

A585 Windy Harbour to Skippool Improvement Scheme

TR010035

7.33 Submissions in respect of Part 3 of Schedule 10 to the Development Consent Order

APFP Regulation 5(2)(q)

Planning Act 2008

Infrastructure Planning (Applications: Prescribed
Forms and Procedure) Regulations 2009

Volume 7

October 2019

Page Left Intentionally Blank

Infrastructure Planning

Planning Act 2008

The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009

Development Consent Order 201[]

SUBMISSIONS IN RESPECT OF PART 3 OF SCHEDULE 10 TO THE DEVELOPMENT CONSENT ORDER

Regulation Number:	Regulation 5(2)(q)
Planning Inspectorate Scheme Reference	TR010035
Application Document Reference	TR010035/APP/7.33
Author:	A585 Windy Harbour to Skippool Improvement Scheme Project Team, Highways England

Version	Date	Status of Version
Rev 0	October 2019	Deadline 8 Submission

Page Left Intentionally Blank

CONTENTS

1	INTRODUCTION.....	1
2	AREAS OF DISAGREEMENT	2
3	HIGHWAYS ENGLAND'S POSITION	4
4	CONCLUSION	5

Page Left Intentionally Blank

1 INTRODUCTION

- 1.1.1 This representation has been prepared in respect of the proposed A585 Windy Harbour to Skippool Improvement Scheme ("the Application") made by Highways England Company Limited ("Highways England") to the Secretary of State for Transport ("Secretary of State") for a Development Consent Order ("the Order") under section 37 of the Planning Act 2008.
- 1.1.2 This representation concerns the proposed protective provisions (the "Protective Provisions") negotiated with Cadent Gas Limited ("Cadent") for inclusion in Part 3 to Schedule 10 to the Order. In particular, it includes Highway England's submissions in respect of those areas of disagreement.

2 AREAS OF DISAGREEMENT

2.1 Sub-paragraph 28(3) – Scope of Indemnity

- 2.1.1 Paragraph 28 (*indemnity*) of the Protective Provisions includes an indemnity given by Highways England 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 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' (paragraph 28(1)).

- 2.1.2 Sub-paragraph 28(3) records those instances in which Highways England is not subject to liability pursuant to sub-paragraph 28(1).

- 2.1.3 Highways England requires the inclusion of sub-paragraph 28(3)(c) at part of Part 3 of Schedule 10 to the Order, which records that nothing in sub-paragraph 28(1) shall impose any liability on Highways England in respect of:

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

- 2.1.4 This wording is resisted by Cadent.

2.2 Paragraph 32 – Extent of Arbitration

- 2.2.1 Paragraph 32 (*arbitration*) of the Protective Provisions records that, save for sub-paragraphs 24(2), 24(4) and 26(11) of Part 3 to Schedule 10 of the Order, any difference or dispute arising between the undertaker and Cadent under the Protective Provisions must, unless otherwise agreed, be determined by arbitration in accordance with article 43 (*arbitration*) of the Order.

- 2.2.2 Cadent requires the following amendment to paragraph 32 (as shown by the struck-through text below), to exclude any dispute or difference arising under any part of paragraph 26 (*retained apparatus: protection of Cadent*) of Part 3 of Schedule 10 from determination by arbitration:

'Save for the differences or disputes arising under sub-paragraphs 24(2), 24(4), and paragraph 26(11) 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 (arbitration).'

- 2.2.3 Paragraph 26 of Part 3 of Schedule 10 to the Order requires Highways England 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. Sub-paragraph 26(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.

2.2.4 Highways England is not permitted to commence any works to which sub-paragraphs 26(1) and (2) apply unless Cadent has given its written approval to the submitted plan (per sub-paragraph 26(3)). We refer to the following further provisions of paragraph 26:

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

(a) may be given subject to reasonable conditions for any purpose mentioned in sub-paragraphs (5) or (7); and

(b) must not be unreasonably withheld.

(5) In relation to any work to which sub-paragraphs (1) and/or (2) apply, Cadent may require such modifications to be made to the plans as may be reasonably necessary for the purpose of securing apparatus against interference or risk of damage or for the purpose of providing or securing proper and convenient means of access to any apparatus.

[...]

(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 to 20 and 23 to 25 apply as if the removal of the apparatus had been required by the undertaker under sub-paragraph 24(2).'

2.2.5 Highways England resists Cadent's proposal to amend paragraph 32 of the Protective Provisions, which would have the effect of removing the ability to arbitrate any dispute arising out of the paragraphs referred to above.

3 HIGHWAYS ENGLAND'S POSITION

3.1 Sub-paragraph 28(3) – Scope of Indemnity

- 3.1.1 Highways England considers that, without the inclusion of sub-paragraph 28(3)(c) in the Protective Provisions (as set out at paragraph 2.1.3 above), the risk of potential costs and losses through no fault of its own would place an unreasonable and unjustified burden on Highways England. Should sub-paragraph 28(3)(c) not be included in the Protective Provisions it would unacceptably raise the financial risk of the scheme. In particular, given the inability of Highways England to control the costs associated with any indirect losses, there is a real concern as to the potential adverse economic impacts on the delivery of the scheme. Highways England 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.

3.2 Paragraph 32 – Extent of Arbitration

- 3.2.1 The inability to refer any dispute under sub-paragraphs 26(1) – (10) and (12) of the Protective Provisions to arbitration has the potential to stymie the scheme. Highways England is not permitted to commence any works to which sub-paragraphs 26(1) and (2) apply without obtaining Cadent's approval to the plan and method statement previously submitted. However, the basis upon which Cadent is permitted to withhold or condition its approval to the plan pursuant to sub-paragraph 26(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 Highways England agree to comply with conditions that it considers are onerous and which may add unacceptably to the costs of, or programme for, the delivery of the scheme.
- 3.2.2 Cadent has expressed its view that it must ensure that its apparatus is adequately protected to ensure network integrity. Highways England does not dispute this. However, it does not consider that allowing any dispute or difference under paragraph 26 to be referred to arbitration under paragraph 32 offends this principle. Any retained apparatus will be adequately protected, but such protection should not be at a cost or effort that threatens the timely delivery of the scheme. Given that Cadent has accepted that its ability to: (i) condition and withhold approval to any plan under sub-paragraph 26(4); (ii) modify any plan under sub-paragraph 26(5); and (iii) require the removal of apparatus under sub-paragraph 26(8) is tempered by the requirement to act reasonably, Highways England fails to understand why independent scrutiny of its decisions under these provisions is resisted. Without the wording that Highways England requires, it would permit Cadent to ransom the scheme.

4 CONCLUSION

- 4.1.1 In light of the above, Highways England requests that, should the Order be made, its preferred drafting in respect of sub-paragraph 28(3)(c) and paragraph 32 is incorporated into Part 3 of Schedule 10 to the Order.

Page left intentionally blank