first, the indemnity was capped, and, second, it excluded the applicant from liability for <u>any</u> consequential losses experienced by CRT. The Examining Authority (at paras. 8.5.30 of its Report):

> "… reached a preliminary conclusion that … [these terms] placed an unreasonable and unjustified burden on CRT, who face a risk of meeting potential costs and losses through no fault of its own"

and recommended CRT be allowed to claim for consequential losses *if reasonably foreseeable*, and that the liability cap be deleted. It then confirmed that finding, despite the fact the applicant did not accept it (para. 8.5.31):

> "I have considered the Applicant's response carefully. However, I do not find that the Applicant has reasonably justified why CRT should be financially burdened with an indemnity cap if damages caused by the Applicant exceed £5,000,000, which the Applicant states is highly unlikely in any event. I also find that CRT should be within its reasonable rights to claim for ***<u>foreseeable consequential losses</u>*** as a result of the construction of the Proposed Development."

The Secretary of State accepted the Examining Authority's recommendation in this regard, and the Eggborough DCO therefore includes an exclusion of unforeseeable consequential loss (Schedule 12, Part 3, para. 32(3)(b), as the Applicant is proposing in this case. For the avoidance of doubt, no cap on Cadent's indemnity is proposed by the Applicant or included in the dDCO. The report and decision in Eggborough therefore support the Applicant's case, not Cadent's.

1.3.13 Fourth, Cadent argues that an equivalent to paragraph 53(3)(c) is not included in the PPs agreed between the Applicant and National Grid Electricity Transmission for this project, or in PPs in other DCOs reached between the Applicant and Cadent's predecessor National Grid Gas. But that fact that the Applicant has concluded different commercial arrangements with NGET in this case (including a side agreement containing terms that are not on the face of the DCO) or with other bodies in the past is not relevant to the question of whether the Applicant should be liable for unforeseeable consequential losses of third parties.

1.3.14 Fifth, Cadent argue that the Applicant's preferred wording goes beyond the "standard" PPs at Schedule 10, Part 1, para. 11, which does not "carve out" unforeseeable consequential loss in the same way. This fails to take account of the fact that the scope of the indemnity in the standard PPs is significantly narrower than that given to Cadent: the former covers "damage", "interruption in service" or "supply of goods" arising only from construction of a narrow class of the Authorised Development (namely works affecting a utility's apparatus) and resulting subsidence; whereas the latter covers

> "… construction of any such works authorised by this Part of this Schedule (including without limitation relocation, diversion, decommissioning, construction and maintenance of apparatus or alternative apparatus) or in consequence of the construction, use, maintenance or failure of ***any of the authorised development*** (including works carried out under article 22 (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 …"

In particular, as the indemnity covers any "use" of "any of the authorised development" – i.e., the use of the new road itself, there is potentially a much wider range of unforeseeable consequences, and it is appropriate that liability for these should be restricted, as requested by the Applicant.

(c) Paragraphs 53(5) and (6) and definition of "acceptable insurance"

1.3.15 As outlined above, paragraph 53 (indemnity) includes an indemnity given by the Applicant in the event that any damage is caused to Cadent's assets. Cadent, concerned that the Applicant may not have sufficient resources to cover the indemnity granted, initially sought additional security, e.g. that the Applicant take third party insurance. However, this ignored the Applicant's status as a public body, bound by the guidance set out in HM Treasury's Managing Public Money, which provides (para. 4.4 and Annex 4.4) that public bodies should not generally take commercial insurance to cover risk. The parties have now agreed a form of words which confirms the Applicant's status, the circumstances in which the Applicant would take insurance and what constitutes "acceptable insurance" for those purposes.

1.3.16 The difference between the parties is whether that agreed form of words (namely, paragraphs 53(5) and (6)) and the definition of "acceptable insurance" in para. 44) should properly be included in the DCO (as Cadent contends) or if they should instead be included in a Side Agreement negotiated between the parties (as the Applicant contends). In short, the Applicant considers that these paragraphs are not suitable to be included in legislation, and the fact that they have been agreed as a matter of expedience by other bodies, or by the Applicant on another scheme (whether for reasons related to that specific scheme or otherwise) does not negate the substantive point.

1.3.17 Paragraphs 53(5)(5) and (6) state:

> *(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 works; and*
>
> *(d) in 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 paragraphs 11(5) or 11(6) 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 it has been minimised.*

The definition of "acceptable insurance" is:

> *"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."*

1.3.18 As regards sub-paragraph 53(5), the Applicant considers that it is not appropriate or necessary for the DCO, which is a statutory instrument, to contain provisions which merely "confirm" its status or what it will do in certain circumstances. Such provisions are otiose and contrary to good statutory instrument drafting practice and their inclusion does not meet the "serious detriment" test in s.127 of the Planning Act 2008. As set out above, the purpose of the protective provisions is to make appropriate statutory provision in circumstances were contractual protection would be ineffectual, e.g. where a contractual provision between the promoter of a scheme and the affected utility would not bind a third party. That is not the case here. Moreover, as Cadent and the Applicant have agreed that this wording should be included in the Side Agreement – whose terms are now agreed, although the document has not yet been executed, that protection for Cadent is not reduced. There is no evidence that the £50m figure needs to be in legislation and, indeed, there is good reason to exclude it, namely that it may need to be revised at a later date.

1.3.19 As regards sub-paragraph 53(6), equivalent provision regarding

a. Cadent being entitled to seek injunctive relief; and

b. Cadent mitigating the Applicant's losses;

has been made in the Side Agreement negotiated between the parties. the Applicant therefore considers that including this sub-paragraph in the PPs is also unnecessary.

(d) Paragraph 57 (Arbitration)

1.3.20 Paragraph 57 provides that differences or disputes between the Applicant and Cadent in respect of the PPs must be referred to arbitration under article 47 of the DCO. It states:

> *Save for differences or disputes arising under sub-paragraphs 49(2), 49(4) [and paragraph 51]* ***OR*** *[DELETE TEXT] 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 47 (arbitration).*

Cadent considers that paragraph 51 should be referred to in this provision, the Applicant does not.

1.3.21 Paragraph 51 (*Retained apparatus: protection of Cadent*) requires (sub-paragraph (1)) the Applicant to submit a plan (and, if required a ground monitoring scheme) to Cadent not less than 56 days before the commencement of any "specified works" (defined in paragraph 44, and broadly works that may affect Cadent's retained apparatus). Sub-paragraph 51(2) provides that such plan 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 matter of their construction or renewal including details of excavation, positioning of the 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.

1.3.22 The Applicant is not permitted to commence any specified works unless Cadent has given its written approval to the submitted plan (see sub-paragraph (3)). Cadent's approval may be subject to reasonable conditions (sub-paragraph (4)(a)) and Cadent may require modifications to the plan for the protection of its apparatus and related purposes (sub-paragraph (5)). The Applicant must then do the works in accordance with the plan and the conditions (sub-paragraph (6)), and any protective works must be carried out to Cadent's satisfaction (sub-paragraph (7)). Cadent may reasonably require the removal of the apparatus instead, in which case paragraphs 43 to 45 and 48 to 50 apply (sub-paragraph (8)). The Applicant may submit a new plan, to which the provisions of the paragraph apply as to the original plan (sub-paragraph (9)). In the event of subsidence, the Applicant must implement a ground mitigation scheme, and Cadent may carry further protective works as necessary (sub-paragraph (10)). In the event of emergency works (defined in sub-paragraph (12)), the Applicant need not comply with the 56-day requirement in sub-paragraph (1) but should provide notice and a plan as soon as reasonably practicable and comply with any conditions imposed insofar as reasonably practicable in the circumstances (sub-paragraph (11)).

1.3.23 Cadent's preferred form of paragraph 57 would have the effect of removing the ability to arbitrate any dispute arising out of the paragraphs referred to above. This has the potential to stymie the scheme, which is contrary to the statutory scheme provided under the Planning Act 2008 for the delivery of nationally significant infrastructure projects to be authorised by the Secretary of State, by substituting Cadent for the Secretary of State as a final decision-maker. Under this paragraph, the Applicant is not permitted to commence any specified works without obtaining Cadent's approval to the plan and method statement submitted. However, the basis upon which Cadent is permitted to withhold or condition its approval to the plan pursuant to sub-paragraph 51(4) is subject only to the requirement that the same must be "reasonable". Without the ability to subject the reasonableness or otherwise of Cadent's decision to withhold or condition its approval to independent and impartial review, there is an unacceptable risk that the delivery of the scheme will be delayed and/or that it can only be secured in the event that the Applicant agree to comply with conditions that it considers are unreasonable and which may add unacceptably to the costs of, or programme for, the delivery of the scheme.

1.3.24 Moreover, the Applicant does not consider that the level of protection afforded to Cadent would be reduced by allowing any dispute or difference under paragraph 51 to be referred to arbitration. Cadent has accepted that its ability to (i) condition and withhold approval to any plan under sub-paragraph 51(4); (ii) modify any plan under sub-paragraph 51(5); and (iii) require the removal of apparatus under sub-paragraph 51(8), is tempered by the requirement to act reasonably, so Highways England fails to understand why independent scrutiny of its decisions under these provisions is resisted.

1.3.25 The Applicant is naturally aware of the regulations and standards which govern Cadent's use and maintenance of its apparatus and the need to ensure the safety of the public and those working on or in the vicinity of that apparatus, and conditions which require compliance with such requirements are, self-evidently, not "unreasonable". But without any specific evidence in this regard, the Applicant does not understand why Cadent considers that an arbitrator would be unaware of the importance of these matters. Without the wording that the Applicant requires, Cadent would be able to ransom or stymie the scheme by including unnecessary or unreasonable conditions. Sub-paragraphs (10), (11) and (12) also contain "reasonableness" requirements which should be subject to arbitration.

1.3.26 The Applicant has accepted that paragraphs 49(2) and (4) need not be subject to the arbitration proposals in paragraph 57. However, paragraph 49(2) includes a reference to paragraph 50(1), which is explicitly subject to arbitration under paragraph 50(2)., and paragraph 49(4) only relates to *how* alternative apparatus is to be laid, which does not raise an equivalent risk of Cadent stymieing the scheme through the imposition of unreasonable conditions.

1.3.27 Further, as there is nothing in the Planning Act 2008 which expressly states that a DCO can oust the jurisdiction of the Courts, and given the use of the qualifier "reasonable", it is likely that Cadent's preferred wording, far from giving them the final word on matters relating to paragraph 51, actually makes disputes under paragraph 51 subject to litigation rather than arbitration. The Applicant considers that this is particularly likely to be the case given the absence of any provision in the 2008 Act which enables the Secretary of State to delegate his decision-making role on DCOs to individual utilities. The Applicant considers that litigation would be less effective than arbitration for a construction-related dispute, and that requiring litigation rather than enabling arbitration would simply result in a more costly and protracted dispute resolution process.

1.3.28 For all these reasons, the Applicant considers that disputes under article 51 should not be excluded from the scope of arbitration under the DCO.